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SUMMARY

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**Caitlin Keating-Bitonti**
Analyst in Natural Resources Policy

# United Nations Convention on the Law of the Sea (UNCLOS): Living Resources Provisions

The United Nations (U.N.) Convention on the Law of the Sea (UNCLOS) established a comprehensive international legal framework to govern activities related to the global oceans. UNCLOS often is referred to as the *constitution of the oceans*. The convention was agreed to in 1982 and entered into force in 1994, after the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (commonly referred to as the *1994 Agreement*) amended many of the deep-seabed resources provisions that several industrialized nations found objectionable.

In 1994, President Clinton submitted UNCLOS and the 1994 Agreement as a package to the Senate for its advice and consent. To date, the Senate has not given advice and consent to accession to the convention and ratification of the 1994 Agreement. The Senate Committee on Foreign Relations has considered UNCLOS, most recently in the 112th Congress, when the committee held several hearings. The committee took no further action, and UNCLOS has since remained with the committee.

Measures pertaining to UNCLOS have been introduced in the 117th and 118th Congresses but have not been enacted to date. In general, introduced measures support U.S. accession to UNCLOS (e.g., H.Res. 361 and S.Res. 220 in the 117th Congress). Of relevance to living marine resources, a 117th Congress bill found that "as a party to [UNCLOS], the United States would be better able to participate in negotiations regarding the management of high seas fish stocks, migratory fish stocks, and marine mammals" (H.R. 3764).

In general, UNCLOS Articles 61-73 address living resources, including highly migratory species, marine mammals, and sedentary species, among others. Other relevant provisions include those that address living resources in the high seas (Articles 116-120) and protection of the marine environment (Articles 192-196), among other provisions. In general, these living resources provisions appear to reflect current U.S. domestic laws, such as the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. §§1801 et seq.), Shark and Fishery Conservation Act (P.L. 111-348), High Seas Driftnet Fishing Moratorium Protection Act (Title VI of the Fisheries Act of 1995; P.L. 104-43), and Marine Mammal Protection Act (16 U.S.C. §§1361 et seq.). In addition, the United States participates in several bilateral or multilateral international agreements that are viewed as consistent with UNCLOS (e.g., the 1995 U.N. Fish Stocks Agreement).

Stakeholders have differing views on what U.S. accession to UNCLOS would accomplish. As presently understood and interpreted, UNCLOS provisions generally appear to reflect current U.S. policy with respect to living marine resource management, conservation, and exploitation. Thus, some may not see a benefit of U.S. accession to UNCLOS, given that U.S. policies generally reflect its provisions. However, some experts view certain U.S. living resource laws as exceeding the obligations set forth in UNCLOS, which may complicate U.S. bilateral negotiations with nations party to UNCLOS. Some legal scholars also view many U.S. laws as reflecting "use-by-use" or "issue-by-issue" approaches for living marine resources, and thus view U.S. accession to UNCLOS as providing a more comprehensive U.S. approach.

Some stakeholders view U.S. accession as potentially complicating enforcement of domestic marine regulations, such as regulation of pollution from ships. Others remain concerned about UNCLOS language relating to arbitration and potential conflicts should the U.S. adopt the convention. These uncertainties in part reflect the absence of any comprehensive assessment of the social and economic impacts of UNCLOS implementation by the United States. Congress may wish to consider whether to require preparation of such an assessment by an executive branch agency.

Some in support of U.S. accession to UNCLOS contend that the convention's provisions could provide new privileges for the United States. One potential privilege could be the power to make declarations and statements, which could be useful in promulgating U.S. policy and U.S. interpretation of the convention. Another privilege would be U.S. participation in commissions that develop international ocean policy. Such commissions include the Commission on the Limits of the Continental Shelf, the International Seabed Authority, and the International Tribunal for the Law of the Sea. Participation in these bodies could help forestall future conflicts related to living resources.

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# Introduction

The United Nations (U.N.) Convention on the Law of the Sea (UNCLOS) established a comprehensive international legal framework to govern activities related to the global oceans.[1] It often is referred to as the *constitution of the oceans*. UNCLOS was the culmination of years of intense negotiation that began in 1973. UNCLOS was agreed to in 1982. However, it did not enter into force until 1994 because several industrialized nations, including the United States, objected to the convention's provisions that dealt with deep-seabed resources (minerals).[2] After the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (commonly referred to as the *1994 Agreement*) amended many of the provisions dealing with deep-seabed mineral resources,[3] UNCLOS entered into force on November 16, 1994, with 60 nations ratifying it.[4]

The United States signed the 1994 Agreement on July 29, 1994. Shortly thereafter, on October 7, 1994, President Clinton formally submitted UNCLOS, its annexes, and the 1994 Agreement as a package to the Senate for advice and consent to accession and ratification.[5] In the 103rd Congress (1993-1994), the Senate took no action on receipt of the UNCLOS package. To date, the Senate has not given advice and consent to accession and ratification, although, the Senate Committee on Foreign Relations has held hearings on UNCLOS (see "Congressional Actions").

UNCLOS and the 1994 Agreement are extensive, complex documents touching on a wide range of ocean policy issues and U.S. interests. UNCLOS addresses naval power, maritime commerce, coastal state interests, marine environment protection, marine scientific research, and international dispute settlement. Some members of the executive branch have stated that some (but not all) portions of UNCLOS reflect *customary international law*.[6] For example, Presidential Proclamation 5928 claimed a 12 nautical mile (nm) territorial sea and Presidential Proclamation 5030 claimed a 200 nm exclusive economic zone (EEZ), both in accordance with UNCLOS.[7] The

[1] United Nations (U.N.), *United Nations Convention on the Law of the Sea of 10 December 1982, Overview and Full Text*, at https://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm (hereinafter referred to as UNCLOS). UNCLOS builds on four 1958 Law of the Sea Conventions to which the United States is a party: the Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas, the Convention on the Continental Shelf, and the Convention on Fishing and Conservation of Living Resources of the High Seas.

[2] For instance, the United States, under the Reagan Administration, chose not to participate in UNCLOS in the early 1980s because of provisions dealing with deep-seabed resources beyond national jurisdiction. See Bernard Gwertzman, "U.S. Will Not Sign Sea Law Treaty," *New York Times*, July 10, 1982, p. 5.

[3] U.N., *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, at https://www.un.org/depts/los/convention_agreements/texts/agreement_part_xi/agreement_part_xi.htm (hereinafter referred to as the 1994 Agreement).

[4] Article 2 of the 1994 Agreement provides that it will be interpreted and applied together with UNCLOS as a single instrument. See Raul Pedrozo, "Reflecting on UNCLOS Forty Years Later: What Worked, What Failed," *International Law Studies*, vol. 99, 2022, p. 877.

[5] U.S. Congress, Senate, *United Nations Convention on the Law of the Sea, With Annexes, and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, with Annex*, 103rd Cong., 2nd sess., October 7, 1994, Treaty Doc. 103-39 (Washington, DC: GPO, 1994), pp. 298.

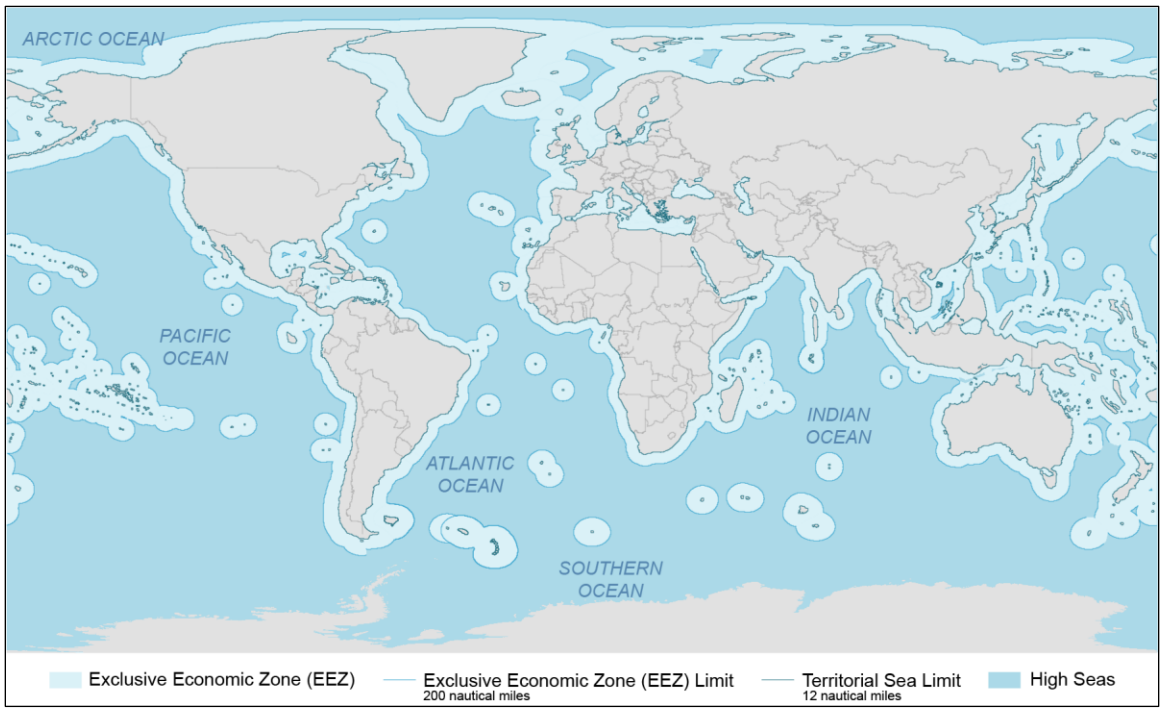
[6] According to Restatement of the Law (Third), the Foreign Relations of the United States, §102(2), "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."

[7] The President of the United States, "Proclamation 5928 of December 27, 1988: Territorial Sea of the United States of America," 54 *Federal Register* 777, January 9, 1989 and The President of the United States, "Proclamation 5030 of March 10, 1983: Exclusive Economic Zone of the United States of America," 48 *Federal Register* 10605, March 10, 1983.

U.S. EEZ is the ocean area located generally between 3 and 200 nm from the shoreline; the area of the ocean beyond the EEZ is referred to as the *high seas*.[8] **Figure 1** depicts these maritime zones.

**Figure 1. Selected Maritime Zones**

(as reflected in the United Nations Convention on the Law of the Sea)




**Source:** Congressional Research Service, using the Sovereign Limits database (sovereignlimits.com).

**Notes:** The figure is an illustration only and not for official purposes of identifying specific boundaries for the high seas, exclusive economic zones (EEZs), or territorial sea limits. Darker blue areas represent the high seas (i.e., areas beyond national jurisdiction). Lighter blue areas represent EEZs, within which coastal nations have sovereign rights over the exploration, exploitation, conservation, and management of both living and nonliving natural resources. The dark blue line outlining the continents and island nations denotes the 12 nautical mile territorial sea; however, due to the scale of the map, it is not possible to denote the waters of the territorial sea.

The U.S. government, particularly the U.S. Coast Guard, currently enforces U.S. and international living marine resources laws (i.e., those concerning fish, shellfish, and marine mammals) in the U.S. EEZ. The responsibility extends off both the Atlantic and Pacific coasts as well as off the coasts of Hawaii, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States exercises sovereignty. The U.S. Coast Guard also enforces U.S. and international fishing and living resources laws in "key areas of the high seas,"[9] such as areas of regional fisheries management organizations (RFMOs) to which the United States is a party.[10] Recognizing the existing level of U.S. commitment to living marine resources,

[8] Under the Submerged Lands Act (43 U.S.C. §§1301 et seq.), state waters in most cases extend seaward three nautical miles (nm) from the coast; for Texas and the Gulf Coast of Florida, they extend farther, to three marine leagues (approximately nine nm).

[9] U.S. Coast Guard, *Illegal, Unreported, and Unregulated Fishing Strategic Outlook*, September 2020, p. 19.

[10] Regional fisheries management organizations (RFMOs) are established to conserve and manage certain species or to (continued...)

most stakeholders contend that U.S. accession to UNCLOS would not impose new U.S. obligations, commitments, or encumbrances involving living resources and their management.[11] Most stakeholders also view that no new domestic legislation would be required to implement the living resources provisions of UNCLOS.[12] This view has been asserted by both those supporting and opposing U.S. accession to UNCLOS, but for differing reasons.

This report describes provisions of UNCLOS that relate to living resources (i.e., those concerning fish, shellfish, and marine mammals) and discusses how these provisions may align with current U.S. policy.

# Background on U.S. Administration Positions and Congressional Actions

The Clinton Administration submitted UNCLOS, its annexes, and the 1994 Agreement as a package to the Senate in the 103rd Congress, as noted. This section sets out subsequent Administration and congressional action.

## Administration Positions

In general, Administrations that followed the Clinton Administration have supported U.S accession to UNCLOS and ratification of the 1994 Agreement. The George W. Bush Administration expressed support for U.S. accession to UNCLOS, with then-President Bush saying that joining UNCLOS would "secure U.S. sovereign rights over extensive marine resources, including the valuable natural resources they contain," and would serve other purposes.[13] In the 111th Congress, then-Secretary of State Hillary Clinton, at her confirmation hearing before the Senate Committee on Foreign Relations, acknowledged that U.S. accession to UNCLOS would be an Obama Administration priority.[14] At the 40th anniversary of the Law of the Sea Convention, the Biden Administration "reiterated the United States' continued view that much of the convention reflects customary international law, and [the United States'] steadfast

manage fishing activities occurring within a specific geographic region of the high seas. RFMOs operate as treaty-based multilateral bodies whose agreements are binding upon their members. Member nations are required to adhere to management and conservation measures developed and agreed to by parties of the RFMO.

[11] For example, see the opening remarks of Representative Tom Lantos in U.S. Congress, House Committee on International Relations, *The United Nations Convention on the Law of the Sea*, 108th Cong., 2nd sess., May 12, 2004, H.Hrg. 108-136 (Washington, DC: GPO 2004), p. 5, and the written response from the State Department in U.S. Congress, Senate Committee on Foreign Relations, *United Nation's Convention on the Law of the Sea (Treaty Doc. 103-39)*, 110th Cong., 1st sess., September 27 and October 4, 2007, S.Hrg. 110-592 (Washington, DC: GPO 2008), p. 34.

[12] For example, see, Jennifer Talhelm, "Curbing International Overfishing and the Need for Widespread Ratification of the United Nations Convention on the Law of the Sea," *North Carolina Journal of International Law & Commercial Regulation*, vol. 25 (2000), pp. 381-418.

[13] White House, Office of the Press Secretary, "President's Statement on Advancing U.S. Interests in the World's Oceans," press statement, May 15, 2017, at https://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070515-2.html.

[14] U.S. Congress, Senate Committee on Foreign Relations, *Nomination of Hillary R. Clinton To Be Secretary of State*, 111th Cong., 1st sess., January 13, 2009, S.Hrg. 111-249 (Washington, DC: GPO, 2010), pp. 113-114, 182, and 218 (hereinafter referred to as Senate Hearing 111-249).

commitment to upholding the rights, freedoms, and obligations of all U.N. Member states as reflected in the convention."[15]

## Congressional Actions

The Senate Committee on Foreign Relations held hearings on UNCLOS in the 108th (2003),[16] 110th (2007), and 112th (2012) Congresses. In the 108th Congress, the Senate Committee on Foreign Relations favorably reported UNCLOS and "recommend[ed] that the Senate give its advice and consent to accession to the Convention and ratification of the [1994] Agreement."[17] However, the Senate did not consider UNCLOS on the floor. In the 110th Congress, the Senate Committee on Foreign Relations held two hearings on UNCLOS: one hearing with U.S. governmental officials and a second with nongovernmental witnesses.[18] The committee favorably reported UNCLOS on December 19, 2007, and again recommended "that the Senate give its advice and consent to accession to the Convention and ratification of the 1994 Agreement."[19] The Senate did not take up UNCLOS. During then-Secretary of State Clinton's confirmation hearing, then-Senator John Kerry, the committee chair, confirmed that UNCLOS also would be a committee priority, but the committee took no action on UNCLOS during the 111th Congress.[20] In the 112th Congress, the Committee on Foreign Relations held three hearings on UNCLOS but took no further action on whether to recommend that the full Senate give its advice and consent on the convention.[21] UNCLOS has since remained with the Senate Committee on Foreign Relations, which has not held a hearing on the treaty in more than a decade.

In recent Congresses, some Members have expressed an interest in U.S. accession to UNCLOS. For example, in the 117th Congress, some Members "call[ed] upon the United States Senate to give its advice and consent to the ratification of the United Nations Convention on the Law of the Sea" but did not identify living resources as a reason.[22] Section 801 of Title VIII of the Ocean-Based Climate Solutions Act of 2022, introduced in the 117th Congress, addressed UNCLOS and found that "as a party to the Convention, the United States would be better able to participate in negotiations regarding the management of high seas fish stocks, migratory fish stocks, and marine mammals."[23] In the 118th Congress, some Members expressed a sense of Congress that deep seabed mining should not occur until the U.N. adopts a binding regulatory framework in accordance with the obligation to protect the marine environment and prevent harm to its living

[15] U.S. Department of State, "Assistant Secretary Monica Medina Remarks: The Constitution of the Sea," December 8, 2022, at https://www.state.gov/assistant-secretary-monica-medina-remarks-un-convention-on-the-law-of-the-sea-40th-anniversary/.

[16] October 14 and 21, 2003, hearings printed in U.S. Congress, Senate Committee on Foreign Relations, *United Nations Convention on the Law of the Sea*, 108th Cong., 2nd sess., March 11, 2004, S.Exec.Rpt. 108-10 (Washington, DC: GPO, 2004), pp. 23-187.

[17] U.S. Congress, Senate Committee on Foreign Relations, *United Nations Convention on the Law of the Sea*, 108th Cong., 2nd sess., March 11, 2004, S.Exec.Rpt. 108-10 (Washington, DC: GPO, 2004), p. 1.

[18] U.S. Congress, Senate Committee on Foreign Relations, *United Nation's Convention on the Law of the Sea (Treaty Doc. 103-39)*, 110th Cong., 1st sess., September 27 and October 4, 2007, S.Hrg. 110-592 (Washington, DC: GPO 2008), pp. 1-267 (hereinafter referred to as Senate Hearing 110-592).

[19] U.S. Congress, Senate Committee on Foreign Relations, *Convention on the Law of the Sea*, 110th Cong., 1st sess., December 19, 2007, S.Exec.Rpt. 110-09 (Washington, DC: GPO, 2007), p. 1.

[20] Senate Hearing 111-249, p. 55.

[21] U.S. Congress, Senate Committee on Foreign Relations, *The Law of the Sea Convention (Treaty Doc. 103-39)*, 112th Cong., 2nd sess., May 23, June 14, and June 28, 2012, S.Hrg. 112-654 (Washington, DC: GPO 2013), pp. 1-318.

[22] See H.Res. 361 and S.Res. 220 in the 117th Congress.

[23] See H.R. 3764 in the 117th Congress.

resources under UNCLOS.[24] Other Members have expressed concerns with U.S. accession to UNCLOS based on its language regarding arbitration and potential complications of enforcement of domestic marine regulations, among other reasons. (See "Issues for Congress.")

# Living Resources Provisions

The living resources provisions of UNCLOS recognize international interdependence on these resources and provide a framework for their cooperative and sustainable management. These provisions, comprising Articles 61 through 73, deal specifically with

- conservation (Article 61) and utilization (Article 62),
- straddling and transboundary fish stocks (Article 63),
- highly migratory species (Article 64),
- marine mammals (Article 65),
- anadromous stocks (Article 66),[25]
- catadromous species (Article 67),[26]
- sedentary species (Article 68),[27]
- rights of landlocked nations (Article 69) and geographically disadvantaged nations (Article 70), along with relevant issues in Articles 71 and 72, and
- enforcement by coastal nations (Article 73).

In addition, sedentary continental shelf species are further considered in Article 77(4), living resources on the high seas are considered in Articles 116-120, protection of the marine environment (including habitats) is provided by Articles 192-196, and dispute settlement related to living resources is addressed in Article 297.

UNCLOS living resource provisions generally reflect current U.S. policy with respect to living marine resource management, conservation, and exploitation as established primarily in the Magnuson-Stevens Fishery Conservation and Management Act (MSA; 16 U.S.C. §§1801 et seq.), the Shark and Fishery Conservation Act (P.L. 111-348), and the High Seas Driftnet Fishing Moratorium Protection Act (Title VI of the Fisheries Act of 1995; P.L. 104-43).[28]

## Articles 61 and 62: Conservation and Utilization of Living Resources

UNCLOS recognizes the broad authority of a coastal nation over living resources within its territorial sea and EEZ to a maximum of 200 nm seaward from the baselines used to measure the

[24] See H.R. 4536 in the 118th Congress.

[25] *Anadromous species* spend most of their lives in the ocean but enter freshwater to spawn (e.g., salmon).

[26] *Catadromous species* spend most of their lives in freshwater but enter the ocean to spawn (e.g., American eel).

[27] *Sedentary species* are sessile organisms that live on the seabed or within the seabed sediments (e.g., clams).

[28] For example, see Austin Dieter, "From Harbor to High Seas: An Argument for Rethinking Fishery Management Systems and Multinational Fishing Treaties," *Wisconsin International Law Journal*, vol. 32 (2014), pp.726-727 (hereinafter referred to as Dieter, 2014) and Patricia Bauerlein, "The United Nations Convention on the Law of the Sea & (and) U.S. Ocean Environmental Practice: Are We Complying with International Law," Loyola of Los Angeles International & Comparative Law Review, vol. 17 (1995), p 914 (hereinafter referred to as Bauerlein, 1995).

territorial sea.[29] In managing living resources, coastal nations are to determine allowable catches and promote optimal resource use within their EEZs. However, the terms *maximum sustainable yield* (Article 61) and *optimum utilization* (Article 62) are open to interpretation and may require further definition to provide additional guidance on how to attain sustainable harvest and management of living resources.[30] Some experts define *maximum sustainable yield* as the highest possible annual catch that can be continuously taken from a stock under existing environmental conditions that still allows the population to sustain itself and keeps the stock at the level producing the maximum growth of its population.[31]

In general, with the exception of Article 65, UNCLOS supports optimum utilization of the resource.[32] MSA provides one definition of *optimum*, with respect to the yield from a fishery, and defines it as

> the amount of fish which- (A) will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems; (B) is prescribed on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant social, economic, or ecological factor; and (C) in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery.

UNCLOS does not explicitly recognize nonconsumptive management objectives of living resources (e.g., whale watching, scuba diving, wildlife photography, biodiversity conservation), which in some cases might reduce harvests to substantially less than optimal or maximum sustainable yield levels. Articles 61(2) and 61(3) provide a mandatory obligation to ensure living resources are not endangered by overexploitation and harvested species' populations are maintained or restored to levels that can produce their maximum sustainable yield. In addition, the phrase "as qualified by relevant environmental and economic factors," appearing in Article 61(3), provides a basis for harvesting at rates both above or below the maximum sustainable yield. However, the subsequent examples in Article 61(3) of how this qualification is to be interpreted do not acknowledge that other reasons may exist for refraining altogether from harvesting to achieve nonconsumptive goals or to respond to moral or ethical concerns (e.g., beliefs that large sharks, dolphins, and whales should not be killed). Regardless, determination of allowable catch within a coastal nation's EEZ is not subject to compulsory procedures leading to binding dispute settlement (refer to "Provisions Related to Dispute Settlement for Living Resources" below).

Under UNCLOS Article 62(2), if a coastal nation is unable to harvest the entire allowable catch within its EEZ, other nations must be given access to the surplus of allowable catch, subject to appropriate terms and conditions. Resource populations are to be managed such that they can produce harvests at maximum sustainable yield levels. MSA was crafted to closely parallel most of the draft provisions of UNCLOS for living resources.[33]

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[29] Coastal nation sovereign rights over sedentary species (see "Article 68: Sedentary Species," below) may extend beyond 200 nm, to the extent of the continental shelf.

[30] Some nations (e.g., Norway) have interpreted the terms broadly to encompass commercial whaling.

[31] See Athannassios C. Tsikliras and Rainer Froese, "Maximum Sustainable Yield," in *Encyclopedia of Ecology*, 2nd ed., ed. Brian D. Fath (Townson, MD: Elsevier, 2019), pp. 108-115.

[32] The approach taken in Article 65 of UNCLOS explicitly recognizes coastal nations' rights to prohibit the exploitation of marine mammals.

[33] Initial work on UNCLOS began in 1958, so the essence of many provisions had been agreed to by 1976, when the Fishery Conservation and Management Act (P.L. 94-265) was enacted. See U.N., "1958 Geneva Convention on the Law of the Sea," at https://legal.un.org/avl/ha/gclos/gclos.html.

UNCLOS, in Article 61(4), encourages attention to species associated with or dependent on harvested species. Article 61(4) states that "the coastal state shall take into consideration the effects on species associated with or depended upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened." An *associated species* refers to a species caught as bycatch with the harvested species, and a *dependent species* refers to a species that has a predator-prey relationship with the harvest species (e.g., Steller sea lions are dependent on Pacific cod).[34] If interpreted narrowly, this provision might encompass incidental bycatch concerns by calling for consideration of these associated or dependent species so that their reproduction is not seriously threatened. For example, sea turtles are associated with harvested species because they can drown when caught in fishing gear.[35] Article 61 provides some protection for threatened or endangered populations, and most sea turtle species are recognized internationally as being either threatened or endangered.[36] However, the "shall take into consideration" language of Article 61(4) does not mandate strong protective measures. Article 194(5) encourages habitat protection beneficial to threatened and endangered species.

## Article 63: Straddling and Transboundary Fish Stocks

*Straddling fish stocks* migrate between or occur within both national EEZs and the high seas. Under UNCLOS Article 63, straddling fish stocks are to be managed through multilateral international agreements involving one or more coastal nations through whose waters these fish stocks range, as well as any nations fishing these stocks on the high seas. An example of a multilateral agreement on a straddling fish stock is the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (Treaty Doc. 103-27). The United States acted in concert with UNCLOS Article 63 in the negotiation of this multilateral agreement, which governs the harvest and management of fish stocks migrating between international waters in the Bering Sea (the *donut hole*[37]) and adjacent waters under national jurisdiction.[38] The 1995 U.N. Fish Stocks Agreement more specifically addresses straddling fish stocks (see textbox on "1995 United Nations Fish Stocks Agreement," below).[39]

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[34] National Oceanic and Atmospheric Administration (NOAA), "Steller Sea Lion," at https://www.fisheries.noaa.gov/species/steller-sea-lion.

[35] See NOAA, "Endangered Ocean: Sea Turtles," at https://oceantoday.noaa.gov/endoceanseaturtles/.

[36] Extensive protection for sea turtles, in the form of trade restrictions, derives from their inclusion in the appendixes of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (commonly known as CITES). For additional information on CITES, see CRS Report RL32751, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*, by Pervaze A. Sheikh.

[37] The *donut hole* refers to an area of the Arctic high seas (international waters) that is surrounded by the EEZs of the United States, Russia, Norway (via Svalbard), Denmark (via Greenland), and Canada.

[38] The United States, the People's Republic of China, Japan, the Republic of Korea, the Republic of Poland, and the Russian Federation are parties to the convention (NOAA, "Annual Conference of the Parties to the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea," at https://www.fisheries.noaa.gov/alaska/international-affairs/annual-conference-parties-convention-conservation-and-management-pollock-resources). The Senate agreed to a resolution of advice and consent to ratification of this convention on October 7, 1994 (U.S. Congress, Senate, *Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea*, 103rd Cong., 2nd sess., April 25, 1994, Treaty Doc. 103-27). This agreement entered into force on December 8, 1995 (U.S. Department of State, "4. Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, Done at Washington June 16, 1994," at https://www.state.gov/donut-hole-agreement).

[39] U.N. Document A/CONF.64/37, Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, September 8, 1995 (hereinafter referred to as the 1995 U.N. Fish Stocks Agreement). The agreement entered into force on December 11, 2001.

*Transboundary fish stocks* occur within the EEZs of two or more coastal nations.[40] Transboundary fish stocks are to be managed cooperatively through bilateral international agreements involving neighboring coastal nations through whose waters these fish stocks range. An example of a bilateral agreement on a transboundary fish stock is the 2003 Agreement Between the Government of the United States and the Government of Canada on Pacific Hake/Whiting (Treaty Doc. 108-24), which aims to manage Pacific whiting (also known as Pacific hake).[41] The Pacific Whiting Act (P.L. 109-479) implemented the agreement and established a catch level for Pacific whiting corresponding to standards and procedures agreed to by the United States and Canada.[42]

### 1995 United Nations Fish Stocks Agreement

Excessive fisheries exploitation on the high seas (international waters) is one factor that can impact sustainable use and management efforts within nations' exclusive economic zones (EEZs). The 1982 United Nations (U.N.) Convention on the Law of the Sea (UNCLOS) recognized that nations fishing on the high seas needed to seek agreement on the management of straddling fish stocks (UNCLOS Article 63) and highly migratory fish stocks (UNCLOS Article 64). This issue was first addressed comprehensively in 1993, when the U.N. Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks was convened. On August 4, 1995, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (commonly known as the 1995 U.N. Fish Stocks Agreement) was adopted.[a] The United States and 25 other nations signed the agreement on December 4, 1995, the first day it was open for signature, and the 1995 U.N. Fish Stocks Agreement entered into force upon ratification of the 30th nation on December 11, 2001.[b] The U.S. Senate agreed to a resolution of advice and consent to ratification of this agreement on June 27, 1996.[c]

The 1995 U.N. Fish Stocks Agreement elaborates on the UNCLOS principle that nations should cooperate to ensure the long-term conservation of, and promote the objective of the optimum utilization of, fisheries resources both within and beyond the EEZ. In general, the provisions of the 1995 U.N. Fish Stocks Agreement that apply to the United States, as a party to the agreement, include conservation and management measures (Articles 5-7); mechanisms for international cooperation, such as regional fisheries management organizations (RFMOs; Articles 8-16); duties of flag nations (Article 18); compliance and enforcement (Articles 19-23); and dispute settlement (Articles 27-32).

The 1995 U.N. Fish Stocks Agreement establishes general obligations for nations to take an ecosystem approach to conservation and management, recognizing that changes in one area of an ecosystem can impact other areas. For example, an ocean ecosystem may span the high seas and the EEZ of one or more coastal nations. Overfishing on the high seas can impact adjacent EEZs. Under the agreement, fisheries management approaches should be based on the best scientific information available to maintain a maximum sustainable yield. In addition, nations are required to have their commercial fishing vessels accurately collect and share data.

The 1995 U.N. Fish Stocks Agreement mostly applies to areas beyond the limits of the EEZ. On the high seas, RFMOs manage and conserve fish stocks of a particular species or group of species in a particular region. The 1995 U.N. Fish Stocks Agreement provides an enhanced framework for RFMOs' conservation and management of straddling and highly migratory fish stocks.

Under the 1995 U.N. Fish Stocks Agreement, party nations are obligated to regulate "the activities of vessels flying their flag which fish for such stocks on the high seas."[d] In addition, the agreement gives party nations the right to monitor and inspect vessels of other nation parties to ensure compliance with internationally agreed fishing regulations, including regulations established by RFMOs. For the United States, the U.S. Coast Guard is the lead agency for at-sea enforcement of living marine resource laws within the U.S. EEZ and areas of the high seas.[e]

[40] See Juliano Palacios-Abrantes et al., "The Transboundary Nature of the World's Exploited Marine Species," *Scientific Reports*, vol. 10 (October 2020), p. 1.

[41] The agreement is commonly known as the Pacific Hake/Whiting Treaty or the Pacific Whiting Treaty. U.S. Department of State, Agreement Between the Government of the United States of America and the Government of Canada on Pacific Hake/Whiting, TIAS 08-625, November 21, 2003. For more information about United States and Canada bilateral fisheries agreements, see CRS Report R47620, *Canada: Background and U.S. Relations*, coordinated by Peter J. Meyer.

[42] 16 U.S.C. §§7001-7010.

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a. U.N., *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, at https://www.un.org/depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm (hereinafter referred to as 1995 U.N. Fish Stock Agreement).

b. U.N., "The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as from 11 December 2001) Overview" at https://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm.

c. U.S. Congress, Senate, *Agreement for the Implementation of the United Nations Convention of the Law of the Sea of 10 December 1982 Relating to Fish Stocks*, 104th Cong., 2nd sess., February 1996, Treaty Doc. 104-24 (Washington, DC: GPO 1996).

d. Article 7 of the 1995 U.N. Fish Stock Agreement.

e. U.S. Coast Guard, *Illegal, Unreported, and Unregulated Fishing Strategic Outlook*, September 2020, p. 19.

## Article 64: Highly Migratory Species

*Highly migratory species* live primarily in the water of the open ocean and can travel long distances crossing domestic and international boundaries.[43] UNCLOS Article 64 calls for cooperative management of highly migratory species among nations to ensure their conservation and to promote their optimum harvest, within and beyond the EEZ.[44] Prior to 1990, the U.S. position on certain highly migratory species was contrary to that of UNCLOS. In particular, the United States did not claim national jurisdiction over tunas.[45] However, the Fishery Conservation Amendments of 1990 (P.L. 101-627) modified U.S. policy to be consistent with UNCLOS by amending MSA to extend national jurisdiction to include tunas.[46] In addition, the Western and Central Pacific Fisheries Convention Implementation Act (Title V of P.L. 109-479) defined *highly migratory fish stocks* as "all fish stocks of the species listed in Annex 1 of the 1982 [UNCLOS], except sauries, occurring in the Convention Area, and such other species of fish as the [Western and Central Pacific] Commission may determine."[47]

Conservation and sustainable management of highly migratory species (e.g., tuna), through RFMOs, aim to protect fish stocks from overfishing and help rebuild those with below-target population levels. The United States is a member to nine RFMOs, as well as other international fisheries agreements that function similarly (e.g., the 1995 U.N. Fish Stocks Agreement), that manage highly migratory species consistent with UNCLOS obligations.[48]

[43] NOAA, "Highly Migratory Species," at https://www.fisheries.noaa.gov/highly-migratory-species.

[44] Annex I to UNCLOS provides a list of species designated as *highly migratory*, including tunas, mackerel, marlins, swordfish, dolphin, oceanic sharks, and cetaceans, among others.

[45] Conflicts between certain Pacific Island nations and the United States arose in the 1980s due to differing interpretations of the treatment of highly migratory species, such as tuna, in UNCLOS Article 64(1). See B. Martin Tsamenyi, "The Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America: The Final Chapter in United States Tuna Policy," *Brooklyn Journal of International Law*, vol. 15 (1989), pp. 189-190.

[46] See footnote 44.

[47] *Sauries* are long, slender fish found in temperate ocean waters. 16 U.S.C. §6901(8).

[48] Email correspondence with NOAA, Congressional Affairs Specialist, Office of Legislative and Intergovernmental Affairs, February 8, 2023. For more information about U.S. participation in RFMOs, see CRS Report R47065, *China's Role in the Exploitation of Global Fisheries: Issues for Congress*.

## Article 65: Marine Mammals

UNCLOS Article 65 allows coastal nations to manage and regulate marine mammals through their domestic laws more strictly than otherwise provided by UNCLOS. In addition, Article 65 mandates international cooperation for conservation of marine mammals. UNCLOS Article 120 extends this mandate to marine mammals on the high seas. In the case of cetaceans (e.g., whales, dolphins),[49] nations are to work through "appropriate international organizations" for the mammals' conservation. Protection for whales is provided through a 1986 global moratorium on commercial whaling imposed by the International Whaling Commission (IWC) under the authority of the International Convention for the Regulation of Whaling;[50] the global moratorium is still in place today.[51] Additional protection for most of the large whales in the form of trade restrictions derives from their inclusion in appendixes of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (commonly known as CITES).[52]

Congress enacted the Marine Mammal Protection Act of 1972 (MMPA; 16 U.S.C. §§1361 et seq.) in response to concerns that human activities were adversely impacting certain marine mammal species.[53] According to the National Oceanic and Atmospheric Administration, the U.S. government was the first government to establish a domestic law aimed at protecting ecosystems and conserving species at the scale of the MMPA.[54] The MMPA "established a national policy to prevent marine mammal species and population stocks from declining beyond the point where they ceased to be significant functioning elements of the ecosystems of which they are a part."[55] Although the MMPA became law before the adoption of UNCLOS, the MMPA generally aligns with UNCLOS Articles 65 and 120.

## Article 66: Anadromous Stocks

*Anadromous species* spend most of their lives in the ocean but enter freshwater to spawn.[56] Salmon, sturgeon, and striped bass are some of the anadromous species of interest to the United States. UNCLOS Article 66 assigns primary interest in and responsibility for anadromous fish stocks to the nations in whose rivers the stocks originate. Fishing for anadromous stocks is prohibited on the high seas, except in cases where there may be harm to the local economy. Coastal nations through whose waters anadromous fish migrate are required to cooperate with the nations wherein the anadromous stocks originated. Enforcement of regulations concerning anadromous fish stocks beyond the EEZ is to be accomplished through negotiated agreements. The United States participates in a cooperative bilateral salmon agreement with Canada as well as broader regional agreements for both Atlantic and Pacific stocks.[57] For example, the Treaty

[49] Both whales and dolphins are identified on the list of highly migratory species provided in Annex I to UNCLOS.

[50] International Whaling Commission (IWC), "Commercial Whaling," at https://iwc.int/management-and-conservation/whaling/commercial.

[51] Ibid.

[52] For additional information on the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, see CRS Report RL32751, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*, by Pervaze A. Sheikh.

[53] 16 U.S.C. §1361(1).

[54] NOAA, National Marine Fisheries Service, "Laws & Policies: Marine Mammal Protection Act," at https://www.fisheries.noaa.gov/topic/laws-policies/marine-mammal-protection-act.

[55] Ibid.

[56] National Park Service, "Anadromous Fish," at https://www.nps.gov/olym/learn/nature/anadromous-fish.htm.

[57] Treaty Between the Government of the United States of America and the Government of Canada Concerning Pacific (continued...)

Between the Government of the United States of America and the Government of Canada Concerning Pacific Salmon (Treaty Doc. 99-2) aims to prevent overfishing and provide for optimum production of transboundary stocks of Pacific salmon occurring between southeastern Alaska, British Columbia, and Washington.[58]

## Article 67: Catadromous Species

*Catadromous species* spend most of their lives in freshwater but enter the ocean to spawn. American eels are the primary catadromous species of interest to the United States. UNCLOS gives the coastal nations where these species spend most of their lives the responsibility for managing them and prohibits harvesting them on the high seas. International cooperation is required where these species migrate through more than one EEZ.

## Article 68: Sedentary Species

*Sedentary species* are sessile organisms that live on the seabed or within the seabed sediments. At the harvestable stage, these organisms are immobile or are unable to move except when in physical contact with the seabed. Coastal nation jurisdiction over sedentary species may extend beyond 200 nm, to the extent of the continental shelf (as defined in Article 76). UNCLOS Article 77(4) describes sedentary species but does not list which species are to be considered sedentary. This ambiguity over which species are to be considered sedentary has proved controversial over access to certain species. For example, in July 1994, Canada seized two U.S. fishing vessels for harvesting Icelandic scallops on extensions of the Canadian continental shelf, outside Canada's 200-nm jurisdiction.[59] U.S. officials conceded in November 1994 that the Canadian interpretation that Icelandic scallops were sedentary was correct.[60] Given current differences of opinion and limited data, additional scientific research may be required to better understand the sedentary nature of certain shellfish, such as scallops.[61] Protection for sedentary species is further promoted by UNCLOS Articles 136, Common Heritage of Mankind, and 145, Protection of the Marine Environment (for more information see "Articles 192-196: Protection of the Marine Environment" below).

## Articles 69 and 70: Rights of Landlocked and Geographically Disadvantaged Nations (and Articles 71 and 72)

UNCLOS provides special access rights to surplus living resources within coastal nation EEZs for nearby developing nations that are landlocked (Article 69) or geographically disadvantaged (Article 70). No nations meeting these criteria currently exist within the same region as the United States. Under UNCLOS, regional, subregional, or bilateral agreements would be

Salmon, Ottawa, 1985 (TIAS 11091); Convention for the Conservation of Salmon in the North Atlantic Ocean, Reykjavik, 1982 (TIAS 10789); and Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, Moscow, 1992 (Treaty Doc. 102-30).

[58] The Pacific Salmon Treaty Act of 1985 (P.L. 99-5) implements the 1985 Treaty Between the Government of the United States of America and the Government of Canada Concerning Pacific Salmon (TIAS 11091).

[59] Ted McDorman, "Canada's 1994 International Fisheries Actions," *The Northern Mariner*, vol. 5, no. 2 (April 1995), p. 54.

[60] Ibid.

[61] Scallops swim by producing an expulsion of water from between their two valves by rapid contraction of the adductor muscle (Isabelle Tremblay et al., "When Behavior and Mechanics: Scallop Swimming Capacities and Their Hinge Ligament," *Journal of Shellfish Research*, vol. 34, no. 2 (August 2015), p. 203).

negotiated to guide the provision of an equitable allocation to any such disadvantaged nation. Regardless, the coastal nation alone determines whether any harvestable surplus exists within its EEZ, and such a decision may not be challenged through dispute settlement procedures. Under UNCLOS Article 71, the provisions of Articles 69 and 70 do not apply to a coastal nation whose economy is overwhelmingly dependent on living resources within its EEZ. In addition, UNCLOS Article 72 prohibits the transfer of rights provided under Article 69 and 70 to third-party nations.

### Article 73: Enforcement by Coastal Nations

UNCLOS Article 73 gives coastal nations the ability to take necessary measures to ensure compliance with their national laws and regulations for living resources that are in conformity with UNCLOS. Measures may include vessel boarding and inspection, arrest and judicial proceedings, and vessel detention. The U.S. Coast Guard is the lead agency responsible for enforcing U.S. and international fishing and living resources laws in the U.S. EEZ.

## Provisions Related to Marine Habitats and the Marine Environment

### Articles 116-120: High Seas

Among other UNCLOS articles pertaining to the High Seas, Article 116 preserves the freedom for all nations to fish on the high seas.[62] Articles 117-119 obligate parties to adopt national conservation measures and to cooperate with other nations for the conservation and management of high seas living resources. Article 120 applies the obligations of Article 65, which addresses the conversation of marine mammals, to the high seas (see "Article 65: Marine Mammals" above).

The United States participates in other international agreements that aim to be compliant with UNCLOS. For example, the 1995 U.N. Fish Stocks Agreement addresses specific concerns for the conservation and management of high seas stocks in a manner consistent with UNCLOS. As another example, the Senate agreed to a resolution of advice and consent to ratification for the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas on October 7, 1994.[63] This agreement, developed under the leadership of the U.N. Food and Agriculture Organization, reflects the intent of UNCLOS to ensure compliance with international conservation and management measures by aiming to enhance the role of flag nations over their fishing vessels.[64] This agreement entered into force on April 24, 2003; as of August 2023, there are 45 parties to the agreement.[65]

[62] According to UNCLOS Article 87, the high seas are open to all nations with the freedom to navigate, fly over, lay submarine cables and pipelines, construct artificial islands and other installations, fish, and conduct scientific research.

[63] U.S. Congress, Senate, *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, 103rd Cong., 2nd sess., April 25, 1994, Treaty Doc. 103-24 (Washington, DC: GPO 1994).

[64] U.N. Food and Agriculture Organization, "Illegal, Unreported and Unregulated (IUU) Fishing," at https://www.fao.org/iuu-fishing/international-framework/fao-compliance-agreement/en/.

[65] For updated status, see https://treaties.un.org/pages/showDetails.aspx?objid=080000028007be1a.

## Articles 192-196: Protection of the Marine Environment (and related articles)

Among other UNCLOS articles pertaining to protection of the marine environment, Article 192 states that a general obligation of parties to UNCLOS is to protect and preserve the marine environment, and Article 193 states that resource exploitation is to be conducted within this obligation to protect and preserve the marine environment. These obligations become more specific in UNCLOS Article 194(5), which calls attention to measures "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."[66] In addition, Article 196 directs parties to prevent intentional or accidental introduction of harmful alien or exotic species by all measures necessary.

Several UNCLOS articles address pollution of the marine environment. Parties are to prevent, reduce, and control pollution of the marine environment from any source (Article 194), including pollution from land-based sources (Article 207), dumping (Article 210), and vessels (Article 211). In addition, parties are to prevent pollution arising from or in connection with seabed activities under national jurisdiction (Article 208) and in areas beyond national jurisdiction (Article 209). Article 195 directs parties to not transfer hazards to prevent pollution of the marine environment.

Article 206 requires an environmental impact assessment (EIA) where parties have reasonable grounds to believe that planned activities may lead to substantial pollution or harmful changes to the marine environment. On June, 19, 2023, the U.N. adopted the Biodiversity Beyond National Jurisdiction Agreement (BBNJ Agreement; commonly referred to as the High Seas Treaty), an agreement developed under the UNCLOS rubric.[67] The BBNJ Agreement provides an EIA framework for identifying and evaluating the potential impacts of an activity in areas beyond national jurisdiction. If a party to the BBNJ Agreement determines that an activity under its control may pollute or cause significant harm to the marine environment, the party is required to conduct an EIA. Further, the BBNJ Agreement directs parties to communicate EIA reports to the clearing-house mechanism established by the agreement, thereby making reports publicly available as obligated under UNCLOS Article 205.[68]

UNCLOS Article 145 addresses the protection of the marine environment, including the seabed, ocean floor, and subsoil, in areas beyond the limits of national jurisdiction. Article 145 also addresses the conservation of natural resources on the international seabed to prevent damage to flora and fauna. Article 136 further supports this aim, stating that the seabed, ocean floor, and subsoil beyond the limits of national jurisdiction are the "common heritage of mankind." In UNCLOS, the common heritage principle establishes that all activities occurring on the international seabed (e.g., seabed mining) must be carried out for the benefit of all humanity, including future generations (Article 140).[69] This implies an obligation to protect marine habitats, such as seamounts and hydrothermal vents, that support unique ecosystems.

[66] Article 61(4) provides additional protection, encouraging attention to bycatch and incidental catch by calling for commercial fishermen to consider associated or dependent species so that those species' reproduction is not seriously threatened.

[67] U.N., "Intergovernmental Conference on an International Legally Binding Instrument 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 (General Assembly Resolution 72/249)," at https://www.un.org/bbnj/.

[68] For more information about the Biodiversity Beyond National Jurisdiction Agreement, see CRS In Focus IF12283, *The Biodiversity Beyond National Jurisdiction Agreement (High Seas Treaty)*, by Caitlin Keating-Bitonti.

[69] For more information on international seabed mining, see CRS Report R47324, *Seabed Mining in Areas Beyond National Jurisdiction: Issues for Congress*, by Caitlin Keating-Bitonti.

# Provisions Related to Dispute Settlement for Living Resources

UNCLOS established the International Tribunal for the Law of the Sea (ITLOS), composed of 21 independent members, to adjudicate disputes arising out of the interpretation or application of UNCLOS. [70] UNCLOS Article 297(3)(a) offers assurances that domestic EEZ fisheries matters cannot be forced to undergo compulsory dispute settlement proceedings leading to binding decisions under UNCLOS:

> the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

UNCLOS Article 297(3)(b) provides that disputes can be submitted to conciliation when a coastal nation has

- failed to properly conserve and manage EEZ living resources such that the resources become seriously endangered,
- arbitrarily refused to determine allowable catches and capacity to harvest species desired by a foreign nation, or
- arbitrarily refused to allocate a declared surplus in a living resource to any foreign nation.

However, Article 297(3)(c) prohibits a conciliation commission from substituting its discretion for that of the coastal nation. Conciliation procedures are outlined in Articles 4-8 of Annex V, and 7(2) states that a conciliation commission's report, including its conclusions and recommendations, is not binding.

# Issues for Congress

An issue for Congress is whether the Senate should give its advice and consent to accession to UNCLOS and ratification of the 1994 Agreement. As presently understood and interpreted, UNCLOS provisions generally appear to reflect current U.S. policy with respect to living marine resource management, conservation, and exploitation.[71] Based on these interpretations, some Members of Congress support U.S. accession to UNCLOS as it would generally not impose significant new U.S. obligations, commitments, or encumbrances involving living resources and their management.[72] Some of this opinion even view select U.S. living resource laws as exceeding

[70] See Annex VI of UNCLOS. International Tribunal for the Law of the Sea (ITLOS), "Members," at https://www.itlos.org/en/main/the-tribunal/members/.

[71] See, for example Testimony of John B. Bellinger III, former Legal Adviser, U.S. Department of State, Partner, Arnold & Porter, LLP, in U.S. Congress, Senate Committee on Foreign Relations, *The Law of the Sea Convention (Treaty Doc. 103-39)*, 112th Cong., 2nd sess., May 23, June 14, and June 28, 2012, S.Hrg. 112-654 (Washington, DC: GPO 2013); Testimony of Professor Bernard H. Oxman, Professor of Law, University of Miami School of Law, in U.S. Congress, Senate Committee on Foreign Relations, *United Nation's Convention on the Law of the Sea (Treaty Doc. 103-39)*, 110th Cong., 1st sess., September 27 and October 4, 2007, S.Hrg. 110-592 (Washington, DC: GPO 2008), pp. 91-92; and in the 117th Congress, Section 801(a) of H.R. 3764.

[72] See in the 117th Congress, Section 801(b) of H.R. 3764.

the obligations set forth in UNCLOS.[73] In cases where U.S. law exceeds UNCLOS in its stringency, persuading another nation to adhere to U.S. standards could be more challenging than in cases where U.S. law and UNCLOS were equivalent in stringency. Such cases may complicate some U.S. bilateral negotiations.[74] However, some legal scholars view many U.S. laws as reflecting "use-by-use" or "issue-by-issue" approaches for living marine resource management, conservation, and exploitation,[75] and thus accession to UNCLOS could provide a more comprehensive U.S. approach. Conversely, some may not see a benefit of U.S. accession to UNCLOS, given that U.S. policies generally reflect its provisions.

A second issue for Congress is whether U.S. accession to UNCLOS could complicate enforcement of existing domestic marine regulations. Some Members of Congress have expressed concerns that this could be the case.[76] For example, the Vessel Incidental Discharge Act of 2018 (Title IX of P.L. 115-282 ) addresses ballast water and charges the U.S. Coast Guard with enforcing regulations consistent with vessel discharge standards established by the Environmental Protection Agency. If UNCLOS is interpreted such that invasive species are covered under the broad definition of pollution,[77] the United States (and other coastal nations) could be constrained as to what preventive measures could be imposed on ships operating outside U.S. territorial waters, according to some observers.[78] Any potential complications associated with the enforcement of existing domestic marine regulations might in part reflect the absence of any comprehensive assessment of the social and economic impacts of UNCLOS implementation by the United States. Congress may wish to consider whether to require preparation of such an assessment by an executive branch agency.

A third issue for Congress is the potential impact of language concerning arbitration. Some Members of Congress remain concerned about UNCLOS language regarding arbitration.[79] While other stakeholders point out that "U.S. firms and citizens cannot take advantage of the arbitration processes established within the Convention to defend their rights against foreign encroachment or abuse."[80] In 1995, the Department of State recommended that the United States choose special arbitration for all categories of disputes.[81]

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[73] For example, in the 117th Congress, Section 801(a) of H.R. 3764 and Bauerlein, 1995, p. 901.

[74] See, Bauerlein, 1995, p. 916.

[75] Bauerlein, 1995, p. 901.

[76] For example, the regulation of pollution from ships. See questions posed by Senator Inhofe in U.S. Congress, Senate Committee on Foreign Relations, *The Law of the Sea Convention (Treaty Doc. 103-39)*, 112th Cong., 2nd sess., May 23, June 14, and June 28, 2012, S.Hrg. 112-654 (Washington, DC: GPO 2013), p. 134.

[77] For example, zebra mussels were introduced into the Great Lakes via ballast water of transoceanic cargo ships in the 1980s (U.S. Geological Survey, "What Are Zebra Mussels and Why Should We Care About Them?," at https://www.usgs.gov/faqs/what-are-zebra-mussels-and-why-should-we-care-about-them).

[78] For further discussion of this issue, see the testimony of Vice Admiral Roger T. Rufe, Jr., U.S. Coast Guard (ret.), President, The Oceans Conservancy, before the Senate Committee on Foreign Relations during Senate Hearing 108-498 (U.S. Congress, Senate Committee on Foreign Relations, *United Nations Convention on the Law of the Sea*, 108th Cong., 2nd Sess., March 11, 2004, S.Exec.Rept. 108-10, pp. 127-128).

[79] For example, see questions posed by Senator Lee in Senate Committee on Foreign Relations, *The Law of the Sea Convention (Treaty Doc. 103-39)*, 112th Cong., 2nd sess., May 23, June 14, and June 28, 2012, S.Hrg. 112-654 (Washington, DC: GPO 2013), pp. 228-229.

[80] See, prepared statement of Ambassador John Negroponte in Senate Committee on Foreign Relations, *The Law of the Sea Convention (Treaty Doc. 103-39)*, 112th Cong., 2nd sess., May 23, June 14, and June 28, 2012, S.Hrg. 112-654 (Washington, DC: GPO 2013), p. 180.

[81] U.S. Department of State, *Law of the Sea Convention: Letters of Transmittal and Submittal and Commentary*, Dispatch Supplement, vol. 6, no. 1, February 1995, p. 4.

A fourth issue for Congress is whether U.S. accession to UNCLOS could provide new privileges for the United States. One potential privilege could be the power to make declarations and statements, as provided for in Article 310 of UNCLOS.[82] Supporters of U.S. accession contend that such declarations and statements could be useful in promulgating U.S. policy and putting other nations on notice of U.S. interpretation of UNCLOS.[83] Another potential privilege could be the participation in commissions developing international ocean policy. Such commissions include the Commission on the Limits of the Continental Shelf (CLCS), International Seabed Authority (ISA), and ITLOS.[84] Proponents of U.S. accession to UNCLOS maintain that U.S. participation in the development of policies and practices of the CLCS, ISA, and ITLOS could help to forestall future problems related to living resources. However, the United States has taken on federal initiatives that adhere to the standards of some of these commissions and has participated as an observer delegate in some of these commissions without adoption of the convention.

- **Commission on the Limits of the Continental Shelf.** The CLCS is tasked with evaluating the claim of a coastal nation party to UNCLOS for an area of the continental shelf beyond 200 nm.[85] As an example, a nation could use their extended continental margin to establish new marine protected areas or extend the boundaries of existing ones. UNCLOS Article 76 allows party nations to make a submission to the CLCS concerning the extent of their continental shelves. Although the United States is not a party to UNCLOS, the United States gathers and analyzes data to determine the extent of its continental shelf through a U.S. federal initiative, called the U.S. Extended Continental Shelf Project, that is generally viewed as consistent with international law, according to the U.S. State Department.[86] The Department of the Interior currently leases areas on the extended continental shelf and U.S. accession to UNCLOS might make those decisions subject to approval by CLCS.[87] It remains unclear how the CLCS and international community would receive a submission from the United States.

[82] Although reservations would have a more substantial legal effect, they are prohibited by Article 309 of UNCLOS.

[83] See, prepared statement of John Norton Moore, Walter L. Brown Professor of Law, and Director, Center for Oceans Law and Policy, University of Virginia, in U.S. Congress, Senate Committee on Foreign Relations, *United Nations Convention on the Law of the Sea*, 108th Cong., 2nd sess., March 11, 2004, S.Hrg. 108-498 (Washington, DC: GPO, 2004), p. 78.

[84] For example, see the prepared statements of Jack N. Gerard, President and CEO, American Petroleum Institute, Secretary of State Hillary Rodham Clinton and Ambassador John Negroponte in U.S. Congress, Senate Committee on Foreign Relations, *The Law of the Sea Convention (Treaty Doc. 103-39)*, 112th Cong., 2nd sess., May 23, June 14, and June 28, 2012, S.Hrg. 112-654 (Washington, DC: GPO 2013) and the prepared statement of Professor of Law, University of Miami School of Law, in U.S. Congress, Senate Committee on Foreign Relations, *United Nation's Convention on the Law of the Sea (Treaty Doc. 103-39)*, 110th Cong., 1st sess., September 27 and October 4, 2007, S.Hrg. 110-592 (Washington, DC: GPO 2008), pp. 96-97.

[85] U.N. "Commission on the Limits of the Continental Shelf (CLCS)," at https://www.un.org/depts/los/clcs_new/clcs_home.htm.

[86] U.S. Department of State, "U.S. Extended Continental Shelf Project," at https://www.state.gov/u-s-extended-continental-shelf-project/.

[87] Those opposing U.S. accession to UNCLOS point to the Department of the Interior's action to lease extended continental shelf areas in the Gulf of Mexico without approval of the CLCS. For example, see the prepared statement of Steven Groves in U.S. Congress, Senate Committee on Foreign Relations, *The Law of the Sea Convention (Treaty Doc. 103-39)*, 112th Cong., 2nd sess., May 23, June 14, and June 28, 2012, S.Hrg. 112-654 (Washington, DC: GPO 2013).

- **International Seabed Authority.**[88] The ISA is authorized as a U.N. organization to regulate parties to UNCLOS conducting mineral-related activities occurring in areas beyond national jurisdiction.[89] Part of the ISA's mandate is to "ensure the effective protection of the marine environment from harmful effects that may arise from deep-seabed related activities," under the obligations of UNCLOS Article 145.[90] As a party of UNCLOS, the United States would receive a permanent appointment of a U.S. national to its 36-Member Council.[91] In addition, the United States could nominate a U.S. national to other ISA bodies, such as its Legal and Technical Commission. Part of the responsibilities of the ISA's Legal and Technical Commission is to address matters related to protection of the marine environment, such as reviewing *areas of particular environmental interest* (i.e., no mining zones), preparing EIAs, and developing exploration and exploitation regulations for seabed mining,[92] all of which may have implications for deep-sea life. However, as a U.N. member nation, the United States has an observer delegate status for the ISA, and to date, has provided input to the ISA in the drafting of environmental regulations pertaining to seabed mining without having adopted the convention.[93]

## Author Information

Caitlin Keating-Bitonti
Analyst in Natural Resources Policy

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[88] For more information about the International Seabed Authority (ISA), see CRS Report R47324, *Seabed Mining in Areas Beyond National Jurisdiction: Issues for Congress*, by Caitlin Keating-Bitonti.

[89] ISA, "About ISA," at https://www.isa.org.jm/about-isa/.

[90] Ibid.

[91] Annex to the 1994 Agreement, Section 3, Paragraph 15. See, Testimony of John B. Bellinger III, in U.S. Congress, Senate Committee on Foreign Relations, *The Law of the Sea Convention (Treaty Doc. 103-39)*, 112th Cong., 2nd sess., May 23, June 14, and June 28, 2012, S.Hrg. 112-654 (Washington, DC: GPO 2013).

[92] ISA, "The Legal and Technical Commission," at https://www.isa.org.jm/organs/the-legal-and-technical-commission/.

[93] The U.S. delegation to the ISA includes representatives from the Department of State's Bureau of Oceans and International Environmental and Scientific Affairs, NOAA, BOEM, and the U.S. Geological Survey.

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