The Evolving Law and Politics of the Sea

Yamamoto Soji

Five years have passed since Japan ratified the United Nations Convention on the Law of the Sea (UNCLOS). What must Japan do as a maritime nation to earn the genuine confidence of international society? Here are the views of an authority on mariti me law. The interviewer is Sato Hiroshi, former director of the Ocean Division, Economic Affairs Bureau, Ministry of Foreign Affairs.

Sato: Since the twenty-first century began, Japan has confronted many difficult maritime issues. We would like to hear your views about how it should deal with these issues. First, would you comment in general on Japan's relationship to the seas?

Yamamoto: Japan developed what we would call a modern interest in the seas from the time the American squadron of warships appeared in Tokyo Bay in 1853 toward the end of the Tokugawa period (1603–1867) demanding that Japan open its doors to diplomacy and commerce. Its interest at that time, however, was mainly in the sea as a line of defense against the outside world. The sea was mainly a source of danger—threats in various forms to the peace and stability of the country—and Japan's attitude to the sea in the nineteenth century was focused mainly on protection of the national interest. This passive, defensive attitude continues today: in our approach to fisheries, maritime transport, and more recently pollution of the seas, there is a marked tendency to view the sea as a "user" would, seeking to reap the maximum benefit from its bounties. It is my impression that there is little consciousness of viewing the sea from the "management" perspective, or for establishing frameworks and systems to ensure the sustainable use and development of the seas indefinitely over the long term.

Sato: Could you explain in more detail Japan's relationship to the international law of the sea?

Yamamoto: The U.N. Convention on the Law of the Sea (UNCLOS) is a massive document ten times the size of a typical treaty of this kind, consisting of 320 articles, annexes, and an agreement relating to implementation. Why did it grow to be so huge? Although each country's interest in the uses of the sea has grown and related national interests have become intricately intertwined, when UNCLOS was being formulated distrust between the developed and developing nations and between coastal states versus deep-sea fishing states intensified, leading to worsening problems and conflicts. And so there was a strong desire among nations, even with regard to maritime issues that could be adequately settled under the laws of individual countries or through bilateral negotiations, to incorporate into the multi-lateral treaty a detailed accounting of their own interests in the hope of gaining the backing of international law in maintaining those interests. UNCLOS was written in such a way as to be widely acceptable to as many nations as possible regardless of their differences in terms of internal political systems, and to get countries to sign the whole treaty with no reservations allowed to be made. Some countries simply translated pertinent articles verbatim for incorporation into their domestic laws. So thorough and finely detailed are the prescriptions of UNCLOS as a whole that it would take a fair amount of skill to complement it with bilateral treaties and domestic law.

In that respect, when it ratified UNCLOS, Japan took up new issues while improving its domestic legal frameworks as well. The results of that endeavor were epochal, even on a world scale. In the International Tribunal for the Law of the Sea, domestic Japanese laws are often referred to either formally or informally. Interest is growing overseas about how these domestic laws are applied for what kinds of specific cases or disputes in Japan. Some developing countries are taking Japan as their model as they strive to enhance their domestic legal systems. In actual practice in Japan, however, government agencies, private corporations, fishermen, and domestic courts have been slow to apply domestic laws relevant to UNCLOS. We have this splendid legal edifice, but it will accomplish little if some spirit is not breathed into it.

The law of the sea builds on a long history of unwritten international customary laws going back more than one thousand years. Japan became an active member of international society rather late, when the country opened up in the mid-nineteenth century after two centuries under its seclusion regime. By then, traditional law of the sea, formed mainly in the seventeenth and eighteenth centuries, had already become the basis of a well-established order. In the second phase, moreover, during which a new system of the law of the sea was being actively shaped in the 1930s and 1940s, Japan ended up an outsider at a very important time, when it was isolated in the world community after its withdrawal from the League of Nations in 1933. Japan eventually joined the legal order only after it was already complete, but it has made use of the principle of freedom of the high seas and championed open competition in uses of the seas.

From the 1950s onward, Japan gradually began to take more initiative in maritime affairs and has actively participated in the process of drawing up new laws of the sea to conserve fisheries resources and to prevent marine pollution. That shift to a more active stance has been a valuable experience not only for Japan but from the standpoint of the international community. In order to earn the real confidence of the global community, Japan as a maritime nation must make the most of this accumulated knowledge in fulfilling the potential of the existing framework of the law as well as developing ways to concretely address new needs of the times.

Sato: UNCLOS was adopted in 1982, nearly twenty years ago. Some voices have called for changes in UNCLOS itself to suit the needs of the times.

Yamamoto: Yes, some are calling for the convening of a Fourth United Nations Conference on the Law of the Sea. However, looking back over the process by which the current Convention came into being, we will recall that the draft was debated for more than ten years and was further discussed over seven or eight years in the Third United Nations Conference on the Law of the Sea. It then took another ten years before the convention to formally enter into force in 1994. It really doesn't suit the tempo of the times at this point to convene another international conference and start the lawmaking process all over again. Nor do I think, moreover, that that would result in a convention that is better than what we have now. UNCLOS covers many different fields and a very broad scope of issues while also in many respects accommodating unwritten international customary law. Rather than attempting to remake the laws from scratch, I think it is important to deepen the content of its stipulations to address actual problems that come up and, when absolutely necessary, to draw up specific or separate agreements for those particular issues.

Moreover, judging from the kinds of cases coming before the International Tribunal recently, I do not think the countries involved are thinking in terms of a need to revise UNCLOS as it currently stands. It is notable that recent suits are often filed by those who have closely studied UNCLOS, finding loopholes to keep their activities from conflicting with its stipulations. In that sense, it is very important for us to consider how to use the broad framework of UNCLOS to maximum effect while devising "soft landing" solutions for any new disputes that emerge from those loopholes.

In the lengthy process leading up to the completion of UNCLOS, there was very passionate and intense international debate stemming from participating countries' differences in political and economic values and ideologies. When we look at the results and the realities, however, that process of legislative and organizational reform seems rather futile. All the while it is going on, various maritime disputes were taking place, and in the fervor of the debate over legislation, little was done to apply or execute what laws were already in force.

As in the past, advances in maritime development technology will continue to give rise to new ways of exploiting the seas, each time bringing into

conflict the interests of different countries. I believe that the shape of the law of the sea in the future should be guided, not by the idea that we have to build a completely new legal order and create new organizations to meet the demands of the changing times, but by a willingness to settle disputes by skillfully applying the terms of UNCLOS already in force. This may sound self-serving, but I believe that the best way to improve the law of the sea, including UNCLOS currently in force, is to busy ourselves with the procedures for settling disputes, in particular through the International Tribunal.

The Future of Maritime Boundaries

Sato: The lines marking exclusive economic zones and the continental shelf, that is, so-called national maritime boundaries between Japan and its neighbors, Korea, China, and Russia, are today not legally delimited, and yet are crucial factors in Japan's national security. What should be done to remedy this situation?

Yamamoto: There are many facets to the issue of national security. The area within which a country's national security is guaranteed in the military realm is limited to the territorial sea within twelve nautical miles from its baselines and internal waters as stipulated in the above-mentioned UNCLOS. A national boundary of waters beyond that line marks the realm of economic security. One problem with a national boundary defined in the military sense that lies within the twelve-nautical-mile limit of territorial waters is that of how to ensure the right of innocent passage. Under the usual terms of innocent passage, the coastal state into whose territorial waters a foreign vessel enters requests that the vessel does so in a manner which is not prejudicial to that country's peace, good order or security. Even when only passing through a coastal state's maritime territory, foreign vessels must give due consideration to that country's national interests. For its part, the coastal state is obliged to ensure freedom of passage for foreign vessels in its waters so long as it is innocent. In any event, there is a need for coastal states to prescribe, on the grounds of jurisdiction over their territorial waters, domestic laws setting the standards and conditions for granting freedom of passage, and ensuring the security of their waters.

Another problem is posed by maritime boundaries beyond and adjacent to the territorial sea twelve-nautical-mile limit. Various issues that have arisen between Japan and neighboring countries in this respect revolve around the question of how to regard maritime boundaries bearing on economic security, such as delimiting the continental shelf and the 200 nautical miles of economic zones. In the East China Sea, for example, such delimitation raises the question of what criteria should be applied in dividing up among the countries concerned the surrounding continental shelf area, which includes, for example, the Senkaku Islands (Diaoyutai). Although the dispute over territorial rights to the Senkaku Islands can easily lead into questions of military security, the claim of military security can be asserted only within twelve nautical miles from the islands. When it comes to delimiting the boundary of the continental shelf outside that area, other criteria have to be considered, such as how to ensure economic security.

Sato: This is nonetheless a very thorny problem.

Yamamoto: That's because territorial claim tends to be an emotional issue. Such disputes can easily escalate as nationalist sentiment comes into play. We have to control that tendency and try to identify the true cause of the problems. To that end, the states involved must make continual efforts to clarify to their citizens that a claim to a national maritime border in terms of military security can be asserted only as far as the limit of territorial sea. Demarcation of areas beyond that point, it should be emphasized, carries a different significance. Without such explanatory efforts, this issue will only get more inflammatory as time goes on.

The sea areas currently at issue lie beyond the territorial seas of all the countries concerned; they are essentially high seas. Accordingly, the only possible way in this case to ensure peace and security in the broad sense is through international cooperation based on the premise that each country concerned will effectively supervise and control the vessels operating under that country's flag. As for where to delimit the boundaries of the continental shelf and the economic zones, according to UNCLOS these must be effected by "agreement" among the countries concerned. Such issues cannot possibly be resolved if individual countries unilaterally assert claims to an area on the basis of their domestic laws or sovereign rights.

If Japan, depending on the stance of the other countries involved, were to push for exclusive control of marine resources within part of a disputed sea, then some delimitation of boundary marking would be needed, whether a median line or something devised on equitable principle based on "natural prolongation of its land territory." Alternatively, if the countries concerned adopted an approach aimed at joint use and fair distribution of resources, the need to delimit such boundaries and fence off the resources would be obviated. As the judgements of the international courts have so far demonstrated, there are all sorts of ways to resolve such disputes through cooperation, including joint ownership, joint control, and joint exploitation.

The crux of the matter for each country concerned is how much importance is attached to the resources in question and how they want to acquire them. In the case of mineral resources in the seabed of the East China Sea, we have to determine what is there and in what quantities, whether Japan and China can simply divide up those resources or if it is necessary, rather, to gain exclusive control of them. The same applies to fishing and scientific research. These questions are still very much up in the air. Although there are also questions bearing on military security, I don't see why research into things like marine pollution and the distribution of marine resources cannot be conducted jointly. It is essential that we include prospects for joint exploitation and joint research as part of our efforts to resolve this issue.

As provided for in UNCLOS, however, in cases where a boundary cannot be drawn due to various circumstances, such as the parties involved taking fundamentally incompatible positions, a number of paths exist toward a final decision. These include drawing a provisional boundary to be fixed or adjusted at a later date on the basis of results actually achieved; and developing and administering the area jointly if the drawing of a boundary is deemed unwise. In this light, Japan's proposal to draw a provisional boundary, allocating each country a portion of the overall area, is well within the realm of possibility.

Sato: But China will reject the idea of drawing even a provisional median line on the grounds that doing so might affect the position each country eventually assumes on the issue.

Yamamoto: China and Japan apply different basic principles to this issue. On the question of delimiting the continental shelf, Japan advocates drawing a median line as the most appropriate solution. China, however, prefers the so-called "natural prolongation" criterion whereby the continental shelf is regarded as the submerged prolongation or continuation of the land mass of each coastal state. In China's view, its continental shelf thus extends to Japan's very doorstep, and there is no alternative but to divide the relevant waters according to "equitable principle." This latter assertion is rooted in the judgment that, when it comes to developing and dividing up resources, instead of assuming an equality of opportunity, we must acknowledge the economic and technological disparities between the two countries and, in

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order to achieve social justice, apply equitable principle which gives due consideration to actual relevant circumstances of the sea areas in question.

On the other hand, countries such as Australia and Indonesia, after many years of negotiations, wisely decided to stop their tug-of-war over principles and standards in favor of an agreement providing for median lines or topographically appropriate delimitations in certain areas as well as for joint development in areas where such delimitation was not deemed necessary. In deciding the use and control of sea-bed resources, it is best to avoid making fruitless claims of "exclusive rights" or implicating territorial issues with arguments about military security and so on. Rather, we should ascertain what is truly important and direct our energies as a nation toward achieving those objectives.

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New Trends in Fishery Affairs

Sato: One area in which Japan is at odds with other countries over the management of marine resources is in relation to such activities as whaling and tuna fishing, which other countries criticize from an environmental standpoint. Japan's position on this issue, which is based on results of scientific research, is not particularly well understood.

Yamamoto: As one of the world's leading fishing nations, Japan is quite advanced in the conservation of fishery resources and related technologies. From the perspective of other countries, however, Japan's claims on the basis of such science and technology are often regarded as lacking an objective and universal basis. For certain countries, it is difficult to erase the suspicion that this is simply the convenient logic of leading distant-water fishing states including Japan seeking to secure preferential fishing rights. Japan needs to rethink its position in light of these concerns.

UNCLOS bears on the fishing industry mainly in relation to the economic zone within the 200-nautical-mile limit and to areas of high seas beyond that limit. To date, the International Tribunal for the Law of the Sea has dealt with in effect seven cases, and the overwhelming majority of these have been disputes over fishery resources. Most of the cases, furthermore, have concerned waters either in the South Pacific Ocean or in the South Atlantic Ocean near Antarctica. These regions include islands in French overseas territories. The disputes have arisen because France has established a 200-nautical-mile boundary around these islands and is applying domestic French law to seize and detain vessels entering those economic zones.

In my view, these trends must be regarded as the signs of a new era of thinking in fishery management. Until now, the focus of concern in high seas fishery affairs has been on the conservation of resources. This has entailed setting scientifically determined limits to the tapping of fishery resources (total allowable catch), within which limits the rational harvesting and utilization of those resources has continued and the resources have been divided in accordance with each country's record of actual fishing results. Because the system of resource division is based on vested interests (or prior rights), it invariably favors the developed fishing nations. The same is essentially true of the current law of the sea.

Recently, however, people have begun to assert that conventional principles of conservation are no longer applicable to certain stocks of species, including salmon, trout, shrimp, crab, cod and, most recently, southern bluefin tuna. It is argued that, since coastal states have diligently conserved and cultivated their coastal marine resources, their share of them should be increased while that of off-shore and deep-sea fishing countries which go far distances to fish should be reduced. This thinking asserts the preferential fishing rights of coastal states because of their biological "special links" with specific varieties of fish, such as those which return to those countries' seas or rivers to spawn, spend their time as young fish in coastal waters, or live on the sea-bed of the continental shelf. The developed countries therefore have no choice but to withdraw from free competition on the high seas. Whereas countries which have hitherto fished in a given area will for the time being be allowed to take part in fishing operations there and share catch quotas on the basis of the coastal states' preferential fishing rights, countries with no significant past record cannot take catches through participation in such operations.

Today, furthermore, as the precautionary principle gains currency in keeping with the ideals of global environmental protection, calls are being made for whale and other catch quotas to be frozen (or sterilized) at their current levels. I don't know the scientific basis for it, but the idea is to place a temporary total ban on the fishing of certain species and return to the catch levels of several years ago in order to study the conditions under which those resources are replenished. If the resources are not restored, the freeze on quotas would then remain in place indefinitely. Thus we have clearly departed from the conventional notion of "conservation" as the tapping and sharing of marine resources at reasonable rates while keeping careful watch on scientific data and the volume of those resources.

With the emergence of scientific standards different from those applied by Japan, as well as calls to ban harvesting of fishery resources regardless of scientific criteria, Japan must consider what standards should be devised for the exploitation, conservation, and sharing of world fishery resources from now on, and whether or not it can win the support of other countries in applying those standards. The mere appeal to the old principle of conservation will not be enough to persuade those countries. The formulation and application of such standards must be carried out not unilaterally by any single country but through cooperation under international fisheries organizations.

Sato: It seems we must foster an understanding in countries where seafood is not commonly eaten that living marine resources are an important source of protein for Japanese, and that Japan therefore needs to continue fishing and utilizing those resources to maintain its food security.

Yamamoto: If more national and ethnic groups ate seafood there would be keener interest in maintaining stable supplies. But leading off-shore and deep-sea fishing countries are too constrained by fishery treaties and conventions to actually engage in overfishing. Rather, they regard continued conservation of marine resources at appropriate levels as ultimately in their own national interests. However, countries which have not ratified fishery conservation treaties, such as South Korea, Indonesia, and the Philippines, as well as Taiwan, freely take from the sea without due regard for the dangers of overfishing or the need for conservation and then sell those catches to the trading companies. As long as seafood is acquired in this manner, even if more national and ethnic groups were to consume marine resources, this increase would not lead directly to greater awareness of the need to ensure stable supplies under the framework of fishery conservation treaties.

Sato: This is the issue of so-called IUU—illegal, unreported and unregulated—fishing, which is undermining the various measures being implemented by the international community as a whole to conserve fishery resources. Since they are not parties to the treaties on conserving fishery stocks, the countries engaged in such fishing activities are under no legal obligation to adhere to conservation measures. Isn't there some way to get those countries to observe the same rules for conserving these resources?

Yamamoto: With the exception of Taiwan, the countries I just mentioned are all parties to UNCLOS, and as such are bound by its provisions; they have an obligation, for example, to effectively regulate and control vessels operating under their respective national flags. However, the provisions of UNCLOS are not very detailed or concrete, so ultimately the only way to ensure strict control is to get those countries to enter into agreements on conserving fishery resources in each specific region or sea area. It will also be necessary to upgrade the responsibilities of countries engaged in regulating ships' operations—such as their use of flags of convenience to avoid regulations—and to prohibit transshipment at sea and import of regulated fishery products.

Protection of the Environment

Sato: To what extent is international law developed for the protection of the marine environment?

What are the specific responsibilities in this area of international society, particularly of Japan?

Yamamoto: As you know, we speak of "sustainable development." The idea is not to completely give up or freeze development and use of the seas for the sake of protecting the environment, but to establish conditions whereby development and use can be sustained in the long term while assuring that the marine environment will be protected. This is a principle that is being applied to environmental protection in general and it is the idea behind approaches for dealing, for example, with pollution of the seas. The more widespread use of the seas becomes, the more complex it becomes and the more likely for frictions to occur in the process, and for the demand for protection of the marine environment. I do not believe that such problems can be solved by simply demanding that use of particular ocean areas be terminated. Rather than trying to stop use of the seas, we need to adopt a fundamental readiness to find ways of resolving the conflicts of interest between use of the seas and protection of the marine environment.

Regarding pollution of the seas, at least for pollution from ships, international law is well established, partly through UNCLOS and the International Convention for the Prevention of Pollution from Ships administered by the International Maritime Organization (IMO), as well as under rules applying to compensation for damages in cases of maritime disasters. Pollution from ships is well regulated in both the areas of the prevention and relief in the case of pollution incidents. Japanese domestic laws have been drawn up in coordination with these international rules, and, with the active cooperation of ship's owners and crews, are proving to be extremely effective against pollution.

Particularly effective against marine pollution is the rule for certain classes of vessels that prohibits entry to foreign ports without proper certificates proving that the ship is equipped with pollution-prevention devices issued by the flag state in accordance with international standards. We can expect good results from now on in other fields besides maritime pollution, such as fisheries, if we prohibit the use of ports or passage within the 200-nautical-mile limit or territorial waters without certification issued by the flag state in accordance with international standards. Particularly in the area of pollution, rather than becoming embroiled in ideological arguments or disputes over abstract principles, we should be resourceful in mobilizing techniques to protect the environment.

In this respect, Japan's domestic legal system and administration, with the cooperation of ships' captains and through the efforts of coast guard personnel responsible for enforcing these laws, have been very effective in addressing the problems of marine pollution. I believe it is Japan's responsibility to make available the experience and know-how it has accumulated to other countries that may be lacking commitment and skills for combating pollution of the seas.

Measures against Piracy

Sato: In recent years piracy has grown into a serious issue in various parts of the world. The dilemma with piracy is that illegal acts take place within the territorial sea, that is, in areas under the sovereignty of another country, so in principle it is extremely difficult for other countries to make much of a contribution in dealing with the problem through the exercise of international law. What can the international community do about this issue?

Yamamoto: Piracy was once a ravage committed on the high seas, and pirates were considered the common enemies of humankind who could be seized by any country wherever they were discovered. To secure safe navigation on the high seas—that is, to protect international public interest or the common interest, so to speak—all countries are granted the authority to visit pirate ships, and capture and punish them. If a country which suffers from piracy does not have the capacity to control it, the international community has been obliged to cooperate in the repression of the piracy when that country asks for it.

As you have said, recent cases of armed robbery at sea, so-called piracy, have occurred in the territorial seas of coastal states or in international straits as part of those territorial seas. That presents a different situation from piracy on the high seas. So, before anything else we must consider the issue of piracy from two approaches: in terms of the right of innocent passage or common interest within the

territorial seas of a country on the one hand, and in terms of protection of a country's national interest or its ships and nationals on the other. As far as this issue is concerned there should be legal arrangements among nations from the very outset. If Japan approaches piracy problems from the perspective of protection of its national interests and its nationals along sea lanes overseas, demanding the benefit and protection of law within another country's territory, it will clash with the laws of that country.

In my view, all that other countries are legally allowed to do is to provide mutual assistance in investigation or provide judicial cooperation, if so requested by the coastal state on whose waters piracy has been committed. So, we should consider whether or not the coastal state bears the responsibility for preventing the occurrence of piracy or armed robbery. It is the coastal state's duty to guarantee the right of innocent passage of ships of foreign countries. Coastal countries must give some serious thought to how to foresee and prevent dangers to navigation.

Under the current UNCLOS, a coastal state can have foreign ships carrying nuclear or other dangerous materials use a designated sea lane and traffic separation regime when they pass through its territorial sea. Likewise, I think it a good idea for a coastal state to designate piracy-free sea lanes, or safe lanes, within its waters and take the responsibility for securing safety along the lanes. If the coastal state cannot do that on its own it should ask other countries for cooperation. There is a system already established for protecting safe navigation of international straits. By working out legal mechanisms like that and helping to enhance the maritime safety of coastal states through systems of cooperation founded on law, among other such measures, I think dealing with piracy will go more smoothly.

Sato: In closing, how would you describe your expectations of Japan from your position as a judge on the International Tribunal for the Law of the Sea?

Yamamoto: When disputes break out between countries, it is important to make every possible effort to resolve the problem through diplomatic negotiations. Today the most effective means of protecting national interests is through skillful diplomacy. If, however, such negotiations do not go well, then a country can decide to seek a settlement of disputes at the International Tribunal for the Law of the Sea. Japan was directly involved with the Southern Bluefin Tuna case, and at the Tribunal, it is necessary to present sufficient reasoning and evidence to convince the judges, who act as a third party. It is my hope that, in order to protect its national interests within the framework of UNCLOS, Japan, each time it faces a particular incident or problem, will seek to make the best use of relevant provisions of UNCLOS, cultivating its application with flexibility and care. As one of the more advanced nations as far as law of the sea is concerned, I hope that Japan will contribute by helping other nations struggling with disputes involving marine affairs, with interpretation and application of the laws and in taking their problems to the Tribunal.

Sato: Thank you for sharing your rich perspectives on this issue.

Translated from the original Japanese, "Umi o meguru shoso," published in the July 2001 issue of *Gaiko Forum*. A maritime nation, Japan faces all kinds of sea-related problems. Focusing on its strategies in such areas as commerce, fisheries, piracy and policing of domestic waters, as well as the resources and environment of the sea, this issue, featuring "Can Japan Be a Maritime Superpower?," presents a wide range of expert views by specialists in the law of the sea, scientific research, security affairs, and from the Maritime Safety Agency.