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Sustainable Management of Marine Protected Areas in the High Seas: From Regional Treaties to a Global New Agreement on Biodiversity in Areas beyond National Jurisdiction

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Abstract: The conservation and sustainable use of marine biodiversity have recently received attention, and Marine Protected Areas (MPAs) have become key management tools that are gradually being applied to the high seas. However, the sustainable management of MPAs in the high seas requires legal regimes to support them, though relevant regimes are still immature. This paper summarizes the existing regional treaties governing high seas MPAs, and the agreement on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (BBNJ Agreement). After reviewing and comparing their law-making histories, it is argued that regional treaties have issues of legitimacy, democracy, and science and are not conducive to sustainable management. It is concluded that the BBNJ Agreement is better suited to the comprehensive and sustainable management of high seas MPAs and can overcome the limitations of regional treaties. As the BBNJ Agreement does not undermine existing instruments and frameworks, the management of high seas MPAs will face the co-existence of different legal regimes. In the context of "not undermining", the Agreement should be applied preferentially, ensuring the universal participation of stakeholders in decision-making and the role of soft law for non-contracting parties.

Keywords: high-seas MPAs; BBNJ Agreement; sustainable management; UNCLOS

Citation: Jiang, R.; Guo, P. Sustainable Management of Marine Protected Areas in the High Seas: From Regional Treaties to a Global New Agreement on Biodiversity in Areas beyond National Jurisdiction. *Sustainability* **2023**, *15*, 11575. https://doi.org/10.3390/su151511575

Academic Editors: Keyuan Zou and Yen-Chiang Chang

Received: 24 May 2023
Revised: 24 July 2023
Accepted: 24 July 2023
Published: 26 July 2023

1. Introduction

The technological revolution has brought fundamental changes to human society, but it might also pose new challenges and dangers for the environment. The high seas, as an important source of goods and services, are facing serious ecological risks, and MPAs have become tools for achieving conservation targets and sustainable use of high-seas biodiversity. On 19 June 2023, the BBNJ Agreement was adopted, which is used to address biodiversity loss and degradation of ocean ecosystems in a coherent and cooperative manner. Among the Agreement, "marine protected area" is a management tool and is provided as "a geographically defined marine area that is designated and managed to achieve specific long-term biodiversity conservation objectives and may allow, where appropriate, sustainable use provided it is consistent with the conservation objectives" [1]. The concept of high-seas MPAs discussed in this paper is consistent with this, and other area-based management tools are beyond the scope of the paper.

At present, three major high-seas MPAs have been established by countries adjacent to these regions [2] and managed in a fragmented manner under different regional treaties. However, the agreement on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (BBNJ) brought questions from other countries, and some stated that the construction of high-seas MPAs was aimed at economic and strategic objectives [3] and pursued the interests of a particular state or a group of states under the guise of protecting community interests [4]. Thus, there are some issues in the construction of high-seas MPAs, such as legality, legitimacy, and practical effects, and existing

management frameworks do not provide sufficient and sustainable protection for marine biodiversity beyond national jurisdiction [5]. As early as 2003, the IUCN published a report entitled "Ten-year high seas marine protected area strategy" [6], which stressed that high-seas MPAs represent a structure for coordinated decision-making among a range of stakeholders and should not be seen as an opportunity to assert sovereignty or jurisdiction. Besides, the conclusion of the BBNJ Agreement led to overlaps and conflicts with regional treaties, and there was significant controversy as to whether the application of global or regional mechanisms is more conducive to achieving sustainable management of high-seas MPAs, including whether a new global body is needed [7]. Most of the existing literature examines different mechanisms from several perspectives, such as the limits and improvement of regional mechanisms [4,8,9], the construction of a global mechanism [5,10], and international cooperation and coordination between regional and global mechanisms [11,12]. However, it still fails to tackle the question of the legitimacy of those mechanisms and their instruments. This paper studies the legal instruments provided by different mechanisms and analyzes whether these instruments comply with the principles of rule of law in international law-making, which include elements of legitimacy, democracy, and science, in order to clarify which legal instruments are conducive to achieving sustainable management of the high-seas MPAs. At the same time, it is checked to see if the BBNJ Agreement, a new global instrument under the UN framework, will fill the existing gaps and achieve sustainable management of protected areas on the high seas, and how it should be implemented.

2. Materials and Methods

2.1. Materials and Data Gathering

The objectives of the present research are to review the legal instruments applied in the MPAs in the high seas. The research focused on documents generated during the law-making process, including purposes of law-making, consultative parties, member parties, applied MPAs, functions of the management committees, members, and decision-making methods resulting from the instruments, documents on management measures and action plans, resolutions for the establishment of high-seas MPAs, maps of existing high-seas MPAs, UN General Assembly resolutions, and reports by the intergovernmental Conference. These determine the attribution of interests and are important factors in determining whether the instrument is appropriate to achieve sustainable management of high-seas MPAs. Meanwhile, the above instruments are based on the United Nations Convention on the Law of the Sea (UNCLOS) and the Vienna Convention on the Law of Treaties; relevant parts of both treaties were summarized.

As it also tracks and analyzes the history of the legal instruments in this paper, the traditional methods of reviewing and analyzing the content of the documents are mainly used without relying on interviews with experts in this field.

2.2. Protection Rules of Living Resources on the High Seas in the UNCLOS

Historically, the freedom of the high seas was once held in high esteem by many nations, and today it remains an unassailable principle of the law of the sea. However, since the rapid increase in productivity and human needs has led to resource scarcity and a growing number of ecological problems in the oceans, the need to protect the marine environment is broadly accepted [13].

The UNCLOS was adopted in 1982 and remains an important source of law for marine living resource protection today, providing more comprehensive rules for the high-seas biodiversity. "Part VII: High Seas" refers to the conservation and management of living resources, mainly fish stocks, which suggests that all states have the duty to take measures or cooperate with other states for the conservation of living resources. The management measures are based on the best scientific evidence and are formulated with the participation of all states concerned, especially taking into consideration the special requirements and economic constraints of developing countries [14]. Article 145 of

"Part XI: The Area" provides protection for the marine environment, which requires the prevention, reduction, and control of interference with the ecological balance of the marine environment and the prevention of damage to marine flora and fauna from the activities in the Area [14]. Besides, because Article 1 of the UNCLOS shows that "pollution of the marine environment" includes harm to living resources and marine life as well as hindrance to fishing activities [14], it is necessary to summarize Part XII of the UNCLOS, "Protection and Preservation of the Marine Environment," which also led to much controversy over the high-seas MPAs. Part XII states that "states have the obligation to protect and preserve the marine environment" and applies generally to the high-seas area, where pollution from activities in the Area, vessels, artificial islands, installations, and structures is the main concern. It is worth noting that Article 194(5) indicates that "the measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened, or endangered species and other forms of marine life" [14]. These provisions of the UNCLOS reflect early ideas on the protection of marine biological resources.

2.3. Law-Making History of Legal Instruments for the Management of High-Seas MPAs

To date, three high-seas MPAs have been established through regional treaties. The South Orkney Islands South Shelf MPA and the Ross Sea region MPA were based on the Convention on the Conservation of Antarctic Marine Living Resources (the CAMLR Convention), and the OSPAR network of MPAs was based on the Convention for the Protection of the Marine Environment of the North-East Atlantic (the OSPAR Convention). The BBNJ Agreement has just been adopted this year and is not in force yet, which might be used to manage some MPAs in the high seas in the future.

2.3.1. The CAMLR Convention

The CAMLR Convention is the main basis for the management of the South Orkney Islands South Shelf MPA and the Ross Sea region MPA, and conservation measures are developed in accordance with the Convention [15]. The CAMLR Convention is an important part of the Antarctic Treaty system, and its formation is closely linked to the Antarctic Treaty consultative parties. In 1959, 12 countries signed the Antarctic Treaty and became the initial consultative parties with decision-making power over Antarctic affairs [16], but the subsequent contracting parties remain observers with no voting power unless the country can construct a scientific research station in Antarctica. In 1985, China was granted the status of a consultative party for the construction of an Antarctic scientific research station [17]. On this premise, the contracting parties of the Antarctic Treaty were then concerned about Antarctic marine living resources, and, from 1975 to 1980, they went through the formation of working groups, extended preparatory meetings, special preparatory meetings, and consultative meetings, respectively, to consider the conservation of Antarctic marine living resources, among which Australia, the United Kingdom, and the United States played the main leading and organizing roles. The CAMLR Convention was signed in Canberra, Australia, in 1980 and entered into force in 1982 [18].

As a result of the Convention, the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) was established as an international organization within the Antarctic treaty system and a decision-making body for the conservation of Antarctic marine living resources. It has decision-making power over the governance of the Southern Ocean and decides on conservation measures [19]. The CCAMLR is open to all states with an interest in marine scientific research and fishing activities in the Convention Area and currently has 27 member parties and 10 acceding states. The member parties have decision-making power, but acceding states cannot enjoy the same decision-making power due to a lack of financial contribution, but all are bound by the CAMLR Convention [20].

In 2009, following a proposal and active promotion by the UK, the CCAMLR adopted a proposal for the establishment of the South Orkney Islands South Shelf MPA [21]. In 2017, the 35th meeting of the Commission decided to establish another high-seas MPA in

the Antarctic Ross Sea region, following a joint proposal and promotion by the US and New Zealand [22]. Unlike the establishment of the South Orkney Islands MPA, the number of countries involved in this negotiation increased to 27, with China among them and an increase in African and Asian countries.

2.3.2. The OSPAR Convention

The 2010 OSPAR Ministerial Meeting decided to establish the North-East Atlantic Network of High-Seas MPAs according to the OSPAR Convention and designate six high-seas MPAs to form the first network of high-seas MPAs in the North-East Atlantic region [23]. The OSPAR Convention was derived from the merger of the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (Oslo Convention) and the Convention for the Prevention of Marine Pollution from Land-Based Sources (Paris Convention) and was opened for signature in 1992 and entered into force in 1998 [24]. The OSPAR Convention has been signed by 14 states, the original contracting parties of the Oslo Convention and Paris Convention, and it now stands at 16 parties with Luxembourg and Switzerland [25], mainly in Western Europe.

The OSPAR Commission, also established accordingly, is composed of representatives of the contracting parties and is chaired by each contracting party in turn. The representatives of the contracting parties have the right to make management recommendations and, monitor the implementation and development of legal instruments, and the observers have the right to participate in the meetings of the Commission [26]. The OSPAR Convention is the foundational treaty for the protection of the North-East Atlantic, regulating pollution from different sources, the assessment of the quality of the marine environment, and the conservation of marine biodiversity, but it explicitly does not take measures on fisheries management issues or shipping issues that may be managed by the International Maritime Organization (IMO) [24].

2.3.3. The BBNJ Agreement

The BBNJ Agreement stemmed from the massive loss of marine biodiversity, but the existing legal regimes, such as the UNCLOS and the Convention on Biological Diversity (CBD), could not provide adequate remedies, and the area-based management tools of international organizations lacked coordination [27]. In this background, European countries, together with some non-governmental organizations, promoted the development of a third legally binding agreement within the framework of the UNCLOS to ensure the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction [28]. Following the Ad Hoc Open-Ended Informal Working Group (2004–2015) and Preparatory Committee (2016–2017), the General Assembly adopted Resolution 72/249 and decided to convene intergovernmental conferences on 24 December 2017 to negotiate key topics of BBNJ instruments [29]. Since 2018, the BBNJ legislation has officially entered the intergovernmental negotiation stage, and five negotiation conferences have been held. On 19 June 2023, the Agreement was adopted at the fifth session of the intergovernmental conference [30].

The BBNJ Agreement mainly includes four key items: (1) the sharing of benefits from marine genetic resources; (2) area-based management measures and tools, including MPAs; (3) environmental impact assessment; and (4) capacity-building and transfer of marine technology. The Agreement provided main procedural matters and guidance for the establishment and management of MPAs, including proposals, publicity and preliminary review of proposals, consultations on and assessment of proposals, establishment, decision-making, implementation, monitoring, and review. The Conference of the Parties (COP) is a decision-making body, and consensus is the primary voting method.

The Conference is open to all member states of the United Nations, members of the specialized agencies, and parties to UNCLOS. Others can participate in the Conference as observers. Besides, the relevant organizations of the United Nations system, the interested global and regional intergovernmental organizations, some key non-governmental

organizations, and associate members of regional commissions were invited to participate in the conferences [31]. At present, the Agreement has been adopted and will be open to signature on 20 September 2023 [30].

The BBNJ Agreement is another milestone in the governance of high-seas biodiversity, providing a legal basis for the implementation of MPAs and laying down uniform standards for procedural issues. As can be seen from the process of law-making, the BBNJ Agreement aims to create a global legal instrument that reflects the views of all relevant subjects, achieves universal participation, and adapts to the legal attributes of the high seas. These are key points that differentiate BBNJ from other regional treaties (see Table 1).

Table 1. Comparison of law-making details of the CAMLR Convention, the OSPAR Convention, and the BBNJ Agreement.

Instruments	Purposes	Entered Into Force	Initial Parties	MPAs	Management Body
The CAMLR Convention	Conservation of Antarctic marine living resources	1982	Argentina, Australia, Belgium, Chile, the French Republic, the German Democratic Republic, the Federal Republic of Germany, Japan, New Zealand, Norway, Poland, the Republic of South Africa, the Soviet Union, UK, and USA	The South Orkney Islands South Shelf MPA; the Ross Sea region MPA	CCAMLR
The OSPAR Convention	Prevention and elimination of pollution of the marine environment, or with respect to the protection of the marine environment against the adverse effects of human activities	1998	Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, UK, and EU	The OSPAR network of MPAs	OSPAR Commission
The BBNJ Agreement	Conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction	No in force	This agreement is now not open to signature, but many states and organizations participated in Conferences [32]	no	COP

3. Results and Discussion

3.1. Law-Making Review of Regional Treaties for the Management of High-Seas MPAs

Legal instruments are the basis of the establishment and management of high-seas MPAs, and if they are deficient in terms of legitimacy, democracy, and science, the sustainable management of high-seas MPAs based on them will be hard to achieve.

3.1.1. Questions on the Sources of Law-Making Authority

International law-making as an international activity should be carried out within the existing frameworks of international law, and the Chart of the United Nations, the Statute of the International Court of Justice, and the Vienna Convention on the Law of Treaties provide basic rules for international law-making [33]. In global ocean governance activities, the UNCLOS is currently the most authoritative and dominant ocean treaty, provides the overarching international legal framework, and should also be complied with. Regional states have engaged in treaty law-making to establish and manage MPAs, which has raised controversy about whether the UNCLOS provides regional states with such law-making competence.

The establishment of high-seas MPAs may regulate the rights of other states within MPAs. Once Russia and Ukraine questioned the legality of the establishment and management of Antarctic high-seas MPAs, Ukraine argued that the UNCLOS only provides a legal basis for the establishment of MPAs within national jurisdiction and does not see any legal possibility in the high seas [34]. But the OSPAR Commission stated in its argumentation document for legal competence that Parts VII, XI, and XII of the UNCLOS do provide the legal basis for the establishment and management of high-seas MPAs, especially Articles 192 and 197 of Part XII [35]. Some scholars share the view that Part VII and Part XII of the UNCLOS could be considered to provide the legal authority to establish management rules [36]. As can be seen, the objectives of Part VII and Part XII are far narrower than the long-term, comprehensive management objectives of high-seas MPAs. High-seas MPAs involve the restriction, prohibition, and management of navigation, fishing, marine scientific research, exploration and exploitation activities, and tourism activities, which go far beyond fishing and pollution (see Figure 1).

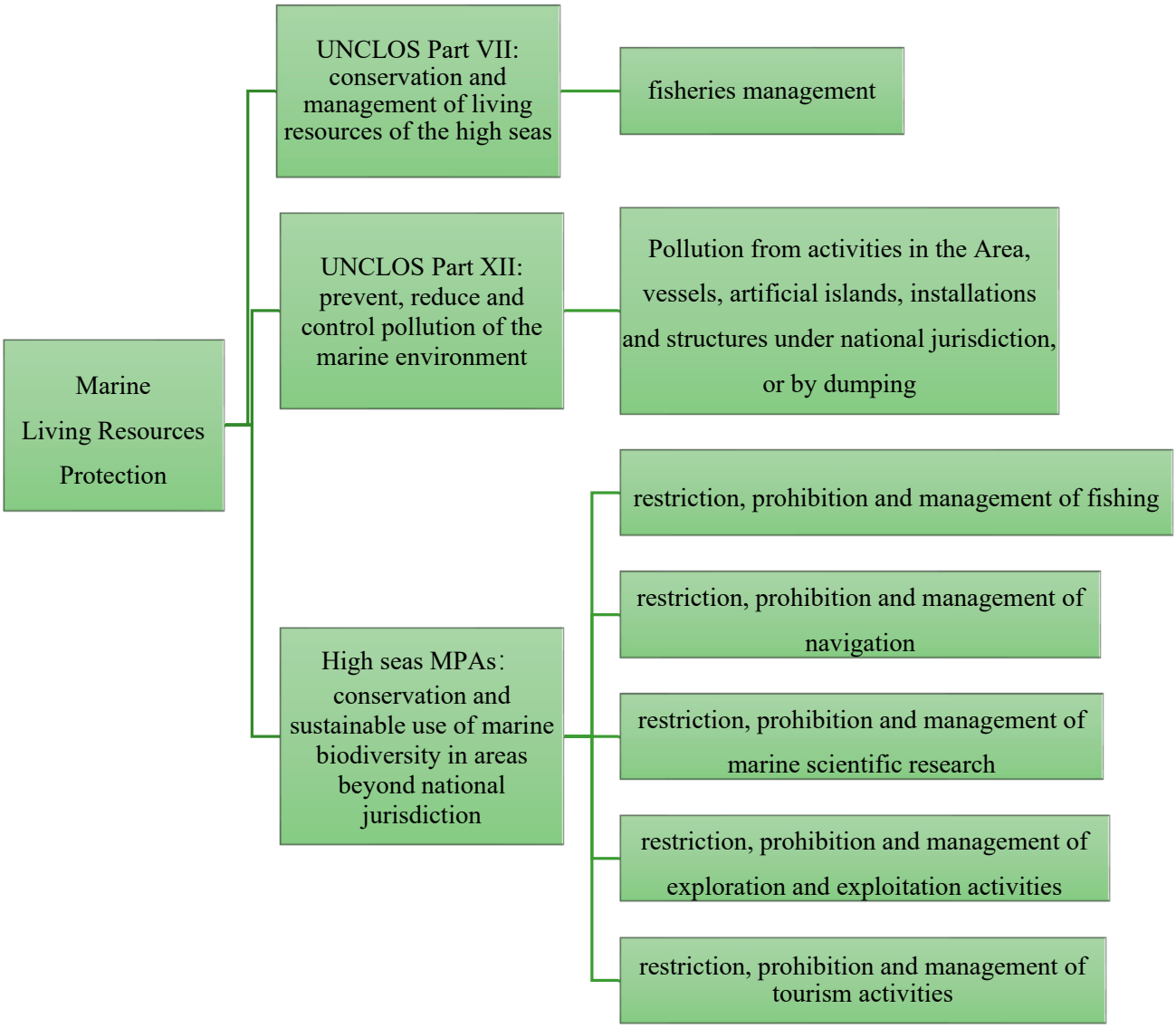

Figure 1. Differences in objectives between Part VII and Part XII of the UNCLOS and the high-seas MPAs.

The legal status of the high seas dictates that law-making in its area should be approached strictly and cautiously. The high seas do not belong to the territory of any state, and no one state can exercise any powers to claim them, implying sovereignty over the high seas [14]. The law of the sea precedents have demonstrated that "an unratified treaty may, at least in the short term, be regarded as the basis of a generally accepted rule" [37]. Once a treaty is concluded, the legal order it establishes takes on a life of its own [38]. Regional treaties ensure some "rights" over a universal resource by "selected" members, and it is difficult to consider that the treaties can achieve sustainable management if there are doubts about their legality.

3.1.2. The Failure of Law-Making Democratic Procedures

The preamble of the BBNJ Agreement, "aspiring to achieve universal participation" [39], demonstrates the importance of democracy in high seas law-making. The regional treaties for high seas MPAs were products of the last century and reflected the hegemony of power and procedures of that time.

The CAMLR Convention was adopted in the 1970s and 1980s. On the eve of the UN General Assembly questioning the legitimacy of the consultative parties' governance of Antarctica and in the context of the NGOs' concern for the global environment, 15 countries, mainly the Antarctic Treaty consultative parties, accelerated the negotiation process and defined the management mechanism of Antarctic biological resources before the UNCLOS was adopted. Clearly, in an era of monopoly power over Antarctic governance, the majority of developing countries were excluded from the process of developing the Convention, and even the major UN international organizations were not able to participate in the process. The OSPAR Convention was developed in the 1990s, when the UNCLOS was adopted, and international organizations began to pay attention to global environmental issues. Then, 15 countries and the European Union negotiated the Convention, while the members of the OSPAR Convention were mainly European and American countries, and almost all Asian and African countries were excluded from the consultative conferences. Third-world countries also failed to garner more power in high-seas governance through the UN platform [40].

On the other hand, the failure of democratic procedures is also reflected in the differential treatment of acceding states and the restriction of their rights. For example, in the Antarctic Treaty, there is a distinction between the rights of consultative parties and contracting parties. In order to become a consultative party with decision-making powers, a later acceding state needs to establish one scientific research station in Antarctica. However, the establishment of a scientific research station in the harsh Antarctic climate can be considered a barrier to involvement in the governance of the Antarctic for most developing countries because it concerns not only economic power but also scientific and technological capacity. The consultative parties largely control jurisdiction and decision-making in Antarctic affairs, and the CAMLR Convention, based on the Antarctic Treaty, has continued this unjustified governance mechanism without exception, and the CCAMLR also distinguishes between member states and acceding states based on financial supports [41]. Financial power determines decision-making power, and the strongest maritime states maintain a regime that gives them a favorable position, leaving the weaker maritime countries to accept such rules and participate in a seemingly fair competition [42], which is in fact procedural hegemony.

In addition to the limitations of some sovereign states, the views of important UN international organizations, such as the International Seabed Authority (ISA), the Food and Agriculture Organization of the United Nations (FAO), and the IMO, had not been adequately expressed in treaty law-making [22].

3.1.3. Political Implications in the Application of Regional Treaties

International law is the product of the harmonization of the wills of states. Article 34 of the Vienna Convention on the Law of Treaties provides that "no obligation or right shall

be created for a third State without its consent" [43]. The consent of states determines the extent of the application of regional treaties, which is independently provided by each state.

At present, more countries have acceded regional treaties on high-seas MPAs. Formally, of course, they are based on national consent, but it is hard to deny the influence of political factors. In the negotiation process of regional treaties, most of the states that led and participated in law-making are developed countries. In contrast, most of the states that did not get involved in the negotiations are developing countries, which are heavily dependent on developed countries in terms of capital, technology, and markets, and if they refuse to join the treaty or do not comply with its provisions, the preferential treatment or trade transactions would not be enjoyed. For example, the CCAMLR has developed a Catch Documentation Scheme (CDS) for non-contracting parties, which requires participating states to identify the origins of toothfish entering their markets and to determine whether toothfish caught in the CCAMLR area and landed or entering their territory were caught in a manner consistent with CCAMLR conservation measures [44]. The CCAMLR also expects to cooperate with non-contracting parties to monitor toothfish trade through electronic records, and has informed the countries on its official website, including developing countries such as the Philippines, Malaysia, Mexico, and Vietnam, that are unwilling to cooperate [45]. This constitutes a form of pressing non-contracting parties to comply with the CAMLR Convention. Besides, some countries have the political need to join a community where the rules are set by powerful countries, which is a way of realizing their values, because they need external support to gain international recognition [46].

3.2. Outcomes: The BBNJ Agreement Is Suitable for the Sustainable Management of High-Seas MPAs

The original intention of international law-making was to formulate normative concepts to institutionalize the distribution of benefits and create an international order. The management of high-seas MPAs also aims to ensure a fair distribution of costs and benefits. However, regional treaties have not only deficiencies in law-making but also other shortcomings such as the absence of international recognition, their subsequent unenforceability against third parties, and the difficulty of coordinating and cooperating with other competent organizations [3]. It is necessary to develop a new instrument for MPAs.

Compared with the regional treaties, the BBNJ Agreement bridges the shortcomings and presents several advantages, including the following: (1) the BBNJ Agreement is an instrument decided and organized by the UN General Assembly, which has greater legitimacy; (2) it is open to all countries and international organizations to achieve universal participation in order to reflect the interests of all stakeholders, thereby facilitating its implementation; (3) it promotes coordination and cooperation between international organizations under the UN framework, overcoming fragmentation of ocean governance; (4) it has taken nearly 20 years for the preparation and incorporates a lot of qualified knowledge and lessons, so it is better informed on scientific evidence and conducive to high-quality management plans. All in all, the BBNJ Agreement is an instrument at an international level that is convenient to achieve the sustainable management of high-seas MPAs [47]. It cannot be denied that there is much to be done to improve the governance mechanism under the BBNJ Agreement in the future. The implementation of the Agreement should avoid the shortcomings of existing regional treaties and deal with coexistence with regional mechanisms, paying special attention to the following matters mentioned thereafter.

3.2.1. The Preferential Application of the BBNJ Agreement in the Context of "Not Undermining"

As an area shared by all mankind, the high seas provide common interests in terms of security, ecology, and economic development, and their management should be the collective responsibility of all mankind. The BBNJ Agreement stipulates that the competence to establish and manage high-seas MPAs belongs to the COP mechanism, which is in line with this trend and wider national interests.

It should be noted, however, that the implementation of the BBNJ Agreement is premised on "not undermining relevant legal instruments, frameworks, and relevant global, regional, subregional and sectoral bodies" [1], which means that even though the regional treaties described above have been questioned, they will continue to exist. Although the BBNJ Agreement provides for "not undermining" existing instruments and mechanisms, it does not provide a clear definition or criteria. There might be two interpretations. The first approach requires that the new instrument "not undermine" the authority or mandate of existing bodies and not overlap with their area of jurisdiction. The second approach would require a new instrument that does not undermine the effectiveness or objectives of existing frameworks and bodies, which could improve the implementation and effectiveness of existing instruments [48]. The new instrument does not yet list the full range of international organizations involved in the governance of marine biodiversity beyond national jurisdiction, which amounted to 52 by 2018 [49]. If the first approach is adopted, the scope for the implementation of the BBNJ Agreement would be too narrow [49].

Therefore, in the case of anachronistic instruments and mechanisms and uncertainty as to which mechanism to apply, the BBNJ Agreement should be applied preferentially, and COP would be allowed to cooperate with regional bodies to improve the implementation and effectiveness of existing instruments. Otherwise, "not undermining" could easily become one excuse for countries with a wide range of interests in regional mechanisms to defend their own interests in the high seas, and any act detrimental to their interests could be considered "undermining" [50].

In addition, existing regional treaties have certain jurisdiction areas (see Figures 2 and 3), for example, the CCAMLR is limited to the areas south of 60° S and between this latitude and the Antarctic Convergence Zone, which forms part of the Antarctic marine ecosystem [51]. In practice, there are also a large number of areas not covered by existing mechanisms and adjacent to waters under the jurisdiction of CCAMLR, where management competence should be exercised by the COP mechanism, reflecting the will of the majority of states and avoiding possible "Enclosure" intentions.

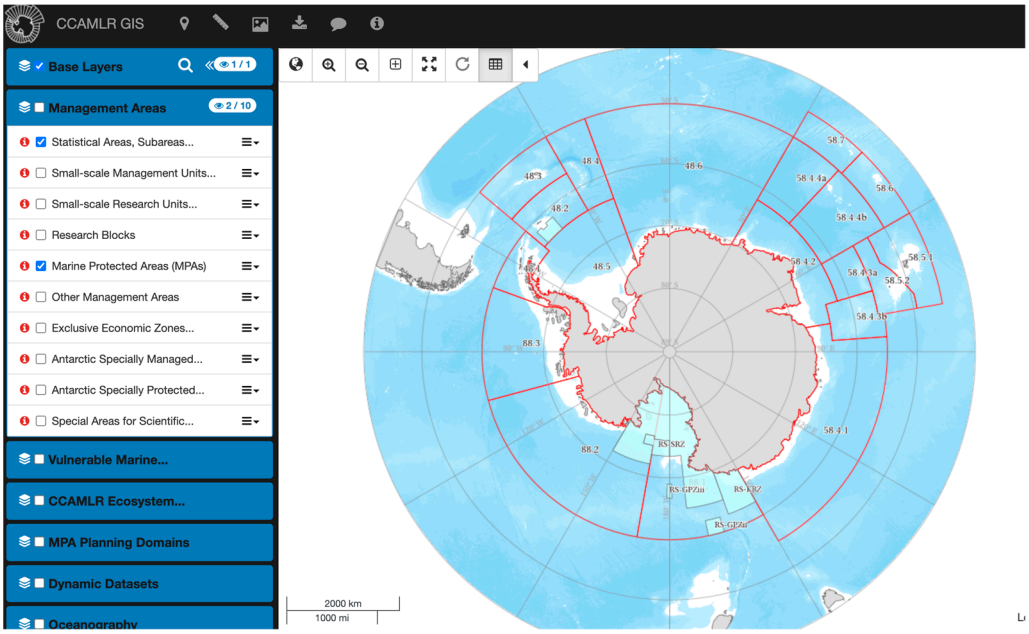

Figure 2. Management areas of CCAMLR, including the Ross Sea region MPA and the South Orkney Islands Southern Shelf MPA. Data from the CCAMLR website [52].

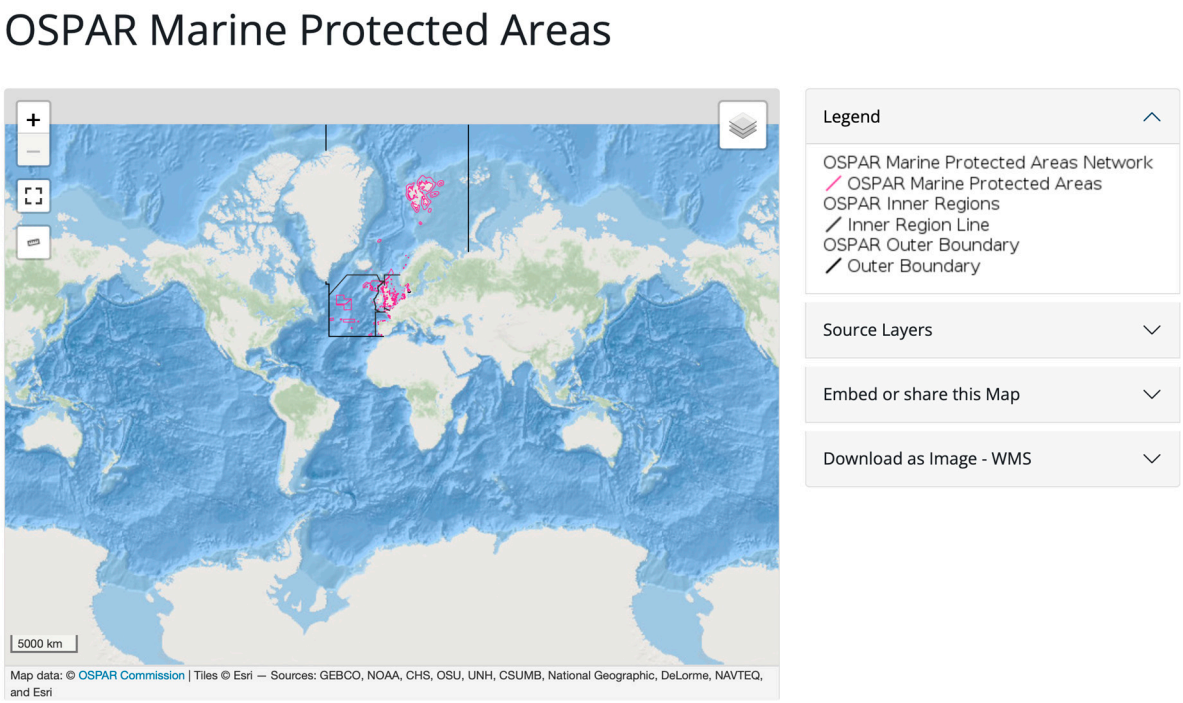

Figure 3. OSPAR region and its MPAs. Data from the OSPAR Commission website [53].

3.2.2. Adherence to Democratic Principles: Achieving Universal Participation of Stakeholders

Fairness and justice are intrinsic human pursuits, the criteria that define a virtuous society, and the primary virtues of a social system. Justice is used to determine the proper distribution of the benefits and burdens of social cooperation, and people prefer to accept a system or an order with equality [54]. The absence of stakeholders easily leads to the failure of policy implementation. Reversely, the universal participation of stakeholders can make decisions fair and effective, meet the needs of different subjects, and improve the quality of long-term management systems [55]. In this sense, the construction of a multi-level law-making power is required to deal with the specificity of the high seas and the changes in power balance. The vast majority of developing countries have been able to achieve on-going operations at sea and have a strong need to intervene in the governance of the high seas. A viable path to democratizing the governance of the global commons lies in encouraging the active participation of sovereign states [56]. In the future, decision-making related to high-seas MPAs within the BBNJ Agreement should be open to all sovereign states, with equal opportunities for participation and unimpeded procedures for expression. Legislative issues and procedures cannot continue to be determined by a few powerful nations, and institutional arrangements cannot unilaterally uphold the interests of those powerful nations [57].

In another respect, allowing international organizations to intervene in decision-making could collect more comprehensive views and knowledge for a high standard of governance. To some extent, they mediate the consultations and negotiations between countries, promote the process of law-making, and provide ideas for launching new issues [58], such as ISA, FAO, IMO, regional fisheries organizations, IUCN, etc. Among them, the involvement of ISA is particularly important in the decision-making process.

3.2.3. Dissipation of Political Influences: The Impact of Soft Law on the Non-Contracting Parties

Eliminating the influence of political factors on the application of treaties lies in avoiding the problem of over-regularization. Over-regularization implies the eradication of differences, enforced uniformity, and the defense of fixed interests, which easily develop into institutional hegemony [59]. Force should never be used in the implementation of the

BBNJ Agreement. Binding obligations are part of law, but law also includes permission, advice, incentives, guidance, etc., which can be uniformly referred to as soft law [60]. Soft law is the counterpart of hard law, a compromise to the mandatory nature of law that is not binding and gives states ample discretion. In the application of regional treaties on high-seas MPAs, some countries would refuse to become parties mainly because of concerns about being overburdened with technical, financial, and developmental burdens. Hence, putting political pressure on these countries is not a feasible way to implement the BBNJ Agreement. In order to minimize "free-riding" by uncompliant countries and achieve good governance of the high seas, soft law can be considered one possible approach to attract non-contracting states to adhere to the Agreement and gradually break through the limitations of the principle of relative effectiveness.

As far as current international practice is concerned, the main option is to develop initiatives and policies for encouraging non-contracting parties to take their own commitments, while all soft law should be premised on the realities and main demands of non-contracting parties. Based on past experiences, most of the non-contracting parties to regional treaties are developing countries with insufficient knowledge of MPAs, poor capacity for scientific research, few infrastructures and monitoring equipment, as well as a lack of strong financial support. Benefit sharing is also a key concern for non-contracting parties, and Southeast Asian developing countries, such as Indonesia and Malaysia, hope that the international mechanisms can achieve equitable benefit sharing, including technology transfer and information sharing [61]. Based on this, for non-contracting states that are willing to comply with the BBNJ Agreement or cooperate with contracting states, the COP shall take into consideration issues raised by those states and provide appropriate support and mechanisms of justice if needed. At the same time, by bearing the cost of MPA implementation, these non-contracting states can enjoy priority in the sharing of benefits from marine genetic resources. All in all, on the application of the Agreement, it is desirable to encourage non-contracting parties to make commitments in accordance with their conditions. It is also recommended to provide flexibility to allow all countries to participate in high-seas conservation actions without undue pressure or suspicion.

4. Conclusions

Treaty law-making, as an integral part of the development of international law, creates rights and obligations for international subjects and maintains international society in a certain stable order. Although the law is essentially political in nature [62] and it is inevitable that states will play games, international law carries the function of building social consensus, and there is still a need to bring the law back to the path of legitimacy and rationality. Regional treaties have played a role in the management of biological resources in parts of the high seas, but they are not recognized internationally. Action at the regional level cannot be seen as the way forward for high-seas MPAs. The BBNJ Agreement opens a new chapter in the governance of the high seas, setting common norms, achieving universal participation of states, overcoming the disadvantages of fragmented ocean governance, and being more conducive to achieving sustainable management. It cannot be denied that action at the international level has some drawbacks, such as inefficient decision-making, overlaps, and conflicts with existing mechanisms, which require the BBNJ Agreement to address the issues of coordination and cooperation with other mechanisms. Generally speaking, the high seas belong to all mankind, and their biodiversity would be most properly managed through a global legal instrument.

Author Contributions: P.G. and R.J.: Conceptualization, Validation, Writing—original draft preparation, Writing—review and editing. R.J.: Resources. All authors have read and agreed to the published version of the manuscript.

Funding: This research was funded by the Southern Marine Science and Engineering Guangdong Laboratory (Zhuhai), grant number SML2020SP005.

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: All data associated with this study are provided in the manuscript.

Acknowledgments: We thank the funding form the Southern Marine Science and Engineering Guangdong Laboratory (Zhuhai) for this paper. We also thank the three referees for their meticulous and rigorous revision suggestions, which made the paper more accurate and complete in many details.

Conflicts of Interest: The authors declare no conflict of interest.

References and Notes

1. Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction. Available online: https://documents-dds-ny.un.org/doc/UNDOC/LTD/N23/177/28/PDF/N2317728.pdf?OpenElement (accessed on 22 July 2023).
2. The three major high seas MPAs are considered by the international community to be: The South Orkney Islands South Shelf MPA, the Ross Sea region MPA and the OSPAR network of MPAs.
3. Wright, G.; Rochette, J.; Gjerde, K.; Seeger, I. *The Long and Winding Road: Negotiating a Treaty for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction*; Studies No. 08/18; IDDRI: Paris, France, 2018; pp. 48–53.
4. Tanaka, Y. Reflections on High Seas Marine Protected Areas: A Comparative Analysis of the Mediterranean and the North-East Atlantic Models. *Nord. J. Int. Law* **2012**, *81*, 295–326. [CrossRef]
5. Hammond, A.; Jones, P.J.S. Protecting the 'blue heart of the planet': Strengthening the governance framework for marine protected areas beyond national jurisdiction. *Mar. Policy* **2021**, *127*, 104260. [CrossRef]
6. Ten-Year High Seas Marine Protected Area Strategy: A Ten-Year Strategy to Promote the Development of a Global Representative System of High Seas Marine Protected Area Networks. New Summary Version for CBD COP7. Available online: https://iucn.org/content/ten-year-high-seas-marine-protected-area-strategy (accessed on 21 December 2022).
7. Prip, C. Arctic Ocean governance in light of an international legally binding instrument on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction. *Mar. Policy* **2022**, *142*, 103768. [CrossRef]
8. Brooks, C.M.; Bloom, E.; Kavanagh, A.; Nocito, E.S.; Watters, G.M.; Weller, J. The Ross Sea, Antarctica: A highly protected MPA in international waters. *Mar. Policy* **2021**, *134*, 104795. [CrossRef]
9. Freestone, D. The Limits of Sectoral and Regional Efforts to Designate High Seas Marine Protected Areas. *AJIL Unbound* **2018**, *112*, 129–133. [CrossRef]
10. Blasiak, R.; Yagi, N. Shaping an international agreement on marine biodiversity beyond areas of national jurisdiction: Lessons from high seas fisheries. *Mar. Policy* **2016**, *71*, 210–216. [CrossRef]
11. Ardron, J.A.; Rayfuse, R.; Gjerde, K.; Warner, R. The sustainable use and conservation of biodiversity in ABNJ: What can be achieved using existing international agreements? *Mar. Policy* **2014**, *49*, 98–108. [CrossRef]
12. Tang, Y.; Chen, W.; Zhang, Y. International cooperation and coordination in the Global Legislation of High Seas ABMTs including MPAs: Taking OSPAR practice as reference. *Mar. Policy* **2021**, *133*, 104767. [CrossRef]
13. Treves, T. *United Nations Convention on the Law of the Sea*; United Nations Audiovisual Library of International Law: New York, NY, USA, 2008; p. 2.
14. See United Nations Convention on the Law of the Sea. Available online: https://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm (accessed on 23 May 2023).
15. CCAMLR Conservation Measures. Available online: https://cm.ccamlr.org/?season=2022-12-01%3A2023-11-30&type=mes&cmc_category=840&op=Apply&form_build_id=form-kF9ri7U20mcTNom5Uh69MmRRTiYxC-X-XTYUfYEgO-8&form_id=conservations_and_resolutions_filter (accessed on 21 December 2022).
16. Duanmu, Z. *International Law*, 1st ed.; Peking University Press: Beijing, China, 1989; pp. 157–158.
17. Wang, W.; Pan, M. The Evolution of structure and operation of the Antarctic Treaty Consultative Meetings. *Pac. J.* **2021**, *29*, 93–104. [CrossRef]
18. History of the Convention. Available online: https://www.ccamlr.org/en/organisation/convention-history (accessed on 1 October 2022).
19. About CCAMLR. Available online: https://www.ccamlr.org/en/organisation/commission (accessed on 21 December 2022).
20. Acceding States. Available online: https://www.ccamlr.org/en/organisation/acceding-states (accessed on 21 December 2022).
21. CCAMLR, Conservation Measure 91-03 (2009). Available online: https://cm.ccamlr.org/measure-91-03-2009 (accessed on 16 June 2023).
22. Report of the Thirty-Fifth Meeting of the Commission. Available online: https://meetings.ccamlr.org/system/files/e-cc-xxxv_0.pdf (accessed on 1 October 2022).
23. MPAs in Areas beyond National Jurisdiction. Available online: https://www.ospar.org/work-areas/bdc/marine-protected-areas/mpas-in-areas-beyond-national-jurisdiction (accessed on 2 May 2023).
24. OSPAR Convention. Available online: https://www.ospar.org/site/assets/files/1169/ospar_convention.pdf (accessed on 23 May 2023).

25. Parties are Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the UK and the EU.
26. OSPAR Commission. Available online: https://www.ospar.org/organisation (accessed on 22 December 2022).
27. De Santo, E.M. Implementation challenges of area-based management tools (ABMTs) for biodiversity beyond national jurisdiction (BBNJ). *Mar. Policy* **2018**, *97*, 35. [CrossRef]
28. Shi, Y. A Step to Victory: Main Divergences of and Prospects for Intergovernmental Negotiations on Marine Biological Diversity of Areas beyond National Jurisdiction. *Asia-Pac. Secur. Marit. Aff.* **2023**, *151*, 37. [CrossRef]
29. Resolution Adopted by the General Assembly on 24 December 2017, A/RES/72/249. Available online: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/468/77/PDF/N1746877.pdf?OpenElement (accessed on 15 May 2023).
30. UN Intergovernmental Conference on Marine Biodiversity of Areas beyond National Jurisdiction. (C.N.203.2023.TREATIES-XXXI.10). Available online: https://www.un.org/bbnj/content/home?Is%20Featured=0&language=en&sort_by=created&sort_order=DESC&page=1 (accessed on 22 July 2023).
31. UN Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction, Participation. Available online: https://www.un.org/bbnj/content/participation (accessed on 15 May 2023).
32. Provisional List of Participants at the Fifth Session. Available online: https://www.un.org/bbnj/sites/www.un.org.bbnj/files/bbnj5-_provisional_list_of_participants_as_of_3_april_2023.pdf (accessed on 15 May 2023).
33. Gu, Z. International Law-making: Basic Principles and Implications for International Law. *Chin. Soc. Sci.* **2012**, *2*, 142–143.
34. Report of the Second Special Meeting of the Commission. Paras 3.26. Available online: https://www.ccamlr.org/en/system/files/e-cc-sm-ii_1.pdf (accessed on 21 December 2022).
35. OSPAR. *OSPAR's Regulatory Regime for Establishing Marine Protected Areas (MPAs) in Areas Beyond National Jurisdiction (ABNJ) of the OSPAR Maritime Area*; OSPAR 09/22/1-E, Annex 6; European Commission: Brussels, Belgium, 2009; pp. 2–6.
36. Gjerde, K.M.; Rulska-Domino, A. Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead. *Int. J. Mar. Coast. Law* **2012**, *27*, 356. [CrossRef]
37. Brownlie, I. *Principles of Public International Law*, 5th ed.; Zeng, L.; Yu, M., Translators; Law Press: Beijing, China, 2002; p. 11.
38. Catherine, B. Law-Making Treaties: Form and Function in International Law. *Nord. J. Int. Law* **2005**, *74*, 402.
39. Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (General Assembly Resolution 72/249). Available online: https://www.un.org/bbnj/ (accessed on 5 March 2023).
40. Wang, W. *Study on the Change of Governance Mechanisms in Antarctica*; Current Affairs Press: Beijing, China, 2022; pp. 106–123.
41. About CCAMLR Membership. Available online: https://www.ccamlr.org/en/organisation/who-involved-ccamlr (accessed on 5 October 2022).
42. Su, C. *Global Public Issues and International Cooperation: An Institutional Analysis*; Shanghai People's Publishing House: Shanghai, China, 2000; pp. 230–231.
43. The Vienna Convention on the Law of Treaties. Available online: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf?_gl=1*8sesm8*_ga*MTMxODMwMDA5MS4xNjY0NDE3MTIw*_ga_TK9BQL5X7Z*MTY5MDM2MjQxNS4xNC4xLjE2OTAzNjMxNDUuMC4wLjA (accessed on 23 May 2023).
44. Catch Documentation Scheme (CDS). Available online: https://www.ccamlr.org/en/compliance/catch-documentation-scheme (accessed on 7 April 2023).
45. Non-Contracting Parties. Available online: https://www.ccamlr.org/en/compliance/ncp (accessed on 7 April 2023).
46. Thomas, M.F. Legitimacy in the International System. *Am. J. Int. Law* **1988**, *82*, 753.
47. Nocito, E.S.; Sullivan-Stack, J.; Pike, E.P.; Gjerde, K.M.; Brooks, C.M. Applying Marine Protected Area Frameworks to Areas beyond National Jurisdiction. *Sustainability* **2022**, *14*, 5971. [CrossRef]
48. Scanlon, Z. The art of "not undermining": Possibilities within existing architecture to improve environmental protections in areas beyond national jurisdiction. *ICES J. Mar. Sci.* **2018**, *75*, 406–407. [CrossRef]
49. Langlet, A.; Vadrot, A.B.M. Not 'undermining' who? Unpacking the emerging BBNJ regime complex. *Mar. Policy* **2023**, *147*, 105372. [CrossRef]
50. Beringen, E.; Liu, N.; Lim, M. Australia and the pursuit of "not undermining" regional bodies at the biodiversity beyond national jurisdiction negotiations. *Mar. Policy* **2022**, *136*, 104929. [CrossRef]
51. See the Convention on the Conservation of Antarctic Marine Living Resources. Available online: https://www.ccamlr.org/en/organisation/camlr-convention-text (accessed on 23 May 2023).
52. Management Areas. Available online: https://gis.ccamlr.org/ (accessed on 12 May 2023).
53. OSPAR Marine Protected Areas. Available online: https://odims.ospar.org/en/maps/map-marine-protected-areas/ (accessed on 16 May 2023).
54. Rawls, J. *A Theory of Justice, Revised Edition*; He, H., Translator; China Social Sciences Press: Beijing, China, 2009; pp. 3–9.
55. Reed, M.S. Stakeholder participation for environmental management: A literature review. *Biol. Conserv.* **2008**, *141*, 2421–2422. [CrossRef]
56. Cumbers, A. Constructing a global commons in, against and beyond the state. *Space Polity* **2015**, *19*, 62–75. [CrossRef]
57. Liu, Z. *The Development of Contemporary International Law: An Analysis from the Perspective of International Relations Theory*; Law Press: Beijing, China, 2010; pp. 330–331.
58. Cao, W. On the International Environmental Law-making Mechanism. *J. Renmin Univ. China* **2016**, *30*, 113–121.

59. Xu, C. The contention over the foundations of the international order: Rules or international law. *Chin. Soc. Sci. Eval.* **2022**, *1*, 29.
60. Pellet, A. The Normative Dilemma: Will and Consent in International Law-Making. *Aust. Year Book Int. Law* **1989**, *12*, 26. [CrossRef]
61. Fan, X.; Bian, T.Z. *The Law and Practice of High Seas Protected Areas*; Ocean Press: Beijing, China, 2015; pp. 281–283.
62. Hart, H. *The Concept of Law*, 3rd ed.; Xu, J.; Li, G., Translators; Law Press: Beijing, China, 2018; p. 2.