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Discussion on the Marine Protected Area on the High Seas: From the Perspective of Obligations Erga Omnes Partes

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ABSTRACT: The BBNJ Agreement promotes the conservation and sustainable use of high seas marine biodiversity through the establishment of high seas protected areas. The high seas biodiversity protected by the Agreement has the nature of "obligations erga omnes partes" on an ex officio basis, but in judicial practice it is subject to a finding by the International Court of Justice that the adoption of treaty-based institutional arrangements is in the "collective interest" and that it is in the "collective interest" to adopt such arrangements. The BBNJ Agreement is currently not a "collective interest" agreement in terms of the management of the BBNJ Agreement. At present, the hybrid management model adopted in the BBNJ Agreement does not reflect the collective interest in substance, and cannot resolve the conflict between the establishment of protected areas on the high seas and other area-based management tools, so it is necessary to further harmonize the relationship between the Conference of Parties to the BBNJ and the IFB, and to strengthen the mandate of the COP.

Keywords: Obligations erga omnes partes; Marine Protected Area on the High Seas; Area-based management tools; Governance model; BBNJ Agreement

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1. Introduction

In recent years, with the application of the "ecosystem approach", which means a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way [1] to marine biodiversity protection, the international community has gradually paid attention to the importance of Marine Protected Area on the High Seas for the conservation and sustainable use of Marine biodiversity [2,3]. On 19 June 2015, the 69th session of the United Nations General Assembly adopted Resolution 292 on the Conservation and Sustainable Use of Marine Biodiversity beyond National Jurisdiction (hereinafter referred to as "BBNJ"), which will lead to the development of an international legally-binding instrument that will include area-based management tools, such as the establishment of High Seas Protected Areas [4]. To facilitate the formation of such an agreement, the United Nations held five intergovernmental meetings, culminating in the adoption of the draft agreement on March 4, 2023, at the resumed fifth session of the BBNJ Agreement.

As one of the main elements of the Agreement, the establishment of high seas protected areas, which is one of the main objectives of the Agreement, has faced obvious difficulties in practice and has given rise to a number of discussions. On the one hand, the establishment of high seas protected areas may overlap geographically with existing regional marine protected areas; on the other hand, in addition to high seas protected areas for the purpose of marine protection, there are also area-based management tools within high seas areas for other purposes, such as fisheries management and shipping management, which are also prone to conflicts of competence [5]. Overlap with regional protected areas and conflict with other area-based management tools are the primary problems that must be addressed in establishing high seas protected areas [6]. In order to address these two types of issues, States have developed three perspectives on the management models for protected areas on the high seas: the regional management model, the global management model and the hybrid management model [7,8]. According to the content of Part III of the BBNJ Agreement, the countries have finally reached a consensus on the adoption of the hybrid management model [9], but there are still

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ambiguities and disputes on how to carry out the arrangements for the specific institutions of the hybrid management model. Among them, the management model of high seas protected areas is an international allocation of authority for the conservation and management of marine biodiversity beyond national jurisdiction inherited from the United Nations Convention on the Law of the Sea [10], is also a concrete implementation of the obligation of each country to protect high seas biodiversity. Therefore, the choice of the management mode of high seas protected areas and the specific arrangement of the implementation mechanism not only affect a country's resource rights and interests in high seas protected areas, but also have a bearing on the legalization process of the obligation of high seas marine environmental protection. Although the BBNJ Agreement currently opts for a hybrid management model, i.e., a management model that allows for the coexistence of a global body with regional or sectoral bodies, with the mandates of regional and sectoral organizations reinforced through regional coordination mechanisms, and with global guidance and oversight by a global body [11], controversies surrounding the management model and contradictions in practice still exist. In order to determine whether this model is the best management model and how to establish an effective implementation mechanism around it, it is necessary to understand the theoretical basis for the establishment of high seas protected areas and to make a full comparison of the advantages and disadvantages of the three models.

2. Obligations Erga Omnes, Obligations Erga Omnes Partes and Biodiversity Conservation on the High Seas

Biodiversity contributes to the proper functioning of ecosystems and provides a variety of essential services to humans, such as ensuring the resilience and stability of ecosystems, regulating the climate, keeping the air and water clean, facilitating soil formation, and protecting against natural hazards such as flooding and erosion [12–14].In principle, biodiversity can be self-renewing, but if it is overexploited or exceeds critical thresholds, ecosystems will collapse and thus be irreversibly damaged or destroyed, and will have pervasive effects on other planetary boundary levels [15]. Marine biodiversity in the high seas is of global environmental interest to humankind, and its impairment can adversely affect global marine ecosystems and be detrimental to the interests of all countries of the world [16–19]. In the case of high seas protected areas, a violation by one State is an infringement of the interests of the entire protected area and will involve multiple States or even global interests. Obligations erga omnes and obligations erga omnes partes are two ways in which States other than the injured State may invoke responsibility to protect a common interest, as provided for in Article 48 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts [20]. For Internationally Wrongful Acts, which allow States other than the injured State to invoke responsibility to protect a common interest. If applied to the construction of high seas protected areas, their strict protection will deter pollution and damage to the high seas marine environment. Therefore, how to recognize the relationship between high seas biodiversity protection and obligations erga omnes and obligations erga omnes partes will have an important impact on the design of the rules for the relief of damage to marine ecological environment protection in high seas protected areas under the BBNJ Agreement, and will also have a significant guiding significance and reference value for the selection and implementation of the management mode of high seas protected areas. It also has significant guiding significance and reference value for the selection and implementation of the management model of high seas protected areas.

2.1. "Obligations Erga Omnes" and the Conservation of High Seas Biodiversity

2.1.1. Historical Development of "Obligations Erga Omnes"

The concept of "obligations erga omnes" in international law was born in the Barcelona Traction Co.Case in 1970. In this case, the Government of Villa argued that the Spanish government had "obligations erga omnes" to protect the interests of foreign investors and demanded that the Spanish government compensate Belgian shareholders who owned shares in Barcelona Traction as a result of its court declaring the company insolvent [21]. Instead of supporting the Belgian Government's claim, the Court stated in its judgement that: "In the field of diplomatic protection, there is an essential difference between the obligation of a State towards the international community as a whole, which is a matter of concern to all States, a general obligation towards all States, and the obligation of a State to another State alone, which may be considered to have a legal interest in their protection inasmuch as the rights involved are of importance" [22]. Since then, the concept of "obligations erga omnes" has occupied a place in the field of international law. In the field of international justice, obligations erga omnes are not only an important basis for national courts to make advisory opinions and judgments, for example, in the 1971 Legal Advisory Opinion of the International Court of Justice on Namibia, the Court held that the end of the South African mandate in Namibia and the declaration of the illegality of the South African presence in Namibia were directed against all States, humanitarian and "erga omnes" [23]; In the 1996 Case on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, the

International Court of Justice stated in its judgment that the rights and obligations under the Convention On the Prevention And Punishment of the Crime of Genocide are rights and obligations of a universal nature [24]; but also an important cause for litigation invoked by sovereign states, for example, in the 1991 Tuna-Dolphin Case, the United States asserted its right to protect tuna in the Eastern Pacific Ocean through trade restrictions on behalf of all mankind [25]. In the field of international legislation, the Draft Articles on Draft Articles on Responsibility of States for Internationally Wrongful Acts (Second Reading) clearly stipulate the serious violations of the obligations of international law and their legal consequences, and recognize the existence of "obligations erga omnes" rules from the legislative level, and further point out in the special report on drafting work, Further research on obligations erga omnes is needed [26].

2.1.2. The Concept and Identification Criteria of "Obligations Erga Omnes"

Regarding the concept of "obligations erga omnes", Professor WangXi summarized them as "the absolute international legal obligations recognized by all countries, which are necessary to safeguard the basic moral values of mankind and the common interests of the international community, and are committed to certain acts or omissions in accordance with the basic norms of international law for the international community as a whole and specific matters" [27]. This expression abstractly summarizes the basic contents of obligations erga omnes. Combining with existing international practices, it can be found that the recognition of obligations erga omnes should meet the following requirements:

First, "obligations erga omnes" are aimed at the overall interests of the international community. The so-called overall interests of the international community emphasize the universality of the beneficiaries, and the act of fulfilling obligations is to protect the common interests of multiple countries. Therefore, in form, it needs to meet the recognition, that is, the universal recognition of its common interest status by the international community.

Secondly, the indivisibility of interests or the necessity of obligations, that is, the damage caused by the violation of obligations by one country will have an impact on many countries and even the whole world, and this impact will not be eliminated by the measures taken by a certain country. Since the essence of "obligations erga omnes" is to increase the obligation of a state to acknowledge certain burdens for the benefit of other countries, this obligation must be something that cannot be realized only through the burden of other interested countries themselves.

Finally, there must be equivalence with the prohibition of acts of aggression, the prohibition of genocide, discrimination and freedom from slavery and the prohibition of violations of fundamental human rights. These three categories are the basic enumeration of obligations erga omnes by the International Court of Justice in the Barcelona Traction Co. Case. Although obligations erga omnes are developmental in connotation and extension [28], but this development should not deviate from the basis on which obligations erga omnes arise.

2.1.3. The Relationship between "Obligations Erga Omnes" and the Conservation of High Seas Biodiversity

There has long been controversy in international law as to whether the protection of biodiversity on the high seas is a matter of "obligations erga omnes", and the Nuclear Tests case in 1974 was the first test of the application of the obligation erga omnes in the field of marine environmental protection. In that case, Australia and New Zealand relied on the freedom of the high seas as a basis for claiming the right to bring an action against France for the protection of the high seas from environmental damage caused by French nuclear tests in the Pacific Ocean [29].Australia and New Zealand argued for the universal character of the ban on atmospheric nuclear testing by analogizing the protection of the marine environment to the obligations enumerated in the judgment of the International Court of Justice [30,31], but the International Court of Justice ultimately did not adjudicate the case or respond to the universal character of the protection of the marine environment because of France's subsequent statement suspending the nuclear tests [29,32]. In the 2011 Advisory Opinion on Obligations and Responsibilities of Sponsoring States, the Chamber directly affirmed that the obligations relating to the protection of the marine environment on the high seas and in the international seabed area are "obligations erga omnes" [33]. This conclusion has contributed significantly to the development of the application of the obligation erga omnes to the conservation of biodiversity on the high seas, and the doctrine is expected to do so. First of all, the conservation of biodiversity in the high seas is beneficial to all humankind and the beneficiaries are universal. The protection of the Marine environment conforms to the concept of "obligations erga omnes", that is, to safeguard the basic moral values of mankind and the common interests of the entire international community [28]. Article 192 of the United Nations Convention on the Law of the Sea provides that States have the obligation to protect and preserve the Marine environment. As a convention of universal international significance in the field of Marine affairs, this provision gives the protection of the Marine environment, including the protection of biodiversity on the high seas, the status of the overall interest of the international community. In fact, as early as 1972, the United Nations Declaration on the Human Environment called environmental protection "the common interests of mankind", and

stressed that protecting and improving the human environment is an important issue related to the happiness and economic development of people all over the world, and is also the urgent hope of people all over the world and the responsibility of governments.

Meanwhile, the obligation of the State to protect the high seas environment is necessary. Whether it is the United Nations Declaration on the Human Environment, the Rio Declaration or the United Nations Convention on the Law of the Sea, it is emphasized that the high seas environment, as an important part of the natural environment, has an ecological integrity and is unique and interdependent. Taking Marine pollution as an example, due to the inseparability of water bodies, the flowing sea water will spread the pollution behavior occurring in one place to several places, which means that even if the coastal state has no Marine pollution behavior itself, its maritime rights and interests may still be affected by the pollution behavior of other countries. As for the Marine resources within the scope of the high seas, because they belong to the common heritage of mankind, more emphasis is placed on the necessity of national protection obligations.

In addition, as mentioned above, the understanding of "obligations erga omnes" cannot only exist at the level of state responsibility. Due to the emphasis of "everything" on the universal participation of States in the management, in order to comply with "obligations erga omnes" in essence, when it comes to the cooperation of obligations erga omnes, the system design which is more conducive to the realization of universal management should be carried out at the level of positive law. Although the protection of biodiversity on the high seas should be an obligation erga omnes at the level of contingency, it lacks relevant legislation and legal practice on the basis of customary international law. Therefore, we should pay more attention to the recognition of obligations erga omnes, and strengthen the cooperation demand and common responsibility of all countries in the protection of Marine biodiversity in the high seas protected areas.

It is thus clear that the protection of biodiversity on the high seas has a universal impact on the survival and development of humankind and is of great significance, and that it falls within the scope of obligations erga omnes at the contingent level. However, at the level of substantive law, the International Court of Justice has not, to date, treated the protection of biodiversity on the high seas as one of the obligations erga omnes in its judicial practice, and has only explicitly recognized the prohibition of the crime of genocide, the prohibition of aggression, the prohibition of slavery, the prohibition of racial discrimination, the prohibition of crimes against humanity, the prohibition of torture, and respect for the right to self-determination of peoples, among other matters. Thus, in the absence of clear international law, the obligation erga omnes is not directly applicable to the protection of biodiversity on the high seas. In practice, the International Court of Justice has preferred to interpret the erga omnes right of action conferred on States parties by the "obligation erga omnes partes" within the framework of specific international conventions [34].

2.2. "Obligations Erga Omnes Partes" and High Seas Biodiversity

2.2.1. Historical Development of "Obligations Erga Omnes Partes"

"Obligations erga omnes partes" is a development of "obligations erga omnes", referring to those treaty obligations owed towards a group of states parties to the same treaty, which all have a legal interest in respecting the rules embodied therein [35]. The Wimbledon case in 1923 was the first case in the international community relating to "obligations erga omnes partes". In that case, according to article 386, paragraph 1, of the Treaty of Versailles: "In the event of a violation of articles 380 to 386, or in the event of a dispute as to the interpretation of those articles, any of the States concerned may appeal against the jurisdiction of the League of Nations." The Permanent Court of International Justice held that four of the contracting States, namely, Great Britain, France, Italy and Japan, had a right of action, and that, since all four States possessed fleets of ships and merchant vessels under their respective flags, they all had an interest in the performance of the provisions relating to the Kiel Canal without having to prove whether or not they were the States whose interests were specially affected [36,37]. This was the first time that the International Court of Justice affirmed "obligations erga omnes partes". Subsequently, in 1962, in the South West Africa case, the Court denied that "obligations erga omnes partes", holding that article 7 of the Mandate was not sufficiently clear to indicate that, at the time of the act, any State member of the League of Nations had a legal right or interest in the fulfillment of the "exercise clause" of the mandate, and that a State could only invoke the "exercise clause" in respect of a breach of the Mandate. The Court held that article 7 of the Mandate was not sufficiently clear to indicate that, at the time of the act, any member State of the League of Nations had a legal right or interest in the performance of the "exercise clause" of the Mandate, and that a State could have a right of action only in respect of a breach of the "special interest clause" [38]. Following the controversy generated by the judgment in this case, the International Court of Justice explicitly endorsed "obligations erga omnes" in the 2012 Prosecute or Extradite (Belgiumv. Senegal) case [39] and the 2020 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambiav. Myanmar) case [40],

allowing either State party to the Convention against Torture and the Genocide Convention to initiate proceedings for violations by the other State party. partes", which allows either State party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Prevention and Punishment of the Crime of Genocide to bring proceedings for violations by the other State party.

2.2.2. Criteria for the Recognition of "Obligations Erga Omnes Partes"

The scope and content of "obligations erga omnes partes" are not yet clearly defined. In addition to the matters that the International Court of Justice has recognized as "obligations erga omnes partes" in its jurisprudence, some scholars, summarizing the judicial practice of the international community and the provisions of international treaties, have found that obligations in the following areas are of the nature of "obligations erga omnes partes": "obligations in the field of the environment or regional security, such as interregional nuclear-free treaties or interregional human rights protection systems". obligations in the field of "environmental or regional security, such as interregional nuclear-free treaties or interregional systems of human rights protection" [41]; Article 136 of the United Nations Convention on the Law of the Sea on the Area [42]; Violations of International Labor Organization Conventions [43]; Violations of the European Convention on Human Rights [44]; as well as violations of article 29 of the ICTY Statute on "Cooperation and Judicial Assistance", among others [37].

The International Law Commission's commentary on article 48, paragraph 1 (a), of the Draft Articles on State Responsibility considers that "obligations erga omnes partes" is a collective obligation based on a treaty. This means that in order to constitute "obligations erga omnes partes", two conditions should be met: first, that it is bound by the same treaty; and second, that the obligation transcends the bilateral relations of the contracting States and is created for the protection of the "collective interest" of all the contracting States [41].It can be seen that the first criterion, which limits the scope of the addressees of the right of action to the same treaty, distinguishes "obligations erga omnes partes" from obligations erga omnes partes, and weakens the erga omnes character of the obligation by considering only the effect of the obligation on the States parties to the treaty in which it is located, rather than on the global community of States. The second criterion, which is central to the identification of "obligations erga omnes partes", is whether an obligation is a collective obligation under a treaty. Collective obligations differ from general obligations under treaties in that they are public in nature and have an impact beyond bilateral relations, i.e., the wrongful act of the State in question is detrimental to the interests of all States parties. This criterion limits the types of "obligations erga omnes partes", and an analysis of the aforementioned categories of situations of an "obligations erga omnes partes" nature reveals that the European Convention on Human Rights and the Constitution of the International Labour Organization contain direct provisions in the treaty that allow either State party to prosecute the wrongful acts of the other State party. The fact that the European Convention on Human Rights and the Constitution of the International Labour Organization provide directly in the treaties for the prosecution by one State party of the wrongful acts of another State party stems from the provisions of the Conventions themselves, and is not exactly the same as the "obligations erga omnes partes" that would require a finding by the International Court of Justice [37]. Other obligations, such as those relating to the environment or regional security, are situations in which the legal interests of all States parties are at stake, and the applicability of "obligations erga omnes partes" in such cases requires a determination by the International Court of Justice. This means that when a treaty does not expressly provide for a right of action, the obligations in the treaty must be strictly compatible with the nature of the collective obligation in order to be recognized by the International Court of Justice as "obligations erga omnes partes". It must be emphasized that not all obligations in a treaty reflect the collective interests of the parties to the treaty, nor do all obligations in a treaty fall within the scope of "obligations erga omnes partes" if one of the obligations in the treaty is found to be of a collective interest. Some scholars have summarized the judicial practice of the International Court of Justice and found that the scope of "obligations erga omnes partes" includes those obligations that are provided for in conventions and fall within the field of jus cogens; or it is left to international tribunals other than the International Court of Justice to decide on their own, based on the jurisprudence that they have developed in the course of their respective interpretations and application of the treaty, whether or not an obligation is one of "obligations erga omnes partes". obligations erga omnes partes" and whether it applies to cases falling within the jurisdiction of the tribunal [37].

2.2.3. "Obligations Erga Omnes Partes" and the BBNJ Agreement

Articles 136 and 137 of the United Nations Convention on the Law of the Sea define the Area [1] and the resources of the Area as the "common heritage of mankind". Since article 137 defines the legal status of the Area under the United Nations Convention on the Law of the Sea and establishes the collective obligations of States by stipulating that all the

resources of the Area belong to mankind as a whole and that no State, no legal person, and no natural person may appropriate the resources of the Area for his own use, there are reasonable grounds for believing that the obligation to protect the Area and its resources, which is set out in article 136 of the United Nations Convention on the Law of the Sea, is an "obligation owed to the States Parties as a whole" [37,45,46]. The BBNJ Agreement is a legally binding international agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction, which protects marine biodiversity resources in the Area as provided for in UNCLOS [47], and which not only relates to the environmental interests of the States Parties, but also to the common heritage of all mankind, and is clearly of a public nature within the scope of the treaty.

It is important to note that, despite the fact that the marine biodiversity on the high seas that the BBNJ Agreement seeks to protect is considered to be of an "obligations erga omnes partes" nature on a contingent level, in practice it is still necessary to rely on the International Court of Justice's interpretation of the obligation, as neither the United Nations Convention on the Law of the Sea nor the BBNJ Agreement currently provides for a right of action directly on the part of the States parties. Judging from the judicial practice of the International Court of Justice, in order to avoid abusive litigation, the Court has no tendency to expand the recognition of "obligations erga omnes partes". Thus, in designing treaty mechanisms, consideration should be given to the manifestation of "collective interests".

3. Management Mode of High Seas Protected Areas

3.1. Types of Management Models for High Seas Protected Areas

The high seas protected area belongs to one kind of Marine protected area in type. The BBNJ agreement states that "Marine protected area" means a geographically defined marine area that is designated and managed to achieve specific long-term biological diversity conservation objectives and may allow, where appropriate, sustainable use provided it is consistent with the conservation objectives [9]. From the perspective of type, although both high seas protected areas and Marine protected areas under national jurisdiction belong to the category of Marine protected areas, due to the essential difference in the nature of the jurisdiction involved in the high seas and the areas under national jurisdiction, the management model of domestic Marine protected areas cannot be applied to high seas protected areas [48]. From the point of view of jurisdiction, in addition to the high seas protected areas, there are other delimitation management tools on the high seas, which are mainly divided into two categories: One is sectoral international organizations, such as the International Maritime Organization, which regulates navigation on the high seas; various fisheries management organizations, which regulate fisheries and fish stock conservation on the high seas; and the International Seabed Authority, which regulates the international seabed area and its mineral resources; The other one is the regional Marine protected area set up by some countries to protect the ecological environment in a certain sea area, such as the Mediterranean "Pegelas High seas Protected Area", this type of zoning management tool, the number of participating countries and regional scope is limited, but the purpose is the same as that of the high seas protected area. According to the BBNJ Agreement on the protection of Marine biodiversity, the establishment of protected areas in the high seas is bound to restrict the exploitation and utilization of protected areas, which may conflict with the functions and powers of international organizations or overlap with regional Marine protected areas [37,49]. Therefore, it is necessary to choose the appropriate management mode of high seas protected areas on the basis of fully considering the characteristics of high seas utilization and the functions of other demarcation management tools. Judging from the current discussion on high seas protected areas, States have proposed three management models [7,8]. The European Union, the Group of 77 and the African Group, among others, supported the "global model" [50], and advocated the establishment of some global umbrella framework for the location, design, management and implementation of Marine protected areas [51], either through the establishment of a body similar to the International Seabed Authority in high seas protected areas or through the Conference of the Parties as a decision-making body, with overall responsibility for high seas protected areas [51]. While protecting Marine biodiversity, it can ensure consistency in global governance. Such consistency not only avoids the problems posed by fragmentation, but also facilitates the demonstration of the collective nature of interests among States parties.

The United States, Russia, Iceland and other countries supported the "regional model" [50], arguing that the effectiveness of existing institutions could be enhanced by establishing cooperation mechanisms between regional and sectoral institutions [52]. The regional model recognizes the authority of regional organizations to determine and review high seas protected areas and relies fully on existing regional systems or arrangements for the management of high seas protected areas; and the regional model excludes centralized decision-making bodies at the global level, opposes intervention at the global level, and emphasizes regional independence [10]. According to statistics, there are already a

number of regional environmental protection organizations and mechanisms involving the high seas in the world, and there are more than 20 regional fisheries management organizations/arrangements alone [53]. Among these regional practices, in addition to the establishment of fisheries resource conservation areas (including no-fishing zones) by regional fisheries organizations/arrangements, some regional organizations have even begun to establish comprehensive high seas protected areas under the framework of regional organizations, such as the Mediterranean Sea Reserve of Peglas, Antarctic "South Orkney Southern Shelf High Seas Protected Area", and the recently established "Ross Sea Protected areas", the Northeast Atlantic Protected areas network, the Baltic Sea and other semi-closed sea area established regional protected areas network [54]. It can be considered that the essence of the regional model is to maintain the status quo, that is, under the premise of not affecting the current use and management order of the high seas, only a very limited protection of Marine biodiversity in the high seas protected area is an institutional arrangement. In addition, the right of action of "obligations erga omnes partes" is difficult to realize under the regional model. If the treaty emphasizes different mode of management, there will be some difficulties for states to seek redress under each of these models. For instance, a state from one region cannot seek to enforce the obligations owed by another state in another region under the regional model. This regionalization also creates an obstacle to the Court's determination of a "collective interest".

Some countries, such as Canada, Japan, Norway and Australia, supported a "hybrid model", arguing that high seas protected areas could be established and managed by a global body in conjunction with regional or sectoral bodies, with the aim of strengthening linkages with existing institutions and sectors [50]. This model takes into account the advantages of the global model and the regional model, not only gives play to the overall advantages of global institutions, but also ensures the effectiveness of existing regional institutions and departments. According to the provisions of Article 22 [2], paragraph 2, of the BBNJ Agreement, the Agreement finally adopted a mixed model, deciding to establish The Conference of the Parties (COP), but adopting the principle of non-prejudice, emphasizing that the new instrument should not prejudice the existing relevant legal instruments and frameworks and the relevant Instruments, Frameworks and Bodies (IFB). Although proponents argue that the hybrid model combines the advantages of other models, given that the relationship between global institutions and regional or sectoral institutions is not easy to distinguish, the hybrid model attempts to improve and improve on the basis of the two, but it is essentially a global model or a regional model [10]. In other words, under the hybrid model, the contradiction between global institutions and regional or sectoral institutions is not resolved, but transformed into a coordination problem between the two types of institutions. If the COP has too much power, the management effect will be biased towards the global model. If the COP status is too low, the effect is biased towards the regional model. Different regulatory effects may also have an impact on the determination of the collectivity of the interests protected by the BBNJ Agreement. Therefore, although the BBNJ protocol chooses the mixed model, the coordination relationship between COP and IFB under this model still needs to be further clarified. The relationship between the two determines whether the Marine biodiversity in the high seas protected area constructed under the mixed model can be effectively protected.

3.2. Coordination of COP and IFB in Hybrid Mode

According to the provisions of Articles 25 and 26 of the BBNJ Agreement, under the current management mode, in order to protect the existing functions and powers of IFB from being infringed, the COP is greatly restricted by IFB when exercising its powers. The exercise of the COP's powers cannot affect the IFB. This arrangement has certain advantages. First of all, from the perspective of efficiency, the compromise of COP powers to IFB will be more conducive to promoting the adoption and implementation of the agreement. Under such an arrangement, new agreements would not have a threatening impact on the previous use of the ocean and would therefore be easier for States to agree to and implement, thus enhancing the efficiency of consultations. Second, a greater role for the IFB would better take into account the specificities of ocean regions. Although the global ocean is an open system connected as a whole, the Marine environment in a specific region is also a whole. Different biological species and natural resources need to be protected in different degrees and ways. From primary life forms such as plankton to advanced life forms such as Marine mammals, they form a complete life chain system and form a complete ecosystem with relative independence [55]. Under this premise, compared with the COP that emphasizes overall coordination, IFB can carry out more targeted Marine affairs management.

However, excessive restrictions on the COP's mandate create more serious problems. First of all, the approach to conservation adopted in the BBNJ Agreement through the establishment of protected areas on the high seas is based on the joint protection of marine biodiversity. The joint promotion of high seas protected areas is in itself an expression of the decision to fulfill "obligations erga omnes partes". However, although formally the hybrid model shares the same

interests as the global model, in substance it leads to a conflict between the two types of interests by not jeopardizing other treaties entered into by the parties. In the event of a conflict, the protection of marine biodiversity in the high seas would have to yield to other interests, which is not in line with the position of "collective interests" and contradicts the objectives of the BBNJ. Given that the "obligations erga omnes partes" nature of the BBNJ Agreement is dependent on a determination by the International Court of Justice, it is necessary to adopt specific institutional arrangements that are more conducive to the promotion of its universal legal protection. This places greater demands on uniform rules and order for protection in high seas protected areas, and thus requires a more vocal COP body to achieve this goal. Secondly, from the point of view of the purpose of the establishment of the high seas protected area, since its destination is protection, when there is a conflict between protection and utilization, priority should be given to achieving the goal of protection, rather than compromising the purpose of utilization. If the functions and powers of the COP institution are weaker than those of IFB, it is difficult for the COP to effectively supervise the acting countries when the protection and utilization objectives conflict. Therefore, even if the final document is adopted, it is likely to be a significantly watered down agreement that will most likely fall short of the international community's original aspirations for the BBNJ [56]. Thirdly, the weakened COP cannot play the function of coordination well. Since IFB involves matters different from the contracting Parties, the content of the agreement is not uniform, which makes the management requirements of high seas protected areas in different regions inconsistent, not only conducive to the formation of a globally planned network of Marine protected areas, but also leads to the overlap of international mechanisms [54], increasing the complexity of other countries' participation in high seas protected areas and the cost of compliance. A COP subject to the principle of no harm would fail to strengthen the links between fragmented institutions and create synergies, undermining the goal of promoting cooperation and coordination [57], and contributing to fragmentation in the management and protection of the high seas [58]. Fourthly, under this provision, a state party could escape its responsibility by virtue of other treaties to which it had previously been a party, and the different treaties to which each State party had previously been a party would result in a loss of fairness in terms of the actual responsibility borne by each State party under this mechanism. In addition, it is worth noting that while the IFB is better able to take into account the unique nature of the regional Marine environment, it does not mean that strengthening the COP mandate will necessarily ignore the unique nature of the regional Marine environment. The establishment of COP can not replace the existing IFB, and the coordination and integration between the two can realize the special management of the region. For areas not governed by the IFB, specific provisions may be made for special matters that require separate provisions, in addition to the general provisions on global high seas protected areas, as already reflected in the United Nations Convention on the Law of the Sea [3].

It follows that the existing content of the IFB needs to be protected to some extent, but limiting the authority of the COP is not the best way to protect it. The existing content of the IFB can be maintained by strictly controlling the criteria for the delineation of high seas protected areas and zoning protection under the premise of strengthening the mandate of the COP, so as to seek a balance between the two, and to promote the protection of marine biodiversity globally while maintaining the established order of marine management and utilization.

4. Conclusions

Addressing biodiversity conservation in protected areas on the high seas is a major challenge for the international environmental rule of law, and in 2015 the United Nations General Assembly adopted a resolution to include protected areas on the high seas in its legislative agenda as an important tool for the conservation and sustainable use of biodiversity on the high seas. Although the conservation and sustainable use of biodiversity in the high seas can be considered an "obligations erga omnes" at the contingent level, due to the lack of normative criteria for identification, and the need to go through a lot of legal practice and time to be elevated to customary international law, the protection of biodiversity in the high seas is a major challenge in the "obligations erga omnes" context. However, due to the lack of normative criteria and the need to go through a lot of legal practice and time before it can be upgraded to customary international law, the protection of biodiversity on the high seas is subject to a lot of difficulties in recognizing "obligations erga omnes". In contrast, the identification of "obligations erga omnes partes" as the conservation objective of the BBNJ Agreement is more feasible, and it is more reasonable to adopt a treaty arrangement that is more in line with the criterion of "collective interest". Currently, BBNJ has adopted a hybrid management model for the management of high seas protected areas and the principle of non-detriment. Under the hybrid model, high seas protected areas have both a COP at the global level and an existing IFB at the regional level, but the contradiction between the two still exists, and the protection of high seas biodiversity is in a weaker position, which is not in line with the objectives of the BBNJ,

and needs to be resolved by striking a new balance between the two. The relationship between the COP and the IFB should be reorganized to strengthen the authority of the COP and provide appropriate protection for the IFB, so as to form a new management order in the high seas protected areas that prioritizes conservation purposes and takes into account the contents of the IFB.

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Declaration of Competing Interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

Footnotes

1. "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. See Reference [42], Article1.
2. In taking decisions under this article, the Conference of the Parties shall respect the competences of, and not undermine, relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies. See Reference [9], Article22.
3. For example, the United Nations Convention on the Law of the Sea provides for a regime of geographically disadvantaged States, taking into account the special geographical position of certain States in order to guarantee their right to participate, on an equitable basis, in the exploitation of an appropriate residual portion of the living resources of the exclusive economic zones of coastal States of the same subregion or region. See Reference [9].

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