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UNCLOS and the Demise of the United States' Use of Trade Sanctions to Protect Dolphins, Sea Turtles, Whales, and Other International Marine Living Resources

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> [E]very nation in the world is today headed toward using dolphin-safe fishing practices, because of the power of American markets. We took a stance, saying we are going to impose an embargo on the products of all countries which violate accepted environmental norms. Think about the power of that principle. . . . The idea will provide the next great international opportunity: to come together with other countries to say we are going to use the markets of the world as a stick to enforce environmental standards.[1]

INTRODUCTION

Soon after taking office, the Clinton administration began assessing its ocean policy options and formulating new approaches to reassert U.S. leadership on international environmental issues. One of the administration's first actions was to inform the United Nations of its desire to find a solution to problems that have prevented the United States from signing the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[2] On April 27, 1993, the U.S. Ambassador to the United Nations, Madeleine Albright, announced that the United States was stepping up its participation in the informal U.N.-sponsored consultations on deep seabed mining, and looking forward to achieving an agreement on a generally accepted Convention.[3]

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1. Bruce Babbitt, *The Future Environmental Agenda for the United States*, 64 U. COLO. L. REV. 513, 521 (1993) (remarks from the Secretary of the Interior's lecture at the University of Colorado Law School, Oct. 29, 1992).

2. United Nations Convention on the Law of the Sea, *done* Dec. 10, 1982, 21 I.L.M. 1261 [hereinafter UNCLOS]. On November 16, 1993, Guyana became the 60th state to deposit its ratification or accession with the United Nations. *Status of the LOS Convention in the UN*, OCEANS POL'Y NEWS (Council on Ocean Law, Wash., D.C.), Nov. 1993, at 1, 1. The Convention enters into force one year after the date of this 60th deposit.

3. Charles Higginson, *U.S. Reenters Sea-Bed Negotiations*, OCEANS POL'Y NEWS (Council on Ocean Law, Wash., D.C.), Apr. 1993, at 2, 2-3 [hereinafter *U.S. Reenters*]. For an interesting discussion of the Bush administration's half-hearted participation in the consultations, see Jonathan I. Charney, *The United States and the Revision of the 1982 Convention on the Law of the Sea*, 23 OCEAN DEV. & INT'L L. 279, 280 (1992). For a summary of their progress through the end of 1991, see Charles Higginson, *The U.N.G.A. and Oceans*, OCEANS POL'Y NEWS (Council on Ocean Law, Wash., D.C.), Dec. 1992 - Jan. 1993, at 1, 1-2. The Clinton administration has in no fashion signalled its imminent intent to sign the Convention. Nor has it underestimated existing obstacles to U.S. signature and ratification. Ambassador Albright emphasized this point at the United Nations when she asserted:

> [S]ome may be tempted to see in the change of U.S. administrations a fundamental shift in the policy regarding the specific objections we have with the Convention's seabed mining provisions. Such an assessment would be incorrect. The United States continues to believe that there are serious problems with those provisions. To successfully resolve these problems, substantial changes will be required.

U.S. Reenters, *supra*, at 3. The Group of 77 continues to refuse to compromise on the "common heritage of mankind" concept and steadfastly holds to the position that the Convention must be adopted without amendment to part XI's deep seabed mining provisions. There are indications, however, that this position is changing and that, given the proper push by the Clinton administration, compromise can be reached. *See* V.S. Kotlyar, *On the*

Despite this recent increase in U.S. interest and activity, U.S. policy related to UNCLOS' substantive provisions remains essentially unchanged from that first enunciated by the Reagan administration in 1982.[4] The views of the Reagan administration—including its refusal to sign the Convention as long as it contained provisions for an international deep-sea mining authority—are well known.[5] The United States has joined the rest of the international community in recognizing that, apart from the seabed mining provisions, nearly all of the substantive provisions in the Convention reflect existing customary international law, which is binding even on those states that do not become members to the Convention.[6]

Prospects of the Entry Into Force of the UN Convention on the Law of the Sea, in MOSCOW SYMPOSIUM ON THE LAW OF THE SEA 45, 46-47 (Thomas A. Clingan & Anatoly L. Kolodkin eds., 1991). For the Group of 77's view, see Mumba S. Kapumpa, *Reflections on Institutional Aspects and How To Facilitate Universal Acceptance of the Convention, in* THE LAW OF THE SEA IN THE 1990's: A FRAMEWORK FOR FURTHER INTERNATIONAL COOPERATION 319 (Tadao Kuribayashi & Edward L. Miles eds., 1992).

4. This policy was originally set forth in President Reagan's Proclamation, which established a U.S. exclusive economic zone (EEZ). Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983). The accompanying policy statement is found in President's Statement on United States Oceans Policy, 1983 PUB. PAPERS 378 (Mar. 10, 1983).

5. *See* Statement by Ambassador James L. Malone to the Third United Nations Conference on the Law of the Sea Plenary (Aug. 5, 1981), *in* MYRON H. NORDQUIST & CHOON-HO PARK, REPORTS OF THE UNITED STATES DELEGATION TO THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 524-30 (1983). For an outstanding collection of papers dealing with the U.S. position, see CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION (Jon M. Van Dyke ed., 1985) [hereinafter CONSENSUS AND CONFRONTATION]; *see also* George D. Haimbaugh, Jr., *Impact of the Reagan Administration on the Law of the Sea,* 46 WASH. & LEE L. REV. 151 (1989); PERSPECTIVES ON U.S. POLICY TOWARD THE LAW OF THE SEA: PRELUDE TO THE FINAL SESSION OF THE THIRD U.N. CONFERENCE ON THE LAW OF THE SEA (Charles L.O. Buderi & David D. Caron eds., 1985); *Sea Law Treaty is Still His 'Baby': Richardson Hopes It Can Be Salvaged,* BOSTON GLOBE, June 8, 1981, at A1.

6. *See* President's Statement on United States Oceans Policy, *supra* note 4, at 378. President Reagan specifically stated that the Convention's provisions dealing with seabed mining were not recognized under customary international law. *Id.* at 383, 384. According to the *Restatement (Third) of Foreign Relations Law of the United States*:

> [T]he United States in effect agreed to accept the substantive provisions of the Convention, other than those dealing with deep sea-bed mining, in relation to all states that do so with respect to the United States. Thus, by express or tacit agreement accompanied by consistent practice, the United States, and states generally, have accepted the substantive provisions of the Convention . . . as statements of customary international law binding upon them apart from the Convention.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 5, introductory note at 5 (1987) (citation omitted). In a footnote, the reporters point out that there is disagreement concerning the customary nature of articles 64-67, article 82, articles 76 and 82 together, the deep seabed mining provisions of part XI, and the dispute settlement provisions of part XV. *Id.*, introductory note at 6 n.6. *But see* W.T. Burke, *Customary Law of the Sea: Advocacy or Disinterested Scholarship?*, 14 YALE J. INT'L L. 508, 510 (1989) (criticizing the *Restatement* for making no attempt to provide details of state practices to support its assertions).

Because UNCLOS is still not in force, any disputes about how to interpret and apply its customary provisions must be settled by methods independent of the Convention.[7] Once the Convention enters into force, "States Parties" may be compelled to rely on its sophisticated compulsory dispute settlement procedures for redress.[8]

This article examines UNCLOS' compulsory dispute settlement provisions and the important role they may play in the development and implementation of U.S. policy on the protection of international marine living resources. The United States may have to relinquish its use of unilateral economic sanctions as a method of protecting dolphins, sea turtles, and whales if it chooses to become a party to UNCLOS and the Convention enters into force.[9] This assertion is based upon an analysis of the substantive rights granted to States Parties under the Convention[10] and its compulsory dispute settlement provisions, which prevent parties from imposing unilateral remedies against other parties.[11]

This article challenges the widely accepted view that the only obstacle preventing the United States from acceding to the Convention[12] is its concern over deep seabed mining.[13] Even if a compromise can be achieved on seabed mining, the Clinton administration will still face a major policy dilemma because of congressionally driven efforts

7. UNCLOS Part XV: Settlement of Disputes applies only to "States Parties," which are defined as "States that have consented to be bound by this Convention and for which this Convention is in force." UNCLOS, *supra* note 2, art. 1, 21 I.L.M. at 1271. Dispute settlement options available to the United States outside of UNCLOS are discussed in NATIONAL ADVISORY COMMITTEE ON OCEANS AND ATMOSPHERE, THE EXCLUSIVE ECONOMIC ZONE OF THE UNITED STATES: SOME IMMEDIATE POLICY ISSUES 12-13, app. D (1984). For a discussion of traditional methods of dispute settlement in the maritime context, see GURDIP SINGH, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: DISPUTE SETTLEMENT MECHANISMS (1985); R.R. CHURCHILL & ALAN V. LOWE, THE LAW OF THE SEA 330-35 (1988).

8. For a detailed discussion of how the UNCLOS compulsory dispute settlement provisions operate, see *infra* part III.C.2.

9. The United States may not have to relinquish this policy tool against non-States Parties. *See infra* notes 373-74, 377-81 and accompanying text.

10. *See infra* part II.

11. *See infra* part III.C.

12. The Convention remained open for signature until December 9, 1984. UNCLOS, *supra* note 2, art. 305(1)(f), 21 I.L.M. at 1326. Since then, states must "accede" to join it. *Id.* art. 307, 21 I.L.M. at 1326-27. Accession normally implies a completed process including Senate ratification. Exactly how the Clinton administration plans to move forward with the accession process remains unclear. *See* G. Galdorisi & J. Stavridis, *Time to Revisit the Law of the Sea?*, 24 OCEAN DEV. & INT'L L. 308 (1993).

13. *See* 139 CONG. REC. S4656-57 (daily ed. Apr. 20, 1993); *Beyond the Law of the Sea: Prospects for a Sustainable Ocean Environment,* OCEANS POL'Y NEWS (Council on Ocean Law, Wash., D.C.), Jan. 1992 special insert (remarks by Elliot L. Richardson at the National Forum on Ocean Conservation, National Museum of Natural History, Nov. 21, 1991).

to impose unilateral trade sanctions[14] on nations that inadequately protect dolphins, sea turtles, whales, and other marine living resources.[15] If the hypothesis put forward by this article is valid, and the Convention's dispute settlement provisions would limit the ability of the United States to impose unilateral trade sanctions, this could significantly affect the political dynamics of the nation's decision whether to become a party to UNCLOS.[16] Congress may view ratification of the Convention as politically impossible given its staunch public support for unilateral trade actions.[17]

UNCLOS supporters may also reexamine their commitment if becoming a State Party means giving up unilateral sanctions. For example, the environmental community in the United States has traditionally shown strong support for the Convention because it contains numerous provisions that serve to protect living resources from human exploitation and environmental degradation.[18] Only by joining the Convention will the United States be able to invoke UNCLOS' compulsory dispute settlement procedures to enforce these environmental provisions.[19] Yet ironically, existing support for the Convention among environmentalists may disappear if, by becoming a State Party, the United States is forced to abandon its policy of imposing unilateral trade sanctions to enforce environmental standards on the international community.[20]

Part I of this article describes how unilateral sanctions are currently used to protect marine living resources under U.S. domestic law. Part II discusses the substantive rights and obligations granted to States Parties under UNCLOS, including the sovereign right to control fisheries within a State's juridical zones, and the obligation to protect and conserve marine living resources. Part III then reviews the

14. Recently some members of the international legal community have endeavored to reserve the term "sanction" exclusively for those measures adopted by international bodies and to use the term "measures" or "countermeasures" for actions by individual states. *See* Gaetano Arangio-Ruiz, *Third Report on State Responsibility*, International Law Comm., U.N. GAOR, 43rd Sess., at 7, 8, U.N. Doc. A/CN.4/440; ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES 75 (1984). For this article's purposes, such narrow definitional distinctions would serve no important function and might confuse readers. The terms "sanction" and "measure" will therefore be used interchangeably to describe any unilateral remedy intended to change the political behavior of another state.

15. *See infra* part I.B. for a discussion of how unilateral sanctions to protect international marine living resources are employed under U.S. law.

16. The political implications of U.S. membership in UNCLOS are discussed in more detail *infra* part V.

17. *See infra* notes 64-66, 412-20 and accompanying text.

18. *See infra* notes 413-14 and accompanying text.

19. This view is developed further in Craig S. Harrison, *Costs to the United States in Environmental Protection and Marine Scientific Research by Not Joining the Law of the Sea Convention, in* CONSENSUS AND CONFRONTATION, *supra* note 5, at 425, 433-37.

20. *See infra* note 412 and accompanying text.

procedures in UNCLOS for resolving disputes regarding a nation's interpretation of these rights and obligations. Part IV examines the argument that U.S. laws imposing unilateral sanctions lie beyond the authority of the Convention and are not subject to UNCLOS' dispute settlement provisions. Finally, part V evaluates how the potential loss of unilateral economic sanctions may erode domestic political support for U.S. membership in the Convention.

This article offers no Solomonic advice on whether the United States should or should not become a State Party to the Convention. It is the author's personal view that the overall merits of UNCLOS outweigh the potential loss of unilateral sanctions, and that U.S. membership is essential if this country wishes to play a leadership role in the international environmental arena in the 1990's and beyond.[21] This article also does not attempt to analyze the legality of U.S. unilateral sanctions should the issue ever be adjudicated pursuant to the dispute settlement provisions in UNCLOS.[22] Instead, it seeks to focus attention on the profound implications that UNCLOS membership may have on how the United States protects international marine living resources.

I

UNILATERAL TRADE SANCTIONS AGAINST NATIONS THAT FAIL TO COMPLY WITH U.S. LAWS TO PROTECT MARINE LIVING RESOURCES

For many years, the threat of trade sanctions has been a fundamental instrument of U.S. fisheries and marine conservation policy.[23] Several domestic statutes incorporate embargo provisions restricting

21. This view is deyeloped more fully in David A. Colson, *The Renewed Opportunity for United States Leadership in Forming a Widely Accepted Law of the Sea Convention*, Address at the Center For Oceans Law and Policy's Seventeenth Annual Seminar (Mar. 19, 1993), *in* PROCEEDINGS OF THE ANNUAL SEMINAR 1993: NEW NATIONAL PERSPECTIVES AND THE LAW OF THE SEA, at 21 (1993); *see also COL and ASIL Evening Program*, OCEANS POL'Y NEWS (Council on Ocean Law, Wash., D.C.), Feb. 1993, at 1, 2 (remarks of Curtis Bohlen, Assistant Secretary of State, in a speech before the Council on Ocean Law and the American Society of International Law). For a spirited defense of the value of the 1982 Convention to U.S. interests, see Edward L. Miles, *Preparations for UNCLOS IV?*, 19 OCEAN DEV. & INT'L L. 421 (1988).

22. Analysis of that nature would depend on the precise type of unilateral action taken. For example, there are obvious legal differences between a U.S. trade embargo—imposed under the Marine Mammal Protection Act—that is based entirely on domestic environmental considerations, as compared to an embargo—imposed under the Pelly Amendment to the Fisherman's Protective Act—that is based on a foreign nation's noncompliance with an existing international marine conservation program. *See infra* part I.B.

23. For an excellent discussion of the use of trade sanctions in U.S. fisheries policy, including a review of the history, operation, and application of specific laws and regulations, see Ted L. McDorman, *The GATT Consistency of U.S. Fish Import Embargoes To Stop Driftnet Fishing and Save Whales, Dolphins and Turtles*, 24 GEO. WASH. J. INT'L L. & ECON. 477 (1991).

the importation of fisheries products from nations refusing to comply with U.S. environmental standards for protecting marine living resources.[24] Embargoes may be triggered under these laws regardless of whether the fisheries management practices violate the foreign state's domestic laws, any international agreement, or customary international law.[25] While the United States has had legislation authorizing the imposition of trade sanctions for over two decades,[26] embargoes have been imposed with increasing frequency during the past five years.[27]

Targeted nations have long expressed dissatisfaction with the U.S. policy of unilateral trade sanctions.[28] These nations, however, did not have a coordinated response until recently, when a unilateral U.S. embargo on tuna imports became a catalytic force in the broader global debate over free trade and the environment.[29]

The interplay between free trade principles and international environmental protection has emerged in the 1990's as one of the most significant and contentious issues facing the international community.[30] Free trade proponents argue that unfettered international trade is a source of increased domestic wealth and technological development that enhance the ability of nations to improve their environments.[31] Critics argue that free trade growth strategies overexploit natural resources, transfer environmentally damaging industries to less developed nations, and result in other destructive practices.[32]

Although the trade-versus-environment dispute has been around for some time, until recently it was primarily confined to concerns by

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24. *Id.* at 482-507.

25. *See infra* notes 152-54.

26. For a discussion of these laws, see *infra* part I.B.2.

27. During the past seven years, at least five pieces of legislation dealing with the conservation of fisheries resources have been enacted that contain trade restriction components. *See infra* notes 79-85 and accompanying text.

28. *See generally* Kazuo Sumi, *The 'Whale War' Between Japan and the United States: Problems and Prospects*, 17 DENV. J. INT'L L. & POL'Y 317 (1989); *What Every American Schoolchild Has Come to Believe, the Japanese Deny*, OCEAN SCI. NEWS (Nautilus Press, Wash., D.C.), Oct. 24, 1991, at 1, 1-3 (Japanese fishermen express their displeasure with threat of unilateral U.S. sanctions).

29. *See infra* notes 39-48 and accompanying text.

30. *See* Richard A. Johnson, *Commentary: Trade Sanctions and Environmental Objectives in the NAFTA*, 5 GEO. INT'L ENVTL. L. REV. 577 (1993); U.S. EPA News Release (Sept. 17, 1992), *available in* WESTLAW, 1992 WL 237129 (highest environmental officials of the United States, Canada, and Mexico emphasized the importance of formal cooperation mechanisms to promote both economic growth and strong environmental protection leading into the 21st century).

31. *See, e.g.*, GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT, TRADE AND THE ENVIRONMENT, Doc. 1529 (advance Copy) (Feb. 3, 1992).

32. *See* GREENPEACE INTERNATIONAL, UNCED UNDERMINED: WHY FREE TRADE WON'T SAVE THE PLANET (1992); Naomi Roht-Arriaza, *Precaution, Participation, and the "Greening" of International Trade Law*, 7 J. ENVTL. L. & LITIG. 57, 63-65 (1992).

industrial interests in the developed countries. They argued that strict environmental standards would impair their international competitiveness, thus warranting increased governmental subsidies or import protection. The general public showed no great interest in the subject until September 1991, when a dispute resolution panel assembled under the General Agreement on Tariffs and Trade (GATT)[33] handed down a controversial decision calling into question the validity of an important and popular U.S. environmental statute.[34]

A. The Tuna/Dolphin Decision

The GATT panel found that the United States violated the general agreement by banning Mexican tuna imports in response to Mexico's noncompliance with the dolphin protection provisions of the Marine Mammal Protection Act (the MMPA).[35] The panel also struck down the intermediary embargo placed on nations that imported tuna from the primary embargoed nations for re-export to the United States.[36] According to the panel, the United States violated GATT because it did not regulate Mexican tuna directly as a product, but instead restricted its importation based upon its method of pro-

33. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pt. 5, A3, 55 U.N.T.S. 187 [hereinafter GATT]. GATT entered into force in January 1948; as of 1991, it was subscribed to by 104 governments that together account for nearly 90% of world trade. GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT ACTIVITIES 1991: AN ANNUAL REVIEW OF THE WORK OF GATT 1 (1992).

34. Report of the Panel, United States—Restrictions on Imports of Tuna (Mexico v. U.S.), GATT Doc. D/S21/R (Sept. 3, 1991), *reprinted at* 30 I.L.M. 1594 [hereinafter Tuna/Dolphin Decision]. For a detailed analysis of the decision, consult the sources cited *infra* note 39.

35. 16 U.S.C. §§ 1361-1407 (1988 & Supp. IV 1992). The MMPA requires that nations whose fleets fish in the eastern tropical Pacific have a dolphin protection plan comparable to the U.S. program. *Id.* § 1371(a)(2)(B). The Act requires that, as of the end of 1990, average dolphin mortality from each nation's fleet could not exceed 1.25 times the U.S. average. *Id.* § 1371(a)(2)(II). If a nation failed to certify that its tuna fleet has met the U.S. standards, the Secretary of Treasury was required to place an embargo on imports of that nation's tuna. *Id.* § 1371(a)(2). In addition, to prevent transhipment of tuna through third countries, the MMPA contains an "intermediary nations" provision, which requires nations that export yellowfin tuna to the United States to certify that they have acted to prohibit importation of tuna from nations that have already been embargoed under the Act. *Id.* § 1371(a)(2)(C). In the absence of an approved certification, intermediary nations' tuna must also be embargoed. *Id.* § 1371(a)(2). The MMPA also provides that if an embargo on yellowfin tuna or tuna products remains in effect against a foreign country for six months, this will trigger the operation of section 8(a) of the Fishermen's Protective Act of 1967, 22 U.S.C. § 1978(a) (1988 & Supp. IV 1992), also known as the Pelly Amendment. 16 U.S.C. § 1371(a)(2)(D). This provision provides the President with discretionary authority to order a prohibition of imports of any product from the offending nation for an indeterminate period of time. For a more detailed discussion of the Pelly Amendment, *see infra* notes 72-77 and accompanying text.

36. Tuna/Dolphin Decision, *supra* note 34, para. 5.40. Countries identified by the U.S. Government as being subject to the intermediary embargo included Costa Rica, France, Italy, Japan, and Panama. *Id.* para. 2.11.

duction.[37] The panel also ruled that GATT forbids extraterritorial application of health and conservation regulations like those applied against Mexican fishermen to protect dolphins outside U.S. waters.[38]

The *Tuna/Dolphin Decision* triggered a torrent of scholarly commentary and public debate.[39] In the United States, environmentalists, animal protection advocates, members of Congress, and others quickly interpreted the decision as imperiling not just the nation's ability to protect marine mammals, but also its ability to use any unilateral economic measures to protect other domestic and international environmental interests.[40] Shortly after the decision was published, President Bush received letters from 100 congressional Representa-

37. *Id.* para. 5.15. Although only Mexico filed an official GATT challenge, the United States cited Mexico, Venezuela, and Vanuatu as being subject to embargo. *Id.* para. 2.7. Panama and Equador were threatened but were exempted from the embargo after demonstrating that their fleets were in compliance with U.S. law. *Id.* The embargo against Vanuatu was lifted on January 23, 1992, after it demonstrated that its purse-seining operations were relatively small. David J. Ross, Comment, *Making GATT Dolphin-Safe: Trade and the Environment*, 2 DUKE J. COMP. & INT'L L. 345, 349 n.41 (1992).

38. Tuna/Dolphin Decision, *supra* note 34, para. 5.32.

39. For studies dealing with the political and economic aspects of free trade versus protection of the international environment, see generally THE GREENING OF WORLD TRADE ISSUES (Kym Anderson & Richard S. Blackhurst eds., 1992); MIKHAIL S. BERNSTAM, THE WEALTH OF NATIONS AND THE ENVIRONMENT (1991); JIM MACNEILL ET AL., BEYOND INTERDEPENDENCE: THE MESHING OF THE WORLD'S ECONOMY AND THE EARTH'S ECOLOGY (1991); PRESERVING THE GLOBAL ENVIRONMENT (Jessica T. Mathews ed., 1991). For legal aspects of tuna regulation, see Joel P. Trachtman, *GATT Dispute Settlement Panel*, 86 AM. J. INT'L L. 142 (1992); John P. Manard, Jr., *GATT and the Environment: The Friction Between International Trade and the World's Environment—The Dolphin and Tuna Dispute*, 5 TUL. ENVTL. L.J. 373 (1992); Frederic L. Kirgis, Jr., *Environment and Trade Measures After the Tuna/Dolphin Decision*, 49 WASH. & LEE L. REV. 1221 (1992); Dorothy J. Black, *International Trade v. Environmental Protection: The Case of the U.S. Embargo on Mexican Tuna*, 24 L. & POL'Y INT'L BUS. 123 (1992); Carol J. Beyers, *The U.S./Mexico Tuna Embargo Dispute: A Case Study of the GATT and Environmental Progress*, 16 MD. J. INT'L L. & TRADE 229 (1992); Eric Christensen & Samantha Geffin, *GATT Sets its Net on Environmental Regulation: The GATT Panel Ruling on Mexican Yellowfin Tuna Imports and the Need for Reform of the International Trading System*, 23 U. MIAMI INTER-AM. L. REV. 569 (1991-92); Robert F. Housman & Durwood J. Zaelke, *The Collision of the Environment and Trade: The GATT Tuna/Dolphin Decision*, 22 Envtl. L. Rep. (Envtl. L. Inst.) 10,268 (Apr. 1992); Ross, *supra* note 37; Matthew H. Hurlock, Note, *The GATT, U.S. Law and the Environment: A Proposal to Amend the GATT in Light of the Tuna/Dolphin Decision*, 92 COLUM L. REV. 2098 (1992). For a discussion of the conflict between the environment and economics in general, see Robert F. Housman & Durwood J. Zaelke, *Trade, Environment, and Sustainable Development: A Primer*, 15 HASTINGS INT'L & COMP. L. REV. 535 (1992) [hereinafter *Trade, Environment, and Sustainable Development*].

40. *See* Jessica Mathews, *Dolphins, Tuna and Free Trade*, WASH. POST, Oct. 18, 1991, at A21. An overview of congressional concerns may be found in *Trade and the Environment: Hearings Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 102d Cong., 1st Sess. (1991).

tives and sixty-four Senators protesting the ruling and rejecting GATT's authority over domestic environmental policy.[41]

In contrast, most foreign governments expressed support for the *Tuna/Dolphin Decision*, believing that it would curtail the long-criticized U.S. policy of imposing unilateral economic sanctions to protect marine living resources.[42] Developing countries used this opportunity to push the U.N. General Assembly to adopt a resolution condemning unilateral economic coercive measures by developed countries.[43] More importantly, several documents adopted by the U.N. Conference on the Environment and Development (UNCED) contain language that generally reflects the holding of the GATT panel's decision.[44] These documents include the Rio Declaration,[45] Agenda 21,[46] Forestry Principles,[47] and the Climate Change Convention.[48]

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41. *See* Hurlock, *supra* note 39, at 2130 n.175; *Members of Congress Protest Recent GATT Ruling on U.S. Embargo of Mexican Tuna*, 8 Int'l Trade Rep. (BNA) 1399 (Sept. 25, 1991); *Impact of GATT on U.S. Environmental Policy Was Denied by Senators*, OCEAN SCI. NEWS (Nautilus Press, Wash., D.C.), Oct. 10, 1991, at 1, 1.

42. Written and oral presentations to the GATT dispute resolution panel in support of Mexico's position were submitted by Australia, Canada, the European Community (the EC), Indonesia, Japan, Korea, Norway, the Philippines, Senegal, Thailand, and Venezuela. For a summary of each country's position, see Tuna/Dolphin Decision, *supra* note 34, paras. 4.1-.30. No nation submitted comments in favor of the U.S. position. The intermediary embargo particularly angered several important trading partners such as Canada, the EC, and Japan, who viewed the U.S. action as illegal and unfair. *See generally* Peter Passell, *Tuna and Trade: Whose Rules?*, N.Y. TIMES, Feb. 19, 1992, at D2 (explaining the basis of the other nations' views).

43. G.A. Res. 46/210, U.N. GAOR, 49th Sess., U.N. Doc. A/46/49 (1991). Among other requests, the resolution "[c]alls upon the international community to adopt urgent and effective measures to eliminate the use by some developed countries of unilateral economic coercive measures against developing countries with the purpose of exerting directly or indirectly, coercion on the sovereign decisions of the countries subject to those measures." Votes for the resolution were 97 in favor, 30 opposed, and 9 abstentions, generally reflecting the north versus south approach taken by its sponsors. 1991 U.N.Y.B. 348, U.N. Sales No. E.92.I.1.

44. For a discussion of events leading up to adoption of these documents, see *Trade, Environment, and Sustainable Development, supra* note 39, at 584-95.

45. According to principle 12 of the Rio Declaration:

> States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

REPORT OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, at 3, 12, U.N. Doc. A/CONF.151/26/Rev.1 (Vol.I), U.N. Sales No. E.93.I.8 (1992), (Annex I, entitled Rio Declaration on Environment and Development).

46. Agenda 21 encourages the following government policies:

> (e) Seek to avoid the use of trade restrictions or distortions as a means to offset differences in cost arising from differences in environmental standards and regu-

A GATT resolution panel decision is not considered binding on the parties, however, until several conditions are satisfied.[49] For example, the panel decision must be formally adopted by the GATT Council before retaliatory trade measures may be imposed on the offending nation.[50] Amidst intense international support for formal adoption, Mexico chose not to pursue its challenge against the United States in the GATT Council because it feared the controversy had the potential to derail ongoing negotiations over the North American Free Trade Agreement (NAFTA).[51] Instead, it entered into bilateral

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lations, since their application could lead to trade distortions and increase protectionist tendencies;

. . .

(i) Avoid unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country. Environmental measures addressing transborder or global environmental problems should, as far as possible, be based on an international consensus . . . .

Id. at 9, 21 (Annex II, entitled Agenda 21).

47. *Id.* Annex III (entitled Non-Legally Binding Authoritative Statement of Principles For a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests). Principle 14 provides: "Unilateral measures, incompatible with international obligations or agreements, to restrict and/or ban international trade in timber or other forest products should be removed or avoided, in order to attain long-term sustainable forest management." *Id.*

48. *U.N. Framework Convention on Climate Change*, 5th Sess., U.N. Doc. A/AC.237/18 (Part II)/Add.1 (1992). The Climate Change Convention was negotiated separately from the UNCED process, but was opened for signature at the Rio Conference. The United States signed and ratified it in 1992. Article 3(5) reads as follows:

> The parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

Id. at 6.

49. Some of these conditions are discussed *infra* notes 346-47 and accompanying text. GATT resolutions can be blocked by the offending party, here the United States, if it disagrees with the panel's decision. This anomaly of consensus decisionmaking may discourage a party from investing the political capital to seek formal adoption of the panel decision by the GATT Council.

50. *See* GATT, *supra* note 33, art. XXIII:2, 61 Stat. A64-A65, 55 U.N.T.S. at 268. The GATT dispute resolution procedure is set out in the *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance,* 26 BASIC INSTRUMENTS & SELECTED DOCUMENTS SUPPLEMENTS 210 (1980), as modified by *Dispute Settlement Proceedings*, 29 BASIC INSTRUMENTS & SELECTED DOCUMENTS SUPPLEMENTS 13 (1983). For more information on GATT dispute resolution panels, see JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 83-113 (1989); William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51 (1987).

51. *See* Ross, *supra* note 37, at 353. Mexico also agreed to impose stricter controls on its tuna fleet, but did not ban the use of purse seine nets in the Eastern Pacific. These measures included introducing a program requiring trained observers on all fishing boats, increasing government funding for research on safer fishing methods, and imposing jail terms for fishermen who illegally kill dolphins. *Bowing to U.S. Pressure, Mexico to Have Observers on Tuna Boats, Delays GATT Action*, 8 Int'l Trade Rep. (BNA) 1411 (Sept. 25, 1991).

negotiations with the United States to end the dispute independently of GATT.[52]

On October 27, 1992, the United States took a step toward resolving its dispute with Mexico and Venezuela[53] by enacting the International Dolphin Conservation Act of 1992 (the IDCA).[54] Under the new Act, the United States would lift its embargoes against Mexico and Venezuela if they agreed to implement a moratorium on the harvest of tuna through purse seine nets beginning on March 1, 1994, and lasting for at least five years.[55] The Act also made it unlawful after February 28, 1994, for any person to harvest tuna with purse seine nets or, "after June 1, 1994, to sell, purchase, offer for sale, transport, or ship, in the United States, any tuna or tuna product that is not dolphin safe."[56] The Act requires periodic monitoring to ensure that countries are fully adhering to the moratorium and allows additional sanctions for noncompliance.[57]

Mexico and Venezuela initially indicated that they would implement a moratorium in accordance with the IDCA.[58] Both nations' support for the moratorium has since eroded, however, and the two countries have signalled their intent to participate instead in the dolphin protection program established under the auspices of the In-

52. *See GATT Council Refuses EC Request to Adopt Panel Report on U.S. Tuna Embargo*, 9 Int'l Trade Rep. (BNA) 353 (Feb. 26, 1992). Nations still subject to either the primary or intermediary embargo opposed the efforts by Mexico and the United States to ignore the *Tuna/Dolphin Decision* in favor of bilateral settlement. *See id.* In July 1992, the European Community filed a formal complaint after the GATT Council, at the behest of the United States and Mexico, refused to adopt the GATT Panel Report. During an earlier hearing before the GATT Council, the EC and twelve other nations (Argentina, India, Canada, Peru, Japan, Columbia, Senegal, South Korea, New Zealand, Pakistan, Brazil, and Hong Kong) all argued unsuccessfully that the *Tuna/Dolphin Decision* should be adopted as a matter of principle, regardless of what Mexico and the United States were arranging bilaterally. *EC Urges Adoption of Tuna Report but U.S., Mexico Claim Accord is Near*, 9 Int'l Trade Rep. (BNA) 524 (Mar. 25, 1992). Interestingly, while leading the fight against the U.S. embargo, the EC Commission barely defeated an European Economic Community proposal to adopt its own embargo against tuna imports caught by dolphin-unsafe practices. *EC Commission Delays Action on EC Tuna Embargo Proposal*, 9 Int'l Trade Rep. (BNA) 1259 (July 22, 1992). The proposed EC embargo would have differed from the U.S. version because it would have been imposed pursuant to multilateral agreement rather than unilaterally. *Id.*

53. *See supra* note 37.

54. Pub. L. No. 102-523, 106 Stat. 3425 (1992) (codified at 16 U.S.C. §§ 1411-1418 (Supp. IV 1992)). For a review of the history and rationale of the Act, see *Review of the Administration's Dolphin Protection Proposal and Discussion of Options Available to Help Reduce Dolphin Mortality: Hearing Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 102d Cong., 2nd Sess. (1992).

55. 16 U.S.C. § 1415(a).

56. *Id.* § 1417(a).

57. *Id.* § 1415(b), (c).

58. *House Approves Bill That Would End Tuna Embargoes Against Mexico*, 9 Int'l Trade Rep. (BNA) 1688 (Sept. 30, 1992).

ter-American Tropical Tuna Commission (the IATTC).[59] In the future, Mexico and Venezuela may elect to join the moratorium or independently seek to establish that they are in compliance with the MMPA's dolphin protection provisions.[60] At present, however, Mexico and Venezuela, along with several other nations, are still subject to either primary or intermediary embargoes by the United States.[61]

Enactment of the IDCA has done little to assuage international concern over the legality of a nation using unilateral economic measures to protect the environment beyond its jurisdictional territory. In fact, a second GATT dispute settlement panel has been established at the behest of the European Community to seek redress from the United States for its continued intermediary embargo of tuna products from Italy and Spain.[62]

By contrast, U.S. congressional leaders have announced that trade sanctions will remain an integral part of the nation's domestic legislation, irrespective of the *Tuna/Dolphin Decision*.[63] Environmentalists and commercial fishing interests have supported Congress' trade embargoes as an effective method of forcing foreign governments to adopt stricter environmental protection measures.[64] The considerable influence of environmental organizations in Congress has become even stronger as commercial and recreational fishermen, animal protection organizations, labor unions, consumer protection advocates, and others have formed a powerful coalition in support of using U.S. environmental standards as the "level playing field" for all

59. Convention For the Establishment of an Inter-American Tropical Tuna Commission, May 31, 1949, 1 U.S.T. 230, 80 U.N.T.S. 3. Current members are the United States, Costa Rica, France, Japan, Nicaragua, Panama, Vanuatu, and Venezuela. Mexico withdrew from the organization in 1980. *See* Christensen & Geffin, *supra* note 39, at 594. The IATTC plan hinges on the success of alternative fishing methods and an observer program. Under the plan, the annual dolphin kill would be reduced each year until 1999, at which point a quota of less than 5000 could be achieved. *See Sen. Kerry Calls for Moratorium on Encircling Dolphins to Catch Tuna*, 9 Int'l Trade Rep. (BNA) 2 (July 29, 1992).

60. *See supra* note 35.

61. Primary embargoes under the MMPA are currently in place against Mexico, Venezuela, Columbia, and Panama. Intermediary embargoes are still in effect against Italy, Spain, Costa Rica, and Japan. Telephone Interview with Mr. Paul Niemeier, Office of International Affairs, National Marine Fisheries Service (Aug. 25, 1993).

62. *See Trade Policy: Policy on Environment, Trade Nexus Expected from Administration in June*, 10 Int'l Trade Rep. (BNA) 756 (May 5, 1993).

63. On November 21, 1991, in response to the *Tuna/Dolphin Decision*, House Majority Leader Richard Gephardt (D-Mo) and 21 cosponsors introduced a resolution, H.R. Res. 246, 102d Cong., 1st Sess. (1991), stating that Congress would not approve enabling legislation for the free trade agreement with Mexico and the Uruguay Round, held under GATT, if the agreements jeopardized U.S. health, safety, environmental, or labor laws. *Waxman Measure Urges Administration to Safeguard U.S. Laws in GATT, FTA*, 8 Int'l Trade Rep. (BNA) 1740 (Nov. 27, 1991).

64. *See infra* notes 412-20 and accompanying text.

the world's fishermen.[65] Because this formidable political coalition will undoubtedly continue to push for enforcement through unilateral trade sanctions, U.S. policymakers will find it increasingly difficult to keep foreign nations from responding in kind with reciprocal trade actions.[66]

B. U.S. Laws That Impose Unilateral Sanctions

A growing number of statutes in the United States authorize the use of unilateral trade measures to protect international marine living resources.[67] Several authors have examined the history and operation of these laws,[68] and little would be gained by repeating that information here. A brief explanation of how the U.S. legal regime is organized and a summary of the most salient features of U.S. laws restricting fisheries imports will suffice. It is helpful to group the laws containing trade restrictions into two categories: those enforcing international agreements, and those enforcing purely U.S. standards.

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65. *See U.S. State Dept. Must Seriously "Press" Fisheries/Environmental Issues,* MARINE FISH MGMT. (Nautilus Press, Wash., D.C.), May 1991, at 3-4 (statement of David A. Colson). *See also infra* notes 412-29 and accompanying text for a discussion of the political implications of this new coalition.

66. Although not formally adopted by the GATT Council, the *Tuna/Dolphin Decision* will serve as persuasive authority, and its reasoning will undoubtedly be applied in future cases. One noted authority commenting on the absence of a doctrine of stare decisis under international law stated: "Yet, in practice, the diplomats and officials who participate in the GATT system are very influenced by 'precedent,' and often mention precedents in some detail in GATT deliberations, as well as in the formal dispute-settlement panel 'findings.' " JACKSON, *supra* note 50, at 90.

67. While the United States continues to participate in multilateral negotiations to protect the environment, it has become increasingly tempted to use unilateral trade measures. Hurlock, *supra* note 39, at 2110. This trend is illustrated by the fact that in 1989-90, out of 80 environmental bills introduced in the 101st Congress, 33 would have restricted international trade or affected international trade policy. *Id.* at 2110 n.69. The discussion that follows does not address U.S. unilateral sanctions that have been imposed as one element of a sanction campaign carried out for broader political purposes. For example, during the 1980's, Poland's fishing fleet was denied access to the U.S. EEZ, in response to Poland's suppression of the Solidarity trade union. The former Soviet Union had similar restrictions placed on its fleet after it invaded Afghanistan. For an analysis of the legality and effectiveness of these sanctions, see generally David D. Caron, *International Sanctions, Ocean Management, and the Law of the Sea: A Study of Denial of Access to Fisheries*, 16 ECOLOGY L.Q. 311 (1989). The purpose of these sanctions is to influence political behavior unrelated to the conservation or management of marine living resources and therefore is not directly relevant to this article.

68. *See* McDorman, *supra* note 23; Hurlock, *supra* note 39, at 2110; Jane Earley, *The Future of Fish Embargoes in U.S. Law and the GATT, in* THE TENTH ANNUAL FISHERIES LAW SYMPOSIUM (Univ. of Wash. Law School, Seattle, Wash., Oct. 15-16, 1992); Gene S. Martin & James W. Brennan, *Enforcing the International Convention for the Regulation of Whaling: The Pelly and Packwood-Magnuson Amendments*, 17 DENV. J. INT'L L. & POL'Y 293 (1989); Laura L. Lones, Note, *The Marine Mammal Protection Act and International Protection of Cetaceans: A Unilateral Attempt To Effectuate Transnational Conservation*, 22 VAND. J. TRANSNAT'L L. 997 (1989).

1. *Enforcing International Agreements*

The laws in this category impose trade restrictions when a foreign nation fails to comply with an existing international conservation or fisheries agreement[69] or refuses to enter into negotiations with the United States to achieve such an agreement. Through these laws, Congress has sought to use the threat of restricted access to U.S. markets to enforce international conservation regimes,[70] which generally lack effective multilateral enforcement measures.

Enacted in 1971,[71] the Pelly Amendment to the Fishermen's Protective Act[72] is unique within the U.S. system because a variety of other statutes invoke it in their embargo provisions.[73] The Amendment grants broad authority to the Secretaries of Commerce and Interior to certify whether a foreign nation is acting in a fashion that diminishes the effectiveness of an international fishery conservation agreement or international program for endangered or threatened species.[74] If a foreign nation is so certified, the President has the discretion to prohibit the importation of "any products from the offending country for any duration," to the extent that such prohibition is sanctioned by GATT.[75] In effect, Pelly Amendment certification serves as a supplemental procedural mechanism to enforce the substantive requirements of other marine conservation statutes.[76] The United States has made Pelly Amendment certifications on at least

69. The Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371-3378 (1988 & Supp. IV 1992), are an exception because its trade restriction provisions also apply to fish, wildlife, or plants taken illegally under the domestic laws of their place of origin.

70. The term regime is used in its broadest sense as a method of administration or management rather than in the narrower sense of a formal legal or political system.

71. Pub. L. No. 92-219, 85 Stat. 786 (1971).

72. 22 U.S.C. § 1978 (1988 & Supp. IV 1992).

73. *See infra* note 100. These statutes include the Marine Mammal Protection Act, 16 U.S.C. § 1371(a)(2)(D) (Supp. IV 1992); Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1821(e)(2) (1988); Driftnet Impact, Monitoring, Assessment and Control Act, 16 U.S.C. § 1822 note (1988); Driftnet Act Amendments of 1990, 16 U.S.C. § 1826 (Supp. IV 1992); and Fishery Conservation Amendments of 1990, 16 U.S.C. § 1822 note (Supp. IV 1992).

74. 22 U.S.C. § 1978(a)(1)-(2).

75. *Id.* § 1978(a)(4). Presidential authority to impose trade sanctions under the Pelly Amendment was significantly expanded in 1992. Pub. L. No. 102-582, § 201, 106 Stat. 4904 (1992). Previously, the President had authority to prohibit only the importation of "fish products." 22 U.S.C. § 1978(a)(4) (1988 & Supp. III 1991).

76. *See infra* notes 78-88. Interestingly, the Pelly Amendment is the only U.S. marine conservation statute requiring that the import restriction be consistent with GATT. 22 U.S.C. § 1978(a)(4). It is unclear what legal effect this requirement would have should the GATT Council ever approve a dispute settlement panel decision that finds the U.S. trade sanction policy in violation of the general agreement. *See supra* notes 35-48 and accompanying text.

eleven separate occasions since 1974; none of these, however, has resulted in the imposition of trade sanctions.[77]

Among the other statutes that use the threat of trade sanctions to enforce international agreements are the Packwood-Magnuson Amendment;[78] Driftnet Impact Monitoring, Assessment and Control Act of 1987;[79] Driftnet Act Amendments of 1990;[80] 1990 Driftnet Amendments to the Marine Mammal Protection Act;[81] International

77. *See generally* JOSEPH J. KALO, COASTAL AND OCEAN LAW 538-39 (1990). For a summary of Pelly Amendment certifications and the actions resulting from each, see Earley, *supra* note 68, at F-19 to F-20; Martin & Brennan, *supra* note 68, at 298-315. All three commentators suggest that the certification process has been effective in forcing other nations to modify their policies so that trade sanctions are unnecessary.

78. 16 U.S.C. § 1821(e)(2) (1988). The Packwood-Magnuson Amendment was enacted in 1979 to impose mandatory sanctions on nations that were found to have diminished the effectiveness of the International Whaling Commission's Conservation Program. If a nation is certified under the Packwood-Magnuson Amendment, its fisheries harvesting allocation within the U.S. EEZ is automatically reduced by not less than 50%. *Id.* § 1821(e)(2)(B). Because there have been so few foreign fisheries allocations within the U.S. EEZ in recent years, the effectiveness of this amendment has been diminished significantly. A certification under Packwood-Magnuson is also deemed a certification under the Pelly Amendment. *Id.* § 1821(e)(2)(A)(i). Pelly Amendment certification gives the President discretion to impose additional trade sanctions. *See supra* notes 72-77 and accompanying text.

79. 16 U.S.C. § 1822 note (1988). The 1987 Driftnet Control Act was intended to encourage cooperation between the United States and the primary high seas driftnet fishing nations in the Pacific—Japan, South Korea, and Taiwan—to acquire more reliable information about the fishery. The legislation also requires that the United States enter into negotiations to ensure effective monitoring and enforcement of laws, regulations, and agreements. *Id.* Failure to reach an agreement within 18 months is deemed a certification for Pelly Amendment trade sanction purposes. *Id.*

80. 16 U.S.C. § 1826 (Supp. IV 1992). The Driftnet Act Amendments of 1990 incorporate and expand upon provisions of the Driftnet Impact Monitoring, Assessment, and Control Act. *Id.* § 1826(a). Among other measures, the Amendments require the United States to (1) implement U.N. General Assembly Resolution 44-225, recommending a moratorium on all large-scale driftnets on the high seas after June 30, 1992; (2) support the Tarawa and Wellington Declarations prohibiting the use of long driftnets in the South Pacific; and (3) secure a permanent global ban on the use of large-scale driftnets on the high seas. *Id.* § 1826(c). They also require the Secretaries of Commerce and State to include a comprehensive set of protections against large-scale driftnet fishing in all future international agreements. *Id.* § 1826(d). The Amendments also require the Secretary to compile annually a list of nations that continue to conduct large-scale driftnet fishing on the high seas in a manner that diminishes the effectiveness of any international agreement governing large-scale driftnet fishing to which the United States is a party or otherwise subscribes. *Id.* § 1826(e)(6). A nation's inclusion on the list is deemed a certification for purposes of the Pelly Amendment and may result in trade sanctions. *Id.* § 1826(f).

81. 16 U.S.C. § 1371(a)(2)(E) (Supp. IV 1992). The 1990 amendments ban the importation of fish or fish products caught by or purchased from nations that are known to use large-scale driftnets, absent documentation that the fish were not harvested using large-scale driftnets on the high seas. *Id.* § 1371(a)(2)(E). The amendments clarify the MMPA ban on fish or fish product imports "caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards." *Id.* § 1371(a)(2). The clarification in the MMPA followed the 1990 Amendments to the Magnuson Fishery Conservation and Management Act of 1976 (the MFCMA), 16 U.S.C. § 1825 (1988 & Supp. IV 1992), in which the United States

Dolphin Conservation Act of 1992;[82] Section 205 of the Magnuson Fishery Conservation and Management Act of 1976 (the MFCMA);[83] Section 801 of the Fishery Conservation Amendments of 1990 (Anadromous Fish Certification Amendments);[84] Atlantic Tunas Convention Act of 1975;[85] Tuna Conventions Act of 1950;[86] Endangered

banned the use of large-scale driftnets by its own fishermen. Pub. L. No. 101-627, § 113(A), 104 Stat. 4436, 4453 (codified as amended at 16 U.S.C. § 1857(1)(M) (1988 & Supp. IV 1992)). Federal regulations prohibit tuna, salmon, squid, shark, and swordfish imports from a nation known to use large-scale driftnets. 50 C.F.R. § 216.24(e) (1992).

82. 16 U.S.C. §§ 1411-1418 (Supp. IV 1992). For a discussion of the Act, see *supra* notes 54-57 and accompanying text. The IDCA authorizes a ban on yellowfin tuna products imports from nations that fail to comply with commitments agreed to under the Act. 16 U.S.C. § 1415(b)(1). If the country fails to comply within 60 days, the President must impose an import ban on fish products equal in value to 40% of the imported fish products from that country during a given year. *Id.* § 1415(b)(2).

83. 16 U.S.C. § 1825 (1988 & Supp. IV 1992). Section 205 of the MFCMA authorizes the United States to prohibit fish or fish products imports from nations that: (1) refuse to negotiate in good faith toward an international fishery agreement allowing U.S. vessels equitable access to their EEZ's, *id.* § 1825(a)(1); (2) do not allow U.S. vessels to fish for tuna species in accordance with an international agreement, *id.* § 1825(a)(2); (3) do not comply with existing international fishery agreements concerning U.S. fishing rights, *id.* § 1825(a)(3); or (4) seize a U.S. fishing vessel in violation of an international fishery agreement, without authorization under a bilateral agreement, or as a consequence of a claim of jurisdiction not recognized by the United States, *id.* § 1825(a)(4). This section uses unilateral trade measures as a method of increasing U.S. access to foreign fishing areas rather than conserving marine living resources. Though fundamentally different from other laws in this category, it has been included in the discussion because it nevertheless uses the trade sanction weapon to force compliance with international fishery conservation agreements.

84. 16 U.S.C. § 1822 note (Supp. IV 1992). The Fishery Conservation Amendments of 1990 require the Secretary of State to negotiate a general international agreement to prohibit trade in anadromous fish or fish products unless those fish or fish products are legally certified as lawfully harvested. If the Secretary of Commerce finds that any nation is engaging in trade in unlawfully taken anadromous fish or anadromous fish products, that nation may be certified for purposes of trade sanctions under the Pelly Amendment.

85. 16 U.S.C. § 971 (1988 & Supp. IV 1992). This Act implements the International Convention for the Conservation of Atlantic Tunas, May 14, 1966, 20 U.S.T. 2887, 673 U.N.T.S. 63. Repeated and flagrant fishing operations that seriously threaten the achievement of the Convention's objectives may subject the fishing vessels' flag state to a U.S. embargo of any fish species covered by the Convention. 16 U.S.C. § 971d(c)(5). Species under investigation by the International Commission for the Conservation of Atlantic Tunas (Tuna Commission) have been expanded to include several new varieties of tuna and billfishes. 50 C.F.R. § 285.82 (1992). The conservation of Atlantic billfishes has become a very contentious issue in recent years and may have all of the elements necessary to trigger U.S. trade restrictions in the near future. Telephone Interview with Ellen Peel, Center for Marine Conservation (Mar. 10, 1994).

86. 16 U.S.C. §§ 951-961 (1988 & Supp. IV 1992). This Act requires the Secretaries of State and Commerce to promulgate regulations to carry out recommendations of the Tuna Commission. *Id.* § 955(c). These regulations are to include an embargo against countries that act in a manner that diminishes the effectiveness of the Commission's conservation recommendations. *Id.* The embargo is limited to fish species that are regulated by the Commission and caught within the regulated area. In the case of repeated and flagrant fishing operations that seriously threaten the achievement of the Commission's objectives, however, an embargo against "other species of tuna, in any form" caught within the regulated area may be imposed. *Id.*

Species Act of 1973 (the ESA);[87] and the Lacey Act Amendments of 1981.[88]

Relating trade restrictions to an international agreement does not diminish the unilateral character of the sanctions imposed. First, international agreements generally do not authorize explicit trade-related enforcement measures.[89] Second, some U.S. sanctions have targeted nations that are not even States Parties to the agreement that is being enforced.[90] Thus, the United States is not merely enforcing international law through its economic sanctions, it is expanding the reach of international agreements to involuntary parties. Third, U.S. sanctions have been imposed to enforce international recommendations before a formal international agreement comes into effect.[91] Finally, under the Pelly Amendment, the authority to determine if a nation is in compliance with an international conservation regime lies not with an international tribunal, but with the U.S. Secretary of Commerce or Interior.[92] While clearly related to international agreements, the U.S. laws in this category use the threat of trade restrictions to increase greatly unilateral U.S. influence over other nations' environmental practices.

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87. 16 U.S.C. §§ 1531-1544 (1988 & Supp. IV 1992). The ESA contains procedures for the listing of endangered or threatened species of plants and animals. It also implements U.S. responsibilities under the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES]. The Act prohibits the importation, exportation, taking, or possession of any listed species absent a specific exemption. 16 U.S.C. § 1538. The prohibitions apply to any person subject to the jurisdiction of the United States including any U.S. national on the high seas. *Id.* Except for the provisions dealing with endangered sea turtles, *see infra* part I.B.2.b., the Act does not authorize the use of trade restrictions against nations that are in noncompliance, but it does impose civil and criminal penalties on any person who knowingly violates any provision of the statute. 16 U.S.C. § 1540. The term "person" has been defined to include officers or departments of any foreign government or any other entity subject to the jurisdiction of the U.S. Government. *Id.* § 1532(13).

88. 16 U.S.C. §§ 3371-3378 (1988 & Supp. IV 1992). The Lacey Act Amendments of 1981 prohibit the importation of wildlife taken in violation of the law in the place of its origin. *Id.* § 3372(a)(2)(A). Its coverage applies to virtually every fish and animal, whether alive or dead, whether wild or bred in captivity, and to "any part, product, egg, or offspring." *Id.* § 3371(a). Prohibited conduct is subject to civil and criminal penalties. *Id.* § 3373.

89. The only exception is the ESA, which implements the explicit trade-related provisions of article II and the three appendices of CITES. *See supra* note 87; *see also Trade, Environment, and Sustainable Development*, *supra* note 39, at 580-82.

90. For example, the Atlantic Tunas Convention Act embargo provisions may be triggered if the vessels of "any country" repeatedly or flagrantly disregard the objectives of the Tuna Commission's recommendations. *See supra* note 85.

91. *See, e.g., supra* note 80 (noting that the Driftnet Act Amendments of 1990, 16 U.S.C. § 1826, allow the U.S. to embargo fisheries products of nations that do not abide by the moratorium on large-scale driftnets recommended by U.N. General Assembly Resolution 44-225).

92. *See supra* note 74 and accompanying text.

2. *Laws To Enforce U.S. Standards*

In contrast with the first category of laws, the second category contains trade sanction provisions that may be triggered as a consequence of noncompliance with U.S. domestic conservation standards, such as the Marine Mammal Protection Act (the MMPA)[93] and the 1989 Sea Turtle Conservation Amendments to the Endangered Species Act.[94] The imposition of trade sanctions pursuant to these laws depends upon whether a foreign nation agrees to implement standards, comparable to those in the United States, for protecting marine mammals and sea turtles.

The international community has expressed more hostility toward these laws, than to the laws in the first category, because their trade sanction provisions are based entirely on U.S. domestic environmental considerations and lack even a pretense of concern for international agreements.[95] In other words, the United States is attempting to impose domestic environmental standards to eliminate or control activities that are permitted under a foreign state's own laws and comply with its international legal duties. In addition, 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.[96] These laws will be examined below in more detail in light of the international controversy surrounding them and their potential conflict with UNCLOS.[97]

a. *The Marine Mammal Protection Act*

In contrast to its record of restraint under the Pelly Amendment,[98] the United States has enforced the MMPA's embargo provisions on several occasions when foreign nations have been unable to show that their tuna fishing practices were "comparable" to U.S. prac-

93. 16 U.S.C. §§ 1361-1407 (1988 & Supp. IV 1992). *See infra* part I.B.2.a.

94. 16 U.S.C. § 1537 note (Supp. IV 1992). *See infra* part I.B.2.b.

95. A good illustration of this hostility may be gleaned from the comments by interested third-party nations in the *Tuna/Dolphin Decision*. Although framed within the context of specific commitments under GATT, most of the comments reflect a deep resentment toward the extraterritorial application of U.S. environmental standards. *See generally* Tuna/Dolphin Decision, *supra* note 34, paras. 4.1-4.30.

96. The court in Earth Island Inst. v. Mosbacher, 746 F. Supp. 964, 968 (N.D. Cal. 1990), stated: "It is . . . clear that such [MMPA] regulations would help to protect United States fishermen and women from unfair competition from the vessels of foreign nations which engage in fishing practices which may be less expensive, but which result in much higher dolphin kill rates." Similar comments were made in the public and congressional debates leading up to passage of the 1989 Sea Turtle Conservation Amendments.

97. For a discussion of why these laws violate UNCLOS' substantive provisions *see infra* part IV.A-C.

98. *See supra* note 77 and accompanying text.

tices.[99] In 1988, Congress amended the Act, making the comparability standards much stricter and more difficult to meet.[100] As a consequence, the number of nations subject to embargoes by the United States rose dramatically after 1988.[101] The Bush administration, facing international pressure to exercise flexibility in enforcing the amended MMPA and in the midst of negotiating NAFTA, balked at prohibiting Mexican tuna imports until forced to do so by court order.[102]

In *Earth Island Institute v. Mosbacher*,[103] the United States Court of Appeals for the Ninth Circuit held that the executive branch has limited discretionary authority under the MMPA; it must impose an embargo on all yellowfin tuna and tuna products from all nations whose fleets fish in the Eastern Tropical Pacific, until the Secretary of Commerce certifies that each nation's incidental kill rate of dolphins is comparable to the U.S. rate.[104] On January 25, 1991, while awaiting the appeal before the Ninth Circuit, Mexico requested the contracting parties to establish a GATT dispute resolution panel to review the

99. During the early 1980's imports of tuna were banned from the Congo, Peru, Senegal, and Mexico. McDorman, *supra* note 23, at 494.

100. The Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100-711, § 4(a), 102 Stat. 4765 (1988) (codified as amended at 16 U.S.C. § 1371(a)(2)(B) (1988 & Supp. IV 1992)), significantly strengthened the comparability standards. In addition to requiring that incidental taking rates by the end of the 1990 fishing season be no more than 1.25 times that of U.S. vessels during the same period, the amendments imposed restrictions on operational matters such as when and how nets may be set, the total number of eastern spinner and coastal spotted dolphin as a percentage of the total incidental take, observer coverage equal to that achieved on U.S. vessels, and cooperation in carrying out U.S.-sponsored scientific research programs. The 1988 amendments also require that intermediary nations be subject to embargo and that additional sanctions under the Pelly Amendment be authorized once an embargo has been in place for six months. *See supra* note 35.

101. Shortly after implementation of the 1988 amendments, embargoes on yellowfin tuna were imposed against Ecuador, Panama, Vanuatu, Venezuela, and Spain, and existing embargoes against El Salvador and the Soviet Union were extended. McDorman, *supra* note 23, at 494.

102. For a discussion of the events leading to the litigation, see Manard, *supra* note 39, at 395-96; Michael T. Parsons, Comment, *The Marine Mammal Protection Act: Working Toward an Effective International Solution to the Dolphin Problem*, 4 TRANSNAT'L LAW. 673, 684 (1991).

103. Earth Island Inst. v. Mosbacher, 929 F.2d 1449 (9th Cir. 1991). The suits were brought by the environmental organizations Earth Island Institute and Marine Mammal Fund to force the Bush administration to implement fully the embargo provisions of the MMPA. The administration argued that the National Marine Fisheries Service (NMFS) did not have sufficient data to make an accurate comparability finding. The district court disagreed and held that yellowfin tuna products harvested with purse seines in the Eastern Tropical Pacific by any foreign nation must be embargoed until NMFS certifies that it is in compliance with the MMPA. Earth Island Inst. v. Mosbacher, 746 F.Supp. 964, 976 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991)

104. 929 F.2d 1449 (9th Cir. 1991).

U.S. embargo.[105] As noted previously, the GATT dispute resolution panel ruled in Mexico's favor on the most important portions of its challenge.[106]

The MMPA may be used as authority for additional bans in the future. The Act requires the Secretary of the Treasury to "ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards."[107] The United States has enacted detailed regulations governing the incidental taking of marine mammals during domestic commercial fishing operations.[108] Several gillnet and trawl fisheries in the Pacific, Atlantic, and Gulf of Mexico have been designated as having "frequent incidental taking of marine mammals" and are therefore subject to strict conservation measures.[109]

Domestic fishing interests and the environmental community likely will insist that foreign fishing fleets competing for these resources comply with marine mammal conservation standards comparable to those imposed on U.S. fishermen.[110] In fact, David Colson, Deputy Assistant Secretary of State for Oceans and Fisheries Affairs, has suggested that the swordfish, pollock, and salmon fisheries all have the necessary ingredients to become subject to future trade sanction legislation.[111]

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105. Tuna/Dolphin Decision, *supra* note 34, para. 1.3; *see also GATT Panel Hears Arguments on U.S.-Mexico Tuna Dispute, with Focus on Trade Obligations*, 8 Int'l Trade Rep. (BNA) 735 (May 15, 1991); *Mexico Says U.S. Tuna Ban is to Protect U.S. Industry, Defends its Dolphin Plan*, 8 Int'l Trade Rep. (BNA) 937 (June 19, 1991).

106. For a discussion of the GATT panel's findings, see *supra* notes 35-38 and accompanying text.

107. 16 U.S.C. § 1371(a)(2) (Supp. IV 1992); *see also supra* note 35.

108. The United States regulatory program is premised on the categorization of specific commercial fisheries based on the marine mammal incidental catch frequency by vessels in the fisheries. 50 C.F.R. §§ 229.1-.10 (1992). Category I fisheries consist of those that have a "frequent" incidental taking of marine mammals. *Id.* § 229.3(b)(1). Category II fisheries have an "occasional" incidental taking of marine mammals. *Id.* § 229.3(b)(2). Category III fisheries have a "remote likelihood" of taking marine mammals." *Id.* § 229.3(b)(3). To engage in a category I or II fishery, a vessel owner must receive an Exemption Certificate and agree to a host of terms and conditions, including the maintenance of daily and annual reports, frequent inspections, and acceptance of government observers under certain circumstances. *Id.* § 229.6.

109. The fisheries category list for 1992 may be found at 57 Fed. Reg. 20,328 (1992).

110. This scenario would be almost assured if the environmental community is successful in its efforts to amend the MMPA to reduce the number of marine mammal incidental catch exemptions currently granted to domestic commercial fishermen. *See* Suzanne Iudicello, *Fisheries Interactions Will Dominate Review of Marine Mammal Protection Act*, MARINE CONSERVATION NEWS, Spr. 1993, at 9.

111. *See U.S. State Dept. Must Seriously "Press" Fisheries/Environmental Issues*, *supra* note 65, at 3-4.

b. *The 1989 Sea Turtle Conservation Amendments to the Endangered Species Act*

The Endangered Species Act was amended in 1989[112] to require the executive branch to initiate negotiations for the development of bilateral or multilateral agreements with other nations to protect endangered sea turtles. The amended Act prohibits the importation of shrimp products from countries that fail to adopt shrimp harvesting methods that provide a level of protection for endangered sea turtles comparable to the level provided by U.S. methods.[113] The embargo provisions are triggered unless the President certifies to Congress by May 1, 1991, and annually thereafter, that the harvesting nation has a regulatory program and an incidental take rate comparable to that of the United States.[114]

The President has delegated certification authority to the State Department,[115] which has enacted guidelines that limit the scope of the Act to the nations of the Wider Caribbean/Western Atlantic Region.[116] The Act provides for no such geographic limitation and it is likely that the certification program will be extended globally in the near future.[117] The guidelines give foreign nations a three-year phase-in period to bring their regulations up to U.S. standards.[118] Foreign nations will be certified as having programs comparable to the U.S. 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 (TED's) at

112. The 1989 Sea Turtle Conservation Amendments to the Endangered Species Act, Pub. L. No. 101-162, 103 Stat. 1037 (1989) (codified at 16 U.S.C. § 1537 note (Supp. IV 1992)).

113. 16 U.S.C. § 1537 note.

114. *Id.* "Certification" under the Turtle Conservation Amendments means that a country will be allowed to continue to export shrimp to the United States. *Id.* In contrast, "certification" under the Pelly Amendment, *see supra* notes 74-76 and accompanying text, has an opposite meaning and serves to trigger sanctions.

115. Memorandum of December 19, 1990, 1990 PUB. PAPERS II-1813, 3 C.F.R. 372 (1991).

116. 56 Fed. Reg. 1051 (1991). The nations affected are Mexico, Belize, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Columbia, Venezuela, Trinidad and Tobago, Guyana, Suriname, French Guiana, and Brazil.

117. The Secretary of State, in consultation with the Secretary of Commerce, must provide Congress with "a list of each nation which conducts commercial shrimp fishing operations within the geographic range of distribution of such sea turtles." 16 U.S.C. § 1537 note. The Commerce Department originally interpreted the Act to apply to all shrimp fishing vessels operating globally, not just to those in the wider-Caribbean region. The State Department chose to interpret the Act more narrowly, but may expand the scope of the embargo program in coming years to all shrimp fishing vessels including the large fleets of Japan, China, and Australia. Telephone Interview with Mr. Terry Henwood, National Marine Fisheries Service (July 2, 1993).

118. 56 Fed. Reg. 1051 (1991).

all times[119] and to engage in a statistically reliable and verifiable scientific monitoring program; and (4) employ a credible enforcement program.[120]

For 1993, certification was granted if the affected nations required, at a minimum, that TED's be installed and used on a significant number of shrimp trawl vessels.[121] For 1994 and subsequent years, the affected nations must require all commercial shrimp trawl vessels to use TED's at all times.[122] On April 30, 1993, the State Department certified eight countries as being in compliance with the 1989 Amendments.[123] Honduras, Suriname, Trinidad and Tobago, and French Guiana were not certified.[124] As a result, shrimp products from those countries were banned on May 1, 1993.[125]

It remains to be seen how many of the countries certified in 1993 will be able to meet the stricter requirements in 1994 and beyond. In addition to the costs associated with equipping every vessel with TED's, the affected developing nations will find credible monitoring and enforcement programs very expensive to implement and maintain.[126] It is also unclear how more powerful nations may react to the sea turtle conservation requirements should the program be expanded beyond the Wider Caribbean Region in the future.[127] Nevertheless, the U.S. environmental community, commercial fishermen, and Congress have put the executive branch on notice that they expect the embargo provisions to be applied aggressively.[128]

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119. TED's prevent sea turtles from drowning after being overtaken by shrimp trawl nets. Large objects, such as turtles, are forced out of the net through a trap-door device while smaller objects, like shrimp, pass through into the cod-end. The requirement that TED's be used on *all* vessels at *all* times was enacted in 1993 to bring them into line with the U.S. program, which considerably expanded the TED's requirement in domestic waters on January 1, 1993. *See* 58 Fed. Reg. 9015, 9016 (1993).

120. 56 Fed. Reg. 1051, 1051-52; 58 Fed. Reg. 9015, 9016.

121. 58 Fed. Reg. 9015, 9017.

122. *Id.* at 9017.

123. 58 Fed. Reg. 28,428 (1993). The following nations were certified: Belize, Brazil, Colombia, Guyana, Mexico, Nicaragua, Panama, and Venezuela. Costa Rica and Guatemala were exempted from the certification process because their commercial shrimp fishing fleets are located in the Pacific rather than the Caribbean and, therefore, pose no threat to sea turtles. *Id.* at 28,429.

124. *Id.* at 28,428-29.

125. *Id.* at 28,429. The import ban has been in place against French Guiana since May 1, 1992, because it was the only nation not certified in 1992. *Id.*

126. According to estimates by NMFS, "the annual cost per vessel of towing a TED [ranges] from $400 to $1500. That figure, however, includes only costs associated with purchase, installation, and maintenance of a TED; it does not calculate nor amortize possible reduction of shrimp catch." Daniel K. Conner, *Turtles, Trawlers, and TEDs: What Happens When the Endangered Species Act Conflicts with Fishermen's Interests,* WATER LOG (Miss.-Ala. Sea Grant Consortium), Oct.-Dec. 1987, at 23.

127. *See supra* note 117 and accompanying text.

128. *See* Earley, *supra* note 68, at F-12 (describing two unpublished cases where a court dismissed a suit on the grounds that negotiations by the executive branch are not subject to

The shrimp embargo provisions of the Sea Turtle Conservation Amendments are just as vulnerable to challenge under GATT as were the provisions of the MMPA.[129] Moreover, both statutes, along with many other U.S. fisheries statutes with trade-related components, may affect the rights and obligations of States Parties under UNCLOS and thereby trigger its compulsory dispute settlement provisions.[130]

C. *Effectiveness of Unilateral Economic Sanctions*

Unilateral state action to protect the international environment appeals to the United States for several reasons.[131] First, it provides a method of achieving policy objectives immediately with none of the delays inherent in international bilateral or multilateral negotiations.[132] Second, it is less expensive to implement because the United States is not required to provide tradeoffs and incentives to reach agreement.[133] Third, and most importantly, a broad spectrum of U.S. political constituent groups perceive it as the most effective and, in some instances, the only feasible method to get foreign nations to change their behavior.[134]

The effectiveness of unilateral economic sanctions in changing unacceptable international political behavior has been studied extensively by political scientists, economists, and legal scholars for several decades.[135] Although these studies differ markedly in methodology,

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judicial review, and that jurisdiction concerning the implementation of embargoes properly belongs in the Court of International Trade).

129. The Sea Turtle Conservation Amendments share many of the features of the MMPA that were found to violate GATT. Both statutes restrict importation based on how a product is produced and apply U.S. conservation standards extraterritorially. *See supra* notes 35-38 and accompanying text. In addition, both may be perceived as protectionist in purpose. *See supra* note 96 and accompanying text.

130. *See infra* part III.C.2.

131. The advantages and disadvantages of unilateral state action in protecting the international environment are discussed in Richard B. Bilder, *The Role of Unilateral State Action in Preventing International Environmental Injury*, 14 VAND. J. TRANSNAT'L L. 51, 79-86 (1981).

132. *Id.* at 79-80; Hurlock, *supra* note 39, at 2140.

133. For example, in implementing its sea turtle conservation program, the United States has agreed to provide affected nations with technical training and TED technology transfer. In many cases the costs of providing this assistance is subtracted from existing foreign assistance grants. The United States will provide no funding for the purchase and maintenance of TED's, monitoring, enforcement, or other expenses. Telephone Interview with Mr. Terry Henwood, *supra* note 117. It is unlikely that the United States could have achieved a similar bargain in bilateral or multilateral negotiations if the unilateral trade embargo weapon were not available.

134. *See infra* notes 144-46 and accompanying text.

135. A comprehensive bibliography of materials on economic sanctions may be found in Blanka Kudej, *Trade Sanctions and International Relations: Selective Bibliography*, 19 N.Y.U. J. INT'L L. & POL. 1117 (1987); Diana Vincent-Daviss & Radu Popa, *The International Legal Implications of Iraq's Invasion of Kuwait: A Research Guide*, 23 N.Y.U. J. INT'L L. & POL. 231, 292 (1991).

scope of inquiry, and purpose, a general consensus among scholars has emerged that economic sanctions have not been particularly effective in changing the policies or conduct of target states.[136] Some revisionist scholars have found that economic sanctions are more effective than previously acknowledged, if viewed in light of certain nontraditional criteria and not solely in terms of whether they coerce the target nation into changing its conduct.[137] If applied to the broad range of 20th century economic sanctions, however, empirical evidence seems to support the view that sanctions have not been especially successful in achieving their immediate foreign policy goals.[138]

The effectiveness of U.S. economic sanctions to protect international marine living resources, like that of other types of sanctions, cannot be measured with any certainty.[139] There is some evidence that some nations threatened by sanctions have generally taken the steps necessary to satisfy U.S. demands for protecting whales,[140] dol-

136. One authority illustrates this consensus by quoting 15 studies and concluding that "it would be difficult to find any proposition in the international relations literature more widely accepted than those belittling the utility of economic techniques of statecraft." DAVID A. BALDWIN, ECONOMIC STATECRAFT 55-57 (1985) (footnote omitted); *see also* Kenneth W. Abbott, *Coercion and Communication: Frameworks for Evaluation of Economic Sanctions*, 19 N.Y.U. J. INT'L L. & POL. 781, 783-84 n.16 (1987).

137. Baldwin persuasively argues that the effectiveness of economic sanctions has been traditionally underestimated because they are often intended to send messages to nontarget nations and to produce effects that are much broader than mere coercion of the targeted state. BALDWIN, *supra* note 136, at 130-38. Doxey refines the concept of effectiveness to account for differences in objectives between the target state, domestic audience, third-parties, and broader foreign policy concerns. MARGARET P. DOXEY, INTERNATIONAL SANCTIONS IN CONTEMPORARY PERSPECTIVE 90-97 (1987). Sykes uses the principles of economic game theory in international negotiations as the foundation for his analysis of the effectiveness of U.S. unilateral sanctions under section 301 of the Omnibus Trade Act. After examining 88 cases in which section 301 was applied, Sykes concludes that unilateral sanctions encourage foreign nations to comply with their obligations under reciprocal trade agreements and that targeted nations accede to U.S. demands in a considerable majority of cases. Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case of Section 301*, 23 L. & POL'Y INT'L BUS. 263 (1992); *see also* Alan O. Sykes, *"Mandatory" Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301*, 8 B.U. INT'L L.J. 325 (1990).

138. For example, Hufbauer, Schott, and Elliot describe over 100 case studies of 20th century economic sanctions. GARY C. HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY (2d ed. 1990). Although their analysis found some sanctions successful (generally those in which the target state was economically and politically weak), the overall level of success in changing the policies of target nations was considered disappointing. *Id.* at 92-93. For a critique of Hufbauer's approach and how it compares with Baldwin's approach, see Abbott, *supra* note 136.

139. BALDWIN, *supra* note 136, at 130-31 (arguing that success or failure of a particular sanction should always be viewed as a matter of degree and depends on the types of alternatives foregone, the inherent difficulty of the enterprise, and the definition of the goals sought).

140. According to Martin and Brennan:

> In each case of actual or potential certification of countries for whaling practices, the offending country has taken positive steps towards compliance with IWC conservation goals. . . . Given the history of certification decisions and the present

phins,[141] and sea turtles.[142] Nevertheless, some critics are not convinced that unilateral sanctions are the most effective method of achieving the desired goals or of serving the nation's broader foreign policy interests.[143]

Valid or not, there is a widely held perception in the United States that unilateral economic sanctions are the single most effective method of forcing foreign nations to adopt stricter environmental standards.[144] This view has been embraced by a powerful coalition

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status of international whaling, the Pelly and Packwood-Magnuson Amendments unquestionably have had a salutary effect on the ability of the IWC to achieve its conservation objectives.

Martin & Brennan, *supra* note 68, at 315; *see also* Caron, *supra* note 67, at 344 (noting that the threat of denying access to fishing, coupled with the possible embargo of fisheries products imports, appears to have led some nations to alter their whaling policies); McDorman, *supra* note 23, at 488-90.

141. Embargoes on imports of yellowfin tuna forced Panama and Ecuador to prohibit their fleets from setting purse seine nets. Tuna/Dolphin Decision, *supra* note 34, para. 2.7. Although embargoes have not forced Mexico and Venezuela to join the U.S.-sponsored moratorium on dolphin-unsafe fishing practices in the Eastern Tropical Pacific, they have encouraged passage of stricter domestic conservation standards and participation in the IATTC dolphin protection program. *See supra* notes 53-61 and accompanying text.

142. Eight out of 12 countries affected by the embargo provisions of the Sea Turtle Conservation Amendments complied with U.S. requirements by adopting conservation programs. *See supra* note 123. According to one U.S. government official, those countries that have lost access to the U.S. market are receiving lower prices for their shrimp from non-U.S. buyers. Consequently, the government anticipates that all of the countries will eventually comply with U.S. requirements. Telephone Interview with Mr. Terry Henwood, *supra* note 117.

143. *See* Caron, *supra* note 67, at 352-53 (arguing that U.S. sanctions to deny foreign access to fishing in U.S. waters may lead to policy changes but also may undermine the international regime governing the EEZ); Dean M. Wilkinson, *The Use of Domestic Measures To Enforce International Whaling Agreements: A Critical Perspective*, 17 DENV. J. INT'L L. & POL'Y 271, 291 (1989) ("[T]here is difficulty in attempting to enforce an international regulatory regime through the application of domestic law. Inevitably, unilateral actions are either of limited utility or create diplomatic friction."); *see also* T. Bayard, *Comment on Alan Sykes' "Mandatory Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301"*, 8 B.U. INT'L. L.J. 325, 331 (1990) (noting that although retaliatory threats may prove useful against smaller nations, they are a prescription for trade war if used against other economic superpowers).

144. The environmental community and animal rights advocates have been the most outspoken, but by no means the only advocates of unilateral trade sanctions. In responding to the possible amendment of the MMPA as a result of the GATT *Tuna/Dolphin Decision*, a representative from a coalition of 15 environmental and animal rights organizations made the following statement before a committee of Congress:

> Tens of thousands and [sic] fewer dolphins will be killed this year because of closure of U.S. and foreign markets to dolphin-unsafe tuna. Ecuador and Panama, responding to the trade sanctions, have changed their practices and passed laws prohibiting all setting of nets on dolphins.
>
> But unless the GATT is reformed, all this and more will be lost. GATT would have us eliminate trade restrictions aimed at stopping the use of deadly driftnets. GATT would have us put whale meat back on the supermarket shelves. GATT would relegate the United States and every other nation to become a bystander to the destruction of marine mammals and ecosystems, powerless to close our markets to fish products caught by deadly and indiscriminate and destructive techniques.

composed of environmentalists, commercial fishermen, labor unions, consumer advocates, animal rights advocates, and some industrial concerns.[145] The political strength of this coalition has gained the attention of Congress and the Clinton administration, leading some observers to predict that the momentum toward trade restrictive policies will accelerate in the United States in coming years.[146]

In sum, the purpose of the trade embargo provisions of the Marine Mammal Protection Act,[147] Sea Turtle Conservation Amendments of 1989,[148] Pelly Amendment,[149] and comparable U.S. statutes[150] 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.[151] Embargoes may be imposed regardless of whether the noncomplying practice occurs on the high seas, in a coastal state's exclusive economic zone (EEZ), in a territorial sea, or in internal waters.[152] For example, a foreign nation may require its fishermen to employ new technologies or gear restrictions that satisfy the conservation standards mandated by the United States.[153] The impact on fishing operations brought about by these changes will not be limited to one juridical zone but may extend from the nation's internal waters to the high seas. Moreover, U.S. trade sanctions may be triggered even if a foreign nation's activities are fully

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GATT: Implication on Environmental Laws: Hearing Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce, 102d Cong., 1st Sess. 47, 48-49 (1991) (statement of David Phillips, Earth Island Institute) [hereinafter Statement of David Phillips].

145. Some of these groups support unilateral economic sanctions as a method of protecting the global environment, others are concerned about health issues or maintaining their international economic competitiveness. Although the reasons for their support may vary, all advocate that the U.S. Government use unilateral trade restrictions to force other nations to adopt stricter environmental protection measures. For an interesting collection of views from several members of this informal coalition, see *Trade and the Environment: Hearing Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 102d Cong., 1st Sess. 984 (1991). For a comprehensive examination of the policy debate in the United States, see Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039 (1993).

146. *More Might-Versus-Right: How America's Love of Weaponry in Trade Could Sink the GATT*, ECONOMIST, July 3, 1993, at 17; Marc Levinson, *The Green Gangs: Environmental Activists Are Reshaping the Staid Diplomacy of Trade*, NEWSWEEK, Aug. 3, 1992, at 58-59; *see also supra* notes 40-41 and accompanying text.

147. 16 U.S.C. §§ 1361-1407 (1988 & Supp. IV 1992).

148. 16 U.S.C. § 1537 note (Supp. IV 1992).

149. *See supra* notes 78-88.

150. *See generally supra* part I.B.1.

151. *See generally supra* part I.B.2.

152. Different juridical zones serve as the foundation for appropriating rights and obligations to conserve and manage living resources under UNCLOS. *See, e.g.*, CHURCHILL & LOWE, *supra* note 7; 1-2 DANIEL P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA (I.A. Shearer ed., 1982 & 1984).

153. *See supra* part I.B.2.b.

consistent with its domestic laws, applicable international agreements, and existing customary international law.[154]

I argue in this article that unilateral sanctions imposed by the United States interfere with a number of substantive rights granted to coastal states under UNCLOS.[155] Were the United States to become a State Party to UNCLOS, the target state may request that any alleged violation of its rights be settled pursuant to the Convention's compulsory dispute settlement procedures.[156]

II
SUBSTANTIVE RIGHTS AND OBLIGATIONS GRANTED UNDER UNCLOS

Most of the substantive rights granted under UNCLOS are recognized under customary international law.[157] UNCLOS grants coastal states virtually unlimited sovereignty over their internal waters and the first twelve nautical miles of territorial sea.[158] The 200-mile EEZ recognized by UNCLOS extends coastal states' rights further out to sea but with concomitant obligations to preserve the marine environment and its resources.[159] In the high seas, UNCLOS grants limited rights and imposes broad obligations.[160] This part of the article discusses UNCLOS rights and obligations for each juridical zone, and concludes with a summary of States Parties' obligations under UNCLOS to protect the marine environment.

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154. Only the Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371-3385 (1988 & Supp. IV 1992), refer to a violation of the domestic laws of a foreign country. *See supra* note 88.

155. *See infra* part II.

156. *See infra* note 291 and accompanying text. I assume for this discussion that the imposition of U.S. sanctions coincides with the failure of the part XV, section 1, settlement negotiations to resolve the dispute. The noncompulsory remedies have thus been exhausted, allowing the target state to initiate compulsory dispute resolution procedures.

157. The United States has generally recognized the Convention's EEZ fisheries provisions as reflecting customary international law. *See supra* note 6 and accompanying text; *see also* Brownsville-Port Isabel Shrimp Producers Ass'n v. Calio, No. B-85-99 (S.D. Tex. June 19, 1985) (relying on UNCLOS to determine whether U.S. fishermen could be cited under the Lacey Act for importing shrimp taken from Mexico's EEZ). While the EEZ concept and the general principles associated with its fisheries regime have emerged as rules of customary law, the precise scope of the customary norms remain unclear. It is generally believed that the sovereign rights granted to coastal states over fisheries within their EEZ's have emerged as customary law, but that many of the restrictions on those sovereign rights have not. *See* William T. Burke, *The Law of the Sea Convention and Fishing Practices of Nonsignatories, With Special Reference to the United States, in* CONSENSUS AND CONFRONTATION, *supra* note 5, at 315; Bernard H. Oxman, *Customary International Law and the Exclusive Economic Zone, in* CONSENSUS AND CONFRONTATION, *supra* note 5, at 157; BARBARA KWIATKOWSKA, THE 200 MILE EXCLUSIVE ECONOMIC ZONE IN THE NEW LAW OF THE SEA 48 (1989).

158. *See infra* part II.A.

159. *See infra* part II.B.

160. *See infra* part II.C.

A. *The Exclusive Right of the Coastal State To Manage Marine Living Resources in the Territorial Sea and Internal Waters*

The territorial sea and internal waters are treated as part of the sovereign territory of the coastal state subject only to the limited right of innocent passage.[161] Article 19 specifically lists "any fishing activities" as non-innocent and therefore "prejudicial to the peace, good order or security of the coastal state."[162] A coastal state has the same authority over the natural resources in its territorial sea and internal waters as it possesses over its land territory.[163] UNCLOS recognizes the sovereign right of a coastal state to impose whatever regulations it chooses regarding the conservation and management of living resources within these zones, consistent with its international agreements and applicable customary law.[164]

Foreign vessels violating U.S. fishing practices can be the target of trade sanctions under U.S. law even if the violations occurred within the targeted state's territorial sea.[165] UNCLOS article 2 gives the coastal state exclusive sovereign authority to regulate its fishing practices within its own territorial sea.[166] If both states are parties to UNCLOS, the coastal state targeted for sanctions may bring a grievance under the compulsory dispute settlement procedures to challenge the unilateral U.S. measures as a violation of rights granted by the Convention.[167]

B. *The Right To Manage Marine Living Resources Within the EEZ*

The rights of a coastal state outside of its territorial sea are limited by certain obligations to manage marine living resources. UNCLOS article 56(1) provides coastal states with the sovereign and exclusive right to conserve and manage living resources within the

161. UNCLOS article 2 provides coastal state sovereignty over the territorial sea. UNCLOS, *supra* note 2, 21 I.L.M. at 1272. Article 3 allows the territorial sea to extend up to 12 nautical miles. *Id.* Article 8 defines internal waters. *Id.* Article 19 provides for innocent passage through the territorial sea. *Id.* at 1274.

162. *Id.* art. 19, 21 I.L.M. at 1274.

163. O'Connell believes that while legislative practice and international law warrant the view that the territorial sea may be included within the national boundary, the exact nature of this "sovereignty" is generally left to municipal law. 1 O'CONNELL, *supra* note 152, at 82-84. For an interesting, albeit somewhat biased, analysis of the sovereign rights of nations to control their natural resources, see GEORGE ELIAN, THE PRINCIPLE OF SOVEREIGNTY OVER NATURAL RESOURCES (1979).

164. *See* CHURCHILL & LOWE, *supra* note 7, at 226-27.

165. *See supra* notes 152-54 and accompanying text.

166. UNCLOS, *supra* note 2, 21 I.L.M. at 1272.

167. Non-Parties to UNCLOS may have alternative venues, such as GATT, to bring a grievance like this, but the UNCLOS dispute settlement procedures have been designed with more teeth and thus greater effect. *See infra* part III.C.

200-mile EEZ.[168] Article 56(2) states that coastal authority is only limited by the provisions of the Convention and general precepts of international law.[169] These limitations are very narrow, leading one knowledgeable observer to quip: "This treaty delegates virtually complete authority for managing fisheries, including conservation, utilization, and allocation, to the coastal states of the world."[170]

The nearly unlimited authority of coastal states to manage living resources within their EEZ's is qualified by certain basic obligations of conservation, rational management, and optimum utilization. Article 61(2) provides that coastal states shall ensure "that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation."[171] While the precise meaning of this provision is unclear, it probably allows a coastal state to set any size of allowable catch that it chooses so long as it does not overexploit endangered fish stocks.[172]

Article 61(4) also limits coastal states' authority over marine resources within their EEZ's. It obligates them to "take into consideration the effects on species associated with or dependent upon harvested species, with a view to maintaining or restoring populations . . . above levels at which their reproduction may become seriously threatened."[173] Once again, one can only speculate how this provision

168. UNCLOS article 56(1) identifies the general rights of coastal states within the zone and provides: "In the exclusive economic zone, the coastal state has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living . . . ." UNCLOS, *supra* note 2, 21 I.L.M. at 1279. Article 62(4) provides a list of the laws and regulations regarding the utilization of living resources that the coastal state may promulgate. *Id.*, 21 I.L.M. at 1281-82. These include, inter alia, regulations pertaining to seasons and areas of fishing; ages, sizes, and species of fish that may be caught; kinds of gear that may be used; sizes and types of fishing vessels that may be used; and many other conservation and management matters. *Id.*

169. "In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention." *Id.* art. 56(2), 21 I.L.M. at 1279.

170. William T. Burke, *Fishing in the Bering Sea Donut: Straddling Stocks and the New International Law of Fisheries*, 16 ECOLOGY L.Q. 285, 316 (1989) [hereinafter Burke, *Fishing in the Bering Sea Donut*]. Burke analyzes the broad discretionary powers of coastal states over access to living resources within the EEZ in William T. Burke, *The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction*, 63 OR. L. REV. 73 (1984); *see also* Caron, *supra* note 67, at 352 (proposing that UNCLOS does not prohibit states from denying access to fisheries in the EEZ as a sanction); CHURCHILL & LOWE, *supra* note 7, at 232-33. A coastal state's discretion over fisheries management decisions within its EEZ is further enhanced by its exemption from the compulsory dispute settlement provisions of article 297(3). *See infra* notes 308-11 and accompanying text.

171. UNCLOS, *supra* note 2, 21 I.L.M. at 1281.

172. CHURCHILL & LOWE, *supra* note 7, at 206; *see* William T. Burke, *U.S. Fishery Management and the New Law of the Sea*, 76 AM. J. INT'L L. 24, 30 (1982).

173. UNCLOS, *supra* note 2, 21 I.L.M. at 1281.

actually will be applied. Terms such as "associated or dependent species" are vague and have as yet no common usage.[174] Moreover, the legal obligations attached to the words "take into consideration" and "with a view to" are susceptible to subjective interpretation and are not particularly demanding.[175] Despite this uncertainty, it would be reasonable to suggest that article 61(4) requires coastal states to consider consequences such as the mortality of marine mammals in purse seine fishing operations for tuna, and the drowning of sea turtles by shrimp nets, before promulgating fisheries management measures for their EEZ's.[176]

Any party wishing to enforce these UNCLOS obligations on a reticent coastal state, however, will confront two important obstacles. First, UNCLOS expressly provides coastal states with broad discretion to weigh any available scientific evidence as the basis for its management decisions.[177] Thus, for the United States to challenge a coastal state's management decision under UNCLOS, it would have the burden of showing the coastal state abused its discretion in relying on its scientific evidence. Second, coastal state management of fisheries within the EEZ falls outside the scope of the binding settlement procedures of section 2, limiting the challenging state to nonbinding conciliation procedures.[178]

C. *The Limited Right to the Living Resources of the High Seas*

UNCLOS article 87 grants the nationals of all states the right to fish on the high seas subject to the limitations imposed by part VII, section 2 of the Convention (articles 116-20).[179] Article 116 declares that states' freedom to fish on the high seas is subject to: "(a) their treaty obligations; (b) the rights and duties as well as the interests of coastal states provided for, *inter alia*, in article 63, paragraph 2, and articles 64 to 67; and (c) the provisions of this section."[180]

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174. Burke, *supra* note 172, at 31.

175. Burke has interpreted this provision to require that the coastal state at least take action to acquire the information it needs to consider the matter. The costly scientific investigation of species interactions required to meet this obligation may impose onerous burdens on coastal states, especially those in the developing world. *See* Burke, *supra* note 157, at 319.

176. Harrison, *supra* note 19, at 435-36.

177. *See generally* UNCLOS, *supra* note 2, art. 61, 21 I.L.M. at 1281.

178. *See infra* notes 308-13 and accompanying text.

179. UNCLOS, *supra* note 2, 21 I.L.M. at 1286-87.

180. *Id.*, 21 I.L.M. at 1290. The rights, duties, and interests of coastal states are enumerated as those dealing with straddling stocks (art. 63(2)); highly migratory species (art. 64); marine mammals (art. 65); anadromous stocks (art. 66); and catadromous species (art. 67). In addition, the use of the phrase "inter alia" seems to broaden coastal states' interests to include the protection of their sovereign rights, granted by article 56, over the living resources in their EEZ's. Professor Burke argues that the relationship between articles 116 and 56 is important because it may provide coastal states with authority to take unilat-

The provisions of section 2 contain four primary obligations. First, all states must require that their nationals comply with all accepted conservation measures on the high seas.[181] Second, states that fish in the same areas "shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned . . . [and] shall, as appropriate, co-operate to establish subregional or regional fisheries organizations to this end."[182] Third, states shall use the "best scientific evidence available to the states concerned" when taking conservation measures.[183] Finally, a state's conservation measures in the high seas must not "discriminate in form or in fact against the fishermen of any State."[184]

UNCLOS also reserves to states the right to regulate the exploitation of marine mammals more stringently than the Convention. Article 120 states that article 65, dealing with conservation and management of marine mammals in EEZ's, also applies to the high seas. Article 65 provides as follows:

> Nothing in this Part restricts the right of a coastal State *or the competence of an international organization, as appropriate,* to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall co-operate with a view to the conservation of marine mammals and in the case of cetaceans shall in

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eral action, if negotiations with other nations for conservation measures on the high seas fail and it can prove that preservation of the resources in the EEZ depends upon conservation measures in waters of the adjacent high seas. *See* Burke, *Fishing in the Bering Sea Donut*, *supra* note 170, at 299; *see also infra* notes 207-10 and accompanying text.

181. UNCLOS, *supra* note 2, art. 117, 21 I.L.M. at 1291.

182. *Id.* art. 118, 21 I.L.M. at 1291.

183. In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, states shall:

(a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environment and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global;

(b) take into consideration the effects on species associated with or dependent 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.

Id. art. 119(1), 21 I.L.M. at 1291.

184. *Id.* art. 119(3), 21 I.L.M. at 1291. The import of this provision is unclear. Any restriction or quota on the high seas would be imposed pursuant to an international agreement voluntarily undertaken. If a particular state felt that it was being discriminated against, it would be entirely free to refrain from becoming a party to the agreement and to disregard the discriminatory regulation adopted. Carl August Fleischer, *Fisheries and Biological Resources*, *in* 2 A HANDBOOK ON THE NEW LAW OF THE SEA 1115 (Rene-Jean Dupuy & Daniel Vignes eds., 1991).

particular work through the appropriate international organizations for their conservation, management and study.[185]

The incorporation by reference of article 65 into article 120 should not be read to imply that coastal states have the same authority over the management and conservation of marine mammals of the high seas as they have in their own EEZ. Clearly, coastal states have no unilateral authority to "prohibit, limit or regulate" the exploitation of living resources beyond the 200-mile EEZ.[186] Instead, article 120 should be interpreted to provide that conservation and management of marine mammals of the high seas may only take place pursuant to the "competence of an international organization."[187] This interpretation is consistent with UNCLOS provisions that require cooperation among states to conserve the fisheries resources of the high seas.[188]

Mandatory cooperation among states is perhaps the most important and unifying feature of the Convention's legal regime for managing living resources beyond the EEZ.[189] This "agreement to agree" formula is used extensively throughout UNCLOS.[190] Yet it is unclear whether the duty to cooperate is legally binding or instead should be viewed as merely precatory in nature.[191] The answer to this question

185. UNCLOS, *supra* note 2, art. 65, 21 I.L.M. at 1282 (emphasis added). The purpose of this provision is to allow states or international organizations to take measures, regarding marine mammals, beyond maintaining or restoring populations of stocks at the level that will produce maximum sustainable yield, as is required for fisheries resources under article 61. Instead, the harvesting of marine mammals may be reduced to zero if necessary. *See* Edward L. Miles & William T. Burke, *Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks, in* MOSCOW SYMPOSIUM ON THE LAW OF THE SEA, *supra* note 3, at 217, 230 n.23; NORDQUIST & PARK, *supra* note 5, at 286.

186. *See* UNCLOS, *supra* note 2, arts. 65, 87, 116-20, 21 I.L.M. at 1282, 1286-87, 1290-91. However, there is some support for the argument that unilateral action, under very limited circumstances, may be permissible in the management of straddling stocks of the high seas. *See infra* notes 207-10 and accompanying text.

187. *See supra* note 185 and accompanying text. Several commentators have confirmed this interpretation. *See, e.g.*, Fleischer, *supra* note 184, at 1123-24.

188. UNCLOS, *supra* note 2, arts. 116-19, 21 I.L.M. at 1290-91.

189. Articles 63(1) (adjacent stocks), 63(2) (straddling stocks), 64 (highly migratory species), 65 (marine mammals), and 66 (anadromous stocks) all contain requirements for mandatory cooperation between states. *Id.*, 21 I.L.M. at 1282-83.

190. *See, e.g., id.* arts. 53 (archipelagic sea lanes), 60 (artificial islands and structures in the EEZ), 83 (delimitation of continental shelf between adjacent states), 123 (cooperation of states bordering semi-enclosed seas), 21 I.L.M. at 1279, 1280-81, 1286, 1291.

191. One scholar has suggested that the obligation to cooperate on conservation measures may have already moved into customary international law, writing that "the character of an emerging principle of customary law could also be attributed to the obligation of the coastal and fishing states to cooperate (and certainly to 'seek' to cooperate, as the LOS Convention provides) with regard to the conservation of the coastal zone/high seas stocks." Barbara Kwiatkowska, *Conservation and Optimum Utilization of Living Resources, in* THE LAW OF THE SEA: WHAT LIES AHEAD? 259 (Tadao Clingan ed., 1988). Support for this assertion may be found in the International Court of Justice's decision in the *Fisheries Jurisdiction* case, in which it held that the high seas fisheries state and interested coastal

is particularly important for determining whether the United States, if it signs UNCLOS, would be violating substantive rights and obligations granted by UNCLOS when it relies on unilateral sanctions rather than bilateral or multilateral cooperation to protect international marine living resources.

The Convention imposes a duty to cooperate regarding conservation of high seas fisheries.[192] For example, it requires that "states whose nationals exploit identical living resources, or different living resources in the same area, *shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned.*"[193] Professor Shearer has persuasively argued that this language is a clear example of a *pactum de negotiando*; it obligates the parties to negotiate with a view to reaching agreement on necessary measures without obliging them actually to reach an agreement.[194] Shearer cites several authorities to support the proposition that a *pactum de negotiando* creates an obligation beyond mere intent.[195] The international tribunal in the *German External Debts Arbitration* between Greece and the Federal Republic of Germany described the obligation as follows:

> [A] *pactum de negotiando* is . . . not without legal consequences. It means that both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken. It implies a willingness for the purpose of negotiation to abandon earlier positions and to meet the other side part way . . . .[196]

The import of Shearer's analysis is that the provisions in UNCLOS dealing with living resources of the high seas create certain practical limits within which good faith negotiations must be conducted to resolve conflicting interests.[197] It can be argued that the

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state had an obligation to "keep under review the fishery resources in the disputed waters and to examine together, in the light of scientific and other available information, the measures required for the conservation and development, and equitable exploitation, of those resources . . . ." Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, 31 (July 25, 1974).

192. UNCLOS, *supra* note 2, art. 118, 21 I.L.M. at 1291.

193. *Id.* (emphasis added).

194. Ivan A. Shearer, *High Seas: Drift Gillnets, Highly Migratory Species, and Marine Mammals, in* THE LAW OF THE SEA IN THE 1990s, *supra* note 3, at 237, 244.

195. *Id.* at 244-246.

196. German External Debts Arbitration (Greece v. Federal Republic of Germany), 47 I.L.R. 418, 453-54 (Jan. 26, 1972), *cited in* Shearer, *supra* note 194, at 245.

197. Shearer, *supra* note 194, at 257. Burke generally concurs, noting: "Specifying an obligation to negotiate is a different burden than simple cooperation, which might be shown by other activities. It is more demanding. An obligation to negotiate does not require an agreement, but it does mandate good faith in the attempt to remove differences and reach substantive agreement." William T. Burke, *Regulation of Driftnet Fishing on the High Seas and the New International Law of the Sea*, 3 GEO. INT'L ENVTL. L. REV. 265, 289 (1990).

United States would be violating this obligation by enforcing domestic legislation that imposes mandatory unilateral embargoes against nations that fail to conform their fishing practices on the high seas to U.S. standards. Furthermore, U.S. fishermen increasingly exploit identical living resources or different resources in the same areas of the high seas as nations targeted by U.S. embargoes.[198] Consequently, if the United States wishes to conserve selected living resources of the high seas it would have an obligation under articles 118 and 300 to enter into good faith negotiations to bring about a mutually satisfactory solution by way of a compromise with other affected states.[199] Legislation that triggers automatic trade sanctions unless the other party agrees to adopt U.S. conservation measures would violate both the letter and spirit of these requirements.[200]

In addition, article 119 sets stringent requirements for establishing conservation measures. States must use the best scientific evidence available, taking into consideration relevant environmental and economic factors, including the special requirements of developing states. They must also consider any "generally recommended international minimum standards, whether subregional, regional or global . . ."[201] Although scientific evidence clearly indicates that some living resources—such as most species of sea turtles—are in dire need of protection, the evidence is less convincing for many other species.[202] For example, there is little scientific evidence to support the contention that dolphin stocks in the Eastern Tropical Pacific are declin-

198. The validity of this statement depends on the scope of the "same area." U.S. fishing vessels, however, seem to be competing for stocks in distant waters with more frequency than in the past. As one observer noted:

> Of course, Americans have been chasing fish across borders for a long time. But the sheer tonnage and variety of vessels that are venturing outside U.S. grounds now bespeaks an historic shift. As U.S. fisheries become either wrung out, overbuilt or hamstrung by regulations, the trek into distant waters is becoming an act of commercial survival.

Brad Warren, *Distant Waters: U.S. Boats Go Farther Afield in Their Search for Better Fishing Grounds*, NATIONAL FISHERMAN, Mar. 1993, at 13. In 1992, seven U.S. tuna vessels continued to compete with fleets from Mexico and other nations for the same stocks of yellowfin tuna in the Eastern Tropical Pacific. Mike Kronman, *Life in the Dolphin-Safe Era*, NATIONAL FISHERMAN, May 1992, at 18.

199. *See infra* part III.C.4.

200. Many of the U.S. domestic statutes that allow imposition of unilateral trade measures direct the Secretary of State to enter into bilateral or multilateral negotiations with targeted nations. *See* Hurlock, *supra* note 39, at 2140 n.228. Trade bans are used as a method of coercing these nations to enter into negotiations and as a method of exacting concessions once negotiations have begun.

201. UNCLOS, *supra* note 2, art. 119(1)(a), 21 I.L.M. at 1291.

202. It has been established that most of the sea turtle populations in the Wider Caribbean Region are either endangered or threatened. *See* Jonathon A. Gurish, *Pressures to Reduce Bycatch on the High Seas: An Emerging International Norm*, 5 TUL. ENVTL. L.J. 473, 517 (1992).

ing.[203] Similarly, there is a lack of evidence demonstrating the precise extent of bycatch effects associated with driftnet fishing in the Northern Pacific.[204] While the "best scientific evidence available" standard does not require international scientific consensus as a prerequisite for states to develop conservation measures on the high seas,[205] article 119 would seem to prevent States Parties from prescribing protection measures for high seas living resources in the absence of both reasonable scientific evidence and international minimum standards.[206]

It is currently unclear what rights states may claim when an international agreement cannot be reached despite good faith negotiations. The legislative history of UNCLOS shows that there were several unsuccessful attempts to amend article 63(2) to give coastal states authority to impose conservation measures on states that fish for straddling stocks in the high seas.[207] Burke argues that despite several legal obstacles, including the legislative history of the Convention, coastal states should be viewed as having a right to impose unilateral conservation measures for high seas straddling stocks if good faith negotiations fail and there is sufficient scientific evidence of a relation-

203. In announcing its final rule regarding the MMPA import restrictions, the United States conceded that there was no substantial evidence that dolphin populations in the Eastern Tropical Pacific (the ETP) are threatened with extinction. Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?*, 49 WASH. & LEE L. REV. 1407, 1451 (1992). To the contrary, recent studies by the Inter-American Tropical Tuna Association, NMFS, and the National Research Council indicate that dolphin stocks in the ETP are healthy and sustaining current mortality rates. *Id.* at 1451 n.271.

204. Uncertainty exists in the North Pacific where scientific data associated with driftnet fishing is incomplete: "[W]ith the possible exception of the effects of driftnet gear on salmon populations in the North Pacific, there does not appear to be an accepted body of knowledge about the effects of driftnets on particular target species, on incidently affected species, or on the marine ecosystem as a whole." Burke, *supra* note 197, at 266.

205. For an interpretation of UNCLOS article 119, see *id.* at 281-82.

206. Article 119 would seem to preclude the use of moral and ethical reasons alone as justification for conservation measures on the high seas. The view that humans have a moral obligation to protect marine living resources, especially marine mammals, is prevalent among environmentalists in the United States and elsewhere. For example, a biologist observed in a television interview that, "[I]t bodes very poorly for the direction of our society and maybe for the future of our planet if we cannot even adopt a nurturing attitude toward a species as special in the hearts and minds of the American people as the dolphins." *West 57th: Pacific Dolphins: Slaughter at Sea*, (CBS television broadcast, Apr. 1, 1989) (statement of Sam Labudde) *cited in* Lones, *supra* note 68, at 1005 n.62. For an interesting examination of the philosophy of animal rights and environmental ethics within the context of international whaling, see Sudhin K. Chopra, *Whales: Towards a Developing Right of Survival as Part of an Ecosystem*, 17 DENV. J. INT'L L. & POL'Y 255 (1989); *see also*, Edwin M. Smith, *The Endangered Species Act and Biological Conservation*, 57 S. CAL. L. REV. 361, 376-82 (1984) (discussing the moral debate pitting biological conservation against human welfare).

207. "Straddling stocks" is a term used to describe a situation where the same stock or stocks of associated species occur within the EEZ and in an area beyond and adjacent to the zone. The legislative history is described in detail in Burke, *Fishing in the Bering Sea Donut, supra* note 170, at 300-02.

ship between the stocks inside and outside a state's EEZ.[208] Burke asserts that the Convention grants special priority to coastal states to conserve and manage coastal species as a single management unit.[209] Refusing to allow coastal states to prescribe conservation measures unilaterally—when good faith negotiations for an international agreement fail-deprives the Convention of significant content and defeats any conservation efforts in the area concerned.[210]

While the purposes of the Convention may be satisfied by allowing coastal states unilaterally to prescribe conservation measures for shared living resources of the high seas if good faith negotiations fail, the same cannot be said for states' protective measures on distant fisheries.[211] The clear purpose of article 116, its cross-references to articles 63-67, and article 118, is to require international agreement before states can prescribe conservation measures for the high seas.[212] Consequently, the United States lacks authority under the Convention unilaterally to prescribe conservation measures for distant high seas living resources, even if it entered into good faith negotiations that ultimately failed.[213]

D. State Duties and Obligations To Protect the Marine Environment Under UNCLOS

UNCLOS provides that "States have the obligation to protect and preserve the marine environment."[214] Though vague and seemingly unenforceable, this obligation contains several elements that may bear on the duties under the Convention to protect international

208. *Id.* at 302-04.

209. He contends that allowing coastal states to manage the entire stock as a single unit is the major assumption underlying the notion of an extended zone of national jurisdiction for fisheries. *Id.* at 304. This view is supported in Kwiatkowska, *supra* note 191.

210. Burke, *Fishing in the Bering Sea Donut, supra* note 170, at 304-05. It should be noted that Professor Burke's theory addressed the specific problem of U.S. management of straddling stocks in the so-called "donut-hole" high seas area of the Bering Sea. Interestingly, unilateral action was not required in this instance, because the affected states negotiated an agreement calling for a temporary suspension of the pollock fishery, on a voluntary basis during 1993-94. *See COL and ASIL Evening Program, supra* note 21, at 2.

211. With the possible exceptions of the limited rights granted to noncoastal states under articles 64 (highly migratory species), 65 (marine mammals), 66 (anadromous stocks), and 67 (catadromous species), only coastal states with straddling stocks may legitimately argue that they have some priority right to protect stocks within the EEZ by prescribing unilateral measures on the high seas. According to Miles and Burke, "Nothing in the 1982 treaty or in other customary law, however, authorizes one high seas fishing state to take action on the high seas to enforce a conservation obligation owed to it by another state." Miles & Burke, *supra* note 185, at 231 (emphasis omitted).

212. *See supra* notes 180-84 and accompanying text.

213. This assumes that the United States lacks some *ergo omnes* obligation to protect the international environment. *See infra* note 381.

214. UNCLOS, *supra* note 2, art. 192, 21 I.L.M. at 1308.

living resources.[215] First, while not formally defined in the Convention, the term "marine environment" has been interpreted to include living resources.[216] Second, the use of the term "preservation of the marine environment" implies an affirmative duty to maintain or improve the present state of the environment rather than a duty merely to prevent prospective damage.[217] Finally, by placing the obligation on "states" rather than "states parties," the Convention is explicitly proclaiming that as a general principle of law, all states have an obligation to protect and preserve the marine environment.[218]

The general principles contained in article 192 are given substance when they are linked with article 194(5), which provides that "[t]he measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life."[219] Read together, these articles may arguably establish a broad affirmative duty for all states to protect and preserve ecosystems and habitats of threatened or endangered species.[220] This obligation could be interpreted to include the protection of certain species of marine mammals and sea turtles from environmentally unsound commercial fishing practices.[221]

This argument, although plausible in isolation, fails when considered within the context of the entire Convention. The primary purpose of part XII is to create a comprehensive legal framework to

215. This article is adapted from similar language in earlier environmental treaties. For example, Principle 1 of the Intergovernmental Working Group on Marine Pollution at its second session (Ottawa, 1971) provides: "Every State has a duty to protect and preserve the marine environment and, in particular, to prevent pollution that may affect areas where an internationally shared resource is located." *Identification and Control of Pollutants of Broad International Significance*, Conference on the Human Environment, Agenda Item 12, at 79, U.N. Doc. A/CONF.48/8 (1972).

Similarly, Principle 7 of the Stockholm Declaration states: "States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea." REPORT ON THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, at 4, U.N. Doc. A/Conf.48/14/Rev.1, U.N. Sales No. E.73.II.A.14 (1973).

216. At the seventh session in 1978, the Chairman of the Third Committee reported that it was understood that the term "marine environment" included "marine life." 4 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 43 (M. Nordquist exec. ed., 1991) [hereinafter COMMENTARY]; *see also* KWIATKOWSKA, *supra* note 157, at 161.

217. 4 COMMENTARY, *supra* note 216, at 40; *see* KWIATKOWSKA, *supra* note 157, at 162-68.

218. 4 COMMENTARY, *supra* note 216, at 39-40.

219. UNCLOS, *supra* note 2, 21 I.L.M. at 1308.

220. *See* Harrison, *supra* note 19, at 434.

221. *Id.*

prevent, control, and reduce pollution of the marine environment.[222] The legislative history of these articles and the subsequent scholarly commentary on them provide little support for the view that part XII establishes any duty to protect living marine resources separate from the obligation to prevent "marine pollution," as that term is broadly defined by the Convention.[223]

The view that the scope of part XII is limited to protecting the marine environment from pollution is supported by specific language in the Convention. For example, article 56 formally distinguishes between management of resources and "protection of the marine environment."[224] In addition, article 194(4) specifically acknowledges the distinction between the obligations in part XII and the rest of the Convention by providing that states taking antipollution measures shall refrain from "unjustified interference" with the rights and duties granted to other states pursuant to the Convention.[225] Further, all of the measures to protect the marine environment in part XII specifically address pollution as a causal agent and do not deal with other causal agents such as improper commercial fishing practices, habitat loss through urban development, overuse by tourists, or other activities.[226]

Additional evidence for this view is provided by comparing the language used in the environmental protection provisions of part XI with the provisions applicable to the rest of the Convention.[227] Part XI specifically provides that the Authority shall adopt regulations to

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222. Except for the general principles outlined in articles 192 and 193, all of the other provisions in part XII specifically deal with "pollution of the marine environment," which is defined in the Convention as:

> [T]he introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

UNCLOS, *supra* note 2, art. 1(4), 21 I.L.M. at 1271.

223. The legislative history of part XII is chronicled and analyzed in 4 COMMENTARY, *supra* note 216, at 35-422; *see also* Pierre-Marie Dupuy & Marinte Rémond-Gouilloud, *The Preservation of the Marine Environment, in* A HANDBOOK ON THE NEW LAW OF THE SEA, *supra* note 184, at 1151, 1190-1232; KWIATKOWSKA, *supra* note 157, at 160-97; N. Ia. Rusina, *International Legal Principles of Protection of the Marine Environment Against Pollution, in* THE LAW OF THE SEA AND INTERNATIONAL SHIPPING: ANGLO-SOVIET POST-UNCLOS PERSPECTIVES 261 (W. E. Butler ed., 1985).

224. UNCLOS, *supra* note 2, 21 I.L.M. at 1279. This distinction was due to the fact that delegations regarded the economic objectives of part V as priority objectives and wanted to keep these issues separate and independent from ecological concerns which had lower political priority. Dupuy & Rémond-Gouilloud, *supra* note 223, at 1196.

225. UNCLOS, *supra* note 2, 21 I.L.M. at 1308.

226. *Id.*, 21 I.L.M. at 1308-16.

227. Part XI deals with the creation and management of the international seabed area that is considered part of the "common heritage of mankind." UNCLOS, *supra* note 2, arts. 133-91, 21 I.L.M. at 1293-1308.

ensure the "protection and *conservation* of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment."[228] The broader and more inclusive language of article 145 could have been adopted throughout the Convention. The delegates feared, however, that more inclusive language would impose onerous environmental obligations that many states could not afford to implement.[229] This is made clear in article 193, which qualifies the environmental obligation set forth in article 192 by providing that "States 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."[230] Article 193 affirms the view that a formal distinction exists in the Convention between the rights and duties to conserve and manage living resources and the duty to protect and preserve the marine environment provided by part XII. Consequently, UNCLOS part XII creates no affirmative duty to protect threatened or endangered marine living resources unless the danger is caused by pollution of the marine environment.[231]

In sum, UNCLOS grants States Parties rights to manage marine living resources within their juridical zones subject only to the obligation to negotiate when interpretations of these rights conflict. While States Parties are obligated to protect and preserve marine environments, this obligation does not necessarily extend to protecting marine mammals and sea turtles. U.S. efforts to enforce such protective measures unilaterally through economic sanctions would, if the

228. *Id.*, 21 I.L.M. at 1294 (emphasis added). The phrase "preservation and protection of the marine environment" is used consistently throughout part XII, as a result of a conscious recommendation by the Drafting Committee to harmonize the provisions. In contrast, part XI uses a variety of terms with no attempt at harmonization. *See* 4 COMMENTARY, *supra* note 216, at 41.

229. *Id.* at 45-49.

230. These concerns were earlier expressed by representatives from developing states at the United Nations Conference on the Human Environment, and they led to the now famous compromise contained in Principle 21 of the 1972 Stockholm Declaration:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

REPORT ON THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, *supra* note 215, at 5.

231. States Parties continue to have obligations to ensure that living resources in the EEZ are not endangered by overexploitation under article 61(2), *see supra* notes 171-72, and to cooperate in the conservation of living resources of the high seas under articles 117-119, *see supra* notes 181-83. Additionally, the dispute settlement provisions of article 297(3)(b), UNCLOS, *supra* note 2, 21 I.L.M. at 1324, provide that any party may request formal conciliation if a coastal state has manifestly failed to protect living resources in its EEZ from serious endangerment. Finally, nothing prevents states from entering into other international agreements for the purpose of protecting these resources.

United States signed the Convention, violate the rights of States Parties granted under UNCLOS. In the next part, this article examines the procedures in the Convention for resolving disputes among States Parties over the substantive rights and obligations recognized by UNCLOS.

III
UNCLOS DISPUTE SETTLEMENT PROCEDURES

Once UNCLOS enters into force, any State Party that believes that its substantive rights under the Convention have been violated by another State Party may submit a claim pursuant to the compulsory dispute settlement provisions discussed below.[232] If the United States becomes a party to the Convention and subsequently imposes unilateral trade sanctions on the fisheries products of another State Party, it is likely that those sanctions will be challenged under the dispute settlement mechanism.

A. Hypothetical Shrimp Embargo

Perhaps the best way to illustrate this potential scenario is to provide a hypothetical example. Assume that UNCLOS has entered into force and the United States has become a party. The United States has just imposed an embargo on the shrimp products of Country *X*, which is also a party, because *X* has not complied with the sea turtle conservation requirements specified in the 1989 Amendments to the Endangered Species Act.[233] In particular, *X* has not fully enforced the U.S.-mandated conservation measure requiring all of its shrimp trawlers to install turtle excluder devices (TED's).

Country *X* defends its actions on several grounds. It feels that most of its fishermen cannot afford to purchase TED's, which it estimates will cost between $400 and $1500 each to install and maintain. Nor does it have sufficient resources to purchase them with public funds. In addition, some of its fishermen have tested various designs of TED's and have reported that their shrimp catch declined between fifteen and thirty percent as a result. Country *X* also feels that even if it complies with U.S. standards and requires its shrimp fishermen to install TED's, it does not have the financial and technical resources necessary to monitor the fishermen's activities and enforce compliance.

Country *X* has a large and diverse fleet of shrimp trawlers that operate throughout the Wider Caribbean Region. The TED's requirement has the potential to affect the fleet's fishing operations in

232. *See infra* part III.C.2.

233. For a discussion of the statute, see *supra* part I.B.2.b.

its internal waters, territorial sea, EEZ, and the high seas. For over two decades, the United States has imported large quantities of shrimp products from *X* and in recent years has purchased about sixty percent of the nation's shrimp harvest. If the United States embargo remains in force, it will cost *X's* fishermen an estimated $20 million or more annually in lost sales.

X files a claim against the United States for compulsory dispute settlement pursuant to UNCLOS part XV, arguing that there is a dispute concerning the interpretation or application of the Convention. It contends that the embargo by the United States violates several of *X's* substantive rights provided by the Convention. Most importantly, *X* believes that the U.S. action violates its sovereign right to conserve and manage the living resources in its internal waters, territorial sea, and EEZ, subject only to other provisions in the Convention and general principles of international law.[234] According to *X*, the United States is using its economic power to force weaker nations, such as itself, to relinquish rights clearly granted to coastal states under the Convention as well as customary international law. As a coastal state, *X* asserts that it has a legal right to harvest shrimp in these juridical zones with or without TED's, and that the United States is violating international law by imposing economic countermeasures in the hope of preventing *X* from exercising its sovereign rights.[235]

In addition, *X* argues that the United States is unilaterally attempting to impose conservation measures on living resources of the high seas by methods that are clearly contrary to the Convention's provisions requiring good faith negotiations and cooperation between States Parties exploiting the same resources.[236] *X* maintains that the U.S. actions not only violate its substantive rights, but also violate the general provisions of the Convention requiring States Parties to fulfill their obligations under the Convention in good faith and in a manner that would not constitute an abuse of right.[237] *X* points out that the United States was one of the strongest proponents of including in UNCLOS a comprehensive and compulsory dispute settlement system and, therefore, its use of unilateral trade sanctions in defiance of the Convention's dispute resolution procedures is a clear breach of good faith and an abuse of right.

The purpose of presenting a hypothetical example is to show that the United States' ability to protect international marine living resources through the threat of unilateral trade sanctions may be significantly undermined should it become a party to UNCLOS. This article

234. These rights are discussed *supra* part II.A-B.
235. This issue is discussed *infra* notes 397-98 and accompanying text.
236. *See supra* part II.C.
237. *See infra* part III.C.4.

has described a number of rights and duties provided by the Convention that may be affected should the United States impose sanctions under conditions similar to those presented in the hypothetical. A State Party has the authority to bring a claim for binding dispute settlement whenever there is a dispute "concerning the interpretation or application of the Convention."[238] Consequently, an international tribunal or other third party dispute settlement body effectively usurps the U.S. choice of whether to impose sanctions. In practical effect, the United States will also be unable to use the threat of unilateral economic measures to gain leverage in negotiations to protect marine living resources.[239]

Before proceeding with an examination of the UNCLOS dispute settlement provisions, the following part reviews the U.S. role in the drafting process that led to the provisions as they exist today. It also examines the basis for the allegation that the U.S. role in developing and advocating for a comprehensive dispute settlement procedure precludes it from arguing in good faith that the dispute settlement provisions should not apply to U.S. laws.

B. U.S. Leadership in Establishing the UNCLOS Dispute Settlement System

> [My] government believes that any law of the sea treaty is almost as easily susceptible of unreasonable unilateral interpretation as are the principles of 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 my 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.

So spoke John R. Stevenson, United States Representative, in a speech before the Third U.N. Conference on the Law of the Sea at Caracas on July 11, 1974.[240] U.S. leadership in advocating adequate dispute settlement procedures in the new Convention on the Law of

238. UNCLOS, *supra* note 2, art. 282, 21 I.L.M. at 1322. Of course, the recourse to binding settlement is conditioned on the parties not reaching an agreement by other methods provided in part XV, section 1.

239. The threat of trade sanctions loses its tactical value in negotiations when the sanctions cannot be imposed unilaterally. This issue is discussed in more detail *infra* notes 373-80 and accompanying text. Once again, it should be noted that this observation only applies to unilateral sanctions against other States Parties.

240. *U.S. Defines Position on 200-Mile Economic Zone at Conference on the Law of the Sea*, 71 DEP'T ST. BULL. 232, 235 (1974).

the Sea began several years earlier.[241] In 1970, President Nixon listed "peaceful and compulsory settlement of disputes" as one of the primary objectives of a treaty on the seabed.[242] Soon thereafter, the United States submitted a working paper on the Draft United Nations Convention on the International Sea-Bed Area containing specific provisions for compulsory settlement of disputes, including a call for a special Law of the Sea Tribunal.[243]

In the preparatory work for the Caracas session of the Third U.N. Conference on the Law of the Sea, there was virtually no mention of dispute settlement until the end of the process, when the United States raised the subject and submitted draft articles.[244] Near the end of the 1974 Caracas Conference, at the initiative of the United States,[245] a group of more than thirty-five delegations held informal consultations, eventually compiling a working paper that contained alternative texts for eleven proposed dispute settlement articles.[246] On behalf of the nine delegations that officially cosponsored the working paper, the cochairman of the group, Ambassador R. Galindo Pohl (El

241. For an informative discussion of the formation of U.S. policy goals, see Louis B. Sohn, *U.S. Policy Toward the Settlement of Law of the Sea Disputes*, 17 VA. J. INT'L L. 9 (1976).

242. *United States Policy for the Seabed: Statement by President Nixon*, 62 DEP'T ST. BULL. 737, 737 (1970).

243. *Draft United Nations Convention on the International Sea-Bed Area*, U.N. Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, at 15-18, U.N. Doc. A/AC.138/25 (1970). For a summary of the U.S. proposal, see A.O. ADEDE, THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 13-16 (1987); Comment, *Toward Peaceful Settlement of Ocean Space Disputes: A Working Paper*, 11 SAN DIEGO L. REV. 733, 750-51 (1974); NORDQUIST & PARK, *supra* note 5, at 53. For a discussion of events leading to the U.S. proposal, see 5 COMMENTARY, *supra* note 216, at 5-6.

244. *Draft Articles for a Chapter on the Settlement of Disputes*, U.N. Doc. A/AC.138/97 (1973). *See* Louis B. Sohn, *Settlement of Disputes Arising Out of the Law of the Sea Convention*, 12 SAN DIEGO L. REV. 495, 496 (1975).

245. In making its request for the consultations, the United States provided the working group with its draft articles submitted to the United Nations Sea-Bed Committee and an explanatory memorandum containing the following views:

> Compulsory dispute settlement is the foundation of a new world order in ocean space. If nations cannot agree to settle their disputes peacefully (and be bound to do so) and to obey the decisions that are given, then all the standards of the rights and duties of states in the Law of the Sea Convention will be of little practical value. A system must be established that will make the rights and obligations provided for in the Convention meaningful by ensuring compliance with them. The success of the legal system for the oceans will depend to a great extent on the kind of dispute settlement mechanism adopted.

The complete memorandum is reprinted in ADEDE, *supra* note 243, at 15-16.

246. *Australia, Belgium, Bolivia, Colombia, El Salvador, Luxembourg, Netherlands, Singapore, and United States of America: Working Paper on the Settlement of Law of the Sea Disputes*, U.N. Doc. A/CONF.62/L.7 (1974), *reprinted in* 3 OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, at 85, 85-93, U.N. Sales No. E.75.U.5 (1975). The first analysis of the working paper can be found in Sohn, *supra* note 244. For more recent studies, see ADEDE, *supra* note 243, at 13-41; NORDQUIST & PARK, *supra* note 5, at 76-78.

Salvador), summarized four fundamental themes that emerged as follows:

> 1. An effective method for the settlement of disputes on the basis of law is needed in order to avoid political and economic pressures. Law is the more appropriate method for regulating international relations and for preserving the equality of States, regardless of their political, economic and military might.
>
> 2. It is desirable to achieve the greatest possible uniformity in the interpretation of the Convention.
>
> 3. In view of the advantages of obligatory settlement of disputes, any exceptions have to be determined with great care. 4. The system of dispute settlement must constitute an integral part of the Convention.[247]

The working paper served as the framework for later discussions by an enlarged working group at the Geneva session of the Conference in 1975.[248] The Geneva group produced a revised working paper containing a single draft text without alternatives.[249] The revised paper formed the basis of an Informal Single Negotiating Text,[250] which was the subject of a general plenary debate during the fourth session of the Conference held in New York in April 1976.[251] Taking into consideration the views expressed during the general debate and suggestions by participating delegations, Conference President H.S. Amerasinghe, the Sri Lankan Ambassador, prepared a Revised Single Negotiating Text,[252] which was debated article by article at informal meetings of the plenary during the fifth New York session in the summer of 1976.[253]

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247. ADEDE, *supra* note 243, at 39 (statement by Ambassador Galindo Pohl).

248. More than 60 states participated in the working group in Geneva. Sohn, *supra* note 241, at 11 n.12.

249. An analysis of this paper can be found in ADEDE, *supra* note 243, at 43-69.

250. *Informal Single Negotiating Text*, U.N. Doc. A/CONF.62/WP.9 (1975), *reprinted in* 5 OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, at 111, U.N. Doc. A/CONF.62Z1, U.N. Sales No. E.76.U.8 (1976) [hereinafter 5 OFFICIAL RECORDS]. This text incorporated several significant changes from the working paper. For comments on the draft, see Louis B. Sohn, *Toward a Tribunal for the Oceans*, 5-6 REVUE IRANNIENE DES RELATIONS INTERNATIONALES 247 (1975-76); ADEDE, *supra* note 243, at 71-82.

251. Statements from 72 delegates can be found in 5 OFFICIAL RECORDS, *supra* note 250, at 8-54. For a summary of these statements, see ADEDE, *supra* note 243, at 82-89.

252. *Informal Single Negotiating Text*, U.N. Doc. A/CONF.62/WP.9/Rev.1 (1976), *reprinted in* 5 OFFICIAL RECORDS, *supra* note 250, at 185. An analysis of this text may be found in ADEDE, *supra* note 243, at 89-120.

253. No records were kept at these informal meetings. This is consistent with the negotiating procedure established for the Third United Nations Conference on the Law of the Sea, in which most of the substantive negotiations were undertaken in informal meetings and special negotiating groups that produced no formal records. A summary of the discussions in New York based on personal recollection and notes may be found in ADEDE, *supra* note 243, at 6.

During the sixth through tenth sessions, an informal plenary chaired by the Conference President negotiated the treaty's dispute settlement system.[254] By the sixth session, the plenary established a general framework for dispute settlement and the remaining negotiations centered around disputed language in specific articles.[255] The eighth and ninth sessions were almost entirely devoted to settlement of disputes related to the exploration and exploitation of the seabed area.[256] By the end of the ninth session in 1980, the dispute settlement portion of the text was, for the most part, completed.[257] Professor Louis B. Sohn, United States delegate to the Conference and Rapporteur to the Working Group on Dispute Settlement, commented in 1976 that, except for the section on settlement of seabed disputes, the Revised Single Negotiating Text reflected all of the major U.S. policy objectives.[258]

Without question, the final dispute settlement provisions of UNCLOS substantially reflect the creativity, persistence, and leadership skills of the United States. By leaving such an indelible imprint on this portion of the Convention, the United States has incurred a special responsibility to abide by the dispute settlement provisions as

254. *Id.* at 6-7.

255. In comparison to the rest of the decade-long UNCLOS negotiations, the basic principles governing dispute settlement were agreed upon relatively quickly during the early years of the process. John W. Kindt, *Dispute Settlement in International Environmental Issues: The Model Provided by the 1982 Convention on the Law of the Sea*, 22 VAND. J. TRANSNAT'L L. 1097, 1102 (1989). Although discussions continued regarding several articles, the most difficult issue remaining in the sixth and seventh sessions involved the scope of compulsory dispute settlement over coastal state actions in the EEZ. Whether disputes over fisheries and marine scientific research should be subject to compulsory dispute settlement proved a serious obstacle to consensus. *See* NORDQUIST & PARK, *supra* note 5, at 183, 246; ADEDE, *supra* note 243, at 165-74; *see also infra* notes 307-17 and accompanying text.

256. For discussions of negotiations during the eighth and ninth sessions, see ADEDE, *supra* note 243, at 185-200; NORDQUIST & PARK, *supra* note 5, at 343, 358, 447. The delegates also drafted several technical annexes dealing with procedural and institutional aspects of conciliation, arbitration, and the International Tribunal for the Law of the Sea. *See* ADEDE, *supra* note 243, at 201-37.

257. NORDQUIST & PARK, *supra* note 5, at 447.

258. Sohn, *supra* note 241, at 13. Professor Sohn cited the following as the principal U.S. objectives: (1) procedures leading to binding settlement of law of the sea disputes; (2) safeguards allowing parties to choose first from a variety of settlement means and then resort to the Convention's procedures if the chosen means fail; (3) both general (e.g., the International Court of Justice) and functional (e.g., an arbitration panel of fisheries experts) dispute settlement methods; (4) some dispute settlement procedures open not only to states but also to international organizations and private persons; and (5) a seabed tribunal independent from the broader Law of the Sea Tribunal. This last objective is the only one that was not achieved. Instead of two distinct tribunals, the Convention provides for a special seabed Dispute Chamber with exclusive jurisdiction over seabed disputes within the larger Law of the Sea Tribunal. *See* UNCLOS, *supra* note 2, arts. 187-91, 21 I.L.M. at 1307-08.

scrupulously as possible, if and when it becomes a party to UNCLOS and the Convention enters into force.[259]

C. *Overview of the Dispute Settlement System*

UNCLOS was created for the "purpose of establishing a comprehensive regime 'dealing with all matters relating to the law of the sea . . . .' "[260] Included within this so-called "Constitution for the Oceans"[261] is a detailed series of provisions dealing with the conservation and management of living resources and the protection of the marine environment. The Convention requires parties to settle their disputes peacefully using a sophisticated system that, with limited exceptions, mandates that a party submit to a settlement procedure if requested to do so by another disputant. The findings of the judicial body to which the conflict is submitted for resolution are binding on the disputing parties. To avail itself of the binding dispute settlement procedures, one of the parties need only prove that there is a "dispute between them concerning the interpretation or application of this convention"[262] and that the claim is neither an abuse of legal process nor

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259. This assertion is based on more than moral precepts. Should the United States become party to a dispute under UNCLOS, the judicial body that is asked to interpret the treaty will comply with the general principles of international law regarding treaty interpretation. These principles are summarized in articles 31 and 32 of the Vienna Convention on the Law of Treaties, which state in pertinent part:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. . . . Recourse may be had to supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion in order to confirm the meaning . . . when the interpretation . . . (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

Vienna Convention on the Law of Treaties, *done* 23 May 1969, 1155 U.N.T.S. 331. Although the Vienna Convention cannot technically be applied to a dispute involving the United States, because it is not a signatory party, most nations, including the United States, view this portion of the Convention as a codification of generally accepted rules of customary law. *See* RESTATEMENT OF THE LAW (THIRD): FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 cmt. a.

260. UNITED NATIONS, THE LAW OF THE SEA: OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, at xix, U.N. Sales No. E.83.U.5 (1983) (introductory remarks of Bernardo Zuleta, U.N. Under-Secretary-General Special Representative of the Secretary-General for the Law of the Sea) [hereinafter OFFICIAL TEXT]. The preamble to UNCLOS states that it was established as: "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." *Id.* at 1.

261. This phrase was used by Tommy T.B. Koh, President of the Third U.N. Conference on the Law of the Sea, in his remarks to the final session of the Conference. He said: "The question is whether we achieved our fundamental objective of producing a comprehensive constitution for the oceans which will stand the test of time. My answer is in the affirmative . . . ." *Id.* at 33.

262. UNCLOS, *supra* note 2, art. 286, 21 I.L.M. at 1322.

prima facie unfounded.[263] Interim provisional measures protect the rights of disputants and prevent serious harm to the environment pending a final decision.[264] Early in the negotiations, a clear consensus developed that the dispute settlement provisions must be easily invoked by aggrieved parties to prevent states from interpreting the Convention unilaterally.[265]

During the course of negotiations, most states came to champion an effective compulsory dispute settlement system as the best method to assure uniform interpretations of the Convention and to maintain the integrity of the Convention's compromise package.[266] There was great fear that unilateral interpretations of the Convention could potentially undo complex compromises and destroy the consensus essential to the agreement's success.[267] The package of provisions that emerged has been called the "most sophisticated and detailed system for international dispute settlement ever drafted."[268] Although the negotiated compromise granted certain limited exemptions to compulsory settlement,[269] the final articles are nevertheless unique because, for the first time, all of the major political blocs of states, including the Soviet bloc, agreed to abide by a standard set of compulsory provisions for dispute settlement.[270]

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263. *See infra* note 301 and accompanying text.

264. *See infra* note 303 and accompanying text.

265. *See supra* text accompanying note 240.

266. John E. Noyes, *Compulsory Third-Party Adjudication and the 1982 United Nations Convention on the Law of the Sea*, 4 CONN. J INT'L L. 675, 681-82 (1989); *see* Louis B. Sohn, *Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way*, 46 L. & CONTEMP. PROBS. 195 (1983); *see also supra* text accompanying note 240.

267. In 1976, President Amerasinghe expressed this fear in a statement to the general plenary prior to debate on the dispute settlement articles, when he said: "[P]rovision of effective dispute settlement procedures is essential for . . . the attainment of agreement on a convention. Dispute settlement procedures will be the pivot upon which the delicate equilibrium of the compromise must be balanced. Otherwise the compromise will disintegrate rapidly and permanently." *Memorandum by the President of the Conference on Document A/CONF.62/WP.9 of 21 July 1975*, U.N. Doc. A/Conf.62/WP.9/Add.1 (1976), *reprinted in* 5 OFFICIAL RECORDS, *supra* note 250, at 122.

268. Noyes, *supra* note 266, at 675.

269. *See infra* part III.C.3.

270. Kindt, *supra* note 255, at 1098-99. When the provisions were being negotiated it was common knowledge that the former Soviet Union had never accepted a system of binding dispute settlement. Louis B. Sohn, *The Law of the Sea Crisis*, 58 ST. JOHN'S L. REV. 237, 261 (1984). *But see* Kazimierz Grzybowski, Comment, LAW & CONTEMP. PROBS., Spr. 1993, at 205 (1983) (comment on Louis B. Sohn, *Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?*). Grzybowski noted that the only instances in which the U.S.S.R. accepted compulsory adjudication were the Convention for Limiting the Manufacture and Distribution of Dangerous Drugs (July 13, 1931) and the International Opium Convention (1925). *Id.* at 206. The Soviet Union's intransigence on the issue of compulsory adjudication led Grzybowski to predict that the U.S.S.R. would surely reject the Convention. *Id.* at 207. He was proved wrong when the Soviet Union became the first nation to make a declaration officially accepting UNCLOS at the final meeting in Jamaica. 17 OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFER-

A number of excellent studies analyze the UNCLOS dispute settlement system in a manner not possible here.[271] A brief explanation is necessary, however, to facilitate a general understanding of how the system functions.[272] UNCLOS part XV divides the dispute settlement procedures into three sections.[273] Section 1 (articles 279-85) sets forth general provisions and deals with noncompulsory procedures for settling disputes through negotiation and voluntary conciliation.[274] When section 1 procedures are inadequate to resolve a dispute, section 2 (articles 286-96) provides for compulsory procedures that are binding on the parties.[275] Section 3 (articles 297-99) sets forth exceptions to the compulsory provisions, primarily concerning military activities and territorial sovereignty.[276]

1. *Noncompulsory Provisions*

Early in the negotiations, delegates agreed that States Parties should only resort to compulsory international adjudication after diplomatic methods of settlement had failed.[277] Maintaining this "flexibility" in dispute settlement mechanisms is the central tenet of section

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ENCE ON THE LAW OF THE SEA 107, U.N. Sales No. E.89.V.3 (1984). *See* Sohn, *supra*, at 261.

271. *See generally* 5 COMMENTARY, *supra* note 216; ADEDE, *supra* note 243; SINGH, *supra* note 7; Raymond Ranjeva, *Settlement of Disputes*, *in* A HANDBOOK ON THE NEW LAW OF THE SEA, *supra* note 184, at 1333; P.W. Birnie, *Dispute Settlement Procedures in the 1982 UNCLOS*, *in* THE LAW OF THE SEA AND INTERNATIONAL SHIPPING: ANGLO-SOVIET POST-UNCLOS PERSPECTIVES, *supra* note 223, at 39; A.O. Adede, *The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention*, 11 OCEAN DEV. & INT'L L. 125 (1982).

272. The discussion that follows is not intended to be a comprehensive analysis and generally describes only those UNCLOS articles directly relevant to this article. Consequently, it will usually refrain from discussing any of the provisions in UNCLOS dealing with settlement of disputes involving the international seabed area or sea boundary delimitations. For information on seabed and sea boundary dispute settlement, see generally ADEDE, *supra* note 243, at 267-85, and the other sources listed in note 243.

273. The basic scheme of part XV is concisely summarized in ADEDE, *supra* note 243, at 248-50. Although part XV contains most of the important articles dealing with dispute settlement, other parts and annexes of the treaty also deal with the subject. In particular see Part XI: The Area (Section 5 on Settlement of Disputes and Advisory Opinions); Annex V: Conciliation Procedures Pursuant to Section 1 of Part XV; Annex VI: Statute of the International Tribunal for the Law of the Sea; Annex VII: Arbitration; Annex VIII: Special Arbitration; and Annex II: Commission on the Limits of the Continental Shelf. In addition, UNCLOS contains several cross references to settlement procedures, including articles 229 and 226(1)(c), and article 264. UNCLOS, *supra* note 2, 21 I.L.M. at 1314, 1319. *See* Birnie, *supra* note 271, at 46.

274. *See infra* part III.C.1.

275. *See infra* part III.C.2.

276. *See infra* part III.C.3.

277. The first draft articles submitted by the United States to the United Nations Sea-Bed Committee in 1973 provided that:

> In any dispute between the Contracting Parties relating to the interpretation or application of the present Convention, any party to the dispute may invite the other party or parties to the dispute to settle the dispute by direct negotiation,

1.[278] UNCLOS assures flexibility by requiring parties to settle any disputes concerning the interpretation or application of the Convention peacefully in accordance with the Charter of the United Nations,[279] by negotiation, conciliation, or other specified means.[280] Freedom of choice is explicitly protected by allowing parties to depart from the provisions of part XV and use "any peaceful means of their own choice," even if a particular procedure has already been initiated.[281] To encourage negotiated settlements and to prevent parties from immediately resorting to the compulsory procedures of section 2, the Convention requires that "the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means."[282]

If the parties to the dispute are members of a bilateral, regional, or international agreement that contains procedures for a binding dispute settlement decision, then that agreement will take precedence over the UNCLOS procedures,[283] but only if the previously accepted procedure "entails a binding decision" will the UNCLOS procedures be superseded.[284] This requirement will not be met if the other agreement merely provides for mediation or conciliation that terminates in a nonbinding report.[285]

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good offices, mediation, conciliation, arbitration, or through special procedures provided for by an international or regional organization.

Draft Articles for a Chapter on the Settlement of Disputes, *supra* note 244, at 2. This concept was retained in the draft articles created by the initial drafting committee and was never seriously challenged in succeeding drafts. Kindt, *supra* note 255, at 1112-13.

278. *See* SINGH, *supra* note 7, at 57-58.

279. UNCLOS, *supra* note 2, art. 279, 21 I.L.M. at 1322. The U.N. Charter obligates all members to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." U.N. CHARTER, art. 2, ¶ 3.

280. The listed means are "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." U.N. CHARTER, art. 33, ¶ 1.

281. UNCLOS, *supra* note 2, art. 280, 21 I.L.M. at 1322; 5 COMMENTARY, *supra* note 216, at 20-21.

282. UNCLOS, *supra* note 2, art. 283(1), 21 I.L.M. at 1322.

283. *Id.* art. 282, 21 I.L.M. at 1322 (providing that the procedures in the other agreement "shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree"). President Amerasinghe has interpreted the phrase "unless the parties otherwise agree" as meaning that:

> if the parties to a dispute have assumed the obligation referred to [in article 282], there can be no release from that obligation without the concurrence of all parties to the dispute who have entered into the special agreement or other instrument referred to there. Any other interpretation would weaken the effect of the provision. Its strength and merit would lie in its binding character.

Informal Single Negotiating Text Addendum, para. 13, U.N.Doc.A/CONF.62/WP.9/Add.1 (1976), *reprinted in* 5 OFFICIAL RECORDS, *supra* note 250, at 122. For additional commentary on this clause, see SINGH, *supra* note 7, at 57.

284. 5 COMMENTARY, *supra* note 216, at 27.

285. *Id.*

Should negotiations or other means of settlement prove inadequate, part XV section 1 provides a mechanism for voluntary conciliation.[286] A party to a dispute may, but is not required to, invite the other party or parties to submit the dispute to a Conciliation Commission under the procedures provided by annex V section 1.[287] The voluntary conciliation procedures will be immediately halted if one of the parties either explicitly rejects the invitation or fails to respond affirmatively. Consistent with the procedure's nonbinding nature, the function of the appointed Conciliation Commission is simply to "hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement."[288] If the parties agree to some form of conciliation, the proceedings may be terminated only in accordance with the agreed conciliation procedure.[289]

2. *Compulsory Provisions*

The compulsory dispute settlement provisions of part XV, section 2, apply only when settlement has not been achieved under the noncompulsory procedures of section 1.[290] Subject to the limitations of section 3, "any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section."[291] The Convention requires parties at the time of signing, ratifying, or acceding to the Convention to choose one of four courts or tribunals to which disputes will be submitted.[292] If a State Party fails to make a selection and then becomes party to a dispute, it shall be

286. UNCLOS, *supra* note 2, art. 284, 21 I.L.M. at 1322.

287. *Id.* UNCLOS annex V, which sets out a detailed conciliation procedure, is divided into two sections. The first deals with voluntary conciliation pursuant to section 1 of part XV; the second deals with compulsory conciliation pursuant to section 2 of part XV.

288. UNCLOS, *supra* note 2, Annex V art. 6, 21 I.L.M. at 1344.

289. *Id.* art. 284(4), 21 I.L.M. at 1322.

290. *Id.* art. 281, 21 I.L.M. at 1322. Moreover, if the parties have agreed to a time limit on noncompulsory procedures, compulsory procedures in section 2 will only be applied after the expiration of that time-limit. *Id.* art. 281(2), 21 I.L.M. at 1322.

291. *Id.* art. 286, 21 I.L.M. at 1322.

292. *Id.* art. 287, 21 I.L.M. at 1322. The four choices are: (1) the International Tribunal for the Law of the Sea established in accordance with annex VI; (2) the International Court of Justice; (3) an arbitral tribunal constituted in accordance with annex VII; and (4) a special arbitral tribunal constituted in accordance with annex VIII for one or more of the categories of disputes specified therein. From the beginning of the conference there was serious disagreement concerning which court or tribunal would have authority over disputes. Allowing states to choose between several forums was the result of the so-called "Montreux Formula" which went through many alterations before final acceptance. For an interesting discussion of the legislative history of article 287, see 5 COMMENTARY, *supra* note 216, at 41-45; ADEDE, *supra* note 243, at 53-55, 73-75, 100-04, 134-35.

deemed to have selected the annex VII arbitration tribunal and its dispute resolution procedures.[293]

Crucial to this compulsory system is the provision that any party to a dispute may unilaterally submit it to binding dispute settlement procedures.[294] If one party submits a dispute to the court or tribunal with jurisdiction, that court or tribunal could render a binding decision regardless of whether the other party participates in the process.[295] Once a state ratifies the Convention or otherwise consents to be bound, that state automatically agrees to abide by the compulsory provisions of section 2.[296]

If the parties to a dispute have not accepted the same court or tribunal, the dispute may be submitted only to arbitration in accordance with annex VII, unless the parties agree otherwise.[297] Finally, to prevent states from changing their choice of court or tribunal for tactical reasons, the Convention requires declarations to remain in force until three months after notice of revocation and prohibits new declarations from affecting proceedings already in progress.[298]

Courts and tribunals having jurisdiction are required to "apply this Convention and other rules of international law not incompatible with this Convention."[299] In addition, the parties may agree to have the court or tribunal decide a case *ex aequo et bono*.[300] Initially, a court or tribunal with jurisdiction shall determine "whether the claim constitutes an abuse of legal process or whether *prima facie* it is well

293. UNCLOS, *supra* note 2, art. 287(3), 21 I.L.M. at 1322.

294. *See* 5 COMMENTARY, *supra* note 216, at 39.

295. *Id.* It is not entirely clear how the court or tribunal would proceed if one of the disputants refused to participate, although the court or tribunal may render a decision without the other party's participation. *Id.* The judges would be faced with a situation similar to that presented when the United States boycotted the proceedings before the International Court of Justice in the well-known Nicaragua case. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). One commentator described the unique problems faced by that court as follows:

> The Court was required to deal with this extraordinarily complex evidence entirely on its own, responding to the arguments and evidence presented by Nicaragua with its own questions . . . and perhaps just because the respondent United States *was* absent—the Court was obliged to theorize more than it would normally have done to justify the positions it ultimately took on matters of evidence. Rules of evidence were formulated that would clearly not have been necessary had the United States been in the courtroom to defend itself and to assist the Court in evaluating and disposing of the factual assertions made by Nicaragua.

Keith Highet, *Evidence, the Court, and the Nicaragua Case*, 81 AM. J. INT'L L. 1, 4 (1987)

296. 5 COMMENTARY, *supra* note 216, at 38.

297. UNCLOS, *supra* note 2, art. 287(5), 21 I.L.M. at 1323.

298. *See id.* art. 287(6)-(7), 21 I.L.M. at 1323.

299. *Id.* art. 293(1), 21 I.L.M. at 1324.

300. *Id.* art. 293(2), 21 I.L.M. at 1324. *Ex Aequo et Bono* means according to equity and fairness. BLACK'S LAW DICTIONARY 659 (4th ed. 1968). In practice, most disputants would probably not be willing to delegate such sweeping discretionary authority to a court or tribunal except under very exceptional circumstances.

founded."[301] Based upon these preliminary findings, the court or tribunal has the discretion to take no further action in the case.[302]

A court or tribunal with jurisdiction may prescribe "any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision."[303] Provisional measures may be prescribed, modified, or revoked only at the request of a party to the dispute, after the parties have been offered an opportunity to be heard.[304]

The last article in section 2 emphasizes the binding nature of decisions, stating that "[a]ny decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute."[305] The Convention limits the precedential impact of decisions, however, by providing that "[a]ny such decision shall have no binding force except between the parties and in respect of that particular dispute."[306]

3. *Exceptions*

The exceptions in part XV, section 3, emerged as a compromise between those delegations that favored applying compulsory dispute settlement to all categories of disputes and other delegations, primarily from developing coastal states, that sought to exclude from binding settlement disputes involving sensitive sovereign rights and national security matters.[307] The compromise designated two categories of activities in the EEZ as outside the scope of section 2's binding settlement procedures.[308] One of these categories involves disputes over coastal state management of fisheries within the EEZ, as regulated by

301. UNCLOS, *supra* note 2, art. 294(1), 21 I.L.M. at 1324. This preliminary determination can come at the request of a party to the dispute or upon motion of the court or tribunal. *Id.*

302. *Id.*

303. *Id.* art. 290(1), 21 I.L.M. at 1323.

304. *Id.* art. 290(3), 21 I.L.M. at 1323.

305. *Id.* art. 296(1), 21 I.L.M. at 1324. Interestingly, an earlier clause that sought to give binding effect to "a settlement effected by a court or tribunal" was omitted, since such settlements were felt to have been made by the parties and merely acknowledged by the court or tribunal. A number of delegates felt that settlements made voluntarily between the parties should not be given the same status as formal decisions. *See* 5 COMMENTARY, *supra* note 216, at 84. It is assumed that voluntary settlements are equally binding on the parties based on the "good faith" provisions in UNCLOS article 300 and other principles of international law.

306. UNCLOS, *supra* note 2, art. 296(2), 21 I.L.M. at 1324.

307. An interesting legislative history of this debate can be found in SINGH, *supra* note 7, at 126-70; *see also* ADEDE, *supra* note 243, at 165-74; 5 COMMENTARY, *supra* note 216, at 87-141.

308. Excluded categories of activities are detailed in UNCLOS, *supra* note 2, arts. 297(2)-(3), 21 I.L.M. at 1324-25.

UNCLOS articles 61-72.[309] The other category relates to coastal state regulation of foreign marine scientific research in the EEZ, detailed in articles 245-65.[310] For these two categories, the Convention creates a different dispute settlement procedure, based upon compulsory conciliation.[311]

Coastal states are required to participate in conciliation under annex V when another state alleges that the coastal state has arbitrarily or manifestly failed to comply with its UNCLOS fisheries management obligations within its EEZ.[312] In no case, however, shall the conciliation commission substitute its discretion for that of the coastal state.[313] A similar compulsory conciliation system is established for disputes over foreign marine scientific research in the EEZ and on the continental shelf.[314]

One commentator has suggested that the United States may have a legitimate right to impose unilateral trade sanctions against a coastal state as long as it follows the compulsory conciliation procedures in

309. *Id.* art. 297(3)(a), 21 I.L.M. at 1325.

310. *Id.* art. 297(2)(a), 21 I.L.M. at 1324.

311. *Id.* art. 297(2)(b), (3)(b), 21 I.L.M. at 1324-25. Under this special procedure, disputes concerning fisheries matters are subject to the compulsory settlement system in section 2,

> except that 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.

Id. art. 297(3)(a), 21 I.L.M. at 1325.

312. Where no settlement has been reached by recourse to section 1 of this Part, a dispute shall be submitted to conciliation under Annex V, section 2, at the request of any party to the dispute, when it is alleged that:
(i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;
(ii) a coastal State has arbitrarily refused to determine, at the request of another state, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or
(iii) a coastal State has arbitrarily refused to allocate to any State, under articles 62, 69, and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.

Id. art. 297(3)(b), 21 I.L.M. at 1325.

313. *Id.* art. 297(3)(c), 21 I.L.M. at 1325.

314. Article 297(2)(a) exempts coastal states from part XV, section 2 compulsory dispute settlement procedures arising out of: "(i) the exercise by the coastal State of a right or discretion in accordance with article 246 [regulations controlling foreign marine scientific research in the EEZ and on the Continental Shelf]; or (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253." *Id.*, 21 I.L.M. at 1324. Article 297(2)(b) requires that at the request of either party any dispute pertaining to the above-mentioned provisions be submitted to conciliation under annex V, section 2. *Id.* The conciliation commission, however, may not call into question the exercise by the coastal state of its discretion to designate specific areas as referred to in article 246(6), or of its discretion to withhold consent in accordance with article 246(5).

article 297(3)(b) and its concerns are not remedied.[315] While there is some merit to this argument, nothing would prevent a targeted coastal state from later waiving its exemption and challenging the U.S. trade restrictions under the binding provisions of section 2.[316] Moreover, this argument cannot be applied if the dispute involves conservation or management of high seas living resources; such disputes are subject to binding settlement.[317]

Apart from these two narrow, automatic exceptions, the Convention makes clear that the compulsory dispute settlement provisions apply to all of the other "freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58."[318] Moreover, binding settlement is available when it is alleged that a coastal state has "acted in contravention of specific international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal state."[319]

The Convention also provides for several optional exceptions to binding settlement.[320] Under the optional exception provision, a State Party may at any time declare in writing that it does not accept compulsory dispute settlement as provided for in part XV, section 2, for one or more of the following categories: (1) seabed boundary delimitations;[321] (2) military activities and certain law enforcement activities;[322] and (3) issues already assigned to the U.N. Security Council.[323]

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315. This argument was brought to the author's attention during a telephone conversation with Professor William T. Burke, University of Washington Law School (Aug. 31, 1993).

316. *See supra* notes 290-306 and accompanying text. The hypothetical example discussed *supra* part III.A. and *infra* part III.C.5. describes a somewhat similar scenario. *See also infra* notes 401-02 for the proposition that unilateral measures may be justified if the dispute settlement provisions are patently inadequate.

317. *See supra* notes 180-213.

318. UNCLOS, *supra* note 2, art. 297(1)(a), 21 I.L.M. at 1324.

319. *Id.* art. 297(1)(c), 21 I.L.M. at 1324. The rules and standards applicable under this provision are those established by UNCLOS or through a competent international organization or diplomatic conference in accordance with the Convention. *Id.* Binding settlement is therefore available to handle disputes over certain environmental provisions in bilateral or multilateral agreements negotiated separately from UNCLOS.

320. *Id.* art. 298, 21 I.L.M. at 1325. For a useful commentary on this article, see 5 COMMENTARY, *supra* note 216, at 109-41.

321. UNCLOS, *supra* note 2, art. 298(1)(a), 21 I.L.M. at 1325. Disputes over historic bays or titles may also be exempted under this provision. At the request of any party to the dispute, the coastal state must agree to submit the matter to conciliation under annex V, section 2.

322. *Id.* art. 298(1)(b), 21 I.L.M. at 1325. This includes military activities by government vessels and aircraft engaged in on-commercial service, as well as disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from compulsory dispute settlement under article 297(2) (marine scientific research) or article 297(3) (fisheries).

A party to a dispute that falls within one of the automatic exceptions to binding settlement in article 297 or is exempted under the optional declarations in article 298 cannot, under any circumstances, be forced against its will to comply with the compulsory dispute settlement procedures of section 2.[324] Nothing in the Convention, however, prevents parties to the dispute from mutually agreeing to use some other procedure to reach an amicable settlement.[325]

4. General Provisions Requiring Good Faith and No Force

Although technically placed outside of Part XV, two general provisions of part XVI may also impact the future interpretation and application of the Convention's dispute settlement scheme. The first of these provisions requires that "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."[326] How this subjective article is likely to be interpreted is open to conjecture.[327] One commentator has suggested that it should be interpreted to restrict both the unnecessary or arbitrary exercise of rights, jurisdiction, and freedoms, and the misuse of powers by States Parties.[328]

The second provision, dealing with peaceful uses of the seas, requires States Parties to "refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations."[329] As with the requirement of "good faith," it is unclear how this article may ultimately be interpreted.[330] There is a long-standing difference of opinion

323. *Id.* art. 298(1)(c), 21 I.L.M. at 1325. Exercising the optional exception to binding dispute settlement does not alleviate the party from the obligation to negotiate in section 1. *See supra* notes 277-89 and accompanying text.

324. This point is reiterated in UNCLOS, *supra* note 2, art. 299(1), 21 I.L.M. at 1325-26.

325. *Id.* art. 299(2), 21 I.L.M. at 1326.

326. *Id.* art. 300, 21 I.L.M. at 1326.

327. For a discussion of the possible implications of UNCLOS article 300 in relation to high seas driftnet operations, see Burke, *supra* note 197, at 303-05.

328. *See* 5 COMMENTARY, *supra* note 216, at 152, citing Alexandre Kiss, *Abuse of Rights, in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1, 1 (Rudolf Bernhardt ed., 1992). *See generally* BRIAN D. SMITH, STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT: THE RULES OF DECISION 84-85 (1988).

329. UNCLOS, *supra* note 2, art. 301, 21 I.L.M. at 1326.

330. The expression "refrain from any threat or use of force against the territorial integrity or political independence of any State" is very close but not identical to article 2, paragraph 4, of the United Nation's Charter. *See* 5 COMMENTARY, *supra* note 216, at 154. One Japanese scholar has argued that an agreement between Japan and the United States in 1984, in which Japan withdrew its objection to a whaling moratorium imposed by the International Whaling Commission, was void *ab initio*, because it was concluded by "threat or use of force" as a result of threats by the United States of economic sanctions. Sumi,

within the international community concerning the circumstances under which economic coercive measures, such as trade embargoes, may be deemed to violate international law.[331]

5. Revisiting the Hypothetical Shrimp Embargo

To illustrate the impact of the UNCLOS dispute resolution provisions in practice, this subpart returns to the hypothetical shrimp embargo. All of the disputed issues submitted by the target of the sanctions, Country *X*, would be subject to compulsory and binding dispute settlement assuming that the parties had exchanged views as required by part XV, section 1 and that no settlement was reached.[332] Only the coastal state may invoke a section 3 exception to binding settlement concerning the conservation and management of living resources in its EEZ,[333] and by bringing the compulsory dispute settlement action in the first place, *X* has voluntarily waived the exception from binding dispute settlement it might have claimed under that section.[334]

X's strategy of waiving its exemption from binding dispute settlement is not risk free. While there is a good chance that a dispute settlement court or tribunal will rule in its favor and demand that the United States rescind its embargo, there is also a chance that the court or tribunal will rule against *X*. UNCLOS article 61 requires all coastal states not to overexploit the living resources in their EEZ's.[335] This requirement would normally be enforced by recourse to the dispute settlement provision in article 297(3)(b), which requires coastal states to submit to conciliation under annex V when they have failed to ensure that living resources in the EEZ are not seriously endangered.[336] Conciliation is nonbinding, and article 297 clearly provides that the conciliation commission shall not substitute its discretion for that of the coastal state.[337] By waiving its exemption to binding settlement, *X* risks the possibility that a court or tribunal will rule that it must adopt conservation measures, perhaps including the use of TED's, to protect endangered sea turtles better in its EEZ. Because settlement decisions have no binding force except over the parties to a particular dis-

supra note 28, at 366-67. The legal validity of this assertion is questionable and is discussed *infra* notes 371-81 and accompanying text.

331. For a detailed discussion, see *infra* part IV.A.

332. *See supra* note 291 and accompanying text.

333. UNCLOS, *supra* note 2, art. 297(3)(a), 21 I.L.M. at 1325. *See supra* notes 315-17 and accompanying text.

334. Use of the terms "shall not be obliged to accept the submission," UNCLOS, *supra* note 2, art. 297(3)(a), 21 I.L.M. at 1325, indicates that a coastal state may not be forced into binding settlement, but is not precluded from voluntarily choosing that option.

335. *See supra* notes 171-76 and accompanying text.

336. For a discussion of this provision, see *supra* notes 311-12 and accompanying text.

337. UNCLOS, *supra* note 2, art. 297(3)(c), 21 I.L.M. at 1325.

pute, however, a favorable ruling for the United States does not prevent later challenges by other States Parties under identical circumstances.[338]

Other hypotheticals could easily be constructed to reflect other situations in which U.S. unilateral sanctions conflict with rights granted under UNCLOS. For instance, the embargo provisions of the MMPA,[339] the sanction requirements under the Pelly Amendment certification process,[340] and the whale protection provisions of the Packwood-Magnuson Amendment[341] all affect the rights and duties of other nations under the Convention and therefore may be challenged pursuant to its dispute settlement procedures.

D. GATT as an Alternative Forum To Address Disputes Over Ocean-Related Trade Sanctions

Arguably any dispute between the United States and another party concerning the imposition of a trade embargo should be settled under the procedures of the General Agreement on Tariffs and Trade rather than under UNCLOS.[342] GATT was created for precisely this purpose, and its provisions for settling trade disputes have been used and developed over many years.[343] UNCLOS defers to the dispute settlement procedures in other agreements conditioned upon a showing that they will provide a *binding* decision and that both disputants are parties to the chosen agreement and therefore obliged to take part in the alternative procedures.[344] The purpose of these conditions is to ensure that a party seeking a binding dispute settlement decision is not prevented from exercising that right as a result of its earlier agreement to participate in the nonbinding procedures of another agreement.[345]

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338. *See supra* note 306 and accompanying text. Although a dispute settlement court or tribunal may wish to adopt the reasoning employed by an earlier body, it is not required to do so and may instead choose to ignore any prior ruling.

339. *See supra* note 35 and accompanying text.

340. *See supra* notes 72-92 and accompanying text.

341. *See supra* note 78 and accompanying text. Although a reduction in foreign fishing allocations within the U.S. EEZ is probably safe from challenge, any trade restriction imposed as a result of a Pelly Amendment certification is not.

342. Assuming, of course, that both are GATT members. The United States has frequently argued that trade issues should be addressed in GATT rather than through other international forums. For example, in the preparatory meetings for the United Nations Conference on Environment and Development, the United States Delegate stated, "We look to the GATT to define how trade measures can properly be used for environmental purposes." *Trade, Environment, and Sustainable Development*, *supra* note 39, at 587-88.

343. *See* sources cited *supra* note 50.

344. In fact, UNCLOS article 282 specifically allows parties to submit their disputes to settlement procedures under other general, regional or bilateral agreements in lieu of UNCLOS' procedures. *See supra* notes 283-85.

345. *See supra* notes 283-85.

I contend that the dispute settlement procedures in GATT are not sufficiently binding to trigger their automatic substitution for the procedures in UNCLOS. In other words, while nothing would prevent the disputants from voluntarily agreeing to settle their dispute through GATT, GATT membership alone will not compel either party to give up its right to third-party settlement under UNCLOS. As I have already noted in relation to the *Tuna/Dolphin Decision*, a finding by a GATT dispute resolution panel is only given force if it is adopted by all the contracting parties, including the party against whom the report is directed.[346] Only when the contracting parties find an injury "serious enough to justify such action" will binding measures take effect.[347] In many instances losing parties simply do not follow dispute panel reports.[348]

Dissatisfaction with the GATT dispute resolution process was the impetus for the United States to enact the unilateral enforcement measures of section 301 of the Trade Act of 1974.[349] This statute authorizes the U.S. Trade Representative to challenge any foreign government practice that infringes upon U.S. rights under a trade agreement or that is "unjustifiable and burdens or restricts United States Commerce."[350] If the Trade Representative determines a violation has taken place under the enumerated standards, he or she may respond by suspending or withdrawing trade agreement concessions, or by imposing duties, fees, or other restrictions on the offending nation's trade.[351] Interestingly, the Act requires the matter to be referred to international dispute settlement procedures where

346. *See Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, *supra* note 50. The practice of allowing the "losing" party to block or delay the approval of a dispute resolution panel decision was modified slightly in 1983, but still exists and is much criticized by many GATT members. *See* JACKSON, *supra* note 50, at 96-97.

347. GATT, *supra* note 33, art. XXIII(2), 61 Stat. at A64-A65, 55 U.N.T.S. at 268.

348. Professor Hudec found that of eight adverse rulings from GATT dispute settlement panels in recent years, the United States either blocked or failed to act upon five. Robert E. Hudec, *Thinking About New Section 301: Beyond Good and Evil, in* AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM 113, 141-42 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990). Jackson suggests that of approximately 117 cases that he surveyed, about 8-10 have not been followed. JACKSON, *supra* note 50, at 101. According to another observer, "[o]ffending countries, especially the large ones, can either block GATT Council decisions condemning them—since the GATT's consensus tradition requires their own acquiescence—or can simply disregard recommendations, since they do not face effective retaliatory action from injured parties." SIDNEY GOLT, THE GATT NEGOTIATIONS 1986-1990: ORIGINS, ISSUES & PROSPECTS 48 (1988).

349. The Act was most recently amended in 1988 and is now called the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. §§ 2411-2420 (1988).

350. *Id.* § 2411(a)(1).

351. *Id.* § 2411(c)(1).

applicable, but does not require the United States to abide by the final decision or refrain from action prior to completing the procedures.[352]

There has been considerable global criticism of the GATT dispute settlement procedures.[353] GATT panel decisions are widely perceived as nonbinding because the consensus required for implementation often undermines their enforcement. Thus, GATT dispute settlement decisions do not provide the kind of truly binding legal determinations accorded deference under UNCLOS article 282.[354]

IV

ANALYSIS OF POTENTIAL U.S. DEFENSES TO UNILATERAL TRADE MEASURES

This part addresses three of the arguments in defense of using unilateral economic measures to protect international marine living resources. First, although the United States may freely admit that it intends to use trade sanctions to coerce other nations into relinquishing some of their sovereign rights to exploit marine living resources, it may deny that these actions violate any rights or duties under UNCLOS. The United States may contend that it has never used direct military or economic pressure on coastal states to force them to change their conservation or management practices. In short, it is merely regulating its foreign trade by choosing its trading partners, which is a primary prerogative of national sovereignty.[355] Second, the United States may reject the contention that membership in UNCLOS precludes unilateral sanctions by requiring parties to use a spe-

352. *Id.* §§ 2413-2414. Jackson believes that this feature of the Act reflects considerable congressional dissatisfaction with the GATT dispute procedures. JACKSON, *supra* note 50, at 105-06.

353. *See* JACKSON, *supra* note 50, at 109-13; P. PESCATORE, ET AL., 1990 HANDBOOK OF GATT DISPUTE SETTLEMENT 69-72 (1991). From the perspective of the United States, President Reagan once told a group of U.S. business leaders that one of his trade policy commitments was to "amend our trade laws to put a deadline on dispute settlement and to contain a fast track procedure for perishable items. We should no longer tolerate 16-year cases, and settlements so costly and time-consuming that any assistance is ineffective." *U.S. Trade Policy: Hearings Before the Senate Comm. on Finance*, 99th Cong., 1st Sess. 20 (1985).

354. *See generally* 5 COMMENTARY, *supra* note 216, at 25-27.

355. According to one scholar, "Customary international law presupposes the right of States to adopt their respective economic strategies. Hence, barring any conflicting treaty obligation, and subject to the rules of international law concerning the protection of aliens, a State may sever at will trade relations with any other." OMER Y. ELAGAB, THE LEGALITY OF NON-FORCIBLE COUNTER-MEASURES IN INTERNATIONAL LAW 197 (1988) *citing* among others, C.C. Hyde & Louis B. Wehele, *The Boycott in Foreign Affairs*, 27 AM J. INT'L L. 1, 2 (1933); H. Lauterpacht, *Boycott in International Relations*, 14 BRIT. Y.B. INT'L L. 125, 130 (1933); CLYDE EAGLETON, INTERNATIONAL GOVERNMENT 87 (1957). *See infra* part IV.A.

cific dispute settlement procedure.[356] Third, the United States may argue that it is merely applying domestic environmental standards consistently to both domestic and foreign participants in the U.S. market, by preventing its citizens from purchasing fisheries products harvested by unacceptable practices.[357] Nothing prevents a targeted coastal state from continuing its existing practices as long as it is willing to find other markets for its products.

A. The United States Has the Sovereign Right To Regulate Its Foreign Trade

The validity of the assertion that states have absolute control over whether they will engage in commercial trade with another nation is unsettled under international law. Differences of scholarly opinion are especially acute on trade restrictions imposed to coerce another state to change its behavior.[358] Professor Neff has described three schools of thought on the legality of this "economic warfare."[359] The school that best represents the first potential U.S. argument, called the "state-sovereignty school," believes that the refusal to engage in trade is within a state's sovereign rights.[360] This school has its roots in positivist international legal theory, which views the international community as an aggregation of fundamentally independent entities whose primary purpose and mission are to promote their own interests.[361] The right to pursue economically isolationist policies is simply a concomitant feature of the more general right to exercise sovereignty freely without regard for the community interest.[362]

In contrast, the "neutrality school" gives slightly greater weight to the role of international law in protecting the community's common

356. *See infra* notes 382-402 and accompanying text.

357. In essence, this is the argument that the United States made to the GATT *Tuna/Dolphin* panel. Although couched in terms of its obligations under the GATT agreement, it argued that its embargo of tuna products from Mexico was an internal regulation affecting the domestic sale, purchase, transportation, and distribution of foreign tuna and was not an infringement of any international obligation. *See* Tuna/Dolphin Decision, *supra* note 34, para. 3.11.

358. For a collection of the opposing views of leading scholars on this subject, see generally ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER (Richard B. Lillich ed., 1976) [hereinafter ECONOMIC COERCION].

359. He has defined "economic warfare" to include "any measures (such as boycotts or embargoes) that are designed to inflict economic injury onto a state in the context of a political dispute." Stephen C. Neff, *Economic Warfare in Contemporary International Law: Three Schools of Thought, Evaluated According to an Historical Method*, 26 STAN. J. INT'L L. 67, 67 n.1 (1989).

360. *Id.* at 70-73.

361. *See generally* Roberto Ago, *Positivism*, *in* 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 305 (Rudolf Bernhardt ed., 1992).

362. Neff, *supra* note 359, at 72.

interests.[363] Adherents to this approach accept the legality of direct economic warfare by one state against another, but seek to prohibit secondary forms that injure "neutral" third parties.[364] For example, the longstanding boycott of Israel by Arab states would be legal, but the secondary boycott against all states or companies that trade with Israel would be prohibited under this view of international law.[365] A better example for our purposes is the recent U.S. embargo of tuna products.[366] According to the neutrality school, the United States may have had a sovereign right to place an embargo directly on tuna products from Mexico, but it lacked the right to extend the embargo to intermediary nations that purchased tuna from Mexico for resale in the United States.[367]

The third school, known as the "prohibitionist school," believes that economic warfare is not permitted by customary international law.[368] This view is founded upon general notions, incorporated in the U.N. Charter and GATT, that international economic relations should promote maximum harmony and cooperation among nations.[369] Some scholars in the prohibitionist school have championed the theory that article 2(4) of the U.N. Charter, which prohibits the use or threat of force in international relations, should be construed to bar coercive economic measures as well.[370] Most scholars refute this the-

363. *Id.* at 73.

364. *Id.* The term "neutrality" is used by Neff to analogize this school's view with the pre-League of Nations view of war and neutrality in which war was an accepted form of international conduct as long as it did not unduly burden the ability of neutral parties to go about their business as usual.

365. A good discussion of the history and effects of the Arab Boycott of Israel can be found in David B. Dewitt, *The Arab Boycott of Israel, in* THE UTILITY OF INTERNATIONAL ECONOMIC SANCTIONS 149-66 (David Leyton-Brown ed., 1987).

366. *See supra* notes 35-38 and accompanying text.

367. Neff, *supra* note 359, at 73.

368. *Id.* at 80-81.

369. The U.N. Charter requires that member states "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." U.N. CHARTER art. 2, ¶ 4. GATT in effect prohibits embargoes and boycotts against member states by banning "prohibitions or restrictions . . . on the importation of any product of the territory of any other contracting party or on the exportation . . . of any product destined for the territory of any other contracting party." GATT, *supra* note 33, art. XI, 61 Stat. at A30-A31, 55 U.N.T.S. at 226. Disagreement over the proper interpretation of this provision was at the heart of the dispute in the *Tuna/Dolphin Decision*. *See supra* notes 33-38 and accompanying text.

370. *See* Richard B. Lillich, *Economic Coercion and the International Legal Order, in* ECONOMIC COERCION, *supra* note 358, at 73, 75-78; Richard B. Lillich, *The Status of Economic Coercion Under International Law: United Nations Norms*, 12 TEX. INT'L L.J. 17 (1977); Jordan J. Paust & Albert P. Blaustein, *The Arab Oil Weapon—A Threat to International Peace*, 68 AM. J. INT'L L. 410, 417-19 (1974); Hartmut Brosche, *The Arab Oil Embargo and United States Pressure Against Chile: Economic and Political Coercion and the Charter of the United Nations*, 7 CASE W. RES. J. INT'L L. 3, 23 (1974). Lillich argues that the U.N. Charter and several subsequent resolutions reflect an emerging consensus against the use of some kinds of economic coercion. He cites as especially important the General

ory by pointing out that the legislative history of the U.N. Charter and subsequent General Assembly resolutions do not support a prohibition of economic coercion.[371] After examining the historical trends associated with the use of economic warfare, Professor Neff concludes that there is an emerging, if not definitive, norm of general customary international law prohibiting economic warfare.[372]

The divergent views noted above provide little support for a black-letter rule prohibiting nations from using economically coercive measures under customary international law.[373] In my opinion, even Neff's recognition of an emerging norm is on rather shaky ground, in light of the continuing widespread use of trade embargoes and other coercive economic measures in state practice.[374]

Although customary international law does not impose a blanket prohibition on using economically coercive measures, this does not imply that all unilateral action is permissible. Specific treaty commit-

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Assembly's Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, G.A. Res. 20/2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1966), *reprinted in* 60 AM. J. INT'L L. 662 (1966), adopted by a vote of 109-0-1 in 1965, which condemns a state's "use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind." Lillich admits that he cannot pinpoint which kinds of economic coercion are prohibited and which are not. Lillich, *The Status of Economic Coercion*, *supra*, at 20-22.

371. ELAGAB, *supra* note 355, at 196-213. After a lengthy examination of the legislative history of the U.N Charter and subsequent General Assembly Resolutions, Professor Elagab rejects the theory that these declarations proscribe economic coercion. He does admit, however, that the international community may be gradually narrowing the concept of permissible economic coercion. *Id.* at 212. Professor Bowett similarly finds little support in article 2(4) for barring coercive economic measures, but he acknowledges an influential trend adverse to economic coercion. Derek W. Bowett, *International Law and Economic Coercion, in* ECONOMIC COERCION, *supra* note 358, at 87, 89-90; *see also* Tom J. Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AM. J. INT'L L. 405, 413 (1985) (proposing that economic coercion should be treated as aggression only when the objective of the coercion is to liquidate an existing state or to force the state to become a mere satellite of the coercing state); ZOLLER, *supra* note 14, at 71 (distinguishing between measures used for punishment, which are unlawful under article 2(4), and measures used for coercion, which may be lawful in her view).

372. Neff, *supra* note 359, at 90.

373. A clear trend has been recognized, however, when the coercive action endangers the territorial integrity or political independence of the target state. According to a recent report for the International Law Commission:

> Although the State practice considered does not appear to warrant the conclusion that certain forms of economic and/or political coercion are equivalent to forms of armed aggression, the said practice none the less reveals a trend towards the prohibition of economic/political measures jeopardizing the territorial integrity or the political independence of the State against which they are taken.

Gaetano Arangio-Ruiz, *Fourth Report on State Responsibility*, U.N. International Law Commission, 44th Sess., at 22, U.N. Doc. A/CN.4/444/Add.1/Corr.1 (1992); *see also* Farer, *supra* note 371.

374. One well-known study documents nearly 100 cases in which economic sanctions have been used in the conduct of foreign policy since the creation of the United Nations. *See* HUFBAUER ET AL., *supra* note 138.

ments may make coercive measures illegal.[375] For example, article 19 (formerly article 16) of the Charter of the Organization of American States expressly classifies the use of economic coercive measures as an unacceptable use of force: "No state may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another state and obtain from it advantages of any kind."[376]

To summarize, customary international law has no prima facie prohibition preventing the United States from imposing embargoes for political purposes.[377] Commonly, such measures are treated as valid "bargaining chips" in international negotiations.[378] In fact, international law recognizes certain categories of legitimate unilateral economic measures that states may take in proportionate response to violations by another state.[379] A number of excellent studies, including several recent reports to the International Law Commission, have attempted to clarify the various legal problems associated with economic countermeasures.[380] A thorough discussion of whether U.S. embargoes to protect marine living resources comply with the general

375. There are examples in which sanctions have been recognized as violative of treaty commitments. For instance, in 1955, the Soviet Union paid $90 million to Yugoslavia because its boycott violated specific treaty commitments. H. Van Houtte, *Treaty Protection Against Economic Sanctions*, 18 REV. BELGE DE DRIOT INT'L 34, 53 (1984-85).

376. Protocol of Amendment to the Charter of the Organization of American States, 2 U.S.T. 2394, 2420, *renumbered by* 21 U.S.T. 607, 662, O.A.S.T. No. 1-A at 6. The U.S. embargo of Cuban sugar in 1960 is generally viewed as a violation of the OAS ban on coercive economic measures. Van Houtte, *supra* note 375, at 36. The obligations under the OAS, GATT, and other treaties may play an important role in any dispute settlement proceeding filed under UNCLOS because article 293 requires a court or tribunal to apply "other rules of international law not incompatible with this Convention." UNCLOS, *supra* note 2, art. 293(1), 21 I.L.M. at 1324.

377. *See* ELAGAB, *supra* note 355, at 212; Bowett, *supra* note 371, at 90.

378. "The taking and lifting of economic measures in fact are normal strategies during negotiations." Van Houtte, *supra* note 375, at 36. This issue is also addressed in ZOLLER, *supra* note 14, at 20-22.

379. These measures were categorized in a recent report to the International Law Commission as follows: (1) self-defense; (2) sanctions (taken by international bodies); (3) Retorsions; (4) reprisals; (5) countermeasures; (6) reciprocity measures; and (7) suspension and Termination of Treaties. Gaetano Arangio-Ruiz, *Third Report on State Responsibility*, U.N. International Law Commission, 43rd Sess., at 8-35, U.N. Doc. A/CN.4/440 (1991). All of these measures are subject to the general rule that they be proportional in degree to the other nation's wrongful conduct. Gaetano Arangio-Ruiz, *Fourth Report on State Responsibility*, U.N. International Law Commission, 44th Sess., at 53-56, U.N. Doc. A/CN.4/444/Add.1 (1992).

380. *See generally* sources cited *supra* note 379; *see also* ELAGAB, *supra* note 355; ZOLLER, *supra* note 14; ELISABETH ZOLLER, ENFORCING INTERNATIONAL LAW THROUGH U.S. LEGISLATION (1985); SHABTAI ROSENNE, THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON STATE RESPONSIBILITY: PART 1 298-300 (1991); IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY: PART I (1983).

principles of international law lies beyond the scope of this study and awaits further attention.[381]

B. *The United States May Impose Proportional Economic Sanctions Even When Party to an Agreement That Mandates Dispute Settlement Procedures*

Under this argument, the United States would be allowed to use unilateral sanctions to the extent that they help restore the relative equality of the disputants. Such proportional sanctions were allowed, despite a prior agreement to specific dispute settlement procedures, by the arbitral tribunal in the *Air Services* case between the United States and France.[382] Although factually distinguishable from any scenario likely to occur under UNCLOS, *Air Services* provides a number of valuable insights. In that case, France took away the landing rights of a U.S. airline at Paris Orly Airport as a result of a dispute over terms in a 1946 Air Services Agreement between the two countries.[383] After both nations agreed in principle to submit the issue to arbitration, the United States issued an order rescinding certain landing privileges of a French airline until the U.S. airline's landing privileges were restored.[384] The U.S. order was stayed pending the binding decision of an arbitration tribunal.[385]

Among other issues, the tribunal was asked to determine whether a party breached international law by imposing coercive economic measures on another party when both had previously committed to negotiate a settlement or to submit their dispute to arbitration or judicial procedures for settlement.[386] The tribunal stated first that it was tempted to assert that the principle of good faith prevents parties from imposing economic sanctions during negotiations.[387] Nevertheless, it

381. A sample of the kinds of questions awaiting further analysis include: Can a nation act unilaterally based on some *ergo omnes* obligation to protect international marine living resources? Would the legality of unilateral measures be more likely to be recognized if the objective being sought is widely shared by the international community? How can the United States take unilateral enforcement measures to protect international marine living resources in light of the fact that targeted coastal states have generally not violated any customary or conventional legal obligation? What type of "injury" is required before a state may take unilateral countermeasures? Is some variety of "moral injury" sufficient?

382. Case Concerning the Air Services Agreement of 27 March 1946 (United States v. France), 54 I.L.R. 304 (Dec. 9, 1978) [hereinafter Air Services]. Professor Willem Riphagen served as President of the arbitral tribunal. The other two arbitrators were Thomas Ehrlich and Paul Reuter. Great weight has been given to the decision because Riphagen and Reuter are members of the International Law Commission. The complete text of the decision is reprinted in ZOLLER, *supra* note 14, at 141-76.

383. Air Services, *supra* note 382, para. 4.

384. *Id.* para. 8.

385. *Id.* para. 9.

386. *Id.* para. 84.

387. *Id.* para. 85.

found that general international law and the provisions in the Air Services Agreement between the United States and France did not allow the tribunal to go that far.[388] After finding that the agreement mandated the parties to make good faith efforts to negotiate on issues of potential controversy,[389] the tribunal ruled that the economic countermeasures taken by the United States were not illegal because "[t]heir aim [was] to restore equality between the parties."[390] It noted that the U.S. measures were proportional so that they "restore[d] in a negative way the symmetry of the initial positions."[391]

Thus *Air Services* provides authority for the view that general international law does not prohibit a nation from imposing proportional economic sanctions against another nation, even where there is a duty to negotiate as part of a third-party settlement procedure. For several reasons, however, *Air Services* is inappropriate authority for the proposition that the United States may take unilateral actions despite being a party to UNCLOS. First, the UNCLOS legal framework is much more explicit than the Air Services Agreement in requiring international cooperation and imposing a duty to negotiate. For example, with respect to the conservation and management of living resources of the high seas, UNCLOS articles 118, 119, and the cross-referenced articles of part V provide specific requirements for cooperation and negotiation between States Parties.[392] The legal obligation to negotiate without resort to coercive measures under the detailed provisions of UNCLOS is decidedly stronger than the weak requirement to "consult" in the Air Services Agreement.[393]

Second, the dispute in *Air Services* involved a bilateral agreement between two developed nations on the narrow issue of airport landing rights. The risk that economic sanctions will be used to coerce less powerful states is not nearly as significant in negotiations between developed nations as it would be with the kind of disputes that are likely to arise under UNCLOS.[394]

388. *Id.* para. 89. The relevant provision in the agreement reads as follows: "In a spirit of close collaboration, the aeronautical authorities of the two Contracting Parties will consult regularly with a view to assuring the observance of the principles and the implementation of the provisions outlined in the present Agreement and its Annex." *Id.* para. 88.

389. *Id.*

390. *Id.* para. 90.

391. *Id.*

392. *See supra* part II.C. After describing the explicit nature of these provisions, Shearer points out that the extent of legal obligation inherent in a *pactum de negotiando* differs "according to the degree to which the substantive contents of the final agreement can be determined by means of the *pactum* itself." Shearer, *supra* note 194, at 245. He also notes that the explicitness of the agreement may affect the ability of a state to refute later assertions that it did not negotiate in good faith. *Id.* at 245-46.

393. *See supra* notes 387-89.

394. The *Air Services* tribunal alluded to this problem by stating that "[c]ountermeasures therefore should be a wager on the wisdom, not the weakness of the

Third, the sanctions the United States imposed in *Air Services* came in response to a perceived violation by France of international rights granted to the United States by the Air Services Agreement.[395] Moreover, according to the tribunal, the U.S. response was directly proportional to France's action and therefore restored the status quo ante.[396] In contrast, when the United States imposes unilateral trade sanctions to protect international marine living resources, the sanctions are targeted against nations that are generally in compliance with international law.[397] Despite the best intentions of the United States to protect and conserve marine living resources, it is impermissible under general international law to impose coercive economic measures except in response to internationally wrongful conduct.[398]

Finally, and most importantly, UNCLOS is distinguished by the existence of *binding* dispute settlement procedures. The *Air Services* tribunal specifically agreed:

> Many jurists have felt that while arbitral or judicial proceedings were in progress, recourse to counter-measures, even if limited by the proportionality rule, was prohibited. . . . If the proceedings form part of an institutional framework ensuring some degree of enforcement of obligations, the justification of counter-measures will undoubtedly disappear . . . .
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> . . . .
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> To the extent that the tribunal has the necessary means to achieve the objectives justifying the counter-measures, it must be admitted that the right of the Parties to initiate such measures disappears.[399]

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other Party. They should be used with a spirit of great moderation and be accompanied by a genuine effort at resolving the dispute." Air Services, *supra* note 382, para. 91. The harm inflicted on less developed countries (LDC's) as a result of U.S. unilateral trade sanctions is discussed in Hurlock, *supra* note 39, at 2138-41.

395. Air Services, *supra* note 382, para. 3.

396. *Id.* para. 90.

397. *See supra* notes 147-54 and accompanying text.

398. Special Rapporteur Arangio-Ruiz asserts that "the very basic requirement for any countermeasure lawfully to be resorted to is the actual existence of an internationally wrongful act infringing a right of the reacting State." Gaetano Arangio-Ruiz, *Fourth Report on State Responsibility*, U.N. International Law Commission, 44th Sess., at 2, U.N. Doc. A/CN.4/444 (1992). Another recent study used this principle to argue that unilateral trade enforcement actions by the United States are illegal under international law. The author defined the limits of permissible unilateral enforcement actions as follows: "The act must permit action only where another nation has violated its legal obligations under a multilateral or bilateral agreement, international law or custom, and injury results to the party seeking to enforce its rights." Marjorie M. Minkler, Comment, *The Omnibus Trade Act of 1988, Section 301: A Permissible Enforcement Mechanism or a Violation of the United States' Obligations Under International Law?*, 11 J. L. & COM. 283, 297 (1992). Other commentators believe that unilateral enforcement measures are generally legal as long as they are not punitive in nature. *See* ZOLLER, *supra* note 380, at 171. *See generally* sources cited *supra* note 371.

399. Air Services, *supra* note 382, paras. 94-96. "In other words, the power of a tribunal to decide on interim measures of protection . . . leads to the disappearance of the power

This view was confirmed one year later by the European Community Court of Justice, which held that member states could not take unilateral countermeasures against other members for violating Community law, but could only institute the formal administrative and judicial proceedings provided by the EC.[400]

Other scholars argue that an even broader prohibition against unilateral action is warranted. Unlike the *Air Services* tribunal, they do not see the need to require enforceable interim measures before prohibiting a party from taking unilateral actions. These writers believe that as long as a treaty provides specific procedures for dealing with disputes, the parties are bound to use these procedures and cannot resort to unilateral self-help.[401] Only if the settlement provisions prove patently inadequate would an aggrieved state be justified in resorting to unilateral measures.[402] Regardless of whether the broader or narrower theory is employed, the dispute settlement provisions in UNCLOS clearly prohibit the use of unilateral measures by States Parties.

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to initiate counter-measures and may lead to an elimination of existing counter-measures to the extent that the tribunal so provides as an interim measure of protection." *Id.* para. 96. The UNCLOS compulsory dispute resolution measures which allow courts and tribunals to prescribe provisional measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the environment clearly meet this criteria. *See supra* note 303 and accompanying text.

400. Case 232/78, Commission of the European Communities v. France, 3 E.C.R. 2729, 2739 (1979), cited in Van Houtte, *supra* note 375, at 37-38.

401. Bowett, *supra* note 371, at 92. According to Elagab:

> [I]f it transpires that there is in reality a definite commitment to peaceful settlement between the parties concerned, resort to counter-measures by either party must be considered as prima facie unlawful. This general rule applies particularly where the treaty containing that rule establishes mechanisms for ensuring its implementation.

ELAGAB, *supra* note 355, at 183. This issue was also dealt with in great detail by the International Law Commission, where the Special Rapporteur, Gaetano Arangio-Ruiz, suggested the following regarding future rules worked out by the Commission:

> [T]he present Special Rapporteur is inclined to believe that more could and should be done . . . to protect by adequate rules any party . . . which had accepted dispute settlement commitments and was ready to comply therewith. Any rules of that kind would . . . promote, together with the just solution of any controversy arising from any specific internationally wrongful act, the conclusion by States of effective bilateral or multilateral instruments of dispute settlement in increasingly broader areas.

Gaetano Arangio-Ruiz, *Third Report on State Responsibility*, *supra* note 379, at 31.

402. ELAGAB, *supra* note 355, at 183-84. What constitutes an inadequate mechanism has not been established. It is hard to imagine that the sophisticated dispute settlement system provided in UNCLOS could be deemed inadequate, except perhaps in dealing with those limited disputes that are exempted in part XV section 3. *See supra* part III.C.1-4.

C. *Unilateral Sanctions Are Domestic Trade Issues Beyond the Authority of UNCLOS*

In essence, this is the argument that the United States made to the GATT Tuna/Dolphin panel.[403] Although couching its position in terms of its obligations under the GATT agreement, the United States argued that its embargo of tuna products from Mexico was an internal regulation affecting the domestic sale, purchase, transportation, and distribution of foreign tuna and was outside the scope of any international obligation.[404] This argument presupposes that U.S. domestic laws are beyond the jurisdiction of any UNCLOS court or tribunal. The motivation for U.S. actions, however, has a direct connection to rights granted under UNCLOS. U.S. embargoes are not, for example, instituted to protect the health or safety of its citizens or to further some other social or economic purpose with no relation to the Law of the Sea.[405] On the contrary, the undeniable motive behind the U.S. trade restrictions is to induce compliance with U.S. measures for the conservation of marine living resources.[406]

By imposing an embargo on a particular fisheries product, the United States hopes that the target nation will be economically disadvantaged to the point that it agrees to settle the dispute on terms acceptable to the United States. If the United States becomes a member of UNCLOS, it would be absurd for it then to impose unilateral trade sanctions that are clearly intended to affect the Conventional rights and obligations of other members. It would be equally absurd to argue that those members have no right to invoke the Convention's dispute settlement provisions because the trade restrictions should be considered a domestic issue having nothing to do with the Convention. The obvious inequity of this position is explained by Elagab, who writes:

> Where the *raison d'etre* of counter-measures is shown to be an inducement to settle a dispute, the availability of third party settlement procedure obliges the parties concerned to refrain from counter-

403. *See* Tuna/Dolphin Decision, *supra* note 34, para. 3.11.

404. *Id.*

405. U.S. embargoes are specifically imposed to modify a state party's rights and duties provided by the Convention. Although an embargo for health and safety or other domestic purposes may indirectly affect these rights, there is no explicit and direct link between a target state's conservation and management practices and the lifting of the embargo. Under these circumstances, if a challenge were brought under the Convention's dispute settlement provisions, the court or tribunal with jurisdiction would have clear authority to dismiss the claim during a preliminary stage, as long as it was convinced that the embargo was based on legitimate domestic concerns and was not being used for the disguised purpose of coercing another state party into giving up its UNCLOS rights.

406. The issue of conservation and management of marine living resources is of transcendent importance to the Convention. Every portion of the Convention, in some way or another, impacts how states may conserve, manage, or exploit living resources.

measures. This view is based on the common-sense notion which provides that a State should not demonstrate conduct that is prima facie inconsistent with a commitment to peaceful settlement.[407]

To further illustrate, we can turn again to a hypothetical example. Suppose that Country *Y* seeks to lay a submarine telecommunications cable within the U.S. EEZ, as is its right under the Convention.[408] The United States agrees to *Y*'s request, conditioned on *Y*'s compliance with a host of stringent environmental restrictions concerning how the pipeline is to be constructed and laid.[409] Compliance with these environmental conditions will cost *Y* millions of dollars and may make the project economically infeasible. After negotiations fail to resolve the dispute, *Y* imposes a unilateral embargo on the importation of all telecommunications equipment produced by the United States until such time as it agrees to amend its environmental standards so that they are comparable to those in effect in *Y*. The United States submits a claim under the dispute settlement provisions of the Convention arguing that it has a right to protect and preserve its marine environment.[410] Suppose, then, that *Y* refuses to participate, contending that its embargo is a domestic trade matter that does not directly affect U.S. rights under the Convention. *Y* argues that the United States is free to keep its stringent environmental regulations in place as long as it is willing to forgo *Y* as a market for its telecommunications products.

Given this reversal of positions, the United States would likely reject *Y*'s line of reasoning. It would probably point out that the underlying dispute directly concerns the interpretation or application of substantive provisions in UNCLOS and that it would be unreasonable to view *Y*'s embargo as anything but a way to coerce the United States

407. ELAGAB, *supra* note 355, at 183-84.

408. UNCLOS protects the freedom to lay submarine cables and pipelines in the EEZ by providing the following: "In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines . . . ." UNCLOS, *supra* note 2, art. 58(1), 21 I.L.M. at 1279. UNCLOS further provides:

> In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

Id. art. 58(3), 21 I.L.M. at 1279.

409. "In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention." *Id.* art. 194(4), 21 I.L.M. at 1308.

410. "In the exclusive economic zone, the coastal state has jurisdiction as provided for in the relevant provisions of this Convention with regard to: the protection and preservation of the marine environment." *Id.* art. 56(1)(b)(iii), 21 I.L.M. at 1279.

into relinquishing its rights under UNCLOS and settling the dispute to Y's satisfaction.

Given the history, comprehensive nature, and binding quality of UNCLOS dispute settlement procedures, the United States cannot support an argument that protecting marine living resources through unilateral trade embargoes is somehow immune from scrutiny under the Convention's dispute settlement system.

D. Summary of U.S. Defenses

Customary international law alone probably does not prevent the United States from using economically coercive measures such as embargoes to protect international marine living resources.[411] Unilateral measures would be prohibited, however, at least as against other States Parties, if the United States becomes a party to UNCLOS. Any argument that the U.S. embargo is a domestic trade issue independent of the Convention, and therefore not subject to UNCLOS dispute settlement provisions, cannot be supported when the motivation for the embargo is to affect rights clearly within the Convention's comprehensive purview. The close connection between the coercive economic measures imposed by the United States and the target nation's specific rights and obligations under the Convention dictate that the parties solve their dispute under the Convention's settlement procedures rather than by resorting to unilateral self-help. If the United States is allowed to opt out of the dispute settlement procedures under these circumstances, other States Parties will likely follow suit, leading to an irreparable weakening of the Convention.

V
LOSS OF UNILATERAL U.S. TRADE SANCTIONS MAY WEAKEN DOMESTIC POLITICAL SUPPORT FOR UNCLOS

Support for U.S. membership in UNCLOS may be imperiled by widespread enthusiasm for unilateral fisheries-related trade sanctions. Some constituent groups that have traditionally been strong supporters of the Convention may be forced to reexamine their positions in light of the real possibility that unilateral economic sanctions will be displaced by the Convention's compulsory dispute settlement provisions.[412] This dilemma may be especially acute in the nation's envi-

411. This statement presumes that the action by the United States is not in violation of general principles of international law dealing with the validity of economic countermeasures. *See supra* notes 377-81 and accompanying text.

412. *See generally supra* part III.

ronmental community, which has long advocated that the United States become a party to the Convention.

Environmental organizations' support for UNCLOS has been strong for over a decade. In 1981, fourteen of the nation's largest environmental organizations wrote a lengthy and detailed letter to James Malone, then Assistant Secretary of State for Oceans and International Environment and Scientific Affairs. The letter communicated the groups' strong endorsement of the UNCLOS treaty negotiation process as well as the content of the Convention.[413] This endorsement was reiterated by leaders of thirty environmental organizations in the 1988 report, *A Blueprint For the Environment.*[414]

In contrast to the active political support of the nation's environmental organizations and animal rights communities, the U.S. commercial fishing industry's support for UNCLOS is evident but harder to categorize. Because the industry is quite diverse and its members often have conflicting interests, support for the treaty has traditionally been stronger in some sectors than in others.[415] Moreover, the Convention's fisheries-related provisions may no longer be considered as essential as they once were because most have become firmly enshrined in customary international law.[416] International fisheries conflicts during the late 1980's, such as those prompted by the depletion of pollock stocks in the Central Bering Sea "Donut Hole" and by concerns relating to Japanese, Taiwanese, and Korean squid driftnet vessels in the North Pacific, have even encouraged some U.S. fishermen to criticize openly the Convention's high seas fisheries management regime and to advocate the unilateral extension of U.S. jurisdiction into high seas areas.[417] Nevertheless, there seems to be a general, if

413. Deborah J. Sterling, *Environmental Protection in the Law of the Sea Convention*, Address at the Center For Oceans Law and Policy's Seventeenth Annual Seminar (Mar. 19, 1993), *in* PROCEEDINGS OF THE ANNUAL SEMINAR 1993: NEW NATIONAL PERSPECTIVES AND THE LAW OF THE SEA, at 91, 91 (1993).

414. The recommendation reads as follows:

> The Secretary of State should take immediate steps to meet with key representatives of other nations in order to achieve widespread acceptance and ratification by the United States and all other nations for the 1982 Law of the Sea Convention either as is or amended to address reasonable U.S. concerns regarding provisions dealing with seabed mining.

Id. at 92; *see also A "Blueprint for the Environment": Challenging George Bush to Act*, OCEAN SCI. NEWS (Nautilus Press, Wash., D.C.), Dec. 10, 1988, at 7-8.

415. For an interesting discussion of how the various international commercial fishing interests, including those of the United States, shaped the UNCLOS negotiations, *see* Robert L. Friedheim, *Fishing Negotiations at the Third United Nations Conference on the Law of the Sea*, 22 OCEAN DEV. & INT'L L. 209 (1991).

416. Panel on the Law of Ocean Uses, *U.S. Interests and the United Nations Convention on the Law of the Sea*, 21 OCEAN DEV. & INT'L LAW. 373, 386 (1990); *see also supra* notes 6, 157 and accompanying text.

417. *See supra* notes 207-13 and accompanying text. The domestic political pressure by the fisheries industry and their Congressional supporters to force the U.S. government to

somewhat ambivalent, recognition by most members of the U.S. commercial fishing industry that widespread ratification of UNCLOS is in their long-term interest because it will facilitate consistency, stability, and predictability in coastal state behavior.[418]

The longstanding political support provided by environmentalists, animal rights advocates, and many sectors of the commercial fishing industry could quickly evaporate without assurances that unilateral trade restrictions will still be available if the U.S. becomes a party to the Convention. Assurances of this kind may be difficult to provide given the fact that there is no evidence that the issue of unilateral economic sanctions to protect marine living resources was discussed either formally or informally during the UNCLOS negotiations.[419] After all, during the late 1970's when most of the non-seabed mining portions of UNCLOS were negotiated, the United States had just begun to impose unilateral fisheries-related economic sanctions on other nations.[420] Consequently, today's advocates of unilateral trade restrictions never had an opportunity to influence the negotiations to ensure that their interests would be protected in future years.

Other special interest groups (such as organized labor, consumer protection advocates, and certain domestic industrial associations) supporting U.S. unilateral economic measures as a method of forcing foreign governments to adopt stricter environmental and health and safety standards have had little direct interest or influence in the development of the Law of the Sea. Their common interests, however, may be adversely affected, both politically and legally, should U.S. trade restrictions be found to violate another major international treaty. Whether this concern will translate into formal opposition to the treaty remains to be seen.

On the other hand, it is no secret that U.S. executive branch officials have been skeptical of fisheries-related embargoes and have historically been reluctant to implement trade restrictions aggressively in

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assert unilateral jurisdiction in the "doughnut hole" is described in Edward L. Miles & David L. Fluharty, *U.S. Interests in the North Pacific*, 22 OCEAN DEV. & INT'L L. 315, 323 (1991). *See also* Panel on the Law of Ocean Uses, *supra* note 416, at 387-98.

418. Panel on the Law of Ocean Uses, *supra* note 416, at 386.

419. A survey of a number of well-known commentaries on the Convention produced no direct or indirect references to unilateral sanctions to protect marine living resources. *See, e.g.*, CHURCHILL & LOWE, *supra* note 7.

420. Although the United States had certified several nations in 1974 and 1978 under the Pelly Act for diminishing the effectiveness of the International Whaling Commission, no sanctions were ever imposed. Earley, *supra* note 68, at app. I. The first sanctions imposed under the Packwood-Magnuson Act took place in 1985. *Id.* Embargoes of tuna under section 205 of the MFCMA first occurred in 1979. McDorman, *supra* note 23, at 503. The first embargo under the MMPA took place in 1980. *Id.* at 494.

the absence of congressional pressure or court order.[421] The Commerce and State Departments view mandatory sanctions as an international irritant and clearly resent having domestic legislation foreclose certain diplomatic options.[422] In addition, there is a continuing sensitivity in the Department of Defense and elsewhere in the executive branch that unilateral actions by the United States will encourage further "creep" in national jurisdiction around the globe.[423] Some critics have even suggested that the U.S. Trade Representative and State Department have actively discouraged other nations from supporting U.S. fisheries policy in the past.[424] Support among some members of the executive branch for U.S. membership in UNCLOS may take on added urgency if they believe it may stop or slow the movement toward greater use of legislatively enacted unilateral trade sanctions in the environmental arena.

Should the Clinton administration move forward with accession and send the Convention to the Senate for ratification, that body may find itself embroiled in a politically intractable position. Powerful special interest groups intent on keeping the "embargo weapon," even if it means rejecting UNCLOS, will vie with well-entrenched bureaucratic forces, including the Defense and State Departments, equally intent on U.S. membership. Sixty-four Senators are already on record urging the President to reject the findings of GATT's dispute settlement panel and to reaffirm the U.S. policy of imposing trade sanctions on nations that inadequately protect the international environment.[425] The possibility that the United States may be forced to abide by a similar dispute settlement ruling under the auspices of UNCLOS may make it politically impossible for the Senate to ratify the treaty, regardless of executive branch pressure or the treaty's overall merit.[426]

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421. The clash between Congress and the President over the interpretation of international environmental statutes has produced a flood of judicial decisions during the past decade. Many of these decisions are cited in David M. Driesen, *The Congressional Role in International Environmental Law and its Implications for Statutory Interpretation*, 19 B.C. ENVTL. AFF. L. REV. 287, 288 n.5 (1991).

422. The reluctance of the executive branch to impose Pelly Amendment sanctions under the International Whaling Convention is illustrative. *See generally* Wilkinson, *supra* note 143; Don Bonker, *U.S. Policy and Strategy in the International Whaling Commission: Sinking or Swimming?*, 10 OCEAN DEV. & INT'L L.J. 41, 52 (1981). Similar disputes emerged over executive branch enforcement of statutes protecting dolphins and sea turtles. *See supra* notes 103, 128 and accompanying text.

423. Burke, *Fishing in the Bering Sea Donut, supra* note 170, at 306.

424. Statement of David Phillips, *supra* note 144, at 49 (the U.S.T.R. and State Department actively discouraged other nations from supporting the U.S. position in the *Tuna/Dolphin Decision*).

425. *See supra* note 41 and accompanying text.

426. Ratification of Treaties requires an affirmative vote of two-thirds of the Senate. U.S. CONST. art. II, § 2.

Ironically, other nations may view the loss of U.S. unilateral trade sanctions as an additional incentive to ratify UNCLOS. Many foreign nations will be inclined to support any institutional mechanism that prevents the United States from imposing unilateral economic trade sanctions, provided that such support does not engender too high a political cost.[427] Developing countries are especially suspicious of efforts by the developed world to impose trade restrictions on environmental grounds, believing them to be protectionist barriers to their economic development.[428] The reasons behind a nation's choice to ratify or not ratify UNCLOS are quite complicated.[429] It is certainly plausible, however, that some uncommitted nations targeted by U.S. embargoes in the past, or fearing sanctions in the future, may have additional incentive to ratify the Convention in a timely fashion in the hope that its dispute settlement procedures will provide some measure of protection.

CONCLUSION

This article establishes four general propositions. First, U.S. unilateral trade sanctions to protect marine living resources potentially violate a number of substantive rights provided by UNCLOS. Consequently, if the United States becomes a State Party, other States Parties may rely on the Convention's compulsory dispute settlement provisions to prevent the United States from imposing unilateral sanctions against them, absent some other specific international agreement to the contrary.

Second, the United States cannot avail itself of the argument that it is not forcing other nations to change their marine conservation and management policies in violation of the Convention, but instead is merely exercising its sovereign right to control its foreign trade. The purpose behind U.S. sanctions is not to protect the health or safety of U.S. citizens or to further other social or economic aims unrelated to the Law of the Sea. On the contrary, their irrefutable purpose is to coerce target states to adopt marine resource management and conservation policies acceptable to the United States. Although customary international law does not explicitly prohibit the use of unilateral economically coercive measures for political purposes, there is a clear consensus among international legal scholars that unilateral measures

427. *See supra* notes 42-48 and accompanying text.

428. *See Trade, Environment, and Sustainable Development*, *supra* note 39, at 588 (citing statements to this effect by South Korea, Singapore, and India). *See generally* John Ntambirweki, *The Developing Countries in the Evolution of an International Environmental Law*, 14 HASTINGS INT'L & COMP. L. REV. 905 (1991).

429. For an insightful essay discussing the kinds of tactical and strategic interests that affect a nation's decision to become a party to UNCLOS, see Edward L. Miles, *Preparations for UNCLOS IV?*, 19 OCEAN DEV. & INT'L L. 421 (1988).

are impermissible when a state is a party to an agreement with an effective dispute settlement mechanism. The obligation to refrain from self-help is especially strong if the parties belong to an agreement such as UNCLOS, which provides for interim protective measures during the pendency of the dispute settlement proceedings.

Third, while it is possible that all of the parties to a dispute may voluntarily agree to settle their dispute under the auspices of GATT rather than UNCLOS, no party can be compelled to give up its right to binding dispute settlement under the Convention simply because all of the disputants are members of GATT. UNCLOS defers to the dispute settlement procedures of other agreements only upon a showing that the alternate procedures will provide a truly binding decision. Because of GATT's recognized failure to ensure implementation of its dispute settlement decisions, its procedures cannot be regarded as sufficiently binding to warrant deference under UNCLOS.

Finally, new and serious domestic political implications attach to U.S. membership in UNCLOS. A powerful political coalition in the United States has come to regard unilateral trade restrictions as the most effective method of forcing foreign nations to adopt stricter environmental standards. These groups strongly believe that the United States should continue to enact domestic environmental legislation with trade restriction components and to oppose any diminution in the nation's ability to use the "trade weapon." If these powerful constituent groups perceive UNCLOS as threatening these interests, even the environmental community, which has traditionally favored U.S. membership, may have no choice but to withdraw its longstanding support. This, in turn, may make Senate ratification politically impossible.

The bottom line is that U.S. membership in UNCLOS will significantly reduce its freedom to impose unilateral economic sanctions to protect marine living resources. The United States will no longer have the luxury of assuming that most nations will comply with its demands simply because they lack easy access to an effective judicial remedy.

It is not my intention either to weaken UNCLOS or torpedo U.S. membership in the Convention. To the contrary, the purpose of this article is to point out potential obstacles to signature and ratification so that the Clinton administration can address those concerns in its renewed negotiation strategy. In the absence of broad public and scholarly debate, the United States could find itself facing the worst of all situations. Suppose that the issues presented in this article either had never been raised or are totally ignored. Suppose further that the United States is successful in exacting significant concessions from developing nations on deep seabed mining in return for U.S. accession to the Convention. Later, during Senate debate on ratification, when the

potential loss of unilateral trade sanctions finally comes to light, this may well cause the Senate to reject UNCLOS. If such a worst case scenario were to occur, it would be hard to overestimate the damage to U.S. foreign policy interests. For years to come, the United States would find it exceedingly difficult to exercise leadership on any international environmental issue, given the fact that it twice led the world toward a widely accepted Law of the Sea regime only to renege on its commitments at the last minute. The damage would be compounded by the fact that the reason for its rejection was to protect a policy of unilateral economic sanctions that is universally disfavored by the international community, especially developing nations.

It is my sincere hope that some compromise can be achieved that will allow the Clinton administration to continue its efforts to reach agreement on an acceptable Convention. This may entail bringing members of government, academia, affected interest groups, and the public together to craft a politically acceptable solution. The international legal community can also play a valuable role by either presenting convincing evidence refuting the rather dire conclusions presented in this article or offering creative legal solutions to mitigate their effects.

If the United States becomes a party to UNCLOS, there is no reason to assume that it will be prevented from achieving any of its international environmental policy goals. On the contrary, it can still meet its goals as long as it is willing to forgo the quick and easy solutions sometimes provided by unilateral trade sanctions and to engage instead in the more tedious process of negotiating international agreements.

Policymakers in United States and the rest of the world are just beginning to come to terms with the full legal and political implications associated with using unilateral economic measures to protect the international environment. In this respect, UNCLOS offers a portent of things to come. Whether unilateral trade sanctions fulfill Secretary of Interior Babbitt's expectations as the "next great international opportunity"[430] or instead serve as a death knell for collective international environmental decisionmaking remains to be seen.

430. *See supra* note 1 and accompanying text.