

# To Whom Does the Sea Belong? Questions Posed by the Henoko Assessment

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Part 3 of a 3 part series

Henoko: The Experts Report and the Future of Okinawa

1. Gavan McCormack, Introduction: The Experts Report and the Future of Okinawa

2. The Okinawa Third Party (Experts) Committee, translated by Sandi Aritza, Report of Okinawa Prefecture's "Third Party Investigation into the Reclamation of Oura Bay" (Main Points)

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## Preface

The environmental assessment system is a public good indispensable for the sustainable development of Japanese society. The environmental assessment on the Futenma Airfield Replacement Facility Works (hereafter: Henoko assessment) was an illegal assessment that negated the value of this public good and to allow it to stand would be to endanger Japan's future. Many assessment specialists, chief among them being former head of the Environmental Assessment Society, Shimazu Yasuo, have said that, whether in terms of procedure or of substance, the Henoko assessment was the worst in the history of assessment in Japan.<sup>2</sup> This study is intended to evaluate Okinawa Defense Bureau's environmental assessment and the approval for reclamation it subsequently issued under the Public Waters Reclamation Act and to raise the question of "To whom does the sea belong?" for the consideration of this Nago meeting of the

National Conference on the Japanese Water Environment.



## Oura Bay 2015

### 1. The Situation Till Now

Before turning to discuss "to whom does the sea belong?" I will outline the process up to now of the Henoko assessment and the permit issued for reclamation and construction of a new base at Henoko.<sup>3</sup> Such a grasp of the picture as a whole is essential preliminary to discussing "to whom does the sea belong."

#### (i) The Henoko Assessment in Brief

The Henoko assessment commenced on August 7, 2007 with the "Public Proclamation" process. The assessment document (EIS, or Environmental Impact Statement) was presented on 28 December 2011. In a "Governor's opinion," dated 27 March 2012, Governor Nakaima Hirokazu then identified 579 problem points in the Assessment and concluded that "with the environmental

protection measures indicated therein it will be impossible to ensure the conservation of the livelihood environment and natural environment of the zone where the works are carried out." The Okinawa Defense Bureau, managing the project [for the government of Japan], set up an experts committee to compile a supplementary assessment addressing the Governor's opinion, and it presented that Supplementary Assessment on 18 December 2012. With the termination of the Public Proclamation process [on that revised assessment] on 29 January 2013, the Henoko assessment procedures were complete.

### **(ii) The Course of the Reclamation Investigation Prior to Approval**

Thereafter, the Okinawa Defense Bureau (ODB) on March 22, 2013 applied to the Governor for permission to reclaim public waters under the Public Waters Reclamation Act (1921), attaching the supplementary EI Report to the application for reclamation as "material containing measures for environmental conservation."

If the EIS was problematic, then a question arises over the effectiveness of the environmental preservation measures based on it. In that context, the prefecture's examination of the application attracted keen interest on all sides.

Okinawa prefecture drew up its "Interim Report" on November 12. The Civil Engineering and Construction Department was assigned the task of investigation and it played a key role in spelling out the procedures for the subsequent investigation. The "Interim Report," like the opinion of the Governor on the EI Report, took a strongly negative view of the Henoko new base construction, and "concern over environmental preservation" was a major consideration for reclamation approval. The Environmental and Community Affairs Department's opinions in response to the Governor's questions would be a major factor

determining how the ODB would respond to the EIS.

On November 29, the Department of Environmental and Community Affairs produced its opinion saying that "it is impossible to set aside concerns over the preservation of the livelihood and natural environment of the zone where the works are to be carried out. The Civil Engineering and Construction Department queried the views of the works operator (ODB, hereafter: "the Operator) on the Environmental and Community Affairs Department's opinion and got a response on December 10. However, on December 23, without consulting the Environmental and Community Affairs Department as to whether their concerns had been "sufficiently addressed," the Civil Engineering and Construction Department drew up its "Results of Investigation (Draft)," and on December 27 Governor Nakaima approved the reclamation. The "review procedure" that called for "judgment based on the views of the Environmental and Community Affairs Department" was completely ignored.

### **(iii) Events Subsequent to the Reclamation Approval**

(Former) Governor Nakaima's approval of the reclamation, in breach of his electoral pledge that there would be "no Futenma base transfer within Okinawa" at the time of the 2010 gubernatorial election, angered many Okinawans. So, from February to July of the following year, the Prefectural Assembly's Article 100 Committee met on more than 10 occasions and investigated how the 180-degree reversal came about between the "Interim Report" and the "Investigative Outcome (Draft). The [content of] the "Interim Report" and the "Investigative Outcome (Draft)" became known during this process. The (former) Governor had an obligation to explain this reversal but to this day nobody has come forward with any new materials justifying this reversal. Furthermore,

not so much as a single memo exists from meetings on the part of prefectural officials. The Article 100 Committee was unable to pin down and secure a cancellation of the (former) Governor's reclamation approval and so simply presented both sides of the case.

In the series of elections in 2014 in which the new Henoko base issue was a crucial factor, the Okinawan people showed with utmost clarity their "No" to the new base. In Nago City, home to the proposed new base, Mayor Inamine Susumu was re-elected in January declaring "I will not allow any new base to be constructed, whether on sea or on land." At City Assembly elections in September, the mayor's supporters won a majority. And in the November gubernatorial election Onaga Takeshi defeated the incumbent Nakaima by the huge margin of 100,000 votes. Then, in December, candidates declaring their opposition to the new base were victorious in all four small seat electorates in the lower house election to the national Diet.

The Abe government paid no heed to the Okinawan people's wishes. Flourishing the former Governor's consent, on January 15, 2015, it resumed the sea-floor boring survey that had been suspended because of concerns over the possible negative impact it might have on elections. In the typhoon of the year 2014 many of the 160-kilogram iron anchors installed to fix in place the floats to keep out protesting citizens in canoes had been lost, so they began installing instead huge concrete blocks of between 10 and 45 tons. When it became apparent that the concrete blocks were destroying the coral, the prefecture began to investigate. But, since both the Okinawa Defense Bureau and the US military refused to cooperate, on March 23, making use of a fisheries regulation ordinance, Governor Onaga ordered suspension of the sea-floor boring survey works. In response, on the following day (March 24<sup>th</sup>), the Okinawa Defense Bureau requested that the Minister of Agriculture and

Fisheries investigate whether the order for suspension of work was illegal under the "Administrative Appeal Act" (1962), seeking that he order the suspension of work illegal, but also that he suspend its operation pending the issue of such a ruling that the order to stop the works was in breach of the law. On March 30, the Minister ordered suspension of the prefecture's directive.

In principle, the Administrative Appeal Act was intended to protect citizens' rights and interests and so serious doubts arise over the state, pressing ahead with transfer work by exercising its vast powers, to have recourse to this law as if it was a private citizen. Furthermore, the reason for the order sought from the Minister to suspend the Governor's order has nothing to do with matters concerning his jurisdiction, fisheries, but something beyond it, the possibility of "bad effect on Japan-US relations." The state's response was already "above the law."

## **2. The Sequence of Procedural Irregularities**

The Henoko environmental assessment process was a series of procedural irregularities. It occurred against the backdrop of the Japan-US agreement to commence the Usage of the New Henoko Base in 2014, with proper procedures prescribed by law under the Assessment Act being ignored because of priority to diplomatic promises.

### **(i) Illegal "Survey of State of the Environment"**

Procedural breaches commenced with the illegal survey of the state of the environment. From June 2007, even before the submission of the August 7 EI scoping document, the Operator, (i.e. the government of Japan), which was repeatedly coercing citizens engaged in non-violent protest activities, even sent a Self Defense Forces mine-sweeping vessel to intimidate them. It spent more than two billion

yen and even undertook a preliminary survey, without scoping documents, which it called a "survey of the state of the environment." According to [Nagoya University] emeritus professor Shimazu Yasuo, "In principle the scoping document sets out the plan for the assessment and the investigation itself can only commence after the scoping document is determined. Consequently, site investigations prior to 2008 were, as assessments, in breach of the law."<sup>4</sup>

Furthermore, Sato Tsutomu, who was at the time Director of Naha Defense Facilities, admits that this procedure was adopted in order to meet the time limit for commencing the provision of the base facilities [to the Marine Corps] by 2014.<sup>5</sup>

This "survey of the state of the environment" carried a very high risk of intimidating the dugong and damaging the coral (the morning issue of the Ryukyu shimpo on May 22, 2007 reported the damage suffered by coral from equipment inserted into the coral bed). The survey before the presentation of the scoping document was illegal, being in breach of the assessment law, and was designed to evade the spirit of that law. There was an undeniable possibility that disturbances it caused to the waters of Henoko Sea and Oura Bay might have driven off the dugong. Accordingly, it must be said that the consistent position of the environmental assessment statement (EIS), that dugong were not to be found in these seas and that the impact of construction, existence and usage of the base would be slight, was without scientific foundation.

**(ii) The Flawed Scoping Document**

The second procedural flaw is that the scoping document was flawed in that it did not contain reference to matters that should have been included. Under "types of aircraft projected to use the airfield for which these works are designated" there is the single line entry "US military rotor craft and aircraft that can land

and take off in a short distance." Part of the assessment did indeed make an estimate of the environmental impact of noise and vibration but "types of aircraft" should have been understood to mean model. This entry in effect said nothing at all.



**The MV-22 Osprey**

It was in the supplementary, revised scoping document that the types of aircraft were specified, but even there the Osprey deployment was not spelled out. It was the top US military commander in Okinawa, the US 4<sup>th</sup> Army's Okinawa Area Coordinator (OAC), who revealed that the MV-22 Osprey vertical takeoff and landing aircraft would substitute for the CH46 helicopter between 2014 and 2016 (Okinawa Times, June 1, 2006). This was a model frequently involved in crashes whose deployment was feared even in the US. Okinawans were anxious because of the risk of accidents as well as the noise, and for that reason too the model of aircraft to be deployed should have been spelled out. Furthermore, in order to predict environmental impact, even just in terms of noise and vibration, the way in which the new facility was to be used (the model to be deployed, flight paths, number of



flights, time span of flights) should have been made clear but was not.

The intention on the US side to deploy the Osprey to Futenma was already clear at the time of the 1996 SACO agreement<sup>6</sup> and naturally the Okinawa Defense Bureau was aware of the [planned] deployment to the new facility that was to replace Futenma. The government of Japan's request to the government of the US to hold back this information because it might be inconvenient to let Okinawans know became known from evidence submitted by the US Department of Defense to the Dugong tribunal. It was June 6, 2011 when the environmental impact was being compiled, that the Ministry of Defense revealed the US intent to deploy Osprey to Okinawa, so the Governor and "parties with an opinion from the point of view of environmental preservation" were deprived of the right to express an opinion at the time of the scoping document and the preparatory documents.

The Okinawan prefecture's environmental assessment commission issued its response to this flawed scoping document on December 17, 2007. It was a severe indictment: "it would be difficult to say that the contents are sufficient to allow a judgment as to whether the matters being assessed or the mode of assessment were appropriate or not." The Operator, criticized by the Governor's opinion issued on December 21 and based on this, adopted the Governor's opinion in its entirety and supplied 150 pages of supplementary materials on June 11 2008. These added to the content of the projected works the following:

Addition of "jet planes" to types of aircraft

Addition of possibility of flights over settlements

Addition of flight beacons at distances of 920 and 430 metres

Addition of facilities for washing aircraft

Addition of provision of a large volume of sand, equivalent to 12.4 years' worth of Okinawan sand production from sources in Okinawa and beyond.

Accompanying these additional materials, the Operator on February 5 and March 14 submitted an additional revised version of the scoping document. However, no opportunity was provided for the issue of opinion as guaranteed by the Assessment Law for "parties who have a view from the perspective of environmental preservation," which was plainly contrary to the spirit of the Assessment Law. For that reason, without checking whether the Governor's opinion, even if fully accepted, could be implemented or not, the works went ahead, and in the end the feedback to produce better environmental assessment from discussion and exchange of views between the parties as envisaged under the assessment system did not take place.

### **(iii) Continued Trickery**

The biggest problem with the Henoko assessment is the series of retrospective additions to the project: at the preparatory phase, belated inclusion of an ammunition storage area, four helipads, grey water septic tanks and a wharf with mooring facilities; at the assessment document phase, the Osprey deployment; and after the completion of the assessment, extension of the wharf and a newly surfaced plan to construct barracks on the hillside of Highway 329.

Article 28 of the Environmental Assessment Law prescribes that in the event of revision of the project's assessment the procedures must be conducted again from the start. This is because if large changes likely to increase the environmental impact were made to the content of the works, such as expansion of the scale of the works or significant change to the site were to be allowed, the procedures followed to that point would lose their meaning. Works operators would be able to escape

scrutiny of major parts of their works by resort to dummy plans.

However, an exemption is granted under Article 28 of the Assessment Law for changes that are held to be minor. A separate table under Regulation 9 (2) of the Ordinance for Implementation of the Assessment Law lists changes that are held to be minor. They would include an increase in the zone of the airport or its facilities by less than 20 hectares through the extension of a runway by less than 300 metres, or the area of reclamation being increased by up to 20 percent. Looked at under such limits, the series of retrospective changes to the Henoko assessment are not contrary to Article 28. However, it is clear that retrospective inclusion functioned as part of a dummy plan to defeat the purpose of the Assessment Law to achieve good environmental outcomes by dialogue and the exchange of opinions between interested parties.

In discussion of the 150 page supplementary document, the Operator and Okinawa prefecture's Environment Policy Section took the view that if the revisions to the content of the works matched Regulation 9 quoted above they were sufficiently minor so that it would not be necessary to redo the scoping procedure. However, under a proviso to Regulation 9, "circumstances that should be recognized as special, when there is a fear that the environmental impact might exceed a certain degree" are excluded from "minor change." To determine, by deliberately ignoring this section of the ordinance, that there was no need to revert to the scoping document procedure can hardly be considered an "appropriate" application of the law. At least a ruling should have been given as to whether or not the change to the content of the project by the presentation of 150 pages of additional material fell within the scope of this proviso. In particular, there was a fear of large environmental consequences arising from provision of a huge volume of 21 million cubic

metres of sand and soil, not only to the proposed site but to the sites from which it would have to be extracted, and it may be said that under Article 28 there should have been a return to the scoping document procedures. Considering the scale of its environmental impact, it was unforgivable for operators to escape assessment for soil and sand being brought in from outside.

#### **(iv) Retrospective Inclusion in the Project of a Military Port**

For space reasons I concentrate here on main points. After completion of the EI procedures, the Okinawa Defense Bureau made further additions to its reclamation permit request. These included construction of a wharf extension with docking facilities and ancillary roads. The added component would function as a military port and, at 30 metres wide, would be comparable to Sasebo Military Port. There is a very considerable likelihood that the USS Bonhomme Richard attack landing vessel with modified deck to allow Osprey landing and takeoff would berth here. There is also a plan for construction of more than 30 hectares of troop barracks. The US military had asked for this to be included in the initial assessment but the Operator, fearing the response of the Okinawan people, has still not yet officially admitted to such a plan.

#### **(v) Investigation Outside the Assessment Procedures**

Okinawa is a typhoon-prone prefecture and its environmental condition when under typhoons is very different from ordinary times. For this reason, the Operator accepted the prefectural request and in the additions to the scoping document and supplementary materials repeatedly assured it that he would conduct an investigation into typhoon conditions. However, it happened that there was no typhoon in Okinawa during the year in which the EI study was conducted. Despite that, in the the draft EI document submitted on April 1, 2009, no

explanation was offered as to how it was possible to compile the report without addressing the reality of a typhoon as had been promised in the additional scoping documents. The draft EI document was done and submitted hastily, but it should have been compiled on the basis of surveys of multiple years, and it should have included a dugong behavioral study. The draft EI document should have been compiled after inclusion of appropriate data.

The compilation of the EIS (draft) without grasp of the situation during a typhoon may be considered a consequence of the Operator's attaching highest priority to faithfully fulfilling its promises to hand over the new base to the US commencing in 2014. As a result, the Operator conducted retrospective surveys outside the scope of the procedures set down in the Assessment law and incorporated these results in the EIS and the supplementary documents. However, since there was no way for related parties to check according to the Assessment law so far as methods of survey, prediction, and appraisal were concerned, this was therefore a thorough-going breach of the assessment law.

#### **(vi) Investigation without Actual Aircraft**

Since the impact of Osprey deployment was included in the assessment at neither scoping nor draft ESS stage, the Governor and "parties with an opinion from the point of view of environmental preservation," did not have the opportunity to form an opinion about its environmental impact. Without mention of specific models it was not possible to determine whether the method of surveying, estimating and appraising aircraft noise and vibration was adequate. The inappropriate assessment procedure blocked any appropriate assessment outcome to the Henoko assessment. The minimization of environmental consequences through dialogue between interested parties did not occur. Consequently, the Governor gave his opinion on the EIS that "I believe it is not

possible to preserve the livelihood environment and the natural environment."

The Operator set up an Experts' Committee to draft a supplementary Assessment to address this opinion from the governor and it presented its supplementary Assessment on December 18, 2012. However, nearly three months earlier, on October 1, 12 Osprey were delivered to Futenma and, although it would have been possible to conduct a detailed investigation into the environmental impact of noise and vibrations using actual aircraft, no such attempt was made.

The supplementary Assessment made predictions of noise levels based on studies of actual flight in the US. However, the fact that actual sound levels recorded at peak times in Nago City have greatly exceeded those predicted shows that the assessment was not appropriate. According to the charts drawn up by Nago City showing Osprey training flights in the Henoko vicinity, those flights are conducted mostly in helicopter mode, and only occasionally in fixed-wing or conversion mode, in breach of the Japan-US agreement.<sup>7</sup> This flight mode is very different from the flight modes used in the US in the assessment. This may be one reason why actual noise levels have been so high. The very fact of applying Osprey operational patterns of the vast US to the small Okinawan islands was a mistake and such mistakes could have been avoided if studies had been conducted locally, using real aircraft.

#### **(vii) Environmental Review and the NEPA**

Prior to its Osprey deployment to Futenma, the US Marine Corps carried out an "Environmental Review of the Deployment of MV-22 [Osprey] to Futenma Airfield and its Operation in Japan," which it published in April 2012.<sup>8</sup> Outside the US, such environmental review is conducted in accordance with presidential decree and Department of Defense directive but is not a proper assessment, as it provides no opportunity for local public

organizations or residents to express opinions on the impact on the environment of activities. At the time of deployment of Osprey to other Marine Corps bases within the US, at Kaneohe Bay on Oahu Island in Hawaii, an environmental survey based on the US domestic law, the National Environmental Policy Act (NEPA) was conducted and as a result, it was decided that, because of the impact of noise and high temperature emissions on the livelihood environment and the natural environment, training flights would not take place on the two neighboring islands of Hawaii (Upolu Airport) and Morokai (Kalaupapa Airport). From the viewpoint of the Okinawan people, it is a clear case of double standards. It is undoubtedly a serious flaw that the Henoko assessment made absolutely no study of loud or low frequency noise or thermal emissions on flora and fauna from low altitude Osprey flights over the Yambaru, with its precious nature that is up for World Heritage listing.

### **(viii) Problems of Soil, Sand, and Alien Species**

The projected new Henoko base site possesses precious nature worthy of World Natural Heritage registration for its high level of biodiversity both on land and at sea. Preservation of this high-level biodiversity is crucial, whether for carrying out the "Okinawa 21<sup>st</sup> Century Vision" that is the agenda for Okinawa's future or for registering Yambaru as World Natural heritage site as the prefecture aims.

Currently the Amami-Ryukyu archipelago is entered on the World Heritage provisional list. In order to obtain formal registration status, the government of Japan has to write a formal recommendation letter, which would then be reviewed by the International Union for the Conservation of Nature (IUCN). The most important criteria for listing of islands is they must be free from alien species. At the time of

the assessment there were repeated exchanges between the prefecture and the operator over the adequacy of environmental protection measures to prevent the encroachment of alien species with the 16 million cubic metres of landfill to be introduced from outside Okinawa for the new Henoko base.<sup>9</sup> But the final conclusion of the Okinawa prefectural reclamation permit review, without clear basis specified, was that there would be no problem.

Relevant for consideration here is the Minister for the Environment's advice in response to the EI study being conducted on the Naha Airport runway expansion, at more or less the same time as for the new Henoko base. An "opinion" was issued to the Minister for Land, Infrastructure, Transport and Tourism and an "advice" to the Governor of Okinawa. Their content was virtually identical and one point in it concerned landfill and greening materials:

"In the case of organisms from island territories it is possible even in the same species for there to be differences at the genetic level between islands and there is a risk that the introduction of organisms from beyond one island might disturb this biodiversity at the genetic level. For this reason, due consideration should be paid in the case of reclamation and greening materials to preservation of the distinctive biodiversity of the island."

As a result, in the case of the Naha Airport runway expansion works, the Operator uses local, Okinawan sourced sand and soil.

In the Okinawa Defense Bureau's reclamation plan, because much of the necessary soil and sand is to rely on sources outside Okinawa there is a risk that it might contain foreign species such as Argentine ants. There is a big difference between this and the Naha Airport expansion reclamation. Why in the case of the Henoko assessment was there no opinion or advice from the Environment Minister?



Because the new Henoko base runways were to be short and the assessment law therefore did not apply, it was the Okinawa prefecture assessment regulations that were applied in the Henoko case. The Minister for the Environment therefore provided no opinion.

However, the governor's opinion was issued on March 27, 2012, just five days before Article 23 (2) of the Assessment Law came into effect stating that such advice must be sought before presenting his opinion.

It is not obligatory under the terms of the Assessment Law to refer to the opinion/advice of the Minister of the Environment but it is still possible for a prefectural governor to seek technical advice from the Minister for the Environment under clause 3 of the Local Government Law Article 245 (4). Okinawa prefecture should surely have done more to care for the richness of nature at Henoko Sea and Oura Bay, and it should have sought a careful investigation and technical advice of the Environment Minister on the reclamation.

It is worth noting that opposition to reclamation is now spreading, especially among environmental groups in the Amami Islands and the Seto Inland Sea area, both of which have been designated as landfill sources. Both the provider and the receiver of landfill are linked in environmental destruction.

### **3. Problems Unique to Environmental Assessment of US Bases**

In order to understand the Henoko assessment, it is necessary to grasp the distinctive problem that the environmental impact study of a US military base is different from other such studies.

In the case of the Henoko assessment it is Japan (the Ministry of Defense's Okinawa Defense Bureau) that is to manage the construction but the US (Marine Corps) that is to use the completed facility. The fact that

works manager and end user are different entities marks a big difference from conventional works. Under the Status of Forces Agreement (SOFA) Japanese sovereignty does not apply and neither Japanese environmental law nor local government environmental administration can apply to this user.

#### **(i) The Root Cause of Retrospective Changes to the Plan**

This makes it difficult for the Operator (the Ministry of Defense's Okinawa Defense Bureau) to grasp in detail and correctly the content of the works and as a result new points kept being added to their content at the stage of implementing the assessment. It also gives rise to the fundamental problem that when it comes to use of the facility the Operator will be unable to exercise any direct control over the implementation of appropriate environmental conservation measures by the US military.

Among the details of the facilities and the way they are to be used within the new Henoko base, there are obviously some of which the ODB is not informed, but there are likely quite a few, such as that of the Osprey, in which the ODB is officially informed but takes the attitude that it has not been officially informed and does not publish the information because it anticipates a reaction on the part of the people. It is also a fundamental cause of the continuing retrospective adjustment to the content of the works at the assessment stage.

However, given this attitude on the part of the Okinawa Defense Bureau, a proper assessment is impossible. To conduct a proper assessment, it would have been necessary, as early as possible in the assessment process (and at latest before the compilation of the EIS preparatory draft) for the ODB to have provided the means and prospect for the US military to provide sufficient information in the scoping document about how the base would be used to allow prediction of environmental impact. But this was not done in the case of the

Henoko assessment.

As a result, though the environmental impact in ordinary circumstances would have been ameliorated by implementation of successive revisions and improvements to the EIS draft, this did not happen in the case of the Henoko assessment because of the repeated retrospective additions to the content of the works. The classic example is the noise of Osprey exceeding the Assessment estimate. On this point, Associate Professor Tokashiki Takeshi, University of the Ryukyus specialist on noise and low frequency sound, says.

"Since it is the scoping document that determines how an assessment is conducted, a proper investigative method cannot be settled if materials for investigation are not fully presented at the scoping document stage. Since Osprey deployment was decided at that stage of the assessment, without adequate discussion, it exceeds standards for noise. Had this been known from the outset, it might have been possible to discuss improvements to the Osprey or to the siting of the facilities which to some extent might have met the prescribed standards before the assessment was presented."<sup>10</sup>

### **(ii). Impractical Environmental Preservation Measures**

An assessment studies the various environmental conservation measures in the course of the investigation, surveying, calculating, and evaluating the environmental impact caused by the Operator, looks for ways in which the environmental impact can be contained within the target standards, and confirms that they could be so contained.

However, in the case of the Henoko assessment, once the facility is handed over, it will be mainly the US military that will be responsible for implementing environmental preservation measures. All that the Operator, the ODB, can do is "to strive for understanding

at every level of the US military."

The Governor's opinion on the Assessment cast doubt on the efficacy of "to strive for understanding at every level of the US military" as a measure for post-handover of the base by the works operator to the US military. But the response by the Operator as shown in the Supplementary Assessment document is that

"So far as "to strive for understanding at every level of the US military" is concerned, steps will be taken to have the US military understand and implement environmental conservation measures and, if it happens that the US military does not respond, we will promote measures for environmental conservation including by requesting the US military whenever the opportunity arises."

This was not really a response at all.

Also, referring to the 1996 Japan-US agreement on measures to limit noise from aircraft using Futenma Airfield, the November 29, 2013 opinion of the Environmental and Community Affairs Department said, "If the situation continues in which environmental standards set by the prefecture's noise monitoring station continue to be unmet, in light of the priority to US operational factors, the uncertainty of the point of "to strive for understanding at every level of the US military" as an environmental conservation measure is considerable. No response to this - other than, as stated in its response to the Governor's opinion "to strive for understanding at every level of the US military" - has been forthcoming from ODB.

### **(iii) "Matters for Attention" - Empty Words**

In light of these considerations, it must be said that the examination of the application for reclamation called for extremely strict investigation on the part of Okinawa prefecture into the question of whether or not effectiveness of environmental conservation measures could be assured from the time of the

handover of the facility. However, the Civil Engineering and Construction Department, assigned to investigate it, approved the reclamation without consulting with the Environmental and Community Affairs Department that had expressed concerns over the distinctive problem of assessing a US military base.

A December 27, 2013 document "Matters for Consideration," attached to the approval document, under clause 3 "On post-handover environmental considerations," called on the national government to adopt means such as negotiating a special environmental agreement with the United States. Such an agreement was the precondition for being able to guarantee the effectiveness of environmental conservation measures.

However, being fundamentally of the same character as the environmental conservation measures already implemented [in 1996] which proved to be ineffective, it is clear that "to strive for understanding at every level of the US military" cannot guarantee post-handover environmental conservation.

#### **4. To Whom Does the Sea Belong?**

The question with which the Henoko base construction confronts us is this: To whom does the sea belong? The Okinawa Defence Bureau claims that it secured the approval of ex-Governor Nakaima to reclamation based on the Public Waters Reclamation Act. To clarify whether the former Governor's consent was appropriate it is necessary to understand the Public Waters Reclamation Act on which it was based.

##### **(i) The Public Waters Reclamation Act as a Law to Constrain Reclamation**

The "Public Waters Reclamation Act" (1921) is one of those rare and antiquated laws that have survived for what will soon be 100 years. This law has the characteristics of a "procedural

law" centred on licensing reclamation for "turning publicly owned water into land," then granting land ownership by "approval of reclamation," or a kind of primitive acquisition. It is inclined to promote reclamation, and, in the post-war period, it functioned as a means of "peaceful territorial expansion" and a dynamo of high economic growth.

However, 50 years after its enactment, in 1973 it was subject to major revision, as reclamation came to be seen as the root of a "polluted archipelago," since large-scale reclamation for massive industrial complexes destroyed nature and produced pollution. Under the revision, a grand transformation took place from being "reclamation promoting" to being "reclamation constraining," characterized by the adoption of the "Nature and Environment Protection Law." Essentially, this required that criteria be set for the issuance of a reclamation permit by the state, and for the first time in Japan it made environmental assessment compulsory. In 1993 the "Environmental Basic Law" and in 2014 the "Water Circulation Basic Law" were enacted, reflecting higher need to make efficient use of limited water resources, promoting recycling and conserving the environment and water quality.

In the 1999 reforms to devolve administrative power to the localities the "agency delegated matters" category was abolished and the governor was freed from the position of being the delegate of the state, i.e. being Tokyo's "hands and feet." The relationship between the nation state and local government became equal. Accordingly, the governor's authority to license or approve reclamation shifted from being an "agency delegated" matter on behalf of the nation state to being a local self-government matter as stated under "No 1, statutory entrusted matters" (under Article 51 of the Public Water Reclamation Law). Statutory entrusted matters were "matters that in principle should be performed by the state and which it was especially necessary to

reserve to the state (Local Self Government Act, Article 2, page 9, No 1), but it goes without saying that these were local matters which the Governor would address on his own responsibility, without direction from the national government. In principle at this point Article 42 acts to give approval to the state as an exceptional case. "Reclamation activity undertaken directly by the national government" should have been abolished and substituted so that the state would be treated on the same level as a private citizen. As this indicates, governors in the era of devolution of local government powers should administer reclamation matters independently. As heads of the local government authority they are entrusted by the people of the prefecture with good administration over the sea (with environmental conservation their No. 1 priority).

### **(ii) The Sea as the Collective Property of the People of the Prefecture**

The Public Waters Reclamation Act Article 42 (dealing with reclamation by the nation), in paragraph 1 substitutes approval by the local Governor for license and in paragraph 2 substitutes notification for authorization on completion of the works, and in paragraph 3 provides for licensing procedure to be *mutatis mutandis* (spelled out in detail from Article 2 to Article 42). On the character of this reclamation approval, the state prescribes, under a theory of state omnipotence, as follows:

"Publicly owned water surfaces naturally belong to the state and fall under the exclusive control of the state. The state exercise of its administrative and control rights naturally includes the right to reclaim. Accordingly, since the state possesses administrative control as state organ ... it is not necessary to establish a 'right to reclaim'."

This opinion was given by Miyoshi Seiji in his *Koyu suimen umetateho - mondaiten no*

*kangaekata* (Reclamation of public water surfaces-problematic points, 1970), but it is undoubtedly outdated, since under local government devolution policy the governor as holder of the right to license or give approval is not an agent of the national government but in an equal relationship to it. After completion, the state acquires land ownership rights and the site becomes state-owned land. This process is identical to reclamation by an individual and it is simply that at the procedural level special approval and notification rules are prescribed. This means that so far as the legal character of reclamation is concerned, the theory of rights and the notion of "all power to the state" should be set aside.

Subsequent to the 1973 revision, appropriate usage of land, scale, and strict environmental conservation are the key considerations for issue of a reclamation license. Allowing the reclamation of the precious seas that are the common possession of the people of the prefecture is confined to exceptional cases where there is no problem in terms of environmental conservation, since it relates directly to the interests of the people as a whole (the prefectural interest is the sum total of the interests of each and every citizen combined).

This is also clear from the circular "On some amendments to the Public Waters Reclamation Act," issued by the head of the Ports Bureau and of the Rivers Bureau on June 14, 1974. Since this was issued as an explanation of the 1973 revision marking the transition to "a law for the constraint of reclamation," it strictly cautioned against simple approval of applications for reclamation: "henceforth in reclamation strict attention should be paid to the service of the public interest, with greater attention than hitherto paid to environmental conservation." Under part 3 of this directive "on criteria for reclamation licensing" "concerning the character of the reclamation



license" appears the following:

Criteria under Article 4, paragraph 1 of this law [i.e. criteria for issue of reclamation license] means that at a minimum the license cannot be issued in cases where the criteria are not met but, even when all the criteria are satisfied, the assessment must be very carefully considered after comprehensive assessment of questions such as necessity."

This means that if under the Public Waters Reclamation Act as it now stands, if he judges that it would be to the greater benefit of the people of the prefecture that reclamation not proceed, the Governor may make a discretionary ruling not to permit it.

**(iii) Non-Exercise of Discretionary Powers. An Evident Flaw in the Assessment Process**

However, by simply ticking "appropriate" [or "OK"] to all the criteria for license, thus ruling that from the perspective of public interest there was no ground to deny approval, ex-Governor Nakaima was approving the project on discretionary grounds, i.e. as a "political judgment." However, as noted above, "even when all the criteria are satisfied, the assessment must be very carefully considered after comprehensive assessment of questions such as necessity." In other words, this was a non-exercise of the governor's discretionary powers under the Public Waters Reclamation Act. This is clear too from the evidence given by the Governor himself to the Prefectural Assembly and to the Article 100 Investigation Committee. The prefectural governor confined himself to an "administrative judgment" by his staff and did not make appropriate usage of his "discretionary judgment" power to determine whether or not to grant the approval. And, since he was acting on the basis of a mistaken interpretation that, provided legal requirements were met he had to grant approval, without making appropriate exercise of the power of "discretionary judgment," this was a mistake at the stage of making of

judgment and was plainly illegal.

On this point, at a special session of the Okinawan prefectural assembly on January 9, 2014, in response to a claim by a member of the Assembly that "non-approval is possible on public interest grounds under the reclamation law," Tome Kenichiro, head of the Civil Engineering and Public Works Department, said:

"The prefectural governor is not a licensee to the state. Publicly owned water surfaces are places controlled by the state and in principle, according to the Cabinet Legislative Bureau's opinion, the state has the right to reclaim, but the Governor has the right [only] to review whether any problem arises in terms of public water surfaces management."

Tome was clearly basing himself on the "state omnipotence theory." It was an outrageous statement, denying the legal right of a Governor as representative of the people of the prefecture to approve, and it was a denial of local devolution and self-government. The seas belong to the people of Okinawa as a whole, never to the state. The governor is entrusted with the good management of the Okinawan people's seas.

Here let me introduce recent judgments on the question of "rights theory" and "state omnipotence theory," in particular the suit filed on February 7, 2008 by 18 local plaintiffs against Yamaguchi prefecture. In the matter of the transfer of US Navy carrier-based aircraft from Atsugi to Iwakuni as part of the "Global Posture Review" (Beigun saihen), the plaintiffs sought cancelation of the approval for reclamation and of the retrospective changes to the reclamation application. The Yamaguchi District Court on June 6, 2012 ruled that Article 42 of the Reclamation Act served notification of the change in the special case of the state from reclamation license to reclamation approval, and, on completion of the works, from authorization to notification. However, this was

a procedural exemption, and did not confer any special privilege or priority on the state. Yamaguchi prefecture, defendant in the case, had argued that state exception based on Article 42 was the golden rule, that, under the "omnipotence of the state theory" the state or administration is incapable of evil or breach of the law), and the seas being ownerless belong to ownership of the state, and fall under its exclusive control. Following this line of argument the Yamaguchi District Court dismissed the case. It ruled that, since the reclamation was complete, "even if the state had conducted an illegal reclamation, there was no provision for it to bear the obligation to restore the works to their pre-reclamation state" and consequently the "interest of the plaintiffs disappears." In short, it dismissed the case.

However, on appeal, the plaintiffs argued that it would create a bad precedent, and go against the rule of law, for a judgment to be confirmed that the state bore no obligation of restitution for conducting an illegal reclamation. The Hiroshima High Court on November 13, 2013 ruled that the state did bear an obligation to restore.<sup>11</sup> Even in the case of reclamation by the state, the effectiveness of approval did not differ from the right to acquire ownership of the reclaimed site upon completion of the works, i.e. it prescribed a "reclamation right, and the state and private individuals stood in the same position as legal subjects for purposes of the reclamation law. In other words, it ruled that they became a landfill right holder. It dismissed the theory that "the state equals administrative good" or that it is "omnipotent."

#### **(iv) Henoko Sea and Oura Bay as Ocean Treasure House**

On November 11, 2014, 19 scientific organizations including the Japan Ecological Society presented to the national and Okinawan prefectural governments a "Joint Appeal by 19 scientific organizations for the

conservation of Okinawa prefecture's Oura Bay with its extremely high level of biodiversity."<sup>12</sup> This petition concluded that, from the viewpoint of conservation of biodiversity, Oura Bay ranked as one of the most precious regions in Japan and although the Henoko assessment had concluded that "concern for environmental conservation was "appropriate and consistent with the standards and objectives of environmental conservation measures," not only did the supplementary assessment document neglect various recently discovered and hitherto unknown or unrecorded species, but it failed to adequately grasp the uniqueness of this sea region in which multiple different environments complement each other. So the Joint Appeal called for a re-investigation of the matters neglected in the Henoko assessment and a proper reappraisal of the project based on it.

The Joint Appeal by the 19 scientific organizations attested to the seas of Henoko and Oura Bay being a marine treasure-house. The seas are the property of the local people. We must recognize our role as responsible custodians of the precious sea and pass on this treasure to future generations.

#### **Author Note:**

Sakurai Kunitoshi is emeritus professor and former president of Okinawa University. He is a specialist in environmental assessment law and a prominent figure in Okinawan environmental conservation circles. In January 2015 he was appointed by Okinawan Governor Onaga a member of the Prefectural Third Party (Experts) Committee to investigate the decision by the former Governor Nakaima to grant license to reclaim the seas of Oura Bay and Henoko Bay. The report of that Commission was presented to Governor Onaga on July 16, and is now posted on the Okinawa prefecture's web page [here](#).

See the translation (by Sandi Aritza) of the "Main Points" resume of that report.

The present paper was presented at the 31<sup>st</sup> National Conference on the Japanese Water Environment (Suigo suitei zenkoku kaigi) Nago City, Okinawa, 18-19 July 2015. The text was translated and edited by Gavan McCormack.

The Asia-Pacific Journal has published translations of several of Professor Sakurai's previous articles, including one entitled, "[If the Law is Observed, There Can be No Reclamation: A Mayoral Opinion Endorsed by Citizens of Nago and Okinawans](#)," The Asia-Pacific Journal, Vol. 11, Issue 47, No. 3, November 25, 2013. For this and other articles by Professor Sakurai, see this journal's index.

Translator:

Gavan McCormack is an editor of The Asia-Pacific Journal and author of many studies of modern Okinawa and Japan, including (co-authored with Satoko Oka Norimatsu) *Resistant Islands: Okinawa Confronts Japan and the United States*, Rowman and Littlefield, 2012. This latter book, like much of his recent work, has been published in Japanese, Korean, and Chinese as well as English.

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## Notes

<sup>1</sup> This paper is a revised version of my "Asesu seido hokai saseru Henoko asesu," [The Henoko assessment that causes the assessment system to collapse], *Kankyo to kogai*, (Tokyo, Iwanami, 2015), vol. 45, no 1.

<sup>2</sup> Shimazu Yasuo, "Henoko asesu o sokatsu suru," *Kankyo gijutsu*, (Tokyo: Iwanami, 2012), vol. 41 No 5, p. 29.

<sup>3</sup> Though officially known as the "Futenma Replacement Facility" (FRF), Okinawans know

it as the "New Henoko Base," not as a replacement. While it would upgrade and completely renew Futenma Airfield, which is difficult to use with complete freedom, it would be a brand new base, designed to last 200 years.

and with its own military port and ammunition storage area.

<sup>4</sup> Shimazu, "Henoko asesu o sokatsu suru."

<sup>5</sup> [Explanation](#) offered by Sato during negotiations on May 21, 2007 at Naha Defence Facilities Agency.

<sup>6</sup> SACO: Special Action Committee on Okinawa, the special joint Japan-US committee set up in the wake of the rape attack by US servicemen on an Okinawan girl to explore ways to adjust and reduce the size of the US bases in Okinawa. It reached its agreement on December 2, 1996.

<sup>7</sup> The US and Japanese governments agreed on September 19, 2012 that Osprey flights would not be conducted in helicopter mode over settled districts.

<sup>8</sup> "Environmental Review for Basing MV-22 Aircraft at MCAS Futenma and Operating in Japan," Japanese text [here](#).

<sup>9</sup> According to Attachment 10 to the Application for Reclamation Approval, 16.44 million cubic metres were to be provided from the Seto Inland Sea, Moji, Goto, Amakusa, Cape Sata, Amami Oshima, Tokunoshima, Kunigami and Motobu.

<sup>10</sup> "Futenma hikojo daitai shisetsu jigyo ni kakawaru koyu suimen umetate shonin mondai nado ni kansuru chosa hokokusho," p. 19.

<sup>11</sup> Translator note: However, it also ruled that, because of the lapse of time, the right had been extinguished.



<sup>12</sup> See [here](#).