

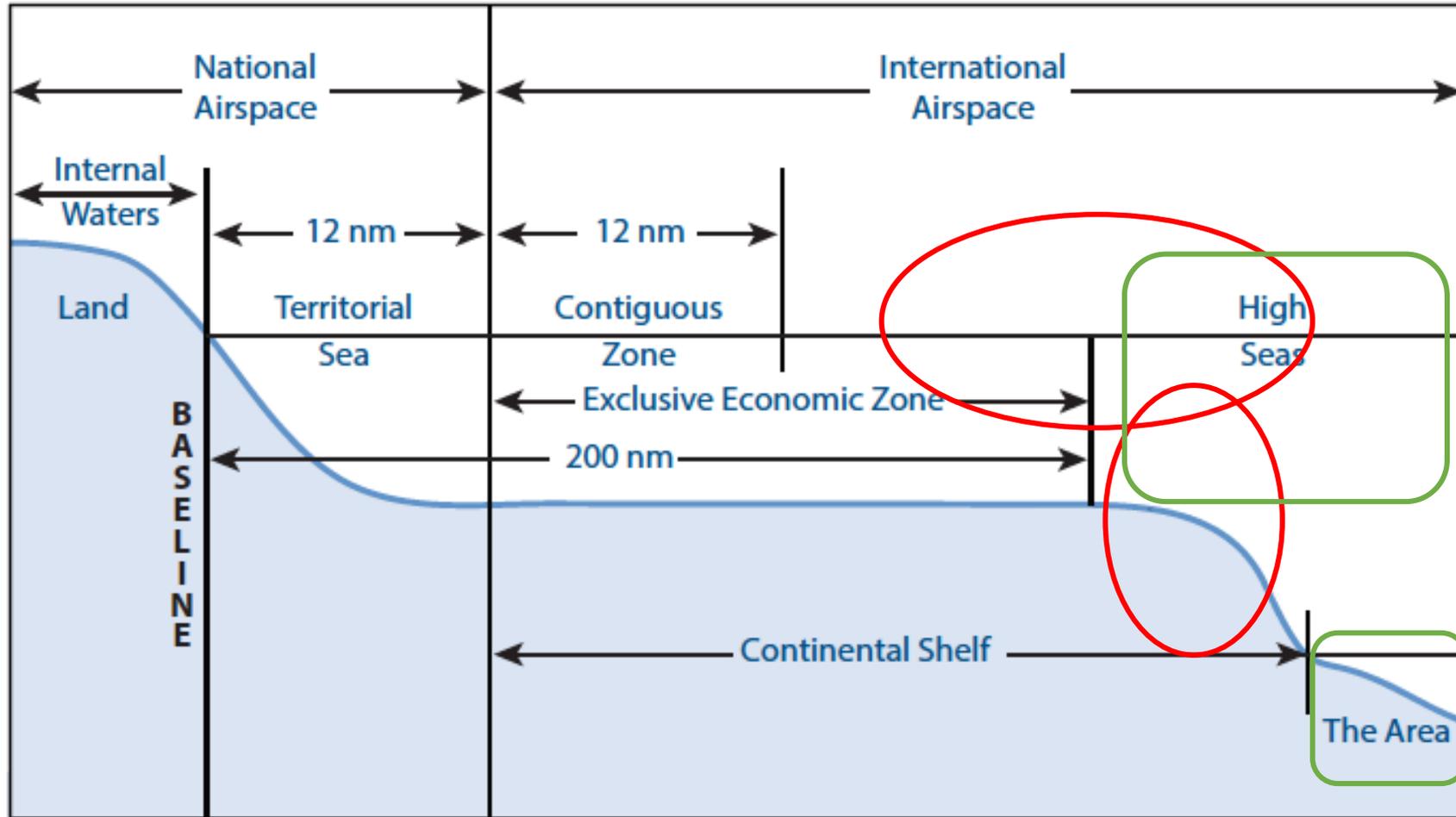


Clarifying Adjacency: What might it mean and how can it be reflected in the BBNJ treaty?

Joanna Mossop, Victoria University of
Wellington

and

Clive Schofield, World Maritime University



**Legal
Boundaries of
the Oceans and
Airspace**

**Horizontal
connectivity**

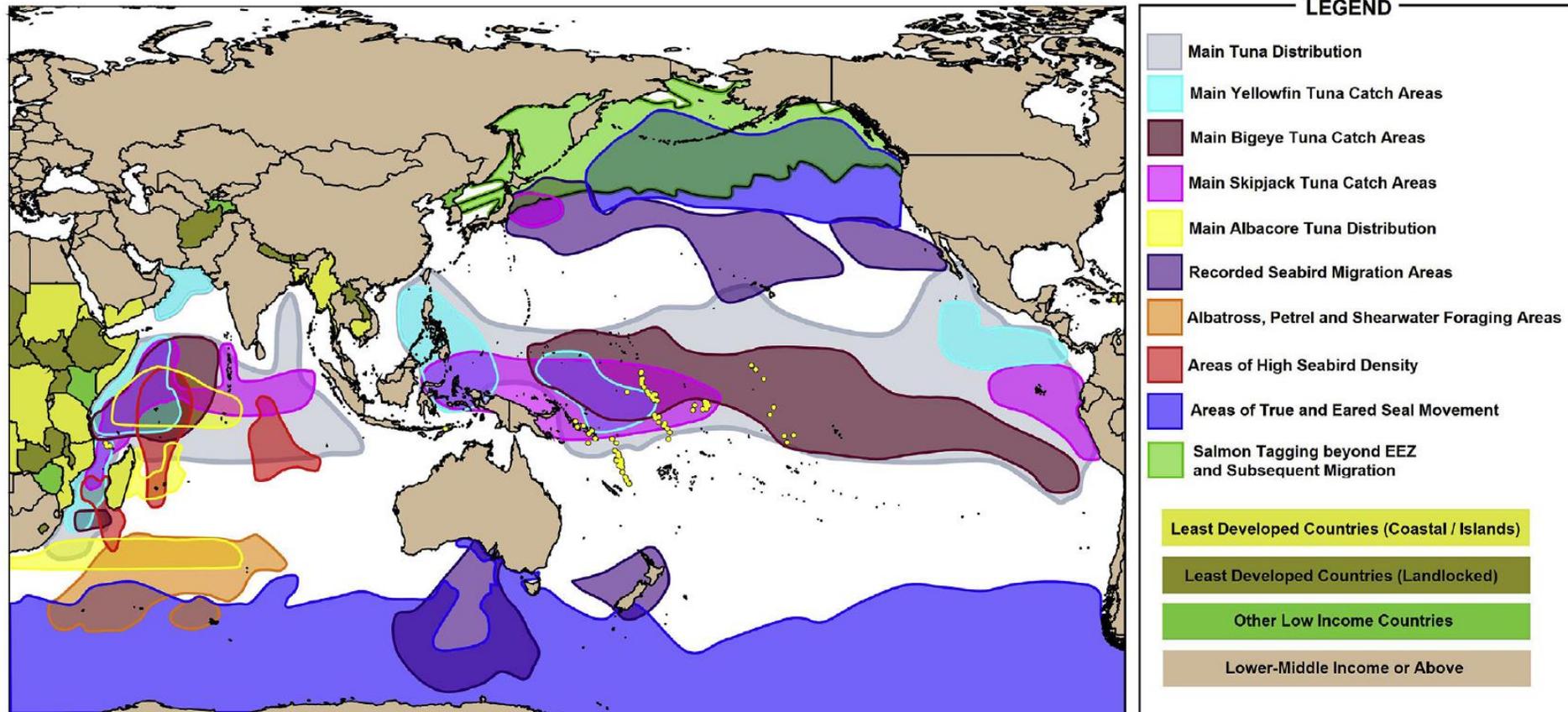
**Vertical
connectivity**

**Areas beyond
national
jurisdiction
(ABNJ)**

nm – nautical mile

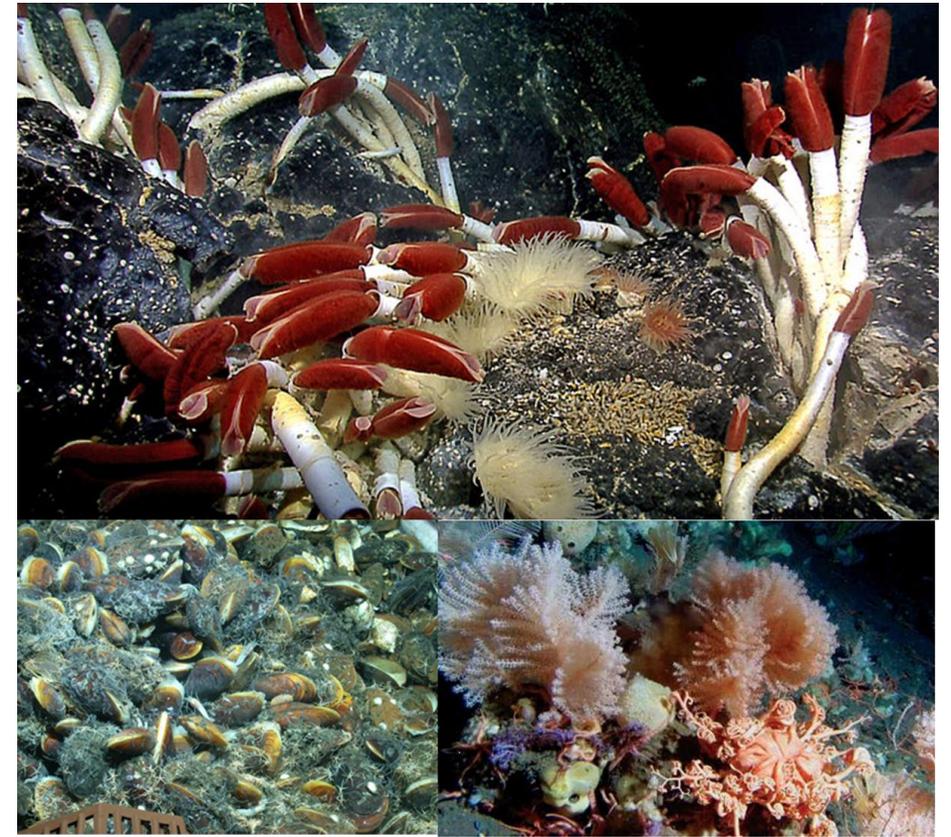
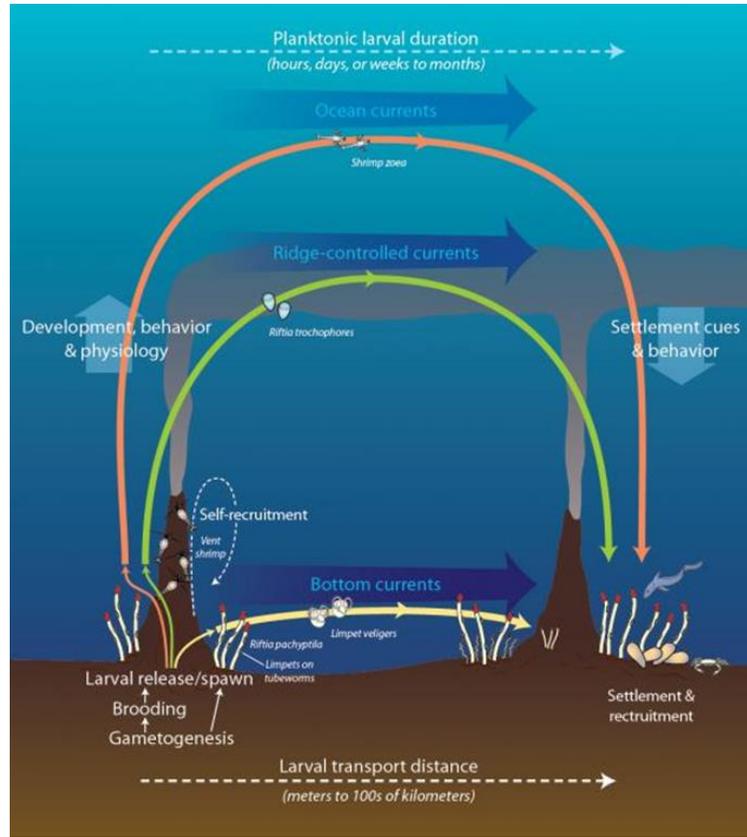
Horizontal connectivity

Popova et al,
Marine
Policy, 2019



Vertical Connectivity

Woods Hole Oceanographic Institution



POLICY BRIEF

Adjacency: How legal precedent, ecological connectivity, and Traditional Knowledge inform our understanding of proximity

Dunn, D.C., G.O. Crespo, M.Vierros, D. Freestone, E. Rosenthal, S. Roady, A. Alberini, A.-L. Harrison, A. Cisneros, J.W. Moore, M. R. Sloat, Y. Ota, R. Caddell, P.N. Halpin

“... [S]o long as adjacent States can prove that their management measures conserve marine biodiversity within or beyond their national jurisdiction, the over-arching conservation mandate of UNCLOS would support granting to those States greater influence over management of those ABNJ resources to which they lie adjacent. Under this approach, those qualified adjacent States would be allocated the primary responsibility to coordinate with existing sectoral and regional organizations to become the leading architects of new regional conservation agreements.”

CANADA

GUNBOAT DIPLOMACY

Canada fires the first shots in what may become an all-out fish war with Europe

In a blue-bellied bottom-reefer—a generalization fish with ugly, raised eyes that Canadian supermarkets can barely give away. Not the sort of prize, then, that would normally be expected to bring two nations to the edge of open warfare on the high seas. But last week, as the long-simmering turbot fishing dispute between Canada and Spain boiled over into a dramatic chase across a high-seas arena, a hunt of machine-gun fire and the seizure of a Spanish fishing vessel, it became obvious that these are not ordinary times. Ottawa, after all, had finally heeded demands from Atlantic Canada fishermen and politicians to stand tall and end foreign overfishing in the waters of Newfoundland. The week may have ended in a diplomatic moderate with Spanish trawlers threatening to resume catching turbot on the lip of Canada's 200-mile fishing zone and Fisheries Minister Brian Tobin promising more boat seizures if they did. But his loss of strength, at least for the moment, diminished the prestige of a minister whose department is surely in need of any sort of high-profile victory.

In a way, Tobin's build response actually carried little political risk. Foreign Affairs diplomats in Ottawa may have lashed with fervor on his attempts at gunboat diplomacy. But in his home province of Newfoundland, where 40,000 fishery workers have been put out of work by mechanization to save depleted cod and flounder stocks, he was universal praise for a tough stance against foreigners who they say have been pillaging fish in Canada's backyard for the past five years. Predictably, the 15-country European Union

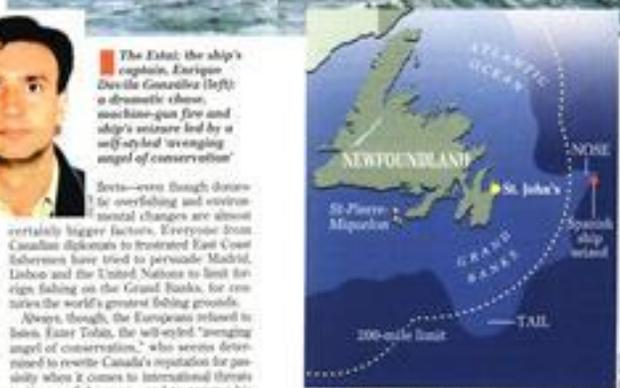
(EU), of which Spain is a member, accused Canada of "piracy" and flouting international law by interfering with fishing fleets outside Canada's 200-mile limit. And in truth, experts say that Ottawa has clearly stepped into uncharted legal waters with its decisive step. But, for the time being at least, Ottawa did not seem too concerned about legal niceties. "It's not the mark of a pirate," declared Tobin. "It's track out in desperation to save the last fish stock. It's the mark of a pirate."

In fact, at week's end, as the seized Spanish ship Estel and its crew were being escorted to St. John's by Fisheries and Canadian Coast Guard vessels, Ottawa was determined to stick to its guns—and, it appeared, to some effect. According to Tobin, 14 other Spanish vessels and a dozen Portuguese trawlers had withdrawn well beyond the turbot grounds on the Grand Banks. He threatened further arrests if the European vessels resume fishing in a zone just beyond Canada's 200-mile limit in parts of the Grand Banks known as the nose and the tail. He also warned that Canada was only prepared to resume seeking a negotiated settlement with the EU as long as its member nations agreed to honor a 90-day moratorium on fishing turbot in the disputed waters.

The Europeans have watched Canada draw a line in the sand before. Much of the blame for the ravaging of cod and other North Atlantic fish stocks during the late 1980s and 1990s has fallen on foreign



The Estel, the ship's captain, Enrique Davila Gonzalez (left) is dramatic chase, machine-gun fire and ship's seizure led by a self-styled 'avenging angel of conservation'



Estel—over a though dozens of overfishing and environmental changes are almost certainly bigger factors. Everyone from Canadian diplomats to frustrated East Coast fishermen have tried to persuade Madrid, Lisbon and the United Nations to limit foreign fishing on the Grand Banks, for centuries the world's greatest fishing grounds.

Always, though, the Europeans refused to listen. Enter Tobin, the self-styled 'avenging angel of conservation,' who seems determined to rewrite Canada's reputation for passivity when it comes to international threats to its own fisheries—and to reverse his own department's abysmal record of failing to order quota cuts for cod and other fish species until stocks had fallen to dangerously low levels.

Tobin had shown in the past that he was ready to back up his tough words with action. Last June, he stopped a \$1,200 fee on U.S. salmon fishermen navigating the coastal waters of British Columbia—a move that helped convince the Americans to resume negotiations on a new Pacific salmon treaty. Then, in August, Tobin ordered the seizure of two U.S. scallop ships fishing in Cana-



dian waters. In the process, he lashed the American government to concede Canadian jurisdiction over leviathan whalops on the continental shelf of Nova Scotia.

His latest target, Spanish factory trawler breeders catching turbot on Newfoundland's Grand Banks, Canada, actually, is not the first country to tackle Spain's fleet, which has a long-established reputation for ignoring international regulations and ravaging other country's fishing grounds. When the southwest African country of Namibia was independent in 1990, one of its first moves

was to declare a 200-mile exclusive zone and kick out the Spanish boats depleting the fish stocks off its coast.

Unfortunately, those six boats set sail for the area known as the nose and tail of the Grand Banks. Since the bulk of the Spanish fleet arrived in 1991, its turbot catches have averaged roughly 50,000 tons a year. Newfoundland fishermen, by comparison, landed just 3,000 tons last year, which raised fears about the future of one of the last remaining East Coast fisheries that has not been closed because of depleted stocks.

Ottawa thought it had resolved the problem when the Northwest Atlantic Fisheries Organization (NAFO) set a 1995 quota of 3,400 tons for EU boats, compared with 16,200 tons for Canada. Trouble is, Spanish and Portuguese fishermen feel they are entitled to far more. Their governments, through the EU, have challenged the NAFO quota. In the meantime, the dozens of EU boats operating off Newfoundland have been busy and, by Canada's reckoning, caught 7,000 tons of turbot in the first two weeks of 1995.

On March 3, Ottawa called for a 90-day moratorium on turbot fishing while Canada and the EU thrashed out the quota question. After EU officials ignored that request, Tobin decided it was time for some subtle rattling.



gun fire across the Estel seized boat was turned when the skipper faces distant fisheries conservancy will likely be flown.

The Europeans appear guarded by Canada's words. In an emergency ambassadorial call, a letter act against the seizure state of the European patched a naval vessel Newfoundland to power research ministry have plan to sign a previously co-operation pact with C

How far Tobin and Canada push the issue remains at least, the fisheries tough. He says he has the face of threats before the United States, which rage when he took strong fishermen. "The govern seized the consequences



Towards a functional approach to adjacency

Coastal states

- a) their existing rights are protected;
- b) that activities that could impact on activities and the marine environment within national jurisdiction only proceed after consultation with potentially affected states;
- c) that coastal states have access to mechanisms that allow them to propose measures to protect biodiversity that has an ecological and cultural connection for their people; and
- d) that the instrument provides a pragmatic and workable process that provides legal certainty and will not be bogged down in debates over interpretation.

Other states

- a) coastal states do not impact high seas biodiversity unduly negatively, and
- b) that high seas freedoms are not undermined.





What is an 'adjacent state'?

- Could be defined:
 - Geographically proximate and/or
 - Potentially affected state and/or
 - 'Range' state through which migratory species travel (see CMS Convention)
- Use specific language in the appropriate context
 - E.g. consultation with "potentially affected states" may be best for EIAs
 - For ABMT, may want to refer to adjacent states to indicate geographical proximity to EEZ and/or above continental shelf

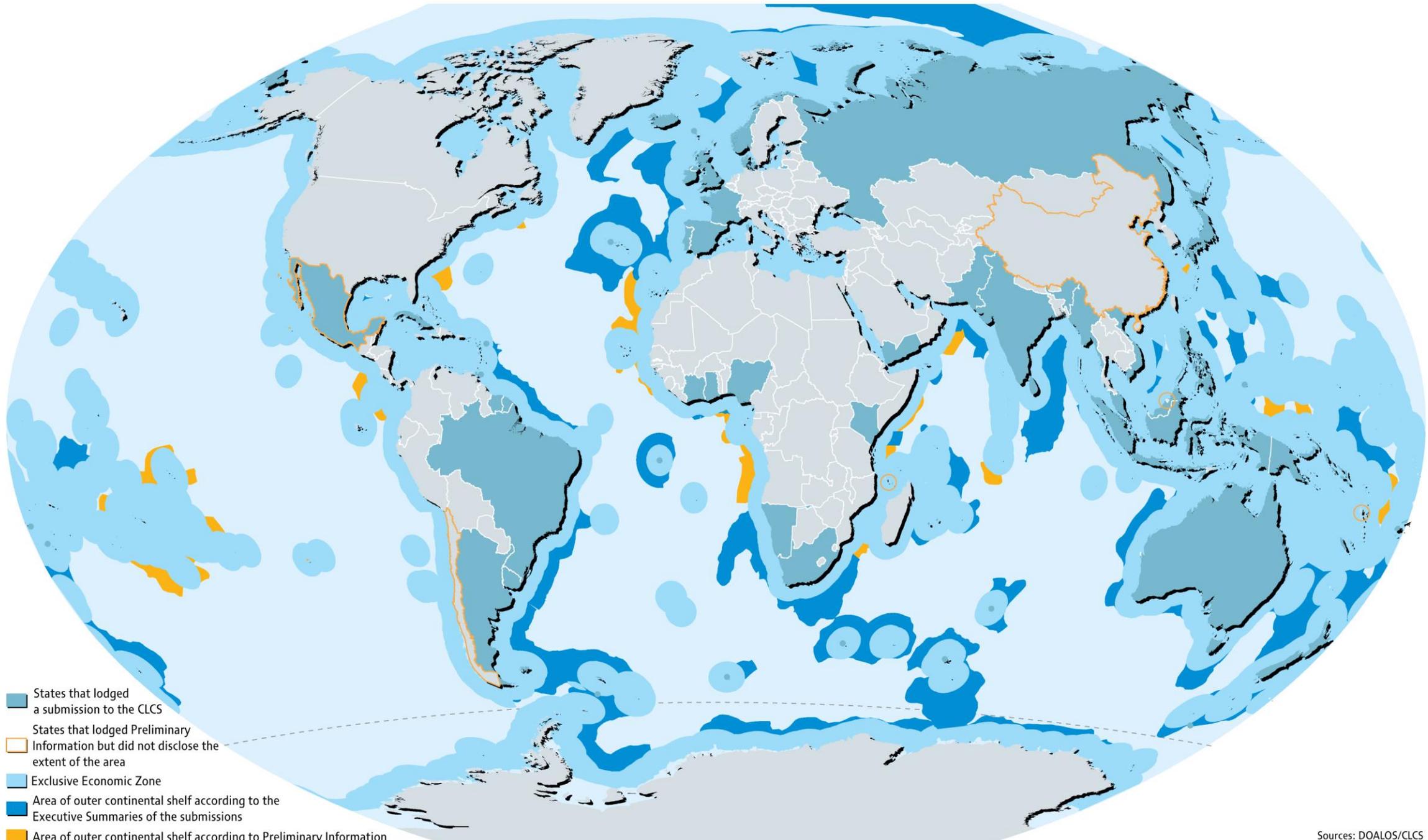
Relationship between adjacency and due regard

- ‘Due regard’ for the interests of coastal states provides procedural rights. E.g.
 - The impacts of activities or other measures on the high seas on areas under national jurisdiction should be part of the decision making process. Notification and consultation are important.
 - Process allowing coastal states to raise concerns about impacts of activities in ABNJ.
- Limited substantive rights, but arguably ‘due regard’ for the interests of coastal states would imply giving consideration to not undermining the coastal state measures for the conservation and sustainable use of marine biodiversity in areas within national jurisdiction. No veto.

The special case of the continental shelf

- On the extended CS, coastal states have sovereign rights to **some parts** of benthic ecosystems i.e. sedentary species. Therefore, have a legitimate interest in the conservation and sustainable use of the entire ecosystem.
- What would 'due regard' involve in this context?
 - Special role in the proposal and establishment of ABMTs to protect the benthic environment
 - Obligation to, **at least**, notify the coastal state if collecting samples of benthic marine species on an ECS. Possibility that the coastal state could impose conditions including sharing data, having observers, etc. **If directly sampling sedentary species, must get coastal state consent.**

Global distribution of outer continental shelf



- States that lodged a submission to the CLCS
- States that lodged Preliminary Information but did not disclose the extent of the area
- Exclusive Economic Zone
- Area of outer continental shelf according to the Executive Summaries of the submissions
- Area of outer continental shelf according to Preliminary Information

Conclusions

- Adjacency as conceptualised by Dunn et al unlikely to be accepted
- BBNJ treaty does need framework for managing the interface between areas within and beyond national jurisdiction. States can choose to give content to adjacency.
- Adjacency could:
 - respect the existing balance of rights
 - involve states having due regard for the rights and interests of other states, both within and beyond national jurisdiction
 - encourage a regional approach to oceans management, either under the COP or in existing bodies
 - require specific provision for issues arising from the intersection between areas within and beyond national jurisdiction. E.g. the extended continental shelf and overlapping claims, MGRs



Questions?

Joanna Mossop

Joanna.mossop@vuw.ac.nz