

Biodiversity Beyond National Jurisdiction (BBNJ) Agreement and Its implications in Fisheries Management

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The Regional Training Course on the UNCLOS 1982

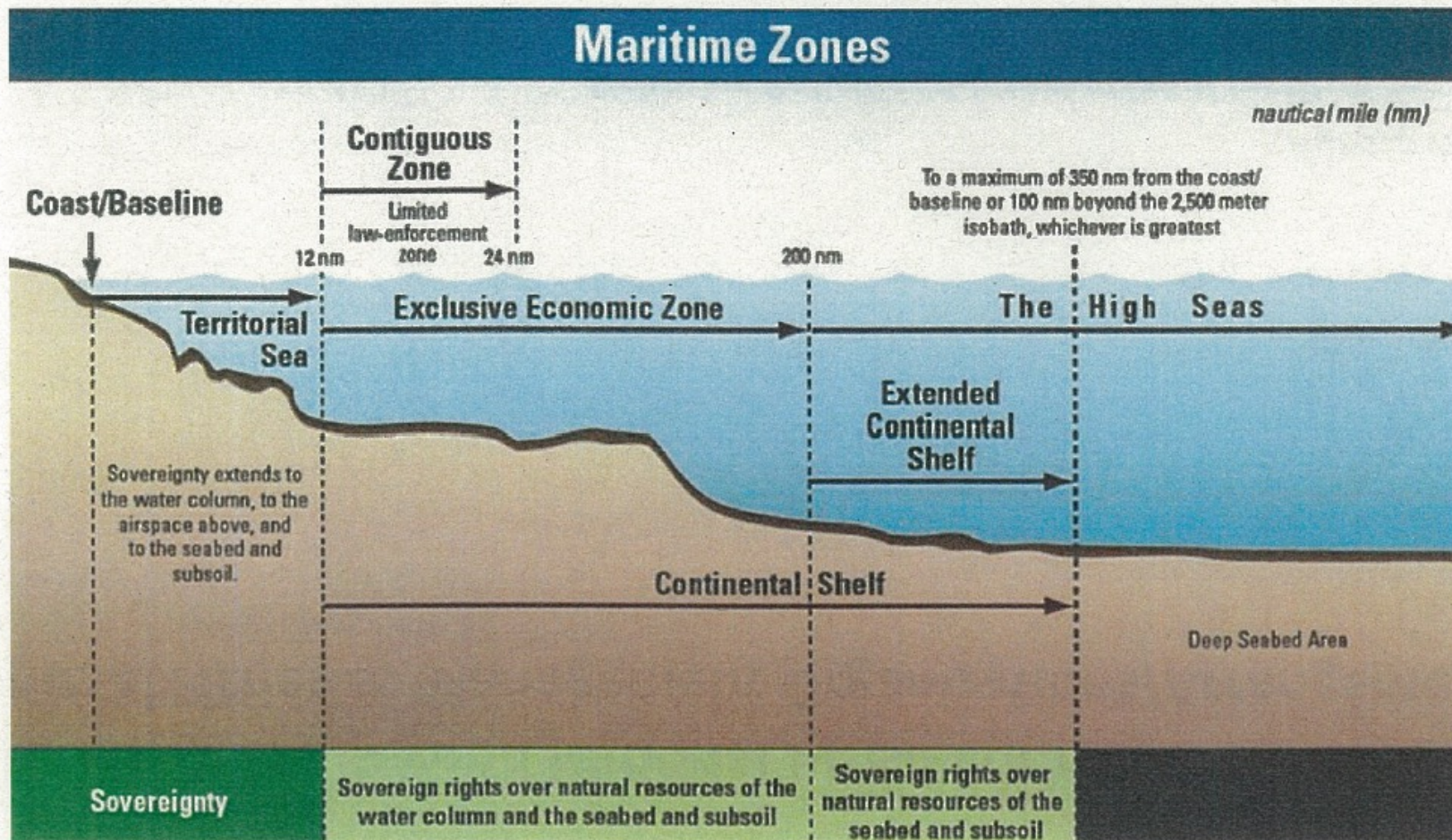
In Fisheries Perspective, SEAFDEC

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I. Background for the negotiation

- Convention on Biological Diversity (CBD, Adopted in 1992 and entered into force in 1993)
 - ⇒ Conservation and Sustainable Use of Biodiversity within National Jurisdiction (Land, Territorial Sea, Exclusive Economic Zone)
- Need to address Conservation and Sustainable Use of Marine Diversity beyond National Jurisdiction (High Seas and the Area (deep seabed as defined in UNCLOS))



UNCLOS Maritime Zones.

Source: NOAA Office of Ocean Exploration and Research

Title of the BBNJ Agreement

Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction.

Four Main Themes for the Negotiation

- 01 Marine Genetic Resources, including the Fair and Equitable Sharing of Benefits (Part II)
- 02 Measures such as Area-Based Management Tools (ABMT), including Marine Protected Areas (MPA) (Part III)
- 03 Environmental Impact Assessment (Part IV)
- 04 Capacity-Building and the Transfer of Marine Technology (Part V)

II. Issues relating to fisheries (ABMT Part except for 1)

1. Marine Genetic Resources and Fisheries Resources
2. Definition of ABMT and MPA
3. Precautionary Principle vs Precautionary Approach
4. Power/Authority of Conference of the Parties (CoP) vs Competence of Relevant (existing) Legal Instruments and Frameworks and Relevant Global, Regional, Subregional and Sectoral bodies (IFB including RFMO)
5. Decision-making
6. Opt-out clause (the Right to object)

Position/Stance of Active Players (for ABMT Part)

- Negotiation Group
 - (1) G77 + China : Not very active except China
 - China : Very firm in protecting IFB scheme and the interest of long-distance fishing fleets
 - Exclusion of disputed sea areas from the ABMT establishment
 - (2) African Group : Not very active
 - (3) South Pacific Islands Group (PSIDS) :
 - Support strong power/authority of CoP
 - Emergency Measures, Not undermine the costal States' conservation measures
 - (4) Caribbean Coastal States' Group (CARICOM)
 - Support strong power /authority of CoP, Not support opt-out clause
 - (5) Latin American Group (CLAM)
 - Support strong power/authority of CoP, except Nicaragua supporting current IFB scheme

(6) Active players from developed nations

EU, UK : Support strong power/authority of CoP

MPA should not include “sustainable use”.

Recognition by CoP of ABMT established by IFB

Norway, Iceland :

Striking the balance between the power/authority of CoP and IFB, Need for the Opt-out clause

Australia, NZ :

Similar to PSIDS’s position

Japan, US : Not undermining the IFB

Need for the Opt-out clause

[MPA : Japan supporting the inclusion of “sustainable use”, US not in favor.]

(7) Independent players : Indonesia, Thailand, Philippines, Vietnam

(8) Russia : Reject all new elements not included in the UNCLOS

IV. Explanation on key provisions relating to fisheries

1. Marine Genetic Resources and Fisheries

Article10 Application

2. The provisions of this Part shall not apply to:

- (a) Fishing regulated under relevant international law and fishing-related activities; or
- (b) Fish or other living marine resources known to have been taken in fishing and fishing-related activities from areas beyond national jurisdiction, except where such fish or other living marine resources are regulated as utilization under this Part.

2. Definition of ABMT and MPA

(1) ABMT

Article 1 : Use of Terms

1. “Area-based management tool” means a tool, including a marine protected area, for a geographically defined area through which one or several sectors or activities are managed with the aim of achieving particular **conservation and sustainable use** objectives in accordance with this Agreement.

(2) MPA

9. “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.**

[In the 5th session (August 2022), a small group discussion had crafted the following compromised text.

[“Marine protected area” means a geographically defined marine area that is designated and managed to achieve specific [long-term biodiversity] conservation objectives and may include sustainable use which is consistent with the conservation objectives.

3. Precautionary Principle vs Precautionary Approach

Article 19 (Proposals), paragraph 3

3. Proposals shall be formulated on the basis of the best available science and scientific information and, where available, relevant traditional knowledge of Indigenous Peoples and local communities, taking into account the precautionary approach and an ecosystem approach.

Declaration of the 1992 UN Conference on Environment and Development (UNCED)

15. In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Chair's suggestion : "Application of precaution"

4. Demarcation of power/authority of CoP vs. that of IFB (RFMO) in fisheries governance. (Article 5 and 22) — most debated in ABMT part

Group A

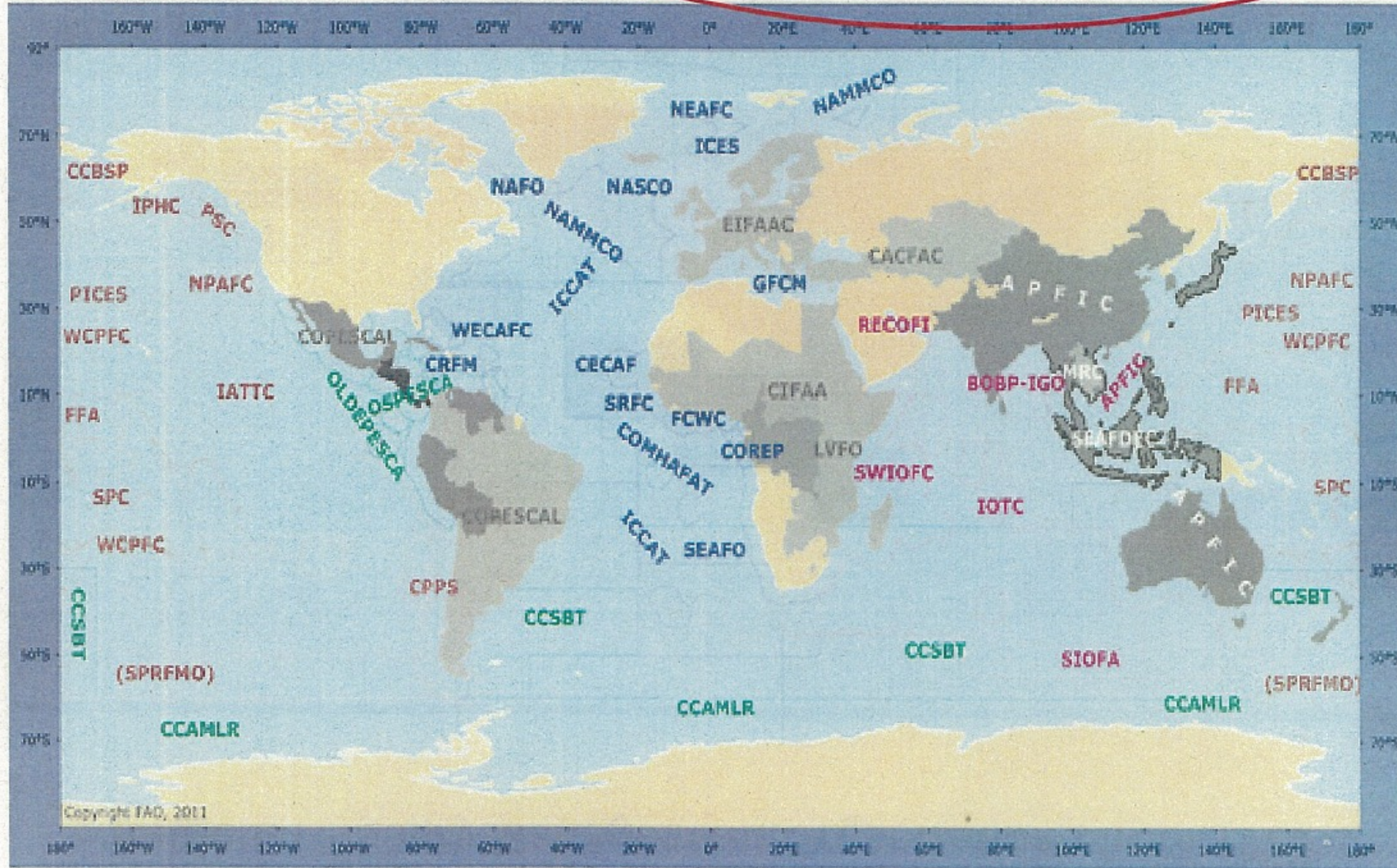
RFMO's activities/authorities should not be undermined by CoP in the new Agreement (RFMO can take care of biodiversity conservation in the high seas.) :
Japan, US, China, Iceland, Norway

Group B

CoP should be given wide power/authority in fisheries governance (Reliance on RFMO is not sufficient for biodiversity conservation) :
EU, Australia, PSIDs, CARICOM

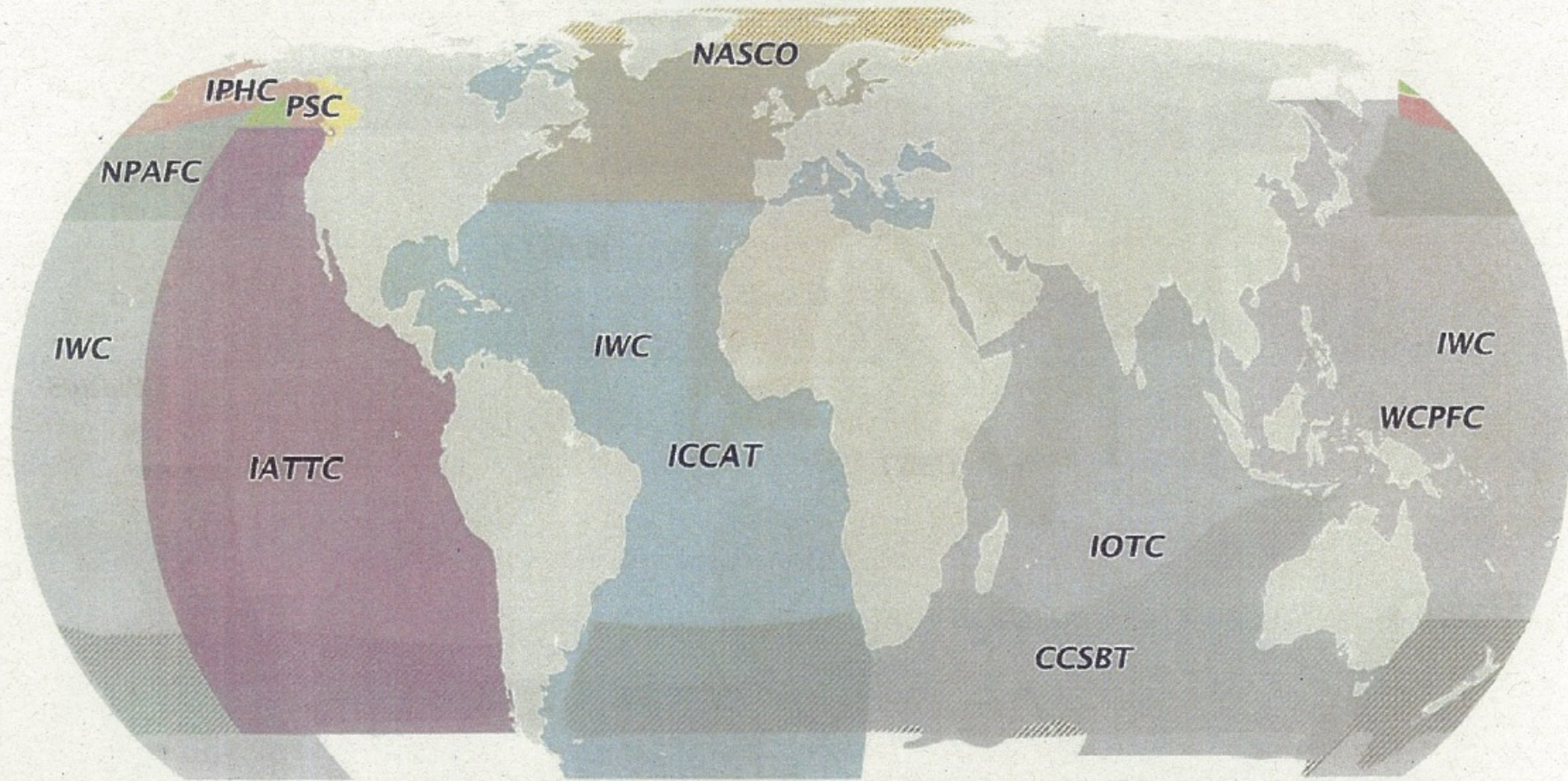


RFABs/RFMOs Net(work?)



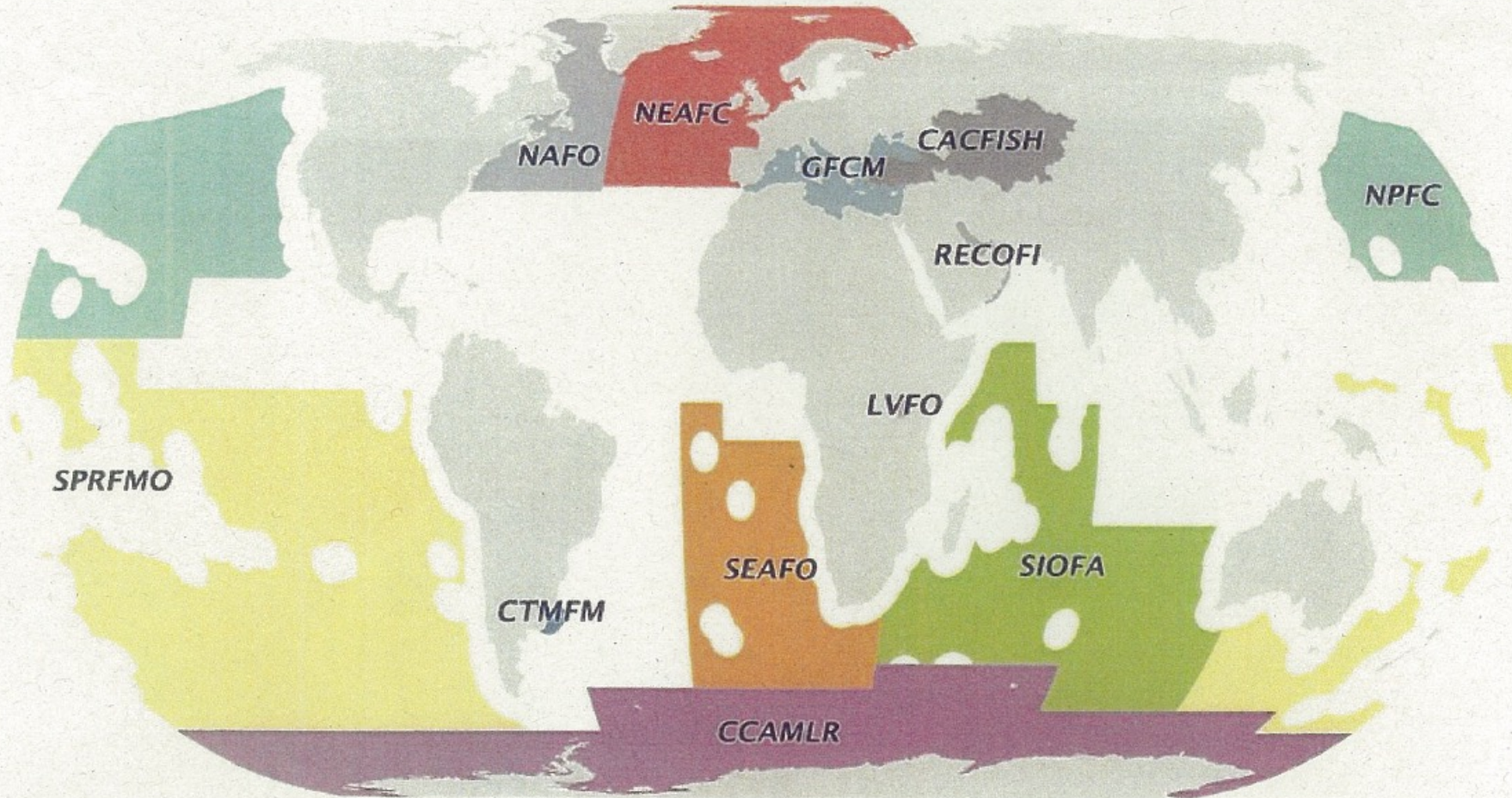


Regional Fishery Management Organizations (RFMOs – species specific)



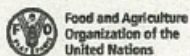


Regional Fishery Management Organizations (RFMOs – non species-specific)





Regional Fishery Advisory Bodies (RFABs)



- | | | | | | | | | | | | |
|--|-----------|--|-------|--|------------|--|----------|--|------------------|--|------|
| | NAMMCO | | FFA | | GLFC | | LTA | | SRFC | | SPC |
| | OLDEPESCA | | CECAF | | CIFAA | | SWIOFC | | WECAFC | | LCBC |
| | OSPESCA | | BCC | | COPPESAALC | | BOBP-IGO | | COMHAFAT-ATLAFGO | | |
| | OLDEPESCA | | CRFM | | COREP | | EIFAAC | | APFIG | | |
| | OSPESCA | | CRFM | | COREP | | FCWC | | SEAFDEC | | |

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(1) Overall relationship between CoP and IFB (RFMO)

Article 5

Relationship between this Agreement and the Convention and relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies

1. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention. Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention, including in respect of the exclusive economic zone and the continental shelf within and beyond 200 nautical miles.
2. This Agreement shall be interpreted and applied in a manner that does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies and that promotes coherence and coordination with those instruments, frameworks and bodies.

UN Resolution 72/249 of 24 December 2017 : To convene negotiation

6. Reaffirms that the work and results of the conference should be fully consistent with the provisions of the United Nations Convention on the Law of the Sea;
7. Recognizes that this process and its result should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies;

(2) Substantive provisions

Article 22 Establishment of area-based management tools, including marine protected areas

1. The Conference of the Parties, on the basis of the final proposal and the draft management plan, taking into account the contributions and scientific input received during the consultation process established under this Part, and the scientific advice and recommendations of the Scientific and Technical Body:
 - (a) Shall take decisions on the establishment of area-based management tools, including marine protected areas, and related measures;
 - (b) May take decisions on measures compatible with those adopted by relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies, in cooperation and coordination with those instruments, frameworks and bodies;
 - (c) May, where proposed measures are within the competences of other global, regional, subregional or sectoral bodies, make recommendations to Parties to this Agreement and to global, regional, subregional and sectoral bodies to promote the adoption of relevant measures through such instruments, frameworks and bodies, in accordance with their respective mandates.
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.

(i) What CoP can do when and where there is a competent RFMO?

Group A

- When there is a competent RFMO, CoP can make recommendation for that RFMO to take action.
- When there is not a competent RFMO, CoP can make decision to establish ABMT and related measures.

Group B

- Even there is a competent RFMO, CoP shall also take decisions on measures complementary to those adopted under RFMO.

(ii) Norway's proposal (2022.08.24)

CoP can establish ABMT, not depending on whether there is a competent IBF or not, but whether the IBF has the competence for the subject matter, while avoiding the duplication of the measures by CoP and IBF.

1. The Conference of the Parties, taking into account the contributions and scientific inputs received during the consultation process established under this Part:
 - a) Shall take decisions on the establishment of area-based management tools, including marine protected areas, and related measures on the basis of the final proposal and, in particular, the draft management plan,
 - b) May take decisions on measures complementary to those adopted under relevant legal instruments and, frameworks, and global, regional, subregional or sectoral instruments, frameworks and bodies, and
 - c) May, where proposed measures are within the competences of other global, regional, subregional or sectoral bodies, make recommendations to those bodies and members thereof, to promote the adoption of relevant measures through such bodies, in accordance with their respective mandates.

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.
3. The Conference of the Parties shall make arrangements for regular consultations to enhance cooperation and coordination with and among relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies, and members thereof, with regard to area-based management tools, including marine protected areas, as well as coordination with regard to related measures adopted under such instruments and frameworks and by such bodies.

(iii) Further discussion/negotiation on the Norway's proposal

- **Paragraph 1 (b)**

- **“complementary to”** ⇒ **“compatible with”**

- At the end, insert **“in cooperation and coordination with IBF”**.

[Insertion of “where the proposed measures are not within the competence of IFB” or “the proposed measures fall outside of the geographical area of IFB competence or concern the matter outside of IFB competence” was not accepted.]

- **Paragraph 2**

“Respect the competence of IFB” is maintained, but “not undermine IFB” is deleted because this element has been already addressed in Article 5, paragraph 2.

(iv) China's position

1. The Conference of the Parties, on the basis of the final proposal and the draft management plan, taking into account the contributions and scientific inputs received during the consultation process established under this Part, and the scientific advice and recommendations of the Scientific and Technical Body:
 - (a) Shall take decisions on the establishment of area-based management tools, including marine protected areas, and related measures;
 - ~~[(b) May take decisions on measures [complementary to] [compatible with] those adopted under relevant legal instruments and frameworks and by relevant global, regional, subregional and sectoral bodies;]~~
 - (bc) May, where proposed measures are within the competences of other global, regional, subregional or sectoral bodies, make recommendations to Parties to this Agreement and to global, regional, subregional and sectoral bodies to promote the adoption of relevant measures through such instruments, frameworks and bodies, in accordance with their respective mandates.
- 1 bis. Subject to paragraph 1 under this article, the Conference of the Parties may take decisions on measures compatible with those adopted under relevant legal instruments and frameworks by other global, regional, subregional and sectoral bodies, where the proposed measures are not within the competences of such bodies.

(v) Final outcome

Article 22 Establishment of area-based management tools, including marine protected areas

1. The Conference of the Parties, on the basis of the final proposal and the draft management plan, taking into account the contributions and scientific input received during the consultation process established under this Part, and the scientific advice and recommendations of the Scientific and Technical Body:
 - (a) Shall take decisions on the establishment of area-based management tools, including marine protected areas, and related measures;
 - (b) May take decisions on measures compatible with those adopted by relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies, in cooperation and coordination with those instruments, frameworks and bodies;
 - (c) May, where proposed measures are within the competences of other global, regional, subregional or sectoral bodies, make recommendations to Parties to this Agreement and to global, regional, subregional and sectoral bodies to promote the adoption of relevant measures through such instruments, frameworks and bodies, in accordance with their respective mandates.
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.

5. Decision-making (Article 23)

- Why special provisions in Part III (ABMT), not in general decision-making provision (Article 47, paragraph 5)?
- The CoP's decisions on ABMT can be expected to be made more often than those on other Parts. More detailed and practical provisions were considered necessary.
- Consensus-only option was discarded at an early stage of negotiation (except for China and Russia) in exchange for the need for opt-out clauses.

Article 23 Decision-making

1. As a general rule, the decisions and recommendations under this Part shall be taken by consensus.
2. If no consensus is reached, decisions and recommendations under this Part shall be taken by a three-fourths majority of the Parties present and voting, before which the Conference of the Parties shall decide, by a two-thirds majority of the Parties present and voting that all efforts to reach consensus have been exhausted.

Article 47 Conference of the Parties

5. The Conference of the Parties shall make every effort to adopt decisions and recommendations by consensus. Except as otherwise provided in this Agreement, if all efforts to reach consensus have been exhausted, decisions and recommendations of the Conference of the Parties on questions of substance shall be adopted by a two-thirds majority of the Parties present and voting, and decisions on questions of procedure shall be adopted by a majority of the Parties present and voting.

6. Opt-Out clause (Article 23, paragraphs 4-10)

Only in ABMT Part

Rationale : Function as a safeguard

- Making it easier for more nations to join the BBNJ Agreement.
- Addressing the concern that a particular ABMT may be adopted by the 3/4 majority vote which cannot be acceptable for certain Parties.
- Most of the developed nations supported the mechanism of opt-out, (EU, Australia, etc. wanted to put some limitations on the exercise of the opt-out clause.)
- CARICOM against the opt-out clause and this remained the last negotiation subject in ABMT Part.

Article 23 Decision-making

4. During the period of 120 days provided for in paragraph 3 above, any Party may, by notification in writing to the secretariat, make an objection with respect to a decision adopted under this Part, and that decision shall not be binding on that Party. An objection to a decision may be withdrawn at any time by written notification to the secretariat and, thereupon, the decision shall be binding for that Party 90 days following the date of the notification stating that the objection is withdrawn.

5. A Party making an objection under paragraph 4 above shall provide to the secretariat, in writing, at the time of making its objection, the explanation of the grounds for its objection, which shall be based on one or more of the following grounds:
 - (a) The decision is inconsistent with this Agreement or the rights and duties of the objecting Party in accordance with the Convention;
 - (b) The decision unjustifiably discriminates in form or in fact against the objecting Party;
 - (c) The Party cannot practicably comply with the decision at the time of the objection after making all reasonable efforts to do so.
6. A Party making an objection under paragraph 4 above shall, to the extent practicable, adopt alternative measures or approaches that are equivalent in effect to the decision to which it has objected and shall not adopt measures nor take actions that would undermine the effectiveness of the decision to which it has objected unless such measures or actions are essential for the exercise of rights and duties of the objecting Party in accordance with the Convention.

7. The objecting Party shall report to the next ordinary meeting of the Conference of the Parties following its notification under paragraph 4 above, and periodically thereafter, on its implementation of paragraph 6 above, to inform the monitoring and review under article 26.
8. An objection to a decision made in accordance with paragraph 4 above may only be renewed if the objecting Party considers it still necessary, every three years after the entry into force of the decision, by written notification to the secretariat. Such written notification shall include an explanation of the grounds of its initial objection.
9. If no notification of renewal pursuant to paragraph 8 above is received, the objection shall be considered automatically withdrawn and, thereupon, the decision shall be binding for that Party 120 days after that objection is automatically withdrawn. The secretariat shall notify the Party 60 days prior to the date on which the objection will be automatically withdrawn.
10. Decisions of the Conference of the Parties adopted under this Part, and objections to those decisions, shall be made publicly available by the secretariat and shall be transmitted to all States and relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies.

V. Mechanism to establish ABMT

Proposal on ABMT submitted to the secretariat based on the Annex I criteria (Article 19)



The secretariat will make the proposal publicly available and transmit to the Scientific and Technical Body (STB) for a preliminary review. The outcome of the STB review and a revised proposal by the proponent will be made publicly available. (Article 20)



The secretariat will engage in consultations with various stakeholders. The proponent will revise the proposal which will be submitted to STB who will make recommendations to CoP.

(Article 21)



Deliberation of the proposal by CoP



CoP will take decision on ABMT.

(Article 22, paragraph 1 (a) and (b))

2/3 majority
to decide that
the effort to
reach consensus
have been exhausted

(Article 23, paragraph 2)

3/4 majority
to adopt ABMT

No objection

Exercise of
the right to object

(Article 23, paragraphs 4-10)

where the proposals are within the
competences of IFB

CoP will make recommendations
to IFB to take action.

(Article 22, paragraphs 1 (c))

VI. Implications in fisheries governance

1. If and when competent RFMOs are doing good jobs for the conservation of marine biodiversity, including the protection of Vulnerable Marine Ecosystem (VME), these RFMOs will be trusted and can continue to function well without interference from CoP.
2. If not, interference of CoP in the field of fisheries management, or at least the pressures toward that direction will become stronger and these RFMOs may well fail to function and lose their *raison d'être*.

VII. Prospect for BBNJ Agreement

(As of October 2023)

	Adopted	Entered into force (Required number of ratification, etc.) [Years spent prior to the entry into force]	Number of Contracting Parties
UNCLOS	1982	1994 (60 nations) [12 years]	168 nations
UNCLOS Part 11 Implementation Agreement (Deep sea mining)	1994	1996 (40 nations) [2 years]	150 nations
UN Fish Stock Agreement	1995	2001 (30 nations) [6 years]	90 nations
BBNJ Agreement	2023	? (60 nations) [? Years]	?

BBNJ Agreement is open for signature from 20 September 2023 to 20 September 2025. As of 5 October 2023, 82 nations signed it, including all EU member states (27), UK, US, China, Australia, Brazil, Mexico.

Thank you!