

CRS Report for Congress

Received through the CRS Web

U.N. Convention on the Law of the Sea: Living Resources Provisions

Eugene H. Buck
Senior Analyst in Natural Resources Policy
Resources, Science, and Industry Division

Summary

This short report describes provisions of the 1982 United Nations Convention on the Law of the Sea relating to living marine resources and discusses how these provisions comport with current U.S. marine policy. As presently understood and interpreted, these provisions generally reflect current U.S. policy with respect to living marine resource management, conservation, and exploitation. As such, they incur little new U.S. obligation, commitment, or encumbrance, while similarly providing few beneficial new privileges. This report will be updated as circumstances warrant.

On November 16, 1994, the 1982 United Nations Convention on the Law of the Sea (LOS Convention) entered into force, but not for the United States. The LOS Convention was the culmination of more than 10 years of intense negotiation. However, the United States chose not to participate in this convention in the early 1980s without changes to parts dealing with deep seabed mineral resources beyond national jurisdiction. After a 1994 agreement amended parts of the LOS Convention dealing with deep seabed mineral resources, the LOS Convention, Annexes, and Agreement package was formally submitted to the U.S. Senate on October 7, 1994, for advice and consent to accession and ratification (Senate Treaty Doc. 103-39) and is awaiting Senate action.

Provisions

The living resources (i.e., fish, shellfish, sea turtles, and marine mammals) provisions of the LOS Convention comprise Articles 61 through 73, and deal specifically with conservation (Article 61), exploitation (Article 62), transboundary and straddling stocks (Article 63), highly migratory stocks (Article 64), marine mammals (Article 65), anadromous stocks (Article 66), catadromous stocks (Article 67), sedentary species (Article 68), rights of landlocked States (Article 69), rights of geographically disadvantaged States (Article 70), nonapplicability of Articles 69 and 70 (Article 71), restrictions on transfer of rights (Article 72), and enforcement by coastal States (Article 73). In addition, sedentary continental shelf species are more specifically addressed in Article 77(4), living resources on the high seas are considered in Articles 116-120, and

marine habitat protection is provided by Articles 192-196. As presently understood and interpreted, these provisions generally reflect current U.S. policy with respect to living marine resource management, conservation, and exploitation. As such, they incur little new U.S. obligation, commitment, or encumbrance, while similarly providing few beneficial new privileges. However, some measure of increased stability in international living marine resource policy can be inferred as a beneficial aspect of U.S. participation in the LOS regime. It appears that no new domestic legislation would be required to implement the living resources provisions of the LOS Convention.

Conservation and Exploitation

The LOS Convention recognizes the broad authority of a coastal State over living resources within its territorial sea and exclusive economic zone (EEZ) to a maximum of 200 miles seaward from the baselines used to measure the territorial sea.¹ In the management of living resources, the coastal State is to determine allowable catches and promote optimal resource use. Except for Article 65, the convention shows some bias toward optimal exploitation of the resource, with little explicit recognition of non-consumptive management objectives which might seek to limit harvests to substantially less than optimal or maximum sustainable yield levels.² The phrase *as qualified by relevant environmental and economic factors*, appearing in Article 61(3), provides a basis for harvesting at rates other than the maximum sustainable yield. However, the subsequent examples of how this qualification is to be interpreted focus on ways to protect against overharvesting or possible justification for exceeding the maximum sustainable yield, rather than providing any explicit acknowledgment that valid reasons may exist for refraining altogether from harvesting to achieve non-consumptive goals (e.g., tourism in reef environments or biodiversity conservation) or to respond to moral/ethical concerns (e.g., large sharks, dolphins, and whales should not be killed). Regardless, determination of allowable catch within a coastal State's EEZ is not subject to compulsory procedures leading to binding dispute settlement.

If a coastal State is unable to harvest the entire allowable catch, other States must be given access to these resources, subject to appropriate terms and conditions. Resource populations are to be managed such that they can produce harvests at maximum sustainable yield levels. The LOS Convention, in Article 61(4), encourages attention to incidental bycatch concerns by calling for consideration of associated or dependent species so that their reproduction is not seriously threatened. The U.S. Fishery Conservation and Management Act of 1976 (16 *U.S.C.* 1801 *et seq.*, now known as the Magnuson-Stevens Act) was crafted to parallel closely most of the draft LOS Convention's provisions for living resources.

¹ However, coastal State sovereign rights over sedentary species (see "Sedentary Species," below) may extend beyond 200 miles, to the extent of the continental shelf.

² The approach taken in Article 65 of the LOS Convention explicitly recognizes the rights of coastal States to prohibit the exploitation of marine mammals.

Straddling and Transboundary Fish Stocks

Straddling fish stocks (ranging between national EEZs and international waters) and transboundary stocks are to be managed cooperatively through bilateral or multilateral international agreements involving coastal States through whose waters these fish stocks range as well as any States fishing these stocks in international waters. The United States acted in concert with these provisions by negotiating the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (Senate Treaty Doc. 103-27) to govern harvest and management of fish stocks migrating between international waters in the Bering Sea (the “donut hole”) and adjacent waters under national jurisdiction.³ An example of an effective bilateral agreement on a transboundary fish stock is the 1953 Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea between the United States and Canada. Concerns remain over attempts to cooperatively manage anchovy fisheries along the United States-Mexico Pacific boundary. The more recent Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Senate Treaty Doc. 104-24) more specifically addresses concerns for these stocks in a manner consistent with the LOS Convention.⁴

Highly Migratory Species

Previous to 1990, the U.S. position on certain highly migratory species was contrary to that of the LOS Convention in that the United States did not claim national jurisdiction over tunas. However, with enactment of the Fishery Conservation Amendments of 1990 (P.L. 101-627), the United States achieved consistency with the LOS Convention by amending the Magnuson-Stevens Act to extend national jurisdiction to include tunas. Article 64 of the LOS Convention calls for cooperative management of highly migratory species to ensure their conservation and promote their optimum harvest, within and beyond the EEZ. The United States is party to agreements in both the Atlantic and Pacific consistent with the provisions of Article 64. In the Pacific, the 1950 Convention Between the United States of America and the Republic of Costa Rica for the Establishment of an Inter-American Tropical Tuna Commission serves this purpose by involving six nations, while in the Atlantic, the 1966 International Convention for the Conservation of Atlantic Tunas involves 22 nations. The 1995 Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks more specifically addresses concerns for these stocks in a manner consistent with the LOS Convention and involves 32 nations. More recently, the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean was signed by 19 nations, but has not yet entered into

³ However, the Central Bering Sea Convention does not provide for compulsory dispute settlement. The Senate agreed to a resolution of advice and consent to ratification of this Convention on October 7, 1994.

⁴ The Senate agreed to a resolution of advice and consent to ratification of this Agreement on June 27, 1996.

force. Annex I to the LOS Convention provides a list of species designated as highly migratory, and includes whales and dolphins.

Marine Mammals

The LOS Convention provides that coastal States may manage and regulate marine mammals more strictly than otherwise provided by the convention. International cooperation for conservation is mandated, with specific direction that cetaceans (i.e., whales and dolphins) be conserved, managed, and studied internationally. Article 120 extends this understanding to marine mammals on the high seas.

Sea Turtles

Sea turtles are considered indirectly under the LOS Convention, because they are associated with harvested species,⁵ and because most sea turtle species are recognized internationally as being either threatened or endangered. Article 61(2)/61(4) provides some protection for threatened or endangered populations as well as species associated with harvested species,⁶ while Article 194(5) encourages habitat protection beneficial to threatened and endangered species. Regardless of LOS Convention provisions, extensive protection for sea turtles, in the form of trade restrictions, derives from their inclusion on Appendices of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). (For more information on CITES, see CRS Issue Brief IB10072, *Endangered Species: Difficult Choices*.)

Anadromous Stocks

Anadromous species spend most of their lives in the ocean, but enter freshwater to spawn. Salmon, sturgeon, and striped bass are some of the anadromous species of interest to the United States. The LOS Convention assigns primary interest in and responsibility for anadromous fish stocks to the States in whose rivers the stocks originate. Fishing for anadromous stocks is prohibited on the high seas, except in cases where economic dislocation might result. Coastal States through whose waters anadromous fish migrate are required to cooperate with the States wherein the anadromous stocks originated. Enforcement of regulations concerning anadromous fish stocks beyond the EEZ is to be accomplished through negotiated agreement. The United States actively participates in a cooperative bilateral salmon agreement with Canada as well as broader regional agreements for both Atlantic and Pacific stocks.⁷

⁵ Sea turtles may drown when caught in fishing gear.

⁶ However, the “shall take into consideration” language of Article 61(4) does not mandate strong protective measures.

⁷ Treaty Between the Government of the United States of America and the Government of Canada Concerning Pacific Salmon, Ottawa, 1985 (TIAS 11091); Convention for the Conservation of Salmon in the North Atlantic Ocean, Reykjavik, 1982 (TIAS 10789); Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, Moscow, 1992 (Senate Treaty Doc. 102-30).

Catadromous Species

Catadromous species spend most of their lives in freshwater, but enter the ocean to spawn. American eels are the primary catadromous species of interest to the United States. The LOS Convention gives the coastal States where these species spend most of their lives the responsibility for managing them, and prohibits harvesting them on the high seas. International cooperation is required where these species migrate through several EEZs.

Sedentary Species

Sedentary species are addressed in Article 77(4) of the LOS Convention. Coastal State jurisdiction over sedentary species may extend beyond 200 miles, to the extent of the continental shelf (as defined in Article 76). Although the meaning of sedentary is defined, no listing of exactly which species are to be considered sedentary is provided in the LOS Convention. Thus, controversy may arise over access to certain species,⁸ and dispute resolution provided by the LOS Convention may become necessary.

High Seas

The LOS Convention preserves the freedom to fish on the high seas, subject to other treaty obligations; the rights, duties, and interests of coastal States; and an obligation to cooperate in conserving and managing high seas living resources. The LOS Convention's obligation to cooperate in the conservation and management of high seas living resources represents a new commitment for the United States, and is subject to compulsory dispute settlement should conflict arise. The 1995 Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks addresses specific concerns for the conservation and management of high seas stocks in a manner consistent with the LOS Convention. In addition, the Senate agreed to a resolution of advice and consent to ratification for the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Senate Treaty Doc. 103-24) on October 6, 1994. This agreement, developed under the leadership of the U.N. Food and Agriculture Organization, reflects the intent of the LOS Convention and extends its reach by limiting the reflagging of vessels in high seas fisheries. This agreement entered into force on April 24, 2003, with 27 nations as parties.

Access by Disadvantaged States

Although the LOS Convention provides special access rights to surplus living marine resources within coastal State EEZs for nearby developing States that are landlocked or geographically disadvantaged, no States meeting these criteria are believed to exist within

⁸ The most recent example was a July 1994 dispute with Canada when two U.S. fishing vessels harvested Icelandic scallops on extensions of the Canadian continental shelf outside Canada's 200-mile jurisdiction. U.S. officials conceded in November 1994 that the Canadian interpretation, that Icelandic scallops were sedentary, was correct.

the same region as the United States. Regional, subregional, or bilateral agreements would be negotiated to guide the provision of an equitable allocation to any such disadvantaged State. Regardless, it is the coastal State alone that determines whether any harvestable surplus exists within its EEZ, and such a decision may not be challenged through dispute settlement procedures.

Marine Habitat Protection

Article 192 states a general obligation of parties to the LOS Convention to protect and preserve the marine environment, while Article 193 states that resource exploitation is to be conducted within this obligation to protect and preserve the marine environment. This becomes more specific in Article 194(5), which calls attention to measures *necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life*. Additional protection is provided by Article 61(4), which encourages attention to bycatch and incidental catch by calling for commercial fishermen to consider associated or dependent species so that their reproduction not be seriously threatened. Prevention of the intentional or accidental introduction of harmful alien or exotic species by all measures necessary is directed by Article 196.

Dispute Settlement for Living Resources

Article 297(3)(b) appears to give ample assurances that domestic EEZ fisheries matters cannot be forced to undergo compulsory dispute settlement proceedings leading to binding decisions under the LOS Convention:

... the coastal State shall not be obliged to accept the submission to such settlement [compulsory procedures leading to binding decisions] 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.

Article 297(3)(b) does provide that disputes can be submitted to conciliation when (1) a coastal State has failed to properly conserve and manage EEZ living resources such that they become seriously endangered; (2) a coastal State has arbitrarily refused to determine allowable catches and capacity to harvest species desired by a foreign nation; or (3) a coastal State has arbitrarily refused to allocate a declared surplus in a living resource to any foreign nation. However, Article 297(3)(c) prohibits a conciliation commission from substituting its discretion for that of the coastal State. Conciliation procedures are outlined in detail in Annex V, wherein Article 7(2) states that a conciliation commission's report, including its conclusions and recommendations, is not binding.