10-1-1995

The United Nations Convention on the Law of the Sea & (and) U.S. Ocean Environmental Practice: Are We Complying with International Law

Patricia C. Bauerlein

Recommended Citation
Available at: http://digitalcommons.lmu.edu/ilr/vol17/iss4/8
I. INTRODUCTION

The health of the planet depends on the health of the oceans. Even if we were to focus only on the marine environment off our own coasts, it would be impossible or extremely expensive to protect [the ocean environment] without active and consistent regulation by other governments both near and far.¹

The United Nations Convention on the Law of the Sea ("UNCLOS")² became international law on November 16, 1994,³ one year after the sixtieth signatory ratified the treaty.⁴ World delegates, recognizing their interdependence in the global marine environment, joined together at the convention determined to create a new "legal order" designed to protect and preserve the marine environment for future generations.

As international law, UNCLOS imposes an obligation on nation-states to adopt, implement, and enforce national legislation to protect the world marine environment.⁵ In addition, nations must work together internationally to achieve that same goal. When signing an Agreement that modified Part XI of UNCLOS in July of 1994,⁶ the U.S. Ambassador to the United Nations,

---

⁴. Id.
Madeline Albright, announced the U.S. intent to seek congressional ratification of the treaty.\(^7\) If Congress ratifies the treaty,\(^8\) the United States will become a nation-state bound by the terms of the treaty as a whole.\(^9\)

UNCLOS remains the "strongest comprehensive global environmental treaty" ever negotiated.\(^10\) Basic obligations established in the treaty require nation-states not only to enact domestic legislation, but also to cooperate through multilateral or bilateral arrangements to protect and preserve the global marine environment.\(^11\) These obligations include a duty to minimize and control pollution in the oceans, to manage fisheries in order to avoid over-exploitation, and to protect endangered species from extinction.\(^12\) The overall UNCLOS mandate is for nations to consider the global effect of their activities on the marine habitat and ecosystems and to tailor national policies to minimize any adversities.

In 1982, rather than signing UNCLOS and binding the United States by its mandate, President Reagan announced a new "United States Ocean Policy."\(^13\) This policy purported to parallel the

provisions of UNCLOS, without adopting the treaty obligations as a whole. The U.S. plan declared an intent to cooperate with international organizations to develop "uniform international measures" that protect the marine environment. In fact, the United States has participated in several bilateral negotiations and enacted many domestic environmental regulations addressing certain marine environment issues. Unfortunately, the U.S. approach toward problems seriously threatening the environment has been remedial rather than preventive. One commentator notes that, "with a few exceptions, these laws reflected a 'use-by-use,' 'issue-by-issue,' and 'pollutant-by-pollutant' approach to oceans policy." Although in theory these measures may exceed specific obligations set forth by UNCLOS, the United States' ocean environmental policy is essentially a collection of ad hoc agreements and legislation that, as applied, fall far short of the mandate.

In the long run, both the United States and UNCLOS seek to provide global comprehensive environmental guidelines protecting and preserving the marine environment. U.S. methods to achieve that goal, however, are self-centered and burdensome rather than streamlined and internationally cooperative as envisioned by UNCLOS. The United States tends to impose its policies unilaterally on other states rather than to encourage negotiation and cooperation among states in working toward a common goal. As a result, application of U.S. domestic regulations and

---

14. Id.
17. Belsky, supra note 8, at 430.
18. UNCLOS "requires that States, when implementing the established standards, harmonize their legislation and practices both regionally and through international organizations and diplomatic conferences, globally." McConnell & Gold, supra note 5, at 92.
19. David M. Driesen, The Congressional Role in International Environmental Law and Its Implications for Statutory Interpretation, 19 B.C. ENVTL. AFF. L. REV. 287, 301-02 (1991). For example, several domestic statutes enacted to protect the marine environment expressly provide for imposing embargoes on countries not complying with U.S. environmental laws. An embargo may be triggered under such a statute regardless of whether the activity violates or satisfies the foreign country's domestic laws, any international agreement, or customary international law. Richard J. McLaughlin, UNCLOS and the Demise of the United States' Use of Trade Sanctions to Protect Dolphins, Sea Turtles, Whales, and Other International Marine Living Resources, 21 ECOLOGY L.Q. 1, 8
internationally negotiated agreements falls short of the comprehensive national policy envisioned by UNCLOS. Additionally, such application may well violate UNCLOS in failing to establish a comprehensive international policy that espouses cooperation with other nation-states.

This Comment calls for a change in the U.S. approach to its ocean environmental policy. Part II of this Comment examines the goals expressed by UNCLOS during the initial convention, as well as the substantive role of the United States in defining those goals. Part III reviews specific provisions of UNCLOS that mandate a global plan to protect and preserve marine resources, and recommends that all states adopt this plan. Part IV provides an overview of U.S. environmental legislation concerning marine resources and illustrates gaps resulting from ad hoc regulation and from the hyperextension of U.S. policy into foreign states' sovereign territories. Part V compares the UNCLOS mandate with current U.S. practices, noting specifically the shortcomings and areas of tension. Part VI of this Comment concludes that, in order to comply with international law, the United States must enact a comprehensive national plan to preserve marine resources.

II. THE U.S. ROLE IN UNCLOS III

The original United Nations Conference on the Law of the Sea began in Geneva in 1958 in response to growing international pressure to establish uniformity in maritime laws and rights of passage. UNCLOS I and UNCLOS II, two years later, both resulted in international consensus on some issues, but left many issues unresolved.

UNCLOS III convened in 1973 to attempt to resolve those issues still in dispute. World delegates from developing and developed states attended the Conference determined to agree to a "comprehensive constitution for the oceans." UNCLOS III lasted nine years. One hundred fifty-seven countries participated

(1994).


21. Id.

in the negotiations and eleven delegations attended as observers.\textsuperscript{23} At the United States' insistence, the participants did not vote on the provisions until the end of the convention,\textsuperscript{24} at which time 130 delegations accepted UNCLOS as a complete package.\textsuperscript{25}

The United States, as one of the most powerful states attending UNCLOS III, played an instrumental role in setting the goals and policies of the agreement.\textsuperscript{26} The world was shocked, therefore, when the United States was not one of the 119 delegations who accepted UNCLOS when it opened for signature in 1982.\textsuperscript{27} The United States, under newly elected President Reagan, disagreed with the seabed mining provisions calling for shared technology and complex licensing procedures contained in Part XI of UNCLOS and, thus, refused to sign.\textsuperscript{28}

Shortly after the close of the convention, however, President Reagan announced the new United States Ocean Policy ("Ocean Policy"). This Ocean Policy followed President Reagan's overall philosophy of reducing federal involvement in the private sector and leaving control over local issues in the hands of the state and local governing bodies.\textsuperscript{29} For the oceans, this meant that "ocean resources were to be exploited; developers to be left alone and allowed to develop; and protective measures only taken upon concrete proof of real and present injury."\textsuperscript{30}

\begin{itemize}
\item \textsuperscript{23} \textit{Id.} at 74.
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} Because UNCLOS represented a culmination of compromises among the participants, delegates had to accept it in its entirety. "It is therefore not possible for states to pick what they like and disregard what they do not like. In international law, as in domestic law, rights and duties go hand in hand." UNCLOS, \textit{supra} note 2, at xxxvi (statement by the President of the Convention, Tommy T.B. Koh). Thus, international law forbids States to take advantage of rights under UNCLOS while ignoring the corresponding duties. \textit{Id.}
\item \textsuperscript{26} "The present position of the United States Government towards this convention is, therefore, inexplicable in the light of its history, in [the] light of its specific law of the sea interests and in the light of the leading role which it has played in negotiating the many compromises which have made this treaty possible." \textit{Id.} at xxxv.
\item \textsuperscript{27} Galdorisi & Stavridis, \textit{supra} note 20, at 230.
\item \textsuperscript{28} Colson, \textit{supra} note 9, at 39. At the time of the convention, the United States was convinced that technological capability for mining minerals from the deep seabed was imminent. The United States objected to the provisions that required that seabed technology be shared, set production limits on seabed mining and set high fees for licensing mining companies. Rebecca J. Fowler, \textit{Law of the Sea: An Odyssey to U.S. Acceptance}, WASH. POST, July 29, 1994, at A3.
\item \textsuperscript{29} Belsky, \textit{supra} note 8, at 432.
\item \textsuperscript{30} \textit{Id.}
\end{itemize}
proclaimed a new U.S. Exclusive Economic Zone ("EEZ") of 200-nautical miles and unilaterally accepted many of the provisions of UNCLOS as binding on both the United States and all other states.\footnote{31}{Carol Elizabeth Remy, \textit{U.S. Territorial Sea Extension: Jurisdiction and International Environmental Protection}, 16 \textit{FORDHAM INT'L L.J.} 1208, 1218 (1992/1993). President Reagan noted that UNCLOS contained provisions regarding the oceans that "confirm existing maritime law and practice and fairly balance the interests of all states." Marian Nash Leich, \textit{Contemporary Practice of the United States Relating to International Law: Law of the Sea (U.S. Digest, Ch. 7, S1) United States Ocean Policy}, 77 \textit{AM. J. INT'L L.} 619 (1983) (emphasis added). The new Ocean Policy would "promote and protect United States oceans interests 'in a manner consistent with those fair and balanced results in the Convention and [with] international law.'" \textit{Id.} President Reagan then announced the creation of a 200-nautical mile EEZ for the United States and that the United States intended to "act in accordance with [UNCLOS] . . . relating to traditional uses of the oceans--such as navigation and overflight." \textit{Id.} at 620. In making this statement, President Reagan seemed to acknowledge that UNCLOS, in fact, was creating new international law but, because of the seabed mining provisions, the United States did not want to comply with the entire treaty.}

President Reagan's announcement fostered international controversy because the policy purported to use UNCLOS provisions, but not UNCLOS itself, as a guide for developing U.S. marine laws. President Reagan claimed he could do so \textit{without} adopting UNCLOS because, with the exception of provisions opposed by the United States (e.g., the seabed mining provisions), UNCLOS merely codified customary international law.\footnote{32}{No other country originally viewed the Law of the Sea as codifying international law, but rather as a document created as a substitute for international law. UNCLOS was convened to provide an alternative to international law that had been evolving in such a way as to cause increasing dispute over extensions of national jurisdictions. "What makes this so ironical [sic] is that the purpose of the United States in having a Law of the Sea Conference was to end customary international law . . . . There was not to be any more development of the law of the sea by custom, strange as that sounds." Comment by William Burke During Discussion on Customary International Law and the Law of the Sea Convention, \textit{in CONSENSUS AND CONFRONTATION, supra} note 9, at 169, 170 (emphasis added).} President Reagan also contended that the rejected provisions did not codify customary international law but revised existing international law. The United States thus seemed to "pick and choose" desirable portions of international law, and ignored the rest.\footnote{33}{Djalal, \textit{supra} note 9, at 52.} Members of UNCLOS strongly criticized the U.S. position because UNCLOS, in its final version, represented a compromise on most issues among all the participating states.\footnote{34}{"The argument that, except for Part XI, the Convention codifies customary law or reflects existing international practice is factually incorrect and legally insupportable."}
In the early 1990s, amid voluminous criticism of the United States' showing of bad faith in rejecting UNCLOS, and "picking and choosing" in violation of the terms of the agreement, the United States agreed to revisit the prospect of becoming a signatory to the treaty. The United States held firm on objections to the seabed mining provisions and insisted they be modified. In order to address objections to the seabed mining provisions by the United States and other developed countries, the United Nations Secretary-General began a series of informal discussions with representatives from twenty-five states. This meeting produced a supplemental agreement that modified seabed provisions by making them more market-oriented and, thus, acceptable to the United States.

The United States' decision to sign UNCLOS was due in part to the revised seabed mining provisions and in part to the prospect of losing worldwide influence if UNCLOS became international law without U.S. participation. UNCLOS received its sixtieth ratification in November 1993, and UNCLOS became international law effective November 1994, without the United States' formal participation.

III. THE UNCLOS MANDATE

States came together at UNCLOS to recognize their interdependence in the marine environment. That awareness is evident in the resulting agreement for marine resource protection and preservation. The participating states created a "constitution for
the oceans," recognizing the concept of "the ocean as a resource that is exhaustible and finite, and ocean usage as a resource management question—one State's use or abuse negatively affecting another State's use of the resource."42

A. The Scope of UNCLOS

The concept of a "legal order" as envisioned in the UNCLOS preamble reflects a balancing of conflicting interests in order to achieve a common goal:

Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.43

UNCLOS' "complete package" resulted from compromises among states determined to harmonize each state's sovereign right to exploit natural ocean resources with the global need to protect and preserve those same resources for future generations. As a package, UNCLOS sets forth rights and obligations of nation-states designed to achieve this goal.

UNCLOS provides a global directive in which nation-states recognize an "obligation to protect and preserve the marine environment."44 To comply with that obligation, each state has the exclusive right to oversee activities in its own coastal areas, within a twelve-mile territorial sea, and within its 200-nautical mile EEZ.45 Further, each state controls its nationals' activities on the high seas and in foreign territory. States "are individually and collectively responsible for their ocean space, and, with other nations, responsible for all the world's seas."46

42. McConnell & Gold, supra note 5, at 84-85.
43. UNCLOS, supra note 2, pmbl. (emphasis added).
44. Id. art. 192 (emphasis added).
45. UNCLOS redrew the boundary lines of coastal state control. It extended the territorial sea, where a state exercises sovereign control, from three to twelve nautical miles, limited only by the right of innocent passage. Id. arts. 3-33. In addition, UNCLOS created an EEZ extending 200-nautical miles out from the territorial sea. A state's rights and obligations in the EEZ are sovereign as to "exploring and exploiting, conserving and managing the natural resources," but it must allow free access to geographically disadvantaged and landlocked states nearby. Id. arts. 55-75.
46. Belsky, supra note 8, at 461.
B. States' Individual Obligations

UNCLOS recognizes a state's sovereign interest in commercial activities in the oceans but dictates that the interest is secondary to the obligation to protect marine resources. Article 193 declares that "[s]tates have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment." This language of "obligation" and "duty" illustrates the importance placed on conserving marine resources throughout UNCLOS.

UNCLOS requires states to incorporate its provisions into domestic law on a regional basis and into cooperative agreements with other states on a global basis. Article 61, titled "Conservation of the Living Resources," requires that each state "shall determine the allowable catch of the living resources in its [EEZ] . . . [and] shall ensure through proper conservation and management measures that the maintenance of [those resources] . . . is not endangered by over-exploitation." To achieve these ends, coastal states must cooperate as necessary with appropriate international organizations.

C. Goals of Mandated Legislation and Agreements

Fishery conservation measures mandated in Article 61 must provide for maintenance or restoration of species so those species can sustain the maximum yield over time. More importantly, conservation measures must take into account interdependence of species and species dependent upon, or associated with, the harvested species "with a view to maintaining or restoring populations . . . above levels at which their reproduction may become seriously threatened." One example of such mandated conservation would be to require "coastal states to consider consequences such as the mortality of marine mammals in purse

---

47. UNCLOS, supra note 2, art. 193 (emphasis added).
48. Id. art. 61 (emphasis added).
49. Id.
50. Id.
51. Id.
seine [net] fishing operations for tuna, and the drowning of sea
turtles by shrimp nets.\textsuperscript{52}

Foreign nationals fishing in a coastal state's EEZ must comply
with the zone's conservation measures.\textsuperscript{53} Furthermore, coastal
states and other states "shall cooperate . . . with a view to ensuring
conservation" and efficient management of marine mammals,\textsuperscript{54}
highly migratory species,\textsuperscript{55} anadromous stocks,\textsuperscript{56} and
catadromous species.\textsuperscript{57}

UNCLOS has enacted mandates similar to those in Articles
61 through 67 for the high seas. Article 117 establishes the "duty
of States to adopt with respect to their nationals measures for the
conservation of the living resources of the high seas."\textsuperscript{58} Article
118 requires "cooperation of States in the conservation and
management of living resources" on the high seas.\textsuperscript{59} Article 119
mandates "conservation of the living resources of the high seas,"\textsuperscript{60}
and Article 120 commands protection of marine mammals.\textsuperscript{61}

\textsuperscript{52} McLaughlin, \textit{supra} note 19, at 31. Tuna and dolphins are examples of species
"associated with" one another. Tuna fishermen are aware of this association, and they
actively seek out herds of dolphin as a locator for tuna. When they spot a herd, the
fishermen set out purse seine nets. Purse seines are large nets used to harvest tuna. Two
boats set them around the dolphins and arrange them so that the ends are closed at the
bottom, thereby trapping them inside. Tuna travel close beneath the dolphins and are thus
harvested; however, dolphins consequently are trapped in the nets with the tuna. They
become entangled in the nets and drown. Alan S. Rafterman, \textit{Chicken of the Sea: GATT
Restrictions on United States Environmental Measures Designed to Protect Marine Mam-
mals}, 3 FORDHAM ENVTL. L. REP. 81, 82 n.11 (1991). In a similar manner, large sea
turtles become trapped and drown in shrimp trawl nets.

\textsuperscript{53} UNCLOS, \textit{supra} note 2, art. 62. "Nationals of other States fishing in the [EEZ]
shall comply with the conservation measures and with the other terms and conditions
established in the laws and regulations of the coastal State." \textit{Id.}

\textsuperscript{54} \textit{Id.} art. 65.

\textsuperscript{55} \textit{Id.} art. 64 and Annex 1. "The coastal State and other States whose nationals fish
in the region for the highly migratory species . . . shall co-operate directly or through
appropriate international organizations with a view to ensuring conservation and
promoting the objective of optimum utilization of such species throughout the region."
\textit{Id.}

\textsuperscript{56} \textit{Id.} art. 66. "Enforcement of regulations regarding anadromous stocks beyond the
[EEZ] shall be by agreement between the State of origin and the other States concerned." \textit{Id.}

\textsuperscript{57} \textit{Id.} art. 66.3(d).

\textsuperscript{58} \textit{Id.} art. 67. "In cases where catadromous fish migrate through the [EEZ] of another
State, . . . the management, including harvesting, of such fish shall be regulated between
the State [of origin] and the other State concerned." \textit{Id.}

\textsuperscript{59} \textit{Id.} art. 117.

\textsuperscript{60} \textit{Id.} art. 118.

\textsuperscript{61} \textit{Id.} art. 120.
Finally, UNCLOS requires that states take all measures “necessary to prevent, reduce and control pollution of the marine environment from any source . . . [and] 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.”

Thus, viewed as a complete package, UNCLOS requires states to initiate comprehensive national and international policies for marine resource protection and preservation.

D. States’ Global Obligation to Cooperate

The obligatory language used in UNCLOS demonstrates the overwhelming importance of marine resource protection and preservation to the international community. Thus, if “a State breach[es] its obligation to protect and preserve the marine environment [it is] . . . in breach of international law.”

Article 235 specifically addresses a state’s liability if the state breaches its responsibility to the marine environment. In short, UNCLOS creates mandatory minimum guidelines for nation-states to follow in setting their ocean policies. These minimum guidelines call for a comprehensive national policy and cooperation among states internationally to protect marine resources.

The mandatory minimum guidelines apply to domestic regulations and to bilateral and multilateral negotiations, as well as to nationals’ activities on the high seas. The measures taken by states must comply with their general obligation to “protect and preserve the marine environment.” Thus, states must consider all relevant environmental factors in their resource management assessments and decisions:

They are to take such measures as are necessary to preserve ecosystems and the habitat of marine life. Such measures shall include environmental assessment of risks and monitoring of risks and effects. Such assessment and monitoring is to be done directly by each nation-state and indirectly and cooperatively through international organizations.

62. Id. art. 194.
63. McConnell & Gold, supra note 5, at 89.
64. “States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.” UNCLOS, supra note 2, art. 235.
65. Id. art. 192.
66. Belsky, supra note 8, at 467.
States must enact domestic legislation and enter cooperative agreements designed to implement the following obligations: (1) conserving living resources by preventing over-exploitation of species and by considering the effects on "species associated with or dependent upon harvested species"; (2) cooperating with one another to ensure the conservation of highly migratory species; and (3) protecting and conserving marine mammals and, "in the case of cetaceans... work[ing] through the appropriate international organizations for their conservation, management and study."

In sum, the obligation to cooperate with other states and international organizations includes:

an obligation to notify affected states of actual or imminent danger to the marine environment, to make contingency plans for dealing with such dangers, to research, to study and to exchange information and data in order to provide scientific criteria for the development of rules, standards, procedures and practices to reduce, prevent or control pollution.

An accusation against a state for breaching its responsibility to the ocean environment, or a breakdown in negotiations between two or more states concerning appropriate resource management policies, activates the compulsory dispute settlement provisions.

E. Compulsory Dispute Settlement Procedures

Compulsory dispute settlement provisions form an integral part of UNCLOS and prevent states from imposing unilateral remedies against one another. The key to UNCLOS is global cooperation. Thus, to encourage cooperation and discourage unilateral actions by one state against another, the participating states agreed to submit to compulsory dispute settlement procedures.

[A]ny law of the sea treaty is almost as easily susceptible of unreasonable unilateral interpretation as are the principles of

67. UNCLOS, supra note 2, art. 61.
68. Id. art. 64. Annex I of UNCLOS specifically lists highly migratory species, e.g. species of tuna, marlins, swordfish, and dolphins.
69. Id. art. 65. Article 65 also allows states to regulate the protection of marine mammals more strictly than is provided for in UNCLOS. Cetaceans—marine mammals of the order Cetacea—include whales, dolphins, and porpoises.
70. McConnell & Gold, supra note 5, at 91.
71. McLaughlin, supra note 19, at 4.
customary international law. This is particularly true when we consider that the essential balance of critical portions of the treaty, such as the economic zone, must rest upon impartial interpretation of treaty provisions. One of the primary motivations of [the U.S.] government in supporting the negotiation of a new law of the sea treaty is that of making an enduring contribution to a new structure for peaceful relations among states. Accordingly, we must reiterate our view that a system of peaceful and compulsory third-party settlement of disputes is in the end perhaps the most significant justification for the accommodations we are all being asked to make.72

To facilitate peaceful settlement of disputes among states, UNCLOS requires states to submit to a settlement procedure if requested to do so by any other party to the dispute.73 Any decision rendered by the court or tribunal having jurisdiction74 "shall be final and shall be complied with by all the parties to the dispute."75 The dispute settlement provisions in UNCLOS form a sophisticated system of voluntary negotiation and compulsory settlement procedures.76

The final wording of UNCLOS makes clear the individual state's obligation to enact domestic legislation and to cooperate in international agreements with a view toward protecting and preserving marine resources. The new "constitution for the oceans" recognizes the need to balance each state's sovereign right to exploit the resources off its own coasts with the global need to protect those resources for future generations.

73. UNCLOS, supra note 2, art. 286.
74. Article 287 gives a choice of the means for the settlement of disputes. The court or tribunal chosen pursuant to Article 287 is granted jurisdiction to interpret the provisions of UNCLOS in the dispute settlement. Id. arts. 287-88.
75. Id. art. 296.
76. A complex analysis of the UNCLOS compulsory dispute settlement procedures is beyond the scope of this Comment. In general, Articles 279-85 provide standard dispute resolution provisions and address the preferred method of dispute resolution procedures through voluntary negotiation. McLaughlin, supra note 19, at 49-50 (citing UNCLOS arts. 279-99). Articles 286-96 describe compulsory dispute resolution procedures when voluntary measures fail. Id. Resolutions under compulsory procedures are binding on all parties to the dispute. Id. Articles 297-99 address exceptions to the compulsory provisions. Id.
Thus, states together have the duty to establish a comprehensive plan that will harmonize effectively the needs of each country's fishery management plans with the survival needs of the oceans' ecosystems. The interdependence of species requires that such a plan consider and care for all species' habitats in establishing fishery management plans. Furthermore, the plan must be flexible because each party contributing to UNCLOS is at differing stages of development and has differing resource needs. Lastly, to ensure the balance of all interests involved in this global plan, states recognized the need to establish compulsory dispute settlement procedures to prevent stronger states from acting unilaterally against weaker states.

IV. UNITED STATES OCEAN ENVIRONMENTAL LEGISLATION

Rather than implement a comprehensive national plan designed to comply with the new global "legal order" establishing marine protection, the United States maintains an ad hoc approach to ocean environmental regulation. The United States reacts to specific ecological problems when drafting domestic legislation and when negotiating international agreements. Far from being comprehensive, the U.S. scheme of ocean environmental protection is "scattered," problem-specific, and often contradictory.77

The United States' desire to assert national sovereignty over the ocean space is the basis for legislation regulating the use and protection of ocean resources.78 Its refusal to cooperate with neighboring countries in negotiating ocean environmental policies and access to ocean resources stems from an unwillingness to compromise that sovereignty.79

Moreover, individual state sovereignty over coastal territory is a basic foundation of the U.S. political scheme. Additionally, "federal versus state control over the newly acquired territorial sea is one of the major controversies raised by the most recent legislative proposals."80 If individual U.S. states maintain control over the territorial sea off their coasts, they will be responsible both financially and legally for pollution control and cleanup in that

---

77. Belsky, supra note 8, at 431.
78. Remy, supra note 31, at 1211.
80. Remy, supra note 31, at 1211.
area. Such piecemeal regulation could result in "varying degrees of marine protection throughout the United States." 8

The internal conflict over exercising state and national sovereignty in the ocean territory has taken precedence over international interests. As a result, U.S. policy is adverse to the UNCLOS mandate to harmonize resource use and conservation activities with other states to achieve uniformity in global environmental legislation. 82 Moreover, when problems arise, the United States at times violates the UNCLOS spirit, and possibly its directives, by failing to cooperate with other states in addressing the problems. Rather, the United States elects to act unilaterally, thereby violating rights delegated to other states under UNCLOS. 83

The U.S. government's policy of pursuing a "quick fix" to environmental issues by enacting ad hoc domestic legislation and failing to negotiate comprehensive international agreements conflicts with UNCLOS' goal of global cooperation. Moreover, the U.S. unilateral actions often encourage other states to retaliate by initiating their own trade restrictions. 84 In the long run, the U.S. policy undermines UNCLOS and the goal of global cooperation in marine resource protection.

A. Ad Hoc Regulation

Historically, the U.S. government only occasionally attempted to coordinate ocean activities and resource management. 85 More often, the prevailing modus operandi included passing numerous, singularly-focused, ocean-related laws and dividing administrative responsibility of ocean matters among "more than twenty congres-

81. Id. at 1234.
82. Id.
83. As discussed supra Part III.B., states have the sovereign right under UNCLOS to manage resources in their 200-nautical mile EEZ. In doing so, they must use the "best scientific evidence available" for determining appropriate conservation measures. UNCLOS, supra note 2, art. 61. Additionally, other states must refrain from "unjustifiable interference" with those states exercising such sovereign rights. McConnell & Gold, supra note 5, at 90. Thus, when the United States imposes its own standards on those other nations through unilateral actions, it directly violates UNCLOS. See infra discussion at Part V.B.
85. For an excellent chronology of the United States' regulation of the ocean, see Belsky, supra note 8, at 434-48.
sional subcommittees, twelve different Cabinet departments, eight independent agencies, and numerous other sub-cabinet federal agencies and advisory groups."

By the end of the 1970s, the United States had passed numerous legislative acts that focused on six goals of marine regulation: "development of resources; protection of the ocean space; management of resources; service to ocean users; promotion of marine science, education and technology; and strategic and military use of the oceans." No coordination of administration or enunciated overall policy ever existed. As a result, the programs were diverse and uncoordinated, and the goals and procedures often contradicted one another.

Statutes that illustrate this inconsistent and incomprehensive ocean environmental program establish procedures for protecting endangered species, protecting marine mammals, maintaining and managing commercial fishery habitats, and ocean resource research and development. The United States protects and manages marine resources on a species-by-species basis, without considering the interdependence of species or the impact of individual ocean activities on their ecosystem.

B. Substantive U.S. Domestic Legislation

In drafting domestic legislation, Congress typically responds only to environmental "emergencies" and public pressure. This results in the ad hoc collection of laws described above. Statutes addressing environmental concerns, therefore, are species-specific or problem-specific and are not enforced on a wide scale. A brief discussion of a few representative statutes follows.

86. Id. at 429.
87. Id. at 430.
88. Id.
92. Belsky, supra note 8, at 482.
1. The Endangered Species Act

By its terms, the Endangered Species Act ("ESA")\(^\text{93}\) broadly protects endangered or threatened species. Rather than looking at the global ecosystem to determine which species to protect and where they should be protected, however, the courts have interpreted the ESA to apply only to a limited geographical area focusing on a particular species to be protected.\(^\text{94}\) Moreover, in *Lujan v. Defenders of Wildlife*,\(^\text{95}\) the Supreme Court virtually disallowed any extraterritorial application of the ESA due to the plaintiffs' inability to establish standing. The Supreme Court stated "we shall assume for the sake of argument that . . . certain agency-funded projects threaten listed species . . . . [There are] no facts, however, showing how damage to the species will produce 'imminent' injury."\(^\text{96}\) Consequently, U.S. agencies continue to fund projects that threaten endangered species beyond U.S. territory without the threat of legislative recourse.

Congress amended the ESA in 1989 to require the executive branch to initiate negotiations with other states to protect endangered sea turtles.\(^\text{97}\) The ESA prohibits the importation of shrimp products from countries failing to require their shrimp trawlers to install turtle excluder devices similar to those required on U.S. vessels.\(^\text{98}\) The President's failure to certify to Congress annually that the harvesting state has a regulatory program and an incidental take rate comparable to the United States' automatically triggers the embargo provisions.\(^\text{99}\)

Harvesting states will be certified as having programs comparable to the United States' if they: "(1) prohibit the retention of incidentally caught sea turtles, (2) require that comatose incidentally caught sea turtles be resuscitated, (3) require all shrimp vessels to use turtle excluder devices (TEDs) at all times

\(^{93}\) 16 U.S.C. §§ 1531-44.  
^{94}\) Belsky, *supra* note 8, at 482.  
^{96}\) *Id.* at 563. The Supreme Court held that the plaintiff did not demonstrate the requisite concrete injury-in-fact to obtain standing to sue for extraterritorial enforcement of the ESA.  
^{98}\) *Id.*  
^{99}\) *Id.*
and to engage in a statistically reliable and verifiable scientific monitoring program, and (4) employ a credible enforcement program.”

Thus, the United States unilaterally requires a state with whom it has relations to adhere to U.S. standards rather than negotiate an acceptable compromise.

2. Marine Mammal Protection Act

The primary purpose of the Marine Mammal Protection Act ("MMPA")101 is to protect marine mammals against man’s activities by prohibiting the "taking" of marine mammals “to the disadvantage of those species.”102 “Taking” is defined as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.”103 Some criticize the MMPA, however, as being poorly drafted, ambiguous,104 and contradictory to other federal statutes, such as the Magnuson Fishery Conservation and Management Act ("MFCMA").105 The substance of this criticism is that “many provisions of the MMPA threaten achievement of [MFCMA] objectives . . . [and the MMPA] contains no provision for balancing the conflicting objectives of the two statutory schemes.”

Some also criticize the MMPA as being protectionist107 because it imposes a moratorium on the importation of tuna products not caught in a manner consistent with U.S. standards.108 The rigid protection standards of the MMPA preclude harmonization with other domestic and international legislation that regulates commercial exploitation. Thus, the MMPA standards contribute nothing towards establishing a comprehensive and balanced approach to global marine resource management and conservation.

100. McLaughlin, supra note 19, at 24.
102. Id. § 1373(a).
103. Id. § 1362(13).
106. Child & Haley, supra note 104, at 405. See infra discussion at Part V.A.
107. Id.
108. MMPA § 1412.
3. Magnuson Fisheries Conservation and Management Act

Similarly, the MFCMA\(^{109}\) establishes an elaborate mechanism for fishery management. The primary purpose of the MFCMA is to "realize the maximum sustainable productivity from fishery resources."\(^{110}\) Until 1987, however, fishery regulations focused only on specific regions and particular species within those regions, and not on the overall ecosystem and the fate of interdependent species.\(^{111}\)

The MFCMA also fails to recognize the need to negotiate international agreements designed to regulate the taking of highly migratory species, such as tuna, in order to preserve the species for future generations.\(^{112}\) Nor does the MFCMA recognize a coastal state's sovereignty in its 200-nautical mile EEZ as it relates to highly migratory species.\(^{113}\) In another example of unilaterally imposed standards, the United States automatically prohibits all tuna imports when the exporting country refuses to allow the United States access to fish for tuna within its EEZ.\(^{114}\)

Moreover, fishery plans and regulations do not provide for curbing the effects of pollution and conflicting resource uses on the marine environment.\(^{115}\) Many different agencies implement numerous regulatory and statutory controls to manage the pollution resulting from these conflicting resource uses and other adverse onshore activities.\(^{116}\) With so many different interests involved, harmonization and consistency is almost impossible. Illustrative of the United States' failure to coordinate its fishery and resource management plans with ocean pollution regulations is the method by which it determines where and to whom to grant leases for offshore oil and gas exploration.

\(^{110}\) Child & Haley, supra note 104, at 399.
\(^{111}\) Belsky, supra note 8, at 483.
\(^{113}\) Id.
\(^{114}\) Id. at 502.
\(^{115}\) Belsky, supra note 8, at 484.
\(^{116}\) Id.
4. **Outer Continental Shelf Lands Act**

Pollution and resource management statutes generally call for a "balancing" of interests when ruling on a proposal that affects the environment. For example, the Outer Continental Shelf Lands Act ("OCSA")\(^{17}\) balances the need to protect the marine environment against increasing energy needs. Specifically, the statute requires the Department of the Interior to prepare and periodically revise a leasing plan that balances the potential for adverse environmental impact with the potential for the discovery of oil and gas.\(^{18}\)

The OCSA leasing policy exemplifies the inadequacy of the U.S. ocean policy. The statute mandates that the Department of the Interior "consider" the comments of others and the impact of a proposal on the environment but does not force it to take any action or refuse any leases due to adverse effects on the environment.\(^{19}\) Before refusing a lease, the government must find an "unreasonable risk" to the fisheries. In fact, the Secretary of the Interior has interpreted the OCSA "balancing requirement" to operate as a mandate for expediting offshore leasing and commercial exploitation rather than for environmental protection.\(^{20}\)

The statutes addressed above represent a sampling of the myriad of U.S. legislation regulating resource use and conservation in the marine environment.\(^{21}\) Such ad hoc regulation leads to ambiguity and conflict among the statutes rather than coordination toward a single goal. As a result, the overall U.S. ocean policy, as applied, conflicts with the UNCLOS mandates of implementing a comprehensive national plan for conservation and resource management and coordinating that plan on a global level.

V. **U.S. DOMESTIC LEGISLATION COMPARED TO UNCLOS: CONFLICTS AND SHORTCOMINGS**

Examples of the tensions between U.S. regulations and UNCLOS directives and goals follow. One such tension concerns

---

118. Id. § 1344(a)(3).
119. Belsky, supra note 8, at 485.
120. Id. at 487.
121. Raftberman, supra note 52, at 92.
the UNCLOS requirement of a comprehensive national plan for resource conservation and management and the U.S. practice of ad hoc legislation. Another major source of tension between U.S. regulations and UNCLOS directives concerns the United States' imposition of unilateral trade sanctions against other states in order to enforce U.S. standards of operation.

A. Failure to Adopt a Comprehensive National Plan

The conservation provisions in the ESA, to date, have been applied to a limited geographical area and to particular species in that area.122 According to UNCLOS, international law mandates globally-focused conservation that considers the ecosystem as a whole rather than piecemeal regulation. Moreover, contradictions inherent in the application of such piecemeal legislation undermine the implementation of a comprehensive national plan, as required by UNCLOS.

The interaction between the MMPA and the MFCMA provides an example of such contradiction and how it frustrates the comprehensive national plan required under UNCLOS. Different Congresses enacted the MMPA and the MFCMA, and the statutes "reflect disparate influences in their purposes and goals, some of which verge on mutual exclusivity."123 Such differences can have a dramatic impact on the marine environment due to the interdependence of the species affected by the acts.

The MFCMA focuses on commercial exploitation of fisheries. The MMPA, however, rigidly protects marine mammals from harm, with almost no exception for the needs of commercial fisheries.124 Thus, "[i]t is possible that any harvest of fish that detrimentally affects marine mammals as described [such as reducing sources of food or degrading the habitat] could be found by a court to constitute a 'taking' for purposes of the MMPA."125

Species are necessarily interdependent in the ecosystem, so rational management of that ecosystem requires that regulations be coordinated carefully to achieve a common purpose. Such is the express mandate of the new international law under

---

122. See supra Part IV.B.1.
124. Id. at 401.
125. Id. at 407.
UNCLOS.\textsuperscript{126} The U.S. system of resource management, however, sharply deviates from that mandate.

\textbf{B. Violations of the UNCLOS Requirement of Global Cooperation}

A major source of tension between U.S. regulations and UNCLOS directives concerns the United States' imposition of unilateral trade sanctions against other states in order to enforce U.S. standards of operation. Such unilateral actions violate international law by directly interfering with a sovereign's exclusive right to regulate activities in its own territory.\textsuperscript{127} A state may trigger U.S. trade sanctions if it fails to comply with U.S. domestic conservation standards, such as the MMPA\textsuperscript{128} or the 1989 Sea Turtle Conservation Amendments to the ESA.\textsuperscript{129} As discussed above, the imposition of trade sanctions under these laws depends upon whether a foreign state implements conservation or operating standards comparable to those adopted in the United States for protecting marine mammals and sea turtles.\textsuperscript{130}

The international community is hostile toward these laws because trade-sanction decisions are based solely on U.S. domestic environmental standards and contain no exceptions for internationally agreed upon standards.\textsuperscript{131} Additionally, "these statutes have been deemed protectionist by many nations because they serve to protect U.S. fishermen from foreign competition by equalizing costs associated with environmental protection."\textsuperscript{132}

Congress enacted trade-sanction provisions in the MMPA to respond to public outcry about the alarming rate of dolphin mortality in the tuna industry.\textsuperscript{133} The provisions establish import bans on tuna obtained through purse seine fishing methods. To export tuna to the United States, a country must adhere to the following: (1) the foreign state must demonstrate that it has

\begin{itemize}
\item \textsuperscript{126} See supra Part III.
\item \textsuperscript{127} See supra discussion at Part III.B.
\item \textsuperscript{128} 16 U.S.C. §§ 1361-1421.
\item \textsuperscript{129} 16 U.S.C. § 1537.
\item \textsuperscript{130} McLaughlin, supra note 19, at 20.
\item \textsuperscript{131} Id.
\item \textsuperscript{132} Id.
\item \textsuperscript{133} McDorman, supra note 112, at 492. Data before Congress indicated that in 1987, foreign fishing fleets using purse seine methods were responsible for more than eighty percent of the dolphins killed, a number in excess of 103,000 for the year. Id. at 493.
\end{itemize}
established the same or similar restrictions on its fishermen as the U.S. restrictions on the incidental killing of marine mammals; and (2) within sixty days of a U.S. ban, any intermediary country must submit proof that it will not be exporting to the United States any of the restricted tuna caught in a nonconforming country.\textsuperscript{134}

In \textit{Earth Island Institute v. Mosbacher},\textsuperscript{135} the U.S. Court of Appeals for the Ninth Circuit held that the Department of the Interior has limited discretionary authority under the MMPA. The Department of the Interior \textit{must} impose an embargo on all yellow-fin tuna and tuna products from all states whose fishing practices fail to conform to U.S. standards.\textsuperscript{136} The embargo cannot be lifted until the Secretary of Commerce certifies that each state's incidental kill rate of dolphins is comparable to the U.S. rate according to the certification standards set forth in the Act.\textsuperscript{137}

Provisions for the protection of endangered sea turtles for automatic embargoes are almost identical to those in the MMPA.\textsuperscript{138} Both statutes, along with many other U.S. fisheries statutes with trade-related components, may affect the rights and obligations of states under UNCLOS and, thereby, trigger its compulsory dispute settlement provisions. "The purpose of the trade embargo provisions of the [MMPA], the Sea Turtle Conservation Amendments of 1989, . . . and comparable U.S. statutes is to force foreign nations to alter their fisheries conservation and management practices so that they comply with standards deemed adequate by the United States."\textsuperscript{139} The imposition of trade sanctions is automatic regardless of whether the noncomplying practice occurs on the high seas, in a coastal state's own EEZ, in its own territorial sea, or in internal waters.\textsuperscript{140} Moreover, unilateral U.S. trade sanctions may be imposed even if a foreign state's practices comply with its own domestic laws, international agreements, or existing international law.

\begin{itemize}
\item \textsuperscript{134} Rafterman, \textit{supra} note 52, at 84.
\item \textsuperscript{135} 929 F.2d 1449 (9th Cir. 1991).
\item \textsuperscript{136} \textit{Id.} at 1451.
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} \textit{See supra} discussion at Part IV.B.1.
\item \textsuperscript{139} McLaughlin, \textit{supra} note 19, at 28.
\item \textsuperscript{140} \textit{Id.}
\end{itemize}
VI. CONCLUSION

UNCLOS is now international law. As such, parties are bound by the obligations and duties imposed by the “constitution for the oceans.” Arguably, even states that have not formally ratified the treaty are bound due to its status as customary international law.

UNCLOS requires states to cooperate globally to “protect and preserve the marine environment.” As a compromise package, UNCLOS carefully balances the need for states to maintain sovereignty over their territorial waters and EEZs with the global need to manage effectively the ocean ecosystem. Because such careful balancing is necessary to preserve global harmony and provide effective resource management, the participants in UNCLOS agreed to rigid dispute settlement procedures that are both compulsory and binding.

UNCLOS resulted from a long, arduous negotiation, in which the parties present compromised on numerous policies to achieve a global balance. The United States played a major role in the negotiations and greatly influenced the resulting policies.

Once the package was complete, however, the United States decided not to sign, but to take advantage of the negotiated compromises. The United States announced that it would be bound by and would hold other states responsible for certain portions of the treaty it viewed as customary international law. The United States would not treat as binding, however, those portions with which it disagreed.

Since President Reagan's announcement that the United States would adhere to the terms of UNCLOS, the United States has made little change in its policy of ad hoc regulation of marine issues. As a result of its ad hoc decision-making and “knee-jerk” responses to immediately perceived problems in the ocean environment, the United States has failed to create a comprehensive national plan. The U.S. ocean legislation fails to balance the needs of the ocean ecosystem with the needs of U.S. commercial fisheries and, therefore, conflicts with the express provisions of UNCLOS.

Moreover, the United States explicitly violates UNCLOS by unilaterally imposing its policies on those states it can control through strong-arm trade sanctions rather than recognizing and respecting each state’s sovereign right to manage its own ocean
space. Rather than cooperating in compromise agreements designed to achieve a plan benefitting each country involved, the United States' first response to a state with practices different from its own is to impose trade sanctions.

To comply with international law and to achieve the vision aspired to by UNCLOS, therefore, the United States must now revisit its approach to ocean policy-making and modify it to achieve harmony and cohesion. The United States must combine the myriad of scattered, conflicting legislation into one package designed to manage ocean resources while considering the interdependence of species and habitats. The United States also must cooperate globally, rather than act unilaterally, to achieve and not impede the goal of world environmental protection.

Patricia C. Bauerlein*

* J.D. candidate, Loyola Law School, 1996. This Comment is dedicated to my mother, Mary Cheek, for all of her love and support; to my husband, John, for his patience and support through my career change; and to my daughter, Rachel, one of the best things that has ever happened in my life.