

Overlapping and Coordination in Ocean Governance

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Abstract: As the signing of the Agreement on the Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction (BBNJ) under the United Nations Convention on the Law of the Sea (UNCLOS) is nearing completion, coordination with the International Seabed Authority (ISA) and regional fisheries management organizations (RFMOs) is imminent. This paper investigates the problem of overlap and harmonization in ocean governance and finds that the BBNJ Agreement contains overlapping competencies with Instruments, Frameworks and Bodies (IFBs), which make it possible for them to have the same (or partially the same) rights in the same region. In the case of the ISA, there are already standards for environmental effect assessment as regards management of the international seabed area, which BBNJ also requires, potentially leading to duplicative assessments and regulatory gaps; In the case of RFMOs, their own conservation measures for biological resources are not uniform in different areas, and it is even more difficult for them to apply the new standards brought by the BBNJ as a matter of course, which may lead to conflicts with the Marine Protected Area (MPA) and other Area-Based Management Tools (ABMT) proposed by the BBNJ. However, the BBNJ's harmonization provisions do not address these issues in a satisfactory manner. This study highlights the hindering nature of these overlapping issues for the future implementation of BBNJ and makes corresponding recommendations to facilitate the cooperation between BBNJ and other organizations to achieve the conservation of marine living resources.

Keywords: BBNJ agreement, areas beyond national jurisdiction, regional ocean governance.

1. Introduction

With the active development of the global oceans, the environment and biodiversity of maritime zones outside national sovereignty are facing serious challenges. On June 19, 2023, 193 member nations within the UN adopted the BBNJ Agreement, which is a major breakthrough in the establishment of international ocean reserved areas and avoiding the unlimited and disorderly exploitation of marine resources, etc. Before the BBNJ Agreement was concluded, there already existed corresponding regional systems and regional management institutions in the fields of fisheries, navigation, seabed mineral resources development, etc. However, the ocean is fluid whole, and due to the fragmentation of competence, systems and conflicting interests, the governance effect is not satisfactory, and it is difficult to integrate the whole situation [1]. The BBNJ Agreement

balances the interests of all parties in a “package deal” way and reaches a partial consensus on the four core issues, establishing a new mechanism for ocean governance [2].

However, a sequence of new barriers and dilemmas have arisen, such as the overlapping functions of the BBNJ and the IFB as an international agreement encompassing multiple issues. Although Article 5 of the BBNJ Agreement stipulates that it should not cause any “damage” to the IFB or affect its legal status, the overlap of competence and system between RFMOs, ISA and BBNJ will inevitably lead to a certain degree of conflict [3]. And with the growing scale of the oceanic economy and the accelerated globalization of marine area management, international collaborative governance and regional autonomy will continue to merge, and the resolution of such conflicts is imminent. In this perspective, this paper uses the literature research method, through the BBNJ agreement on ocean governance content of some of the provisions and the corresponding IFB provisions of the comparative analysis, to derive its possible contradictions, as well as the resulting impact; but also use the case study method, revealing the system design, the implementation of the level of the actual problem, to optimize the coordination strategy to provide a reference. On the basis of studying the overlapping problems of BBNJ Agreement and IFB, corresponding solutions are proposed to provide reference for the subsequent implementation and improvement of the agreement, thus promoting win-win cooperation in ocean governance.

2. Literature review

Around the overlap between the BBNJ Agreement and the IFB, currently, some scholars have suggested that the field of ocean governance outside the limits of national sovereignty is already filled with numerous institutions, and the BBNJ Agreement, which gives the basic norms for diversity of marine species conservation beyond the jurisdiction of any single state, is expected to intervene with no less than 52 institutions, which makes overlap unavoidable, and may even lead to a boycott of the BBNJ Agreement as a result [4,5].

In this paper, this study will focus on the overlap between ISA, RFMOs and BBNJ agreements. In this regard, some scholars believe that there is duplication of supervisory authority in the relationship between BBNJ and the ISA. The range of BBNJ encompasses non-sovereign ocean spaces as well as the Area, in the meantime, regulatory jurisdiction over the international seabed region is held concurrently by BBNJ and the ISA. The management of non-living seabed resources is entrusted to the ISA, while BBNJ is responsible for the living resources, but in carrying out the activities relating to the abiotic resources, the corresponding abiotic resources will inevitably be involved, and BBNJ will be responsible for the non-living resources. Corresponding biological resources, and BBNJ does not specify in particular the application of the two systems when they overlap [6]. Some scholars believe that at present, countries and RFMOs tend to set a higher threshold to protect marine ecosystems, and the application of Environmental Impact Assessment (EIA) is not the same, while the BBNJ Agreement implements stricter standards in ABMT and EIA, which makes the overlap with the governance of fishery resources, a problem that cannot be ignored [7].

From the views of the above scholars, it can be seen that the overlap between the BBNJ Agreement and the IFB is a problem of high generality. The BBNJ Agreement indeed provides an overarching legal framework for the protection of marine biodiversity beyond national jurisdiction, but this does not mean that BBNJ can be applied ipso facto to the governance of this area. On the contrary, despite the limitation of the obligation of not to “undermine”, there remains a clash across BBNJ framework and IFBs in managing the open-ocean areas and the seabed areas outside national control. Regardless of whether the focus is the same or not, once it involves cross-cutting areas, the

overlapping of the system and competence is almost inevitable in terms of regulations and implementation.

3. Current situation of ocean governance beyond national jurisdiction

3.1. Current situation

Part VII, Section 2 of the 1982 UNCLOS provides corresponding provisions about conservation alongside with management of living resources on the global commons of the sea, which clearly define the rights of nationals of all countries to undertake fishing in such areas. They also emphasize the importance of cooperation among States and require that the management and use of living marine organisms for human benefit be accompanied by a commitment to conservation. In Part XII, UNCLOS stipulated in detail the privileges and liabilities of states in the exercise of national authority over marine ecological management. Yet it does not articulate precise duties or mechanisms for the protection of ocean spaces outside national control; This part also provides for direct or indirect cooperation among countries and international organizations to take appropriate interventions to maintain the marine ecosystem and prevent and mitigate marine contamination, but of course, this is obviously difficult to implement without a stronger cooperation framework.

In the face of ocean governance, countries show very different attitudes. The U.S. government issued an executive order in April this year, authorizing the U.S. government to issue commercial licenses to companies planning to engage in deep-sea mining outside national jurisdiction, the Deep Sea Hard Mineral Resources Act is cited in this ruling as the domestic legal foundation, trying to bypass UNCLOS, reflecting its unilateral regulatory claims on ocean governance. The EU's long-standing cooperation with Atlantic nations on ocean-related matters has endowed it with extensive experience in ocean governance. As one of the key drivers of the BBNJ international legislation, the EU underscores the importance of international cooperation and coordination in ocean governance. It advocates for thorough environmental impact assessments prior to ocean-related activities and calls for the creation of an effective international mechanism to address ocean environmental problems. As an island nation encircled by the sea, Japan has always placed a strong emphasis on ocean statehood in its ocean policy. It has also adopted a more optimistic stance toward international collaboration, ocean security, and the development of marine resources. China actively participates in ocean governance and continues to promote institution-building within the framework of UNCLOS. The G77 also has a more positive attitude and proposes benefit sharing, which needs to take into account the characteristics of different countries. Russia's attitude is more ambiguous, more inclined to advocate for unrestricted maritime access and maintain the existing maritime order as the United States but is open to the participation of relevant countries in environmental assessment.

3.2. Overlap between the BBNJ agreement and the IFB

3.2.1. BBNJ and ISA overlap and implications

Both the BBNJ Agreement and ISA's EIA standards apply to marine areas which are not subject to the jurisdiction of any single nation, and ISA has a dedicated EIA provision in its mineral resource extraction regulations. In the assessment process, BBNJ requires an EIA to be conducted prior to the authorization of activities that may have substantial harm on oceanic species richness, whereas ISA currently requires it to be conducted after exploration work has already been authorized, but in the future exploitation phase ISA will also require it to be conducted prior to the formation of a mining

contract. In addition, the BBNJ specifies a screening process for planned activities in Article 30, whereas the ISA's EIA regulatory framework does not have a screening phase, which may result in incomplete EIAs conducted during activities with unclear references. Among the specific requirements, the BBNJ Agreement's EIA criteria include screening, scoping, and assessment, requiring that information be made publicly available and allowing other countries to express their views. The ISA also emphasizes the need for a holistic assessment of the environmental impacts of seabed mineral extraction activities, including impacts on biodiversity, ecosystems, and habitats. There is also a difference in focus between the two in how the EIA criteria are developed, with the BBNJ Agreement establishing the Science and Technical Body (STB) to develop EIA standards and guidelines, while the ISA relies on its Legal and Technical Commission (LTC) to develop standards, and the different institutional arrangements have led to difficulties in coordinating the development and implementation of EIA. The overlap presents a complex situation and reflects the international consensus on the importance of EIA in safeguarding marine ecosystems and advancing the responsible stewardship of ocean resources. Compared with ISA, which focuses more on the commercial value of development activities, the BBNJ agreement emphasizes the precautionary rule and ecosystem integrity, which may strengthen the environmental protection constraints on ISA development activities [8].

3.2.2. Overlap and implications of BBNJ and RFMOs

The four core topics of the BBNJ Agreement are all inextricably linked to global fisheries, with ABMT (including MPAs) being perhaps the most obvious one. Currently, the ABMT continues to be implemented by a variety of regional and global organizations, including fishery closures imposed by RFMOs [9]. Of course, "fishing" is the focus of RFMOs' actions and management, rather than "conservation", and they aim to manage fishing rights for high seas fish stocks, and while setting conservation measures and restricting overfishing also serves to ensure biodiversity, it is indeed more for the benefit of fishing interests than for the benefit of BBNJ. The BBNJ Agreement, by contrast, focuses on the maintenance and sustainable development of high seas organisms, which naturally includes fish, unlike the BBNJ, which may not grant industrial fishing rights in the MPAs it establishes. It is obvious, then, that there will be jurisdictional overlaps between the two.

The adoption of the BBNJ Agreement has made a variety of recognized areas of high seas biodiversity popular for MPAs designation and will affect the extraction and harvesting of marine life, including these areas [10]. Article XXII of the Agreement calls for compatibility with measures already in place in IFBs when deciding on the establishment and use of ABMTs and promotes the adoption of measures within their competence. However, the BBNJ's wording is not absolute or strong, and it places the ABMTs in a "negotiable" position. When public goods (even if the aim is long-term benefits) collide with interests, it is inevitably not possible to be completely compatible, and therefore, regardless of whether or not the BBNJ and the RFMOs can agree on a criterion for conservation measures for the same areas, this would affect the biological state of those areas and the costs and benefits of fishing in those areas. In the less desirable situation, the two will be in strong conflict over overlapping issues, and which side will compromise, and which side will give in will determine the situation of the ecological resources in the areas involved for a long time to come.

4. Difficulties faced by the existing coordination mechanism and its solution path

4.1. BBNJ agreement harmonization of ambiguous provisions and improvement of treaty content

The BBNJ Agreement lacks clarity on a number of key provisions, and although the BBNJ Agreement is theoretically binding once it enters into force, the wording of the binding obligations used in the provisions is “shall”, which in practice contains vague standards rather than highly legalized obligations, leading to a great deal of uncertainty about implementation [11]. The Agreement's provisions on “plans and programs” are not legalized. The lack of clarity in the definition of “plans and programs” in the agreement makes it difficult to determine which activities need to be subject to an EIA, and the lack of detailed provisions on the specific requirements and procedures of an EIA leaves countries with a large amount of discretion in the implementation process, and inconsistent assessment results for the same activity in different countries affects the ability to make decisions on whether or not it can be successfully implemented according to the same standards. In addition, management measures such as MPAs have been introduced into the Agreement, but the provisions do not specify the criteria for establishing these measures, leading to conflicts when coordinating with fisheries management measures already in place in RFMOs. In addition, in the context of the access to and benefit-sharing of genetic resources, although the BBNJ Agreement defines “marine genetic resources” and “marine genetic materials”, the criteria are based on the amount of catch or the value of the genetic information carried, as well as the purpose at the time of harvesting or the value of the genetic information carried. However, the questions of whether the catch or the value of the genetic information carried should be the criterion, and whether the purpose of harvesting or the purpose of actual utilization should be the criterion, have not been clearly defined, and there is still a lot of room for operation in practice. In order to improve the content of the treaty, these terms can be clarified through subsequent supplementary agreements or amendments, drawing on practical experience in international law. The problems faced in the implementation of the agreement are bound to be diverse, so a flexible mechanism for amendment and revision should also be established in order to adapt to new circumstances and needs.

4.2. Solution paths

BBNJ and ISA should establish a global EIA framework that specifies the events and minimum standards that trigger an EIA, ensures that EIA for all activities reach a uniform level of quality, and reduces the uncertainty caused by differences in standards. The tiered management approach in the Antarctic Treaty System can be borrowed to strictly monitor activities with potentially significant impacts, while activities with lesser impacts are decentralized to be monitored by countries themselves [12]. An effective coordination mechanism can also be established to set up a joint scientific advisory body and build an information-sharing platform to provide strong support for cooperation between the two sides in the procedure of sustainability-related effect surveys. Additionally, according to the related provisions of BBNJ, the Conference of the Parties (COP) is obliged to conduct regular consultations with the relevant IFBs, and the ISA Council should make full use of the consultation opportunities to actively coordinate on activities that may generate conflicts, and to improve the transparency and scientificity of decision-making, so as to better realize the conservation and sustainable utilization of oceanic biological diversity in areas beyond national authority.

As a means to harmonize conflicts between the existing fisheries regime together with biodiversity conservation, corresponding liaison bodies, such as the Fisheries Liaison Group, can be added to the Implementation and Compliance Committee established under the BBNJ, and representatives of RFMOs can be included as an important part of the cooperation and regulation, so as to conduct information sharing and measures matching for overlapping and conflicting rules, and to assess the compliance and harmonization of the decisions made by the Committee, in order to help the both parties will continue to monitor the implementation and timely adjustment of the coordinated management measures.

Currently, RFMOs have their own set of judging guidelines for the improvement as well as protection of biological resources, so they adopt inconsistent accreditation systems and implementation standards for different regions and targets, i.e., dual-label fishery labeling [13]. This standard of differentiation in the scale of judging, although it may bring controversy, can maintain a balance in the case of overlapping powers such as BBNJ and RFMOs. Under this standard, BBNJ's definition and judgment of biodiversity varies according to areas and objectives, and similarly, RFMOs' certification of fishing varies as well, allowing each to fulfill its own role to satisfy the needs of both parties at the same time.

China has always been committed to promoting the establishment of high seas protected areas to restore and maintain marine ecosystems, and therefore actively fulfilled its obligations during the negotiation, formulation and adoption of the BBNJ Agreement. Nowadays, China should participate in all aspects of marine ecological protection, adhere to the concept of “community of marine destiny” emphasized in BBNJ agreement, and promote the sharing of marine hereditary assets alongside with the sharing and transfer of technology and capacity, so as to achieve the purpose of coordination between all parties (including IFBs) and the BBNJ. At the same time, China should also pay attention to the joint proposal on Antarctic high seas protected areas, and actively promote the process of these proposals in the context of the adoption of the BBNJ Agreement, so as to make them complementary to the BBNJ, further harmonize the contradictions between fishery interests and biological conservation, and lay a solid foundation for future cooperation.

5. Conclusion

The birth of the BBNJ Agreement has brought a more systematic structure and more unified standards for the protection of marine biodiversity. In this regard, this paper, after exploring the contradictions between the BBNJ and ISA in the application of EIA standards and the RFMOs in the management and implementation of ABMT (including MPAs), summarizes the many overlapping problems that the BBNJ has with the IFBs under the main issues. On the one hand, the overlapping of functions may evolve into contradictions and conflicts in future practice, creating a stalemate in marine protection; on the other hand, the overlap provides an opportunity for each party to examine itself, forcing it to put the issues on the table for substantive solutions.

The BBNJ Agreement has already made preparatory measures for the coordination mechanism when considering the relationship with the IFB, but it was formulated in a difficult balancing situation, which makes the corresponding coordination provisions do not give clear and concrete solutions. Therefore, this paper further points out that there is ambiguity in the wording of the terms of the BBNJ Agreement, and therefore proposes the formation of a clear EIA framework, the introduction of a liaison body, the development of fishery labels, the promotion of protected area proposals and other solutions, with a view to the continuous improvement of the BBNJ Agreement in practice and application thereafter in response to the overlapping problems that are difficult to avoid. This will continue to be a serious challenge for BBNJ. In addition to improving itself, BBNJ

should actively promote cooperation among institutions and reverse its own problems by reconciling external conflicts. The ocean governance mechanism formulated by BBNJ will require the joint efforts of multiple governance actors to ensure its future implementation, and more countermeasures are needed to promote the coherence and effectiveness of ocean governance.

Authors contributions

All the authors contributed equally and their names were listed in alphabetical order.

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