

11 April 2025

**The BBNJ Agreement in the Context of the
Historical Development of the Law of the Sea**

1

ATSUKO KANEHARA
RESEARCH DIRECTOR FOR THE CANON
INSTITUTE FOR GLOBAL STUDIES
SENIOR FELLOW FOR THE SASAKAWA
PEACE FOUNDATION
FORMER PRESIDENT OF THE JAPANESE
SOCIETY OF INTERNATIONAL LAW

Lecturer

2

Expert on Public International Law

Research Director for the Canon Institute for International Studies

Senior Fellow for the Sasakawa Peace Foundation

Former Professor of International Law at Sophia University

Former President of the Japanese Society of International Law

Member of the Governing Board of IMO International Maritime Law Institute

Advocate for the Government of Japan in “Southern Bluefin Tuna” Cases

Counsel for the Government of Japan in “Whaling in the Antarctic” Case

Member of the Committee on Submarine Cables and Pipelines under the International Law Association.

Former Councilor of the Headquarters for Ocean Policy of Japan,
Appointed by Prime Minister, Government of Japan

References

3

[This lecture is based upon:]

- **Atsuko Kanehara**, “Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea,”

https://cigs.canon/article/20240510_8073.html

- **Atsuko Kanehara**, “What Does a New International Legally Binding Instrument on Marine Biological Diversity of Areas beyond National Jurisdiction ‘under the UNCLOS’ Mean?”, *Sophia Law Review [Jochi Hogaku Ronshu]*, Vol. 59, No. 4, (2016), pp. 53–73.

- **Atsuko Kanehara**, “Interplay between the United Nations Convention on the Law of the Sea and Other International Law for Building a Comprehensive International Maritime Order,” *Japanese Yearbook of International Law* Vol. 63 (2020), pp. 52–92.

References

4

[The BBNJ Agreement]

AGREEMENT UNDER THE UNITED NATIONS
CONVENTION ON THE LAW OF THE SEA ON THE
CONSERVATION AND SUSTAINABLE USE OF MARINE
BIOLOGICAL DIVERSITY OF AREAS BEYOND
NATIONAL JURISDICTION

<https://www.un.org/bbnjagreement/sites/default/files/2024-08/Text%20of%20the%20Agreement%20in%20English.pdf>

Structure of the Lecture

5

- 1. Introduction**
- 2. The Adoption of the BBNJ Agreement in 2023**
- 3. The Characteristics and the Arguments on the Contents of the BBNJ Agreement**
- 4. The Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea**
- 5. Fundamental Change of the Idea of Oceans**

I. Introduction

6

[Significance of the BBNJ Agreement from the perspective of the historical development of the law of the sea]

This lecture purports to examine the significance and the achievement of the BBNJ Agreement in the historical development of the law of the sea.

How has the international regulation on the use of high seas developed, and how can it proceed further by the BBNJ agreement?

2. Adoption of the BBNJ Agreement

7

On **the 13th of June, 2023**, after very long discussion and many sessions of the international governmental conference, it was agreed by the conference, and adopted by the UN.

On the occasion of the regular session of the GA of the UN in September of 2023, 67 States signed the BBNJ Agreement.

As of **11 April, 2025**, the BBNJ Agreement, not yet into force.

2. Adoption of the BBNJ Agreement

8

[Current Status of the BBNJ Agreement]

As of the 31th of March, 2025, 112 States signed it and 21 States ratified it.

After 120 days from ratification by 60 States, it will enter into force according to Article 68, Paragraph 1 of the Agreement.

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_n=XXI-10&chapter=21&clang=_en

While certain enthusiastic celebration has been frequently heard since the adoption of the BBNJ Agreement, the current status might demonstrate a slow development of it toward being actually a legally binding document.

Without coming into force, the BBNJ Agreement, while the name means an agreement with legally binding force, is a document with certain normative contents.

2. Adoption of the BBNJ Agreement

9

[What significance and achievement does the BBNJ Agreement demonstrate, from the perspective of the historical development of the law of the sea?]

Such consideration seems to be useful, as it may form, at least to a certain degree, its slow progress toward being coming into force and becoming really a legally binding instrument with enough support by international society's normative conscience.

How has the international regulation on the uses of high seas developed, and how can it further proceed by the BBNJ Agreement?

3. The Characteristics and the Arguments on the Contents of the BBNJ Agreement

10

(1) The BBNJ Agreement as the Third Implementation Agreement for UNCLOS

UNCLOS is expected to work together with its implementation agreements.

Its Preamble admits an existence of matters that are not regulated by

UNCLOS.

Affirming that *matters not regulated by this Convention* continue to be governed by the rules and principles of general international law (emphasis added),

3. The Characteristics and the Arguments on the Contents of the BBNJ Agreement

11

The BBNJ Agreement is the third implementation agreement for UNCLOS.

- ① The 1994 Agreement Relating to the Implementation of Part XI of the Convention, with respect to the exploration and exploitation of the natural resources on the deep sea-bed.
- ② The 1995 Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the Fish Stock Agreement).

3. The Characteristics and the Arguments on the Contents of the BBNJ Agreement

12

(2) Characteristics of the BBNJ Agreement

① Marine Genetic Resources

→ equitable distribution of the interests from the development of marine genetic resources

② Area Based Management Tools

= so-called “marine protected areas”

③ Human Resources Development and Capacity Building

④ Technology Transfer

4. The Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea

13

(1) Traditional Controversy in the History of the Law of the Sea

① “Mare Liberum”

The historical controversy:

“Mare Liberum” v. “Mare Clausum” in the 17th Century

The most famous conflicting arguments were conducted between Hugo Grotius of the Netherlands, the so-called founder of international law, and John Selden of the United Kingdom.

With the background of the mercantilism and necessity of marine transportation, “*mare liberum*” surpassed “*mare clausum*.”



4. The Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea

14

(1) Traditional Controversy in the History of the Law of the Sea

① “Mare Liberum” (continued)

Thus, the oceans became to be understood as being wide (and open) and free for various uses of all humankind.

= A fundamental idea of oceans that still maintains some influence even in the current days.



Such an idea, as being explained later, will inevitably change for the purpose of realizing the common interest in the conservation and sustainable use of biodiversity.

This is: a remarkable result that the BBNJ Agreement will bring to the law the sea.

4. The Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea

15

(1) Traditional Controversy in the History of the Law of the Sea (continued)

② Dual zone system: high seas and territorial seas

With the development of the understanding of territorial seas as “sea zones” over which coastal States have a comprehensive right (sovereignty), the dual zone system, that of high seas and territorial seas, was established.

Initially coastal States did not have a concept of “sea zones”, and claimed different distances for their exercises of rights depending on different matters, such as maritime security, fishing, immigration, marine pollution and etc.

At the latest, at the end of the 19th century, States became to grasp their sea areas near to their coasts as “sea zones” over which they exercise a comprehensive right in relation to the various matters.

= Territorial seas.

4. The Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea

16

(1) Traditional Controversy in the History of the Law of the Sea (con

② Dual zone system: high seas and territorial seas (continued)

The dual zone system of high seas and territorial seas



A main pillar of the 1958 four Geneva Conventions on the Law of the Sea.

Among the four conventions, the two are related to high seas and territorial seas: the Convention on the High Seas, and the Convention on the Territorial Sea and Contiguous Zone.

The 1982 UNCLOS established a multiple zone system.

In addition to high seas and territorial seas, there are contiguous zones, exclusive economic zones, continental shelf, archipelagic waters, deep sea-bed.

* The legal regimes on contiguous zone and continental shelf were established by the 1958 Conventions on the law of the sea.

Under UNCLOS, too, the zones of high seas and territorial seas still stand out as the principal legal regimes of oceans.

4. The Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea

17

(2) Development of the International Regulations on the Uses of High Seas

① Reasonable (Due) regard principle

Article 2 of the Convention on High Seas reads:

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States *with reasonable regard to the interests of other States* in their exercise of the freedom of the high seas (emphasis added).

Article 87, Paragraph 2 prescribes for the same idea as follows:

These freedoms shall be exercised by all States *with due regard for the interests of other States* in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area (emphasis added).

According to the reasonable (due) regard principle, **the logic of the international regulation is to seek “compromise on an *ad hoc* basis” when two (plural) uses of high seas conflict with each other.**

4. The Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea

18

(2) Development of the International Regulations on the Uses of High Seas

① Reasonable (Due) regard principle (continued)

e. g. States may conduct military drills, and for the safety of foreign vessels and for the protection of the military equipment, they may set a safety zone where the navigation of foreign vessels is restricted.

If the safety zone is unreasonably and unnecessarily wide, such a use of high seas would be criticized as lack of reasonable (due) regard for the interests of other States, mainly the freedom of navigation of other States.

The same holds true with offshore windfarms in exclusive economic zones and safety zones that are established surrounding the windfarms.

Thus, these conducts would infringe upon the freedom of navigation of foreign vessels.

Concrete contents of such international regulation on the uses of high seas by the reasonable (due) regard principle are decided on an *ad hoc* basis as compromise between two (plural) uses of high seas which conflict with each other.

4. The Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea

19

(2) Development of the International Regulations on the Uses of High Seas (continued)

② International regulations on the uses of high seas depending on individual matters: “Sector-specific regulation”

Based upon the recognition of common interests (explained in the following slides) of international society, the relevant treaties were adopted to realize such common interests.

The individual matters reflect the common interests of international society.

=Sector-specific regulation on the uses of high seas

4. The Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea

20

(2) Development of the International Regulations on the Uses of High Seas

② International regulations on the uses of high seas depending on individual matters: “Sector-specific regulation” (continued)

“Sector-specific regulation on the uses of high seas”

a. UNCLOS

Preamble may indicate the idea of “a cross-sectoral regulation on the uses of high seas” in the phrase, “the problems of ocean space are **closely interrelated and need to be considered as a whole.**”

However, UNCLOS individually regulates the uses of high seas, such as navigation (Article 94), fishing (Articles 116 to 119), harmful uses to the marine environment (Part XII), and marine scientific research (Part XIII)

=A sector- specific regulation on the uses of high seas

4. The Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea

21

(2) Development of the International Regulations on the Uses of High Seas

② International regulations on the uses of high seas depending on individual matters: “Sector-specific regulation” (continued)

b. Treaties other than UNCLOS

▪ Preservation and protection of the marine environment

e. g. MARPOL 73/78

e. g. The London Convention Regime on the Ocean Dumping

▪ Conservation and management of fishery resources

e. g. Regional treaties on the conservation and management of fishery resources

e. g. The 1995 Fish Stock Agreement

▪ Safety of navigation

e. g. SOLAS

e. g. SUA Convention with its Protocol

4. The Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea

22

(3) The Third Wave of the International Regulation on High Sea Uses That Has Been Brought by the BBNJ Agreement

① Common Interest in the Conservation and Sustainable Use of BBNJ (= Common Interest in BBNJ)

Special nature of the common interest

It cannot be realized by the simple aggregation of the common interests to be realized on the individual matters, such as preservation and protection of the marine environment, conservation and management of fishery resources, safety of navigation, and etc.

4. The Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea

23

(3) The Third Wave of the International Regulation on High Sea Uses That Has Been Brought by the BBNJ Agreement (continued)

② Common interest in BBNJ to be realized by preventing the **integrative effects** on BBNJ by various harmful uses of high Seas

a. Biodiversity

Article 2 of the Convention on Biological Diversity gives a definition of biodiversity.

“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.

4. The Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea

24

(3) The Third Wave of the International Regulation on High Sea Uses That Has Been Brought by the BBNJ Agreement

② Common interest in BBNJ to be realized by preventing the **integrative effects** on BBNJ by various harmful uses of high seas (continued)

b. Various harmful uses to biodiversity

e. g. Destructive fishing practice, such as bottom trawling, and the so-called IUU fishing; vessel-source pollution; construction of artificial islands and pipelines; offshore oil and gas exploration, sea bed mining; exploration of thermal vents; bioprospecting; more intrusive marine scientific research and etc.

4. The Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea

25

(3) The Third Wave of the International Regulation on High Sea Uses That Has Been Brought by the BBNJ Agreement

② Common interest in BBNJ to be realized by preventing the **integrative effects** on BBNJ by various harmful uses of high seas (continued)

c. Integrative effects

= The various harmful uses of high seas cause damage to biodiversity, **not only individually, but also, as a synergy of the integration** of the harmful effects of all individual uses of high seas

× ⇔ (Simple) Total of the independent harmful effects caused by the individual harmful uses of high seas

To achieve the goal of the BBNJ agreement, it is indispensable to cope with such **integrative harmful effects** to biodiversity.

4. The Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea

26

(3) The Third Wave of the International Regulation on High Sea Uses That Has Been Brought by the BBNJ Agreement

② Common interest in BBNJ to be realized by preventing the **integrative effects** on BBNJ by various harmful uses of high seas (continued)

c. Integrative effects

Considering ecosystem(s),

Biodiversity under Article 2 of the Convention on Biological Diversity

“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 Approach

4. The Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea

27

(4) Ecosystem Approach

As for promising method of such international regulation to prevent integrative effects of various harmful uses of seas to biodiversity, ecosystem approach has been proposed.

① Ecosystem

Article 2 of the Convention on Biological Diversity reads:

Ecosystem” means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.

4. The Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea

28

(4) Ecosystem Approach (continued)

② Ecosystem Approach

e. g. Article 5 (d) and (e) of the 1995 Fish Stock Agreement

(d) 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 the target stocks;

(e) 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;

4. The Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea

29

(5) Integrative regulation or cross-sectoral regulation (cross-cutting on matters)

* Different from the sector-specific regulation

Every activity that exerts harmful effect to BBNJ needs to be regulated by a cross-sectoral or an integrative approach on the international regulation on the uses of high seas.

For the effective regulation, calculation is required on the harmful impacts by every harmful act, not individually, but by an integrative manner to assess the synergy effects of all harmful activities.

4. The Significance of the BBNJ Agreement from the Perspective of the Historical Development of the Law of the Sea

30

(5) Integrative regulation or cross-sectoral regulation (cross-cutting on matters) (continued)

For such calculation to assess **the synergy (integrative) effects** of all harmful activities, the traditional idea of “wide and open” ocean is not appropriate.



5. Fundamental Change of the Idea of Sea

31

The traditional idea of sea as “Wide and Open Ocean”

Oceans are enough wide to prevent serious collisions between vessels.

Oceans are enough wide to ensure the reproduction of fishery resource without extinction.

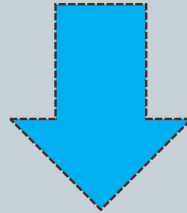
Oceans are enough wide so that they themselves clean up pollution.

Therefore, oceans could be “wide and open (free)” for uses of all humankind.

Individual effects by these conducts on ocean can be calculated independently and individually.

5. Fundamental Change of the Idea of Sea

32



An idea of sea as “Closed Water Tank(s)”

In order to consider the synergy (integrative) effects of all harmful activities, an idea of “closed water tank(s)” is indispensable, that is different from an idea of “wide and open ocean.”

(Similar) Experience by the international practice on marine protected areas.

End

33

Thank you for your attention!