

# New Legal Viewpoints for Development and Conservation of Enclosed Coastal Seas

KENJI SANBONGI

*Japan Sewage Works Agency, Toranomon 2-3-13, Minato-ku, Tokyo, 105 Japan*

At first, Japanese institutions related with the sea in general and particular to enclosed coastal seas are introduced with background of characteristics of their conservation, development and utilization problems, and the choice of institutional policies is reviewed. Then several new legal viewpoints with regards to comparative law, such as public access, public trust doctrine, method of zoning, role players in planning, mitigation and environmental investment are discussed in order to contribute to basic studies for sustainable development and sustainable environment of enclosed coastal seas.

## 1. Fundamental Characteristics of Enclosed Coastal Seas

Enclosed coastal seas, such as large bay area and inland sea, are especially important serene areas for a country having long coastline facing ocean, and are most suitable for human activities ranging from formation of national land in the long history, utilization of various and abundant natural resources, to recent recreational use. As a result of concentration of population, industry, traffic, cultural assets etc., they embrace problems of overcrowded city and urban renewal on one hand, and those of pollutants accumulation and eutrophication on the other hand.

From the viewpoint of long human-ecological cycle, we can see a series of natural resources utilization, industry location, urban development, community formation and again utilization of resources including coastal environment. Along this progress, human beings enjoy the mean time before overcrowding, side by side with living things enjoying the mean time before environmental degradation ; the sea hopes for itself the maintenance of natural purification.

To secure policies of sustaining those subtle balances, it is necessary to preserve precious national land and resources in the first place, and also to harmonize development with environment, then to coordinate all the conservation, development and utilization with each other for people's welfare and economic advance.

We propose here some new legal viewpoints, in addition to various existing institutions, concerning public nature of water front area, method of zoning and sustainability of development and environment in order to contribute to basic studies for enclosed sea problems.

## 2. Institutions for Conservation and Development of Enclosed Coastal Seas

< Major institutions related with the sea in general >

a. Sea Coast Law, Harbour Law and other public domain management laws stipulate special administrators to ensure standardized policies through various administration levels, but those are not for marine management in general.

b. National Property Law is a basic and general legislation for beach, sea bed and coastal construction management as national property, but it does not prescribe visions for conservation, development and utilization of sea and coastal zone.

c. Land development legislations : Reclamation Law stipulates procedures after project application, but it does not show the masterplan in advance. Comprehensive Resort Area Arrangement Law (1987) is a new legislation characteristic of recent administrative planning.

d. Industry and traffic legislations : Fishery Law, Marine Resources Promotion Law, Marine Traffic Safety Law and many other legislations prescribe the legal order of marine utilization from respective viewpoint.

e. Environmental conservation legislation: Natural Parks Law, Nature Conservation Law, Water Pollution Control Law, Marine Pollution and Disaster Prevention Law, Sewage Law, Waste Disposal Law etc. have contributed to good effects of environmental conservation altogether.

f. National land use planning legislations : Comprehensive National Land Development Law, National Land Use Planning Law and several regional development laws have played the important role in proper and reasonable conservation, development and utilization of sea and coastal zone. (The Fourth Comprehensive National Development Plan (1987) under the first law gives priority to comprehensive utilization of coastal zone.)

< Major institutions related with the enclosed coastal sea in particular >

g. Law Concerning Special Measures for Conservation of the Environment of the Seto Inland Sea (1973) stipulates intensified control of water pollution, total amount control of pollutants, reduction of eutrophication substance, promotion of sewerage construction, conservation of natural beach, guidelines for reclamation etc. in the form of regional intensification and supplement of related institutions. Those special measures are desirable for other enclosed seas.

h. Total amount control measure is adopted for other important seas, such as Tokyo Bay and Ise Bay, in the form of special prescription for Water Pollution Control Law. Problems are non-point sources pollution of hinterland origin, such as agricultural effluents and household wastes.

i. Densely-populated urbanization is more extensive problem. Legislations for arrangement of the greater metropolitan areas stipulate control of office and plant location, and Law Concerning Multi-polar Pattern National Land Formation (1988) was enacted to promote dispersion of concentrated population. In this connection, well-balanced development through national highway construction including strait bridges, and regional arrangement and urban development for the formation of local bases are becoming important policies.

Thus, environmental problems of enclosed coastal sea are possibly argued in their specified area and particular phases, but moreover, it would be desirable to overview them comprehensively in the context of the whole area and the nationwide land use including territorial sea.

Problems concerning administration and management for enclosed sea have many phases reflecting various intricate interests. The way of coordination seems to be depending on the choice of following policies.

- (1) Unified administrative institution all through the sea and coastal zone management.
- (2) Special institution suitable for characteristics of enclosed coastal sea (e.g. the Seto Inland Sea legislation).
- (3) Application and supplement of existing institutions.
- (4) Promotion of new local customs under certain guidelines.
- (5) Free coordination into expected harmony without any special institutional measures.

### 3. Public Nature of Water Front Area

The sea itself is traditionally "Res Publicum", and it is deemed to be far even from national ownership. The bed of territorial sea is "national property" and/or inalienable "public domain" in Japan and also in France (e.g. law of 1963), which is the object of administrative management. The wet sand between low-tide line and high-tide line is generally public domain, but it can be the object of private ownership in several institutions of

the United States.

The dry sand, which is on land side from high-tide line, has not privately owned originally in Japan ; according to nationwide research of civil customs(1880), "public beach is usually extended as far as 216 m from wet sand". The partial strip designated as coastal conservation area (at most 50 m far from low-tide line) is public domain, and rest of the beach falls generally into national ownership. On the contrary, private ownership seems to cover as far as edge of wet sand through "enclosure or prior appropriation" in European countries.

There is an English doctrine of "Jus Publicum" to the effect that "the beach alienated to private ownership should be subject to public use". When a developer is under an obligation to ensure public access to waters, it is a matter of recoverability of the cost after all.

On the other side, there are many instances of transfer to public property through purchase by government or national trust movement and through donation etc. Easement is often applied for public access in European countries (e.g. French tradition and law of 1986). In that case, it is important to determine if the compensation is necessary (as in "chemin halage") or not.

In Japan, licensees of reclamation project did not always consider public access generally because of factory location or port service.

From now, steep rivetment and wharf work should be restricted in the necessary limit, and reclamation and artificial island project should produce "nature-like seacoast" with beach nourishment, artificial tidal flats and natural stone rivetment, as seen in recent environment works of seacoast and ports.

In this connection, public access should be considered not only for human beings, but also to invite birds and fishes. It may symbolize "mild nature" instead of "wild nature", presenting well-being of human life as long as coexistence of all the creatures is desirable. Naturally, it should be admitted to sum up duly the cost of "environmental elements" in the main project.

Although institutions are various by countries, there is a doctrine of "public trust" applicable for all the instances. It originated in Roman law (Gaius), could be traced in Common law (Magna Charta) and in German law (Sachsenspiegel), and was splendidly revived in modern disputes of environmental protection in the United States, where the doctrine has rather been used mainly in the negative way, such as in injunction suits. However, it is recommended to apply this also in the positive way, for instance, how to manage sea and coastal zone for development and utilization necessary to people's needs, because "trust" implies "expectation to make most of it".

#### **4. Method of Zoning**

Zoning is the most definite measure to clarify ranges of prior interests and to certify the result of coordination of conflicting interests. National land conservation and preservation of excellent natural environment may have special priorities, while many other interests are deemed to have values essentially equal to each other.

The method of zoning is usually to divide the whole area without exception. However, taking into account of future interests and change of circumstances, the more flexible way is recommended. For that reason, part of the area should be reserved, and procedure for change should be retained. In fact, the sea is too vast to divide completely by men. The way of taking position or sitting in a corner, so to speak, might sometimes be pursued.

In coordinating between long-term visions and present or presupposed interests, it is useful to consider characters of parties concerned in planning. Conceptually, central government with principal guidelines and subsidies is control-oriented party. Intermediately, prefectural government with grand design is consensus-oriented party. Public or private enterprise is project-oriented party. Those parties have to play roles in good harmony considering people's needs.

If all the needs are difficult to be met from the limitation of enclosed coastal sea, the best possible allocation of conservation, development and utilization should be implemented within the allowance of its total capacity.

Since it is worried that the balance of coexistence of human and sea in some part of enclosed coastal sea area

advanced in its development and utilization, and since there are many troubles against natural, living and industrial environment caused by recreational activities near metropolitan area, proper rule making is necessary for it, with seasonal or time-scheduled coordination, zoning of utilization and requirements of prohibition and permission. For instance, as regards traditional fishery in coastal zone, the distinction of categories is useful, while due consideration should be taken of circumstantial and structural change of fishery near metropolitan area.

The rule making, as above mentioned, forms essentially new local customs having legal significances, or new customary law. It is desirable to make up regional rules of conservation, development and utilization of sea and coastal zone by the method of zoning, with respect to locality, creativity and vitality, also keeping cultural and aesthetic point of view in mind.

## 5. Scheme for Sustainable Development and Sustainable Environment

We mean here "environment" not only as natural environment and natural resources in narrow sense, but also including people's welfare by those interests, in other words, life and industry environment. In these days, active debates have been heard concerning sustainable development and sustainable environment in this context.

There are many cases of seacoast conservation and harbour arrangement works which involve environmental measures in the construction stage rather than additionally. It is recommended to take such consideration in financial aids institutionally.

In recent years, as in coastal development cases in the United States, the concept of "mitigation" has been introduced. In typical instances, it implies mitigating environmental impacts by measures of the same quality and the same degree. Except for the national land improvement works such as seacoast conservation and dredging, a new application with model rule is presented in coastal development works such as reclamation and marine structure. In the cases of the United States, reclamation right is obtained according to "trade off ratio" by a certain countermeasure.

Our Reclamation Law (1921) stipulates already an optional duty of damage evasion works, and its Amendment Law (1973) added "consideration of environment" in licence criteria, which might show another concept in the similar effect. We have ideas of coordinating existing interests, not through economic transaction, but through administrative orders in which environmental impact assessment and development license criteria are deliberated from national and civic viewpoints. Technical judgement is important in any way.

In many cases, monetary compensation has been made in carrying out development projects. It signifies directly economic reparation of damages. Even though the advantages of development exceed them, relevant environmental value diminishes definitely by that amount. If a new scheme persuades damage evasion works and environmental improvements as substantial measures, those are added to the former environmental value to form a renewed environmental value. Balance of added value and estimated damage shows a sort of safety index.

There were famous oyster grounds in the Seto Inland Sea. One of them disappeared after compensation, but another one has been moved offshore step by step with the progress of reclamation through several centuries, even now being prosperous.

Also in our recent public works and coastal development projects, construction of artificial reef and tidal flats and nourishment of seaweed bed have been tried in order to maintain and improve biological environment.

On the other hand, as stated in the final report of Marine Development Council of Japanese Government (May 1990), the coastal fishery is required to tend to "cultured and nourished fishery" and "fishery of resources management type". In viewpoint of manageability of natural resources, enclosed coastal sea should hold a position to set a good pattern of the policy.

In those contexts, "environmental investment" in a link of public works and development projects should be institutionally recognized to attain the ultimate aim of sustainable development and sustainable environment altogether.