種　別：　論説

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所　収：　『上智法学論集』第 59 巻 4 号（平成 9 年 6 月）53-73 頁

発行元：　上智大学法学会

論　説

# What Does a New International Legally Binding Instrument on Marine Biological Diversity of Areas beyond National Jurisdiction "under the UNCLOS" Mean?*

Atsuko Kanehara



## 1. Introduction

The resolution of the United Nations General Assembly 69/292 (1) under Paragraph 1 decided to develop an international legally binding instrument (new instrument) under the UNCLOS (2) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. (3) In this

*This paper is based upon the presentation which the author made in the 2nd International Symposium on the Law of the Sea on the 16th and 17th of February, 2016, in Tokyo, hosted by Ministry of Foreign Affairs of Japan.

(1) Resolution adopted by the General Assembly on 19 June 2015, A/RES/69/292.

(2) The 1982 United Nations Convention on the Law of the Sea.

(3) In addition, Paragraph 3 of the resolution also decided that the process of developing the new instrument should not undermine existing relevant legal instruments and frameworks and relevant

paper the term BBNJ is used to refer to the marine biological diversity of areas beyond national jurisdiction. This paper will focus on the high sea regime [(4)] and will examine what the phrase "under the UNCLOS" means. [(5)]

In order to answer the question, first, an understanding of the high seas regime under the UNCLOS and its development is necessary. In this regard, consideration will be given to the UNCLOS and relevant international or regional treaties and organizations. This is because these treaties and organizations develop the regulation and implementation on the high seas under the UNCLOS. They include an Implementing Agreement of the UNCLOS, such as the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks（FSA）. In addition, some of them realize the cooperation that the UNCLOS requires under Article 118 for fishing regulation and Article 197 for marine environmental protection. Therefore, the current high seas regime under the UNCLOS is understood by taking into consideration the developments of these international or regional treaties and organizations. Then, based upon the recognition of the current achievement of the high seas regime, it becomes possible to appropriately evaluate new agendas to be addressed beyond the current high seas regime under the UNCLOS for the purpose of the conservation and sustainable use of BBNJ. [(6)]

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global, regional and sectoral bodies.

（4） Generally areas beyond national jurisdiction include both the high seas and "Areas" under the UNCLOS. "Areas" is defined by Article 1, Paragraph 1. Since the analysis is confined to the high seas regime, in this paper areas "beyond national jurisdiction" shall mean the high seas.

（5） The issues of marine genetic resources（MGRs）and the Access and Benefit Sharing that is discussed concerning such are not touched upon in this paper.

（6） For a succinct historical survey of the high seas regime from the Grotian Era to the 21st century, see D. R. Rothwell and T. Stephens, *The International Law of the Sea*, Hart Publishing, 2010, pp. 147−150.

From this perspective, this paper will deal with the following two issues. First, it should be noted that there is a remarkable tendency for a change from the freedom of the high seas to high seas governance. Second, due to the nature in the common interest of the conservation and sustainable use of BBNJ new agendas have been raised for negotiation and agreement by members of international society.

## 2. A Current Significant Tendency for a Change from the Freedom of the High Seas to High Seas Governance

### (1) Meaning of Governance

Currently, in scholarly writings the word "governance" is frequently used in the context of the law of the sea. (7) Governance may contain a wide range of elements, such as regulation, implementation, the decision-making process, institutional arrangement and so on. (8) In the discussion of BBNJ, expressions are seen such as "governance" and "governance principles". (9) Some scholars approach the issue of BBNJ by proposing the application of governance principles, (10) and there is also an analysis of the role of the principle-based approach for the issue of BBNJ. (11) Sometimes, in the context of the law of the

(7) "Management" is also used as a word that may have a similar meaning to governance. In this paper the term governance will be used according to the meaning explained herein.

(8) For an examination of the concept of governance in the context of the law of the sea, see Y.-Ch. Chang, "International Legal Obligations in Relation to Good Ocean Governance," *Chinese Journal of International Law*, Vol. 9, 2010, pp. 589 *et seq*.

(9) See R. A. Barnes, "Consolidating Governance Principles for Areas beyond National Jurisdiction," *The International Journal of Marine and Coastal Law*, Vol. 27, 2012, pp. 261 et seq.; A. G. Oude Elferink, "Governance Principles for Areas beyond National Jurisdiction," *The International Journal of Marine and Coastal Law*, vol. 27, 2012, pp. 205 *et seq*.

(10) Professor David Freestone is a leading figure in this regard. D. Freestone, "Principles Applicable to Modern Oceans Governance [editorial]," *The International Journal of Marine and Coastal Law*, Vol. 23, 2008, pp. 385 *et seq*.; by the same author, "Modern Principles of High Sea Governance— The Legal Underpinnings—," *Environmental Policy and Law,* Vol. 39/ 1, 2009, pp. 44 *et seq*.

sea, the concepts of both governance and management are referred to. [12] Others describe regulation and governance in a parallel manner, such as in arguments for regulation gaps and governance gaps in the UNCLOS concerning the protection of BBNJ. [13] Regulation and "implementation" gaps are also suggested in the same context. [14] However, regulation and governance are sometimes interchangeably used. [15]

Thus, it is not an easy task to find a unified or definite definition of governance in these writings. In order to avoid confusion, in this paper, the term governance is defined by setting Professor Treves's remarks as a starting point. Professor Treves points out that governance does not always coincide with the concept used by lawyers; it includes the idea of "good government, government for the general interests of those governed, on the basis of commonly shared values and with the involvement of stakeholders." [16] This explanation sets the basis for understanding the concept of governance for BBNJ. [17] Bearing in

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（11） See K. Houghton, "Identifying New Pathways for Ocean Governance: The Role of Legal Principles in Areas beyond National Jurisdiction," *Marine Policy*, Vol. 49, 2014, pp. 118 *et seq*.

（12） For instance, Professors Rothwell and Stephens, on the one hand, regard the high seas as a managed common area, and in their book, on the other hand, they allot an independent chapter to oceans governance. Rothwell and Stephens, *op. cit*., p. 146, pp. 461−485.

（13） For a typical example of this, see K. Gjerde, H.Dotinga, S. Hart, E. J. Molenaar, R. Rayfuse, and R. Warner, "Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction, Marine Series No. 1," *IUCN Environmental Policy and Law Papers*, 2008. Professor Treves argues a distinction between a regulation gap and an institutional arrangement gap. T. Treves, "Principles and Objectives of the Legal Regime Governing Areas beyond National Jurisdiction," in E. J. Molenaar and A. G. Oude Elferink eds., *The International Legal Regime of Areas beyond National Jurisdiction; Current And Future Developments,* Martinus Nijhof Publishers, 2010, pp. 7−8.

（14） See Houghton, *op. cit*., p. 118

（15） See S. Kr. Agarwal, "Legal Issues in the Protection of Marine Biological Diversity beyond National Jurisdiction," *Maritime Affairs: Journal of the National Maritime Foundation of India*, Vol. 11/ 1, 2015, pp. 90−91.

（16） Treves, *op. cit.*, p. 7.

（17） Barnes, *op. cit.*, p. 263.

mind the concept of governance, in this paper, governance means development in two aspects. First, as for the aspect of regulation, common interests are being established and the freedom of the high seas is exercised under regulations that are set for the purpose of the realization of these common interests. Second, as for the aspect of implementation of regulations, there is the development of a decentralized mechanism for securing the order of the high seas.

### (2) The Regulation Aspect: Development of Regulation on a Sector-Specific Basis

The UNCLOS regulates the uses of the high seas [18], such as navigation, [19] fishing, [20] uses harmful to the marine environment, [21] and marine scientific research [22] on a sector-specific basis. [23] The preamble to the UNCLOS indicates that its State parties are conscious that the problems of ocean space are closely interrelated and need to be considered as a whole. Here a perspective can be seen on integrated regulation different from sector-specific regulation. [24] However, the preamble sets out not a legal obligation but a sort of political objective. [25] The bulk of the rules and principles under the

(18) Under Article 87 six basic high seas freedoms are established: freedom of navigation; freedom of overflight; freedom to lay submarine cables and pipelines; freedom to construct artificial islands and other installations; freedom of fishing; and freedom of marine scientific research.

(19) Typically Article 94 provides for the flag State principle that regulates high seas navigation.

(20) Articles 116 to 119.

(21) Not confined to the high seas only, Part XII addresses issues of marine environmental protection.

(22) Not confined to the high seas only, Part XIII regulates marine scientific research.

(23) Professor Barnes indicates that while navigational rights are not identical in discrete maritime zones, the actual navigation of vessels is standardized through the Collision Regulations. R. Barnes, "The Law of the Sea Convention and the Integrated Regulation of the Oceans," *The International Journal of Marine and Coastal Law*, Vol. 27, 2012, p. 860.

(24) Oude Elferink, *op. cit*., p. 230.

(25) Barnes, *op. cit*., (Integrated Regulation), pp. 859, 861; Barnes, *op. cit*., (Consolidating Governance Principles), pp. 283−284. See also, D. Freestone, "The Law of the Sea Convention at

UNCLOS retain a highly sectoral focus.[26] The relevant international organizations also have mandates on a sector-specific basis, such as the International Maritime Organization, the Food and Agriculture Organization and the United Nations Environmental Program. The same holds true with regional organizations and treaty regimes. As a result, a sector-specific nature is maintained in the treaties adopted by these international organizations and in the regulations established by these international and regional organizations or treaty regimes.[27]

With the significant growth in the regulation of high seas uses, there is little room for doubt that high seas freedom is conditioned.[28] However, beyond that the idea of "high seas governance" can be seen. Many scholars, as well as the discussion within the Ad Hoc Open-Ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction（WG）have repeatedly referred to "high seas governance" and "governance of the high seas." This fact evinces an emerging change in ideas concerning the high seas regime. "High seas governance" is developing in the following sense. High seas regulations is moving beyond simple compromise among individual uses on ad hoc basis in

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30: Successes, Challenges and New Agendas," *The International Journal of Marine and Coastal Law*, Vol. 27, 2012, p. 680.

（26） In addition, the zone approach taken by the UNCLOS deserves attention. The UNCLOS adopts the zone approach which divides oceans into several kinds of national jurisdictional sea areas and sea areas beyond national jurisdiction. Thus, its rules and principles bear a space-specific nature, Barnes, *op. cit*.,（Integrated Regulation）, pp. 860−861. In comparison, Article 192 is interpreted as an overarching provision which is applied to all maritime zones.

（27） The UNCLOS is said to be "a living instrument" that continuously evolves by involving development in the relevant international and regional instruments, Houghton, *op. cit*., pp. 118, 122.

（28） Professor Freestone counts "conditional freedom of activity on the high seas" as the first principle among the principles to be applied to the high seas, Freestone, *op. cit*.,（Principles）, p. 391; Freestone, *op. cit*.,（Modern Principles）, p.45; Oude Elferink, *op. cit*., p. 211.

accordance with a combination between the traditional "laissez faire" principle and "due regard" requirement. The high seas regime has been and still is moving toward a new regime in which common interests are recognized on a sector-specific basis, such as the safety [29] and security [30] of navigation, conservation of living resources [31] and marine environmental protection. [32] These are commonly shared interests by members of international society which has decentralized nature. In order for realization of these common interests, regulated freedom of uses may be exercised. [33]

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(29) For instance, Article 94, Paragraph 3 of the UNCLOS and the 1974 International Convention for the Safety of Life at Sea reflect this common interest.

(30) Combating piracy at sea has been a universally-recognized common interest, which is recognized by the relevant provisions under the UNCLOS and the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) with its Protocol of 2005.

(31) Not to mention, there is a great amount of international and regional conventions regarding the conservation and management of living resources.

(32) Part XII of the UNCLOS, the 1973 International Convention for the Prevention of Pollution from Ships with its 1978 Protocol, and the various regional sea conventions concerning marine environmental protection provide firm evidence of this common interest.

(33) For a similar idea of the high seas governance, see Rothwell and Stephens, *op. cit.,* p. 146. Professor Tanaka is keen to indicate that the law of the sea itself is moving from the freedom of the sea toward ocean governance. According to him the following factors evince this development: the introduction by the UNCLOS of new regimes of exclusive economic zones (EEZ), archipelagos and deep sea-beds; growing regulations on marine environmental protection. He asserts that the argument for the BBNJ and marine protected areas should be situated within this development. N. Tanaka, *Kokusaikaiyoho No Gendaiteki Keisei (Modern Formation of the International Law of the Sea)*, Toshindo, 2015, pp. 11-36, 67-68, 300-304. Professor Sugihara points out the development of the law of the sea from *mare liberum* to *mare commune.* T. Sugihara, "Kaiyoho No Hatten No Kiseki To Tenbo (The Track and Prospect of Development of the Law of the Sea)," in T. Kuribayashi and T. Sugihara eds., *Gendai Kaiyoho No Choryu (The Stream of the Modern Law of the Sea) I—Kaiyoho No Rekishiteki Hatten (Historical Development of the Law of the Sea)*, Yushindo, 2004, p. 289. From the perspective of fishing regulation on the high seas, Professor Sakamoto also emphasizes a change from the freedom of fishing to ocean governance. Sh. Sakamoto, "Chiikiteki Gyogyokanrikikan No Kino Kakudai Ga Utsusu Kokusaiho No Hatten— Gyogyo Kisei Kara Kaiyo No Kanri He— (Development of International Law That is Reflected by Enhancement of Functions of Regional Fisheries Management Organizations— From Fishing Regulation to Ocean Governance—), in

Various opinions have been heard concerning the new regime to be applied to the high seas. Among them are the concept of the common concern of human kind [34] and public trusteeship doctrine. [35] Professor Rayfuse and Professor Warner propose to introduce public trusteeship particularly for high seas governance. [36] Regarding the concept of the common concern of humankind, its legal effect is not necessarily clear beyond the fact that against international regulation on matters of the common concern of humankind no excuse can be opposed by claiming national jurisdiction over such matters. According to the view arguing for public trusteeship, the high seas are not subject to the freedom of competition principle. Every State enjoys a substantial equality of

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Sh. Yanai and Sh. Murase eds., *Putting International Law into Practice: In Memory of Ambassador Ichiro Komatsu*, Shinzansha, 2015, pp. 458–471, especially, pp. 468–469.

From a perspective of enforcement, Professor Oral insists that the area of the high seas is a global commons wherein lies a community interest, and that harm to the global commons is a harm to the community interest. According to him, it is now time to consider whether certain acts harmful to the high seas and to the community interest should also be treated as violations of obligations *erga omnes.* N. Oral, "1982 UNCLOS + 30: Confronting New Complexities in the Protection of Biodiversity and Marine Living Resources in the High Seas," *American Society of International Law, Proceedings,* Vol. 106, 2012, p. 405.

(34) In the context of biogenetic resources in the areas beyond national jurisdiction, Professor Francioni argues for the concept of common concern as a possible idea to be applied. According to him, this is a legal tool designed to safeguard the general interests of the global ecosystem, such as biodiversity and climate.

(35) A leading figure who discusses public trusteeship doctrine is Professor Sand. P. H. Sand, "Sovereignty Bounded: Public Trusteeship for Common Pool Resources," *Global Environmental Politics,* Vol. 4, 2004, pp. 47 *et seq*.; by the same author, "Public Trusteeship for the Oceans," in T. M. Ndiaye and R. Wolfrum eds., *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, Martinus Nijhoff, 2007, pp. 521 *et seq*.

(36) R. Rayfuse and R. Warner, "Securing a Sustainable Future for the Oceans beyond National Jurisdiction: The Legal Basis for an Integrated Cross-Sectoral Regime for High Seas Governance for the 21st Century," *The International Journal of Marine and Coastal Law*, Vol. 23, 2008, pp. 410–411 and footnotes thereto. From the perspective of reframing the "right to fish," see C. M. Brooks; J. B. Weller; K. Gjerde; U. R. Sumalia; J. Arden; N. C. Ban; D. Freestone; K. Set; S. Under; D. P. Costa; K. Fisher; L. Crowder; P. Halpin; and A. Bounstany, "Challenging the 'Right to Fish' in a Fast-Changing Ocean," *Stanford Environmental Law Journal*, Vol. 33, 2013–2014, p. 316.

opportunities to have rights and obligations in high seas uses. For that purpose, capacity-building and the transfer of technology for less-developed countries would fulfill a function. (37)

International public trusteeship is an attractive option for a future high seas regime. However in order to realize international public trusteeship on the high seas international society will still need various improvements in the following factors: global coordination and cooperation; participation and compliance by all States; assessment, evaluation and regulation of existing and new uses; and institutional arrangements. (38) Compared to this view, a secure stance is appropriate concerning a new idea of high seas regime considering the development within it thus far. At this stage, high seas freedom is conditioned. International society has already recognized this. In addition, the high seas regime is going beyond simple compromise among individual uses on ad hoc basis in accordance with the combination of the traditional "laissez faire" principle and "due regard" requirement. It has been and still is moving toward a new regime in which common interests are recognized on a sector basis. This tendency in the high seas regulations should be noted as a tendency toward governance.

Next, the implementation aspect will be examined from the perspective of development toward high seas governance.

### (3) The Implementation Aspect: Development of the Decentralized Mechanism of Implementation of Regulations on the High Seas

Traditionally it has been expected that the flag State system combined with the freedom of the high seas principle, fulfills the function of the maintenance of

(37) Rayfuse and Warner, *op. cit.,* pp. 411, 415-416.

(38) These factors are examined by scholars who propose the application of public trusteeship to the high seas. *Ibid.,* pp. 411-420.

order on the high seas. (39) The flag State principle is closely connected to the freedom of the high seas principle. On the high seas only flag States exercise jurisdiction over vessels flying their flags and intervention by non-flag States is prohibited. In other words, vessels can enjoy freedom of uses on the high seas without being intervened upon by foreign States.

The decentralized mechanism of implementation of regulations on the high seas has been growing, and the idea has emerged that every relevant State and every relevant international or regional organization is expected to play a role in realizing common interests concerning the high seas. In this regard, the following three points can be noted.

First, flag States not only have exclusive jurisdiction over vessels flying their flags, but they also have the obligation to exercise it. Article 94 of the UNCLOS provides for that. In addition, in the sectors of fishing regulation (40) and the marine environmental protection, (41) the obligations of flag States to implement the regulations are emphasized. The flag State jurisdiction that is thus obliged functions as a tool for the realization of the common interests of international society by implementing the regulations for that purpose. (42) The

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(39)　G. Gidel, *Le droit international public de la mer*, Topos Verlag, 1932, Tome I, pp. 225–230; D. P. O'Connell, *The International Law of the Sea*, Clarendon Press, 1982, pp. 794–795.

(40)　For instance, Article 117 of the UNCLOS provides for the general obligation of all States to take such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas. This includes a flag State obligation. Articles 18 and 19 of the FSA set forth the detailed obligation of a flag State.

(41)　Part XII of the UNCLOS distributes jurisdiction depending on the sources of pollution among the relevant States in order to protect and preserve the marine environment. Looking into vessel-source pollution, on the one hand, flag States have obligations to prescribe（Article 211, Paragraph 2）and enforce（Article 217）, and, on the other hand, coastal States may exercise prescriptive jurisdiction（Article 210, Paragraphs 3–5）and enforcement jurisdiction（Article 220）. The critical point is that the jurisdiction of flag States is obligatory compared to coastal State jurisdiction, which has a voluntary nature.

(42)　The same holds true for the coastal State obligation to conserve and manage living resources in their EEZs. ITLOS stresses this obligation in its advisory opinion for the Sub-Regional Fisheries

insufficiency and ineffectiveness of flag State jurisdiction has been pointed out in many scholarly writings.[43] This is related to the next point. Second, to complement flag State jurisdiction, non-flag State measures have been utilized[44] mainly in the sectors of fishing regulation,[45] the security of navigation on the high seas,[46] and marine environmental protection.[47] They include non-flag State measures on the high seas in accordance with Article 105 and Article 110, Paragraph 1（a）under the UNCLOS, as well as in accordance with Articles 20 and 21 of the FSA.[48] They also include port State control and

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Commission, Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, ITLOS, Advisory Opinion of 2 April 2015, https: / / www. itlos. org/ fileadmin/ itlos/ documents/ cases/ case_no. 21/ advisory_opinion/ C21_AdvOp_02. 04. pdf（last accessed 20 February, 2016）, para. 104. ITLOS says, "the coastal State is *entrusted with the responsibility* to determine the allowable catch of the living resources in its exclusive economic zone and to 'ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation（emphasis added）.'" For future high seas governance, Professor Treves places weight on flag State and port State obligations. Treves, *op. cit*., pp. 21−22.

（43） See Rayfuse and Warner, *op. cit*., p. 408; K. M. Gjerde, "Challenges to Protecting the Marine Environment beyond National Jurisdiction," in D. Freestone ed., *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas*, Martinus Nijhoff Publishers, 2013, p. 172; Oral, *op. cit*., p. 405; Barnes, *op. cit*.,（Consolidating Governance Principles）, p. 274; D. Freestone, "The Final Frontier: The Law of the Sea Convention and Areas beyond National Jurisdiction," LOSI Conference Papers, 2012, "Securing the Oceans for the Next Generation," p. 4.

（44） Rayfuse and Warner, *op. cit*., p. 416; A. Kanehara "Challenging the Fundamental Principle of the Freedom of the High Seas and the Flag State Principle Expressed by Recent Non-Flag State Measures on the High Seas," *Japanese Yearbook of International Law*, Vol. 51, 2008, pp. 21 *et seq*.

（45） R. G. Rayfuse, *Non-Flag State Enforcement in High Sea Fisheries*, Martinus Nijhoff Publishers, 2004; A. Kanehara, "Gendai Kokai Gyogyo Kisei Ni Okeru Kikokushugi No Sonritsu Kiban（The Raison d'Être of the Flag State Principle in the Modern Regulation of High Sea Fishing）," *Rikkyo Hogaku*, Vol. 75, 2008, pp. 23 *et seq*.

（46） Article 8 bis, Paragraph 5 of the 2005 Protocol to the 1988 SUA.

（47） Concerning coastal State jurisdiction and port State jurisdiction over vessel-source pollution, see E. J. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution,* Kluwer Law International, 1998, Part 2.

（48） The same non-flag State measures are introduced under Article 26, Paragraph 2 of the

jurisdiction [49] under Articles 218 and 219 of the UNCLOS [50] as well as under the relevant international or regional treaties. [51] Third, international and regional organizations that have mandates in individual sectors utilize various enforcing measures, such as reporting system, listing fishing vessels like so-called white lists and black lists, vessel monitoring systems and so on. [52]

In sum, the fundamental idea throughout these developments is that every relevant State and every relevant international or regional organization is carrying on its shoulders the implementation of regulations on the high seas on a sector-specific basis.

Possible regimes for the conservation and sustainable use of BBNJ should be envisaged based upon the current tendency toward high seas governance that has been surveyed thus far in this paper.

Next, the issues will be examined as to how the common interest in the conservation and sustainable use of BBNJ requires the furtherance of high seas governance, and how the UNCLOS can play a role for that purpose, and what the new agendas are.

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Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean.

（49） Concerning the difference between port State control and port State jurisdiction, see H.-S. Bang, “Recommendations for Policies on Port State Control and Port State Jurisdiction,” *Journal of Maritime Law and Commerce*, Vol. 44-1, 2013, pp. 119-120. There is no doubt that both port State control and port State jurisdiction have significance as non-flag State measures.

（50） Under Articles 218 and 219 of the UNCLOS port state jurisdiction may be exercised to cope with vessel-source pollution that takes place on the high seas.

（51） Article 23 of the FSA provides for port State measures. As for port State measures for combatting IUU fishing, see M. A. Palma, M. Tsamenyi, and W. Edeson, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing*, Martinus Nijhoff Publishers, 2010, Chapter 7; Kanehara, *op. cit.*,（Gendai Kokai Gyogyo Kisei）, pp. 53-54. As for the current situation surrounding port State control and port State jurisdiction for the safety of shipping and combatting vessel-source pollution, see Bang, *op. cit*., pp. 120 et seq.

（52） As for the various measures taken in the sector of fishing regulation, see Rayfuse, *op. cit.,* pp. 329-344.

## 3. The Nature of the Common Interest in the Conservation and Sustainable Use of Biodiversity on the High Seas: A Simple Balancing of Various Common Interests, or Supremacy of the Newly-Established Interest over Other Interests?

### (1) A New Common Interest in the Conservation and Sustainable Use of Biodiversity on the High Seas

The new instrument will establish a common interest in the conservation and sustainable use of BBNJ bringing an end to the conflict in interpretation over the relation between the UNCLOS and the Convention on Biological Diversity (CBD).[53] This is necessary since the UNCLOS contains a few provisions that only touch upon ecosystem such as Article 194, Paragraph 5 and Article 211, Paragraph 6, without mentioning biodiversity.[54]

The nature of the newly-established common interest in the conservation and sustainable use of BBNJ is understood by considering the ecosystem approach that has arisen largely as a management response to the decline in biodiversity and natural resource.[55]

### (2) The Ecosystem Approach to Be Applied to the High Seas

The precise definition of the ecosystem approach has not yet been given.[56]

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(53) See R. Wolfrum and N. Matz, "The Interplay of the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity," *Max Planck Yearbook of United Nations Law*, Vo. 4, 2000, pp. 461–463; A. Boyle, "Further Development of the Law of the Sea Convention: Mechanisms for Change," *International and Comparative Law Quarterly*, Vol. 54, 2005, pp. 578–580.

(54) It has been pointed out that the UNCLOS focuses on pollution and that it lacks provisions addressing the protection of marine ecosystems. Gjerde, *op. cit* (Challenges to Protecting the Marine Environment), pp. 166, 170.

(55) M. Vierros, I. D. Cresswell, P. Bridgewater, and A. D. M. Smith, "Ecosystem Approach and Ocean Management," in S. Aricò ed., *Ocean Sustainability in the 21st Century,* Cambridge University Press, 2015, p. 127.

However, it can be stressed that the ecosystem approach is different from single-species management, and that it requires not only the protection of the species composing the marine communities but also a consideration of the physical structures of the ecosystems and the interaction of the species within the community. (57)

As an implementing Agreement of the UNCLOS, the FSA has already introduced the ecosystem approach in regard to the limited sector of the conservation and management of straddling fish stocks and highly migratory fish stocks. (58) Under the new instrument the ecosystem approach will be applied to all activities carried out on the high seas for the purpose of the conservation and sustainable use of BBNJ. All uses on the high seas that have been already regulated in individual sectors will be further regulated for that purpose. Habitat protection requires considerations of the impacts of shipping, fishing activities, and any harmful uses to the habitat. Thus, the ecosystem approach for the realization of the new common interest in BBNJ naturally

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（56） The concepts of “biodiversity” and “ecosystem” are closely related to each other. The CBD defines both “biological diversity” and “ecosystem” under Article 2. According to the provision, “biological diversity” means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems. “Ecosystem” means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.

（57） S. Iudicello, and M. Lytle, “Marine Biodiversity And International Law: Instruments and Institutions That Can Be Used to Conserve Marine Biological Diversity Internationally,” *Tulane Environmental Law Journal,* Vol. 8, 1992, pp. 124 *et seq*.

（58） Article 5（d）and（e）of the FSA are interpreted to adopt the ecosystem approach. According to these provisions, coastal States and States fishing on the high seas shall ‘assess the impacts of fishing, other human activities and environmental factors on target stocks and species belonging to the same ecosystem or associated with or dependent upon target stocks（Article 5（d））,’and ‘adopt, where necessary, conservation and management measures for species belonging to the same ecosystem or associated with or dependent upon the target stocks, with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened（Article 5（e））.’

introduces the cross-sectoral or integrated regulations of uses on the high seas and implementation of these regulations. (59)

In respect to the cross-sectoral or integrated regulation of the high seas, two points should be noted. First, there is strong possibility that the cross-sectoral or integrated regulation will strengthen high seas governance in comparison with regulation on a sector-specific basis. Regarding the regulation aspect, regulations from a cross-sectoral or integrated perspective are required for all human activities including new ones that were not known to international society at the adoption of the UNCLOS, if these activities are harmful to BBNJ. There are various activities that are said to be harmful to marine ecosystems. Destructive fishing practice such as bottom trawling, and the so-called IUU fishing are to blame for posing serious threat to marine ecosystems. In addition, the existing and emerging harmful uses of the high seas include vessel-source pollution, marine debris and noise pollution, construction of artificial islands and pipelines, offshore oil and gas exploration, seabed mining, exploration of thermal vents, bioprospecting, more intrusive marine scientific research, and environmental modification activities to mitigate the effects of climate change. Every harmful impact exerted by these activities need to be regulated from a cross-sectoral or integrated perspective. Concerning the implementation aspect, a feasible way to implement the regulations is to promote coordination and cooperation within the decentralized implementation mechanism that has developed on a sector-specific basis. (60)

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(59) Oude Elferink, *op cit*., pp. 230–233. Professor Rayfuse and Warner propose the application of public trusteeship for integrated and holistic high seas governance. Rayfuse and Warner, *op. cit*., pp. 408–410. See also, J. Anderson, R. Rayfuse, K. Gjerde and R. Warner, "The Sustainable Use and Conservation of Biodiversity in ABNJ: What Can Be Achieved Using Existing International Agreement?" *Marine Policy,* 2014, pp. 104–106; L. L. Nordtvedt Reeve, A. Rulska-Domino, and K. Gjerde, "The Future of High Sea Marine Protected Areas," *Ocean Yearbook*, Vol. 26, 2012, pp. 268–269, 280–281.

(60) The joint conference that has been held since 2007 among regional fishery management

The second point is closely related to the establishment of cross-sectoral or integrated regulations. Thus far, regarding uses on the high seas, common interests have been sought on a sector-specific basis. In distinct contrast with that, the establishment of the cross-sectoral or integrated regulations must be based upon subtle and complicated compromise among the various interests that each use of the high seas reflects. Here arises the issue of the nature in the common interest in the conservation and sustainable use of BBNJ. (61)

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organizations deserves attention as a model of intra-sectoral coordination. Sakamoto, *op. cit.*, pp. 471−475. Before talking about a new body with an overarching mandate for activities on the high seas, coordination and cooperation among existent international and regional organization is required. In addition, a review of existing organizations with jurisdiction over activities in areas beyond national jurisdiction shows that there are serious gaps in coverage. In relation to sectoral activities there are both functional and geographical gaps. D. Freestone, "International Governance, Responsibility and Management of Areas beyond National Jurisdiction," *The International Journal of Marine and Coastal Law*, Vol. 27, 2012, p. 195. The same concern is voiced by Professor Molenaar. E. J. Molenaar, "Managing Biodiversity in Areas beyond National Jurisdiction," *The International Journal of Marine and Coastal Law*, Vol. 22−1, 2007, p. 95. See also E. Druel and K. Gjerde, "Sustaining Marine Life beyond Boundaries: Options for and Implementing Agreement for Marine Biodiversity beyond National Jurisdiction under the United Nations Convention on the Law of the Sea," *Marine Policy,* Vol. 49, p. 91. In terms of global marine protected areas a lack of coordination among sectoral and regional instruments is a major obstacle. Brooks et als., *op. cit*., p. 314; D. Freestone, D. Johnson, J. Ardon, K. Killerlain Morison, and S. Unger, "Can Existing Institutions Protect Biodiversity in Areas beyond National Jurisdiction? Experience from Two On-Going Processes," *Marine Policy,* Vol. 49, pp. 167 *et seq.*; Freestone, *op. cit.,*（The Final Frontier）, p. 15.

(61)　Professor Barnes suggests as follows. Areas beyond national jurisdiction are subject to collective regulation and this means that any regulation ought to be inclusive of the interests of all States and, potentially, the international community as a whole. Barnes, *op. cit*.,（Consolidating Governance Principles）, p. 261. According to him, one of the key issues concerning integration is how to weight different activities occurring in the same space or at the same time. Barnes, *op. cit*.,（Integrated Regulation）, p. 863. See also N. Matz-Lück and J. Fuchs, "The Impact of OSPAR on Protected Area Management beyond National Jurisdiction: Effective Regional Cooperation or a Network of Paper Parks?" *Marine Policy*, Vol. 49, 2014, p. 156. Concerning a conflict between the right to fish and the conservation of marine ecosystems within the framework of the CCAMLR, see Brooks et als., *op. cit*., pp. 310−311. Professor Sakamoto indicates that setting marine protected areas introduces a conflict between fishing and marine environmental protection. Sakamoto, *op. cit*., p. 475.

There are two options. First, the new common interest has an equal status with other common interests pursued in various sectors, and by a simple balancing of these interests, cross-sectoral or integrated regulation will be established. Or, second, the new common interest has supremacy over other common interests, and a balancing of the interests, placing weight on the former, creates the basis on which cross-sectoral or integrated regulation of the high seas should be established. Either way, international society has not yet reached an agreement concerning the nature of the new common interest in the conservation and sustainable use of BBNJ. (62) Without the agreement, and without a necessary balancing of the interests based upon the agreement, it is difficult to achieve the required cross-sectoral or integrated regulation of the high seas.

A conflict between different common interests has already emerged. In the discussion in the WG some countries proposed exclusion of the issues of fishing regulation from the scope of the new instrument. (63) The reason for this attitude is that fishing regulation has already developed in the relevant international or regional treaties. This fact reveals an existence of a conflict between the two common interests, namely, the interest of conservation of fish stocks for securing world food supply, on the one hand, and the new common interest in the conservation and sustainable use of BBNJ, on the other hand. If the new

(62) In the discussion in the WG some delegations reaffirmed the importance of preserving the balance of interests, rights and obligations enshrined in the UNCLOS and between competing uses of the oceans and conservation and sustainable use objectives. Letter dated 25 July 2014 from the Co-Chairs of the Ad Hoc Open-Ended Informal Working Group to the President of the General Assembly, A/ 69/ 177, para. 18; Letter dated 13 February 2015 from the Co-Chairs of the Ad Hoc Open-Ended Informal Working Group to the President of the General Assembly, A/ 69/ 780, para. 16.

(63) See Letter dated 25 July 2014 from the Co-Chairs of the Ad Hoc Open-Ended Informal Working Group to the President of the General Assembly, *op. cit*., paras. 25, 43; Latter dated 13 February 2015 from the Co-Chairs of the Ad Hoc Open-Ended Informal Working Group to the President of the General Assembly, *op. cit*., para. 19.

instrument includes in its scope fishing regulation, and if cross-sectoral or integrated regulation is required for the purpose of protecting BBNJ, possible results are as follows.[64] In case in which international society admits supremacy of the new common interest in BBNJ over the interest of conservation of fish stocks for securing world food supply, the issue will arise as to whether the fishing regulation should be tightened for the purpose of protecting BBNJ. In case in which the common interest in BBNJ has equal status with the interest of conservation of fish stocks for securing world food supply, in order to establish the most appropriate fishing regulation, compromise is needed between the two common interests that are mentioned here. In either case, great difficulty is anticipated for international society to reach an agreement on these issues. The same issues will arise concerning the relation between the common interest in BBNJ and other common interests pursued by uses of the high seas, such as the freedom of navigation.

The UNCLOS does not provide any answers concerning the nature of the common interest in BBNJ and its status among the various common interests that have already been recognized concerning high seas uses. Thus, this is the agenda that remains for future negotiations.

The same holds true for arguments for marine protected areas（MPAs）on the high seas.

Before the examination of this issue, a brief analysis should be given in respect to a precautionary approach and matters closely related to it.

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（64） The WG in 2011 agreed the package of topics that future negotiations shall address. This is reflected in General Assembly resolution 66/ 231. The package identifies the following topics: conservation and sustainable use of marine biological diversity areas beyond national jurisdiction; marine genetic resources, including questions on the sharing of benefits; measures such as area-based management tools, including marine protected areas; environmental impact assessments; capacity building and the transfer of marine technology. Fishing regulation is not included in the topics.

Considering development in international environmental law and the adoption of a precautionary approach by the FSA, (65) it is very likely that the new instrument will provide for a precautionary approach to be applied to all human activities on the high seas. Scientific knowledge concerning the cumulative impacts of all human activities on the high seas involves significant uncertainty. If, due to this scientific uncertainty, a hasty decision to take precautionary measures were to be made, this would inappropriately over-restrict uses of the high seas. (66) To prevent this, the importance of a scientific basis cannot be overemphasized. In addition, international society needs to develop a strategic environmental impact assessment regarding the cumulative impacts exerted by all human activities that are potentially harmful to marine biodiversity. (67) An appropriate balance must be sought between precaution as a result of scientific uncertainty and the improvement of a scientific basis.

### (3) Setting MPAs on the High Seas

MPAs are said to be the most effective tool for the application of the ecosystem approach. (68) In setting MPAs on the high seas for the purpose of the conservation and sustainable use of BBNJ, a new agenda will reappear concerning the nature of the new common interest. (69)

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(65) Article 6.

(66) Contra. B. C. O'Leary, R. L. Brown, D. E. Johnson, H. von Nordheim, J. Ardron, T. Packeise and C. M. Roberts, "The First Network of Marine Protected Areas (MPAs) in the High Seas: The Process, the Challenges and Where Next," *Marine Policy,* Vol. 36, 2012, p. 601.

(67) Environmental impact assessment is included in the package of topics that future negotiations shall address. See supra note 64.

(68) L. L. Nordtvedt Reeve, A. Rulska-Domino and K. Gjerde, "The Future of High Seas Marine Protected Areas," *Ocean Yearbook*, Vol. 26, 2012, p. 280; Y. Kagami, "Kaiyo Hogoku— Basho Honi no Kaiyo Kanri—(Marine Protected Areas— Area-Based Ocean Governance—)," in T. Kuribayashi and M. Akiyama eds., *Umi No Kokusai Titsujo To Kaiyo Seisaku (International Order and Policy for Oceans)*, Toshindo, 2006, p. 206.

(69) MPAs established in national and international practices have various purposes and it is not an

As for requirements for setting MPAs on the high seas, the issue of their legal basis comes first. Since MPAs are not consistent with Article 89 of the UNCLOS, international society will need to agree on MPAs on the high seas under the new instrument. (70)

The existing MPA practices are fragmented depending on the purposes of the MPAs, and no unified standard has yet been developed. (71) When the new instrument establishes MPAs on the high seas, a unified standard will be necessary for the purpose of the conservation and sustainable use of BBNJ. A unified standard could be derived based upon a cross-sectoral or integrated approach. (72) Here again arises the issue of the nature of the new common interest in the conservation and sustainable use of BBNJ. A decision must be made as to which approach should be taken; namely, a simple balancing of various interests in the sector-based uses of the high seas, or a balancing of those interests by placing weight on the new interest in BBNJ. Based on this decision,

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easy task to define a MPA. Here it suffices to refer to the definition given by Professor Scovazzi, a leading scholar in addressing the issue of MPAs. According to him MPAs on the high seas mean "areas of marine waters which are granted a special protection regime because of their significance for ecological, scientific, historical, cultural or recreational activities and are located beyond the limits of national jurisdiction." "Marine Protected Areas on the High Seas: Some Legal and Policy Considerations," Paper presented at the World Park Congress, Durban, South Africa（11 September 2003）, cited by E. Morgera "Competence or Confidence? The Appropriate Forum to Address Multi-Purpose High Seas Protected Areas," *Review of European Community and International Environmental Law,* Vol. 16（1）, 2007, p. 1, footnote 2.

（70） On this issue, see Tanaka, *op. cit*., pp. 292–298; K. N. Scott, "Conservation on the High Seas: Developing the Concept of the High Seas Marine Protected Areas," in Freestone, *op. cit*., p. 177

（71） Oral, *op. cit*., p. 404.

（72） Professor Drankier examined various MPA practices from the perspective of cross-sectoral cooperation among the relevant organizations and treaty regimes, P. Drankier, "Marine Protected Areas in Areas beyond National Jurisdiction," *The International Journal of Marine and Coastal Law*, Vol. 27, pp. 291 *et seq.* Another examination given from the same perspective is K. M. Gjerde and A. Rulska-Domino, "Marine Protected Areas beyond National Jurisdiction: Some Practical Perspective for Moving Ahead," *The International Journal of Marine and Coastal Law,* Vol. 27, 2012, pp. 354, 368–371.

and by seeking a necessary balance among the common interests, a unified standard for MPAs on the high seas could be derived. (73)

In addition, the limit imposed by the zone approach under the UNCLOS deserves attention. (74) To protect an ecosystem as a whole, it would be necessary to set MPAs covering relevant sea areas that have different legal statuses. The UNCLOS contains such an idea under Article 192. The FSA overcomes the zone approach under the UNCLOS by seeking a compatibility of regulation between sea areas beyond and within national jurisdiction. However, since the new instrument will be negotiated under the concept of "beyond national jurisdiction," it would not encroach on the national jurisdiction. (75) This limitation remains as an agenda to be dealt with in the future.

## Concluding Remarks

The new interest in the conservation and sustainable use of BBNJ demands the furtherance of high seas governance, which international society has already recognized. That is true. However, the fundamental issues still remain to be negotiated and agreed upon by international society. The key issues are where international society should place this new interest among the various common interests, and how to achieve the necessary balancing of these interests.

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（73） Regarding setting MPAs on the high seas, preference for regionalism over universalism is discussed in Matz-Lück and Fuchs, *op. cit*., pp. 162−164.

（74） Concerning the insufficiency of the zone approach for the protection of BBNJ, see Y. Tanaka, *A Dual Approach to Ocean Governance: The Cases of Zonal and Integrated Management in International Law of the Sea,* Ashgate, 2008, Chapter 2; Gjerde, *op. cit*.,（Challenges to Protecting the Marine Environment）, p. 170; Barnes, *op. cit*.,（Consolidating Governance Principles）, p. 256..

（75） In this regard, Professor Treves points out that the resistance to the adoption of rules encompassing areas within and beyond national jurisdiction remains strong. Treves, *op. cit*., pp. 8−10. See also, Tanaka, *op. cit.*,（Kokusaikaiyoho No Gendaiteki Keisei）, p. 334