


Perspective

A Sustainable Approach towards Fisheries Management: Incorporating the High-Seas Fisheries Issues into the BBNJ Agreement

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Abstract: The issue of high-seas fisheries is the main threat to biodiversity in areas beyond national jurisdiction. The BBNJ Agreement, which focuses on biodiversity in areas beyond national jurisdiction, is under vigorous discussion. Subject to the “not undermine” requirement and considerations of practical interests, it is highly possible that the BBNJ Agreement may not address the issue of fisheries on the high seas. The objective of this paper is to analyze the relationship between the high-seas fisheries issue and the BBNJ Agreement for the purposes of the conservation of marine biodiversity, the unity of the marine ecosystem, and the consistency of regulations. It maintains that from the perspective of protecting the oceans, enacting legislation in areas beyond national jurisdiction, and transforming marine management mode, the issue of high-seas fisheries should be included in the BBNJ Agreement. In the future, the BBNJ agreement needs to clarify its scope of application, resolve overlapping issues through general regulations and conflict rules, clarify the methods and contents of international cooperation, and establish international law obligations for integrated ocean management.

Keywords: areas beyond national jurisdiction; marine biodiversity; not undermine; high-seas fisheries; BBNJ agreement



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1. Introduction

Biodiversity issues beyond areas of national jurisdiction are under unprecedented pressure, among them, high-seas fisheries have been a major threat to biodiversity in areas beyond national jurisdiction [1]. The United Nations Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (the “BBNJ Agreement”), aims to design a set of methods such as zoning management tools and environmental impact assessments to protect marine biodiversity and regulate human activities to utilize sea areas beyond national jurisdiction and their resources, to avoid or mitigate their interference and damage to marine biodiversity. However, there is a division of opinion among the international community over whether to include high-seas fisheries in the BBNJ agreement.

The United Nations Convention on the Law of the Sea has established the basic institutional framework for ocean governance. However, it is not perfect, nor omnipotent. As the third implementation agreement of the United Nations Convention on the Law of the Sea in the future, one of the purposes of the BBNJ Agreement is to improve the legal system of the United Nations Convention on the Law of the Sea on maritime areas beyond national jurisdiction. At present, there are still some defects in the system of high-seas fisheries, including the United Nations Convention on the Law of the Sea. For example, it does not reflect the principles of the ecosystem and comprehensive management, and cannot meet the needs of conservation and sustainable development of high-seas fisheries. Fishery resources are an important part of biodiversity in sea areas beyond national jurisdiction. The BBNJ Agreement should no longer follow the previous method of sectoral management

of the oceans but should cover all resources that constitute biodiversity in sea areas beyond national jurisdiction, and regulate and manage them as a whole.

The current academic studies on the high-seas fisheries issue mainly focus on three aspects. First, the marine protected areas (MPAs) on the high seas—There have been academic works discussing the establishment of MPAs on the sea areas beyond national jurisdiction [2], and whether the MPAs should be included in the BBNJ Agreement [3]. However, the scope of the MPAs on the high-seas is too broad and covers many marine biodiversity issues, and high-seas fisheries are one of them. The management of the high-seas fisheries issue needs to be more specific and focused. Second, illegal, unreported, and unregulated fishing (IUU fishing) on the high seas—Some academic research focuses on the IUU fishing on the high-seas, and whether the latest draft text of BBNJ negotiation can solve such a problem [4]. However, such studies only focus on IUU fishing and do not discuss other issues of high-seas fishing, such as overfishing and accidental catching of deep-sea vulnerable fish stocks. Third, high-seas fisheries agreements in the arctic—Countries in the arctic region have negotiated and concluded agreements on regional high-seas fisheries, which have been critically studied by academic scholars [5]. However, the high-seas fisheries agreement in the arctic is a regional treaty, which does not have the global influence of the BBNJ negotiation. The pertinent literature indicates a gap in the systematic study and the holistic evaluation of the relationship between the high-seas fisheries issue and the BBNJ agreement.

By analyzing the relationship between the high-seas fisheries issue and the BBNJ Agreement, this paper maintains that the issue of high-seas fisheries should be included in the BBNJ Agreement. From the perspective of the conservation of marine biodiversity, the unity of marine ecosystems, and the consistency of regulations, the issue of high-seas fisheries should be included in the BBNJ Agreement. This paper proposes some specific countermeasures and suggestions for some legal obstacles it may be confronted with. By adopting such systematic and holistic analysis of the relationship between the high-seas fisheries issue and the BBNJ Agreement, this paper wishes to contribute to the conservation of biodiversity and the sustainable use of marine resources in areas beyond national jurisdiction by suggesting the incorporation of the high-seas fisheries issue in the BBNJ Agreement.

2. The BBNJ Agreement and High-Seas Fisheries

At present, the legislative process of the BBNJ Agreement neither addresses its scope of application nor clarifies whether the issue of fisheries on the high seas should be included. Instead, it mainly focuses on setting rules for access to marine genetic resources, benefit-sharing, capacity-building, and technology transfer. Thus, the BBNJ Agreement would not effectively apply to the sea areas beyond national jurisdiction and all its resources in the future, but also exclude the issues of fisheries on the high seas.

(1) The BBNJ Agreement process

Earlier than 2004, the United Nations General Assembly established an open-ended informal ad hoc working group to study biodiversity conservation and sustainable use of marine resources in areas beyond national jurisdiction (hereinafter referred to as the “BBNJ Working Group”) [6]. It promoted the attention and study of this issue by many countries and provided ample rationalized suggestions and support for countries to cooperate in resolving this issue. The Preparatory Committee (hereinafter referred to as the “Preparatory Committee”) finalized the draft BBNJ Agreement. In December 2017 [7], the General Assembly resolved to convene an intergovernmental meeting to formally negotiate the BBNJ Agreement. It also decided to hold four intergovernmental meetings between September 2018 and 2020 to agree on the text of the BBNJ Agreement, to improve the relevant provisions of the United Nations Convention on the Law of the Sea.

The draft agreement proposed by the Preparatory Committee is divided into parts A and B [8], and the two parts are interrelated. There are eight main topics in Part B, three of which are related to high-seas fisheries. The first relevant issue is the legal principles

applicable to genetic resources in marine areas beyond national jurisdiction. One hotly debated issue is whether the “principle of freedom of the high seas” or the “principle of the common heritage of mankind” be applied. It was also one of the main topics of the intergovernmental negotiations, under the responsibility of the Working Group on Marine Genetic Resources [9]. The second related topic was the disagreement over the management and decision-making modalities of the zoning management tools, including how future legal mechanisms do not undermine existing legal instruments and frameworks and regional and/or sectoral competencies. This overlaps with the issue of cooperation mechanisms in part A. The third relevant topic was the relationship between the new mechanism established by the future BBNJ Agreement and the existing regional and sectoral legal mechanisms, including how to implement and comply, monitor, and review the relevant rules.

The negotiations of the BBNJ Agreement have reached some consensus in the following areas, and a breakthrough will likely be made in the future in these areas. First, it strengthens the links with existing regional and sectoral mechanisms through the provisions of the BBNJ Agreement; second, it clarifies the general legal principles that apply to the areas beyond national jurisdiction; and third, it coordinates the relationship between the BBNJ Agreement and the existing legal mechanisms. However, it is unclear whether the BBNJ Agreement is a comprehensive agreement applicable to fisheries in areas beyond national jurisdiction, or a specialized agreement dealing only with genetic resources.

(2) Relevant legal systems and existing problems of high-seas fisheries

Internationally, the existing legal mechanisms for international fisheries are inadequate. Taking the United Nations Convention on the Law of the Sea as an example, it only imposes general obligations for due regard (article 87 (2)), the obligation to comply with the provisions of the Convention and other treaties for the freedom of fishing (article 116), the obligations to cooperate for the conservation and management of biological resources (article 118), and some basic conservation measures (article 119). It also establishes a framework of general responsibility for the protection and preservation of the marine environment, as well as the adoption of the necessary measures to protect and preserve rare or fragile ecosystems, and threatened, or endangered species and other forms of marine life (article 194 (5)). However, it lacks relevant legal regulations for non-commercial fishery resources such as discrete fish stocks on the high seas. The United Nations Fish Stocks Agreement also manages fisheries on the high seas poorly [10]. While it has established the legal framework for international fisheries governance, dominated by RFOs, it does not mandate RFOs to act according to its provisions. Additionally, its scope of application is limited. The agreement also applies primarily to fishery resources of commercial value and does not apply to non-commercial fish stocks such as discrete fish stocks [11]. Moreover, the agreement has a very limited effect on the management and conservation of target fish stocks [12]. Although there are currently some global guidelines governing the management of fisheries on the high seas, such as the Code on Responsible Fisheries, these guidelines are only recommendations and lack legally binding force [13].

There are also problems with the case of regional fisheries organizations or arrangements. Firstly, regional fisheries organizations have a limited scope of application, with a limited geographical scope and fish stocks. There are currently more than 20 regional fisheries organizations around the world, but they do not cover all sea areas beyond the jurisdiction of all countries, nor do they cover all fish stocks. Most RFOs are concentrated in the Arctic, Mid-Atlantic, and Southwest-Atlantic waters [14]. For example, the regional fisheries organizations (RFOs), which cover the most extensive areas of benthic fish resources in the high seas, have as many as eight regional organizations, but they do not cover all the sea areas beyond national jurisdiction, covering 77% of the area.

Taking the issue of incidental catch as an example, the sea area under its jurisdiction currently accounts for only 37% of the sea area where the problem of incidental catch exists [15]. Secondly, the regional fisheries management mechanisms are not perfect. There are major shortcomings in their management methods, most RFOs or arrangements lack

effective decision-making mechanisms [16], and many regional fisheries treaties (RFTs) do not include modern environmental protection regimes [17]. The legal effect of RFOs or arrangements is also limited. This is partly due to the lack of financial resources, technology, and capacity of developing countries, partly due to the closure of some RFMOs themselves, and partly due to the limited capacity of regional organizations or arrangements themselves, whose management and conservation measures cannot be applied to non-parties or non-target fish stocks [18]. Thirdly, the issues have arisen due to the absence of coordination mechanisms among RFOs and the lack of cooperation among them. Therefore, there are still many problems that need to be solved in the development of the legal mechanisms for high-seas fisheries.

(3) Relationship between BBNJ Agreement and High-seas fisheries

The issue of fisheries on the high seas is inextricably linked to the BBNJ Agreement. High-seas fisheries are not only the main threat to the biodiversity of areas beyond national jurisdiction [19], but are also one of the main problems that need to be addressed in the comprehensive management of sea areas beyond national jurisdiction.

The close connection between the two is also reflected in the relevant materials for the preparation of the BBNJ Agreement [20]. Reference is made in the recommendations of the Preparatory Committee on the identification and establishment of zoning management tools, including marine protected areas, which require an assessment and provision of a range of information on the marine environment and living resources, such as vulnerability and threats, ecological environment, global or regional or sectoral institutional arrangements, measures taken, and socio-economic conditions. It also suggested that consultation and cooperation with relevant global, regional, and sectoral institutions on relevant matters be stipulated. The president's statement noted that states or competent organizations could make proposals for the establishment of marine protected areas, including regional organizations. It also pointed out that proposals for the application of zoning management tools should be made public to all organizations, including regional and sectoral bodies. Reference was also made to regional and sectoral bodies in the president's instrument facilitating the negotiations. The reference to regional and sectoral bodies in the above-mentioned document certainly includes and mainly refers to regional fisheries organizations or arrangements.

The Preparatory Committee recommended that the provisions for environmental impact assessment should include not only possible environmental impacts but also cumulative environmental impacts. This requires the collection of information on a variety of areas, including fishery resources. The Preparatory Committee also recommended that the provisions for environmental impact assessment should be linked to existing environmental impact assessment standards for relevant global, regional or sectoral legal instruments, and organizational frameworks. At the first intergovernmental negotiating meeting the working group responsible for environmental impact assessment discussed minimum international standards for consultation with regional organizations or sectoral bodies on environmental impact assessment. It also indicated that activities carried out by existing regional or sectoral environmental impact assessments did not require further assessments. If the activity was permitted, no further assessment is required. It is emphasized that these assessments should be in line with the requirements of the BBNJ Agreement on environmental impact assessment. It is noteworthy that the instrument that the president assisted in the negotiation with explicitly includes the International Guidelines for the Management of High Seas Fisheries developed by the Food and Agriculture Organization of the United Nations as the standard for the BBNJ environmental impact assessment [21].

3. Disputes over Whether the Issue of High-Seas Fisheries Should Be Included in the BBNJ Agreement

The international community has different views on whether the issue of high-seas fisheries should be included in the BBNJ Agreement. From the current trend of negotiations, the high-seas fisheries issue is likely to be excluded from the BBNJ Agreement. However,

high-seas fisheries issues should be included in the BBNJ Agreement given the objective need for the conservation and management of sea areas beyond national jurisdiction.

(1) Disagreements over whether the issue of high-seas fisheries should be included in the BBNJ Agreement

At present, the international community still has serious differences on whether the issue of high-seas fisheries should be included in the BBNJ Agreement. Some countries, such as Iceland, Japan, and Russia, strongly oppose the inclusion of high-seas fisheries in the agreement [22]. They believe that the existing regional fisheries management organizations or arrangements are the most effective mechanisms for managing high-seas fisheries, so the BBNJ Agreement does not need to address high-seas fisheries. The African Group, Costa Rica, Indonesia, Jamaica, New Zealand, Norway, Peru, and the United States issued statements in favor of including fisheries issues in the agreement [23]. Some non-governmental organizations also believe that the BBNJ Agreement should be a comprehensive agreement, which should address the issue of high-seas fisheries [24]. There are also differences within the EU. Some member states support the inclusion of high-seas fisheries in the agreement, while some oppose it [25].

At the same time, the rise of the issue of whether high-seas fisheries should be included in the BBNJ Agreement is also reflected in the debate on whether genetic resources (hereinafter referred to as “MGRs”) include fish resources. Some countries believe that the genetic resources in the sea areas beyond national jurisdiction certainly include fish resources, while some countries are opposed to it. The United Nations Convention on the Law of the Sea does not cover the concept of marine genetic resources. The definition of this in the Convention on Biological Diversity is widely used in practice. According to the Convention on Biological Diversity, genetic resources refer to substances containing genetic functional units from any plant, animal, microorganism, or other sources. Logically speaking, it includes fish and its derivatives, but there are also objections in the academic community. Marciniak, a scholar, believes that the BBNJ Agreement should distinguish the nature and use of marine genetic resources, to regulate them separately [26].

(2) Reasons why high-seas fisheries should not be included in the BBNJ Agreement

At present, there are four main arguments against the inclusion of high-seas fisheries issues in the BBNJ Agreement. First, to reach a BBNJ agreement as soon as possible, discussion on issues with greater controversy should be excluded. Since the BBNJ inter-governmental negotiation, the negotiation practice seems to avoid controversial matters, given the large dispute among countries over whether the high-seas fisheries issue should be included in the BBNJ Agreement.

Second, from the perspective of the genetic characteristics of marine genetic resources and their benefit sharing, the issue of high-seas fisheries should not be included in the BBNJ Agreement. At the first intergovernmental negotiation meeting held from 4–17 September 2018, the Chairman’s report stated that it should be distinguished whether fish and other biological resources are genetic resources or commodities, and the BBNJ Agreement is only applicable to biological resources with genetic characteristics. Moreover, fishery resources as commodities already have relevant legal systems, thus high-seas fisheries should be excluded from the BBNJ Agreement.

Third, from the text of BBNJ negotiation materials, it has a small scope of application and does not involve high-seas fisheries. In the chairman’s report of the first intergovernmental negotiation, the reference to “integration” and related concepts was reduced. For example, “integration” was not mentioned once, the ecosystem was mentioned twice, the connected network was mentioned once, and inclusiveness (between relevant mechanisms) was mentioned once; however, more attention was paid to the term “cooperation”, which was mentioned in 32 places and 34 departments. From the above text, the international community is more inclined to formulate an agreement with a smaller scope of application, that is, to exclude the issue of high-seas fisheries, to ensure that the existing legal mechanism is not compromised. It is emphasized to strengthen the cooperation between existing

mechanisms to ensure the coordination between the BBNJ Agreement and relevant legal documents and organizations.

Fourth, some delegations and scholars believe that because the United Nations General Assembly has put forward the requirement of “not undermine” for the BBNJ Agreement, the United Nations Convention on the Law of the Sea, the United Nations Fish Stocks Agreement, and regional fisheries agreements have already involved high-seas fisheries issues. Therefore, this issue should not be within the scope of BBNJ’s negotiations.

(3) Reasons why high-seas fisheries should be included in the BBNJ Agreement

From the perspective of protecting the marine environment, conserving marine biodiversity, and considering the original intention of formulating the BBNJ Agreement, the high-seas fisheries issue should be included in the BBNJ Agreement for the following reasons.

First, the issue of high-seas fisheries is the main threat to biodiversity in sea areas beyond national jurisdiction. To achieve the goal of conservation and sustainable use of biodiversity in sea areas beyond national jurisdiction, the issue of high-seas fisheries should be included in the BBNJ Agreement. The problem of high-seas fisheries is mainly manifested in overfishing, IUU fishing, and incidental catch of deep-sea vulnerable fish stocks. In addition, the progress of fishing gear and fishing technology, such as the use of large-scale trawling gear, has also caused greater damage to the entire marine ecosystem, especially the ecosystems in the outer sea areas under the jurisdictions of vulnerable countries [27]. Take overfishing as an example, according to the FAO report, 33.1% of the monitored species are overfished and 59.9% are at or near the maximum sustainable yield [28]. Overfishing on the high seas is more serious than in those areas under national jurisdiction. According to the research report by the FAO, the overfishing rate of high seas and straddling fish stocks is almost twice that of the same or similar coastal fish stocks [29].

Second, the current legal mechanism for ocean governance cannot eliminate the cumulative impact of human activities on the ocean, and the management of sea areas beyond the national jurisdiction is relatively decentralized. In detail, the sea areas beyond the national jurisdiction are mainly controlled by the flag state over its nationals, ships, and activities under its control. At the same time, different competent international organizations have specialized in fisheries, shipping, environmental protection, seabed mining, and marine scientific research. The current decentralized legal mechanism for ocean governance, lacking communication and coordination mechanisms, cannot eliminate the cumulative impact of human activities on the oceans, which has constituted a huge threat to the conservation of marine biodiversity [30]. Cooperation is essential for the effective management of specific activities beyond national jurisdiction or the protection of the entire marine environment [31]. Only by incorporating the high-seas fisheries issue into the BBNJ Agreement can we truly promote the cooperation and development of various legal mechanisms and achieve the goal of conservation and sustainable use of biodiversity in the sea areas beyond the national jurisdiction.

Third, the inclusion of high-seas fisheries issues in the BBNJ Agreement will help promote the reform of marine governance. The preamble of the United Nations Convention on the Law of the Sea points out that “the integrity of the marine ecosystem should be maintained”. Moreover, the comprehensive management of the ocean is more in line with its ecological characteristics. As early as 2002, the Johannesburg Plan of Implementation formulated by the World Summit on Sustainable Development proposed the integrated management of oceans and seas [32]. This principle runs through chapter 17 of the report by the United Nations Conference on Environment and Development [33]. Article 6 (b) of the Convention on Biological Diversity requires parties to adopt an integrated approach to biodiversity conservation by their respective conditions and capacities. Despite the voice of the international community on integrated ocean management, it is not yet an obligation under international law [34].

Fourth, whether or not the BBNJ Agreement involves high-seas fisheries, its application and implementation will inevitably have a direct or indirect impact on high-seas fisheries. As far as environmental impact assessment is concerned, if there are reasonable grounds

to suspect that the proposed activities will cause significant and harmful changes to the marine environment, it is necessary to assess their possible impacts. This is not only an international law obligation under Article 206 of the United Nations Convention on the Law of the Sea, but also customary international law [35]. Although the current international law does not specify how to conduct an environmental impact assessment, it can be clear that all activities located in the same space or interacting with each other need to be assessed together. Zoning management tools and their application are closely related to the issue of high-seas fisheries. The practice of high-seas marine protected areas, the Convention on the Conservation of Antarctic Marine Living Resources and the Convention for the Protection of the Marine Environment of the Northeast Atlantic Ocean show that high-sea fisheries have a significant impact on the scope of application of marine protected areas, the formulation of specific rules, and the measures taken, especially in the sea areas where human activities are more active.

Last, the opportunity to compile the rules of the law of the sea is precious. We should use the opportunity to formulate the BBNJ Agreement to promote the improvement of the legal system of maritime areas beyond national jurisdiction, including high-seas fisheries. Historically, the international community has compiled the law of the sea four times. They were the Hague Codification Conference in 1930, the First Conference on the Law of the Sea in 1958, the Second Conference on the Law of the Sea in 1960, and the Third Conference on the Law of the Sea in 1973. Only two of the four opportunities achieved the goal of codification and progressive development of the law of the sea. The two meetings were the First Conference on the Law of the Sea and the Third Conference on the Law of the Sea. The former formulated the four Geneva Conventions on the Law of the Sea, and the latter adopted the United Nations Convention on the Law of the Sea [36]. In fact, in the whole process of promoting the BBNJ Agreement, all parties generally believed that it was necessary to solve the problem of high-seas fisheries. For example, in 2006, the Ad Hoc Open-ended Informal Working Group listed destructive fishing and illegal, unreported, and unregulated fishing as the main threats to biodiversity [37]. It reiterated this in 2014. Although statements made in the informal process and negotiations are not the outcome of the agreement, they are important evidence reflecting the positions of all parties. Therefore, it is reasonable to include the issue of high-seas fisheries in its framework.

4. Legal Obstacles to the Inclusion of the BBNJ Agreement in High-Seas Fisheries

The main legal obstacles to the inclusion of high-seas fisheries issues in the BBNJ Agreement are: how to meet the “not undermine” requirements of the United Nations General Assembly for the BBNJ Agreement, how to position the relationship between the BBNJ Agreement and the existing fisheries legal mechanism, how to determine the purpose and scope of application of the BBNJ, and how to deal with the different legal systems of the high seas and the area.

(1) Limitation of the “not undermine” clause

For the requirement of “not undermine”, the General Assembly of the United Nations requested that the process of the BBNJ Agreement negotiation should not undermine the existing relevant legal instruments and frameworks, as well as the relevant global, regional, and sectoral organizations. The instrument that the chairman assisted in with the negotiations stated that nothing in this instrument shall prejudice the jurisdiction, rights, and obligations of states under the law. This instrument shall be interpreted and applied within the scope of the United Nations Convention on the Law of the Sea and in a manner consistent with it.

Some countries believe that if the issue of high-seas fisheries is included in the BBNJ Agreement, it will overlap with the existing legal regime for fisheries, which may detract from the existing legal regime and relevant mechanisms. Some countries understand that with the “not undermine” requirement the BBNJ Agreement should not deal with the problems that have been stipulated in existing international legal documents. However,

“not undermine” does not refer to no overlap and no repetition. Therefore, it is important to accurately and reasonably interpret the meaning of “not undermine”.

(2) How to define the relationship between the BBNJ agreement and the existing legal mechanism

The President’s statement reported that the relationship between the BBNJ Agreement and all relevant legal instruments and frameworks, including the United Nations Convention on the Law of the Sea, should be stipulated, but there was no consensus on whether to adopt general provisions or separate provisions in different parts. To define the relationship between the BBNJ Agreement and the existing legal mechanism, it is necessary to clarify that whether the BBNJ Agreement is a repair to the existing legal mechanism on the premise of an accurate understanding of “not undermine”, or change to the existing marine governance mechanism. Clarifying this issue will not only help to determine the purpose of the BBNJ Agreement but also help to clarify the scope of application of the agreement. As one commentator pointed out, this would help to harmonize the relationship between the new agreement and existing legal instruments, particularly fisheries arrangements [38]. In other words, to clarify this issue is to clarify whether the BBNJ Agreement includes high-seas fisheries.

(3) The Scope of Application of the BBNJ Agreement

At present, the BBNJ Agreement negotiation process has not clarified the scope of application of the agreement. The background of the BBNJ Agreement is the awareness of protection, the importance of biodiversity in sea areas beyond national jurisdiction. However, whether the purpose of the BBNJ Agreement is to formulate general legal rules applicable to sea areas beyond national jurisdiction or only to establish general legal rules for genetic resources in sea areas beyond national jurisdiction cannot be determined from the current relevant information. Therefore, it is difficult to judge its scope of application. In other words, it is uncertain whether it includes high-seas fisheries.

Twenty-one principles were put forward in the instrument that the chairman assisted with in the negotiation, including due regard, the precautionary approach, comprehensive international cooperation and coordination at all levels, promoting the conservation and sustainable use of marine life, stakeholder engagement, ecosystem-based management method, scientific management, and information disclosure. From the perspective of these rules, they are universally applicable, not limited to marine genetic resources in areas beyond national jurisdiction, but also applicable to other resources, including high-seas fisheries resources. From its relationship with relevant legal documents, the BBNJ Agreement should maintain compatibility and consistency with the United Nations Convention on the Law of the Sea and its implementation agreements, such as the United Nations Fish Stocks Agreement. For example, the working group responsible for the zoning management tool mentioned that the future BBNJ Agreement should maintain compatibility and consistency with relevant treaties, including the United Nations Fish Stocks Agreement. Therefore, the BBNJ Agreement should apply to high-seas fisheries. However, the opinion of the Working Group on Marine Genetic Resources is that the BBNJ Agreement does not cover fisheries resources as commodities.

(4) How to coordinate the overlapping jurisdiction of maritime zones and high seas

According to the United Nations Convention on the Law of the Sea, the outer continental shelf belongs to the sea area under national jurisdiction and is under the jurisdiction of coastal states; the principle of freedom of the high seas shall apply to the high seas, which shall be under the jurisdiction of the flag state. The area is governed by the principle of the common heritage of mankind and is managed by the International Seabed Authority on behalf of the international community. The high seas and the area overlap geographically, as do some of the high seas and the outer continental shelf under national jurisdiction. Taking the genetic resources in the above-sea areas as an example, it is one of the legal obstacles that the BBNJ Agreement needs to solve to apply to the same legal rules or different legal rules.

5. Specific Proposals for Incorporating High-Seas Fisheries Issues into the BBNJ Agreement

To ensure that the BBNJ Agreement meets the requirements of the United Nations General Assembly and is compatible with existing legal mechanisms and serves the purpose of conservation and sustainable use of biodiversity in sea areas beyond national jurisdiction, high-seas fisheries should be included in the regulation. It is recommended to adopt general legal norms and formulate conflict clauses and to establish mandatory international cooperation and international obligations for integrated ocean management to address the above legal obstacles.

(1) Adopt general legislative norms

The general norms, because of their general expression, help to strengthen the connection and coordination between the BBNJ Agreement and other legal documents; at the same time, it can ensure the flexibility of the BBNJ Agreement, broaden the scope of application of the agreement, and facilitate the coordination between the provisions of the BBNJ Agreement and other legal documents or organizations, to deepen the cooperation of existing legal mechanisms and better deal with the complex and changing marine environment. In addition, they can serve as the core concepts and values of sea area governance beyond national jurisdiction, and guide the marine policies and practices of countries. We can also improve the existing legal mechanism through their interpretation. Many scholars believe that this legislative approach is essential for the conservation and sustainable use of sea areas beyond national jurisdiction [39]. Many existing international agreements adopt this legislative approach, such as Article 5 of the United Nations Fish Stocks Agreement, Article 2 of the Convention for the Protection of the Marine Environment of the Northeast Atlantic Ocean, Article 3 of the Convention for the Protection of the Baltic Sea Marine Environment, and Article 3 of the United Nations Framework Convention on Climate Change.

(2) Conflict and Compatibility Clauses

We should accept overlap and potential conflicts and remain open-minded. The current mechanisms of the law of the sea, or between global and regional mechanisms and regional mechanisms (such as regional fisheries organizations and regional environmental protection organizations), all overlap to some extent. This is unavoidable and normal. Therefore, in the process of formulating the BBNJ Agreement, we should not avoid the problems or disputes that need to be resolved.

To prevent future conflicts or disputes, it is suggested to coordinate the relationship between existing legal instruments, organizational mechanisms, and the BBNJ Agreement by adding conflict norms. Moreover, the BBNJ negotiation process also referred to the resolution of possible problems through “conflict clauses”. The intergovernmental meeting endorsed the general principles mentioned in the chairman’s assistance in negotiating the instrument and the conflict clauses concerning the principles applicable to specific matters [40].

In international practice, some treaties define their relationship with the past or relevant treaties at a macro level. For example, Article 311 of the United Nations Convention on the Law of the Sea stipulates that it shall take precedence over the 1958 Geneva Conventions on the Law of the Sea, but shall not alter the rights and obligations of the contracting states arising from other agreements consistent with this convention, and shall not affect the enjoyment of their rights or the performance of their obligations by other contracting states under this convention. Article 4 of the United Nations Framework Convention on Climate Change stipulates that any provisions of this agreement shall not prejudice the rights, jurisdiction and obligations of states under this convention. This agreement shall be interpreted and applied within the scope and in a manner consistent with this convention. Article 44 of the United Nations Framework Convention on Climate Change also stipulates that this treaty shall not alter the rights and obligations of state parties arising from other agreements consistent with this agreement, nor shall it affect the enjoyment by other state parties of their rights or obligations under this agreement. Some treaties require compatibility and consistency at the micro level. As required by Article 7 of the United Nations

Convention on Food Security. The conservation and management measures developed for the high seas and those adopted in areas under national jurisdiction should be compatible to ensure the conservation and management of straddling fish stocks and highly migratory fish stocks as a whole.

It is worth noting that ensuring compatibility does not emphasize which is higher or which is lower, or that it has priority, and only considers the same subject of protection and management or the consistency of measures taken. This not only emphasizes the importance of maintaining the “unity of biological systems”, but also emphasizes that these measures “will not have harmful effects on the entire biological resources”, and will not damage the existing legal mechanisms. Each of the above methods has its advantages and disadvantages. The macro-conflict clauses are exploitative, and the negotiation time is short, so it is easy to reach a consensus. Micro conflict norms may be more targeted in coordinating specific rights and obligations that may overlap (or conflict), but negotiations take a long time and it is not easy to reach a consensus. Regardless of the nature of such provisions, their purpose is to identify the priority application of relevant provisions relating to the same matter.

As far as the relationship between fisheries issues and the BBNJ Agreement is concerned, the key issue is to formulate conflict norms to resolve the relationship between the BBNJ Agreement and regional fisheries management mechanisms in areas beyond national jurisdiction [41]. This will promote the development and improvement of international fishery law in areas beyond national jurisdiction.

(3) Establishing mandatory international cooperation obligations

In addition to the inclusion of conflict clauses in the BBNJ Agreement, cooperation between subjects of international law in the sea areas beyond national jurisdiction should also be strengthened. The current provisions on international cooperation are suggestive. As the sea areas beyond the national jurisdiction belong to the common property of all mankind, they are of great significance to the entire Earth’s ecosystem and face serious threats. If we hope to reverse the deteriorating trend of biodiversity and ecological environment in the sea areas beyond national jurisdiction as soon as possible, the BBNJ Agreement should provide for mandatory international cooperation obligations to avoid the “tragedy of the commons” because no international organization or country can change the status quo by itself.

The report of the preparatory committee has repeatedly emphasized strengthening international cooperation. The chairman assisted in negotiating the instrument reaffirming the importance of international cooperation. However, there is no clear way and content of cooperation, only pointing out strengthening cooperation and coordination with existing relevant legal instruments and frameworks, including global, regional, and sectoral institutions. In the BBNJ Agreement, strengthening cooperation mainly means that countries or international institutions, whether regional organizations (such as regional fisheries organizations) or international organizations (such as the International Seabed Authority), deepen cooperation through various ways [23]. Taking fisheries as an example, cooperation should be wider than what the provisions of the United Nations Convention on the Law of the Sea requested, such as Articles 61 (2), 63 (2), 64 (1), 65, 66, 69 (3), 70 (4), and 118.

The chairman promoted that the negotiation instrument had listed the corresponding cooperation obligations that countries should undertake [42]. However, the content should still be expanded to strengthen cooperation within and among international, regional, and sectoral institutions. This involves the complex issue of the status of the parties with regards to the BBNJ Agreement. For example, sometimes countries are both independent subjects of international law and members of intergovernmental international organizations. It needs to be clarified in what capacity they should join the organizational mechanism of the agreement and what obligations they should undertake.

In addition, it is suggested that the BBNJ agreement should allow regional and sectoral institutions to join the agreement to fulfil their rights and obligations under the agreement. Moreover, the BBNJ Agreement should also make it clear that it is a mandatory obligation

for countries to undertake promoting international cooperation. For example, the BBNJ Agreement can provide that countries should cooperate directly or through regional, sectoral, or international institutions to “achieve the objectives of the BBNJ Agreement”. This obligation applies to international cooperation at any level. For example, it may be stipulated that “States are urged to take measures to promote cooperation among international organizations to which they are members”. Some regions have already started such practices. For example, in 2008, the Commission for the Protection of the Marine Environment of the North East Atlantic signed a memorandum of understanding on cooperation with the North East Atlantic Fisheries Commission [43].

The BBNJ Agreement can also provide that state parties are required to encourage national and international arrangements of non-parties to cooperate in the conservation and sustainable use of sea areas beyond national jurisdiction. These practices are based on the will of countries or organizations and do not constitute damage to existing legal mechanisms. In addition, we can also learn from the WTO General Council’s provisions on mutual compliance when making decisions. There are also provisions on regional cooperation and sectoral coordination in the United Nations Convention on the Law of the Sea, such as the provision that “States consider cooperation through competent authorities”. The above approaches can not only promote the coordination between the BBNJ Agreement and existing legal instruments and mechanisms, but also respect and not detract from the competence of various existing subjects of international law.

(4) Establishing international obligations for the integrated management of oceans

As mentioned earlier, there is a high demand for integrated ocean management, but it is not a rule of international law. To achieve the conservation and sustainable use of biodiversity in sea areas beyond national jurisdiction, the current sector-based management mode must be changed. This kind of management mode has the defects of being independent and fragmented, which does not conform to the fundamental characteristics of ocean integrity and ecosystem connectivity. It cannot eliminate the cumulative impact of human activities on the oceans. To achieve the purpose of the BBNJ Agreement, it is necessary to establish the international legal obligations of integrated ocean management. Based on this, it is necessary to incorporate the high-seas fisheries issue into the BBNJ Agreement, and to take measures to comprehensively manage the sea areas beyond the national jurisdiction to eliminate the direct and cumulative impacts of human activities on them. Moreover, the comprehensive management of the sea areas beyond national jurisdiction is also conducive to eliminating the overlap and conflict of the legal systems of the outer continental shelf, the high seas, and the area.

6. Conclusions

The high-seas fisheries issue is seen as the major threat to biodiversity in areas beyond national jurisdiction. The discussion of the BBNJ Agreement is gaining momentum, this paper takes this opportunity and proposes the inclusion of the high-seas fisheries issue into the BBNJ Agreement to address the integrated and sustainable management of the fisheries issue in areas beyond the national jurisdiction. This paper first evaluates the agenda and process of the BBNJ Agreement and the problems that exist in the current legal system with regards to high-seas fisheries, and then analyzes the relationship between the high-seas fisheries issue and the BBNJ Agreement.

This paper maintains that the high-seas fisheries issue is inextricably linked to the BBNJ Agreement. This paper summarizes the current dispute over the inclusion of the high-seas fisheries issue in the BBNJ Agreement and evaluates the supporting and dissenting opinions in this debate. It is believed that the high-seas fisheries issue should be incorporated into the current discussion of the BBNJ Agreement from the perspective of protecting the marine environment and conservation of marine biodiversity in areas beyond national jurisdiction. This paper identifies the legal obstacles to including the high-seas fisheries issue in the BBNJ Agreement. These legal obstacles include the limitations of the interpretation of the “not undermine” clause, the need to define the relationship between the BBNJ Agreement and

the existing legal norms on high-seas fisheries, the need to define the scope of application of the BBNJ Agreement, and the problem of coordination of the overlapping jurisdiction of maritime zones and high seas.

In light of the legal obstacles aforementioned, this paper proposes some specific measures to ensure the incorporation of the high-seas fisheries issue into the BBNJ Agreement. This paper suggests the adoption of certain general legislative norms that ensure the flexibility of the BBNJ Agreement and broaden its scope of application. A conflict and compatibility clause is suggested to accommodate the overlap and potential conflicts with the current norms. Mandatory international cooperation obligation needs to be established, to facilitate the cooperation between international subjects in sea areas beyond national jurisdiction. The legal obligation for integrated management of the ocean ought to be formed, to create binding norms for states to dedicate to the conservation and sustainable use of marine resources concerning the high-seas fisheries issue. Through these proposed measures, the BBNJ Agreement would be compatible with the existing legal norms of high-seas fisheries and would serve to conserve biodiversity in areas beyond national jurisdiction.

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