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I. INTRODUCTION

A. The Purpose of this Article

The purpose of this article is to prompt the United States Congress to hold open, transparent and substantive public hearings to discuss, evaluate and explain to the American people the significant environmental regulatory and judicial enforcement aspects of the United Nations Convention on the Law of the Sea (UNCLOS) before that treaty is submitted to the full Senate for a vote of accession.[1]

This article hopefully accomplishes this objective by identifying and examining how U.S. UNCLOS accession could be used by both external and internal constituencies of the United States to facilitate the adoption as U.S. law of Europe's "'standard-of-proof diminishing,' 'burden of proof-reversing,' 'guilty-until-proven-innocent,' 'I fear, therefore I shall ban,' 'hazard-not-risk-based,'"[2] Roman civil law-not-common law,[3] extra-WTO Precautionary Principle (hereinafter "Europe's Precautionary Principle").[4] "Generally speaking, the precautionary principle says that *in dubio pro natura*. "If in doubt, decide in favour of the environment . . . *Ennaltavarautumisen periaate or varovaisuusperiaate* (in Finnish), *försiktighetsprincip* (in Swedish), *Vorsorgeprinzip* (in German), *principe de précaution* (in French), *principio de precaución* (in Spanish)."[5] In other words,

1. Accession has the same legal effect as ratification. Accession is a synonym for ratification for treaties already negotiated and signed by other states, like UNCLOS. *See* United NATIONS, TREATY REFERENCE GUIDE (1999), http://untreaty.un.org/English/guide.pdf.
2. Lawrence A. Kogan, *The Extra-WTO Precautionary Principle: One European 'Fashion' Export the United States Can Do Without*, 17 TEMP. POL. & CIV. RTS. L. REV. (Spring 2008), http://www.itssd.org/Kogan%2017%5B1%5D.2.pdf.
3. *See* Lawrence A. Kogan, *Effort to expand 'Authentic Acts' in Europe Imperils Economic Freedom*, 24 LEGAL BACKGROUNDER 6 (Washington Legal Found., Wash., D.C.), Feb. 2009, *available at* http://itssd.org/2-13-09Kogan_LegalBackgrounder%20-%20FINAL.pdf.
4. GARY ELVIN MARCHANT & KENNETH L. MOSSMAN, ARBITRARY AND CAPRICIOUS: THE PRECAUTIONARY PRINCIPLE IN THE EUROPEAN UNION COURTS, (2004); Jonathan Adler, *Dangerous Precaution*, Nat'l Rev. Online (Sept. 13, 2002), http://www.nationalreview.com/adler/adler091302.asp.
5. *See* Marko Ahteensuu, *IN DUBIO PRO NATURA? A Philosophical Analysis of the Precautionary Principle in Environmental and Health Risk Governance*, 20 Rep. from the Dept of Phil, University of Turku, Finland (2008) at 1, *available at* https://oa.doria.fi/bitstream/handle/10024/38158/diss2008ahteensuu.pdf?sequence=1; *See* ROLANDO CASTRO, PROTECTION OF SEA TURTLES: PUTTING THE PRECAUTIONARY PRINCIPLE INTO PRACTICE, CARIBBEAN CONSERVATION CORPORATION (2005) (The civil law precautionary principle is often referred to as "*in dubio pro natura*, a Roman law

> [T]he Precautionary Principle . . . entails a radical change in outlook: a reliance on progress and a basically favourable attitude to technology are here replaced by a need for caution. The principle of in dubio pro natura has been called into play: reversing the burden of proof, it is up to those undertaking any activity likely to transform the environment to demonstrate the absence of negative effects.[6]

Thus, Congress can no longer ignore that "[t]he concept of the precautionary principle is different in civil law and common law, which have different approaches to the relationship between science and law. In the USA the regulation is 'science-based,' meanwhile, in Europe the rule of science is determined through a 'policy – related' way."[7]

Pathways for external constituencies would consist, in part, of UNCLOS (and its related Protocol) Secretariat-level treaty amendments, regulations and resolutions incorporated within federal law by U.S. government agencies charged with implementing the environmental and natural resource obligations that our nation assumed upon acceding to UNCLOS Parts V, VII and XII. Such pathways would also include compulsory and binding international tribunal decisions resulting from legal actions initiated by foreign nations. Foreign nations will likely challenge U.S. interpretation and implementation of its UNCLOS environmental obligations as inconsistent with Europe's Precautionary Principle. And they will insist that U.S. federal and state courts recognize and enforce those judgments, consistent with our nation's accepted obligations under UNCLOS Part XV and Annexes VI-VIII.

Pathways for internal constituencies would consist of proposed congressional amendments to current federal environmental legislation, as well as federal agency-initiated reinterpretations or amendments of current administrative regulations. In addition, executive office directives may be used to secure administrative amendments to or reinterpretations of current environmental regulations, consistent with Europe's Precautionary Principle. Another such

principle for environmental protection that asserts that in case of doubt, any decision should favour the protection of nature.")
http://www.cccturtle.org/pdf/PrecautionaryPrincipleInCostaRicaTurtleBan.pdf.

6. *See* FRANÇOIS OST, THE PHILOSOPHICAL FOUNDATION OF ENVIRONMENTAL LAW: AN EXCURSION BEYOND DESCARTES, FACULTÉS UNIVERSITAIRES SAINT-LOUIS, BRUXELLES, HUMAN RIGHTS AND INTERCULTURAL DIALOGUE (Oct. 2001), http://www.dhdi.free.fr/recherches/environnement/articles/ostenvlaw.pdf.
7. *See* MARIA VITTORIA LUMETTI, PRECAUTIONARY PRINCIPLE IN COMMON LAW AND CIVIL LAW, INTERNATIONAL COMMISSION FOR ELECTROMAGNETIC SAFETY, (2006), http://www.icems.eu/docs/Lumetti.pdf.

pathway would include the use of executive office directives or congressional action to ensure U.S. federal court recognition and enforcement of adverse foreign tribunal judgments instructing the U.S. government to fulfill its UNCLOS environmental law obligations, consistent with Europe's Precautionary Principle.

Part I of this article provides an overview of the issues concerning the relationship between the UNCLOS, Europe's Precautionary Principle and international environmental law. Part II discusses the external pathways. Part III discusses the internal pathways. Part IV sets forth the article's conclusion and surmises why the U.S. Congress has thus far failed to hold public and transparent substantive hearings to examine the environmental dimensions of the UNCLOS.

B. Overview of the Issues

UNCLOS is a comprehensive framework agreement with 45 'self-adjusting' environmental articles that reflect the current state of international environmental law. Upon UNCLOS ratification, the U.S., as a coastal state, would be expected to fulfill its international legal responsibility to protect the marine environment and natural living resources against all pollution generated from land-based, atmospheric, and ocean sources within U.S. jurisdiction and control. UNCLOS' unique compulsory and binding dispute settlement mechanism would afford state parties and the International Seabed Authority the opportunity to invoke UNCLOS tribunal or arbitral jurisdiction to hear disputes grounded on the U.S. failure to satisfy its UNCLOS environmental duties. UNCLOS tribunals and arbitral panels could apply UNCLOS' environmental and natural resource provisions and the rules, principles and standards of other relevant international environmental treaties to compel the U.S. to adopt, implement and enforce strict environmental and wildlife laws, regulations and practices that incorporate Europe's Precautionary Principle.

Sometime during 2009, as newly confirmed U.S. Secretary of State Hillary Clinton recently declared,[8] President Barack Obama will have the dubious honor of

8. *See* Hillary Clinton, *Senate Confirmation Hearing*, N.Y. TIMES, JAN. 13, 2009, http://www.nytimes.com/2009/01/13/us/politics/13text-clinton.html?_r=1&pagewanted=print, ("MURKOWSKI: Will ratification of the Law of the Sea Treaty be a priority for you? CLINTON: Yes, it will be, and it will be because it is long overdue, Senator. The Law of the Sea Treaty is supported by the Joint Chiefs of Staff, environmental, energy, and business interests. I have spoken with some of our -- our naval leaders, and they consider themselves to be somewhat disadvantaged by our not having

submitting the UNCLOS to the Senate Foreign Relations Committee (SFRC) of the 111th Congress along with an accompanying resolution of accession. As history strongly suggests, the treaty and resolution will likely receive favorable committee consideration and then be forwarded to the floor of the full U.S. Senate for a vote of accession. However, should this be permitted to occur without any of the other House and Senate Committees possessing oversight jurisdiction[9] having first convened open and transparent public hearings to substantively review the environmental regulatory and judicial enforcement dimensions of this most complex and comprehensive instrument?

Indeed, this is what had transpired from September to October 2007. The SFRC of the 110th Congress held what can best be described as perfunctory UNCLOS accession hearings, with administration officials and treaty proponents dominating much of the 'air time' and their obscurantist testimonies receiving the most minimal of examinations from Majority members.[10] Following a favorable 17-4 outcome in the SFRC, the treaty was subsequently transferred to the full Senate for

become a party to the Law of the Sea.")

9. Arguably, given the sheer number and scope of UNCLOS environmental regulatory and judicial enforcement provisions, their potential impact on court proceedings, interstate and foreign commerce and military subcontractors, as well as, their potential to trigger new or amended U.S. legislation and/or federal agency regulations, these provisions should be reviewed *by more than just* the Senate Committee on Foreign Relations. In the Senate, by: (1) the Committee on Energy and Natural Resources; (2) the Committee on Commerce, Science and Transportation; (3) the Committee on Intelligence; (4) the Committee on Finance; (5) the Committee on Environment and Public Works; and (6) the Committee on Judiciary. In the House, by: (1) the Committee on Energy; (2) the Committee on Foreign Affairs; (3) the Committee on Intelligence; (4) the Committee on the Judiciary; (5) the Committee on Natural Resources; (6) the Committee on Science; (7) the Committee on Transportation and Infrastructure; and (8) the Committee on Ways and Means.

10. *See, e.g., Senate Panel Approves 'Law of the Sea' Treaty*, ASSOCIATED PRESS (Oct. 31, 2007), http://www.iht.com/articles/ap/2007/10/31/america/NA-GEN-US-Law-of-the-Sea.php?WT.mc_id=rssamerica; Kevin Drawbaugh, *U.S. Senate Panel Backs Law of the Sea Treaty*, Reuters (Oct. 31, 2007), http://www.reuters.com/article/latestCrisis/idUSN31335584; *See Vitter on Law of the Sea Treaty: Part 1* , YouTube, (Republican Senators David Vitter (LA) and James DeMint (SC) led the only penetrating cross examination during the October 7, 2007 hearings convened by the Committee on Senate Foreign Relations to 'review' the UNCLOS), http://www.youtube.com/watch?v=9dtv6eBZR1k&feature=related; *Round 2: Vitter on Law of the Sea Treaty*, YouTube, http://www.youtube.com/watch?v=1J9YlqaFHZw&feature=channel; *DeMint on Law of the Sea Treaty: Part 1*, YouTube, http://www.youtube.com/watch?v=OGr1zJfZhlo&feature=related; *DeMint on Law of the Sea Treaty: Part 2*, YouTube, http://www.youtube.com/watch?v=h7LF6NyYkbM&feature=related.

a floor vote, which ultimately never took place. Why? Because the SFRC and other committees failed to heed many Americans' demands that the Congress hold substantive public hearings. The treaty languished in the Senate during the remainder of the 110th Congress with the Majority unable to muster the 67 Senate votes necessary to secure its passage.[11]

Arguably, had the Congress chosen to undertake a due diligence review and entertain an extensive public debate which "is written into the very structure of our congressional system,"[12] befitting its oath of office,[13] and in fulfillment of its constitutional obligation to provide all Americans with due process of law[14] before the UNCLOS had been voted on by the SFRC, Congress would have been able to discover and explain the treaty's numerous environmental regulatory, enforcement and revenue-raising provisions. Surely, such an investigation, which would have also disclosed how new controls and imposts could be introduced to the general public, was justified given the sheer length of the UNCLOS (over 200 pages) and the multiple subject matters that it covers?

11. James Watkins, Admiral, *Strange Bedfellows: The Law of the Sea and Its Stakeholders*, Statements at the Council on Foreign Relations Meeting (March 20, 2008), http://www.cfr.org/publication/15813/strange_bedfellows.html. ("We're still pounding on Law of the Sea Convention and acceding to it. *We are up seeing members of Congress, and they all just shake their heads. And they say, we're not going to be able to get it to the floor, because it won't pass. And the leader says, I need 75 votes.* And so I hope one of the questions tonight is, what can the council do?") (emphasis added).
12. Lee H. Hamilton, *Debate Good for the System*, THE WASHINGTON TIMES COMMENTARY (Oct. 31, 2007), http://www.washingtontimes.com/article/20071031/COMMENTARY/110310012/1028/election.
13. U.S. Const. Art. VI, cl. 3 ("The Senators and Representatives before mentioned...shall be bound by Oath or Affirmation, to support the Constitution)"; United States Senate and House of Representatives Oath of Office, http://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm ("I, (name of Member), do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign or domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God").
14. The obligation imposed on U.S. congressional representatives and senators to 'support the U.S. Constitution' and its accompanying Bill of Rights serves to safeguard Americans against the inclinations of a wanton and arbitrary U.S. government. Since the time-honored notion of due process of law (comprising substantive *and* procedural rights) is found within the penumbra of the Fifth and Fourteenth Amendments of the Bill of Rights, senators' failure to take such rights into account by heeding Americans' requests for thorough public hearings to vet the UNCLOS is arguably tantamount to a violation of Americans' U.S. constitutional rights.

Interestingly, pre-2007 congressional hearing transcripts reveal that relatively little examination and discussion were devoted to this aspect of the treaty. These transcripts contained no discussion of the complex relationship between the UNCLOS framework and the evolving and expanding dynamic body of substantive and procedural international environmental law; the ability of other treaty parties to utilize the unique UNCLOS dispute settlement mechanism to ensure that the U.S. adopts, implements and enforces strict non-science-based international environmental law rules, principles and standards at the U.S. national and state levels premised on the European Precautionary Principle; or the efforts by U.S. environmentalists to use UNCLOS accession as a legitimating cover to secure long sought after substantive amendments to U.S. federal environmental law (legislation, regulations and jurisprudence). To the contrary, prior hearings focused primarily on the U.S. national security and the deep-sea mining dimensions of the treaty:

> The issues raised in the 1982-1994 period dealt primarily with the regime and international organization associated with the deep seabed area beyond national jurisdiction. Much of the debate during and since the October 2003 hearings related to more traditional law of the sea topics. They included use of the military activities exemption in application of the mandatory dispute settlement machinery; protection of U.S. security interests in the face of current terrorist threats; delimitation of the continental shelf beyond 200 nautical miles; and a concern that continued absence by the United States in the bodies . . . The International Seabed Authority and its Councils, the Commission on the Limits of the Continental Shelf, and the International Tribunal for the Law of the Sea Due to The Complex Structure of the UNCLOS's Ocean Management Provisions . . . set up by the Convention and Agreement *will act negatively against the interests of the United States.*[15]

The 110th Congress' failure to publicly evaluate the environmental regulatory and judicial enforcement dimensions of UNCLOS is all the more curious in light of the ongoing battle between the Republican and Democratic parties over the growing intrusiveness of U.S. federal, state and local environmental laws and regulations.[16]

15. Marjorie Ann Browne, *The U.N. Law of the Sea Convention and the United States: Developments Since October 2003*, CRS Report For Congress #RS21890 (Updated Oct. 31. 2007) at p. CRS-2, http://www.fas.org/sgp/crs/row/RS21890.pdf (emphasis added).
16. *See, e.g.,* Stephen Dinan and S.A. Miller, *Democrats Abandon Drilling Ban*, Washington Times (Sept. 24, 2008) at: http://www.washingtontimes.com/news/2008/sep/24/democrats-abandon-drilling-ban; *The Coastal Zone Management Act*, Nicholas Institute for Environmental Policy Solutions website (6/24/08), http://www.nicholas.duke.edu/nioceans/dispatches/whats-the-coastal-zone-management-

The flurry of environmental bills introduced and co-sponsored by the Majority members of the 110th Congress, especially the omnibus oceans bill, is eerily reminiscent of the environmental evangelism of congresses past.[17] Then, as now, the ostensible goal of enlightened environmentalism has been to 'update' U.S. federal environmental laws in order to ensure public health and safety and a cleaner environment for American families; however, it has often been at the expense of free enterprise and private property rights.[18] But what if, in today's era

act-czma; Harry Reid, *The Failed Bush-Republican Environmental Record*, Democratic Caucus's Senate Journal (April 22, 2008), http://democrats.senate.gov/journal/entry.cfm?id=296529; Adrienne Froelich Sponberg, *Republicans Wrangle over Environmental Legislation*, Washington Watch American Institute for Biological Sciences (July 2006), http://www.aibs.org/washington-watch/washington_watch_2006_07.html; *Daily Mojo*, Mother Jones (July 11, 2003), http://www.motherjones.com/news/dailymojo/2003/07/we_477_05.html; *Clean Water Bill May Lead to Massive Expansion of Federal Jurisdiction Say Committee GOP Leaders*, Press Release Office of John L. Mica, Ranking Republican, Committee on Transportation and Infrastructure (July 17, 2007), http://republicans.transportation.house.gov/news/PRArticle.aspx?NewsID=199; *Republicans in Ohio Could Teach Capitol Hill a Lot About the Oceans - Voters believe U.S. Congress responsible for protecting the Flipper and Friends*, Oceana Press Release (June 29, 2006), http://www.pollingcompany.com/cms/files/MMPA%20Poll%20News%20Release%20NATIONAL%20FINAL.pdf; *US Update on Western Land Grab*, Planet Ark (Nov. 22, 2005), http://www.minesandcommunities.org/article.php?a=1931; Joel Gay, *Seeing Green*, THE NEW MEXICO INDEPENDENT (June, 2 2008), http://newmexicoindependent.com/view/enviros-want-to-win; Paul D. Thacker, *Hidden ties: Big Environmental Changes Backed by Big Industry*, ENVIRONMENTAL SCIENCE AND TECHNOLOGY (March 8, 2006), http://pubs.acs.org/subscribe/journals/esthag-w/2006/mar/policy/pt_bigindustry.html; J.R. Pegg, *U.S. House Votes to Lift Offshore Oil Drilling Ban*, Environmental News Service (June 30, 2006), http://www.ens-newswire.com/ens/jun2006/2006-06-30-10.asp; Forrest Laws, *Pombo Introduces Rewrite of Endangered Species Act*, Western Farm Press (Sept. 26 2005), http://westernfarmpress.com/news/9-26-05-Pombo-Endangered-Species-Act; *Pombo Bill Would Rip the Heart Out of the Endangered Species Act - Thirty Years of Progress Threatened by Industry Wish List Bill*, SEA SHEPHERD NEWS (Sept. 22, 2005), http://www.seashepherd.org/news/media_050922_2.html.

17. *See* NEPA and CAA Extension, 91st U.S. Cong. (1969-1971); MMPA and CZMA, 92nd U.S. Congress (1971-1973); ESA, 93rd U.S. Congress (1973-1975); TSCA and MSFCMA, 94th U.S. Congress (1975-1977); CWA, 95th U.S. Congress (1977-1979).
18. *See* Lawrence A. Kogan, *Brazil's IP Opportunism Threatens U.S. Private Property Rights*, 38 U. MIAMI INTER-AM. L. REV. 1, 103-113 (2006)(discussing the American conception of property rights through the lens of constitutional guarantees and the idea of natural rights in the context of intellectual property); Lawrence A. Kogan, Closing Address: *U.S. Private Property Rights Under International Assault*, (Oct. 4, 2006), http://prfamerica.org/speeches/10th/USPrivatePropertyRightsUnderIntlAssault.html; Kogan, *The Extra-WTO Precautionary Principle: One European 'Fashion' Export The U.S.*

of globalization marked by increased cross-border travel, trade and investment, not to mention political correctness and solidarity, the new congress' and administration's calls to enlist the U.S. as a party to the UNCLOS and other related multilateral environmental treaties are intended to serve the grander purpose of facilitating greater global environmental governance?[19] Does Washington truly wish to be the groom at this bride's wedding before it closely examines the bride and her family?

Apparently, the greater good served by global greenism was one of five key selling points highlighted during the early- to mid-1990's to secure nations' ratification of both the 1982 UNCLOS and the 1994 Implementing Agreement. According to one legal scholar intimately behind this effort,

> Global ratification would unite the nations of the world in the most comprehensive and far-reaching treaty for protection of the global environment yet achieved, establishing a clear and inexorable link between the rule of law in international affairs and the preoccupation of people everywhere to ensure that their children inherit a safe and healthy home. . . [and] global ratification would commit the nations of the world to accept the submission to international arbitration or adjudication of most disputes arising under the Law of the Sea Convention that are not settled by other means.[20]

Can Do Without, *supra* note 2, 530-532, 598-604.

19. Kogan, *The Extra-WTO Precautionary Principle: One European 'Fashion' Export The U.S. Can Do Without*, *supra* note 2 (What if such multilateral posturing masks a long term transatlantic effort to establish a more communitarian global environmental regulatory governance structure anchored by mostly interventionist national governments and unaccountable UN and Brussels-based institutions steeped in civil law rather than common law traditions, that mandate harmonization (arguably homogenization) and enforcement of all national environmental and health laws consistent with universally accepted UN and EU sustainable development principles, including Europe's Precautionary Principle?); Ken Geiser, *A Talk to the First National Conference on Precaution*, Lowell Center for Sustainable Production: Precaution in "Old Europe" and New America 1 (June 9, 2006), http://www.chej.org/BESAFE/prec_conf_proceedings/Ken_Geiser_Talk1.pdf; John R. Bolton, *One world? Obama's on a Different Planet*, LOS ANGELES TIMES (July 26, 2008), http://www.latimes.com/news/opinion/la-oe-bolton26-2008jul26,0,4549608.story; J. William Middendorf II and Lawrence A. Kogan, *The 'LOST 45' UN Environmental Restrictions on U.S. Sovereignty*, ITSSD JOURNAL ON THE UN LAW OF THE SEA CONVENTION (Sept. 2007), http://itssdjournalunclos-lost.blogspot.com/2008/01/itssd-lost-45-un-environmental.html; *see* The Global Agenda 2009, World Economic Forum 29, 224, http://www.weforum.org/pdf/globalagenda.pdf, ("Global governance exemplifies challenges to the sustainability of industrial society and the survival of the world's peoples. In some areas effective solutions to address these challenges exist. . . . Existing institutions and processes of global governance have not completely broken down: the Law of the Sea, for example, has earned the acceptance and compliance of the major stakeholders").
20. *See* Bernard Oxman, *The Rule of Law and the United Nations Convention on the Law of the*

Given the heavy hand of the U.N. Secretariat, the U.N. Secretary General's Offices and the U.N. General Assembly in shaping, monitoring and reporting on state practice in the implementation of the evolving UNCLOS legal regime, including its many environmental provisions, protocols, regulations and appendices,[21] it is incumbent upon the Congress to elucidate whether the intention all along was to bring U.S. national environmental legislation, rulemaking and judicial enforcement under global auspices.

Evidently, a number of UNCLOS conferees were well aware at that time of the emerging notion of the Precautionary Principle, at least as expressed within Principle 15 of the Rio Declaration, which had been discussed *ad nauseum* during the1992 United Nations Rio Conference on Sustainable Development ("Earth Summit"). In fact, it can now be confirmed that the UNCLOS was *intended* to tap into the growing "'grass roots' environmental movement – *the first truly global political party*"[22] – that had emerged from this Earth Summit. "The global consciousness that, insofar as the environment is concerned, we are all affected by what happens in remote parts of the globe . . . [which] is particularly strong with respect to global environmental issues such as climate change and protection of the marine environment . . . is [also] central to the idea of the rule of law in international affairs. *The link between strengthening the rule of law in international affairs and strengthening the protection of the global environment is inescapable. This fact is nowhere more apparent than in the Law of the Sea Convention.*"[23]

As previously noted, the Precautionary Principle is arguably the most contentious of all the sustainable development principles that arose from the 1992 Rio Conference. Yet, the environmental activist community and many academicians are committed to ensuring that the Majority of the 111th Congress and members of the new Obama administration incorporate Europe's version of the principle within an updated and amended corpus of U.S. federal environmental

Sea, 7 EURO J INT LAW 353, at p. 355 (1996).

21. *See* Lawrence A. Kogan, Arctic Escapades: Can The Precautionary Principle Be Invoked via UNCLOS to Undermine U.S. Polar Interests?, Address at the National Defense University and Forces Transformation and Resources Seminar Transforming National Security Unfrozen Treasures National Security, Climate Change and the Arctic Frontier Laws of the Sea: Changing Air Land and Sea Routes, 175-179, http://www.ndu.edu/CTNSP/NCW_course/Arctic%20Security%20Compilation.pdf.
22. *Id.* at 364 (emphasis added).
23. *Id.* at 363-364 (emphasis added).

law and regulations[24] incident to or following U.S. UNCLOS accession.[25] Given the public pressures this constituency has imposed on government regulators and policymakers, the Congress and the public must carefully monitor the President's future administrator of the U.S. Office of Management and Budget (OMB)'s Office of Information and Regulatory Affairs (OIRA).[26] Although he is ostensibly on record as opposing Europe's Precautionary Principle (much to the dismay of environmentalists[27]), he nevertheless has designs to redefine and employ it in certain instances, along with an economic cost-benefit approach to risk regulation that creatively utilizes psychological tools to generate less public resistance to new rules.[28] Additionally, despite being recognized as "one of the few intellectuals that

24. The environmental community that supported the candidacies of President Obama and the new members of the congressional majority have developed a U.S. environmental law paradigm shift report for the Obama administration's first 100 days in office. It contains a 'wish list' that not only details specifics for UNCLOS accession but also for adoption of Europe's precautionary principle as U.S. law. See *Transition to Green: Leading the Way to a Healthy Environment, A Green Economy and a Sustainable Future,* ENVIRONMENTAL TRANSITION RECOMMENDATIONS FOR THE OBAMA ADMINISTRATION (NOV. 2008), pp. 1-3, 1-10, 1-12 to 1-13, 9-28, 14-21 and 15-4 to 15-5,at: http://www.scstatehouse.gov/citizensinterestpage/EnergyIssuesAndPolicies/CommentsReceived2ndRequest/Sierra%20Club%20Attachment%20No.%202%20to%2012-01-08%20Comments.pdf.
25. *See* Hillary Clinton, *supra* note 8, (John Kerry: "Let me just say to you and to others interested that we are already -- I have talked to Senator Lugar about this, and I've talked to Senator Clinton about it. We will be -- we are now laying the groundwork for and expect to try to take up the Law of the Sea Treaty. So that will be one of the priorities of -- of the committee, and the key here is just timing, how we proceed.").
26. *See* Michael D. Shear, *Obama to Name Lawyer Friend To Regulatory Affairs Position*, Wash. Post, Jan. 8, 2009, (Document how President Obama has nominated Harvard Law Professor Cass Sunstein as Administrator of the Office of Information and Regulatory Affairs (OIRA) within the Executive Office of Management and Budget. "In his new position, Sunstein will oversee reform of regulations, seeking to find smarter approaches and better results in health, environment and other domestic areas"), http://www.washingtonpost.com/wp-dyn/content/article/2009/01/07/AR2009010704311.html.
27. *See* Aaron Lovell, Obama Regulatory Review Nominee Draws 'Groan' From Activists, Risk Policy Report, Precaution.org. (Jan. 13, 2009), http://www.precaution.org/lib/09/prn_groans_for_sunstein.090113.htm.
28. *See* Cass R. Sunstein, *Laws of Fear: Beyond the Precautionary Principle*, at pp. 15 and 18 (Cambridge University Press, 2005) (illustrating that Although Professor Sunstein is on record as being opposed to Europe's precautionary principle, he has indicated that he believes there are limits to economic cost-benefit analysis and has expressed an interest in refining the European Precautionary and incorporating an American version of it within U.S. federal regulations), http://books.google.com/books?id=C1IjGIk51NwC&dq=cass+sunstein+fear&printsec=frontcover&source=bl&ots=XlWvo_w8EZ&sig=4DXHisypwUekJrEmsSiPoCliZ7s&hl=en&sa

embraces both a strong regulatory state and rigorous use of cost-benefit analysis,"[29] several academics have criticized his cost-benefit approach as masking important cultural differences and opposing world views that are actually "the product of an ongoing political debate about the ideal society."[30]

Furthermore, as this article will show, many that served in prior congresses seemed to favor the implied adoption of Europe's Precautionary Principle.[31] Even today, many, including Senator John Kerry, new Chairman of the Senate Committee on Foreign Relations, remain convinced that since said principle has already become a widely accepted general principle of international environmental law, it should now be expressly incorporated within U.S. federal environmental laws,[32] notwithstanding the ongoing disagreement among legal experts.[33]

=X&oi=book_result&resnum=4&ct=result#; *see also* Abstract *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=721562; *see also* Cass R. Sunstein, *The Laws of Fear*, U. CHIC. L. & ECON. No. 128, 33-35, (June 2001), http://ssrn.com/abstract=274190; Richard H. Thaler & Cass R. Sunstein, *Designing Better Choices - Libertarian Paternalism Gives You Options While Achieving Society's Goals*, L. A. Times (April 2, 2008), http://www.latimes.com/news/opinion/la-oe-thalerandsunstein2apr02,0,3730262.story; Cass R. Sunstein & Richard Zeckhauser, *Overreaction to Fearsome Risks*, HKS Faculty Research Working Paper Number RWP08-079 (Dec. 2008) 2, 12-13, http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP08-079/$File/rwp_08_079_zeckhauser.pdf.

29. *See* Michael A. Livermore, *Should Environmentalists Fear Cass Sunstein?*, THE NEW REPUBLIC VINE (Jan. 12, 2009) http://blogs.tnr.com/tnr/blogs/environmentandenergy/archive/2009/01/12/should-environmentalists-fear-cass-sunstein.aspx.
30. Dan M. Kahan, Paul Slovic, Donald Braman & John Gastil, *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1080-1083 at 1096, (2006)("Although Sunstein purports to be reconciling risk regulation with 'deliberative democracy,' his proposed regulatory reforms are neither particularly deliberative nor particularly democratic. Sunstein's central prescription is to redirect risk regulation from 'highly representative institutions' to 'more insulated' experts. Rather than try to inject scientifically sound information into public discourse, government officials should endeavor to '[c]hange the subject' — 'to discuss something else' in order to divert public attention away from 'facts that will predictably cause high levels of alarm' (pp. 123–25). The cultural-evaluator model, in contrast, supports an approach to risk regulation that is much more consistent with participatory and deliberative visions of democracy."), http://ssrn.com/abstract=801964.
31. *See* discussion *infra.*
32. *See* John Kerry, Teresa Heinz Kerry, *This Moment on Earth: Today's New Environmentalists and Their Vision for the Future* (Public Affairs © 2007) at pp. 48-51, at http://books.google.com/books?id=DSgVX-5sIEoC&pg=PA48&lpg=PA48&dq=john+kerry+%2B+precautionary+principle&source=bl&ots=6G_VyQfT2v&sig=4HZE-X8owcW5uGWpKvYD66QJfu4&hl=en&sa=X&oi=book_result&resnum=1&ct=result#PP

Consequently, academics argue that the continuing international debate over the applicability of the Precautionary Principle concerns only the specific elements (different formulations) of it that are still being developed through state practice, court decisions and treaty provisions, and not the 'superficial' (semantic) distinction between an *approach* and a *principle*.[34] Nevertheless, U.S. law has, for approximately 25 years, employed mostly risk-based precaution, which more or less balances environmental protection against other considerations, namely empirical risk assessment and economic costs, while EU law, which employs hazard-based precaution, does not.[35] In the view of one international legal commentator, the Precautionary Principle:

> sets an unprecedented low threshold for environmental action, by providing that merely 'reasonable grounds for concerns. . . [which introduces 'extremely subjective elements into the definition of the precautionary principle'] . . . of a *hazard*' suffice as a threshold for action in comparison to 'threats of serious or irreversible damage' required by some other formulations. . . . It is also worth noting that the precautionary principle is not subject to cost-effectiveness.[36]

In effect, whenever the Precautionary Approach (risk-based precaution)

A51,M1 .

33. *See, e.g.*, Rabbi Elamparo Deloso, *The Precautionary Principle: Relevance in International Law and Climate Change* (Master's Thesis, Lund University Sweden Dec. 2005), http://www.lumes.lu.se/database/alumni/04.05/theses/rabbi_deloso.pdf (citing the longstanding debate among international law scholars over the status of the precautionary principle as customary international law, and positing the author's own conclusions with respect to climate change). *Cf.* McGinnis, John O., *The Appropriate Hierarchy of Global Multilateralism and Customary International Law: An Example from the WTO*, Northwestern Law & Economics Research Paper No. 03-09 (2003), http://ssrn.com/abstract=421661 ("Some have suggested that the precautionary principle can be used to supplement - indeed to override - otherwise applicable principles of the WTO. But the process from which the WTO emerges has advantages over the customary law process from which the precautionary principle emerges . . . .").
34. *See, e.g.*, Nicholas A. Ashford, *The Legacy of the Precautionary Principle In U.S. Law: The Rise of Cost Benefit Analysis and Risk Assessment as Undermining Factors in Health, Safety and Environmental Protection*, (2007) 352-378, at 354-355, http://web.mit.edu/ctpid/www/tl/docs/LegacyOfPrecaution_19.pdf.
35. *Id.* at 354, *citing* APPLEGATE, J. S. (2000) *The Precautionary Preference: An American Perspective on the Precautionary Principle* in HUMAN AND ECOLOGICAL RISK ASSESSMENT, vol. 6, no. 3, 413–443.
36. *See* SIMON MARR, THE PRECAUTIONARY PRINCIPLE IN THE LAW OF THE SEA, (2003) at p. 61, http://books.google.com/books?id=ynGLz1FqgvYC&pg=PA63&lpg=PA63&dq=unep+precautionary+principle&source=web&ots=zGhHxtuwp4&sig=mdilegqk_TpaKzqhPpVCoxS67Gc#PPA62,M1.

language appears within a multilateral environmental agreement,[37] the European Union and its member states have simply read and interpreted it as if it were the (hazard-based) Precautionary Principle.[38]

Furthermore, transatlantic proponents of Europe's Precautionary Principle argue that the debate over the Precautionary Principle has not merely been attributable to the cultural differences between the American and European peoples *per se*, but has also been a consequence of the successful *political* opposition led by the former Bush administration and the powerful grassroots movement of the conservative right.[39] However, by demonizing the U.S. conservative movement this objection fails to address the true source of its discontent – a traditional distrust and disdain for big, centralized, interventionist and unaccountable government, which is enshrined in U.S. law and shared generally by most Americans.[40]

> U.S. law reflects a traditional suspicion of government regulation, requiring extensive factual records proving 'significant risks' to justify regulation aimed at protecting public health from environmental contaminants. This fundamental norm of the U.S. legal culture, sometimes called the 'principal of legality,' makes precautionary environmental health regulation difficult because government must assemble a factual record to support its actions . . . . When Europeans today call for decisions based on 'the precautionary principle' in international forums, they are challenging a core premise of the American

37. Risk-based 'Precautionary Measures' language also appears in several such agreements although it is frequently interpreted by European treaty parties consistent with Europe's hazard-based Precautionary Principle.
38. *See, e.g.* Lawrence A. Kogan, *World Trade Organization Biotech Decision Clarifies Central Role of Science in Evaluating Health and Environmental Risks for Regulation Purposes*, 2 GLOBARL TRADE AND CUSTOMS J. 149, 153-155 (2007), *available at* http://www.itssd.org/Publications/GTCJ_04-offprints_Kogan%5B2%5D.pdf; Lawrence A. Kogan, *'Unscientific' Precaution: Europe's Erection of New Foreign Trade Barriers*, National Foreign Trade Council, Washington Legal Foundation (Sept. 2003), 57-65, http://www.itssd.org/White%20Papers/WLFKoganArticle2.pdf; Lawrence A. Kogan, *The Precautionary Principle and WTO Law: Divergent Views toward the Role of Science in Accessing and Managing Risk*, 77 SEATON HALL J. OF DIP. & INT'L REL. (Winter/ Spring, 2004), 90-92, *available at* http://www.isn.ethz.ch/pubs/ph/details.cfm?v21=108747&lng=en&click53=108747&v33=106395&id=29789; *The Precautionary Principle in the European Union & its Impact on International Trade Relations*, EurActiv.com (Oct. 24, 2002), http://www.euractiv.com/en/environment/precautionary-principle-european-union-impact-international-trade-relations/article-110071.
39. *See* Ken Geiser, *A Talk to the First National Conference on Precaution, Precaution in 'Old Europe' and New America*, at 5-6 http://www.besafenet.com/prec_conf_proceedings/Ken_Geiser_Talk1.pdf.
40. *See* discussion *infra* at 2-3.

> legal culture that requires an extensive factual record to justify government regulatory action. U.S. tradition holds the deep belief that the risks of arbitrary government action are so great that it is better to pay the costs of procedural delay and elaborate legality than to run the risk of unjustified government actions.[41]

These advocates ignore, at our nation's peril, the longstanding advantages of inherent strength and stability of American individualism, and entrepreneurialism and sovereignty at an extremely vulnerable and uncertain moment in history.[42]

Indeed, the European Union and its member states have devoted considerable time and effort to incorporating Precautionary Principle language in a number of multilateral environmental agreements, bilateral, regional and multilateral trade agreements and the national laws of its developing country trading partners.[43]

41. *See* Gail Charnley & E. Donald Elliott, *Risk Versus Precaution: Environmental Law and Public Health Protection*, 32 ENVTL. L. REP. 10363, 10363-64 (2002), *available at* http://www.healthriskstrategies.com/pdfs/rvp.pdf; *See also* Augustin Landier, David Thesmar, & Mathias Thoenig, *Comparative Capitalism - What Accounts for Europe's and America's Different Attitudes Toward the Free Market?*, STERN BUS. (Fall/Winter, 2007), *available at* http://w4.stern.nyu.edu/sternbusiness/fall_2007/comparativeCapitalism.html ("Compared with countries whose systems derive from French civic law, countries whose systems derive from British common law have a stronger propensity to protect debtholders and shareholders, have lower job protection, and facilitate entry by making business creation easier. When we ran the numbers, we found that legal origin has a significant impact. Notably, French legal origin was strongly related to competition aversion, and British common law was related to a strong preference for owner control.")
42. *See* Edmund S. Phelps, *Dynamic Capitalism - Entrepreneurship is Lucrative--and Just*, Opinion, WALL ST. J. (Oct. 10, 2006) *avaliable at* http://www.opinionjournal.com/editorial/feature.html?id=110009068 (Comparing Anglo-American entrepreneurial capitalism with European Continental social market capitalism. "Several nations--including the U.S., Canada and the U.K.--have a private-ownership system marked by great openness to the implementation of new commercial ideas coming from entrepreneurs, and by a pluralism of views among the financiers who select the ideas to nurture by providing the capital and incentives necessary for their development...This is free enterprise, a k a capitalism. The other system--in Western Continental Europe--though also based on private ownership, has been modified by the introduction of institutions aimed at protecting the interests of "stakeholders" and "social partners...The system operates to discourage changes such as relocations and the entry of new firms, and its performance depends on established companies in cooperation with local and national banks . . . . So different is this system that it has its own name: the 'social market economy' in Germany, 'social democracy' in France and 'concertazione' in Italy.")
43. *See* Claudia Saladin, *The LRTAP POPs Protocol and its Relevance to the Global POPs Negotiations*, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (1999) at 6-8, http://www.ciel.org/Publications/LRTAPPOPsProtocolGlobal.pdf; *Proposal for a Regulation of the European Parliament and of the Council on Persistent Organic Pollutants and Amending Directives 79/117/EEC and 96/59/EC*, COM (2003) 331, 2003/0119 (COD); Clifton Curtis and Cynthia Palmer Olsen, *New Stockholm Convention to Protect Wildlife and People from POPs*, World Wide Fund for Nature / World Wildlife Fund (WWF),

Transatlanticists have also lent considerable conceptual and emotional support to and have virtually laid the foundation for America's adoption of Europe's Precautionary Principle as U.S. environmental law.[44] Consequently, U.S. political leaders, policymakers and industry officials must quickly acquire a greater intellectual understanding of the legal and political significance of this principle, a deep pragmatic appreciation for the likely economic and technological consequences of adopting it,[45] and a healthy skepticism toward the almost faith-based reliance on U.S. UNCLOS accession to reestablish America as a global environmental citizen[46] that embraces Europe's Precautionary Principle as a central tenet of both U.S. and international law.

Considering that UNCLOS "establishes unqualified obligations for all states to protect and preserve the entire marine environment, subject to compulsory binding dispute settlement,"[47] and might "one day become a mechanism to confront climate change . . . [because of] its broad definition of pollution to the marine environment,"[48] the Congress' failure to adequately vet what is perhaps "the most comprehensive and progressive international environmental law of any modern international agreement,"[49] potentially places U.S. national sovereignty *and* U.S.

Wash. DC (2002), *cited in* Sustainable Development International, p. 155; Kogan, *The Precautionary Principle and WTO Law: Divergent Views toward the Role of Science in Accessing and Managing Risk*, *supra* note 38 at pp. 93-95; Kogan, *'Unscientific' Precaution: Europe's Erection of New Foreign Trade Barriers*, *supra* note 38; Lawrence A. Kogan, *Looking Behind the Curtain: The Growth of Trade Barriers that Ignore Sound Science*, National Foreign Trade Council, Inc (Wash., DC, May 2003) http://www.wto.org/english/forums_e/ngo_e/posp47_nftc_looking_behind_e.pdf;

44. Kogan, *supra* note 2.
45. *See* Lawrence A. Kogan, *Exporting Precaution: How Europe's Risk-Free Regulatory Agenda Threatens American Free Enterprise*, Washington Legal Foundation Monograph (Nov. 2005), 17-35, 75-80 available at www.wlf.org/upload/110405MONOKogan.pdf; *Precautionary Preference: How Europe Employs Disguised Regulatory Protectionism to Weaken American Free Enterprise*, 7 INT'L J. ECON. DEV. (Dec. 2005), 2-3, 211-222, 241-291, available at www.spaef.com/IJED_PUB/index.html.
46. See *Obama Seeks Stronger Europe Ties*, BBC News (July 25, 2008) http://news.bbc.co.uk/2/hi/americas/7522738.stm.
47. *See* Senate Executive Report 108-10, 108th Cong. (March 11, 2004) at 166-168 ("Prepared Statement of World Wildlife Fund, Brooks B. Yeager, Vice President, Global Threats Program"), http://www.virginia.edu/colp/pdf/UNCLOS-Sen-Exec-Rpt-108-10.pdf.
48. *See* William C. G. Burns, *Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention*, INT'L J. OF SUSTAINABLE DEVELOPMENT LAW & POLICY, Vol. 2, No. 1, pp. 27-51 (2006) at pp. 1 and 50-51, http://policy.miis.edu/programs/BurnsFT.pdf.
49. *See* Tim Stephens, *The Role of International Courts and Tribunals in International Environmental Law*, University of Sidney eScholarship Repository (2005) *citing* Patricia

national security at risk.

As the most directly accountable representative political body of the American people, the U.S. Congress bears the unique constitutional burden and responsibility of ensuring that the international treaties it recommends to the President for accession or ratification do *not* subsequently impair U.S. national interests or citizen rights. In the case of UNCLOS, the many committees of Congress should pose and answer *at least* the following questions: How extensive are the UNCLOS' environmental regulatory provisions and how could the legal norms they incorporate apply within U.S. sovereign borders? Is any form of the Precautionary Principle present, in letter and/or spirit, within the broad UNCLOS legal framework? How could UNCLOS ratification be used to herald Europe's Precautionary Principle as U.S. law? Is the UNCLOS really an environmental "Trojan Horse"?[50]

II. EXTERNAL PATHWAYS TO U.S. ADOPTION OF THE PRECAUTIONARY PRINCIPLE VIA THE UNCLOS

A. The Comprehensive UNCLOS Legal Framework Subdivides the Oceans into Distinct Zones of Functional as Well as Territorial Jurisdiction and Control

The UNCLOS legal framework subdivides the oceans into five distinct legal zones of jurisdiction and control (high seas; exclusive economic zone (EEZ); continental shelf; contiguous zone; and territorial sea). Each of the UNCLOS zones vests coastal and flag state nations with legally specified freedoms and obligations. UNCLOS recognizes the existence of six freedoms on the high seas that are beyond national control.[51]

Within the EEZ, which can extend outward 200 nautical miles from the

W. Birnie and Alan E. Boyle, *International Law and the Environment* (2d Ed. 2002) 348 at 36, http://ses.library.usyd.edu.au/bitstream/2123/706/2/adt-NU20060309.02243102whole.pdf; Jonathan I. Charney, 'The Marine Environment and the United Nations Convention on the Law of the Sea (1994), 28 International Lawyer 879,882.

50. *See* Doug Bandow, *LOST Crosscurrents*, THE WASHINGTON TIMES (July 27, 2008), http://www.washingtontimes.com/news/2008/jul/27/lost-crosscurrents.

51. United Nations Convention on the Law of the Sea art. 87(1)(a)-(f, Dec. 10, 1982, 1833 U.N.T.S. 397) (recognizing six freedoms in the high seas: "(a) freedom of navigation, (b) freedom of overflight, (c) freedom to lay submarine cables and pipelines , (d) freedom to construct artificial islands and other installations permitted under international law, (e) freedom of fishing, [and] (f) freedom of scientific research") [hereinafter *UNCLOS*].

coastline,[52] coastal nations may exercise sovereign rights to explore, exploit, conserve and manage natural living and nonliving resources in the waters, seabed and subsoil, to oversee marine research and to exploit the EEZ economically.[53] As concerns the continental shelf, the UNCLOS departs from the general definition provided by geologists: the continental margin between the shoreline and the shelf break or, where there is no noticeable slope, between the shoreline and the point where the depth of the superjacent water is approximately between 100 and 200 metres."[54] Instead, it sets forth a juridical definition: it extends from the shoreline "through 'the natural prolongation of a coastal state's land territory to the outer edge of the continental margin, or [generally] a distance of 200 miles'"[55] (unless it can establish via scientific evidence that it extends beyond 200 miles).[56] Coastal nations hold "'the exclusive right to authorize and regulate drilling for all purposes,[57] subject to the rights of other nations to lay cables and pipes over the shelf.'"[58] Within the contiguous zone, which extends up to 24 miles from shore,[59] coastal states may "enforce laws relating to activities in the territorial sea."[60] And within the territorial sea extending up to 12 miles from shore, coastal states are vested with total sovereignty "over the waters, airspace, seabed and subsoil therein, subject to peaceful ship's right of 'innocent passage.'"[61]

Chief among coastal and flag state responsibilities is the self-adjusting legal duty to protect and preserve the marine environment, which effectively qualifies and conditions the right to freedom of navigation. All nations, but especially coastal states, have a comprehensive legal duty to individually and jointly protect and preserve the marine environment by adopting, implementing and enforcing laws and policies domestically that ensure against marine pollution arising from

52. *See Id.* art. 55, 57.
53. *See Id.* art. 56(1).
54. *See The Definition of the Continental Shelf and Criteria for the Establishment of its Outer Limits*, Commission on the Limits of the Continental Shelf (CLCS) - The Continental Shelf, United Nations Division for Ocean Affairs and the Law of the Sea website, http://www.un.org/Depts/los/clcs_new/continental_shelf_description.htm.
55. *See* UNCLOS, *supra* note 51, art. 76.
56. *See Id.* art. 76(4)(4)-(6); *Id.*, Annex II, art. 4-7.
57. *See Id.* art. 81, 77(1)-(2).
58. *See Id.* art.79(2).
59. *See Id.* art. 33(2).
60. *See Id.* art. 33(1).
61. *See Id.* art. 2; *see also* Robin Kundis Craig, *Sustaining the Unknown Seas: Changes in U.S. Ocean Policy and Regulation Since Rio '92*, at 10193, (citing UNCLOS Articles), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=922508.

any and all sources within their sovereign jurisdiction and control. UNCLOS also recognizes and upholds the legal obligations imposed by all other international agreements regarding protection of the marine environment.[62]

The imposition on coastal states of such a broad and comprehensive legal duty is substantiated by various United Nations findings that marine pollution is generated primarily from *land-based* sources. According to one study, 82% of all marine pollution load (by mass) are derived from land-based sources, including sewage outfalls, industrial discharges, urban storm water and agricultural runoff, river borne and airborne pollution, litter and even vehicle emissions.[63] Another study concluded that "land-based pollution" accounts for approximately 70% of all marine pollution, and it defines 'land-based pollution' as "pollution of maritime zones due to discharges by coastal establishments or coming from any other source situated on land or artificial structures, including pollution transported from rivers to the sea."[64] A third study laments that "some 80 percent of the pollution load in the oceans originates from land-based activities, includ[ing] municipal, industrial and agricultural wastes and runoff, as well as atmospheric deposition."[65]

Consistent therewith, the UNCLOS oceans zoning framework recognizes that coastal states, including the U.S., bear total legal responsibility for arresting and otherwise preventing in advance all land-based sources of marine pollution. This includes pollution generated from a coastal state's physical landmass, internal and ocean waters and the atmosphere above, over which it is deemed to possess and expected to exercise, complete sovereignty and control.[66]

Sovereignty, however, is viewed today as being multi-dimensional (more than territorial)[67] and can be complex in the case of the United States, given its

62. Robin Kundis Craig, *Sustaining the Unknown Seas: Changes in U.S. Ocean Policy and Regulation Since Rio '92*, at 10194.
63. *See* Lal Krukulasuriya and Nicholas A. Robinson, *Training Manual on International Environmental Law*, United Nations Environment Programme (2005) 147 at par. 7, and 150 at par. 21, http://www.unep.org/law/PDF/law_training_Manual.pdf.
64. Dinah Shelton and Alexandre Kiss, *Judicial Handbook on Environmental Law*, United Nations Environment Programme (2005) at pp. 71-72, http://www.unep.org/law/PDF/JUDICIAL_HBOOK_ENV_LAW.pdf.
65. The Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities, United Nations Environment Program, http://www.gpa.unep.org.
66. *See* Oxman, *supra* note 20 at 835.
67. *See* STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY, (Princeton University Press, 1999) at 3-4, 10, http://books.google.com/books?id=TkrfTZlyUogC&dq=Sovereignty:+Organized+Hypocrisy&pg=PP1&ots=Q5qrjIElbP&sig=SyAKEtz6cbVD3dsSsMhWiZq5EA0&hl=en&sa=X&oi

federalist system.[68] It is also widely acknowledged that traditional notions of national sovereignty are being eroded by globalization[69] and rendering once independent nation-states more susceptible to foreign state or even international organizational influences as the consequence of entering into binding international treaty commitments.[70] For example:

> international [treaty] commitments that concern [a state's] internal affairs [can not only] *directly* violate its sovereignty [but] can also imply further *indirect* violations of. . . sovereignty [such that]. . . government decisions that are not the subject of international negotiation are nevertheless distorted away from the . . . domestic . . . decisions that would normally have been made."[71]

This becomes all the more apparent if one considers the notion of sovereignty in more modern terms of functionality.

> Functional sovereignty . . . distinguishes jurisdiction over specific uses from sovereignty over geographic space . . . This would permit the interweaving of national jurisdiction and international competencies within the same territorial space and open the possibility of applying the concept of 'common heritage of mankind' both beyond and within the limits of national jurisdiction.[72]

In effect, it would be possible for the U.S. to claim that its domestic environmental laws, customs and norms premised on scientific risk assessment and economic cost-benefit analysis apply without limitation within each of the various

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68. Craig, *supra* note 62 ("[T]he U.S. system of federalism divides regulatory power between the federal government and the 50 state governments, and this division of regulatory authority extends to the oceans. The history of ocean regulatory authority in the United States is convoluted").
69. *See* Krasner, *supra* note 67 at 12; Robert J. Samuelson, *Globalization's Achilles Heel*, NEWSWEEK (July 21, 2008) at 53, http://www.newsweek.com/id/145864 (noting how the "[c]onnections among countries have deepened and become more contradictory . . . [c]ountries are growing more economically interdependent and politically more nationalistic. This is a combustible combination").
70. *See* Kyle Bagwell & Robert W. Staiger, *National Sovereignty in an Interdependent World*, (Aug. 2004) at 3, http://www.stanford.edu/~rstaiger/sovereignty.122903.revisioncopy.082304.pdf.
71. *Id.* at 4.
72. *See* Jan Tinbergen, *RIO (Reshaping the International Order)*(1976) at 172; *See also,* Brent Jessop, *'Functional' Sovereignty and the Common Heritage of Mankind - Reshaping the International Order Part 3* (April 21, 2008) (citing the Club of Rome's Report to the UN), http://www.knowledgedrivenrevolution.com/Articles/200804/20080421_RIO_3_Common.htm.; Oxman, *supra* note 20, at 836, ("Three zones of functional jurisdiction extend seaward from the outer limit of the territorial sea, and therefore overlap to some extent: the contiguous zone . . . the exclusive economic zone (EEZ) . . . and the continental shelf").

ocean zones established by the UNCLOS.[73] Yet, it would also be possible, simultaneously, for its interpretation, implementation and enforcement of those laws, customs and norms (i.e., its risk-based Precautionary Approach) to be influenced and/or challenged by a competing hazard-based interpretation applied within the same legal and physical space by other UNCLOS parties – namely those from Europe – and perhaps even by like-minded U.N. arbitral, tribunal and secretariat bodies. As a matter of logic, such a scenario would necessarily entail competing UNCLOS Party interpretations of the term "high seas."[74]

The U.S. Navy encountered this issue in the case of *Natural Resources Defense Council v. Department of the Navy*.[75] In that case, "the court and all parties agreed that [U.S. Endangered Species Act] jurisdiction extends [through the U.S. EEZ and the high seas] to at least the foreign exclusive economic zone." One legal commentator has referred to this decision as significant because it implies that the U.S. recognizes how different law applies in the U.S. exclusive economic zone (EEZ), on the high seas and within foreign EEZs.[76] It thus acknowledges the potential for these different laws to be in conflict with each other on the high seas, as well as at points where there are overlapping state EEZs or opposite or adjacent coasts.[77]

73. Outer Continental Shelf Lands Act, 43 U.S.C. 1333, ("SEC. 4. LAWS APPLICABLE TO OUTER CONTINENTAL SHELF.— (a)(1) *The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed* which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental shelf were an area of exclusive Federal jurisdiction located within a state")(emphasis added), http://epw.senate.gov/ocsla.pdf.
74. *See* Keith S. Gibel, *Defined by the Law of the Sea: 'High Seas' in the Marine Mammal Protection Act and the Endangered Species Act*, 54 NAVAL LAW REVIEW 1, 26-27 (2007), http://www.jag.navy.mil/FieldOffices/NJS3Courses.htm.
75. Natural Resources Defense Council v. Department of the Navy, No. CV-01-07781 CAS (RZx), 2002 U.S. Dist. LEXIS 26360 (C.D. Cal. Sept. 17, 2002).
76. *See, e.g.*, UNCLOS, *supra* note 51, art. 2, 15, 47, 51, 53, 55, 63, 74, 83.
77. Gibel, *supra* note 74 at 26-27 ("[T]he court's recognition of U.S. sovereign control in its EEZ evidences implicit U.S. recognition of the difference between the EEZ and high seas for all sovereign States in the natural resource context. Once again, if the United States has control over the natural resources in its EEZ, then other countries have the same authority in their EEZs. Because the United States has sovereign rights to regulate within its EEZ, it is not difficult to conceive why the ESA and the MMPA would apply in the U.S. EEZ. Due to a conflict with foreign sovereign rights, however, it is not necessarily easy to understand

The U.S. Supreme Court decisions in *Charming Betsy*[78] and *The Paquete Habana*[79] also recognize the potential for conflicting laws operating within the same jurisdictional space. These cases hold: (1) "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"[80]; and (2) "[Customary] International law is part of our law" subject, of course, to the caveat that this rule is only given effect where there is no "treaty and no controlling executive or legislative act or judicial decision."[82] According to one legal commentator, "this understanding of customary international law suggests . . . that the President, as well as Congress, may override a customary international law obligation as a matter of domestic law."[83] This rule of statutory interpretation has since been incorporated within U.S. foreign relations law.[84] Thus, it would seem that the U.S. government would be required to interpret the Endangered Species Act, Marine Mammal Protection Act (MMPA), and other U.S. environmental statutes within these 'zones' not inconsistent with prevailing international treaty or customary international law and practice (e.g., Europe's Precautionary Principle), irrespective of the U.S. government's application of a Precautionary Approach for domestic law purposes.[85]

The UNCLOS protocol known as the Migratory Fish Stocks Agreement (MFSA)[86] also engenders the ethic reflected in these two U.S. Supreme Court

why the ESA and the MMPA would apply in a FEEZ. While a FEEZ is not the sovereign territory of a State, it is within the rights of a foreign sovereign to regulate that area. This explains why we can have different answers concerning the applicability of the two statutes in the EEZ: the MMPA and the ESA apply in the U.S. EEZ due to U.S. control over natural resources and the statutes don't apply in the FEEZ due to foreign control over natural resources.").

78. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).
79. *The Paquette Habana*, 175 U.S. 677, 700 (1900).
80. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).
82. The Paquette Habana, 175 U.S. 677, 700 (1900).
83. *See* Julian Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1 (2006) at 143, http://ssrn.com/abstract=879237.
84. *Id.* at 47; *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114 (2005)("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").
85. *See* discussion *infra* about the enforceability of UNCLOS Annex VI, Article 39 ITLOS Seabed Dispute Chamber Decisions.
86. *See* AGREEMENT FOR THE IMPLEMENTATION OF THE PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA OF 10 DECEMBER 1982 RELATING TO THE CONSERVATION AND MANAGEMENT OF STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS, UN G. A. A/CONF.164/37 (Sept. 8, 1995),

decisions. It well recognizes the potential for a conflict between the national conservation and management laws applicable to fish stocks within a coastal state's EEZ and analogous laws applicable on the high seas within the global commons. For example, it encourages UNCLOS parties to work together to harmonize their laws, first amongst themselves and then with the laws of the commons. MFSA Article 7(2)(a) provides that "[c]onservation and management *measures* established for the high seas and those adopted for areas under national jurisdiction *shall be* compatible in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks in their entirety."[87]

A third potential conflict scenario may arise over the future treatment of marine genetic resources located within the U.S. EEZ and the global commons. For example, during a 2006 meeting of a UN General Assembly Working Group on marine biological diversity, the "EU had proposed a new UNCLOS implementation agreement" on fisheries to control deep sea bottom trawling activities "and the creation of marine protected areas, invoking the Precautionary Principle" to ensure "the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction." Not unexpectedly, the U.S. and Japan had strenuously objected.[88] The disagreement reflected the apparently different regional and national conceptions of how the benefits of marine genetic resources should be shared with developing countries. Whereas Europe called for the expanded jurisdiction of the International Seabed Authority over the global commons and new international regulations to protect such resources as the common heritage of mankind, the U.S. and Japan argued that such resources should instead fall subject to the freedom of the high seas principle.[89]

International law experts have characterized the possibility of distinct and competing national and regional laws crossing and influencing otherwise distinct sovereign spaces as "creeping jurisdiction."[90] It may also occur *in reverse* (i.e.,

http://daccessdds.un.org/doc/UNDOC/GEN/N95/274/67/PDF/N9527467.pdf?OpenElement

87. *Id.* art. 7(2)(a) (emphasis added).
88. *See Legal Status of Marine Genetic Resources in Question*, BRIDGES TRADE BIORES VOL. 6, NO. 4 (March 3, 2006) http://www.ictsd.org/biores/06-03-03/inbrief.htm.
89. *Id.*
90. Erik Francxk, *The 200 Mile Limit: Between Creeping Jurisdiction and Creeping Common Heritage?*, 39 George Washington Law Review 3, p. 467-498 (2007) ("The EEZ grants specific sovereign rights and jurisdiction to the coastal State and is today usually categorized as a sui generis zone (not to be assimilated with the well-known concepts of the territorial sea or the high seas."), http://www.allbusiness.com/environment-natural-

"creeping common heritage") in the event the interests of the international community,[91] as represented by the International Seabed Authority (ISBA),[92] become more proactive and are reflected within more stringent environmental regulations based on Europe's Precautionary Principle, that are adopted and enforced in and around the Area.[93] This is made all the more possible because of the ISBA's legal capacity,[94] and its ability to sue or respond to suit in order to enforce UNCLOS party compliance with its regulations at an UNCLOS tribunal.[95]

B. There is a Complex Interrelationship Between the UNCLOS Framework and International Environmental Law, Including Europe's Precautionary Principle

Legal commentators generally agree that the 1982 UNCLOS oceans management framework served as a source of inspiration for a number of international environmental agreements and voluntary initiatives, including the

resources/ecology-environmental/8896189-1.html;
http://findarticles.com/p/articles/mi_qa5433/is_200705/ai_n25137635/pg_4.

91. *Id.* ("Creeping can be carried out either by the coastal State, in which case the widely used term 'creeping jurisdiction' is normally relied upon, or by the international community, a process referred to by the term 'creeping common heritage.' Creeping jurisdiction can further be subdivided into creeping 'qualitatively' inside the 200mile limit and spatially beyond that limit.").
92. The International Sea-Bed Authority was established under Article 156 of the UNCLOS III.
93. *See* UNCLOS, *supra* note 51, art. 145; *See also ISA Council Begins Substantive Work on Draft Regulations On Sulphides*, INTERNATIONAL SEABED AUTHORITY PRESS RELEASE SB/13/5 (July 10, 2007) http://www.isa.org.jm/files/documents/EN/Press/Press2007/SB-13-5.pdf; *IUCN (2004) TEN-YEAR HIGH SEAS MARINE PROTECTED AREA STRATEGY: A Ten-year Strategy to Promote the Development of a Global Representative System of High Seas Marine Protected Area Networks*, Executive Summary (Sept. 2003), Toolbox 1 at 13, http://www.iucn.org/THEMES/MARINE/pdf/10-Year_HSMPA_Strategy_SummaryVersion.pdf; Ambassador Satya N. Nandan, Secretary General of the Int'l Seabed Authority, Benthic Biodiversity and the Work of the International Seabed Authority, Statement to the 5th meeting of the United Nations Informal Consultative Process on the Law of the Sea (June 7-11, 2004) at 1, citing Regulation 31(3), http://www.un.org/Depts/los/consultative_process/documents/5s_nandan.pdf.
94. *See* UNCLOS, *supra* note 51, art. 176 (giving the International Seabed Authority (ISBA) legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes").
95. *Article 3, Legal Personality of the Authority*, Protocol on the Privileges and Immunities of the International Seabed Authority (opened for signature Aug. 28, 1998) ("The Authority shall possess legal personality. It shall have the legal capacity: (a) to contract; (b) to acquire and dispose of immovable and movable property; (c) to be a party in legal proceedings") http://untreaty.un.org/English/notpubl/seabed2_eng.htm.

nonbinding 1985 *Montreal Guidelines for the Protection of the Marine Environment Against Pollution from Land-Based Sources.*[96] These voluntary guidelines spoke of the need for coastal states to harmonize their domestic environmental laws with the rules of bilateral, regional and multilateral environmental conventions to address land-based sources of pollution.[97]

Because the Montreal guidelines were later found at the 1992 Rio Summit on Sustainable Development to be inadequate since "control of land-based sources of marine pollution [had been] failing," Governments looked instead to UNEP's more detailed Agenda 21[98] as providing the necessary basis for an update of the Montreal Guidelines "drawn from international agreements such as the UN Law of the Sea Convention."[99]

The Rio Conference also revealed the quite extensive and interdependent relationship between the UNEP's Agenda 21 and the UNCLOS.

> International law recognizing coastal nations' jurisdiction over the ocean and its resources is an important precedent to sustainable development, particularly in light of the historical tradition of freedom of the seas. For this international regulatory structure, Chapter 17 depends heavily upon the 1982 United Nations Convention on the Law of the Sea (UNCLOS III), which came into force on November 16, 1994 . . . [Indeed,] UNCLOS III provides a foundation for Chapter 17 of Agenda 21.[100]

> [T]he United Nations Convention on the Law of the Sea (UNCLOS) sets out the legal framework within which *all activities in the oceans and seas* must be carried out. *Chapter 17 of Agenda 21*, adopted in 1992 at the United Nations Conference on Environment and Development, *remains the fundamental programme of action for achieving sustainable development in respect of oceans and seas.*[101]

96. *See* Montreal Guidelines for the Protection of the Marine Environment Against Pollution from Land-Based Sources, Decision 13/18/II of the Governing Council of UNEP (May 24, 1985), http://www.unep.org/law/PDF/UNEPEnv-LawGuide&PrincN07.pdf.
97. *Id.* at 2.
98. Conference on Environment and Development, June 3 - 14, 1992, *Rio Declaration on Environment and Development,* (paragraph if there is one), U.N. A/CONF.151/26 (Vol. 1)(Aug. 12, 1992) *available at* http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm and Conference on Environment and Development, June 3 - 14, 1992, *Statements of Principles for the Sustainable Management of Forests*, U.N. A/CONF.151/26 (Vol.III)(Aug. 14, 1992) *available at* http://www.un.org/documents/ga/conf151/aconf15126-3annex3.htm [collectively, "Agenda 21].
99. See Krukulasuriya & Robinson, *supra* note 63 at 150 para. 22.
100. *See* Craig, *supra* note 63 at 10193-94 (emphasis added).
101. See *United Nations Open-ended Informal Consultative Process on Oceans and the Law of*

In effect, Chapter 17 of Agenda 21 became the primary roadmap for achieving the environmental objectives of the UNCLOS.

Three years later, in 1995, world leaders adopted the Washington Declaration on Protection of the Marine Environment from Land-Based Activities. This political declaration articulated an intergovernmental action plan ("Global Program of Action") that called for better management of land-based sources of marine pollution internationally, regionally and nationally.[102] Interestingly, the Global Program of Action more broadly defined the phrase "marine environment"[103] and more closely related the international legal obligation to prevent, control and reduce land-based sources of marine pollution at the national, regional and international levels to achieving sustainable development via the application of Europe's Precautionary Principle.[104]

Thus, commentators have since had good reason to conclude that the hazard-based Precautionary Principle is integral to maintaining the close relationship between the UNCLOS oceans management framework and the U.N. Agenda 21 Chapter 17, which builds upon it. As one commentator has emphasized,

> Agenda 21 . . . Chapter 17['s] . . . overall goal is to develop 'new approaches to marine and coastal areas management and development, at the national, sub regional, regional, and global levels. . .that are integrated in content and are precautionary and anticipatory in ambit' — i.e, *to transform countries' use of oceans and seas into a precautionary approach*. If successfully applied to ocean resources, the precautionary approach would be *a profound shift in historical paradigms . . . To achieve an international precautionary approach* to and sustainable use of the oceans and seas, Chapter 17 of Agenda 21 outlines seven programs, the first four of which are the most applicable to the United States.[105]

This close interrelationship was confirmed more recently during the 2006 UNEP review of governments' implementation of the Global Program of Action, which was then reported in the Beijing Declaration. This declaration set forth an ambitious timetable (2007-2011) within which nations would commit to further implement the Global Plan of Action by, among other things, "applying ecosystem

the Sea, (Background)
http://www.un.org/depts/los/consultative_process/consultative_process_background.htm (emphasis added).

102. *See Washington Declaration on Protection of the Marine Environment from Land-Based Activities* (Nov. 1, 1995) at 1, http://www.gpa.unep.org/documents/washington_declaration_english.pdf.
103. *See* discussion *infra*.
104. *Id.* at 7-8 para. 4-5, 9.
105. *See* Craig, *supra* note 64 at 10191-10192.

approaches" and "mainstreaming the Global Programme of Action into national development planning and budgetary mechanisms."[106] Such commitments were to be undertaken in the manner "set forth in the Johannesburg Plan of Implementation,"[107] which had called for "[inviting] States to ratify or accede to *and* implement the United Nations Convention on the Law of the Sea of 1982 [and for] [p]romot[ing] the implementation of chapter 17 of Agenda 21 . . . [within States'] coastal areas and exclusive economic zones."[108] The Johannesburg plan also called for "[improving] policy and decision-making at all levels through . . .[p]romot[ing] and improv[ing] science-based decision-making and *reaffirm[ing] the precautionary approach* as set out in principle 15 of the Rio Declaration."[109] Not surprisingly, the U.S. had previously assumed a leadership role in each of these initiatives during the two Clinton Administrations, which had accepted the UNCLOS framework as the definitive instrument that should inform U.S. oceans and environmental policy.[110]

The close relationship between the UNCLOS and UNEP's Agenda 21 was once again declared in an even more recent March 2008 United Nations General Assembly resolution. Resolution 62/215 reaffirmed "the universal and unified character" of the UNCLOS, as well as its "strategic importance as *the* legal framework within which all oceans and seas activities must be carried out" and as "the basis for national regional and global action and cooperation in the marine

106. *See* Beijing Declaration on furthering the implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities, United Nations Environment Program (2006) at pars. 2, 7, http://www.mep.gov.cn/ztbd/hyhj/sch/200702/P020070212302633511528.pdf.
107. *Id.* at para. 8-9.
108. *Johannesburg Plan of Implementation of the World Summit on Sustainable Development* (Sept. 4, 2002), at para. 30(a)-(b), http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf.
109. *Id.* at para. 109(f) (emphasis added).
110. *See* United Nations Commission on Sustainable Development, Implementation of Agenda 21: Review of Progress Made Since the United Nations Conference on Environment and Development, 1992: United States of America - AGENDA 21 CHAPTER 17: PROTECTION OF THE OCEANS, ALL KINDS OF SEAS, INCLUDING ENCLOSED AND SEMI-ENCLOSED SEAS, AND COASTAL AREAS AND THE PROTECTION, RATIONAL USE AND DEVELOPMENT OF THEIR LIVING RESOURCES (Apr. 7-25, 1997), http://www.un.org/esa/earthsummit/usa-cp.htm (emphasis added); *See also Fact Sheet: U.S. Oceans Policy and the Law of the Sea Convention*, Released by the Bureau of Oceans and International Environmental and Scientific Affairs (May 28, 1998), http://www.state.gov/www/global/oes/oceans/fs_oceans_los.html .

sector"[111] It also reemphasized the need for all nations "to harmonize . . . their national legislation with the provisions of the Convention. . .and to ensure. . .*that any declarations or statements . . . made . . . when signing, ratifying or acceding to the Convention do not purport to exclude or to modify the legal effect of its provisions . . . in their application to the State concerned . . . .*"[112] Is it possible that the General Assembly might have been referring to the United States?

Beyond its close relationship with UNEP's Agenda 21, which emerged during the 1992 Earth Summit, the provisions of UNCLOS Part XII also arguably reflect environmental policy objectives that were in common with numerous other regional and multilateral environmental agreements (MEAs) developed during an earlier era. From 1972[113]- 1992,[114] the world had witnessed the negotiation of many multilateral treaties calling for the increased regulation of the environment. In fact, as many as 302 separate but overlapping MEAs were drawn up during this era, many of which ("197, or nearly 70%") are regional rather than global in scope.[115]

111. *See* U.N. General Assembly Res. A/RES/62/215, Oceans and the Law of the Sea (March 14, 2008), Preamble, para. 5, http://www.ioc-unesco.org/hab/components/com_oe/oe.php?task=download&id=4023&version=1.0&lang=1&format=1; *Id.*, at par. 95, (calling also for "States to implement the Global Programme of Action . . . and to take all appropriate measures to fulfill the commitments . . . embodied in the Beijing Declaration").

111. *See Declaration of the United Nations Conference on the Human Environment*, United Nations Environment Program website http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503 (emphasis added).

112. *Id.*

113. *See Declaration of the United Nations Conference on the Human Environment*, United Nations Environment Program website http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503.

114. *See* U.N. Conference on Environment and Development (1992), http://www.un.org/geninfo/bp/enviro.html; *Rio Declaration on Environment and Development*, United Nations Environment Program website, http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163.

115. *See* International Environmental Governance: Multilateral Environmental Agreements (MEAs) - Status of Multilateral Environmental Agreements, UNEP/IGM/1/INF/3 (April 6, 2001), presented at the Meeting of Open-Ended Intergovernmental Group of Ministers or their Representatives on Int'l Envir. Governance. (April 18, 2001) apars. 9-11, http://www.ramsar.org/key_unep_governance1.htm; *See also* Linda Nowlan and Chris Rolfe, *Kyoto, POPS and Straddling Stocks: Understanding Environmental Treaties*, WEST COAST ENVIRONMENTAL LAW (Jan. 2003) at 16

These MEAs are viewed as falling within two general categories. The first category consists of core environmental conventions and related international agreements. They are themselves divided into five clusters: (1) the biodiversity-related conventions,[116] (2) the atmosphere conventions,[117] (3) the land conventions,[118] (4) the chemicals and hazardous wastes conventions,[119] and (5) the regional seas conventions and related agreements."[120] According to UN authorities, the second category of MEAs consists of "[o]ther Global Conventions Relevant to the Environment, including Regional Conventions of Global Significance,"[121] to which the 1982 UNCLOS belongs.[122] Both UN and

http://www.wcel.org/wcelpub/2003/13929.pdf.

116. *Id.* para. 18, ("The scope of the biodiversity-related conventions ranges from the conservation of individual species (CITES and the Lusaka Agreement) via conservation of species, their migration routes and their habitats (CMS, AEWA, EUROBATS, ASCOBANS, ACCOBAMS and various MOUs) to the protection of ecosystems (CBD, the Ramsar Convention, the World Heritage Convention and the International Coral Reef Initiative--ICRI)").
117. *Id.* para. 19 ("The Vienna Convention on the Protection of the Ozone Layer and its Montreal Protocol on Substances that Deplete the Ozone Layer and the United Nations Framework Convention on Climate Change and its Kyoto Protocol are closely associated in protecting the environment by eliminating or stabilizing anthropogenic emissions that threaten to interfere with the atmosphere"); Craig, *supra* note 63 at 10192 ("[Agenda 21,] Chapter 17's fifth program addresses climate change. It is worth emphasizing, however, that oceans are particularly vulnerable to two types of climate change: global warming and ozone depletion.").
118. *Id.* para. 20.
119. *Id.* para. 21.
120. *Id.* para. 22-23 (Showing a strong interrelationship between the global mosaic of regional seas conventions and actions plans, the chemicals-related conventions, and the biodiversity-related conventions in particular "Table 1 - Core Environmental Conventions and Related Agreements of Global Significance").
121. *Id.* para. 14.
122. Mark Drumbl, *Actors and Law-Making in International Environmental Law*, *in* RESEARCH HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, at 18 (Ong & Fitzmaurice, eds.)(2007), available at http://ssrn.com/abstract=1022363. ("Major MEAs can be divided into two groups: first generation and second generation. First generation MEAs focus on issues such as air and water pollution, wildlife conservation, and protection of vulnerable habitat. Pivotal first generation treaties include MARPOL 73/78; the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972); the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (1973); and the Ramsar Convention on Wetlands (1971). Second generation MEAs involve even more complex issues that implicate economic behavior and lifestyles at a multiplicity of levels. Pivotal second generation treaties include the Vienna Convention for the Protection of the Ozone Layer (1985), and subsequent Protocols (in particular the Montréal Protocol (1987) and London Amendment thereto (1990)); the United Nations Framework Convention on Climate Change (FCCC) (1992) and Kyoto Protocol (1997); the

environmental commentators believe that "40% [or more] of [all of] these treaties are related to the protection of the *marine* environment, with the comprehensive UNCLOS as [their] centerpiece.[123]

Besides the UNCLOS, which operates "under the U.N. General Secretariat,"[124] and the International Convention for the Prevention of Pollution from Ships (MARPOL),[125] there are several MEAs administered by the United Nations Environment Program (UNEP), namely those concerning biodiversity, atmosphere and land[126] that fall within this core grouping. These include the U.N. Framework Convention on Climate Change (UNFCCC) and its accompanying Kyoto Protocol and the UN Montreal Protocol on Substances that Deplete the Ozone (Montreal Protocol) (*atmosphere*); the UN Convention to Combat Desertification (UNCCD) (*land*); the U.N. Convention on Biological Diversity (CBD) and the non-binding UN Forum on Forests (UNFF) (*biodiversity*).[127] But, "by far, the largest cluster of MEAs is related to the marine environment . . . and is distinguished by the

Convention on Biological Diversity (CBD) (1992); the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989); and the United Nations Convention to Combat Desertification (CCD) (1994). Another major MEA is the United Nations Convention on the Law of the Sea (UNCLOS) (1982) which, although not primarily concerned with environmental issues, addresses pollution and protection of the marine environment.").

123. *See* Nowlan & Rolfe, *supra* note 115 at 16, *citing* Mostafa Tolba and Iwona Rummel-Bulska, *Negotiating the Environment*, (Boston: MIT Press) (1999) ("the memoirs of the longest serving Executive Secretary of UNEP, documenting this period of MEA development") (emphasis added).
124. *See* "International Environmental Governance: Multilateral Environmental Agreements (MEAs) - Status of Multilateral Environmental Agreements," UNEP/IGM/1/INF/3 *supra* note 115 at para. 90; *See also* LAWRENCE ZIRING, ROBERT E. RIGGS & JACK C. PLANO, THE UNITED NATIONS – INTERNATIONAL ORGANIZATION AND WORLD POLITICS (2000) at 57.
125. The International Convention for the Prevention of Pollution from Ships, 1973, *modified* by the Protocol of 1978 relating thereto (MARPOL 73/78), http://www.imo.org/Conventions/mainframe.asp?topic_id=255.
126. *See* WORLD IN TRANSITION: VOLUME 2 - NEW STRUCTURES FOR GLOBAL ENVIRONMENTAL POLICY, GERMAN ADVISORY COUNCIL ON GLOBAL CHANGE (Earthscan Publications Ltd.) (2000) Figure B 3.2-1 at 55, http://www.wbgu.de/wbgu_jg2000_engl.pdf; http://www.wbgu.de/Images/jg2000_en/fig_B3-2-1.pdf.
127. *See UNFF Fact Sheet*, United Nations Forum on Forests website http://www.un.org/esa/forests/about.html; *United Nations Forum on Forests Report of the Seventh Session* (Feb. 24, 2006 - April 27, 2007); Economic and Social Council Official Records, 2007, Supplement No. 22, E/CN.18/2007/8 at 4, http://daccessdds.un.org/doc/UNDOC/GEN/N07/349/31/PDF/N0734931.pdf?OpenElement .

(UNCLOS)."[128]

The cluster of marine environment-related agreements referred to above also consists of 11 legally binding regional seas conventions operating under the joint auspices of the U.N. General Secretariat and the UNEP.[129] Included among these is the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region and its accompanying Protocol Concerning Pollution from Land-Based Sources and Activities.[130] According to the United Nations, these "regional seas conventions and action plans, are a global mosaic of agreements with one over-arching objective: the protection and sustainable use of marine and coastal resources."[131] And, "because of their multisectoral nature" they are deemed "the most comprehensive of the framework conventions"[132] and to be "closely, and in some cases, systematically linked to *global* conventions and agreements" such as UNCLOS, whose implementation they tend to support.[133] "In fact, the regional seas programmes were developed as complimentary instruments to UNCLOS,"[134] to address primarily "the deteriorating conditions in the marine/coastal environment through the control of their *land-based* causes."[135]

128. *See* International Environmental Governance: Multilateral Environmental Agreements (MEAs), Status of Multilateral Environmental UNEP/IGM/1/INF/3 (April 6, 2001), *supra* note 115 at para. 11.
129. *See United Nations Environment Programme Regional Seas Programme* website http://www.unep.ch/regionalseas/legal/conlist.htm.
130. *See* Protocol Concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Treaty Doc. 110-1) (Annexes done at Oranjestad, Aruba, on October 6, 1999, and signed by the U.S. on that same date), http://www.cep.unep.org/pubs/legislation/lbsmp/final%20protocol/lbsmp_protocol_eng.html; *see also* Article 7, Pollution from Land-Based Sources - Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, http://www.cep.unep.org/pubs/legislation/cartxt.html; *see also* Protocol Concerning Pollution from Land-based Sources and Activities - Overview of the LBS Protocol http://www.cep.unep.org/cartagena-convention/plonearticlemultipage.2005-12-01.7401488329/plonearticle.2005-12-01.1115293440/view?portal_status_message=Your%20changes%20have%20been%20saved.
131. *See* "International Environmental Governance: Multilateral Environmental Agreements (MEAs), - Status of Multilateral Environmental Agreements," *supra* note 115 at para. 22.
132. *Id.* at para. 26.
133. *Id.* at para. 25, 27 (emphasis added).
134. *Id.* at para. 92; *See also* Action Plan for the Caribbean Environment Programme – UNEP Regional Seas Reports and Studies No. 26 at 3, http://marine-litter.gpa.unep.org/framework/region-8-next.htm#actionplan.
135. *See* OECD Development Assistance Committee (1996) Guidelines for Aid Agencies on

C. Relevant UNCLOS Environmental Provisions and Regulations May be Used to Facilitate Adoption of the Precautionary Principle as U.S. Law

Several key provisions within UNCLOS Part XII provide UNCLOS parties with the ammunition to legally challenge the perceived failure of U.S. environmental law to implement the hazard-based Precautionary Principle within the ocean zones over which the U.S. government exercises jurisdiction and control. These prescriptive provisions obligate all UNCLOS parties to prevent marine "pollution" generated by land-based, water-based and atmosphere-based sources. There are also other important provisions with UNCLOS Part V (Articles 61-67) and Part VII (Articles 117-120) which would empower foreign nations to challenge U.S. failure to fully implement the Precautionary Principle for purposes of adequately protecting migrating fish stocks and other living resources found within the U.S. EEZ and on the high seas.

Article 192 is the primary UNCLOS provision that sets forth the broad obligation and legal duty of care "to protect and preserve the marine environment" that is assumed by all national government UNCLOS parties.[136] Upon ratifying the UNCLOS, Article 194 would require the U.S. to take all measures necessary and within its means to prevent, reduce and control pollution and ensure against damage to the marine environment from any source or activity under its jurisdiction or control.[137] That duty and obligation is owed, as well, to other States and their environments and to the global public commons at large – i.e., the "Area."[138] In particular, Article 194(3) mandates that such measures "shall deal with all sources of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimize to the fullest possible extent: (a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by

Global and Regional Aspects of the Development and Protection of the Marine and Coastal Environment, Guidelines on Environment and Aid, No. 8, OECD, Paris at 3, 22, http://www.oecd.org/dataoecd/37/9/1887756.pdf; *See generally*, DAC Guidelines on Aid and Environment, Development Cooperation Directorate, Organization for Economic Cooperation and Development (OECD) http://www.oecd.org/document/26/0,3343,en_2649_33721_1887578_1_1_1_1,00.html (emphasis added).

136. *See* UNCLOS, *supra* note 51, art. 192 ("States have the obligation to protect and preserve the marine environment").
137. *See Id.* art. 194(1), (2).
138. *Id.* art. 194(2).

dumping."[139] Article 194(3)(b)-(d) obligates national governments to enact measures that also ensure against pollution from vessels, installations, seabed and seafloor exploration and exploitation devices, and from "installations and devices [otherwise] operating in the marine environment." This duty arguably relates to activities and operations conducted within the U.S. EEZ and the high seas. At least one commentator has characterized Article 194 as a "no-harm" rule.[140]

Article 207 imposes more specific obligations with respect to land-based pollution sources than the broader legal obligations contained in Article 194(1)-(3)(a). Article 207 requires coastal states to "adopt laws and regulations . . . and take other measures as may be necessary . . . to prevent reduce and control pollution of the marine environment from land-based . . . taking into account internationally agreed upon rules, standards and recommended practices and procedures."[141] This means that UNCLOS parties must make an effort "to. . . harmonize their policies . . . [and to design and] establish global and regional rules, standards and recommended practices and procedures" to prevent land-based sources of pollution originating in "rivers estuaries, pipelines and outfall structures from harming the marine environment.[142] To this end, such laws, standards and practices should, "to the fullest extent possible . . . minimize . . . the release of toxic, harmful or noxious substances [chemicals], especially those which are persistent, into the marine environment."[143] In other words, Article 207 mandates and facilitates regional and international oceans governance.

For purposes of these provisions, the Montreal Guidelines broadly defined the term 'land-based sources' as,

> Municipal, industrial or agricultural sources, both fixed and mobile, on land, discharges from which reach the *marine environment*, in particular: a. From the coast, including from outfalls discharging directly into the marine environment and through run-off; b. *Through*

139. *Id.* art. 194(3)(a).
140. *See* RODA VERHEYEN, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION DUTIES AND STATE RESPONSIBILITY, (2005) at 193, *available at* http://books.google.com/books?id=iTDfdM0jpfUC&pg=PA193&lpg=PA193&dq=unclos+article+235+state+responsibility&source=web&ots=3-8YAfzQ5h&sig=t2iXVaJwCSV0joXodhrBfv9eBec.
141. *See* UNCLOS, *supra* note 51, art. 207(1)-(2).
142. *Id.* art. 207(3).
143. *Id.* (referencing impliedly other U.N. environmental treaties that the president has quietly submitted to the U.S. Senate Foreign Relations Committee for ratification, namely, the U.N. Stockholm Convention on Persistent Organic Pollutants – POPS and the UN Convention on Biological Diversity).

> *rivers, canals of other watercourses, including underground watercourses*; and c. *Via the atmosphere*: (ii) Sources of marine pollution from activities conducted on *offshore fixed or mobile facilities within the limits of national jurisdiction.*[144]

These guidelines also broadly defined the term "marine environment" as, "the maritime area extending, in the case of watercourses, up to the freshwater limit and including inter-tidal zones and salt-water marshes," and the term "freshwater limit" as, "the place in watercourses where, at low tide and in a period of low freshwater flow, there is an appreciable increase in salinity due to the presence of sea water."[145]

> Areas of concern (what areas are affected or vulnerable): (not listed in order of priority) (i) Critical habitats, including coral reefs, wetlands, sea grass beds, coastal lagoons and mangrove forests; (ii) Habitats of endangered species; (iii) Ecosystem components, including spawning areas, nursery areas, feeding grounds and adult areas; (iv) Shorelines; (v) Coastal watersheds; (vi) Estuaries and their drainage basins; (vii) Specially protected marine and coastal areas; and (viii) Small islands.[146]

The Washington Declaration on Protection of the Marine Environment from Land-Based Activities and the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities thereafter identified the types of substances from land-based sources that have "land-based impacts upon the marine pollution." They include "specifically [impacts] resulting from sewage, persistent organic pollutants, radioactive substances, heavy metals, oils (hydrocarbons), nutrients, sediment mobilization, litter, and physical alteration and destruction of habitat"[147] Both the Montreal Guidelines and the Global Programme of Action effectively demonstrate that the UNCLOS potentially reaches deeply into U.S. domestic watershed areas.

Article 212, likewise, imposes more specific obligations with respect to *atmosphere-based* sources of pollution than the broader legal duty of Article 194(1)-(3)(a). "States shall adopt laws and regulations . . . [and take whatever] . . . other measures [are] necessary to prevent, reduce and control . . . pollution of the

144. *See* Montreal Guidelines for the Protection of the Marine Environment Against Pollution from Land-Based Sources, *supra* note 96, at "Definitions – 1(c)," at 3 (emphasis added).
145. *Id.* at 1(d).
146. *See* The Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities, *supra* note 65 at 14.
147. *See* Washington Declaration on Protection of the Marine Environment from Land-Based Activities, *supra* note 102 at p. 1; The Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities, United Nations Environment Program, *supra* note 65 at 11, 14.

marine environment from or through the atmosphere."[148] And, as in Article 207, states must, "in fulfilling these obligations . . . tak[e] into account internationally agreed rules, standards . . . practices . . . and the safety of air navigation"[149] while endeavoring to "establish global and regional rules and recommended practices to prevent, reduce and control such pollution."[150] The "atmosphere" in question is that "applicable to the air space under [a state's] sovereignty and to vessels flying [the state] flag or vessels or aircraft of the state registry."[151] Given Article 1(4)'s definition of "marine pollution" as consisting of "the introduction by man of 'energy' into the marine environment," one may reasonably conclude that Article 212 mandates national government regulation of carbon dioxide and other greenhouse gas emissions from land-based[152] as well as sea-based sources within U.S. sovereign territory or control. This appears, at the very least, to offer European nations and American Europhiles a viable back-door channel to secure UNCLOS party compliance with the U.N. Kyoto Protocol.[153] It also confirms how Article 212 mandates and facilitates regional and international atmosphere and oceans governance.

In addition, there are the mandatory enforcement provisions of UNCLOS Articles 213 and 222.[154] UNCLOS parties may reference them in a dispute settlement action brought against another UNCLOS party that has failed to ensure that its citizens have complied with national pollution laws designed to protect the marine environment, consistent with Articles 207 and 212. Such actions are likely to proceed where such failure has already caused or is likely to cause harm to the

148. *See* UNCLOS, *supra* note 51, art. 212(1)-(2) (emphasis added).
149. *Id.* art. 212(1).
150. *Id.* art. 212(3).
151. *Id.* art. 212(1).
152. Larry Parker & John Blodgett, Air Quality: Multi-Pollutant Legislation in the 110th Congress, CRS Report for Congress (May 25, 2007) at 2, http://www.ncseonline.org/NLE/CRSreports/07Jun/RL34018.pdf ("In the 110th Congress, three bills have been introduced that would impose multi-pollutant controls on utilities. They are all four-pollutant proposals that include carbon dioxide.").
153. *See* Burns, *supra* note 48; *see also* "IMO Policies and Practices Related to the Reduction of Greenhouse Gas Emission From Ships," Resolution A.963(23) (Dec. 5, 2003) at Preamble, 1-3 para. 2-3, http://www.sof.or.jp/proj/pdf/Res963.pdf; *Air Pollution Rules to Enter into Force in 2005*, International Maritime Organization Press Release (May 2005) http://www.imo.org/Newsroom/mainframe.asp?topic_id=848&doc_id=3620.
154. *See* UNCLOS, *supra* note 51, art. Article 213 (*Enforcement with respect to pollution from land-based sources); Id.* art. 222 (*Enforcement with respect to pollution from or through the atmosphere).*

marine environment. Article 213 provides that, "States *shall* enforce their laws and regulations adopted in accordance with article 207, dealing with prevention, reduction and control of *land-based* sources of marine pollution" (emphasis added). It requires States to "adopt laws and regulations and take other measures necessary to implement applicable international rules and standards" that ensure such compliance.[155] Article 222 is the corresponding enforcement provision relating to atmosphere-based sources of marine pollution, including carbon dioxide, within a nation's sovereign jurisdiction and control. According to its mandatory provisions, "States *shall* enforce, within the air space under their sovereignty or with regard to vessels flying their flag or vessels or aircraft of their registry, their laws and regulations adopted in accordance with Article 212(1) and with other provisions of this Convention."[156] States "*shall* [also promulgate such] laws and regulations and take [whatever measures are otherwise] necessary to implement applicable international rules and standards . . . to prevent, reduce and control pollution of the maritime environment from or through the atmosphere, consistent with . . . all relevant international rules and standards concerning the safety of air navigation."[157]

Last, but not least, there is Article 235, which can be utilized by an UNCLOS party to impose international legal liability against another UNCLOS party pursuant to the international law doctrine of State Responsibility.[158] This provision thus effectively catapults evidence of alleged violations of Articles 192, 194, 207, 212, 213[159] and 222 to a 'higher level' if land or atmosphere-based sources of pollution result or are likely to result or have resulted in damage to the marine environment. "Article 235 UNCLOS stresses that State Responsibility is triggered if States do not fulfill their environmental duties under UNCLOS. This is mirrored by [A]rticle 35 of the Straddling Stocks Agreement."[160] Article 235 also calls

155. *See Id.* art. 213.
156. *See Id.* art. 222 (emphasis added).
157. *Id.* (emphasis added).
158. *See, e.g.*, Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 798 (2002) 798-799, http://www.asil.org/ajil/ilcsymp3.pdf.
159. *The Mox Plant Case* discussed, *infra*, Part II.E. (Ireland relied on these same articles in support of its argument that the United Kingdom had violated its obligations to protect the marine environment of the Irish Sea).
160. *See* Verheyen, *supra* note 140 at 194 ("The Straddling Stocks Agreement could provide additional primary rules obliging States to prevent or minimize climate change damage").

upon UNCLOS parties to work cooperatively to expand and enforce the law of state responsibility for marine pollution within the UNCLOS regime.[161]

Another prime source of UNCLOS environmental law derives from the growing number of International Seabed Authority (ISBA) environmental regulations that implement UNCLOS Articles 136-139, 145 and 147. UNCLOS Part XI, which was allegedly amended by the 1994 Agreement, establishes the guidelines for the ISBA's structure and operations.[162] UNCLOS Article 136 sets forth the central principle establishing the ISBA's jurisdiction over 'the Area' and its living and nonliving resources. It provides that, "[t]he Area and its resources are the *common heritage of mankind.*"[163] Article 137 describes the 'legal status' of "the 'Area' or its resources" (the global commons) - as not being susceptible to "claim or exercise of sovereignty or sovereign rights. . . or appropriation" [by] any State or natural or juridical person."[164] Rather, "[a]ll rights in the resources of the Area are vested in mankind as a whole, *on whose behalf the Authority shall act. These resources are not subject to alienation*" (emphasis added),[165] (i.e., they are *not* reducible to private property). Article 140 reinforces this notion: "Activities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole."[166] "The Authority shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism, on a non-discriminatory basis."[167] Were the analysis to end here it would likely indicate that CHM doctrine is concerned solely with the exploitation, extraction and use of minerals and other natural resources gathered from the Area. Indeed, the congressional testimonies of one government official[168]

161. UNCLOS, *supra* note 51, art. 235(2)-(3).
162. *See* Senate Executive Report 110-9, CONVENTION ON THE LAW OF THE SEA, Report Together With Minority Views of Committee on Foreign Relations [To accompany Treaty Doc. 103–39] (Dec. 19, 2007), at 24-25 http://www.fas.org/irp/congress/2007_rpt/lots.pdf; *See* 1994 Implementing Agreement website http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.
163. *See* UNCLOS, *supra* note 51, art. 136 (emphasis added).
164. *See Id.* art. 137(1).
165. *Id.* art. 137(2).
166. *Id.* art. 140(1).
167. *Id.* art. 140(2).
168. *See* JOHN D. NEGROPONTE, DEPUTY SECRETARY U.S. DEPARTMENT OF STATE, *Accession to the 1982 Law of the Sea Convention and the Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention, Before the Senate Foreign Relations Committee,* Sept. 27, 2007, [Senate Treaty Document 103-39] at 15, http://www.senate.gov/~foreign/testimony/2007/NegroponteTestimony070927.pdf.

and one legal scholar[169] both indicate that the regulatory functions of the Seabed Authority are limited to mining activities. However, the law and the facts say otherwise.

Article 145 imposes upon UNCLOS parties the obligation to take all "necessary measures to ensure effective protection for the marine environment from harmful effects which may arise from . . . activities [undertaken] in the Area."[170] It then mandates the International Seabed Authority to "adopt appropriate rules, regulations and procedures for *inter alia*: (a) the prevention, reduction and control of pollution and other hazards to the marine environment, including [from] the coastline, and of interference with the ecological balance of the marine environment."[171] Article 145 also specifies that such rules, regulations and procedures must 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."[172] These provisions more than suggest that the potential reach of the ISBA extends beyond the management of deep seabed mining activities, to encompass also the environmental stewardship of *all* activities conducted by U.S. nationals, both within the Area, U.S. EEZs, *and* sovereign U.S. territory, that could potentially affect the Area's marine environment and living and nonliving resources.[173] And, the ISBA is empowered to achieve this by means of both regulation and fee assessments.[174]

The environmental community well recognizes the expansive scope of the ISBA's organizational mandate. The World Conservation Union, for example, has declared that, "the ISA's mandate regarding the resources of the deep seabed extends well beyond mineral exploitation, and the Authority is being encouraged to more fully exercise its powers and responsibilities with regard to living resources

169. *See* BERNARD OXMAN, PROFESSOR OF LAW, UNIVERSITY OF MIAMI SCHOOL OF LAW, *Testimony at the Senate Hearings Before the Committee on Environment and Public Works,* 108th Congress, 2nd Sess., S.Hrg. 108-498 (March 23, 2004) at 164-165.
170. *See* UNCLOS, *supra* note 51, art. 145, Preamble.
171. *Id.* art. 145(a).
172. *Id.* art. 145(b).
173. *See* Report of the Secretary-General of the International Seabed Authority under article 166, paragraph 4, of the United Nations Convention on the Law of the Sea, ISBA/7/A/2 (May 18, 2001) at 3, http://www.isa.org.jm/files/documents/EN/7Sess/Ass/ISBA_7A_2.pdf.
174. *See ISA Council Begins Substantive Work on Draft Regulations On Sulphides*, International Seabed Authority Press Release SB/13/5 (July 10, 2007) at: http://www.isa.org.jm/files/documents/EN/Press/Press2007/SB-13-5.pdf.

of the seabed and to ensure that marine ecosystems are properly protected."[175]

The ISBA's role as regulatory steward of the marine environment in and around the 'Area' has also been confirmed by the Authority's Secretary-General and the U.N. General Assembly. According to the former, "[w]hilst the Authority's role is primarily concerned with prospecting, exploration and exploitation of mineral resources, it also has a broader role concerning the protection and preservation of the marine environment (including its biodiversity)" against contractor activities.[176] And, the latter, in U.N. General Assembly Resolution 58/240,[177] noted "the importance of the ongoing elaboration by . . . ('the Authority'), pursuant to article 145 of the Convention, of rules, regulations and procedures to ensure the effective protection of the marine environment, the protection and conservation of the natural resources of the Area and the prevention of damage to its flora and fauna from harmful effects that may arise from activities in the Area."[178]

The ISBA Secretary-General has also clearly linked this stewardship function with the Authority's need to employ the Precautionary Principle, as noted by one of the members of the ISBA Legal and Technical Commission:

> Since its establishment in 1994, the Authority has kept environmental protection as one of it highest priorities, as evidenced by the comprehensive regime for monitoring and protecting the marine environment in the Area . . . by the adoption of the environmental guidelines by the Legal and Technical Commission of the Authority. *We must remember that nowadays, more than in 1982, the development of the international environmental law leads to the application of a precautionary approach to ocean management.*[179]

175. *See* IUCN (2004) TEN-YEAR HIGH SEAS MARINE PROTECTED AREA STRATEGY: A Ten-year Strategy to Promote the Development of a Global Representative System of High Seas Marine Protected Area Networks, Executive Summary (Sept. 2003) at 13, Toolbox 1, http://www.iucn.org/THEMES/MARINE/pdf/10-Year_HSMPA_Strategy_SummaryVersion.pdf.
176. *See* Nandan, *supra* note 93, (citing Regulation 31(3): Benthic refers to the bottom of an ocean, estuary or lake); *See Benthic Flux*, Toxic Substances Hydrology Program U.S. Geological Survey http://toxics.U.S.gs.gov/definitions/benthic_flux.html; *See* Answer.com http://www.answers.com/topic/benthos, (Defining Benthos as "The Collection of organisms on or in sea or lake bottoms" and as "The bottom of a sea or lake").
177. *See* G. A. Res. 58/240 *Oceans and the law of the sea*, A/RES/58/240 (March 5, 2004), http://www.intfish.net/docs/2004/un/res58-240.pdf.
178. *Id.* at Preamble para. 1-3; *Id.* at Part IV, para. 14.
179. *See* Frida M. Armas Pfirter, *The Management of Seabed Living Resources in the "the Area" under UNCLOS*, 11 REVISTA ELECTRONICA DE ESTUDIOS INTERNACIONALES (2006) 25 and accompanying fns 105-106, *available at* http://www.reei.org/reei%2011/F.Armas(reei11).pdf (emphasis added) (Frida M. Armas Pfirter is a Member of the Legal and Technical Commission of the International Seabed

The U.N. General Assembly apparently agreed. In paragraph 52 of Resolution 58/240, the General Assembly appealed to

> the relevant global and regional bodies, in accordance with their mandates, to investigate urgently how to better address, on a scientific basis, including the application of precaution, the threats and risks to vulnerable and threatened marine ecosystems and biodiversity in areas beyond national jurisdiction [and] how existing treaties and other relevant instruments [e.g., Chapter 17 of Agenda 21]. . . can be used in this process consistent with international law, in particular with [UNCLOS]and with the principles of an integrated ecosystem-based approach.[180]

The ISBA, supported by its Legal and Technical Commission,[181] has been rather active since 1997.[182] They have already completed final environmental regulations and guidelines governing the activities relating to polymetallic nodules[183] and only recently submitted to the ISBA Assembly for consideration draft regulations and guidelines they have worked on to encompass polymetallic ferromanganese sulfides[184] and cobalt-rich crusts.[185]

At least one specialist from the ISBA's Office of Legal Affairs, in addition to the ISBA Secretary-General himself, has detailed how the obligation of the ISBA

Authority).

180. *See* G. A. Res. A/RES/58/240, Oceans and the Law of the Sea, at Preamble, par. 3, Part X, par. 52 (emphasis added).
181. *See* International Seabed Authority, Legal Technical Commission, at 2 par. 2, http://www.isa.org.jm/en/about/members/legal ("Recommendations from the Workshop to Develop Guidelines for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area).
182. *See* Report of the Secretary-General of the International Seabed Authority under article 166, par. 4, of the United Nations Convention on the Law of the Sea", at p. 4, citing ISBA/4/C/4/Rev.1; *see also* Michael W. Lodge, *The International Seabed Authority's Regulations in Prospecting and Exploration for Polymetallic Nodules in the Area*, THE JOURNAL, VOL. 10, ABSTRACT 2 (Dec. 18, 2001) at 12, http://www.dundee.ac.uk/cepmlp/journal/html/vol10/article10-2.pdf.
183. *See* Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, International Seabed Authority Assembly ISBA/6/A/18 (July 20, 2000), http://www.isa.org.jm/files/documents/EN/6Sess/Ass/ISBA-6A-18.pdf.
184. *See* Draft Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, International Seabed Council ISBA/13/C/WP.1 (March 29, 2007), http://www.isa.org.jm/files/documents/EN/13Sess/Cncl/ISBA-13C-WP1.pdf.
185. *See* Draft Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, International Seabed Authority Legal and Technical Commission ISBA/13/LTC/WP.1 (May 9, 2007), http://www.isa.org.jm/files/documents/EN/13Sess/LTC/ISBA-13LTC-WP1.pdf; *see* Informal Note on Matters before the 14th Session of the Int'l Seabed Authority (May 26 - June 6, 2008), http://www.isa.org.jm/en/sessions/2008.

to protect the marine environment goes beyond mere prevention. According to this specialist, UNCLOS imposes a two-part duty of care upon the ISBA, any contractors operating in the "Area," and even coastal state governments. Not only must these actors take preventive steps against known or knowable harms to the marine environment, but they must also exercise precaution in advance to ensure that activities in or around the "Area" or otherwise directly or indirectly affecting the "Area" do not pose any unknown or uncertain potential future hazards to the marine environment. In other words, the ISBA is obliged, as a matter of international environmental law, to employ precaution.[186]

Given this mandate, it is therefore not surprising, as the ISBA Secretary-General notes, that the recently crafted final environmental regulations and both sets of draft environmental regulations "are [also] based on a precautionary approach as contained in Principle 15 of the Rio Declaration."[187] This presumably means that it contains an economic cost-benefit analysis (balancing) requirement within it – i.e., whatever measures are finally settled upon to prevent the harm from occurring in the first place must be "cost-effective" and proportionate to the potential harm being prevented.

The facts reveal, however, that although each of these sets of regulations currently contain Precautionary Approach language,[188] within a section of Part V entitled, 'Protection and Preservation of the Marine Environment,' there had previously been marked differences of opinion (amounting to a dispute) between the European and American delegations over its actual legal meaning.[189] These delegations did manage to agree that this section of the regulations generally should parallel the requirements of UNCLOS Article 145.[190]

186. *See* Lodge, *supra* note 182, at 21, citing UNCLOS Article 165(2)(e),(f), (h); Annex III, Article 17(1)(b)(vii), Article 17(2)(f).
187. *See* Nandan, *supra* note 93 at 1; *See also* Report of the U.N. Conference on Environmental and Development, A/CONF.151/26 (Vol. I) (June 3-14, 1992) http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm (emphasis added).
188. Regulation 31 of ISBA/6/A/18, Regulation 33 of ISBA/13/C/WP.1, ISBA/13/LTC/WP.1 (containing this language).
189. *See* discussion *infra*.
190. *See* Outstanding Issues With Respect to the Draft Regulations on Prospecting and Exploration for Polymetallic Nodules In the Area (ISBA/5/C/4/REV.1) – Note by the Secretariat, Doc. No. ISBA/6/C/INF.1 (Dec. 30, 1999), *in* INTERNATIONAL ORGANIZATIONS AND THE LAW OF THE SEA – DOCUMENTARY YEARBOOK 2000, (Barbara Kwiatkowska & The Netherlands Institute for the Law of the Sea Eds.) Vol. 16 (2000) at

The cause of that dispute can be traced to an August 1999 Netherlands proposal to add a formal definition of the Precautionary Principle anchored in Principle 15 of the Rio Declaration to the then current draft's Regulation 1 "Definitions" section. The Netherlands proposal also sought to add Precaution language to the Regulation section covering the Protection and Preservation of the Marine Environment, for the purpose of amending it "to provide for the application of the precautionary principle in the conduct of activities in the Area."[191]

According to the minutes from the Seabed Council's fifth session meeting, which the Seabed Authority subsequently publicized in a March 2000 press release[192] despite the reference to "cost-effective" preventive measures, some members of the American delegation were uncomfortable with introducing the Precautionary Principle into the ISBA's regulations at all, where it had not been explicitly incorporated within the UNCLOS and "could be interpreted in many ways."[193] Similarly, they were concerned that the phrase "reasonable grounds for concern" also "could be very broadly interpreted and could place stumbling blocks in the way of investors."[194] Nevertheless, the press release noted how "most speakers supported the Netherlands proposal," and how some had recognized that "the [P]recautionary [P]rinciple . . . had become a full-fledged principle of international law. . . that knowledge about the environment and how to protect it had advanced significantly since the signing of the Convention nearly two decades

401, 403, http://books.google.com/books?id=lzBIfgyCmxEC&pg=PA404&lpg=PA404&dq=%22isba+5+c+l+8%22+netherlands&source=web&ots=Q_PVOQMeWa&sig=vbVFOrvAo_5fjVuQOAz-wlhpHUA.

191. *Id.* at 404, para. 15.

192. Press Release, "Seabed Council Takes Up Environmental Part of Mining Code," ISBA SEA/1660 (March 22, 2000), http://www.un.org/news/Press/docs/2000/20000322.sea1660.doc.html ("The main clause of the proposal read as follows: "In the conduct of activities in the Area, *the precautionary principle shall be applied to protect and preserve the marine environment*, by virtue of which cost-effective preventive measures are to be taken *when there are reasonable grounds for concern* that these activities may cause serious harm to the marine environment, even where there is lack of full scientific certainty")(emphasis added).

193. *Id.*

194. *Id.* ("Most of today's debate centered on a proposal by the Netherlands concerning precautionary measures to be taken to prevent environmental degradation. The proposal (ISBA/5/C/L.8), resulting from informal consultations last August, is based on principle 15 of the Rio Declaration on Environment and Development, adopted in Rio de Janeiro in 1992 by the United Nations Conference on Environment and Development . . . Divergent positions were expressed today on whether to incorporate the Netherlands text").

ago. . . that the Agreement which had come into effect only in 1994 did not reflect any lessening of concern about protection of the marine environment . . . [and] that *while the Convention might not contain the exact words '[P]recautionary [P]rinciple,' they were implied in its spirit.*"[195]

In the end, the Europeans were successful in having secured the Precautionary Approach language within both the final and draft ISBA regulations. The Council had apparently reasoned that although the principle was not explicitly contained in the UNCLOS text "it was implied in its spirit."[196]

At least one legal commentator has argued that, although the language of the polymetallic nodules regulation, on its face, could not legitimately be read as incorporating the more stringent *hazard*-based form of the Precautionary Principle, the resulting confusion over which meaning was actually intended, as evidenced by the lack of an explicit standard on the burden of proof, was likely to hamstring the mining industry in the future.[197] After all, deep sea mining, whether of polymetallic nodules or of crusts and sulfides, engenders similar "general risks at the exploitation stage . . . to a variety of organisms – including zooplankton, fishes and deep diving mammals," in addition to, the "inherent risks to the extant ecosystems at the crust and sulfide mining sites."[198]

Furthermore, the Europeans had successfully managed to add new language to the Emergency Orders (Provisional Measures) section within these crust and sulfides Regulations. The reader should note that the phrase "to prevent, contain and minimize the threat of serious or irreversible damage to the marine environment" within Regulation 35 of these draft regulations[199] is different from the terminology used in Regulation 32(2) of the final regulation covering polymetallic nodules – "to prevent, contain and minimize serious harm to the marine environment." It would appear that if such a change becomes permanent, UNCLOS parties and the ISBA will have succeeded in reducing the legal and scientific thresholds that must be reached before precautionary action can be taken

195. *Id.*
196. *Id.*
197. *See* Jason C. Nelson, *The Contemporary Seabed Mining Regime: A Critical Analysis of the Mining Regulations Promulgated by the International Seabed Authority*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 27, 45 (2005).
198. *Id.* at 70.
199. *See* ISBA Draft Regulation 35 - Draft Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area; *See also* ISBA Draft Article 35 - Draft Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area.

in and around the Area. In other words, rather than having to show the existence of actual, probable or likely serious harm, a claimant seeking precautionary action need only show *a threat* of serious or irreversible damage to threat of serious or irreversible damage, to the marine environment. The outcome of this debate is even less certain now than it was previously, considering the real possibility that a future U.S. government is more likely to work *with* rather than against the Europeans.

According to the Chief of the ISBA's Office of Legal Affairs, the incorporation of precautionary language into Part V 'Protection and Preservation of the Marine Environment' of each such ISBA regulation is significant because it represents the broadening scope of ISBA regulatory authority:

> [a]lthough the Regulations do not go as far as some delegations would have liked, it is suggested that what is contained in Part V of the Regulations is in fact a very significant advance upon Article 145 of the Convention and *provides a firm basis for the elaboration of a comprehensive code of environmental regulation.*[200]

This thinking was again evidenced in a recent May 2007 report prepared by the ISBA Secretary-General. It expressly referred to the Precautionary Principle in discussing how the ISBA "should go about managing nodule mining and the design of 'marine protected areas.'"[201] It was thereafter reported, during July 2007, that the Australian delegation to the continuing negotiations over ISBA draft regulations for polymetallic sulfides submitted a proposal to add the Precautionary Principle to but yet another regulatory provision:

> With regard to regulation 2, relating to prospecting, Australia proposed a sentence to be added to paragraph 2, which would now read: "Prospecting shall not be undertaken if substantial evidence indicates the risk of serious harm to the marine environment. In any event, prospectors and the Authority *shall apply a precautionary approach, as reflected in principle 15 of the Rio Declaration.*"[202]

In May 2008, the ISBA's Legal and Technical Commission reexamined the

200. *See* Lodge, *supra* note 182 at 22 (emphasis added).
201. Report of the Secretary-General of the International Seabed Authority under article 166, par. 4, of the United Nations Convention on the Law of the Sea, ISBA/13/A/2 (May 29, 2007) at par. 74 (This report provides an account of the Authority's work "over the past 12 months . . . a review of the 2005-2007 programme of work and a presentation of the proposed programme of work for 2008-2010).
202. *See* Seabed Council Takes Note of Legal and Technical Commission Report; Continues Discussion on Draft Regulation, International Seabed Authority Press Release SB/13/8 13th Session (July 11, 2007), http://www.isa.org.jm/files/documents/EN/Press/Press2007/SB-13-8.pdf (emphasis added).

scope of the ISBA's mandate and its ability to manage the marine environment in and around the Area incident to deep sea mining.[203] The Commission concluded that, while "[t]he threats [to biological resources] are numerous . . . as far as the Authority is concerned . . . its mandate is limited to the management of potential impacts as a result of mining."[204] Yet, according to the Commission, this *self-imposed* limitation on the exercise of the Authority's regulatory powers, at least for the time being (i.e., until the time the Authority's environmental regulations, as adopted and enforced, are challenged), would not preclude it from regulating mining activities in the Area pursuant to the *hazard*-based Precautionary Principle and the foundations of ecosystem-based management.[205] Nor would this limitation discourage the ISBA from formally calling upon coastal State governments, intergovernmental organizations (e.g., UNEP) and multilateral environmental treaty secretariats, in their respective capacities, to work harder in implementing the Johannesburg plan for the purpose of protecting the global commons. Thus, the ISBA can and will continue to encourage coastal States to cooperate in finding better ways to manage risks to marine biological diversity, namely by employing

203. *See Considerations relating to an economic assessment of the marine environment in the Area and the use of area-based management tools to conserve biodiversity*, Note by the Legal and Technical Commission of the International Seabed Authority Secretariat, ISBA/14/LTC/5 (May 12, 2008) at pars. 3-4, http://www.isa.org.jm/files/documents/EN/14Sess/LTC/ISBA-14LTC-5.pdf.

204. *Id.* para. 4.

205. See *Proceedings of Pew Workshop on Design of Marine Protected Areas for Seamounts and the Abyssal Nodule Province in Pacific High Seas* (Oct. 23-26, 2007) http://www.soest.hawaii.edu/oceanography/faculty/csmith/MPA_webpage/documents/Proceedings_PEW_Workshop_MPAs_October_2007.pdf; *see also* Craig R. Smith, Steven Gaines, Alan Friedlander, Charles Morgan, Andreas Thurnherr, Sarah Mincks, Les Watling, Alex Rogers, Malcolm Clark, Amy Baco-Taylor, Angelo Bernardino, Fabio De Leo, Pierre Dutrieux, Alison Rieser, Jack Kittinger, Jacqueline Padilla-Gamino, Rebecca Prescott and Pavica Srsen, *Preservation Reference Areas for Nodule Mining in the Clarion-Clipperton Zone: Rationale and Recommendations to the International Seabed Authority*, expert participants in the Workshop to Design Marine Protected Areas for Seamounts and the Abyssal Nodule Province in Pacific High Seas, (Oct 23-26, 2007) http://www.soest.hawaii.edu/oceanography/faculty/csmith/MPA_webpage/documents/Smith%20et%20al.%20-%20Recommendations%20to%20the%20ISA%20for%20design%20of%20PRAs%20in%20the%20CCZ%20-%202-2008.pdf; *see also Rationale and recommendations for the establishment of preservation reference areas for nodule mining in the Clarion-Clipperton Zone - Summary outcomes of a workshop to design marine protected areas for seamounts and the abyssal nodule province in Pacific high seas*, International Seabed Authority Legal and Technical Commission, ISBA/14/LTC/2 (March 28, 2008) at: http://www.isa.org.jm/files/documents/EN/14Sess/LTC/ISBA-14LTC-2.pdf.

the Precautionary Principle both within and beyond areas of national jurisdiction, consistent with the UNCLOS and general international environmental law.[206]

In effect, the ISBA has clearly signaled that the UNCLOS framework can be used by certain coastal states, or even the ISBA itself, to compel the U.S. government to subject all U.S. economic activities (i.e., including those undertaken at locations within U.S. jurisdiction and control) that may potentially impact the marine environment to Precautionary Principle-based environmental regulations. Judging from the juxtaposition of paragraphs 11 and 12 contained within this May 2008 ISBA Legal and Technical Commission note, the coastal state governments most likely to try this are those based in Europe.[207]

D. Non-UNCLOS Substantive Environmental Law May Be Used to Facilitate Adoption of Europe's Precautionary Principle as U.S. Law

As a matter of substantive law, UNCLOS Article 293 provides that "a court or tribunal having jurisdiction" under Part XV, Section 2 (compulsory, binding decisions) "shall apply this Convention *and other rules of international law not incompatible with this Convention.*" According to one European legal commentator, this understanding comports with the Vienna Convention on the Law of Treaties,[208] and takes into account the potential applicability of other relevant treaties as well as customary international law in interpreting the provisions of the UNCLOS and such other treaties.[209] As a second commentator has pointed out, the UNCLOS articles "addressing the protection and preservation of the marine environment . . . incorporate by reference 'generally accepted international rules and standards,' thereby increasing the sources of law that may be applicable to a dispute." [210]

206. *See* ISBA/14/LTC/5 (May 12, 2008) *supra* note 224 para. 12.
207. *Id.* para. 11.
208. *See* Vienna Convention on the Law of Treaties (1969), United Nations, Treaty Series, vol. 1155, p. 331, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.
209. See ALAN BOYLE, Some Problems of Compulsory Jurisdiction Before Specialized Tribunals: The Law of the Sea, 242-253, at 252, in ASSERTING JURISDICTION: INTERNATIONAL AND EUROPEAN LEGAL PERSPECTIVES (Patrick Capps, Malcolm Evans & Stratos Konstad Dinidis Eds.)(2003), *available at* http://books.google.com/books?id=bb0VULJ8g5MC&dq=unclos+tribunals+jurisdiction.
210. *See* NATALIE KLEIN, DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA(2005), at 58, *available at* http://books.google.com/books?id=jdz6KSyyXJkC&dq=Various+articles+of+UNCLOS,+particularly+those+addressing+the+protection+and+preservation+of+the+marine+environme

In other words, since the UNCLOS provisions for the protection and preservation of the marine environment and its living resources set forth general rules and obligations that "are best viewed only as sources of guidance and interpretation rather than as standard-setting principles,"[211] an International Tribunal for the Law of the Sea (ITLOS) panel would likely need to reference more specific and substantive non-UNCLOS sources of law to discern how the UNCLOS framework and guidance rules apply in a given circumstance.[212] Substantive non-UNCLOS sources of law include, for this purpose, both domestic laws as well as internationally agreed upon standards, rules and principles either incorporated within other relevant international treaties or reflected in customary international law.[213]

Therefore, "[a]ny dispute based on these substantive provisions of the Convention would necessarily have to rely on sources extraneous to the Convention in order to assess whether a treaty violation had occurred."[214] As previously discussed, Europe's Precautionary Principle cloaked in Precautionary Approach treaty language is incorporated within a number of international environmental agreements. It arguably constitutes such an extraneous source of law that an UNCLOS tribunal or arbitral body would need to consider when interpreting the relevant UNCLOS Part XII or Part VII provisions in the event of a dispute among treaty parties. But, what if the U.S. is not a party to those other treaties at the time of a dispute? Would an UNCLOS tribunal or arbitral body, in that case, need to consider whether the Precautionary Approach is a rule of customary international law for such purposes?

One European commentator has opined that an ITLOS tribunal and an arbitral panel possessing subject matter jurisdiction would be empowered to and, in fact, must take into account the law of the CITES, the CBD and any other relevant treaties and protocols, as well as any germane customary international law (e.g., reflecting the Precautionary Principle) when interpreting the general UNCLOS

nt,+incorporate+by+reference+%E2%80%98generally+accepted+international+rules+and+standards%E2%80%99&source=gbs_summary_s&cad=0.

211. *Id.* at 149, citing Moira L. McConnell and Edgar Gold, *The Modern Law of the Sea: Framework for the Protection and Preservation of the Marine Environment?* 23 CASE W. RES. J. INT'L L. 83, 88 AND 98 (1991).

212. *Id.*

213. *Id.*

214. *Id.*

land-based and atmosphere-based pollution provisions cited in a dispute.[215] Such logic would also require consideration of the provisions of the Migratory Fish Stocks Agreement Implementing the UNCLOS, including its Article 6 – "Application of the Precautionary Approach"—when interpreting the general UNCLOS living resources provisions.[216] Indeed, UNCLOS Article 288(2) vests any tribunal selected in Article 287 with the procedural jurisdiction to interpret and apply provisions from other treaties "related to the purposes of this Convention."[217]

The U.S. has long been a party to the CITES,[218] but is not a party to its 1983 amendment.[219] The U.S. is a signatory to the CBD, but has not yet ratified it.[220] Both the CITES amendment and the CBD, along with other MEAs noted above,

215. *See* Boyle, *supra* note 209, at 252-253.
216. *See* Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks *in* Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 26 October 2007, http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm.
217. *See* UNCLOS, *supra* note 51, art. 288.
218. *See* "Member Countries - List of Parties," Convention on International Trade in Endangered Species of Wild Fauna and Flora, UNEP website, http://www.cites.org/eng/disc/parties/alphabet.shtml, (Showing The United States ratification of CITES on January 14, 1974); *See* Conf. 9.24 (Rev. CoP14) Criteria for Amendment of Appendices I and II http://www.cites.org/eng/res/09/09-24R14.shtml#FN0; http://www.cites.org/eng/res/all/09/E09-24R14.pdf (CITES regulates the protection of over 30,000 plant and animal species depending on their biological status and the impact that international trade may have upon them. The EU has argued that the CITES arguably incorporates a later (nonbinding) resolution requiring application of the Precautionary Principle); Discussion Document on Precautionary Measures in CITES Resolution Conf. 9.24, Convention on International Trade in Endangered Species of Wild Fauna and Flora, http://www.cites.org/eng/prog/criteria/1st_meeting/precautionary.shtml, *discussed in* Lawrence A. Kogan, *The Precautionary Principle and WTO Law: Divergent Views Toward the Role of Science in Assessing and Managing Risk*, *supra* note 44, at 94-95 and accompanying endnote 144.
219. *See* Amendment to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), done at Gaborone April 30, 1983 (Treaty Doc.: 98-10) (submitted to Senate October 4, 1983); *See also* Gaborone Amendment to the Text of the Convention (permitting accession by regional economic integration organizations such as the European Communities), http://www.cites.org/eng/disc/gaborone.shtml.
220. *See* Convention on Biological Diversity, (Treaty Doc.: 103-20) (drafted in Rio de Janeiro June 5, 1992 and signed by the United States at New York on June 4, 1993, submitted to Senate November 20, 1993). *See also* GREEN PAPER: TOWARDS A FUTURE MARITIME POLICY FOR THE UNION: A EUROPEAN VISION FOR THE OCEANS AND SEAS, COM(2006) 275 final Volume II – ANNEX (6/7/06) 42-43, http://ec.europa.eu/maritimeaffairs/pdf/com_2006_0275_en_part2.pdf.

remain in the U.S. Senate pending ratification.[221] Both the CITES and CBD focus on protecting marine life, including mammals, migratory fish, birds, fauna and flora, consistent with UNCLOS Part VII, Section 2[222] and Part XII.[223] Both instruments have attracted transatlantic debates over the Precautionary Principle. The U.S., furthermore, is a party to the Migratory Fish Stocks Agreement (MFSA), which had also previously engendered such debates.[224] In fact, U.S. ratification of the MFSA already renders the U.S. subject to ITLOS dispute settlement jurisdiction and to the relevant substantive provisions of the UNCLOS, any related international treaties and customary international law, should the U.S. or another MFSA party decide to initiate proceedings pursuant to MFSA Article 30.[225]

European Union officials have expressly referred to the UNCLOS and the CBD as being integral to their efforts to employ the Precautionary Principle globally, particularly, on the high seas and in the Area. Given that "[p]roper oceans governance . . . requires action that is forward-looking and is based on the [P]recautionary [P]rinciple, rather than being merely reactive to the problems of today . . . we should strengthen our resolve to only act with the greatest care in . . . coastal state areas and areas beyond national jurisdiction . . . by giving full effect to the provisions of UNCLOS and other international conventions such as the Convention on Biological Diversity."[226] So it would seem that EU member states

221. *See* Treaties Pending in the Senate (Updated as of October 1, 2007), U.S. Department of State, http://www.state.gov/s/l/treaty/pending, http://www.senate.gov/~foreign/treaties.pdf.
222. UNCLOS, *supra* note 51, Part VII § 2(, Conservation and Management of the Living Resources of the High Seas).
223. *Id.* Part XII (Protection and Preservation of the Marine Environment).
224. *See* Warren Christopher, U.S. Secretary of State, LETTER OF SUBMITTAL, Accompanying Letter of Submittal, accompanying AGREEMENT FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION OF THE LAW OF THE SEA OF 10 DECEMBER 1982 RELATING TO FISH STOCKS, Treaty Doc. 104-24, 104th Cong. 2nd (Feb. 20, 1996) at p. VI, at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_documents&docid=f:td024.pdf, ("Although the United States need not become party to the Convention in order to become party to the Agreement, we would maximize our benefits from these two treaties if the United States were a party to both of them . . . The linkage between the two treaties is very strong."); *see also* discussion, infra at Part III(A)(6).
225. *See* Article 30(1)-(5), Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of Dec. 10 1982, relating to the conservation and management of Straddling fish stocks and highly migratory fish stocks, G. A. A/CONF.164/37.
226. See Statement on Behalf of the European Union by Mr. Arjan P Hamburger, Deputy Permanent Representative, Plenary, 59th G. A., EU Presidency Statement: Oceans and the

are likely to be the first UNCLOS parties to invoke CBD provisions together with the Precautionary Principle in an UNCLOS Part XII or Part VII Section 2 dispute.

In addition, the U.S. is not yet a party to two chemicals-based UNEP treaties, namely the Stockholm Convention on POPS[227] and the PIC Rotterdam Convention,[228] that address the listing, use, distribution and transport of toxic chemicals that may find their way to U.S. territorial seas via agricultural and/or urban runoff. These agreements remain in the U.S. senate pending ratification and have engendered contentious domestic and international debate concerning the application of the Precautionary Principle within their provisions.[229]

Furthermore, the U.S. is a party to the UN Framework Convention on Climate Change (UNFCCC)[230] which, as one legal commentator has emphasized, "would appear to be . . . the most germane international obligation in the context of potential climate change damages to the oceans,"[231] and thus, a fertile source of non-UNCLOS substantive treaty law that must be considered and interpreted by the ITLOS or an arbitral panel in the event of a future UNCLOS dispute. He has also noted how UNCLOS Articles 197, 212 and 235 could be relied upon to provide the basis for initiating such a cause of action.

> The UNFCCC should clearly be construed as the 'competent organization' to address climate change under Article 197 of UNCLOS given the fact that it has been ratified by 189 nations . . . . Moreover, the obligations under UNFCCC should be recognized as 'international mechanisms to control pollution' under Article 212, since its overarching purpose is to control greenhouse gas emissions so as to 'prevent dangerous anthropogenic

Law of the Sea (Nov. 16, 2004), http://www.europa-eu-un.org/articles/en/article_4065_en.htm.

227. Stockholm Convention on Persistent Organic Pollutants, (Treaty Doc.: 107-5) (done at Stockholm May 22, 2001 and signed by the United States on May 23, 2001, submitted to Senate May 7, 2002).
228. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, (Treaty Doc.: 106-21) (done at Rotterdam September 10, 1998 and signed by the United States on September 11, 1998 submitted to Senate February 9, 2000).
229. *See* Lawrence A. Kogan, *'Enlightened' Environmentalism or Disguised Protectionism: Assessing the Impact of EU Precaution Standards on Developing Countries*, National Foreign Trade Council (April 2004) at 19-28, http://www.wto.int/english/forums_e/ngo_e/posp47_nftc_enlightened_e.pdf. *See also* reference and accompanying footnotes, *infra* Part III.
230. *See* Ratification Status – United Nations Framework Convention on Climate Change, UNFCCC website http://maindb.unfccc.int/public/country.pl?country=US (The U.S. ratified the UNFCCC on 15 October 1992).
231. *See* William C. G. Burns, *Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention*, *supra* note 48 at 46.

> interference with the climate system.' Finally, under Article 235, the UNFCCC is clearly an international obligation that can contribute to the protection and preservation of the marine environment by reducing greenhouse gas emissions.[232]

However, it might be quite difficult to prevail in such an action – i.e., to show that a breach of UNFCCC obligations, and thus, of related UNCLOS provisions has occurred — in the absence of "causal links between climate change and alleged damages to marine resources."[233] Given the lack of understanding among scientists concerning how geologic processes ultimately determine the level of atmospheric CO2, and regarding the capacity of the oceans to absorb it, establishing such causal links (physical evidence) would be especially challenging, that is, unless science is suspended in favor of politics and faith.[234]

Lastly, there is the protocol to the UNEP-managed[235] mini-UNCLOS in the Caribbean region[236] dealing with land-based[237] sources of marine pollution that awaits Senate ratification. A close evaluation of this treaty (a.k.a the "Toilet Bowl Treaty")[238] has already attracted great public interest given its extensive reach into U.S. sovereign territory encompassing U.S. inland waterways, estuaries, watersheds and bathroom bowls[239] and its close relationship to another U.N.

232. *Id.* at 46-47.
233. *Id.* at 49.
234. *See e.g.*, Lawrence Solomon, *Models trump measurements*, CANADIAN FINANCIAL POST (July 7, 2007) http://www.financialpost.com/story.html?id=433b593b-6637-4a42-970b-bdef8947fa4e (" 'The IPCC postulates an atmospheric doubling of CO2, meaning that the oceans would need to receive 50 times more CO2 to obtain chemical equilibrium,' explains Prof. Segalstad. 'This total of 51 times the present amount of carbon in atmospheric CO2 exceeds the known reserves of fossil carbon-- *it represents more carbon than exists in all the coal, gas, and oil that we can exploit anywhere in the world*'")(emphasis added); *See also*, Tom V. Segalstad, *Web-info about CO2 and the 'Greenhouse Effect' Doom*, http://www.co2web.info.
235. *See* Action Plan for the Caribbean Environment Programme – UNEP Regional Seas Reports and Studies No. 26 at 3, http://marine-litter.gpa.unep.org/framework/region-8-next.htm#actionplan.
236. *See* Land-Based Sources of Marine Pollution in the Wider Caribbean Region: A Protocol for Action," LBS Protocol Fact Sheet, UNEP (June 2005) at 1-2, http://www.cep.unep.org/cartagena-convention/plonearticlemultipage.2005-12-01.7401488329/plonearticle.2005-12-01.8829489599.
237. UNCLOS, *supra* note 51, a. Art1.1(4), *available at s*http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf; s*ee Id.* art. 194(1), (3)(a).
238. *See* Cliff Kincaid, "President Bush's Toilet Bowl Treaty," The National Ledger (Oct. 29, 2007), http://www.nationalledger.com/artman/publish/article_272616936.shtml.
239. *See* Annexes I and III, Protocol Concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and Development of the Marine

Regional Seas Program agreement integral to the operation, implementation and interpretation of the UNCLOS — the European OSPAR Convention. At least one legal commentator has emphasized how EU member states have construed the terms of the OSPAR Convention, the UNEP regional seas agreement for the northeast Atlantic,[240] as not only "following the language of the LOS Convention," but also as implicitly and explicitly incorporating the *hazard*-based formulation of the Precautionary Principle within its Preamble and its definitional and general obligation articles.[241]

> The precautionary principle was first articulated under the [1974] Paris Convention . . . for the Prevention of Marine Pollution from Land-based Sources . . . in a nonbinding form in PARCOM Recommendation 89/1 of 22 June 1989 on the Principle of Precautionary Action and implicitly in the Prior Justification Procedure under the [1972] Oslo Convention . . .for the Prevention of Marine by Dumping from Ships and Aircraft . . . . Thereafter, following a German initiative, it was inserted into the [1992] Ospar Convention.[242]

The juxtaposition of these multilateral environmental treaties alongside the UNCLOS within the U.S. Senate is legally significant, given UNCLOS' acknowledged role as "an 'umbrella convention' most of [the] provisions [of

Environment of the Wider Caribbean Region, with Annexes, (Treaty Doc. 110-1)(done at Oranjestad, Aruba, on October 6, 1999, and signed by the U.S. on that same date; submitted to Senate February 16, 2007); *see e.g.*, Protocol Concerning Pollution From Land-Based Sources and Activites to the convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, http://www.cep.unep.org/pubs/legislation/lbsmp/final%20protocol/lbsmp_protocol_eng.html; *see also* Article 7 Pollution from Land-based Sources - Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, http://www.cep.unep.org/pubs/legislation/cartxt.html; *See also* Protocol Concerning Pollution from Land-based Sources and Activities - Overview of the LBS Protocol, http://www.cep.unep.org/cartagena-convention/plonearticlemultipage.2005-12-01.7401488329/plonearticle.2005-12-01.1115293440/view?portal_status_message=Your%20changes%20have%20been%20saved.

240. *See* United Nations Environment Program Regional Seas Database Manager – Regions: Northeast Atlantic (OSPAR) website, http://www.gpa.unep.org/regsea/regions/view.php?ids=23; *See also*, 7th Global Meeting of the Regional Seas Conventions and Action Plans (Helsinki, Finland Oct. 2005), UNEP(DEC) /RS.7/ INF.9./IGR, http://www.unep.org/regionalseas/globalmeetings/7/INF.9.IGR_Partnership_Roll-up.pdf.
241. *See* Marr, *supra* note 36 at 60; *See also* Preambular par. 13 and Articles 1(d) and 2(a), 1992 OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic, OSPAR Commission website, http://www.ospar.org/eng/html/welcome.html.
242. *Id.*

which] . . . being of a general kind, can be implemented only through specific operative regulations in other international agreements."[243] In particular, UNCLOS Articles 197[244] and 207[245] collectively require UNCLOS parties to cooperate in developing competent international organizations through which appropriate and relevant international rules, standards and practices for the protection and preservation of the marine environment and its living and nonliving resources, may be elaborated.[246]

Consequently, were the U.S. to ratify the UNCLOS and any of the other multilateral environmental agreements (MEAs) that President Bush submitted to the Senate for consideration during 2007, each of which arguably incorporates the

243. *See* Implication of the United Nations Convention on the Law of the Sea for the International Maritime Organization., International Maritime Organization LEG/MISC/3/Rev.1 (Jan. 6, 2003) at 3, http://www.andreekirchner.de/imel/imo.pdf; *see also* Anna Mihneva – Natova, *The Relationship Between the United Nations Convention on the Law of the Sea and the IMO Conventions*, United Nations and Nippon Foundations (June 2005) at 14, 33, http://www.un.org/depts/los/nippon/unnff_programme_home/fellows_pages/fellows_papers/natova_0506_bulgaria.pdf, (These are variously referred to as 'applicable international rules and standards,' 'internationally agreed rules, standards, and recommended practices and procedures,' 'generally accepted international rules and standards,' 'generally accepted international regulations,' 'applicable international instruments' or 'generally accepted international regulations, procedures and practices'"); *see also*, Agustín Blanco-Bazán, *IMO interface with the Law of the Sea Convention*, Paper presented at the Seminar on current maritime issues and the work of the International Maritime Organization, Twenty-Third Annual Seminar of the Center for Ocean Law and Policy, University of Virginia School of Law, IMO, (January 6-9, 2000), http://www.imo.org/infoResource/mainframe.asp?topic_id=406&doc_id=1077.

244. UNCLOS, *supra* note 51, art. 197 ("States *shall* cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.") (emphasis added)

245. *Id.* art. 207 ("(1) States *shall* adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures; (2) States *shall* take other measures as may be necessary to prevent, reduce and control such pollution; (3) States *shall* endeavor to harmonize their policies in this connection at the appropriate regional level; (4) States, acting especially through competent international organizations or diplomatic conference, *shall* endeavor to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from land-based sources.)" (emphasis added).

246. *See e.g.*, *Id.* a.Art 61, 119, 211, 213-214, 216, 218, 222.

hazard-based Precautionary Principle, the U.S. government could potentially find itself before the ITLOS or an arbitral panel. It would then need to respond to other UNCLOS party allegations, that it had failed to strictly regulate emissions of land-based, water-based or atmosphere-based sources of pollution, consistent with UNCLOS Part XII and the relevant provisions of such MEAs, where such actions or inactions have resulted in, or threaten to result in, serious damage to the marine environment and/or its living resources.

E. UNCLOS Tribunal Provisional Measures May Be Used to Facilitate Adoption of Europe's Precautionary Principle as U.S. Law

The International Tribunal on the Law of the Sea (ITLOS) seems the most likely venue at which the U.S. government's interpretation of international environmental regulatory law could be successfully challenged by UNCLOS State parties favoring Europe's Precautionary Principle. At least one commentator has noted how the jurisdiction exercisable by the ITLOS is particularly well suited to quickly granting interim measures for the purpose of preempting and ultimately avoiding possible irreversible environmental harm, especially "where there is as yet no definite proof of environmental damage."[247]

In this commentator's opinion, the legitimacy of such jurisdiction is found in UNCLOS Part XII, the text of which emphasizes the obligation of state parties to prevent and protect against serious harm to the marine environment. In addition, as international environmental law has continued to evolve, there has been a consequent need to enforce emerging norms as evidenced by the expansion of international litigation of environmental issues in the International Court of Justice, the Permanent Court of Arbitration, the World Trade Organization and the ITLOS.[248] In other words, there is a growing acceptance of "soft- law principles of [once] amorphous content and uncertain normative status," such as the Precautionary Principle, "which have [over time] been given concrete effect by international courts."[249] This largely motivated the parties in three previous ITLOS cases to ground their application for a provisional measure on the Precautionary Principle[250] in order to postpone or otherwise ban a contested

247. Stephens, *supra* note 49, at 101.
248. *Id.* at 313-314.
249. *Id. at.*314-315.
250. *Id.* at 223 ("ITLOS has issued provisional measures on three occasions [since 1999] to protect marine environmental interests. And, *in all these cases there has been at least*

economic activity, despite the absence of scientific evidence that the activity had caused, or would cause, environmental harm.[251]

Although the ad hoc ITLOS tribunals clearly had determined that the hazard-based Precautionary Principle was not applicable in those particular cases[252] (perhaps because they had applied the same higher evidentiary threshold required in Permanent Court of Arbitration (PCA) [253] provisional measure proceedings commenced pursuant to Article 26 of the Environmental Rules)[254] – i.e., the need to present evidence of any likelihood of environmental damage,[255] this same result cannot be guaranteed in the future. In light of continually evolving international environmental law, U.S. law and policymakers, regulators and industry officials would surely be remiss if, after reviewing these cases, they failed to discern an emerging global pattern towards greater environmental governance and awareness.[256] A brief review of these cases follows.

In the *SBT Case*,[257] the Governments of Australia and New Zealand had sought provisional measures to halt the Japanese Government's Experimental Fishing Program (EFP). These governments alleged that, by continuing its EFP, Japan had breached its obligations under UNCLOS Article 118 "to cooperate with each other

implicit reliance upon the precautionary principle")(emphasis added).

251. *See* SBT Order (1999); *See also,* MOX Plant Case (Ireland vs. United Kingdom (2002)(Provisional Measures*); See* Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v. Singapore) (Provisional Measures) (2003).
252. Stephens, *supra* note 49, at 104-105 ("ITLOS has without question contributed significantly to the evolution of the LOS Convention[.] [H]owever . . . in all three of its provisional measure orders in environmental cases, ITLOS has been careful to avoid taking a position in the debate concerning the legal status of the concept of 'precaution.' *Rather than identifying precaution as a customary 'principle' of law, or indeed merely a guiding 'approach', the Tribunal has favored the more neutral notion of 'prudence and caution'*.") (emphasis added).
253. *See* Ad Hoc Arbitration Under Annex VII of the United Nations Convention on the Law of the Sea Permanent Court of Arbitration, http://www.pca-cpa.org/showpage.asp?pag_id=1288 (The PCA has served as registry in four out of five cases arbitrated under Annex VII of the UNCLOS).
254. *See* Permanent Court of Arbitration, Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment, (2002), art. 26, at 198, http://www.pca-cpa.org/upload/files/ENVIRONMENTAL(1).pdf.
255. Stephens, *supra* note 49, at 27-28.
256. *Id.* at 223 ("The compulsory dispute system of the LOS Convention is arguably the most important environment-focU.S.ed adjudicative arrangement currently in existence, and it remains to be seen whether ITLOS judges and ad hoc arbitrators appointed to Annex VII Arbitral Tribunals will seek to realize its full potential in this respect.").
257. Southern Bluefin Tuna Cases (N.Z. v. Japan; Autl. V. Japan, 38 ILM 1624, (Provisional Measures Order of Aug. 27, 1999).

in the conservation and management of living resources in the areas of the high seas" and under UNCLOS Article 117 "to take measures as may be necessary for the conservation of the living resources of the high seas."[258] As noted by several commentators, the Tribunal, in expressly stating that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment," implicitly applied the precautionary principle.[259]

> [E]ven though ITLOS did not expressly refer to or endorse the Precautionary 'Principle,' its decision revealed a classic 'Precautionary 'Approach'' . . . ITLOS noted that there was scientific uncertainty regarding the measures necessary to conserve stocks of SBT, but that the Tribunal was not in a position to assess this evidence conclusively . . . . [I]n so doing . . . *ITLOS appears to have given effect to the obligation to apply the precautionary approach to straddling and highly migratory species under Article 6 of the Straddling Stocks Agreement, notwithstanding that the instrument was not then in force*, and despite the controversy that surrounds it applicability to fisheries management.[260]

In the *MOX Plant Case*,[261] the Government of Ireland sought provisional measures to suspend both the UK Government's authorization of a permit to operate a nuclear facility located along the Northwest English coastline opposite the Irish Sea, and any transport of associated radioactive materials through Irish coastal zones. It alleged that the UK had breached its UNCLOS obligations: "to take the necessary measures to prevent, reduce and control pollution of the marine environment"; "to cooperate" with Ireland in 'the protection of the marine environment' of the Irish Sea by "sharing information" about the plant with Ireland; and "to carry out a proper environmental impact assessment," consistent with UNCLOS Article 206, concerning the potential marine environmental impacts of the plant.[262] Although the ITLOS ultimately avoided discussion of whether to apply the Precautionary Principle to suspend such activities, legal commentators roundly criticized the decision as being the textbook case of when to apply precaution.

258. Stephens, *supra* note 49, at 204.
259. *Id.* at 203-204.
260. *Id.* at 204, 206 and accompanying FN 147 (referencing FN 147, citing Adrianna Fabra, *The LOSC and the Implementation of the Precautionary Principle* (1999), 10 Y.B. OF INT'L ENVTL LAW 15); David Freestone, *Caution or Precaution: A Rose by Any Other Name? in* 10 Y.B. OF INT'L ENVTL LAW 15 (1999); Simon Marr, *The Southern Bluefin Tuna Cases: The Precautionary Approach and Conservation and Management of Fish Resources* (2000), 11 EURO. J. OF INT'L LAW 815 (emphasis added).
261. MOX Plant Case (Ireland vs. United Kingdom), 41 ILM 405 (2002) (Provisional Measures).
262. Stephens, *supra* note 495, at 214-215.

> [Despite] *the existence of scientific uncertainty* as to the marine environmental impacts of the MOX plant, together with *the highly dangerous nature of the radioactive materials involved*, it is surprising that the Tribunal made no reference to the precautionary approach or principle. Such characteristics of the dispute suggest that it is *a 'textbook example' of a situation that would ordinarily demand the invocation of the precautionary approach*.[263]

In the *Straits of Johor Case*,[264] the Malaysian Government sought provisional measures against the Singapore Government to suspend land reclamation work it had undertaken in and adjacent to a narrow strait separating the island of Singapore from the Malay Peninsula known as the Straits of Johor. Malaysia alleged that Singapore has breached its UNCLOS obligations to provide Malaysia with full information about its current and projected work on the straits and an opportunity to comment on it, and to protect and preserve the marine environment in the straits. In particular, the Government of Malaysia "contended that the concept of precaution must direct the application and implementation of obligations under the LOS Convention."[265] However, the ITLOS declined to grant Malaysia's order and instead "suggest[ed] that the parties themselves must adhere to the Precautionary Approach."[266]

Apparently, at least for now, the ITLOS deliberately sidestepped the political and legal controversy surrounding the status and application of the Precautionary Principle/Approach.[267] It likely did this for either of two possible reasons. First, as a matter of law, this last panel seems to have heeded the words of Judge Wolfrum. In *MOX*, he focused on the threshold of evidence of harm to the marine environment that must first be shown before an ITLOS provisional measure will be invoked, and which Europe's Precautionary Principle and its reversal of the burden of proof cannot override.[268] Second, as noted by one commentator, these results

263. *Id.* at 216, FN 214, citing David Vander Zwaag, *The Precautionary Principle and Marine Environmental Protection: Slippery Shores, Rough Seas and Rising Normative Tides*, 33 OCEAN DEV.& INT'L LAW 165, 177 - 178 (2002) (emphasis added).
264. Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v. Singapore) (Provisional Measures) (Oct. 8, 2003), http:www.itlos.org.
265. Stephens, *supra* note 49, at 220-221.
266. *Id.* at 221.
267. *See, e.g.*, Lawrence A. Kogan, *WTO Ruling on Biotech Foods Addresses "Precautionary Principle,"* LEGAL BACKGROUNDER, Dec. 8, 2006, at 2, available at http://www.wlf.org/upload/120806kogan.pdf; Kogan, *World Trade Organization Biotech Decision Clarifies Central Role of Science in Evaluating Health and Environmental Risks for Regulation Purposes*, 2 GLOBAL TRADE & CUSTOMS J. 149 (2007).
268. *See*, MOX Plant Case, at 3-4, (separate opinion of Judge Wolfrum), http://www.itlos.org/case_documents/2001/document_en_202.pdf.

may reflect a conscious effort on the part of the ITLOS institution "to facilitate an amicable settlement rather than to reach definitive conclusions regarding compliance with environmental obligations."[269]

> [Arguably,] . . . this is a consequence of the 'proceduralisation' strategy adopted in the LOS Convention [i.e.,] . . . that 'the parties were prepared to sign off the Convention text without dotting every 'i' and crossing every 't,' because the details in critical areas would be worked out either by state practice or, if all else failed, by recourse to adjudication.'[270]

No doubt, the influence of transatlantic academic and environmental activist groups in favor of adopting Europe's Precautionary Principle has continued to grow and trigger louder political calls for paradigmatic change concerning how possible but not provable international environmental hazards are to be evaluated and managed where there is scientific uncertainty as to causation, magnitude of harm or timing.[271] Given international environmental law's evolutionary march in apparent lock-step with this positivist ethos, however, international adjudication bodies such as the ITLOS and UNCLOS *ad hoc* arbitral panels, will eventually have little choice but to respond in like fashion.[272]

For this reason, two UNCLOS commentators believe that the further development of UNCLOS Part XV, Article 290 provides the key to the relationship between the hazard-based Precautionary Principle, the respective rights of UNCLOS parties and the absolute UNCLOS *erges omnes* obligation to preserve and protect the marine environment. Article 290(1) vests the ITLOS Seabed Disputes Chamber with the power to prescribe provisional measures.

> The reference in Article 290 of the LOS Convention to the avoidance of 'serious harm to

269. *See* Stephens, *supra* note 49, at 104.

270. *Id.* citing Vaughn Lowe, *Advocating Judicial Activism: The ITLOS Opinions of Judge Ivan Shearer*, 24 AUSTL. Y. B. OF INT'L LAW 145, 150 (2005).

271. Peter J. Smith, *Former Vice President Al Gore Makes Star Debut in Toronto as Global Warming Prophet*, LIFESITENEWS.COM (Feb. 22, 2007) ("Al Gore's environmental message is a development of ideas first set forth in his 1992 book: Earth in the Balance: Ecology and the Human Spirit, where he wrote: *'We must make the rescue of the environment the central organizing principle for civilization. . . .' Gore calls for a Global Marshall Plan or Strategic Environmental Initiative, with the first goal as stabilising what he believes is an overpopulated world, with the end result of massively increasing the powers of government to engineer a 'wrenching change of society' in order to save the world's ecology*'") (emphasis added), http://www.lifesite.net/ldn/2007/feb/07022204.html.

272. Stephens, *supra* note 49, at 200 (According to international law professor Philippe Sands, "the PCA's [Permanent Court of Arbitration's] 'contextual and 'acontextual' approach' confirms that environmental considerations have 'not yet fully permeated the reasoning processes of some classical international lawyers'").

> the marine environment' indicates that this mechanism was designed specifically to allow ITLOS to deal with potential environmental harm efficiently and effectively. It may also be noted that since jurisdiction need only be established on a prima facie basis, and the court at an interlocutory stage must be cautious of definite factual findings that may prejudice a later determination on the merits, *there is an obvious conceptual affinity between the precautionary principle in international environmental law and this particular judicial mechanism for providing interim relief.*[273]

III. INTERNAL PATHWAYS TO U.S. ADOPTION OF EUROPE'S PRECAUTIONARY PRINCIPLE VIA THE UNCLOS

Since 2004, the former Bush administration insisted that no federal *environmental* implementing legislation would be required incident to UNCLOS accession.

> Except as noted below regarding deep sea-bed mining, the United States does not need to enact new legislation to supplement or modify existing U.S. law, whether related to protection of the marine environment, human health, safety, maritime security, the conservation of natural resources, or other topics within the scope of the Convention. The United States, as a party, would be able to implement the Convention through existing laws, regulations, and practices (including enforcement practices), which are consistent with the Convention and which would not need to change in order for the United States to meet its Convention obligations . . . . The one area in which implementing legislation would be necessary at some point after U.S. accession is legislation to enforce decisions of the Seabed Disputes Chamber, with respect to which the Administration proposed a declaration for inclusions in the Senate's resolution.[274]

Yet, simultaneously, legal scholars and environmentalists who have advocated in favor of both UNCLOS accession and adoption of the Precautionary Principle have called for the updating of U.S. federal environmental laws and regulations incidental to UNCLOS accession. Indeed, at least one such commentator has long argued that U.S. accession to the UNCLOS would benefit the U.S. because it would encourage greater U.S. domestic implementation of the UN Agenda 21 sustainable development-based oceans directives. At least one such commentator believes that since "The United States has yet to fully meet Chapter 17's *primary*

273. *Id.* at 40-41 (emphasis added); *see* Marr, *supra* note 36, at 67-69.

274. *See Annex I—Letter from State Department Legal Adviser William H. Taft, IV to Chairman Lugar*, dated March 1, 2004, accompanying Senate Committee on Foreign Relations, United Nations Convention on the Law of the Sea 108th Congress, Senate Executive Report 108-10 (March 11, 2004), at Annex I, p. 23, at: pp. 166-168, *available at* http://www.virginia.edu/colp/pdf/UNCLOS-Sen-Exec-Rpt-108-10.pdf (emphasis added).

emphasis. . . land-based nonpoint source pollution continues to degrade ocean water quality in unsustainable ways."[275] Consequently, in this commentator's view, the U.S. approach to oceans management must be changed to a new paradigm of precautionary thinking that is likely to entail modifications to current legislation and the manner in which such legislation is implemented via regulation.[276]

> In the decade since the 1992 Rio Conference, the United States has only begun to shift away from the paradigm of inexhaustibility to a new paradigm of sustainable use and *precautionary thinking*. . . [It] generally has done a good job of regulating and preventing marine pollution. However, [these]. . .efforts have focused on readily identifiable and controllable point sources of pollution, such as ships and factories. *To make further progress in this aspect of sustainable development, the United States must address the remaining issues in sewage treatment and the problem of land-based nonpoint source pollution.*"[277]

> Regarding marine pollution, the United States has been slow to address the multiplicity of sources of land-based runoff and even slower to impose substantive goals for reducing such pollution of the marine environment. These distinctions in regulatory focus and effect indicate that U.S. ocean policy has yet to fully embrace the precautionary approach and the necessary long-term thinking that sustainable use requires.[278]

These seemingly contradictory positions raise several interesting questions. Would or would not the U.S. federal environmental law changes recommended by these experts entail incorporation of Europe's Precautionary Principle as U.S. law? What form would these changes ultimately assume—formal amendments to existing legislation or reinterpretation of implementing regulations? And, when would such changes take place – before or after U.S. accession to the UNCLOS?

In lieu of seeking formal legislative amendments to U.S. environmental laws,

275. *See* Craig, *supra* note 62, at 10202 (emphasis added).
276. *Id.* at 10191.
277. *Id.* at 10901,10206 (emphasis added); *see* Protocol concerning Pollution from Land-based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Annex I (Adopted Oct. 6, 1999) ("'Point Sources' means sources where the discharges and releases are introduced into the environment from any discernable, confined and discrete conveyance, including but not limited to pipes, channels, ditches, tunnels, conduits or wells from which pollutants are or may be discharged; and 'Non-Point Sources' means sources, other than point sources, from which substances enter the environment as a result of land run-off, precipitation, atmospheric deposition, drainage, seepage or by hydrologic modification.") http://www.cep.unep.org/pubs/legislation/lbsmp/final%20protocol/lbsmp_protocol_eng.html.
278. Craig, *supra* note 62, at 10192.

commentators have also discussed how presidents may effectuate a similar change to agency environmental regulations via the issuance of executive orders and memoranda. In addition, presidents might use these instruments to ensure that U.S. federal courts enforce international judgments, especially those handed down by UNCLOS tribunals.

A. There Have Been Specific Efforts and Recommendations to Amend U.S. Federal Environmental Legislation to Incorporate Europe's Precautionary Principle and Comply With the UNCLOS and Related Treaties

Although the U.S. has not acceded to certain MEAs, including the UNCLOS, the U.S. Congress has introduced bills to amend corresponding U.S. federal environmental legislation, as if the U.S. had already acceded to or was expecting to accede to such treaties and was now considering how to implement them. As noted above, most of these treaties incorporate the Precautionary Principle. What is not widely known, however, is how essential and integral these statutes are to U.S. implementation of its UNCLOS obligations following U.S. accession. They include the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA), the Coastal Zone Management Act (CZMA), the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), the Clean Air Act (CAA) and the Oceans Conservation, Education, and National Strategy for the 21st Century Act (HR 21).[279]

Indeed, several independent commissions and nongovernmental organizations have prepared studies and reports recommending UNCLOS accession, as well as amendment or reinterpretation of existing U.S. environmental laws and regulations, in preparation for a new comprehensive U.S. national oceans policy that could effectively implement the legal obligations the U.S. would assume upon UNCLOS ratification.

279. *See generally,* Marine Protection, Research, and Sanctuaries (Ocean Dumping) Act, the Outer Continental Shelf Lands Act, The Submerged Lands Act, the Deep Seabed Hard Minerals Resources Act, a new and revised National Invasive Species Act, the Ports and Waterways Safety Act, the Shore Protection Act, the Solid Waste Disposal Act, the Pollution Prevention Act of 1990 and the Rivers and Harbors Act. (There are other federal statutes with corresponding regulations through which the U.S. government manages the marine environment, that are not discussed within this article due to limited space).

A 2003 Pew Oceans Commission report,[280] for example, has highlighted the need to amend the CWA, the MSFCMA and the National Invasive Species Act.[281] The Pew Oceans Commission Report is interesting also because of the legislative amendments it does not recommend. Instead, it suggests that adjustments can be made to federal administrative regulations to better implement current federal environmental laws such as the ESA and MMPA.[282]

In addition, a 2004 U.S. Commission on Ocean Policy[283] report contains more comprehensive recommendations, concerning amendment of the NEPA, CAA, CWA, ESA, MMPA, CZMA and the MSFCMA.[284] In calling for U.S. accession to UNCLOS, the U.S. Commission on Ocean Policy report also implied both that UNCLOS may be used as political leverage within the U.S. to secure long-desired amendments to U.S. environmental laws, and that the desired amendments to U.S. environmental laws could inversely be used for diplomatic purposes abroad to further shape and amend the UNCLOS in the U.S. image.[285] Apparently, Precautionary Principle proponents have pursued the same double-edged strategy

280. See *America's Living Oceans: Charting a Course for Sea Change*, Pew Oceans Commission (May 2003) http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Protecting_ocean_life/POC_Summary.pdf.

281. *Id.* at 23, 25, 27.

282. *Id.* at 25 (speaking of adjustments to bycatch quotas and regional fisheries allocation plans).

283. *An Ocean Blueprint for the 21st Century*, Final Report of the U.S. Commission on Ocean Policy (Sept. 2004), at: http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/welcome.htmlhttp://www.oceancommission.gov/documents/full_color_rpt/welcome.html; U.S. Commission on Ocean Policy, About the Commission, (The Final Report was issued to the President and the Congress on September 20, 2004, triggering the ninety-day (legislatively mandated) response window for the White House. On December 17, 2004, two days before the Commission was scheduled to expire, pursuant to the Oceans Act of 2000 (P.L. 106-256), the White House issued Presidential Executive Order 133663. The E.O established a cabinet-level Committee on Ocean Policy (COP), which then released the U.S. Ocean Action Plan (OAP)). *See also* "About the Commission," U.S. Commission on Ocean Policy, http://www.oceancommission.gov/commission/welcome.html; Press Release, U.S. Commission on Ocean Policy, Chairman of U.S. Commission on Ocean Policy Commends President Bush on Initial Step toward a National Ocean Policy (Dec. 17, 2004), http://www.oceancommission.gov/newsnotices/dec17_04.html; U.S. Ocean Action Plan: The Bush Administration's Response to the U.S. Commission on Ocean Policy, ,http://ocean.ceq.gov/actionplan.pdf.

284. *See* Transmittal Letter from James D. Watkins to The Honorable William H. Frist, M.D. Majority Leader, United States Senate dated September 2004, accompanying the submission of *An Ocean Blueprint for the 21st Century*.

285. U.S. Commission on Ocean Policy, *supra* note 282, at 444-45.

in calling for environment-friendly trade policies and proactive environmental legislation in Europe so that it is eventually incorporated into treaties and then adopted here in the U.S. However, such a strategy can easily backfire.[286]

A 2006 report issued by the Joint Ocean Commission Initiative (JOCI) called for changes in U.S. legislation and regulation to "[e]nable the transition toward an ecosystem-based approach."[287] It specifically recommended that federal environmental regulatory agencies develop guidelines to implement proposed amendments to federal environmental statutes that will come up for reauthorization in the future, including the MSFCMA, CZMA, CAA, CWA and the National Marine Sanctuaries Act.[288] The JOCI report also highlighted the interrelationship between its recommended U.S. statutory and regulatory changes and the need for the U.S. to ratify UNCLOS.[289]

Apparently, the 110th Congressional majority closely analyzed the recommendations contained within each of these reports in drafting the Oceans Conservation, Education, and National Strategy for the 21st Century Act (HR 21), which is discussed later in this article.[290]

Beyond these U.S. environmental and wildlife laws, U.S. chemicals laws, as well, would need to be amended or reinterpreted incident to UNCLOS accession. They include the Toxic Substances and Control Act (TSCA)[291] and the Federal

286. Joel Tickner, Carolyn Raffensperger & Nancy Myers, *The Precautionary Principle in Action – A Handbook*, SCIENCE AND ENVIRONMENTAL HEALTH NETWORK, at 3, ("In some cases, especially those involving trade and proactive legislation in places like Europe, the U.S. government is actively lobbying against precautionary actions by other governments . . . This lobbying threatens to undermine use of the precautionary principle in other countries, which will ultimately affect the pressure that other countries can exert on the U.S. to invoke the principle") (emphasis added),
http://www.biotech-info.net/handbook.pdf;
http://www.mindfully.org/Precaution/Precaution-In-Action-Handbook.htm.

287. *See* Joint Ocean Commission Initiative, *From Sea to Shining Sea: Priorities for Ocean Policy Reform, Report to the United States Senate*, (June 2006), at 19-20, http://www.jointoceancommission.org/resource-center/1-Reports/2006-06-13_Sea_to_Shining_Sea_Report_to_Senate.pdf.

288. *Id.* at 19-20.

289. *Id.* at 30-31.

290. See discussion *infra*.

291. The Toxic Substance and Control Act (TSCA) 15 U.S.C. 2601 et seq. (1976) ("was enacted by Congress to give EPA the ability to track the 75,000 industrial chemicals currently produced or imported into the United States. EPA repeatedly screens these chemicals and can require reporting or testing of those that may pose an environmental or human-health hazard. EPA can ban the manufacture and import of those chemicals *that pose an unreasonable risk* . . . TSCA other Federal statutes, including the Clean Air Act and the

Insecticide, Fungicide and Rodenticide Act (FIFRA),[292] which regulate toxic chemicals alleged to have been found in increasing quantities in U.S. river effluents and ambient air flowing to U.S. coastal waters and into the oceans. In fact, the Pew Oceans Commission report specifically stated that, "[t]he U.S. should ratify the Stockholm Convention on Persistent Organic Pollutants (POPs) and implement federal legislation that allows for additions to the list of the 'dirty dozen' chemicals."[293] During 2004[294] and 2006[295] Congress had convened hearings for precisely this purpose. However, environmentalist calls to incorporate

Toxic Release Inventory under EPCRA") (emphasis added); *see Summary of the Toxic Substances Control Act, Laws, Regulations, Guidance and Dockets,* U.S. Environmental Protection Agency, ("TSCA Section 2(b), however, only requires action to regulate chemical substances and mixtures *which present an unreasonable risk of injury to health or the environment*, and to take action with respect to chemical substances and mixtures which are *imminent hazards*") (emphasis added), http://www.epa.gov/lawsregs/laws/tsca.html.

292. The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. 135 et seq (1972) (enacted originally in 1947, amended in 1972 by the Federal Environmental Pesticide Control Act and then amended again and renamed in 1998. FIFRA's purpose is to "protect the public health and environment from the misuse of pesticides by regulating the labeling and registration of pesticides and by considering the costs and benefits of their use...The 1988 Amendments strengthen[ed] EPA's authority in several major areas . . . . Under FIFRA [as amended], all pesticides must be registered (licensed) by the Environmental Protection Agency (EPA) before they may be sold or distributed in commerce. *FIFRA sets an overall risk/benefit standard for pesticide registration*, requiring that pesticides perform their intended function, when used according to labeling directions, *without posing unreasonable risks of adverse effects on human health or the environment*. In making pesticide registration decisions, *EPA is required by law to take into account the economic, social, and environmental costs and benefits of pesticide uses*...FIFRA [also] requires the review and 're-registration' of all existing pesticides . . . FIFRA authorizes EPA to cancel the registration of an existing pesticide *if new test data show that it causes unreasonable adverse effects on human health or the environment*")(emphasis added); *See FIFRA Amendments of 1988 – History*, U.S. Environmental Protection Agency, (FIFRA was recently amended again during 2008), http://epa.gov/history/topics/fifra/01.htm.
293. See *America's Living Oceans, supra* note 279, at 28.
294. *See* POPS, PIC, AND LRTAP: The Role of the U.S. and Draft Legislation to Implement These International Conventions, Hearing Before the Subcommittee on Environment and Hazardous Materials of the Committee on Energy and Commerce, House of Representatives, H. Rpt. 108-112, 108th Cong. (July 13, 2004), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:95454.pdf.
295. *See* Legislation to Implement the POPS, PIC and LRTAPs POPS Agreements, Hearing Before the Subcommittee on Environment and Hazardous Materials of the Committee on Energy and Commerce, House of Representatives, H. Rpt. No. 109–63, 109th Cong. (March 2, 2006), http://a257.g.akamaitech.net/7/257/2422/05may20061230/www.access.gpo.gov/congress/house/pdf/109hrg/27145.pdf.

the Precautionary Principle expressly within POPs and PIC federal implementing legislation designed to amend TSCA and FIFRA (by diminishing the role of empirical risk assessment and economic cost benefit analysis) became a serious sticking point and ultimately doomed U.S. ratification efforts.[296] [297] [298]

If one were to agree, based on the findings of Part II of this article, that the Precautionary Principle is embedded within the UNCLOS, then one cannot also agree with the former Bush administration, that no U.S. federal environmental implementing legislation is required incident to UNCLOS accession. To do so, would be to acknowledge that the Precautionary Principle is already embedded in U.S. law, as well.

296. *See* Comments of Brooks Yeager in Response to Questions Posed by Rep. Tom Allen, H. Rpt. No.108-112, at 98-99 (Precautionary Principle implementing legislation and treaty debates during the 2004 hearings); Statement of Susan B. Hazen, Principle Deputy Assistant Administrator, Office of Prevention, Pesticides, and Toxic Substances, U.S. Environmental Protection Agency, *Id.*, at 20-22; Prepared Statement of Michael P. Walls, American Chemistry Council, *Id.*, at 37; Prepared Statement of Glenn M. Wiser, Senior Attorney, The Center for International Environmental Law on Behalf of National Environmental Trust, Oceana, Pesticide Action Network North America, Physicians for Social Responsibility, Sierra Club, and U.S. Public Interest Research Group, *Id.*, at 78; Comments of Michael Walls, American Chemistry Council, in Response to Questions Posed by Honorable Paul E. Gillmor, *Id.*, at 91; Response for the Record by Steven Goldberg on Behalf of CropLife America, *Id.*, at 125-126; Comments of Michael Walls of the American Chemistry Council and Steven Goldberg representing CropLife America in Response to Questions Posed by Rep. Tom Allen, *Id.*, at 97-98; Comments of Michael Walls of the American Chemistry Council and Brooks Yeager, Visiting Fellow, The H. John Heinz III Center for Science, Economics, and the Environment, in Response to Questions Posed by Rep. Mike Rogers, *Id.*, at 102-103.

297. Prepared Statement of Brooks B. Yeager, Visiting Fellow, The H. John Heinz III Center for Science, Economics, and the Environment, H. Rpt. No. 109–63, 59-61 (Precautionary Principle implementing legislation and treaty debates during the 2006 hearings); Prepared Statement of Michael P. Walls, Managing Director, Regulatory and Technical Affairs Department, American Chemistry Council, *Id.*, at 64-67; Comments of Michael P. Walls Before the Honorable Paul Gillmor, *Id.*, at 62-63; Response for the Record by E. Donald Elliott, Partner, Wilkie Farr & Gallagher LLP to The Honorable John D. Dingell and the Honorable Hilda L. Solis", *Id.*, at 117-119; Response for the Record By Susan B. Hazen, Principal Deputy Assistance Administrator, Office of Prevention, Pesticides, and Toxic Substances, U.S. Environmental Protection Agency, to the Honorable Paul E. Gillmor," *Id.*, at 162-165.

298. *See Generally,* Marine Protection, Research, and Sanctuaries (Ocean Dumping) Act, the Outer Continental Shelf Lands Act, The Submerged Lands Act, the Deep Seabed Hard Minerals Resources Act, a new and revised National Invasive Species Act, the Ports and Waterways Safety Act, the Shore Protection Act, the Solid Waste Disposal Act, the Pollution Prevention Act of 1990 and the Rivers and Harbors Act. (There are other federal statutes with corresponding regulations through which the U.S. government manages the marine environment, that are not discussed within this article due to limited space).

There is a difficulty in making this latter assumption, however, if one were to agree with the findings of the environmentalists and legal commentators in Part III of this article. They argue that the Precautionary Principle is, at best, incorporated within specific U.S. environmental laws in spirit and must be expressly adopted as U.S. law and actually employed in U.S. regulatory practice in order for the U.S. to fulfill the legal obligations imposed on all nations by the UNCLOS and UN Agenda 21, Chapter 17. This would seem to indicate rather clearly that implementing legislation *is* required incident to U.S. UNCLOS ratification. If so, Congress should hold open public transparent hearings to look into this question and provide Americans with some answers.

1. The National Environmental Policy Act

Precautionary Principle proponents have opined that the NEPA statute and regulations,[299] by virtue of their requirement that federal agencies undertake an environmental impact study, analysis or assessment that addresses scientific uncertainty before funding project activities that might potentially affect the environment, embody the Precautionary Principle in spirit, "*even though it is not expressly mentioned in laws or policies.*"[300] However, "[D]espite U.S. acceptance of the precautionary principle in international treaties and other statements, little work has been done to implement the principle" within the United States.[301] This

299. *See* The National Environmental Policy Act of 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321-4347, January 1, 1970, as amended by Pub. L. 94-52, July 3, 1975, Pub. L. 94-83, August 9, 1975, and Pub. L. 97-258, § 4(b), Sept. 13, 1982), http://ceq.hss.doe.gov/nepa/regs/nepa/nepaeqia.htm; National Environmental Policy Act of 1969, as amended, http://www.nps.gov/history/local-law/FHPL_NtlEnvirnPolcy.pdf; The National Environmental Policy Act (NEPA), 42 U.S.C. 4321, (signed into law on January 1, 1970, establishes national environmental policy and goals for the protection, maintenance, and enhancement of the environment, and it provides a process for implementing these goals within the federal agencies. The Act also establishes the Council on Environmental Quality (CEQ)); *See* National Environmental Policy Act (NEPA) - Basic Information, U.S. Environmental Protection Agency, http://www.epa.gov/compliance/basics/nepa.html; Jim Chen, *The Jurisdynamics of Environmental Protection* (Environmental Law Institute)(2003) at 117 ("NEPA requires a searching investigation before any federal action that may affect the environment goes forward. Such an investigation involves forecasting future impacts and predicting whether an activity will erode the necessary ecosystems that sustain our healthy human condition). http://books.google.com/books?id=8vCkSM1auwIC&dq=NEPA+%2B+precautionary+principle&source=gbs_summary_s&cad=0.

300. *Id.* at 118 (emphasis added).

301. *See* Tickner, Raffensperger & Myers, *supra* note 286 at 3.

admission is quite significant. It signals to the academic and environmental faithful that a much greater effort must be waged to amend or create new U.S. laws and regulations, particularly those covered by the NEPA, that expressly incorporate the Precautionary Principle and reflect its actual practice.[302]

2. The Clean Water Act

"The Clean Water Act [CWA][303] prohibits the discharge of pollutants from a point source into navigable waters without an NPDES [national pollution discharge elimination system] permit."[304] It defines a "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source."[305]

At least one Precautionary Principle proponent has argued that the CWA's requirement of a "permit to pollute," in the case of identifiable "point sources," essentially constitutes a reversal of the burden of proof from government to industry.[306] This implies that the CWA embodies the Precautionary Principle. This proponent cites two cases that support her position. In *South Florida Water Management District v. Miccosukee Tribe*,[307] the U.S. Supreme Court considered whether the pumping of canal water from a manmade canal into a water

302. *See* Amanda Griscom, *Polluting the Village to Save It*, Grist Environmental News and Commentary (Aug. 12, 2004), http://www.grist.org/news/muck/2004/08/12/griscom-defense/index.html.

303. The Federal Clean Water Act of 1977, 33 U.S.C. §§ 1251-1387, (As amended, is rooted in the Federal Water Pollution Control Act Amendments of 1972, October 18, 1972); *See* "Clean Water Act – Laws and Regulations," U.S. Environmental Protection Agency ("The Clean Water Act established the basic structure for regulating discharges of pollutants into the waters of the United States. It gave EPA the authority to implement pollution control programs such as setting wastewater standards for industry. The Clean Water Act also continued requirements to set water quality standards for all contaminants in surface waters. The Act made it unlawful for any person to discharge any pollutant from a point source into navigable waters, unless a permit was obtained under its provisions. . . . Revisions in 1981 streamlined the municipal construction grants process, improving the capabilities of treatment plants built under the program. Changes in 1987 phased out the construction grants program, replacing it with the State Water Pollution Control Revolving Fund, more commonly known as the Clean Water State Revolving Fund. This new funding strategy addressed water quality needs by building on EPA-State partnerships. Over the years, many other laws have changed parts of the Clean Water Act"), http://www.epa.gov/r5water/cwa.htm.

304. *See* 33 U.S.C. §§ 1311, 1342.

305. *See* 33 U.S.C. § 1362(12).

306. *See* Carolyn Raffensperger, *Arguing Pollution is Legal Under the CWA*, The Environmental Forum (March/April 2006) at 16, http://www.sehn.org/pdf/mar_apr06.pdf.

307. *See* S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004), slip. op., http://www.law.cornell.edu/supct/pdf/02-626P.ZO.

conservation area, where the pumping activities served to artificially maintain the water table in the water conservation area at a level significantly higher than the water level in the lands drained by the canal (i.e., to prevent backflow of the waters into the canal and eventual flooding of populated areas) constituted a "pollution discharge" requiring a CWA permit.[308] Apparently, the waters were considered pollution because they contained contaminated groundwater and agricultural, urban and residential surface runoff.[309] Unable to discern from the facts whether a transfer of pollutant-laden waters from one body of water to another meaningfully distinct body of water had occurred, the Court vacated the order of the lower district court and remanded the case back for such a determination.[310]

In the related case of *Friends of the Everglades et al. v. South Florida Water Management District*,[311] environmentalists and sports fisherman filed suit during 2006 against the South Florida Water Management District (SFWMD) to enjoin it from pumping ground and rainwater runoff allegedly containing "contaminants, including phosphorous from fertilizers" discharged by sugar plantations located along the developed Florida Everglades Agricultural Area into Florida's adjacent Lake Okeechobee and accompanying wetlands.[312] The plaintiffs alleged that the pumping constituted "the discharge of a pollutant" that required a CWA permit.[313] Having followed the Supreme Court's reasoning in *Miccosukee Tribe*, the federal district court ruled, during December 2006 that, in the absence of a NPDES permit, SFWMD's operation of pump stations to back pump pollutant-containing waters from the canals into Lake Okeechobee was in violation of the CWA.[314] The court withheld judgment on plaintiff's request for injunctive relief until June 2007, at which time it issued a permanent injunction against the SFWMD, thereby freezing its pumping activities until it obtains a permit.[315]

308. Order Setting Forth Finding of Fact, Friends of the Everglades v. South Florida Water Management District, Case No. 02-80309-Civ-Altonaga (S.D. Fla.).
309. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, *supra* note 307, Slip op. at 2-4.
310. *Id.* at 13-14.
311. Order Setting Forth Finding of Fact, *supra*, note 320.*See*, et al., Case No. 02-80309-Civ-Altonaga, Order Setting forth Finding of Fact (SD FL 2006).
312. *Id.*
313. *See* Raffensperger, *supra* note 307.
314. *Id.* at 106.
315. *See* Friends of the Everglades, Inc. et. al., v. Henry Dean Case No. 02-803309-Civ-Altonaga, Final Judgment (SD FL 2006), http://www.earthjustice.org/library/legal_docs/judge-rules-pumping-polluted-water-into-lake-okeechobee-illegal.pdf.

In contrast to these two decisions, *National Association of Home Builders v. U.S. Army Corps of Engineers*[316] rejected environmentalists' arguments that home builders and developers needed a CWA permit "to operate construction equipment in wetlands unless they are actually dredging or filling them in. Simply clearing brush or extra vegetation – or even turning on the backhoe . . . the court [reasoned]. . . should not require a permit."[317] The Court saw through environmentalists' efforts to narrowly interpret a revised CWA regulatory 'incidental fallback' exception to the general administrative presumption of a 'discharge of dredged material.'[318] It ruled that "a 'discharge' of dirt should be regulated not by the quantity that is being disturbed, but by where it is put. Regulators can only step in if the dirt is being moved to another location on the property, which presumably might affect the function of the wetland and trigger Clean Water Act interest. Second, the court found the . . . [regulatory] rule defective *because it improperly shifted the burden of proof from the agency to the landowner*."[319]

Alternatively, in the absence of any clear reference to the Precautionary Principle within either the CWA's text or legislative history, activists have argued that the CWA and its accompanying regulations must be amended or supplemented to expressly reflect it. They reasoned that although we in the U.S. are already largely practicing precaution by adopting and complying with many environmental laws and regulations, these laws and regulations still do not cover "each possible industrial hazard or chemical."[320] In addition, the majority of our environmental rules, such as those contained in the Clean Water Act and other statutes, are

316. National Association of Home Builders v. U.S. Army Corps of Engineers, (D.DC 2007) Civil Action No. 01-0274 http://rapanos.typepad.com/tulloch2opinion.pdf;
317. *See* NAHB applauds 'Tulloch II' Clean Water Act Ruling, Builders News Network (Feb. 2, 2007) at 5, http://www.hbaofsc.com/bnn/2007_02_02.pdf.
318. National Association of Home Builders v. U.S. Army Corps of Engineers, *supra* at 2-3 ("This suit is the most recent manifestation of a longstanding legal dispute about just what constitutes the discharge of dredged material. Between 1986 and 1993, the Corps defined the discharge of dredged material as 'any addition of dredged material into the waters of the United States' while expressly excluding 'de minimis, incidental soil movement occurring during normal dredging operations' . . . 33 C.F.R. § 323.2(d) . . . In 1993, however, the Corps issued a new rule that eliminated the de minimis exception . . . It defined the discharge of dredged material as 'any addition of dredged material into, including redeposit of dredged material within, the waters of the United States'").
319. *Id.* (emphasis added).
320. *See* Tickner, Raffensperger & Myers, *supra* note 286, at 17; *The Precautionary Principle - A Common Sense Way to Protect Public Health and the Environment*, Science and Environmental Health Network (Jan. 2000) http://www.mindfully.org/Precaution/Precautionary-Principle-Common-Sense.htm.

intended to control "the amount of pollution released into the environment and cleaning up once contamination has occurred . . . . [They] . . . are based on the assumption that humans and ecosystems can absorb a certain amount of contamination without being harmed."[321] And, "there are some major loopholes in the way these rules are being applied."[322] Accordingly, Americans must change their way of thinking about and approaching environmental issues and expressly adopt the Precautionary Principle. If the [Precautionary [P]rinciple *were universally applied*, many toxic substances, contaminants, and unsafe practices would not be produced or used in the first place . . . . The [P]recautionary [P]rinciple *would become the basis for reforming environmental laws and regulations and for creating new regulations*. . . . In coming years *precaution should be exercised, argued and promoted on many levels*-in regulations, industrial practices, science, consumer choices, education, communities, and schools."[323]

At least one commentator argues that the CWA's lack of defined water quality standards, which precludes the EPA from regulating land-based activities that threaten ocean water quality,[324] constitutes one such loophole. In this commentator's opinion, adoption of the Precautionary Principle within the CWA would enable the EPA to stop land-based pollution. Although this may not yet be politically possible, it is worth aiming for in the future.

> The United States could make astounding progress toward controlling land-based pollution of the oceans if every developer, farmer, silvaculturist, forestry operation, sewage treatment plant, and urban planner had to prove an affirmative answer to one question: Are you certain that your actions will not harm or impair the ocean, or any of the organisms that inhabit the ocean, most directly downstream of your watershed? *Such a truly precautionary regulatory regime is unlikely to garner political support in the next 10 years, but it is worth identifying as a potential future goal now.*[325]

3. The Endangered Species Act (ESA)

The ESA implements obligations the United States assumed upon becoming a party to two international treaties, each containing important provisions for the protection of migratory birds.[326] The obligations include CITES (noted above) and

321. *Id.*
322. *Id.*
323. *Id* (emphasis added).
324. *See* Craig, *supra* note 62 at 10206.
325. *Id.* (emphasis added).
326. The Endangered Species Act (ESA), 7 U.S.C. 136; 16 U.S.C. 460, (1973) ("provides a

the Pan American Convention (the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere).[327]

Both a former senior Bush administration official and a legal scholar well versed in the UNCLOS have testified before the U.S. Senate that it is not necessary to amend the ESA incident to U.S. UNCLOS accession. Their reasoning: UNCLOS Article 194 imposes only a minimal general standard – "to take measures to control pollution of the marine environment" – which the U.S. has already done. In their estimation, there is nothing more required since "Article 194 does not specify any particular pollution control standards." [328] Their position likely acknowledges that neither the UNCLOS nor the ESA currently incorporate the Precautionary Principle expressly. However, does it not overlook the fact that both might very well incorporate the Precautionary Principle in spirit?

Legal commentators who are skeptical of the Precautionary Principle and its legal and economic implications are not unaware of such gamesmanship. At least one has alleged that, "precautionary thinking has affected the implementation of U.S. environmental laws, including . . . the Endangered Species Act. . . . If a given action *could* harm a species that *might* be endangered, do not allow it." [329]

Another commentator's research places the plausibility of such testimony into serious question. This scholar has asserted that neither the express language nor the legislative history of the ESA reflects the Precautionary Principle, and that a

program for the conservation of threatened and endangered plants and animals and the habitats in which they are found. The U.S. Fish and Wildlife Service (FWS) of the Department of the Interior maintains the list of over 1500 endangered species and 300 threatened species. Species include birds, insects, fish, reptiles, mammals, crustaceans, flowers, grasses, and trees. Anyone can petition FWS to include a species on this list. The law prohibits any action, administrative or real, that results in a 'taking' of a listed species, or adversely affects habitat. Likewise, import, export, interstate, and foreign commerce of listed species are all prohibited. EPA's decision to register a pesticide is based in part on the risk of adverse effects on endangered species as well as environmental fate (how a pesticide will affect habitat). Under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), EPA can issue emergency suspensions of certain pesticides to cancel or restrict their use if an endangered species will be adversely affected"). *See Summary of the Endangered Species Act - Laws, Regulations, Guidance & Dockets*, U.S. Environmental Protection Agency, (The ESA has since been amended many times), http://www.epa.gov/lawsregs/laws/esa.html.

327. *See* A Guide to the Laws and Treaties of the United States for Protecting Migratory Birds, U.S. Fish and Wildlife Service, http://www.fws.gov/migratorybirds/intrnltr/treatlaw.html.
328. *See* Statement of Bernard H. Oxman, Professor of Law, University of Miami, *supra* note 188, at 163.
329. *See* Jonathan Adler, *Dangerous Precaution*, National Review Online (Sept. 13, 2002) http://www.nationalreview.com/adler/adler091302.asp.

'Professional Judgment Method' of regulation had long prevailed until the mid-1990s. Pursuant to that method, agencies implemented substantive duties based largely on the professional judgment of administrators, whose "decisions were subject to judicial review under the deferential Administrative Procedure Act standards."[330] Since the mid-1990's however, two competing alternative methods of regulation have evolved, "each pull[ing] the statute in opposite directions" and affecting its implementation.[331] One method requires that "an agency decision to extend protection to a species, such as by limiting land development in the species' habitat . . . withstand the rigors of a scientific peer review process assessing each facet of the agency's work [the Scientific Method]"[332] The other dispenses with "peer review and other accoutrements of science,"[333] and requires that "all close calls are resolved in favor of extending protection to a species, even when the evidence in support of protecting a species is slim, sufficient at most, to support a fear that failure to protect the species could have adverse consequences." [334] It is the latter approach of "err[ing] on the side of the species [, which] . . .is embodied in the Precautionary Principle,"[335] and that triggered much of the contentious public debate since then.

Precautionary Principle proponents have openly argued, for example, that the Congress intended for the ESA to be an "institutionalization of. . . caution. It is likely one of the earliest legislative expressions of what is now referred to as the Precautionary Principle."[336] Consequently, "the rationale and language used to articulate the need for passage of the ESA 30 years ago is nearly the same as that

330. *See* JB Ruhl, *The Battle Over Endangered Species Act Methodology*, 34 ENVTL. L. 555, 589–90 (2004) at 10-12, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=444280.
331. *Id.* at 560.
332. *Id.* at 560-561.
333. *Id.*; Daniel J. McGarvey, *Merging Precaution with Sound Science under the Endangered Species Act*, 57 BIOSCIENCE MAGAZINE 1 (Jan 2007) 65-70 at 69, ("While it is true that the origins of the precautionary principle are more political than scientific (Foster et al. 2000), there is no epistemological reason why it cannot be employed as a legitimate standard in scientific research"), http://www.bioone.org/doi/pdf/10.1641/B570110?cookieSet=1.
334. *See* JB Ruhl, *The Battle Over Endangered Species Act Methodology*, *supra* note 330, at 12.
335. *Id.* at 3.
336. *See* Jeff Curtis and Bob Davison, *The Endangered Species Act: Thirty Years on the Ark*, OPEN SPACES QUARTERLY (2003) http://www.open-spaces.com/article-v5n3-davison.php, *referenced in* Remarks of Assistant Secretary Craig Manson Prepared for Delivery at CLE International's 10th Annual Endangered Species Act and Habitat Conservation Planning Conference (Dec. 5, 2003) http://www.fws.gov/news/speeches/remarksofcraigmanson120503.htm.

used today to argue for its continued strength."[337] Does this mean that the ESA has always incorporated the Precautionary Principle in spirit?

The Congressional Research Service has also contributed to this confusion. In 2007, it concluded that although the ESA text "does not expressly incorporate the Precautionary Principle, it is justifiable to interpret the 'best information/data available' language contained within the ESA *ex post facto* as if the statute had always intended to provide declining species with a margin of safety and the benefit of the doubt, and thus, as incorporating the Precautionary Principle *in spirit.*[338] It cites as support the National Fish and Wildlife Service's *Endangered Species Consultation Handbook*, which states that,

> [E]fforts should be made to develop information, but if a biological opinion must be rendered promptly, it should be based on the available information, '*giving the benefit of the doubt to the species,*' with consultation possibly being reinitiated if additional information becomes available. This phrase is drawn from the conference report on the 1979 amendments to the ESA, which states that *the 'best information available' language was intended to allow FWS to issue biological opinions even when inadequate information was available,* rather than being forced by that inadequacy to issue negative opinions, thereby unduly impeding proposed actions.[339]

Environmental and animal rights activists have since employed this reasoning to keep the U.S. Navy on edge. During 2003, for example, they challenged a legislative exemption from the ESA that had been granted to the Defense Department on 'military readiness' grounds.[340] Yet this garnered only a fraction of the publicity that the U.S. Fish and Wildlife Service's proposed (January 2007)[341]

337. *Id.*
338. *See* The Endangered Species Act and 'Sound Science,' CRS Report for Congress # RL32992 (Jan. 8, 2007) at CRS-17, http://www.fas.org/sgp/crs/misc/RL32992.pdf.
339. *Id.* at CRS-20 (citing Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities under Section 7 of the Endangered Species Act Washington, DC: Fish and Wildlife Service and National Marine Fisheries Service, March 1998, 1-6) (emphasis added); U.S. House, Committee of Conference, Endangered Species Act Amendments, H. Rept. 96-697 (Washington, DC: U.S. GPO, 1979), 12.
340. *See* David M. Bearden, Defense Cleanup and Environmental Programs: Authorization and Appropriations for FY2004, CRS Report for Congress # RL32183 (Jan. 5, 2004) at CRS-17, CRS-18, http://www.ncseonline.org/NLE/CRSreports/04Jan/RL32183.pdf.
341. See Endangered and Threatened Wildlife and Plants; 12-Month Petition Finding and Proposed Rule To List the Polar Bear (Ursus maritimus) as Threatened Throughout Its Range, 72 FR 1064, 1089 (Jan. 9, 2007) (The ESA regulates the 'take' of polar bears, while "[t]he CZMA applies to polar bear habitats of northern and western Alaska. The North Slope Borough and Alaska Coastal Management Programs assist in protection of polar bear habitat through the project review process."),

and final (May 2008)[342] ESA listing of the polar bear did, especially considering environmental activist efforts to have the FWS "institute a [P]recautionary [A]pproach when setting harvest limits in a warming Arctic environment," which it ultimately declined to do.[343]

4. Marine Mammal Protection Act (MMPA)

Like the ESA, the MMPA[344] prohibits the 'take' of a marine mammal, which is defined as "any act of pursuit, torment or annoyance which has the potential to disturb a marine mammal in the wild by causing disruption of behavioral patterns."[345] And, like the ESA, the MMPA does not expressly incorporate the Precautionary Principle within any of its textual provisions to implement this or any other of its provisions.

Yet, this has not prevented the U.S. National Marine Fisheries Service (NMFS) from promulgating final administrative regulations in 2001 that expressly employ the Precautionary Principle for purposes of implementing the 'take' prohibition in both statutes.[346] According to the NMFS, the Precautionary Principle was adopted within its regulations to prevent vessel traffic from creating disturbances that can

http://www.setonresourcecenter.com/register/2007/Jan/09/1064A.pdf.

342. *See* Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (Ursus maritimus) Throughout Its Range, Fish and Wildlife Service, U.S. DEPARTMENT OF THE INTERIOR, 73 FR 28212 (May 15, 2008), 50 CFR Part 17, http://alaska.fws.gov/fisheries/mmm/polarbear/pdf/Polar_Bear_Final_Rule.pdf.
343. *Id.* at 73 FR 28280; *see* Letter from Alaskan Governor Sarah Palin to Honorable Dick Kempthorne, Secretary of the Interior (April 7 2007) (expressing formal opposition to listing the polar bear under the Endangered Species Act as threatened in all or significant portions of its range and accompanying attachments, 'express[ing] concern to pursue precautionary management for the conservation of polar bears'), http://www.adfg.state.ak.us/special/esa/polarbears/state_comments4-9-07.pdf.
344. The Marine Mammal Protection Act (MMPA) of 1972,16 U.S.C. 1361-1407, P.L. 92-522, October 21, 1972, 86 Stat. 1027, (enacted on October 21, 1972 and has been amended numerous times); Marine Mammal Protection Act (MMPA) of 1972 – Overview, NOAA Fisheries – Office of Protected Resources, ("All marine mammals are protected under the MMPA . . . [which] prohibits, with certain exceptions, the 'tak[ing]' of marine mammals in U.S. waters and by U.S. citizens on the high seas, and the importation of marine mammals and marine mammal products into the U.S . . . The MMPA was amended substantially in 1994" and then again in 2004"), http://www.nmfs.noaa.gov/pr/laws/mmpa.
345. *See* 16 U.S.C. §1362(13) of the MMPA; 16 U.S.C. 1538 (Section 9) of the ESA.
346. Endangered Species Act (ESA), 16 U.S.C. 1531; Marine Mammal Protection Act (MMPA) 16 U.S.C. 1361, (Both authorities issue this rule); *See* Final Regulations Governing the Approach to Humpback Whales in Alaska, 66 FR 29502, 50 CFR Part 224 (May 31, 2001) http://www.fakr.noaa.gov/frules/humpbackapproachfr.pdf.

disrupt humpback whale behavior to such an extent as to rise to the level of a 'taking' that could potentially endanger the health and safety of the species.

> Consistent with the definition of 'take' and the associated prohibition on 'take,' NMFS is implementing these regulations to prevent disturbance of humpback whales that may be caused by disruption of behavioral patterns. *In addition, the* precautionary principle *would dictate that NMFS take action to protect a species based on the information that we have that shows that vessel traffic can cause changes in a whale's behavior* . . . . The impact of the current level of viewing pressure, or an increased viewing pressure, may not be fully understood for many years. *The risk of harm to the species from a possible delay in detecting a long-term negative response to increased pressure provides impetus to implement measures on a precautionary basis* to manage vessel interaction with humpback whales in waters off Alaska."[347]

One 2004 Congressional Research Service report identified and discussed the issues that might be raised during any future discussions concerning the reauthorization of the MMPA.[348] In so doing, it reviewed the debates that had arisen over prior legislative and regulatory proposals beginning with the mid-1990's.[349] The report reveals that, on several occasions, environmentalists and animal rights advocates and their congressional patrons had endeavored to enact legislative amendments to and secure regulatory reinterpretations of the MMPA which would have provided for the indirect adoption of Europe's Precautionary Principle.[350] These initiatives had focused on changing three definitional standards within the MMPA: "potential biological removals (PBRs)," "deterrents," and "harassment."[351]

The CRS report highlighted that PBR amendment efforts encountered resistance from industry and native communities. In a nutshell, PBRs determine "the maximum number of animals . . . that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population."[352] Apparently, the fishing industry and Native Alaskan community

347. 66 FR 29506, 29509 (emphasis added).
348. *See* Eugene H. Buck, *The* Marine Mammal Protection Act: Reauthorization Issues, CRS Report for Congress #RL 30120, (June 18, 2004), https://www.policyarchive.org/bitstream/handle/10207/908/RL30120_20040618.pdf?sequence=2.
349. *Id.* at CRS-1.
350. *Id.* at FN 34, CRS-12, CRS-14, CRS-37, CRS-43.
351. *Id.* at CRS-12, CRS-14, CRS-37.
352. *Id.* at CRS-11.

believed that NOAA's restrictiveness in calculating PBRs compromised the economic viability of certain fisheries (e.g., the New England and mid-Atlantic gillnet fisheries, Bering Sea Pollock fishery).[353] Certain scientists and animal protection advocates, on the other hand, were concerned that if PBR limitations were made less restrictive, they would "not provide adequate incentive for commercial fisherman to develop better ways of targeting and catching certain species of fish (e.g., phasing out indiscriminate harvesting methods)."[354] They further worried that a more liberal PBR standard could "retard the process of approaching the MMPA's zero mortality rate goal (ZMRG) . . . . Scientific, animal protection and environmental interests. . .[saw] *PBR as a means of invoking the precautionary principle in marine mammal management* — by which the federal government takes action to avert possible harm to marine mammals, even when the causal link between human behavior and those damages is not completely clear."[355]

With respect to the MMPA's rules concerning deterrents, which are devices that fishermen may use "to discourage marine mammals from damaging fish catch or gear,"[356] the report reflects that environmental and animal rights advocates had endeavored to shift the burden of proof via the Precautionary Principle from the government to show a given deterrent is harmful, to industry to prove that it was harmless.

> Currently, the burden falls on the federal government to prove that a deterrent is harmful before it can be prohibited . . . . With huge gaps of knowledge in marine mammal science, some animal protection advocates argue that it would be prudent to allow only proven harmless deterrents for use on marine mammals interacting with fishing vessels and/or fish farms. Some have argued for reliance on the precautionary principle that would require manufacturers to prove that a deterrent does not cause permanent harm to any age/sex class of affected marine mammal species before allowing its use . . . . Others assert that it is an extreme standard to be required to prove a negative — that an AHD does not cause harm.[357]

In regard to the statutory meaning of the term "harassment," the report described how the environmental and animal activists had sought to reverse a 2003

353. *Id.* at CRS-11, CRS-12.
354. *Id.* at CRS-12.
355. *Id.* at CRS-11, CRS-12 (emphasis added).
356. *Id.* at CRS-14.
357. *Id.* at CRS-14, CRS-15 (emphasis added).

legislative amendment to the MMPA[358] that had effectively granted the Department of Defense an exemption from the statute's general harassment prohibition, which they consider to be "among the key protections provided in the statute."[359] The amendment essentially redefined "harassment" from any action that has the "potential to injure," to any action that has the "*significant* potential to injure" marine mammals.[360] Environmental activists argued that this change raised the burden of proof necessary to show that a military readiness activity would affect a marine mammal (i.e., it made it more difficult to protect them).[361] Some even argued that such change "effectively reverse[d] the precautionary burden of proof that ha[d] been the hallmark of the MMPA since its inception," in favor of U.S. military preparedness, and thus, contravened the original intent of Congress.[362] In the end, these activists pledged to reverse this amendment and to expressly reinstate the Precautionary Principle within the MMPA when the statute came up for reauthorization once again in the future.[363]

No doubt, Precautionary Principle advocates had already been emboldened by the 2002 litigation they had commenced in a northern California federal district court against the U.S. Navy. In *Natural Resources Defense Council, Inc. v. Donald Evans*,[364] various environmental groups alleging violations of the MMPA, ESA, APA, and NEPA sought to enjoin the Navy from conducting peacetime military exercises using low frequency sonar in the U.S. coastal, contiguous and exclusive economic zones.[365] As the result of the plaintiffs' success in securing a

358. *See* Eugene H. Buck and Kori Calvert, Active Military Sonar and Marine Mammals: Events and References, CRS Report for Congress # RL33133 (Updated Nov. 3, 2005) ("On November 24, 2003, "President Bush signed P.L. 108-136 [HR 1588], the National Defense Authorization Act for FY2004, wherein §319 amended the MMPA to exempt military readiness activities from 'specified geographical region' and 'small numbers' requirements, and to modify the definition of 'harassment' applicable to military readiness activities."). https://www.policyarchive.org/bitstream/handle/10207/2610/RL33133_20051103.pdf?sequence=1.

359. *See* Bearden, *supra* note 3409, at CRS-20.

360. *See* Eugene H. Buck, *The Marine Mammal Protection Act: Reauthorization Issues*, CRS Report for Congress #RL 30120, at CRS-43.

361. *Id.*

362. *Id.*

363. *Id.*

364. *See, e.g.*, Natural Resources Defense Council, Inc. v. Donald Evans, 232 F. Supp. 2d 1003 (N.D. Cal. 2002), http://www.animallaw.info/cases/caus232fsupp2d1003.htm.

365. *See* Natural Resources Defense Council, Inc. v. Donald Evans, No. C-02-3805-EDL, Opinion and Order on Cross-Motions for Summary Judgment, at 1-2, http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/nrdc/nrdcevans82503opn.pdf.

preliminary injunction, the Navy was compelled to settle.[366] But this did not end the Navy's effort to secure legislative or executive 'fixes' to the problem (e.g., the MMPA amendment noted above and executive orders exempting Navy adherence to the ESA and CZMA on national security grounds).[367] Notwithstanding these efforts, environmentalists have continued to challenge the Navy's use of low and medium frequency sonar in U.S. waters, as the litigation initiated in response to the Navy's more recent grant of exemption demonstrates.[368]

Apparently, these activists have been inspired by other Precautionary Principle proponents familiar with EU law, who believe that current risk-based studies are inadequate to prove marine mammal safety. According to one such commentator, "although science is central to risk assessment, values and ethics also play important roles."[369] He has thus argued that, since both the UNCLOS and certain EU directives protective of the marine environment incorporate the Precautionary Principle, any use by the U.S. military of high-intensity military sonar within EU member state (EEZ, contiguous and coastal waters) or the high seas would be inconsistent with the Precautionary Principle and EU laws.[370] Consequently, the U.S. government could potentially be found liable under UNCLOS (presumably under the doctrine of State Responsibility) for any damages that U.S. Naval sonar exercises might inflict on marine mammals, even if the U.S. military itself was found to be immune from suit pursuant to UNCLOS Article 298(1)(b).[371]

In addition, it must not be overlooked how EU politicians have helped to shape

366. *Id.*; *see also Navy Agrees to Limit Global Sonar Deployment*, Natural Resources Defense Council Press Release (Oct. 13, 2003) http://www.nrdc.org/media/pressreleases/031013.asp.

367. *See* Gibel, *supra* note 74, at 26–27.

368. *See New National Defense Exemption to Marine Mammal Protection Act Authorized for Navy*, U.S. Department of Defense News Release No. 072-07 (Jan. 23, 2007) http://www.defenselink.mil/releases/release.aspx?releaseid=10427; Joe Beck, *Navy Gets Reprieve From Mammal Protection Law*, NORTH COUNTY TIMES (Jan. 23, 2007), http://www.nctimes.com/articles/2007/01/24/news/top_stories/01_04_901_23_07.txt.

369. *See Statement of Jonathan Van Dyke*, *in* Erin Vos and Randall R. Reeves, *Report of an International Workshop: Policy on Sound and Marine Mammals 28–30 September 2004*, U.S. Marine Mammal Commission – Joint Nature Conservation Committee UK (Dec. 23, 2005) at 22, http://www.mmc.gov/sound/internationalwrkshp/pdf/finalworkshopreport.pdf.

370. *Id.*

371. *Id.*; *see* Jon M. Van Dyke, *Chapter 15 - The Evolution and International Acceptance of the Precautionary Principle*, *in* David D. Caron and Harry N. Scheiber, BRINGING NEW LAW TO OCEAN WATERS (2004) at 357-379, *available at* http://www.mmc.gov/sound/internationalwrkshp/pdf/vandyke.pdf; http://www.brill.nl/print.aspx?partid=210&pid=21272.

international and U.S. public opinion against the U.S. Navy's use of sonar,[372] as they and various transatlantic constituencies have continued to pressure the U.S. government to ratify the UNCLOS.[373] They previously alleged, for example, that by granting these military exemptions to the ESA and MMPA, the U.S. government has failed to implement the Precautionary Principle and consequently has endangered marine wildlife in violation of the UNCLOS and other international environmental laws. Indeed, the European Federation of Green Parties of the European Parliament issued a politically antagonistic resolution during November 2002 for precisely this purpose. The resolution: (1) asserted that the U.S. government military's continued use of sonar has violated various provisions of UNCLOS (Articles 194 and 204-206); (2) declared that the Precautionary Principle, UNCLOS and the U.N. Convention on Biological Diversity (CBD) are customary international law that the U.S. must abide, whether or not it has implemented the principle or ratified both conventions; (3) insisted that, consistent with UNCLOS, the U.S. must provide the public with an environmental impact assessment of its use of sonar; (4) demanded that the U.S. ratify both the UNCLOS and the CBD and "adhere to other instruments of international law"; and (5) applauded the ruling in the 2002 *Natural Resources Defense Council* decision which blocked the U.S. Navy from deploying a new high-intensity sonar system in U.S. waters.[374]

To be sure, the EU continues to move towards greater oceans regulation. This

372. *See* European Greens on LFAS, Resolution Adopted by the European Federation of Green Parties (Nov. 16, 2002) at para. (E)(6), http://www.buergerwelle.de/pdf/grn/omega74.htm.

373. *Id.* at para. 5; *see also Draft Recommendation 833 on Europe's Northern Security Dimension*, in, Paul Wille and Odd Einar Dørum, Europe's Northern Security Dimension, Report of the European Security and Defense Assembly – Assembly of Western European Union, DOCUMENT A/2016 (Dec. 4, 2008), http://www.assembly-weu.org/en/documents/sessions_ordinaires/rpt/2008/2016.pdf (expressing concern that the U.S. must ratify UNCLOS to help resolve competing territorial claims to the Arctic – *See especially*: Preamble at para. xxvii-xxix; Recommendation para. 6. at 3-4.); *see* William H. Taft IV and Frances G. Burwell, Law & the Lone Superpower: Rebuilding a Transatlantic Consensus on International Law, The Atlantic Council (Apr. 2007), http://www.acus.org/docs/070417_Law%20_&%20_The_Lone_Superpower.pdf ("The United States should join at least one multilateral agreement that will enhance its reputation as a leader in the international legal field while also furthering U.S. interests. In particular, securing ratification of the UN Convention on Law of the Sea would reinforce the U.S. position as a leader not only in legal, but also environmental matters — topics on which the U.S. reputation has dropped considerably in recent years, especially in Europe.").

374. *See* European Greens on LFAS, Resolution Adopted by the European Federation of Green Parties (Nov. 16, 2002), at para. (C-D), (E)(2), (5), (6).

past June, the EU Parliament and Council were finally able to agree on a member state directive that establishes a regional framework on marine environmental policy[375] that expressly references the UNCLOS, ecosystem-based approach, marine protected areas, and "in particular, the Precautionary Principle."[376]

5. The Coastal Zone Management Act

International law commentators are often eager to draw the connection between U.N. Agenda 21 and the CZMA.[377] They have multiple purposes for doing so.

First, they wish to point how Agenda 21 obligates coastal state governments to adopt coastal zone management procedures that foster the "sustainable development of coastal areas and the marine environment under their national jurisdiction."[378] These procedures include "*applying 'preventive and precautionary approaches* . . . to protect and preserve sensitive offshore ecosystems such as coral reefs and to maintain water quality despite land- and sea-based pollution."[379] They also wish to emphasize how Chapter 17 [of Agenda 21] admonishes coastal states to "to maintain the biological diversity of marine species in the areas under national jurisdiction and to maintain the productivity of marine ecosystems."[380] In the estimation of one commentator, "[T]he [P]recautionary [P]rinciple might even require a presumption, at least in coastal areas that are

375. *See* Directive 2008/56/EC of the European Parliament and of the Council, (June 17, 2008)(establishing a framework for community action in the field of marine environmental policy, Marine Strategy Framework Directive, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:164:0019:0040:EN:PDF.

376. *Id.* at Preamble, para. (6), (8), (17), (18), (21), (27), (44), art.1(3), 3(1)(a), 13(4), 21.

377. The Coastal Zone Management Act (CZMA), Public Law 92-583, 16 U.S.C. 1451-1456, (enacted in 1972, and has been amended numerous times since); *About Coastal Zone Management Act - Congressional Action to Help Manage Our Nation's Coasts*, Ocean & Coastal Resource Management website of the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, ("The Act...provides for management of the nation's coastal resources, including the Great Lakes, and balances economic development with environmental conservation. The CZMA outlines two national programs, the National Coastal Zone Management Program and the National Estuarine Research Reserve System . . . . The overall program objectives of CZMA remain . . . to 'preserve, protect, develop, and where possible, to restore or enhance the resources of the nation's coastal zone.'"), http://coastalmanagement.noaa.gov/czm/czm_act.html; *see also*, *Coastal Zone Management Act of 1972*, NOAA Ocean and Coastal Resources Management, http://coastalmanagement.noaa.gov/about/czma.html#section304.

378. *See* Craig, *supra* note 62, at 10196.

379. *Id.*

380. *Id.*

already densely populated, against further development and sea traffic, especially if the coastal environment cannot adequately perform its functions of water filtration, erosion control, and habitat for marine species."[381]

Second, they have emphasized how the U.S. government's failure, thus far, to implement the Precautionary Principle within the CZMA and the Clean Water Act has rendered the U.S. government unable to satisfy the CZMA's policy goals, and has also resulted in the further degradation of the nation's coastal wetlands. "The CZMA and CWA programs have been insufficient to prevent overall degradation of the nation's coastal zones or to make significant progress in restoring degraded areas, particularly degraded wetlands. *Neither the CZMA nor the CWA explicitly incorporates a precautionary approach.*"[382]

Third, in order to satisfy the CZMA's underlying policy objectives for the benefit of the American public, and to fulfill the international mandate of sustainable development of the coastlines, these commentators have recommended that the U.S. Congress amend the CZMA in the future so that it expressly incorporates the Precautionary Principle. "For example . . . Congress could amend . . . the Act [to] . . . encourage states to protect sensitive marine species and ecosystems, preserve coral reefs, discourage near shore coastal development, address boating and recreational use issues, *and to adopt a precautionary presumption that further development within a certain distance of the mean high tide line is prohibited.*"[383]

Fourth, they have recommended that U.S. state-level governments employ their laws more proactively to achieve these objectives. Since the CZMA is, for all intensive purposes, a national state-centered program, once a state coastal program has been certified as satisfying the CZMA requirements, Federal actions undertaken within the state's coastal zone must be conducted in a manner consistent with the State's CZM plan to the maximum extent practicable.[384]

The California Coastal Commission may have actually followed this advice. On March 7, 2007, California's Attorney General filed suit under the CZMA in the United States District Court for the Central District of California seeking to enjoin

381. *Id.*
382. *Id.* at 10198 (emphasis added).
383. *Id.* at 10199-10200 (emphasis added).
384. *See* Carolyn Raffensperger, *A State Preempts the U.S. Navy*, ENV'T LAW INST. (May/June 2007), http://www.sehn.org/pdf/may-jun2007.pdf.

the U.S. Navy from conducting planned military training exercises scheduled between February 2007 and January 2009 off of the Southern California coast. These exercises involved the deployment of mid-frequency sonar devices alleged by the State as being dangerous to large marine mammals and sea turtles.[385] The suit was filed notwithstanding the Navy's preparation during February 2007 of "an environmental assessment" [EA] . . . [that bore] a finding of no significant impact - for the training exercises."[386] The Commission alleged that the Navy's sonar program did not satisfy the conditions it imposed because it failed to "protect marine mammals and sea turtles from the effects of mid-frequency sonar."[387] These conditions required the Navy to "take precautionary measures," consistent with California's coastal management program.[388] The Navy challenged the injunction, claiming that it already "had made an effort to use the precautionary approach . . . in the absence of scientific information to the contrary, [by] assess[ing] that the proposed training [was] harmful to the environment"[389] (i.e., by intentionally overstating its estimate of potential injuries to beaked whales). In addition, the Commission alleged that the Navy had violated the reporting requirements of Section 1456 of the CZMA.[390]

On March 22, 2007, the Natural Resources Defense Council and other environmental groups joined the litigation, challenging the Navy's EA and impact findings and its failure to prepare an environmental impact assessment (EIA) as required by NEPA.[391] The Court agreed with the NRDC, identifying two ways the Navy violated the CZMA. First, the Court found that the Navy had failed to mention in its Consistency Determination (CD) that it intended to conduct such activities and did not adequately show that its sonar operations would not have a significant impact on the marine environment and/or would not affect the coastal zone (effectively imposing a reversal of the burden of proof). Second, the Court

385. *See* California Coastal Commission v. U.S. Department of the Navy, Case No. CV07-01899 (filed March 7, 2008), http://www.coastal.ca.gov/fedcd/sonar/ccc-v-navy-2-22-2007.pdf.
386. *Id.* at 7.
387. *Id.* at 2-3.
388. *See* Raffensperger, *A State Preempts the U.S. Navy*, *supra* note 307.
389. *Id.*
390. *See* California Coastal Commission v. U.S. Department of the Navy, *supra* note 404, at 4; CZMA Sections 1456(c)(1)(A) and (C); *see* Coastal Zone Management Act of 1972, as amended through P.L. 104-150, The Coastal Zone Protection Act of 1996, U.S. Department of Commerce National Oceanic and Atmospheric Administration, http://coastalmanagement.noaa.gov/about/czma.html#section307.
391. Natural Res. Def. Council v. Winter, No. 8:07-cv-00335-FMC-FMOx, slip op.

found that the Navy's CD had failed to incorporate mitigation measures required by the California Coastal Commission program (effectively amounting to more than a precautionary approach).[392] Having identified the *possibility* of irreparable harm, on August 7, 2007, the Court issued a preliminary injunction against the Navy of potentially infinite duration – "until the Navy adopt[ed] mitigation measures that would substantially lessen the likelihood of serious injury and death to marine life."[393]

The Navy subsequently appealed the case to the Ninth Circuit Court of Appeals which, on August 31, 2007, stayed the District Court's broad injunction, pending the Navy's appeal.[394] In an order dated November 13, 2007, the Ninth Circuit upheld the District Court's findings and vacated the stay.[395] It also remanded the case back to the district court instructing it to "narrow the scope of the injunction by using its findings to craft mitigation measures uniquely tailored to fit the Navy's . . . sonar operations."[396]

On January 3, 2008, the District Court issued a narrower preliminary injunction ruling that the Navy must "maintain a 12 nautical mile exclusion zone from the California coastline at all times [a zone that corresponds to the U.S. territorial sea under the UNCLOS] . . . [and that] a twenty-five mile exclusion zone [corresponding to the contiguous zone under the UNCLOS] would [have been] unduly burdensome to the Navy."[397] The Court also ruled that the Navy had to cease operation of sonar when marine mammals were spotted within 2200 yards, finding that the maintenance of such a "zone of protection" would impose only a minimal burden upon the Navy.[398] A second order was issued on January 10, 2008 to clarify the January 3, 2008 decision,[399] and it imposed other conditions.[400] "The

392. *See* NRDC v. Winter -- Green Trumps the Blue and Gold -- National Security Takes a Back Seat to Natural Resources, American College of Environmental Lawyers (Jan. 22, 2008), http://www.acoel.org/2008/01/articles/nepa/nrdc-v-winter-green-trumps-the-blue-and-gold-national-security-takes-a-back-seat-to-natural-resources.
393. *Id.*
394. Natural Res. Def. Council, Inc. v. Winter, 502 F.3d 859, 862 (9th Cir. 2007).
395. NRDC v. Winter, 508 F.3d. 885 (9th Cir. 2007).
396. *Id.*
397. NRDC v. Winter, *supra* note 395.
398. *Id.*
399. NRDC v. Winter, 530 F. Supp. 2d 1110 (C.D. Cal. 2008), *available at* http://docs.nrdc.org/water/wat_08011601A.pdf.
400. *See* Kristina Alexander, Environmental Exemptions for the Navy's Mid-Frequency Active Sonar Training Program, CRS Report for Congress # RL34403 (updated Apr. 15, 2008) at CRS-7, http://ftp.fas.org/sgp/crs/weapons/RL34403.pdf.

Navy filed a notice of appeal the following day. On January 14, 2008, the District Court denied the Navy's stay application."[401]

On January 15, 2008, President Bush issued a memorandum exempting the Navy from compliance with the CZMA, declaring that the Navy's use of mid-frequency active sonar, in conjunction with its planned military exercises in Southern California coastal waters, was in the paramount interest of the United States and that the Navy's forced compliance with the CZMA would undermine its combat readiness.[402] On the same day, the Navy filed an ex parte emergency motion to vacate the injunction with both the District Court[403] and the Ninth Circuit Court of Appeals.[404] The Ninth Circuit remanded the action to the District Court on January 16, 2008 to consider the impact of both the military exemption and the Council on Environmental Quality's grant to the Navy of a waiver from NEPA's EIA requirement (i.e., "a finding [of] 'emergency circumstances' [that] provided for 'alternative arrangements' to accommodate those emergency circumstances").[405] Although the Court of Appeals subsequently modified the conditions of the District Court's injunction so that they were somewhat more flexible for the Navy, the Navy, which contested only two of the District Court's six conditions, nevertheless petitioned the U.S. Supreme Court to review that decision.[406]

On November 12, 2008, the U.S. Supreme Court found that the District Court had abused its discretion by imposing a 2,200-yard shutdown zone and by requiring the Navy to power down its MFA sonar during significant surface

401. NRDC v. Winter, 513 F. 3d 920 (9th Cir. 2008), 4, *available at* http://docs.nrdc.org/water/wat_08011601A.pdf.
402. *Presidential Exemption from the Coastal Zone Management Act - Memorandum for the Secretary of Defense and the Secretary of Commerce*, White House Press Release (Jan. 16, 2008), http://www.whitehouse.gov/news/releases/2008/01/20080116.html.
403. NRDC v. Winter, EX PARTE APPLICATION to Stay Pending Consideration of Ex Parte Application to Vacate Preliminary Injunction, http://www.scribd.com/doc/2052829/EX-PARTE-APPLICATION-to-Stay-Pending-Consideration-of-Ex-Parte-Application-to-Vacate-Preliminary-Injunction.
404. NRDC v. Winter, 513 F. 3d 920, *supra* note 395.
405. *Id.* at 4-5. A consortia of environmental groups later held a press conference at which they alleged that the President's exemption "flout[ed] the will of Congress, the decision of the California Coastal Commission and a ruling by the federal court." *See Activists Vow to Push Fight Against Navy Sonar*, ASSOCIATED PRESS (Jan. 17, 2008); http://www.msnbc.msn.com/id/22683062; *Navy Exempted from Sonar Curbs*, REUTERS (Jan. 16, 2008), http://www.reuters.com/article/environmentNews/idUSN16106150200801 17.
406. *See* NRDC v. Winter, 2008 U.S. App. LEXIS 4458, *4 (9th Cir. February 29, 2008).

ducting conditions. It reversed the Ninth Circuit Court's judgment and vacated the preliminary injunction.[407] The U.S. Supreme Court's Majority Opinion delivered by Justice Roberts held that the Appellate Court's reliance upon the ninth circuit precedent of "Issuing a preliminary injunction based only on a *possibility* of irreparable harm[,] is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."[408] The Court's Concurring Opinion authored by Justice Breyer found that "the evidence of need for the two special conditions [ordered by the District was] weak or uncertain." [409] In his view, respondents had failed to show that "the Navy's exercises with the four *un*contested mitigation measures (but without the two contested mitigation measures) in place" would *likely* cause the prospective significant "environmental harm" alleged.[410] It is evident that the Court recognized how these environmentalist groups had persuaded the California lower courts to read Europe's Precautionary Principle into the CZMA and NEPA even though these statutes do not expressly provide for it.[411]

6. The Magnuson-Stevens Fishery Conservation and Management Act

Since April 1976, the MSFCMA[412] has provided the U.S. with a national framework for conserving and managing marine fisheries operating within the U.S. territorial sea and EEZ, consistent with the provisions of UNCLOS, Part V. The

407. *Winter v. Natural Resources Defense Council*, 555 U. S. ____ (2008), 518 F. 3d 658, reversed; preliminary injunction vacated in part, at 1, 24, http://www.law.cornell.edu/supct/pdf/07-1239P.ZO.
408. *Id.* at 12 (emphasis added).
409. Winter v. NRDC, Concur. Op. at 3, http://www.law.cornell.edu/supct/pdf/07-1239P.ZX.
410. *Id.*
411. *See* Lawrence A. Kogan, *A Chill Wind for Precaution?: The Broader Ramification of the U.S. Supreme Court's Winter Ruling*, Wash. L. Found. Working Paper (Apr. 2009).
412. The Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. 1801-1882, (formerly known as The Fishery Conservation and Management Act (Act) of 1976, April 13, 1976, as amended is the primary law governing marine fisheries management in United States federal waters. The Act was substantially amended in 1996 ('The Sustainable Fisheries Act'- PUBLIC LAW 104–297 — OCT. 11, 1996) and then again during 2006, Public Law 109-479, 109th Congress), http://www.nmfs.noaa.gov/sfa/magact/magnuson_stevens2007.htm; *Seesee* Magnuson-Stevens Fishery Conservation and Management Act Reauthorized, NOAA Fisheries Feature, ("Most notably, the Magnuson-Stevens Act aided in the development of the domestic fishing industry by phasing out foreign fishing. To manage the fisheries and promote conservation, the Act created eight regional fishery management councils."), http://www.nmfs.noaa.gov/msa2007/index.html.

MSFCMA contains national standards for establishing fishery conservation and management with which all fishery management plans, and amendments prepared by the Councils and the Secretary must comply.[413] The first of these national standards, the Overfishing Standard, is the cornerstone of the Magnuson-Stevens Act and is essential for responsible fishery management. The national standards, including Standard 1, are to be implemented by a set of regulatory guidelines established by the Secretary of Commerce that provide the details necessary to implement the standards.[414]

During the spring of 1996, the Senate Committee on Commerce, Science, and Transportation reviewed the Sustainable Fisheries Act (SFA) containing a series of amendments to the MSFCMA which incorporated elements of a corresponding 1995 House bill, HR 39.[415] The Senate committee reported their findings to the full Senate during May 1996.[416] The SFA was later amended again, subsequently enacted into law[417] and then incorporated as an amendment within the MSFCMA[418] during October 1996.

The 1996 MSFCMA amendments added new definitions[419] such as "bycatch,"[420] which tracked the language of UNCLOS Article 61(4)[421] (dealing with "standing species"),[422] and required the achievement of the 'optimum yield' of migratory species, consistent with UNCLOS Article 64.[423] In addition, the 1996

413. *See* MSFCMA, Section 301(a).
414. *See* MSFCMA Section 303(b).
415. *See* House Report 104-171 (June 30, 1995), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_reports&docid=f:hr171.104.pdf.
416. *See* Senate Report No. 104-276 (May 23, 1996), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_reports&docid=f:sr276.104.pdf.
417. *See* Public Law 104–297 (Oct. 11, 1996), http://www.nmfs.noaa.gov/sfa/sustainable_fishereries_act.pdf.
418. *See* Public Law 94-265 (Oct. 11, 1996), http://www.nmfs.noaa.gov/sfa/magact; http://www.nmfs.noaa.gov/sfa/magact/mag3.html#s301.
419. *See* Senate Report No. 104-276, *supra* note 438, at 10.
420. *Id.* at 5.
421. *Id.* at 11.
422. *See* Prepared Statement of Mr. David G. Burney, Past President, U.S. Tuna Foundation: The conservation and Management of Highly Migrating Fish Stocks in the Western and Central Pacific Oceans, and Other Int'l Agreement of U.S. Interest in Asia and the Pacific, 110th Cong., H.Rpt. 110-126 (July 17, 2007) at 30, http://foreignaffairs.house.gov/110/36823.pdf.
423. *Id.* at 11-12; *see* Eugene H. Buck, *U.N. Convention on the Law of the Sea: Living Resources Provisions*, CRS Report for Congress # RS21631 (Sept. 30, 2003) at CRS-2, http://lugar.senate.gov/services/pdf_crs/UN_convention_law_of_the_seas.pdf.

changes modified national Standard 5 and added new national Standards 8-10.[424] None of these changes expressly incorporated the Precautionary Principle into the MSFCMA text, since the Congress ostensibly ensured, consistent with the text of UNCLOS Articles 61(2) and 119(1)(a), that 'best available scientific evidence'would become the express legislative standard/benchmark.[426] At least one commentator noted that, had Congress wanted to expressly incorporate the Precautionary Approach within the SFA amendments it would have:

> reversed [the] burden of proof by having conservative fishing levels be the default and maintaining these levels until it [was] shown that higher levels [were] justified . . . . The 1996 amendments to the. . . MSFCMA shift[ed] the burden to a degree, in the sense that targets, such as optimum yield, should be set safety below limits, such as maximum sustainable yield (MSY), even when data [were] lacking. . . . [Yet,] there [was] a lack of consensus on what to do when there [was] inadequate information to understand the tradeoffs between the goals we wish[ed] to achieve and the outcomes we wish[ed] to avoid.[427]

The lack of any express reference to the Precautionary Principle within the SFA has not, however, prevented legal commentators from claiming that the SFA "incorporated sustainable thinking and a [P]recautionary [A]pproach into U.S. domestic fisheries management" in spirit[428] In other words, the fact that "'maximum sustainable yield became a 'limit' to be avoided rather than a target. . .to be achieved" and that it has since become common to view the overexploitation of marine resources as no longer acceptable, marks "a fundamental shift, at least rhetorically," strongly suggesting the incorporation of the Precautionary Approach into the MSFCMA.[429]

It is interesting to note at this juncture how, during February 1996, President Clinton had transmitted the Migratory Fish Stocks Agreement (MFSA) (an UNCLOS protocol based on U.N. Agenda 21) to the Senate Foreign Relations

424. *Id.* at 13-14.
426. *See The Precautionary Approach to Fisheries with Reference to Straddling Fish Stocks and Highly Migratory Fish Stocks*, G. A. Explanatory Note, A/CONF.164/INF/8 (Jan. 26, 1994), at para. 5.
427. *See* Tim Gerrodette, Paul Dayton, Seth Macinko & Michael Fogarty, *Precautionary Management of Marine Fisheries: Moving Beyond Burden of Proof*, BULLETIN OF MARINE SCIENCE, 70(2): 657–668 (2002), http://docserver.ingentaconnect.com/deliver/connect/umrsmas/00074977/v70n2/s18.pdf?expires=1217211343&id=45271008&titleid=10983&accname=Guest+User&checksum=BAF82BA0358C23E319B71C6B44D2270C.
428. *See* Craig, *supra* note 62 at 10212.
429. *Id.*

Committee for ratification following his signing of it in December 1995. In his accompanying January 1996 submittal letter to the President, former Secretary of State Warren Christopher, however, declared that no federal implementing legislation was required to ratify the MFSA.[430] As a result, these MSFCMA amendments were referenced only in the Senate's SFA report. Did the Senate or the Clinton Administration believe that these MSFCMA amendments should be treated independently and separate from the MFSA ratification? If so why? Did not the MSFCMA amendments implement U.S. obligations owed under the MFSA? Was there an underlying political reason why two parallel unconnected tracts were pursued? Was the MSFCMA deemed more closely related to the UNCLOS than to the MSFA that implements its provisions? Has the Bush Administration, by also claiming that no federal environmental implementing legislation is required incident to UNCLOS ratification followed this same strategy?

Unlike the MSFCMA amendments referred to above, the MFSA does expressly incorporate the Precautionary Principle[431] within its Article 6 and Annex II, a fact not lost upon Precautionary Principle proponents.[432] In light of the prior international confusion and debates that arose during the 1994-1995 intergovernmental meetings convened by the U.N. Food and Agricultural Organization (FAO) over the different meanings ascribed by the EU and U.S. to the term Precautionary Approach[433] one must appreciate how the true meaning of that term within the text of the MFSA and the manner in which it is to be applied/implemented by MFSA parties remains unclear to this day. Therefore, how different nations endeavor to employ it, citing the treaty text as a foundation,

430. *See* Warren Christopher, *supra* note 224, at XV.

431. *See* Norwegian plenary statement of 28 November 2005 on oceans and the law of the sea, delivered by Ambassador Mona Juul, Deputy Permanent Representative, Norway Mission to the UN (Nov. 28, 2005) ("The 1995 Fish Stocks Agreement . . . *sets out the precautionary principle* and establishes the institutional framework for cooperation on the sustainable management of the fish stocks")(emphasis added), http://www.norway-un.org/NorwegianStatements/PlenaryMeetings/20051201_lawofsea.htm.

432. *See* U.N. Migratory Fish Stocks Agreement, art. 6, Application of the Precautionary Approach, ("(a) States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment").

433. *See Precautionary Approach to Fisheries Management*, EARTH NEGOTIATIONS BULLETIN VOLUME 7, ENB: 07:30, http://www.iisd.ca/vol07/0730024e.html; *The Precautionary Approach to Fisheries with Reference to Straddling Fish Stocks and Highly Migratory Fish Stocks*, G. A. A/CONF.164/INF/8 (Jan. 26, 1994).

must be carefully scrutinized and closely monitored.

Furthermore, during May 1998,[434] the National Marine Fisheries Service (NMFS) promulgated final regulatory guidelines which enhanced National Standard 1 ('optimal yield') (Sections 600.310; 600.310(f)(5)(i)-(iii))[435] and new National Standard 9 ('bycatch') (Sections 600.350; 600.350(d)(3)(ii))[436] in implementation of Section 301 of the 1996 MSFCMA. As a result, the regulatory guidelines have since expressly incorporated the Precautionary Principle, despite the fact that the underlying statutory text still does not. No doubt, this subsequently encouraged some commentators to claim that the MSFCMA now incorporates the Precautionary Principle in spirit.[437]

Environmentalist efforts apparently persuaded two congressmen during the 106th Congress to expressly incorporate the Precautionary Principle within the text of an MSFCMA reauthorization bill known as the Gilchrest-Farr *Fisheries Recovery Act of 2000* (HR 4046)[438] that was introduced during March 2000,[439] but subsequently languished. According to the bill's proponents,

> (HR 4046) [would have] reauthorize[d] and strengthen[ed] the Act by clarifying and strengthening the conservation provisions added by the Sustainable Fisheries Act in 1996. It addresse[d] the need to *avoid* bycatch, *eliminate* over-harvesting, and *protect* essential fish habitat, such as coral reefs, from damaging fishing practices. *It encourage[d] management precaution when scientific information is lacking* or incomplete, and moves fisheries management toward ecosystem analysis and planning.[440]

434. *See* Final Rule Amending National Guidelines for National Standards to MSFCMA, 63 FR 24211, 50 CFR 600 (May 1, 1998), http://www.epa.gov/EPA-GENERAL/1998/May/Day-01/g11471.htm.
435. *See* 63 FR 24225-24227, Comments 23, 25-26, 35 and accompanying Responses; *see also,* Technical Guidance On the Use of Precautionary Approaches to Implementing National Standard 1 of the Magnuson-Stevens Fishery Conservation and Management Act, NOAA Technical Memorandum NMFS-F/SPO # (July 17, 1998), http://www.nmfs.noaa.gov/sfa/NSGtkgd.pdf.
436. *See* 63 FR 24213, 24236.
437. Justin LeBlanc, *The Global Fish Market and the Need for Multilateral Fishing Disciplines*, 8 ECON. PERSPECTIVES 1 (Jan. 2003)("In addition, NMFS requires application of *the precautionary principle* -- simply put, the less certain you are the more cautious you should be -- to fishery management decisions.") (emphasis added), http://usinfo.state.gov/journals/ites/0103/ijee/toc.htm; http://usinfo.state.gov/journals/ites/0103/ijee/leblanc.htm.
438. *See Gilchrest Introduces Fisheries Recovery Legislation*, SEA TECHNOLOGY (June 2000), http://findarticles.com/p/articles/mi_qa5367/is_200006/ai_n21457320.
439. *See* Legislative Action Alert - HR 4046 - Fisheries Recovery Act, CaliforniaFish.org, http://www.californiafish.org/hr4046.html.
440. *See Reef Relief Goes Fishing in Washington*, REEFLINE NEWSLETTER, VOL. 12, NO. 2

Indeed, at least one proponent had written that HR 4046 made use of the Precautionary Approach "as one of its centerpieces." [441] This was echoed by a legal commentator who later wrote that, "the U.S. *Fisheries Recovery Act* explicitly provides that the *precautionary approach* applies to 'any existing or proposed action' affecting marine life."[442]

One 2001 Congressional Research Service report clearly documented the extent of debate over the Precautionary Approach during this period. It discussed how scientists and environmentalists had proposed that Congress redefine the term 'essential fish habitat' within the MSFCMA so as to reflect the Precautionary Approach. This would have permitted regional fisheries councils to incorporate the Precautionary Approach within their fisheries management plans and to then actually use it in identifying EFH for conservation purposes.[443] In addition, both fishing industry representatives (resource-users) and environmentalists suggested that Congress modify the MSFCMA to focus more on tangible data gathering to improve regulatory decision-making i.e., to provide clearer rules. However, environmentalists wanted to use this opportunity to also call for a "shift [in] the burden of proof to the resources users . . . and away from fishery managers and scientists" (e.g., government) given their belief that the excuse of "imprecise data" was being used "to delay conservation measures."[444] It is also clear that although environmentalists had recognized the NMFS' use of the best available scientific information and its advocacy of risk-averse decision-making, they believed it was necessary for "Congress [to] specifically endorse risk-averse decision-making, especially where limited data and information [were] available."[445] Lastly, many had sought more information concerning the relationship between the MSFCMA, existing international fishing treaties, including the UNCLOS, and the

(SUMMER 2000), http://www.reefrelief.org/ReefLine/Newsletter/vol12no2/RL3.html (emphasis added); *see also* Comments of Veteran Fisherman and Conservationist Phil Kline on 'The Perfect Storm', American Oceans Campaign Press Release (June 30, 2000), http://www.commondreams.org/news2000/0630-07.htm.

441. *See* Molly Thomas and Zeke Grader, *The Precautionary Principle – Making it Work for Fish and Fisherman*, FISHERMEN'S NEWS (June 2000), http://www.pcffa.org/fn-jun00.htm .
442. *See* Arie Trouwborst, Precautionary Rights and Duties of States, at 131 (2006 dissertation), http://igitur-archive.library.uu.nl/dissertations/2006-0629-204021(emphasis added).
443. *See* The Magnuson-Stevens Fishery Conservation and Management Act: Reauthorization Issues for the 107th Congress, CRS Report #RL30215 (Jan. 10, 2001) at CRS-14, http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-1863:1.
444. *Id.*
445. *Id.*, at CRS-42.

Precautionary Approach.[446]

These recommendations inspired another wave of amendments to the MSFCMA during 107th Congress, which resulted in a series of hearings and some significant debates.[447] Subsequently, on May 2, 2002, Congressman Gilchrest, the same sponsor of the unsuccessful HR 4046, convened subcommittee hearings on the discussion draft of a new bill - H.R. 4749, the 'Magnuson-Stevens Act Amendments of 2002.'[449] The House Committee on Resources later reported this bill to the full House along with dissenting views on October 11, 2002.[450] However, floor action was not scheduled during the remainder of that Congress. Not surprisingly, the congressman expressly stated that he wished to find a way to apply the Precautionary Approach to determine "maximum sustainable yield" in an effort to improve fishery practices.[451]

At least three of the witnesses who had testified that day agreed with Congressman Gilchrest that it was imperative for the MSFCMA to expressly incorporate the Precautionary Principle. One, an environmental scientist and professor at the University of Maryland, emphasized the complexity and unpredictability of ecosystems, and the "need for more dedicated language on precautionary approaches in the reauthorized Act . . . . Firm language in the Act to recognize and acknowledge the need of precautionary approaches would be welcome."[452]

A second witness, supporting a related bill to amend the MSFCMA, HR 2570 – The Fisheries Act of 2001, was concerned about the relationship between

446. *Id.*, at CRS-44.

447. *See* Magnuson-Stevens Fishery Conservation and Management Act-101, House Committee on Resources,

http://republicans.resourcescommittee.house.gov/archives/ii00/issues/fcwo/magnstev101.htm.

449. *See* Legislative Hearing before the Subcommittee on Fisheries Conservation, Wildlife and Oceans of the Committee on Resources U.S. House of Representatives, 107th Congress, 2nd Session (May 2, 2002) on H.R. 4749, The Magnuson-Stevens Act Amendments of 2002, http://bulk.resource.org/gpo.gov/hearings/107h/79374.txt.

450. *See* House Rpt.107-746 (Oct. 11, 2002), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_reports&docid=f:hr746.107.pdf.

451. *See* Statement of Congressman Wayne Gilchrest, Legislative Hearing on H.R. 4749, The Magnuson-Stevens Act Amendments of 2002 before the Subcommittee on Fisheries Conservation, Wildlife and Oceans of the Committee on Resources U.S. House of Representatives.

452. *See* Statement of Edward D. Houde, Professor, University of Maryland Ctr. for Ent'l. Science; Statement of Congressman Wayne Gilchrest, *supra* note 451.

ecosystem functions and habitat needs.[453] In his estimation, there has long been a "need to expand fishery management beyond traditional single-species planning to include ecosystem considerations . . . . Such an approach includes, but is not limited to, interactions between predator and prey species within an ecosystem and the habitat needs of living marine resources and other limiting factors in the environment. This concept of ecosystem management supports the Precautionary Approach to fishery management."[454]

This witness was also very concerned about the bill's bycatch and essential fish habitat provisions, which he believed would curtail the ability of the National Marine Fisheries Service to do its job – i.e., to fulfill its regulatory mission. He recommended that explicit Precautionary Approach language be added to HR 4749, consistent with the text of HR 2570, Section 11(a)-(c) to prevent the introduction of fishing gear that could potentially increase bycatch and damage essential fish habitats.[455] HR 2570 would have amended the policy of the MSFCMA "to assure that the national fishery conservation and management program . . . 'utilizes and is based upon . . . the precautionary approach.'"[456] It would have accomplished by adding a new definitional section (46) defining the Precautionary Approach [457] and then establishing the Precautionary Approach as a

453. *See* Fisheries Recovery Act of 2001, H.R. 2570 (amending 16 U.S.C.A. § 1801), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d107:hr2570:@@@L&summ2=m&; Eugene H. Buck, Fishery, Aquaculture, and Marine Mammal Legislation in the 107th Congress, CRS Report for Congress (Jan. 6, 2003) at CRS-3, ("H.R. 2570 and H.R. 4749 were the only bills introduced in the 107th Congress proposing reauthorization and extensive amendment of the MSFCMA."), https://www.policyarchive.org/bitstream/handle/10207/763/IB10074_20030106.pdf?sequence=9.

454. *See* Testimony of Gerald Leape, Marine Conservation Program Director, National Environmental TrustOn Behalf of the Marine Fish Conservation Network, Before the Subcommittee on Fisheries Conservation, Wildlife and Oceans On the Subcommittee Discussion Draft Reauthorization Of the Magnuson-Stevens Fishery Conservation and Management Act (May 2, 2002) at 3-4, http://www.fairifqs.org/media/gerryleapenettestimony_5-02.pdf.

455. *Id.* at 7-8.

456. *See* H.R. 2570, Sec. 11. Precautionary Approach to Fisheries Mgmt. (a)(2), amending Sec. 2, 16 U.S.C. 1801.

457. *Id.* ("The precautionary approach means (A) exercising additional caution in favor of conservation in any case in which information is absent, uncertain, unreliable, or inadequate as to the effects of any existing or proposed action on fish, essential fish habitat, other marine species, and the marine ecosystem in which a fishery occurs; (B) selecting and implementing any action that will be significantly more likely than not to satisfy the conservation objectives of this Act; and (C) taking into account past sustainable fishing levels.").

new national standard for fishery conservation and management.[458]

Lastly, the executive director of a master trade association representing a number of west coast fisheries argued in favor of expressly adding Precautionary Principle language contained within Section 11 of HR 2570 to the text of the MSFCMA.[459] However, judging from his testimony, it appears that his group's true concern was not about protecting the environment and its living resources, but rather about maintaining its competitiveness in the face of increased competition from the aquaculture and biotech industries. In other words, this witness' constituency embraced the Precautionary Principle as a disguised protectionist device to level the playing field for its industry.[460]

7. The Clean Air Act

At first glance, it is not obvious how closely the U.S. Clean Air Act[461] relates to U.S. oceans policy and to the UNCLOS. However, the U.S. Commission on Ocean Policy makes clear that "Managing atmospheric deposition of pollutants to water bodies is *the* principal nexus between the CAA and ocean and coastal management concerns."[462] Indeed, the report reveals an evolved federal strategy to

458. *Id.* (amending Section 301(a) (16 U.S.C. 1851), "The precautionary approach shall apply to conservation and management measures, in particular, and without limitation, to the application of the national standard set forth in paragraph (1)).

459. *See* Additional Issues, Testimony of W.F. 'Zeke' Grader, Jr., Executive Director, Pacific coast Federation of Fishermen's Associations, Before the House Subcommittee on Fisheries Conservation, Wildlife and Oceans, Regarding the Reauthorization of the Magnuson-Stevens Fishery Conservation & Management Act (May 2, 2002), http://www.pcffa.org/M-Stestimony2May02.htm.

460. *Id.*

461. Clean Air Act, 42 U.S.C. 7401-7661; P.L. 95-95, P.L. 88-206, P.L.89-272, P.L. 90-148, P.L. 95-190, P.L. 97-23, P.L. 91-604, P.L. 89-675, P.L. 95-258, P.L. 87-761, P.L. 86-365, P.L. 86-493, P.L. 91-137, P.L. 93-15, P.L. 93-319, P.L. 91-316, P.L. 92-463, P.L. 92-157, P.L. 95-623, P.L. 95-426, P.L. 96-88, P.L. 91-605, P.L. 97-375, P.L. 96-300, P.L. 104-59 and P.L. 104-260, (The majority of the amendments to the Clean Air Act were enacted in 1977, P.L. 95-95; 91 Stat. 685, and the primary objective of the Clean Air Act is to establish Federal standards for various pollutants from both stationary and mobile sources and to provide for the regulation of polluting emissions via state implementation plans). *See also,* Clean Air Act, Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service, http://www.fws.gov/laws/lawsdigest/CLENAIR.HTML; Clean Air Act, U.S. Environmental Protection Agency, http://www.epa.gov/air/caa; *see* The Plain English Guide to the Clean Air Act, U.S. Environmental Protection Agency, http://www.epa.gov/air/caa/peg.

462. See *An Ocean Blueprint for the 21st Century*, Final Report of the U.S. Commission on Ocean Policy (Sept. 2004) at D8 (emphasis added) (They included: "the maximum achievable control technology (MACT) standards for emissions of toxic pollutants from

more fully integrate ocean pollution concerns within U.S. air pollution laws and policies in order to address 'atmospheric deposition of pollutants into water bodies.' In particular, it referred to the EPA's 2001 'Air-Water Interface Work Plan, which drew from a number of Clean Air Act regulations that had not been implemented, and had identified over 20 specific actions that could be taken to reduce atmospheric deposition of pollutants.[463]

A review of the 1970 and 1990 amendments to the Clean Air Act (CAA), which set forth two basic strategies to control "air pollutants,"[464] is helpful in better understanding this relationship. The first strategy is contained in CAA 1970 Sections 108-110. They require the EPA Administrator to publish a list of those pollutants "which in his[/her] judgment ha[ve] an adverse effect on public health or welfare," and are "derived from 'numerous or diverse mobile or stationary sources.'"[465] The EPA has designated the six most common pollutants as "criteria" pollutants.[466] Soon after their listing, the Administrator must issue criteria-based[467] national ambient air (outdoor air)[468] quality standards for such pollutants,[469] "the attainment and maintenance of which in the judgment of the Administrator . . . allow[s] an *adequate margin of safety* . . . requisite to protect the public health"[470] and "to protect the public welfare from any known or anticipated adverse effects associated with the presences of such air pollutant in the ambient air."[471] According to one expert, scientific evaluation was long considered embedded

sources, such as industrial facilities and coal-fired power plants; the nitrogen oxides (NOx) reductions under the Acid Rain program for power plants; a separate program to reduce NOx emissions to meet the National Ambient Air Quality Standards; and controls on automobiles, trucks, vessels, and other mobile sources that will reduce emissions of both NOx and toxics.").

463. *Id.* at 224.
464. *See* Natural Resources Defense Council, Inc. v. Train, 545 F.2d 320 (2d Cir. 1976), (For a good discussion of the structure of the 1970 Clean Air Act), http://bulk.resource.org/courts.gov/c/F2/545/545.F2d.320.76-6075.146.html.
465. *See* CAA Section 108(a)(1)(A),(B); *see* Air Quality, U.S. Environmental Protection Agency http://www.epa.gov/air/oaqps/cleanair.html.
466. See *What Are the Six Common Air Pollutants?*, U.S. Environmental Protection Agency, (Criteria pollutants include carbon monoxide, sulphur dioxide, nitrogen oxides, particulates, ozone and lead), http://www.epa.gov/air/urbanair.
467. *See* CAA Section 109(a).
468. *See* 40 CFR 50.1(e) (Ambient air is essentially all outdoor air. The regulations define it as, 'that portion of the atmosphere, external to buildings, to which the general public has access').
469. *See* Title I CAA, Section 108(a)(1)(C).
470. *See* CAA Section 109(b)(1).
471. *See* CAA Section 109(b)(2) (emphasis added).

within the requirement of a criteria-based standard. "[W]hen the Clean Air Amendments of 1970 established the federal role in setting NAAQS, the 'criteria document' became the basic technical underpinning of the standards-setting process."[472]

At the same time, experts agree that CAA 1970's Section 109(b) focused only on "protecting the public health and welfare" and was unconcerned about the economic costs of complying with the standards once adopted.[473]

> Nothing in its language suggests that the Administrator is to consider economic or technological feasibility in setting ambient air quality standards. The legislative history of the Act also shows the Administrator may not consider economic and technological feasibility in setting air quality standards; the absence of any provision requiring consideration of these factors was no accident; it was the result of a deliberate decision by Congress to subordinate such concerns to the achievement of health goals.[474]

Aside from the costs of complying with the national ambient air quality standards (NAAQS), there was also the issue of timing. CAA Section 108 required the Administrator to immediately develop national ambient air standards. In addition, CAA Section 110 obligated the Administrator to ensure that such standards were implemented and that the states could satisfy the standards they set forth in their own state implementation plans within three years of plan approval.[475] At least two federal courts that have examined the legislative history of the 1970 CAA have found that the EPA Administrator lacked wide latitude in delaying the development of standards and in granting extensions to states for failing to meet the implementation time constraints. In fact, much like today's Precautionary Principle which requires action in the face of scientific uncertainty, incomplete scientific knowledge was not then deemed excusable for failing to establish or implement an ambient quality standard.

For example the Second Circuit Court of Appeals, in *Natural Resources*

472. *See* John E. Blodgett, Larry B. Parker, and James E. McCarthy, Air Quality Standards: The Decisionmaking Process II - Setting NAAQS, CRS Report for Congress 97-722 ENR (June 24, 1998) http://ncseonline.org/nle/crsreports/air/air-21a.cfm#Setting%20NAAQS.
473. *See* Linda-Jo Schierow, Risk Analysis: Background on Environmental Protection Agency Mandates, CRS Report for Congress # 98-619 ENR (June 12, 1998), http://ncseonline.org/nle/crsreports/risk/rsk-12.cfm#Clean%20Air%20Act.
474. *See* Lead Industries Ass'n, Inc. v. EPA, 647 F.2d 1130 (D.C. Cir. 1980), *available at* http://www.altlaw.org/v1/cases/421861; http://cases.justia.com/us-court-of-appeals/F2/647/1130/237769.
475. *See* CAA Section 110(a) and (e).

Defense Council, Inc. v. Train,[476] ruled that, although "the current state of scientific knowledge may make it difficult to set an ambient quality standard . . . [t]he Administrator must proceed in spite of its difficulties . . . on the basis of the best information available to him."[477] Similarly, the D.C. Circuit Court, in *Lead Industries Ass'n, Inc. v. EPA*,[478] found that the EPA cannot

> wait until it can conclusively demonstrate that a particular effect is adverse to health before it acts [which] is inconsistent with both the Act's precautionary and preventive orientation and the nature of the Administrator's statutory responsibilities. Congress provided that the Administrator is to use his judgment in setting air quality standards precisely to permit him to act in the face of uncertainty . . . . [A]s . . . the legislative history [shows,] Congress directed the Administrator *to err on the side of caution* in making the necessary decisions.[479]

Thus, the legislative history of the 1977 CAA Amendments confirms the precautionary nature or spirit of the statute, notwithstanding the absence of express precautionary principle language in the statute's text. As noted by the Court in *Lead Industries*, "the House Report accompanying the [1977 CAA] Amendments states that one of its purposes is '[t]o emphasize the preventive or precautionary nature of the act, i.e., to assure that regulatory action can effectively prevent harm before it occurs; to emphasize the predominant value of protection of public health.'"[480]

And, although the 1970 CAA's legislative history did not elaborate much about the "adequate margin of safety" language contained in Section 109, legal commentators have argued that the Senate Report accompanying the 1970 CAA, "clearly indicates that the 'margin of safety' [wa]s designed to protect against the potential for adverse effects to occur at pollutant concentrations below those known to cause harm [i.e., to] vulnerable [sensitive] population groups."[481]

476. See Natural Resources Defense Council, Inc. v. Train, *supra* note 462.
477. *See* S.Rep. No. 91-1196, 91st Cong., 2d Sess. 416 (1970) discussing S. 4358 - National Air Quality Standards Act of 1970, "Report of the Committee on Public Works, United States Senate", 91st Cong., 2d Sess. at 11; A Legislative History of the Clean Air Amendments of 1970, Vol. I. at 411 (1974), cited and discussed by the Court in Natural Resources Defense Council, Inc. v. Train, 545 F.2d 320 (2d Cir. 1976), *supra* note 462.
478. See Lead Industries Ass'n, Inc. v. EPA, 647 F.2d 1130, *supra* note 472, http://www.altlaw.org/v1/cases/421861
479. *Id.* at para. 64 (emphasis added).
480. *Id.* at para. 62. To add to the confusion, discerning readers will note that the House Report interchanges the terms 'preventive' and 'precautionary', while the European Union treats them as distinct terms.
481. *See* John E. Blodgett, Larry B. Parker, and James E. McCarthy, Air Quality Standards: The

Several commentators also noted how the Court in *Lead Industries* had interpreted the CAA 109 as reflecting a "specific concern for sensitive individuals."[482] They also pointed out how the Court had interpreted the term "'welfare' to include 'effects on economic values,' which clearly [did] "not . . . include the cost of compliance with the air quality standards. It only refer[red] to the economic costs of pollution."[483]

In light of the legislative history underlying the 1970 and 1977 CAA amendments and the accompanying jurisprudence, one expert has concluded that the 1970 Clean Air Act "effectively operationalized the absolutist version of the Precautionary Principle."[484] And a second remarked that, "It is hard to imagine a stronger endorsement of the precautionary principle."[485]

The second strategy of addressing air pollutants is contained within 1970 CAA Sections 111, 112, 202, 211 and 231. Generally speaking, these provisions mandate the control of certain specified "hazardous air" pollutants (HAPs) "at source." Sources include existing and new "stationary sources" (factories, power plants, refineries)[486] as well as mobile sources (vehicles - automobiles, buses, trucks,[487] aircraft[488]). These provisions also focused on regulating the manufacture and sale of fuels and fuel additives (and thus, fuel content) in order to reduce air pollutants.[489]

Furthermore, the second strategy "required EPA to establish a list of *hazardous air pollutants* [HAPs] and [to] impose health-based emission standards for each pollutant."[490] HAPs were those air pollutants listed by the EPA Administrator in CAA Section 112(b).[491] They were generally categorized as 'air toxics' because they were believed to have carcinogenic effect[492] – i.e., to "cause . . . cancer or

Decisionmaking Process II – Margin of Safety, CRS Report for Congress 97-722 ENR.

482. *Id.*; *see* Lead Industries Ass'n, Inc. v. EPA, *supra* note 472 at para. 62, *citing* S.Rep.No.91-1196.
483. *Id.*
484. *See* INDUR M. GOLANKY, THE PRECAUTIONARY PRINCIPLE: A CRITICAL APPRAISAL OF ENVIRONMENTAL RISK ASSESSMENT 4 (2001).
485. *See* Ashford, *supra* note 34, 363-364.
486. *See* CAA Section 111.
487. *See* CAA Section 202.
488. *See* CAA Title II, Section 231.
489. *See* CAA Section 211.
490. *See* Background: The Clean Air Act (CAA), As Amended, ChemAlliance.org, http://www.chemalliance.org/tools/background/back-caa.asp (emphasis added).
491. *See* CAA Section 112(a)(6).
492. *See* CAA Section 112(a)(11).

other serious health effects, such as reproductive effects or birth defects, or adverse environmental and ecological effects."[493]

Although the CAA does not, as of yet, impose rules to reduce HAPs emitted by marine vessels, the 110th Congress has already begun working on it. On May 24, 2007, California Senators Barbara Boxer and Diane Feinstein introduced within the Environment and Public Works Committee[494] S. 1499, "The Marine Vessel Emissions Reduction Act."[495] The Act "is intended to reduce emissions of air pollutants from marine vessels that contribute to air pollution and failure to meet air quality standards in certain areas in the United States."[496] The Act would "amend [Sections 211 and 213 of] the Clean Air Act[497] by adding new requirements relating to marine vessel fuel sulfur content and advanced marine vessel emissions controls,"[498] without regard to its likely domestic effects on commerce and U.S. international economic competitiveness.[499] It would also likely facilitate "desired" environmental amendments to the MARPOL.[500]

In developing standards for HAPs, the Administrator is obliged "to provide 'an ample margin of safety' to protect public health,"[501] which is distinct from the more permissive 'adequate margin of safety' language of CAA Section 109(b)(1) covering national ambient air quality standards[502] which imbues the EPA with more administrative discretion.

In *Natural Resources Defense Council, Inc., v. U.S. Environmental Protection*

493. *See* Pollutants and Sources, U.S. Environmental Protection Agency, http://www.epa.gov/ttn/atw/pollsour.html.
494. Fellow sponsors of the bill included Democratic Senators Cardin, Carper, Clinton and Whitehouse and Republic Senator Warner.
495. *See* Open Congress, http://news.opencongress.org/bill/1/110-s1499/show.
496. *See* Marine Vessel Emissions Reduction Act of 2007 - Senate Report 110-413 (July 10, 2008), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:sr413.110.pdf.
497. *Id.* at 5-6.
498. *Id.* at 4.
499. *Id.* at 10-11 (Minority Views of Senators Inhofe, Vitter, and Voinovich); The Environmental Issues in Relation to the Future EU Policy for Seaports, European Seaports Organization, http://www.espo.be/downloads/archive/c0d8bd66-4a08-4343-9405-5e8d1ae1b52b.doc.
500. *See* Marine Vessel Emissions Reduction Act of 2007 - Senate Report 110-413, *supra* note 543, at 4-5.
501. *See* CAA Section 112(f)(2).
502. *See* Natural Res. Def. Council, Inc., v. U.S. Envtl. Prot. Agency, 804 F.2d 710 (DC Cir. 1986) at para. 50, *available at* http://cases.justia.com/us-court-of-appeals/F2/804/710/435408.

Agency,[503] the D.C. Circuit Court of Appeals examined the meaning of the phrase "ample margin of safety" within the context of HAP standards falling under CAA Section 112. Justice Bork, in writing for the majority, found that costs could not be considered when initially setting air quality standards, but, that with respect to implementation of those standards to secure emissions reductions, "safe" does not necessarily mean risk-free. According to the Court, the "determination of what is 'safe'. . . must be based exclusively upon the Administrator's determination of the risk to health at a particular emission level . . . . [T]he Administrator's decision does not require a finding that 'safe' means 'risk-free' . . . or a finding that the determination is free from uncertainty . . . [C]ost and technological feasibility . . . have no relevance to the preliminary determination of what is safe."[504]

Similarly, in *Whitman v. American Trucking Associations*,[505] which examined the meaning of "adequate margin of safety" in the context of national ambient air standards falling under CAA Section 109(b), Justice Scalia, writing for the U.S. Supreme Court majority, held that the statutory language "unambiguously bars cost considerations from the NAAQS-setting process."[506]

In a separate concurring opinion, Justice Breyer also distinguished between the burdens of developing the standard and managing its implementation. He reasoned that the legislative history underlying CAA Section 109(b)(1) reflects that Congress did not delegate to the EPA Administrator the discretion to consider economic costs of compliance when developing air quality standards that protect public health with an adequate margin of safety.[507] Instead, "[t]he Senate directly focused upon the technical feasibility and cost of implementing the Act's mandates. And it made it clear that it intended the Administrator to develop air quality standards set independently of either."[508] In addition, he found that this phrase did "not describe a world that is free from all risk . . . . [T]he word 'safe' does not mean 'risk-free.'"[509] Furthermore, Justice Breyer's concurring opinion highlighted how the legislative history confirms that the 'technology-forcing' goals

503. *Id.*
504. *Id.* at para. 81.
505. 531 U.S. 457 (2001), *available at* http://docs.justia.com/cases/supreme/531/457.pdf.
506. *Id.* at 471.
507. *Id.* at 490-491 and 494, citing Cong. Rec. 32901–32902 (1970), 1 Legislative History of the Clean Air Amendments of 1970 (Committee Report compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–18, p. 227 (1974).
508. *Id.* at 491-492, citing S. Rep. No. 91–1196, 2–3 (1970), 1 Leg. Hist. 402-403.
509. *Id.* at. 494-495.

of the CAA 1970 amendments were retained in the 1977 and 1990 CAA amendments.[510] In the context of the 1990 CAA amendments, this means that "ambient air quality standards [must] be set at the level that 'protects the public health' with an 'adequate margin of safety,' *without regard to the economic or technical feasibility of attainment.*"[511]

Indeed, the CAA 1990 Amendments added significant new burdens on stationary source locations that did not otherwise satisfy ambient air quality standards, imposed more stringent standards on mobile source emissions, drastically restricted the release of HAPs, developed a new operating permit and emission allowance program ('cap and trade') and established new controls on electric utility sulfur dioxide and nitrous oxide emissions and ozone depleting substances.[512] In addition, "the CAAA established stringent emission standards for drilling on the Outer Continental Shelf in the Gulf of Mexico. Except for the areas off the coasts of Texas, Louisiana, Mississippi, and Alabama, all drilling sites within 25 miles of the coast are required to meet the same clean air requirements as onshore sites . . . have increased the costs of exploration and production in OCS areas other than the Western Gulf."[513]

In particular, according to one science and health expert who had testified during 2002 hearings convened by the House Subcommittee on Energy and Air Quality, the CAA 1990 amendments revised the Section 112 HAP rules by effectively replacing the prior practice of performing a science-based risk assessment on each suspect substance with an across-the-board hazard-based assessment framework. This occurred by virtue of the Section 112(b)(1) perpetual HAP listing requirement (beginning with EPA's original list of 189 substances) in which there is embedded an administrative presumption of harm for each such substance added.[514] It also occurred via the statute's limitation of the EPA's role to

510. *Id.* at 492.
511. *Id.* citing S. Rep. No. 101–228, 5 (1989) (emphasis in original).
512. *See* Background: The Clean Air Act (CAA), as amended, ChemAlliance.org, *supra* note 488.
513. *See* The Clean Air Act Amendments of 1990, Energy Information Administration, http://www.eia.doe.gov/oil_gas/natural_gas/analysis_publications/ngmajorleg/clnairact.html.
514. CAA Section 112(b)(3)(B)(providing that the addition of a substance to the list requires a showing that "the substance is an air pollutant and that emissions, ambient concentrations, bioaccumulation *or* deposition of the substance are known to cause *or may reasonably be anticipated to cause* adverse effects to human health or adverse environmental effects")(emphasis added).

merely removing pollutants from the list upon a finding of no proof of harm, which essentially reverses the burden of proof from government to industry and imposes a zero risk threshold.[515]

In addition, this fundamental reform was facilitated via CAA Section 112(d)(2)'s requirement that HAP emissions standards result in the "the maximum degree of reduction in emissions . . . including a prohibition on such emissions, where achievable." Such standards were to take into account the environmental cost of non-regulation, without reference to the societal and economic benefits such substances would bring.[516] Furthermore, this drastic change in regulatory perspective was accomplished via CAA Section 112(g)(2) which required that the "maximum achievable control technology" be utilized in order to modify a major HAP source point.[517] Consequently, according to this expert's testimony, the Precautionary Principle has long been alive and well *in spirit* and operation within the U.S. Clean Air Act. "*Although not discussed as such at the time, the 1990 amendments to Section 112 of the Clean Air Act governing the control of hazardous air pollutants contain a classic use of the precautionary principle.*"[518]

This witness further elaborated upon this point in a subsequently published article. It highlighted how, although the Precautionary Principle is nowhere to be found expressly, either in the statutory text or the published legislative history, it is, nevertheless, embodied implicitly within the CAA.

> [T]he regulation of hazardous air pollutants ("HAPs") in the 1990 Clean Air Act Amendments ('CAAA') *embodies pre-emptive precautionary actions* that supercede risk assessment and establish a new principle for regulatory intervention. We have evaluated the 1990 CAAA concerning HAPs as it is our belief that in such legislation Congress *radically altered the United States' approach to regulating HAPs by a classic imposition of the Precautionary Principle . . . . We have found no indication that HAPs were discussed by Congress explicitly in terms of the Precautionary Principle. Nor did we find the term "Precautionary Principle" in the published legislative history. Nonetheless, we believe, as discussed . . . that the amended HAPs Program clearly embodies the Precautionary Principle* . . . . The central elements of the amended HAPs program

515. *See* CAA Section 112(b)(3)(B).
516. *See* Ashford, *supra* note 34, at 364.
517. *Id.* at 364-365.
518. *See* Prepared Witness Testimony of Dr. Bernard Goldstein, Dean, School of Public Health University of Pittsburgh on the Accomplishments of the Clean Air Act, as amended by the Clean Air Act Amendments of 1990, before the Subcommittee on Energy and Air Quality, House Committee on Energy and Commerce (May 1, 2002), http://energycommerce.house.gov/reparchives/107/hearings/05012002Hearing548/Goldstein939.htm (emphasis added).

> *mandate precautionary action* that is not based on, and in fact supplants, risk analysis and thus constitutes what we have called *pre-emptive precautionary action. The amendments were a radical departure from the original.* [519]

More recently, the Precautionary Principle was indirectly invoked in the high profile case of *Commonwealth of Massachusetts, et. al. v. Environmental Protection Agency*,[520] under the auspices of CAA Sections 202(a)(1) and 302(g). The case was initiated by State Attorneys General and environmental groups to compel the U.S. EPA to regulate carbon dioxide emissions from automobiles—mobile sources—as an 'air pollutant.'[521] The DC Circuit Court of Appeals ruled in favor of the EPA, finding that its decision not to regulate automobile carbon dioxide emissions, assuming that it had the authority to regulate it in the first place, fell properly within its administrative discretion. Yet, the Court's dissenting opinion authored by Judge Tatel reemphasized the precautionary nature of the Clean Air Act by reading into it an effort to demonstrate first, that the EPA had the authority to regulate carbon dioxide, and then, based on the legislative history, that the EPA had abused its discretion.

> *The statutory standard, moreover, is precautionary.* At the time we decided *Ethyl* [*Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976)] section 202(a)(1) and similar CAA provisions either authorized or required the Administrator to act on finding that emissions led to "air pollution *which endangers* the public health or welfare." *See* 42 U.S.C. § 1857f-1(a)(1) (1976). After Ethyl found that "the statutes and common sense *demand* regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable," *Ethyl*, 541 F.2d at 25, the 1977 Congress not only approved of this conclusion, *see* H.R. Rep. No. 95-294, at 49, but also wrote it into the CAA. Section 202(a)(1) (along with other provisions, *see* H.R. Rep. No. 95-294, at 50) now requires regulation to precede certainty. It requires regulation where, in the Administrator's judgment, emissions "contribute to air pollution *which may reasonably be anticipated to endanger* public health or welfare." 42 U.S.C. § 7521(a)(1). As the House Report explained: 'In order to emphasize *the precautionary or preventative purpose of the act* (and, therefore, the

519. *See* Bernard D. Goldstein and Russellyn S. Carruth, *Implications of the Precautionary Principle for Environmental Regulation in the United States: Examples From the Control of Hazardous Air Pollutants in the 1990 Clean Air Act Amendments*, 66 LAW AND CONTEMP. PROBLEMS 247, 250, 253 (2003) at 250, http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+247+(Autumn+2003)+pdf (emphasis added).

520. Mass. v. Envtl. Prot. Agency, 415 F. 3d 50 (D. D. C. 2005), *available at* http://caselaw.lp.findlaw.com/data2/circs/dc/031361a.pdf.

521. *See* CAA Section 302(g) ("The term 'air pollutant' means any air pollution agent or combination of such agents . . . substance or matter which is emitted into or otherwise enters the ambient air").

> Administrator's *duty* to assess risks rather than wait for proof of actual harm), the committee not only retained the concept of endangerment to health; the committee also added the words 'may reasonably be anticipated to.[522]

Arguably, Justice Tatel's dissenting opinion influenced the outcome of the U.S. Supreme Court's subsequent 2007 split decision, delivered by Justice Stevens, in *Massachusetts v. Environmental Protection Agency.*[523] According to the Court, "[b]ecause greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant' we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles."[524] The Court, however, did not require the EPA to make this determination, and focused instead on EPA's failure to provide a reasoned explanation for deciding not to regulate carbon dioxide which, it concluded, constituted an abuse of administrative discretion.[525] The Court noted only that the EPA was obligated to regulate carbon dioxide emissions under the CAA only if it found that CO2 either independently, or in combination with other pollutants, endangers public health.[526] Under extreme domestic and international political pressure, and despite the scientific uncertainties surrounding the relationship between anthropogenic sources of carbon dioxide and global warming, the EPA eventually made such a finding—it issued an advance notice of proposed rulemaking to this effect on July 11, 2008.[527] The White House issued a press release confirming the report's findings a week later, on July 18, 2008.[528]

It is not difficult to imagine how the Supreme Court ruling and the EPA

522. *Id.* at 68 (emphasis added).
523. Mass. v. Envt. Prot. Agency, 127 S. Ct. 1438, 1457 (2007); 415 F. 3d, at 67, 82,lip Op at 12. ("On the merits, Judge Tatel explained at length why he believed the text of the statute provided EPA with authority to regulate greenhouse gas emissions, and why its policy concerns did not justify its refusal to exercise that authority").
524. Mass. v. Envtl. Prot. Agencey, 127 S. Ct. at 1462.
525. Mass. v. Envt. Prot. Agency, 127 S. Ct. 1438, 1457 (2007); slip op at 32. ("In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore 'arbitrary, capricious. . . or otherwise not in accordance with law.'").
526. *Id.* at 30, 32.
527. *See* Advance Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions under the Clean Air Act, EPA-HQ-OAR-2008-0318 (July 11, 2008) http://www.epa.gov/climatechange/anpr.html ; http://www.epa.gov/epahome/pdf/anpr20080711.pdf.
528. *See* David A. Fahrenthold and Juliet Eilperin, *Warming Is Major Threat To Humans, EPA Warns*, WASHINGTON POST (July 18, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/07/17/AR2008071701557_pf.html.

determination that it spawned will be used by UNCLOS proponents and environmental activists. It is likely they will be employed to promote not only UNCLOS ratification, but also U.S. regulation of land-based sources of carbon dioxide emissions, including both mobile and stationary sources, in order to prevent pollution of the marine environment. As one legal commentator has argued, they are also likely to result in domestic, and perhaps, even international climate change and other environmental litigation.[529]

> Now that EPA has authority to regulate greenhouse gases, regulatory controls on motor vehicles (*as well as on other sources of greenhouse gases, including utilities and industrial facilities*) are sure to follow. In time, however, *Mass. v. EPA* may come to stand for more than the simple proposition that Congress delegated authority to regulate greenhouse gases under the CAA. It may herald in a new era of state-sponsored litigation, environmental standing, and statutory interpretation—and yet still do little to cool down a warming planet.[530]

8. The Oceans Conservation, Education, and National Strategy for the 21st Century Act (HR 21)

As discussed previously, the reports issued by the Pew Oceans Commission, the U.S. Commission on Oceans Policy and the Joint Ocean Commission Initiative were seriously considered by the majority within the new 110th Congress. In reliance thereon, legislation was introduced during January 2007[531] that endeavors to establish "a more comprehensive and integrated national *ecosystem-based*

529. *See* discussion, *infra*, about the potential venue for climate change litigation under the auspices of the UNCLOS and the UN Kyoto Protocol.

530. *See* Jonathan Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 61, 64 (2007), http://www.virginialawreview.org/inbrief/2007/05/21/adler.pdf (emphasis added).

531. *See* H.R. 21, 110th Cong. (introduced Jan. 4, 2007), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h21ih.txt.pdf; "National Affairs and Legislation Committee, The Garden Club of America", 110th Congress, 1st Session (May 8, 2007) at 2 (This comprehensive oceans bill was initially introduced during the 108th Congress as the 'OCEANS-21' bill, and was later reintroduced during the 109th Congress where it also languished. During January 2007, it was reintroduced by Congressman Sam Farr (D, CA). This version of the bill, which was *cosponsored by 70 representatives, 64 of whom are Democrats*, "draws heavily from reports issued by the U.S. Commission on Ocean Policy, the Pew Oceans Commission and the Joint Ocean Commission Initiative." The bill was subsequently marked up during April 2008 in the Subcommittee on Fisheries, Wildlife, and Oceans, which then forwarded it to the House Natural Resources for consideration.), http://www.pgcinc.org/LegisUpdate_5.pdf.

management approach"[532] to ocean stewardship. The express national policy of HR 21[533] is to "protect, maintain, and restore the health of marine ecosystems in order to fulfill the ecological, economic, educational, social, cultural, nutritional, recreational and other requirements of current and future generations of Americans."[534]

Coincidentally, HR 21's mention of the need to maintain "'healthy marine ecosystems'[535] to provide more goods and services, such as seafood and tourism opportunities" [536] [537] closely parallels the European Union's Green Paper on Maritime Policy.[538] It, too, emphasizes the importance of the seafood and tourism industries to the EU national and regional economies. The Green Paper also ironically speaks of how a growth in tourism would help spur the construction of cruise ships and the development of coastal areas and islands that would likely fall subject to costly and restrictive Precautionary Principle-based environmental regulations that ultimately impede such development, tourism and shipbuilding, as newly created marine protected areas proceed to block access to the islands and coastal waters surrounding them.

Interestingly, during House subcommittee hearings held on April 26, 2007, "NOAA Assistant Administrator John Dunnigan told members of the House Fisheries, Wildlife and Oceans Subcommittee that the Bush administration opposes HR 21 [because] '[m]any of the provisions in this bill are inconsistent with the president's "Ocean Action Plan," are impractical or are inconsistent with existing laws.'"[539] His last point would seem to highlight the main theme of this article, namely, that if HR 21 and many of the proposed changes to other federal

532. *Id.* at § 2(3).
533. *Id.*, Title I, § 101(a).
534. *Id.*
535. *Id.*, § 2(3)(A).
536. *Id.*, § 2(12), 2(14).
537. *See* Robin Kundis Craig, *Still Stumbling Toward Ocean Sustainability: The Ocean Commissions' Unfulfilled Vision*, 38 ENVTL. L. REP. __ at 11-12,15, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=983549.
538. *See* GREEN PAPER, Towards a future Maritime Policy for the Union: A European vision for the oceans and seas, Commission of the European Communities (June 7, 2006), COM(2006) 275 final, Volume II - ANNEX, at 3-7, http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0275Ben01.pdf.
539. *See* Lauren Morello, *White House Has 'Serious Concerns' With Reform Bill*, Joint Ocean Commission Initiative (Apr. 27, 2007), http://www.jointoceancommission.org/news-room/in-the-news/2007-04-27_White_House_has_serious_concerns_with_Reform_Bill@E&E_Daily.pdf.

environmental laws are adopted to achieve the objectives of a new comprehensive U.S. oceans policy which is consistent with UNCLOS environmental provisions, then U.S. federal implementing legislation will undoubtedly be required.

UNCLOS and Precautionary Principle proponents, by contrast, have applauded this bill especially in light of the perceived existential threat[540] that emissions of land, air, internal waterway and sea-based pollutants, including carbon dioxide, directly and *in*directly pose to the planet's oceans and their living resources.[541] In fact, HR 21's findings cite all of the potential threats to the marine environment already identified by both commissions and assorted legal commentators and environmentalists, but which current U.S. laws and regulations have allegedly been unable to adequately address. They include global climate change, chemical, nutrient, and biological pollution, unwise land use and coastal development, habitat damage, overfishing, bycatch and invasive species.[542]

However, what stands out most in the January 2007 version of HR 21 is its express incorporation of the Precautionary Approach/Precautionary Principle within the bill's definitional provisions.

> SEC. 4. DEFINITIONS. In this Act: . . . (23) PRECAUTIONARY APPROACH- The term 'precautionary approach' means the approach used to ensure the health and sustainability of marine ecosystems for the benefit of current and future generations, in which lack of full scientific certainty shall not be used as a justification for postponing action to prevent environmental degradation.[543]

The Precautionary Approach/Precautionary Principle appears once again in the bill's provisions dealing with 'national standards.' "In the case of incomplete or inconclusive information as to the effects of a covered action on United States ocean waters or ocean resources, decisions shall be made using the precautionary approach to ensure protection, maintenance, and restoration of healthy marine ecosystems."[544] It is identified as a basis for restricting or preventing any otherwise authorized public or private activity ('covered actions,' including those

540. *See* Marine Degradation From Land-Based Activities: A Global Concern, Remarks by Vice President Gore at the Ministerial Level Plenary Session of the UN Environmental Program Inter-governmental Conference on the Protection of the Marine Environment From Land-Based Activities, Washington, DC, (Nov. 1, 1995), http://www.state.gov/www/global/oes/oceans/951101.html.
541. *Id.* at 13-14.
542. HR 21, 110th Cong., *supra* note 529, § 2(9).
543. *Id.* § 4(23).
544. *Id.* at Title I, § 101(b)(2)(C).

permitted and licensed by the federal government)[545] that significantly affects United States ocean or coastal waters or resources, such that it is "likely to significantly harm the health of any marine ecosystem" or "to impede the restoration of the health of any marine ecosystem."[546]

During March and April 2007, the Subcommittee on Fisheries, Wildlife and Oceans of the Natural Resources Committee convened oversight hearings on HR 21 "to focus on priorities for ocean policy reform in the United States and the recommendations of the Joint Ocean Commission Initiative."[547] The subcommittee subsequently held an HR 21 mark-up session during April 2008 that resulted in several amendments, including one offered by Chairwoman Madeleine Bordallo. This amendment "would change a requirement that agencies review each project for its potential effects on ocean health. Instead, *federal agencies would be required to revise existing regulations as needed* to ensure that they are carried out consistently with oceans conservation policy."[548] It would appear that federal agencies and executive offices operating under the auspices of the white house would now be provided with considerable opportunity for mischief, particularly, the Committee on Ocean Policy that President Bush established via Executive Order 13366 as part of the White House Council on Environmental Quality.[549] Most of the amendments that were filed for consideration by the committee's ranking members, however, ultimately failed.[550]

Among the most noticeable changes in the final marked-up bill [551] is the express

545. *Id.* § 4(4).
546. *Id.* §101(b)(2)(B).
547. *See* Ocean Policy Priorities in the U.S. and H.R. 21 Oceans Conservation, Education and Nat'l Strategy for the 21st Century Act, Oversight and Legislative hearings, before the Subcommittee on Fisheries, Wildlife and Oceans of the Committee on Natural Resources, U.S. House of Representatives 110th Cong. 1st Sess, (Mar. 29, 2007, and Apr. 26, 2007), House Report No. 110-10, http://bulk.resource.org/gpo.gov/hearings/110h/34377.pdf.
548. *See* Sheril Kirshenbaum, *Ocean 21 One Step Closer*, Nicholas Inst. for Envt. Pol'y Solutions (Jun. 24, 2008), http://www.nicholas.duke.edu/nioceans/dispatches/oceans-21-one-step-closer (emphasis added).
549. *See* Executive Order 13366 (Dec. 17, 2004), 69 FR 76591, http://a257.g.akamaitech.net/7/257/2422/06jun20041800/edocket.access.gpo.gov/2004/pdf/04-28079.pdf.
550. *See Oceans-21 Bill Clears Major Legislative Hurdle, Legislative Update*, VOL. 4, ISSUE 3 RAE NEWSLETTER (May/June 2008), http://www.estuaries.org/assets/documents/LegUpdate7MayJune2008Volume4Issue3part2.pdf.
551. *See* Committee Print, 110th Cong. 2nd Sess. H. R. 21 (Apr. 28, 2008)(Showing the Amendment Adopted by the Committee on Natural Resources Subcommittee on Fisheries,

omission of the Precautionary Approach/Precautionary Principle language and the related term "covered actions" within definitional Section 4. Another conspicuous change involves the substitution of the word "Principles" for "Standards" within Section 21, which sounds eerily European. And, among the list of 'Principles' is an indirect recitation of the broad Wingspread version of Europe's Precautionary Principle, which authorizes, in the face of scientific uncertainty, governmental resort to strict proscriptive regulatory measures to reduce or eliminate significant threats of harm (as opposed to actual harm) posed by human activities to "marine ecosystem health," notwithstanding the economic costs associated with undertaking such action(s).

> (2) PRINCIPLES.—The National Ocean Policy shall be implemented in accordance with the following principles: . . . (D) The lack of scientific certainty should not be used as *justification* for postponing action to prevent negative environmental impacts. In cases in which significant threats to *marine ecosystem health* exist, *the best of the available science* should be used to manage ocean waters, coastal waters, and ocean resources in a manner that *gives the greatest weight to the protection, maintenance, and restoration* of marine ecosystem health.[552]

The most efficient way to evaluate this iteration of the Precautionary Principle is to compare it to Principle 15 of the Rio Declaration (Rio Declaration), arguably the most frequently cited statement of the Precautionary Principle:

> In order to protect the environment, the precautionary approach shall be widely used by States according to their capabilities. Where there are threats of serious and irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.[553]

Once compared, HR 21's modified version of the Precautionary Principle raises several issues.

First, there is no reference at all to the economic costs or cost-effectiveness of undertaking preferred mitigation or restorative actions or employing measures, or to the need to perform a cost-benefit analysis of the effects of action versus inaction or between possible alternative actions, unlike in the case of the Rio Declaration. Second, while it is expressly stated that "the best available science" (which, as noted elsewhere in the marked-up bill, is also to be used as the basis for

Wildlife and Oceans), http://resources.ca.gov/copc/7-24-08_meeting/HR%2021.pdf.

552. *Id.* at Title I, Section 101(a)(2)(D) (emphasis added).

553. *See* Rio Declaration on Environment and Development - Annex I, Report of the U.N. Conference on Env't. And Dev. A/CONF.151/26 (Vol. I) (Aug. 12, 1992), http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

ocean and regional assessments[554]) should be used to "manage" ocean and coastal waters and ocean resources, there is no mention of any other factors that might be considered in arriving at a marine ecosystem management option. In other words, it would seem that the National Ocean Advisor or agency heads would have only limited discretion in considering factors other than environmental ones – "the greatest weight should be given to environmental considerations"—which shall not, in any event, include costs.

Third, both the initial and marked-up bills employ the phrase "should not be used as *justification* for postponing action," whereas the Rio Declaration uses the phrase "shall not be used as a *reason* for postponing . . . measures." There is a definitional distinction between justification and reason that must be emphasized. A "reason" is defined as "a statement offered in explanation. . . a rational ground or motive; a sufficient ground of explanation or of logical defense; something that supports a conclusion or explains a fact." [555] A "justification" is defined as something that "prove[s] or show[s] to be just, right or reasonable"; that "shows . . . a sufficient *legal* . . . *lawful* . . . reason for an act done."[556] Justification has elsewhere been defined as a "[j]ust, *lawful* excuse or reason for act or failing to act. A maintaining or showing of sufficient reason in court why the defendant did what his called upon to answer . . . See also *Legal* Excuse."[557] A "legal excuse" is defined as a doctrine by which one seeks to avoid the consequences of [one's] own conduct by showing justification for acts which would otherwise be considered negligent or criminal."[558] It would appear, therefore, pursuant to the language of the original and marked-up bills, that a lack of scientific certainty could not be used as a legal defense or excuse *in law* by a government agency that fails to act to reduce or eliminate significant threats to marine ecosystem health. Pursuant to the Rio Declaration language, however, a lack of scientific certainty may qualify as a legal defense or excuse for such a failure to act, for purposes of avoiding suit (litigation), but may not suffice as an ethical, moral or political defense or excuse.

554. *See* Committee Print, Title II, Section 302(b)(3)(APRIL 28, 2008)(Showing the Amendment Adopted by the Committee on Natural Resources Subcommittee on Fisheries, Wildlife and Oceans).
555. *See* Merriam Webster's Collegiate Dictionary, Tenth Edition (2000) at 971.
556. *Id.* at 635.
557. *See* Black's Law Dictionary Special Deluxe Fifth Edition (1979) at 778.
558. *Id.* at 804.

Fourth, neither of the terms "marine ecosystem health" nor "healthy marine ecosystem," are anywhere to be found in the Rio Declaration. Both the original and marked-up oceans bills define "marine ecosystem health"[559] and the corresponding legal duty to protect and maintain a "healthy marine ecosystem" rather broadly.

> Each of the terms 'marine ecosystem health' and 'health of marine ecosystems' means the ability of a marine ecosystem to support and maintain a productive and resilient community of organisms . . .such that it provides . . *.a complete range of ecological benefits*, including (A) *a complete diversity of native species and habitats* wherein each native species is able to maintain an abundance, population structure, and distribution supporting its ecological and evolutionary functions, patterns, and processes and (B) *a physical, chemical, geological, and microbial environment that is supportive of*[560] . . . patterns, important processes, and productive, sustainable, and resilient communities of organisms having a species composition, diversity, and functional organization resulting from the natural habitat of the region.[561]

Consequently, any activity that disturbs a marine ecosystem's capability of providing a complete range of ecological benefits to a variety of native organisms (i.e., activities that render it 'unhealthy') would likely trigger the application of the Precautionary Principle, and thus, be precluded or severely restricted.[562] Based on the language used, the risk threshold here would seem to be nearly zero, such that the burden of proof is effectively reversed and placed upon economic actors to demonstrate that their suspect activities would not render the marine ecosystem incapable of providing the environmental services so described.

According to one scientific commentator, progressive concepts of ecosystem-based management emphasize four common principles.[563] They "must: (1) be integrated among components of the ecosystem and resource uses and users; (2) lead to sustainable outcomes; (3) *take precaution in avoiding deleterious actions*; and (4) be adaptive in seeking more effective approaches based on experience."[564]

559. *See* H.R. 21, 110th Cong., *supra* note 529 at Short Title, § 4(13), Healthy Marine Ecosystem; Committee Print *supra* note 549, at Title I, § 4(11) 'Marine Ecosystem Health.' (April 28, 2008)(Showing the Amendment Adopted by the Committee on Natural Resources Subcommittee on Fisheries, Wildlife and Oceans).
560. H.R. 21, 110th Cong., *supra* note 52982 at Section 4(12)(A) and (B).
561. *Id.* § 4(13)(A), (B); Title I, § 4(11)(A) and (B).
562. *Id.*
563. *See* Donald F. Boesch, *Scientific Requirements for Ecosystem-based Management in the Restoration of Chesapeake Bay and Coastal Louisiana*, ECOLOGICAL ENGINEERING 26 (2006) 6–26, at 7, 10-11, http://www.umces.edu/president/EBM%20CB-LA.pdf.
564. *Id.* (emphasis added).

In other words, the Precautionary Principle has now been subsumed under the broader framework of ecosystem-based management (EBM) as one of "four key management principles,"[565] hence the removal of the term Precautionary Approach from both the "definitions" and "standards" sections of the marked-up bill, which now refers to "principles."

Perhaps this reconsideration of HR 21 text was precipitated by the testimonies proffered by some of the witnesses who participated at the March and April 2007 HR 21 hearings.[566] It may have even triggered two industry coalition letters of concern more recently sent to both the Chairman and the Ranking minority member of the House Natural Resources Committee. They highlighted industries' serious reservations about HR 21, including its direct or indirect codification of the Precautionary Principle.

> H.R. 21 will most certainly provide a new basis for contesting development or other activity necessary to sustain a growing economy and the nation's defense . . . . For example, a cumulative impacts analysis required for regulating a facility within a geographically defined region or on a specific water body becomes exponentially more difficult to do if the individual and cumulative impacts must be assessed on a regional or national basis to satisfy the integrated approach contemplated under H.R. 21. Also, we are concerned that H.R. 21 *would codify a version of the highly controversial precautionary principle.* Under that principle as enunciated in the specific language of H.R. 21, federal agencies would be required to take action even if the science is insufficient to make informed judgments about a perceived problem and appropriate solutions. Furthermore, for addressing significant threats to marine ecosystem health, H.R. 21 establishes a new basis for selecting the scientific analyses to be used, jettisoning the implied consensus inherent in the requirement of current law to 'use best available science.'[567]

565. *Id.* at 7.
566. *See* Statement of Admiral James D. Watkins, U.S. Navy (Ret.), and The Honorable Leon E. Panetta, Co-Chairmen, Joint Ocean Commission Initiative, at Ocean Pol'y Priorities in the U.S.; H.R. 21, Oceans Conservation and Nat'l Strategy for the 21st Century Act, Oversight and Legislative Hearings before the Subcommittee on Fisheries, Wildlife and Oceans of the Committee on Natural Resources, U.S. H.R. 110th Cong. 1st Sess. (March 29, 2007, and April 26, 2007), at 18; *id.* at 109-110, Statement of W.F. "Zeke" Grader, Jr., Executive Director, Pacific Coast Federation of Fishermen's Associations; *id.* at 112-113, Response to questions submitted for the record by Zeke Grader; *Id.*, at 112, Questions From the Hon. Henry Brown, Minority Ranking Member; *id.* at 117 Statement of Sarah Chasis, Senior Attorney, Natural Resources Defense Council; *id.*, at 132, Response to questions submitted for the record by Dr. Andy Rosenberg; *id.*, at 137, Prepared Statement of David Benton, Executive Director, Marine Conservation Alliance; *id.*, at 151, 153, Statement of Charles C. Vinick, President and CEO, Alliance to Protect Nantucket Sound.
567. Industry Coalition Letter to The Honorable Don Young Ranking Member Committee on Natural Resources, U.S. House of Representatives (May 30, 2008),

Beyond these sources, the spirit of the Precautionary Principle embedded within the marked-up HR 21 can be traced back to Chapter 17 of UN Agenda 21, as discussed in Part I of this article (readers should note the common use of the number '21'). In particular, Chapter 17's second program, Marine Environmental Protection, focuses on the four primary land-based sources of marine pollution, including urban runoff, agricultural runoff, nonpoint sources of pollution from diffuse, hard-to-regulate sources and atmospheric deposition of pollutants, all of which are cited in Article 2(9) of the prior version of HR 21.[568]

Furthermore, the true intent behind marked-up HR 21 with respect to its incorporation of Europe's Precautionary Principle can be discerned from a key 1998 NOAA 'Year of the Oceans' strategy document[569] which arguably employs 'Precautionary Approach' language to confuse people. In no uncertain terms, this document emphasized the growing worldwide acceptance of, and called for the U.S. government's expanded application of, "the Precautionary Approach to marine resource management."

> A concept unheard of a decade ago, the precautionary approach states that in the face of uncertainty, managers and decision makers must err on the side of conservation of living marine resources and protection of the environment. This is the opposite of earlier resource management approaches, where the proponent of resource use prevailed until something went wrong. Representing a radical shift of the burden of proof from those who would conserve resources to those who would use them, the precautionary approach is now being integrated into U.S. policy and practice, as well as into many international agreements.[570]

Moreover, the more recent effort to embed Europe's Precautionary Principle within U.S. environmental laws, including the marked-up HR 21, can be discerned from the prior congressional testimony presented before the Senate Committee on Foreign Relations by Roger T. Rufe, Jr., a retired U.S. Coast Guard Vice Admiral

http://www.nma.org/pdf/misc/060208_joint_letter.pdf.; *Industry Coalition Letter to The Honorable Nick J. Rahall, II, Chairman* Committee on Natural Resources, U.S. House of Representatives (May 30, 2008), http://www2.eei.org/about_EEI/advocacy_activities/Congress/080530HuntHouseOceans.pdf.

568. *See* Craig, *supra* note 62 at 10200-10201; *See also* H.R. 21, 110th Cong. (introduced Jan. 4, 2007), snote 529.
569. *See* 1998 Year of the Ocean – Ensuring the Sustainability of Ocean Living Resources, The Ocean Principals Group, C-7, C-23 – C-24, http://www.yoto98.noaa.gov/yoto/meeting/doc/liv_res_316.doc.
570. *Id.* (emphasis added).

and former CEO of The Ocean Conservancy (OTC). During the March 2004 UNCLOS ratification hearings, Mr. Rufe recommended that the U.S. should and could adopt the Precautionary Principle as a central tenet of domestic environmental law, consistent with the spirit of the UNCLOS, "even though the concept '[P]recautionary [P]rinciple' did not exist at the time UNCLOS was negotiated and . . . did not appear in the Convention."[571] In addition, Mr. Rufe "urge[d] the United States to ensure the appropriate application of this principle to guide decision-making . . . in future Convention amendments [given that . . .] subsequent multilateral agreements related to UNCLOS include the use of the [P]recautionary [P]rinciple, including the Straddling Stocks Agreement."[572]

Lastly, the spirit of the Precautionary Principle embedded within the marked-up HR 21 may be discerned from the reports of both the Joint Ocean Commission Initiative[573] and the U.S. Commission on Ocean Policy, which recommended its adoption as U.S. law. Significantly, the report of the U.S. Commission on Ocean Policy endeavored to distinguish between the Precautionary Approach and the Precautionary Principle, and recommended that the President's "National Ocean Council (NOC) . . . adopt the principle of ecosystem-based management . . . and as part of this effort . . . coordinate the development of procedures for the practical application of the precautionary approach and adaptive management."[574] However, the U.S. Commission on Ocean Policy failed to mention anything about using 'cost-efficient' measures or subjecting precautionary approach-based management decisions to economic cost-benefit analysis. Nor did it mention

571. *See* PREPARED STATEMENT OF VICE ADMIRAL ROGER T. RUFE, JR., U.S.CG (RET.), PRESIDENT, THE OCEAN CONSERVANCY, WASHINGTON, DC, before The Committee on Foreign Relations, United Nations Convention on the Law of the Sea, Senate Executive Report 108-110 (March 11, 2004) at 130-131, http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.181&filename=er010.pdf&directory=/diska/wais/data/108_cong_reports ; *see also* Response of Vice Admiral Rufe to Chairman Lugar; *Id.* at p. 144.

572. *Id.*

573. *See* From Sea to Shining Sea: Priorities for Ocean Policy Reform, Report to the United States Senate, Joint Ocean Commission Initiative, *supra* note 286, at 17 ("A new declaration of national ocean policy should incorporate provisions relating, but not limited to, the following concepts . . . ensure responsible management and sustainable use of fishery resources and other ocean and coastal resources held in the public trust, using ecosystem-based management and *a balanced precautionary and adaptive approach*") (emphasis added).

574. *See* Recommendation 4-3, U.S. Commission on Ocean Policy, *supra* note 283, at 80.

anything about the burden of proof. Therefore, the distinction they set forth between these two concepts is arguably nothing more than semantics.

> The precautionary principle has been proposed by some parties as a touchstone for managers faced with uncertain scientific information. In its strictest formulation, the precautionary principle states that when the potentially adverse effects of a proposed activity are not fully understood, the activity should not be allowed to proceed. While this may appear sensible at first glance, its application could lead to extreme and often undesirable results. Because scientific information can never fully explain and predict all impacts, strict adoption of the precautionary principle would prevent most, if not all, activities from proceeding.
>
> In contrast to the precautionary principle, the Commission recommends adoption of a more balanced precautionary approach that weighs the level of scientific uncertainty and the potential risk of damage as part of every management decision . . . . To ensure the sustainability of ecosystems . . . decision makers should follow a balanced precautionary approach, applying judicious and responsible management practices based on the best available science and on proactive, rather than reactive, policies. Where threats of serious or irreversible damage exist, lack of full scientific certainty shall not be used as a justification for postponing action to prevent environmental degradation.[575]

That the Commission went through the trouble to try and emphasize a distinction and to recommend a "more balanced Precautionary Approach" likely reflects the prior and current political reality in Washington. The Commission served at the pleasure of, and was survived by, a Republican administration,[576] even though the Ocean Act of 2000 that directed former President Bush to create the Commission in the first place was passed by Congress and signed into law during a *Democratic* Clinton administration.[577]

Many will find interesting the fact that, under the auspices of the Bush '41 and '43 administrations and both Reagan administrations, federal agencies and

575. *Id.* at 65.

576. *See* U.S. Commission On Ocean Policy, U.S. Commission on Ocean Policy: Archive of Commission Documents, (The U.S. Oceans Commission, which was established to undertake an 18 month study (a final report being due by June 20, 2003) and submit recommendations to the President and the Congress for a national oceans policy, held its first business meeting during November 2001), http://www.oceancommission.gov/documents/doc_archive.html; U.S. Commission on Ocean Policy, Commission Meetings, http://www.oceancommission.gov/meetings/welcome.html; *see* United States Commission on Ocean Policy, (The Commission subsequently expired on December 19, 2004), http://www.oceancommission.gov/welcome.html.

577. *See* S.2327, *Oceans Act of 2000*, (signed into law on August 7, 2000 as Public Law 106-256; effective on January 20, 2001), http://www.oceancommission.gov/documents/oceanact.pdf.

executive offices employing scientific risk assessment and economic cost-benefit analysis focused on the 'cost' side of the ledger to limit the promulgation of unnecessarily burdensome and costly environmental and health regulations that impair the exercise of private property rights. This may be contrasted with the practices of the federal agencies and executive offices operating under the auspices of the two Clinton administrations. Instead, when applying scientific risk assessment protocols and economic cost-benefit analysis, the agencies and offices focused on the identification of environmental and health hazards (rather than risks) and the anticipated environmental and social public benefits associated with the enactment of more stringent environmental and health regulations to reduce or eliminate those hazards. In other words, during the Clinton administration, a greater emphasis was placed on the benefit side of the ledger and the amelioration of costs to the environment (i.e., environmental externalities as opposed to economic costs), which inevitably had negative consequences for private property rights.[578]

It may be argued that these two different conceptions of the role served by risk versus hazard assessment and costs versus benefits roughly corresponds to the distinction between the WTO-sanctioned Precautionary Approach and the extra-WTO European Precautionary Principle,[579] which members of the 111th Congress now wish to incorporate within HR 21. It is rather clear that the new Obama administration intends to reverse the environmental legacy of the Bush years[580] and to enhance that of the Clinton era.[581] As a result, it is almost certain that the cost-benefit calculus used to determine the stringency and extent of U.S. environmental legislative and/or regulatory changes deemed necessary to implement the

578. *See* discussion, *infra*.
579. Kogan, *World Trade Organization Biotech Decision Clarifies Central Role of Science in Evaluating Health and Environmental Risks for Regulation Purposes*, *supra* note 38.
580. *See Can Obama Undo Bush's Anti-Environment Legacy? The President-Elect Has His Work Cut Out for Him*, The Daily Green, Nov. 23, 2008 http://www.thedailygreen.com/environmental-news/latest/obama-bush-environment-461108; Barack Obama and Joe Biden: Promoting a Healthy Environment, Barack Obama website, http://www.barackobama.com/pdf/issues/EnvironmentFactSheet.pdf.
581. *See, e.g.*, Jeff Smith, *Obama Picks Browner to be 'Energy Czar'*, Media Mouse blog (Dec. 12, 2008available), http://www.mediamouse.org/news/2008/12/obama-picks-bro.php; Ed Cutlip, *Clinton's Environmental Policy*, Media Mouse blog (June 16, 2007), http://www.mediamouse.org/news/2007/06/clintons-enviro.php; James Carney and John F. Dickerson, Rolling Back Clinton, TIME MAGAZINE (Jan. 21, 2001) available at http://www.time.com/time/magazine/article/0,9171,96178,00.html.

recommendations contained in the final report of the U.S. Commission on Ocean Policy will be reconstituted and modernized to more heavily focus on environmental hazards and net benefits.,

B. Presidential Executive Orders and Memoranda May Be Used to Ensure U.S. Compliance With UNCLOS & MEA Provisions Incorporating Europe's Precautionary Principle

It is quite clear that Congress can play an important role in enacting, pre- or post- UNCLOS ratification, implementing legislation to ensure that U.S. federal environmental laws remain explicitly or implicitly in compliance with Precautionary Principle-based multilateral environmental treaty obligations. However, it is less than clear how the President may, via the issuance of executive orders and memoranda, and perhaps even proclamations,[582] instruct federal agencies to more subtly implement federal environmental regulatory and policy changes that bypass Congress, for the purpose of incorporating Europe's Precautionary Principle into U.S. law following UNCLOS ratification.[583]

1. Presidential Executive Orders

Executive orders are said to constitute only one form of 'presidential direct action,' or "situations in which the president simply issues statements, many having the force of law, with no requirement for any particular processes such as those required to enact legislation or even to adopt administrative rules."[584]

582. *See* discussion in Conclusion, *infra*.

583. Responses of Hon. William H. Taft, IV, the Legal Advisor, Dept. of State to Additional Questions for the Record submitted by Senator Joseph R. Biden, JR, Responses to Additional Questions Submitted for the Record, accompanying Senate Committee on Foreign Relations, United Nations Convention on the Law of the Sea 108th Congress, Senate Executive Report 108-10 (March 11, 2004), *supra* note 273, at 177. ("*Question 5.* Does the Executive Branch expect to issue any Executive Orders following U.S. accession to the Convention in order to implement U.S. obligations under the Convention? If so, please elaborate on the subjects that would be addressed in such Executive Orders and the relevant obligations of the Convention that would be covered by such Orders. *Answer.* The Administration does not have current plans to issue any particular Executive Orders following U.S. accession. The Executive Branch may decide over time to make more formal various mechanisms for ensuring that U.S. Executive Branch actions are consistent with the provisions of the Convention; however, if so, there are a variety of mechanisms from which to choose, ranging from informal guidance documents to more formal Executive Orders.").

584. *See* David Dehnel, Book Review of PHILLIP COOPER, BY ORDER OF THE PRESIDENT: THE

Scholars have found that presidents have issued executive orders for several reasons – when they lack the political power to persuade the public, when they are faced with an uncooperative Congress and when they wish to enhance their good relationship with Congress, with executive orders being issued more often during a president's lame duck year.[585]

Presidents have long issued executive orders to promote environmental stewardship. For example, President Nixon issued E.O. 11514—Protection and Enhancement of Environmental Quality,[586] while President Bush ('41') issued E.O. 13274 – Environmental Stewardship and Transportation Infrastructure Project Reviews,[587] E.O. 13423—Strengthening Federal Environmental, Energy, and Transportation Management,[588] and E.O. 13352—Facilitation of Cooperative Conservation.[589]

Yet, it is probably the Clinton administration that is best known for its issuance of executive orders to effectuate comprehensive environmental policy. Prior to November 1994, President Clinton issued Executive Order 12852, which established the President's Council on Sustainable Development, the objective of which was to "advise the President on matters involving sustainable development,"[590] and Executive Order 12856 - Federal Compliance With Right-To-Know Laws and Pollution Prevention Requirements.[591] President Clinton also issued Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (Feb. 1994) the policy objective of which was to ensure that each federal agency makes achieving

USE AND ABUSE OF EXECUTIVE DIRECT ACTION (2002) ("Common forms of presidential direct action include executive orders and proclamations, presidential memoranda, national security directives, and signing statements. Cooper finds the rising use of these instruments understandable, but problematic."), http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/cooper-phillip.htm.

585. *See* Margaret Tseng: Presidential Unilateral Powers: The use of Executive Orders vs. Executive Memorandum, Paper presented at the annual meeting of the American Political Science Association, Marriott Wardman Park, Omni Shoreham, Washington Hilton, Washington, DC, Sep. 01, 2005, at 1-3, 17-19, http://www.allacademic.com//meta/p_mla_apa_research_citation/0/4/2/0/0/pages42000/p42000-1.php.
586. *See* Exec. Order No.11514 (Mar. 5, 1970) 35 FR 4247, 3 C.F.R., 1966-1970.
587. *See* Exec. Order No. 13274 (Sept. 23, 2002) 67 FR 59449.
588. *See* Exec. Order No. 13423 (Jan. 26, 2007) 72 FR 3919; *see also* Vision Statement, About OFEE, Office of the Federal Environmental Executive, http://ofee.gov/about/modified.asp.
589. *See* Exec. Order No.13352 (Aug. 30, 2004) 69 FR 52989.
590. *See* Exec. Order No.12852 (June 29, 1993) 58 FR 35841.
591. *See* Exec. Order No. 12856 (Aug. 3. 1993) 58 FR 41981.

"environmental justice" part of its mission.[592]

It is quite clear that these executive orders expanded the scope of federal agencies' authority to regulate environmental matters coming within their jurisdictional purview. Indeed, legal commentators and presidential advisers are well aware of the influence wielded by the executive branch to expand/contract the size of favored/disfavored regulatory programs. In fact, one commentator has emphasized:

> [e]ven more directly than Congress. . .the executive branch can use its grip on the national purse strings to expand the size of those regulatory program[s] that it favors[] and to contract the size of those it does not. Furthermore, since 1980, the president has used the Office of Management and Budget (OMB) to oversee an economic analysis of all proposed major regulations. This has had a significant effect on the regulatory initiatives proposed by the EPA, the Occupational Safety and Health Administration (OSHA) and the Food and Drug Administration (FDA).[593]

The Clinton administration's freedom to increase the level and stringency of environmental regulation, however, was reined in following the 1994 (midterm) congressional election. Legal commentators agree[594] that it was largely compelled to respond to the 'regulatory reform' plank of the new Republican congressional majority's Contract with America, which had resulted in the adoption of the Unfunded Mandates Reform Act (1995),[595] the Small Business Regulatory Enforcement Fairness Act (1996)[596] and the Information (Data) Quality Act (2000).[597] "A key goal of this reform movement was that all, or virtually all, federal regulation should be required to meet a cost-benefit criterion, which would have required a reduction in the stringency of those regulations whose costs were deemed not to be justified by the associated benefits."[598]

Yet, even despite this apparent constriction, the president continued to wield

592. Exec. Order No. 12898 (Feb. 16, 1994) 59 FR 7629; *see* Presidential Executive Order 12898 - Environmental Justice, Noise Pollution Clearinghouse, http://www.nonoise.org/library/execords/eo-12898.htm.
593. *See* Ashford, *supra* note 40, at 359-359.
594. *Id.* at 356-357.
595. *See* Unfunded Mandates Reform Act, Public Law 104–4 (Mar. 22, 1995), http://www.sba.gov/advo/laws/unfund.pdf; *see* Ashford, *supra* note 21, at 357.
596. *See* The Small Business Regulatory Enforcement Fairness Act (1996), Public Law 104-121 (Mar. 29, 1996) (This act was later amended by P.L. 110-28 (May 25, 2007), http://www.sba.gov/idc/groups/public/documents/sba_homepage/tools_lawsregu_regfair.pdf); *see also* Ashford, *supra* note 40.
597. *Id.* at 358.
598. *Id.* at 357.

considerable regulatory influence through the OMB. Several presidential executive orders were drafted to satisfy the recommendations contained in the Clinton administration's ambitious new 'reinventing government' initiative - i.e., the *National Performance Review* (NPR) report overseen by former Vice President Al Gore.[599] Included in NPR's initiative was the *Reinventing Environmental Management* (REM) report. That report called for the creation of an interagency group to undertake "improved federal decision-making through *environmental cost accounting* and for the issuance of a presidential directive on *environmental cost accounting.*"[601] Several years later, E. O. 13148 - Greening the Government Through Leadership in Environmental Management was issued.[602] Among other things, E.O. 13148 obliged federal agencies to establish and implement "environmental compliance audit programs and policies that emphasize[d] *pollution prevention* as a means to both achieve and maintain environmental compliance" (emphasis added).[603] And, it also encouraged federal agencies, "*whenever feasible and cost-effective* . . . to reduce or eliminate harm to human health and the environment from releases of pollutants to the environment."[604]

Although E.O. 13148 was subsequently revoked by Bush E.O. 13423,[605] it remains instructive for purposes of the following analysis. It would seem that the NPA and REM reports had a measurable impact on federal regulatory practice, which, while subtle in design, marked a substantive departure from the regulatory practices of previous administrations. In any event, it reflected the increasing use of presidential directives to circumvent what had become a Congress adverse to Clinton administration policies.

For example, Executive Order 13112 (Feb. 1999) was issued to establish a National Invasive Species Council that would organize, strengthen and expand federal agencies' jurisdiction over federal lands in implementation of the now-expired National Invasive Species Act.[606] This act arguably circumvented the need

599. *See* George Nesterczuk, *Reviewing the National Performance Review*, CATO REGULATION MAGAZINE, http://www.cato.org/pubs/regulation/reg19n3b.html.
601. *See Chapter 9: Environmental Economics, Annual Report of the Council on Environmental Quality* (1993), http://ceq.hss.doe.gov/NEPA/reports/1993/chap9.htm; http://ceq.hss.doe.gov/nepa/reports/1993/toc.htm (emphasis added).
602. *See* Exec. Order No.13148 (April 21, 2000), 65 FR 81, 24595.
603. *Id.* Section 202 - Environmental Compliance.
604. *Id.* Section 203 - Right-to-Know and Pollution Prevention (emphasis added).
605. *See* Exec, Order No. 13423 (Jan. 26, 2007), *supra* note 641, Sec. 11(iv).
606. *See* "Executive Order 13112 – Invasive Species" (Feb 3, 1999), Sections 2-4, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=1999_register&docid=99-

for congressional legislative amendments.

According to one 1994 Congressional Research Service report (CRS 94-961) prepared out of concern that legislative proposals then simmering in the 104th Congress would "require EPA analyses of risks, costs, and benefits of proposed regulations" that could have constrained Clinton administration environmental policy,[607] it is apparent that the Clinton administration had endeavored to effectuate subtle but much more broadly applicable national regulatory policy changes through the use of executive orders. In particular, the report compared and contrasted the Reagan administration's now revoked E.O. 12291 (Feb. 1981)[608] and E.O. 12498 (Jan. 1985)[609] with the Clinton administration's E.O. 12866 (Sept. 1993)[610] which superseded it,[611] evaluating, in the process, how each administration respectively had required federal agency economic cost-benefit analysis[612] that emphasized either 'risk' probability or hypothetical 'hazard'

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607. *See* Linda-Jo Schierow, Risk Analysis and Cost-Benefit Analysis of Environmental Regulations, CRS Report for Congress 94-961 (Dec. 2, 1994), http://www.cnie.org/NLE/CRSreports/Risk/rsk-5.cfm; *Id.* at Introduction, http://www.cnie.org/NLE/CRSreports/Risk/rsk-5.cfm#INTRODUCTION.

608. *See* Exec. Order No. 12291, 46 FR13193 (Feb. 19, 1981); CRS Report for Congress 94-961, President Reagan's Executive Orders (Now Revoked),("[C]ost-benefit analysis was required for all proposed and final 'major' rules . . . '[M]ajor rules' . . . were defined . . . to mean any regulation likely to have an effect on the national economy of $100 million or more. Rules with a smaller economic impact were also 'major' if they were likely to result in: a major increase in costs or prices for consumers, individual industries, Federal, State, or local government, or geographic regions; or a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets . . . . *A requirement for risk analysis was not explicit in President Reagan's 1981 order but implied by the mandate to assess net benefits of environmental and health and safety regulations. Most benefits of such regulations are the risks avoided due to Federal action*")(emphasis added), http://www.cnie.org/NLE/CRSreports/Risk/rsk-5b.cfm#President%20Reagan's%20Executive%20Orders%20(Now%20Revoked.

609. *See* Exec.Order No. 12498, 60 FR1036 (Jan. 1985).

610. *See* Exec. Order No.12866, 58 FR 51735 (Oct. 4, 1993).

611. *See* Ashford, *supra* note 34, at 359; *see also,* 58 FEDERAL REGISTER 51735 (Sept. 30, 1993), http://www.whitehouse.gov/omb/inforeg/eo12866.pdf; *see also* Circular A-4—New Guidelines for the Conduct of Regulatory Analysis, Office of Management and Budget, Office of Information and Regulatory Affairs (Sept. 17, 2003), at 3-4, http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf; *see also* John Graham, Memorandum for the President's Management Council Regarding OMB's Circular No.A-4, New Guidelines for the Conduct of Regulatory Analysis (March 2, 2004), http://www.whitehouse.gov/omb/inforeg/memo_pmc_a4.pdf.

612. Ashford, *supra* note 34, at 359 ("The core substance of . . . President Reagan's 1981 Executive Order 12291 . . . remains in effect under a 1993 executive order issued by

analysis.[613] The report noted how these subtle differences in policy objectives and prescriptions could have political significance and could result in different regulatory outcomes.[614]

According to the report, President Clinton's executive order expressly sought "to improve the process for [promulgating] Federal regulations" and ensuring public transparency and oversight, while "President Reagan's orders were intended [not only] to improve the quality *but also to reduce the number of regulations* [through more effective] oversight of the regulatory process (emphasis added)."[615] In addition, Reagan and Clinton E.O.s directed agencies to employ different criteria in pursuit of their respective regulatory objectives. Reagan E.O.s focused on "'maximiz[ing] net benefits' [i.e.] *achiev[ing] the greatest possible economic gain for society* to the extent permitted by law", while Clinton E.O.s focused on "address[ing] significant problems or compelling public need – *[e]conomic impacts [were] not considered in the choice of objectives* (although prior to promulgating a regulation, agencies must determine that benefits justify costs, unless the regulation is required by law."[616] Furthermore, Reagan E.O.s "directed agencies to choose the regulatory alternative with the '*least net cost*'" while Clinton E.O.s "established three criteria for choosing a regulatory approach: maximize net benefits, minimize the overall regulatory burden for various segments of society, and design the most cost-effective regulation or alternative to achieve the objective. *The philosophy of the Clinton order emphasize[d] the importance of net benefits . . . (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity),* unless a statute requires another regulatory approach. . . ."[617]

CRS 94-961 also discussed how these differing economic philosophies and

President Clinton.").

613. *See* John L. Moore, Cost-Benefit Analysis: Issues in Its Use in Regulation, CRS Report for Congress (June 28, 1995), http://www.ncseonline.org/nle/crsreports/risk/rsk-4.cfm; *see also*, Summary, http://www.ncseonline.org/nle/crsreports/risk/rsk-4.cfm#SUMMARY.
614. *See, e.g.*, Seth Borenstein, *EPA Drops Value of an American Life*, Associated Press (July 10, 2008) http://news.aol.com/story/_a/epa-drops-value-of-an-american-life/20080710201309990001.
615. *Id.* at Regulatory Planning and Review in the Clinton Administration, http://www.cnie.org/NLE/CRSreports/Risk/rsk-5b.cfm#Regulatory%20Planning%20and%20Review%20in%20the%20Clinton%20Administration
616. *Id.* (emphasis added).
617. *Id.* (emphasis added).

objectives had manifested themselves in divergent views toward the usefulness of federal regulatory agency science—risk assessments—in identifying and quantifying the presence of public environmental and health harms posed to humans, animals and particular subgroups from exposure to hazardous activities, chemicals or technologies."[618] The report found that "[r]isk and economic analyses can be qualitative or, if information is sufficient, quantitative, but economists can only quantify economic benefits of environmental regulations if scientists can quantitatively estimate risks to health and the environment."[619] It also noted the significant disagreements that continue to impair the usefulness of risk analysis, which typically concern the availability, quality and objectiveness of scientific information that such analyses provide.[620]

A subsequently prepared CRS Report (98-738) adopted an entirely different, and perhaps, 'more evolved' approach to addressing environmental concerns, in particular, those relating to the hazards attendant to climate change,[621] which is certainly relevant to any consideration of a future U.S. oceans policy. It conceived of three different policy lenses - technology,[622] economics[623] and ecology[624]—

618. *Id.* at *Is It a Scientific Basis for Environmental Decisions?* http://www.cnie.org/NLE/CRSreports/Risk/rsk-5c.cfm#Is%20It%20a%20Scientific%20Basis%20for%20Environmental%20Decisions.

619. *See* CRS Report Congress 94-961, *supra* note 608 at Executive Summary, http://www.cnie.org/NLE/CRSreports/Risk/rsk-5.cfm#SUMMARY.

620. *Id.*; *see* Borenstein, *supra* note 612.

621. *See* Larry Parker and John Blodgett, Global Climate Change: Three Policy Perspectives, CRS Report for Congress 98-738 (Aug. 31, 1998) (This divergence also spills over into the debate about climate change, which, no doubt, influences oceans policy), http://www.ncseonline.org/NLE/CRSreports/Climate/clim-1.cfm.

622. *Id.* at Technological Lens – Background, ("Viewed through the *technological lens*, an environmental problem is an 'opportunity' for ingenuity, for a technical 'fix.' This technologically driven philosophy focuses on research, development, and demonstration of technologies that ameliorate or eliminate the problem. Many uncertainties can be ignored if technology is available to render them irrelevant (a presumption underlying the 'pollution prevention' concept, for example). From this perspective, environmental policy entails the development and commercialization of new technologies; Government's role can include basic research, technical support, financial subsidies, economic mechanisms, or the imposition of requirements or standards that stimulate technological development and that create markets for such technologies . . . The technological lens reflects a traditional American 'can-do' faith in technology, and in the country's ability to find a 'technology-fix' to meet the needs of most problems . . . . The technological lens provides a view of the economy in which technology permits consumers to continue their preferred behaviors while concomitantly achieving environmental goals. It is not necessary for consumers to change their behavior to adjust to the "new reality" of an environmental problem") (italics in original), http://www.ncseonline.org/NLE/CRSreports/Climate/clim-1a.cfm#_1_4.

through which U.S. federal agency regulations could then be tailored to achieve climate change mitigation as a matter of Presidential policy, and to simultaneously influence the direction of other related environmental and energy programs.[625]

It is significant to the current debate over the availability, applicability and stringency of UNCLOS environmental provisions to protect the marine environment from climate change that this report's authors admitted how politics and fear perceptions, rather than science, had previously guided Clinton administration climate change policy and regulatory approach.

Because of the enormous uncertainties associated with global climate change—whether

623. *Id.* at Economic Lense – Background, ("Estimates of the benefits of a specific environmental action can be uncertain and can vary by an order of magnitude. Uncertainties about pollution taxes have focused attention on using economic incentives to increase polluters' flexibility in achieving environmental standards based upon regulation . . . During the 1970s, four economic mechanisms were adopted to increase polluters' flexibility in meeting the various requirements of the Clean Air Act. These mechanisms were offsets, bubbling, banking, and netting. . . . Results from these tradeable permit systems are spotty . . . [w]hile this [*economic*] lens is sometimes regarded as the private market's alternative to a regulatory command-and-control program, the interactions are more complex. *The so-called 'market for pollution rights' would not exist if not for a governmental role in altering what the market would do in lieu of governmental action . . .* [t]hose viewing environmental policy through the economic lens generally presume that governmental interference, whether through subsidies or regulation, should be minimal. *In reality, the distribution of impacts through the market often leads to calls for political interventions that compromise efficiency* and the 'polluter pays' principle. . . . Policymakers using the economic lens see consumers and producers adjusting their behaviors to the 'new reality' of an environmental problem by responding to the price signals that take into account a particular environmental goal.")(emphasis in original), http://www.ncseonline.org/NLE/CRSreports/Climate/clim-1b.cfm#_1_8.

624. *Id.* at Ecological Approach – Background, ("The *ecological lens* magnifies elements that are psychological, philosophical, and theological. A policy decision to address a pollution problem generally involves a sophisticated and sometimes lengthy educational process of which economics and technological availability are only components. In this view, environmental education, Smokey the Bear, and environmental interest groups from Audubon to Greenpeace to Zero Population Growth represent efforts to inculcate the sense of moral obligation toward the environment -- to acculturate people to the importance of the environment as essential to long-term human health and welfare. . . . *The ecological approach understands the problem of environmental policy implementation to be the moral education of individuals and institutions to the dimensions of the ecological crisis, changing the climate in which decisions are made, and providing opportunities for individuals and institutions to make decisions based on ecological concerns, rather than having those choices limited to alternatives dictated solely by economic criteria.*") (emphasis in original), http://www.ncseonline.org/NLE/CRSreports/Climate/clim-1c.cfm#Ecological%20Approach.

625. *Id.* at Introduction, http://www.ncseonline.org/NLE/CRSreports/Climate/clim-1.cfm#Introduction.

> global climate change is occurring or will occur, what the effects might be and their magnitude, the consequences that would follow from actions to reduce emissions of greenhouse gases, the costs of actions or of taking no action, the time frame of impacts, etc.—*each individual's perception* of what, if anything, to do is strongly influenced by personal values, experience, education and training, and outlook in how to cope with uncertainty. These personal variations affect one's definition of the issue and the weight one gives possible approaches to it. . . . *In the end, the origin of and support for different global climate change policy options arise from* differing orientations to, or philosophies for, thinking about uncertainty, taking risks, human progress and adaptability, and personal and community values.[626]

Also important, is CRS 98-738's discussion of the ecologic lens, which may now be reviewed with 20-20 hindsight. It highlights the continuing trend in international politics and policymaking, especially within Europe, to emphasize communitarian, ethical/moral, humanitarian and religion-based environmental consciousness as a justification for governmental action. It should be noted that UNCLOS proponents had previously tapped into this trend more than a decade ago to promote global ratification of the 1982 and 1994 agreements.[627] In addition to former Vice President Gore, the proponents of this legislative and regulatory approach consist of the 110th Congress's majority leaders, and perhaps, President Barack Obama as well. They, too, appear to believe that a "wrenching transformation of society"[628] (a/k/a progressive change) is necessary for the U.S. to achieve the environment-centric sustainable development long prescribed by the U.N. Brundtland Report.[629]

626. *Id.* (emphasis added).
627. *See* discussion, *supra*.
628. *See* Peter J. Smith, Former Vice President Al Gore Makes Star Debut in Toronto as Global Warming Prophet, LifeSiteNews.com (Feb. 22, 2007) ("Al Gore's environmental message is a development of ideas first set forth in his 1992 book: *Earth in the Balance: Ecology and the Human Spirit*, where he wrote: *'We must make the rescue of the environment the central organizing principle for civilization' . . . . Gore calls for a Global Marshall Plan or Strategic Environmental Initiative, with the first goal as stabilising what he believes is an overpopulated world, with the end result of massively increasing the powers of government to engineer a 'wrenching change of society' in order to save the world's ecology*") (emphasis added), http://www.lifesite.net/ldn/2007/feb/07022204.html.
629. CRS Report for Congress 98-738, *supra* note 619 at Ecological Lens – Background, ("*The development of environmental protection as a national policy concern* reflects three factors: (1) the development of an environmental consciousness among the electorate, (2) a change in the climate of decision-making among individuals, businesses, and government at all levels, (3) the availability of opportunities to make concrete decisions based on environmental grounds . . . The underlying basis of an environmental consciousness is an understanding of the *interconnectedness of the planet's biological processes*, and a recognition that changes caused by humans may have ecological effects beyond those

The subtle doctrinal (philosophical) differences underlying the divergent approaches reflected in the Reagan and Clinton executive orders with respect to the timing and types of economic-cost benefit analyses to be performed as the basis for public environmental and health regulation were recently highlighted by Susan E. Dudley, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget. In an October, 2007 speech delivered at Northwestern University School of Law,[630] Ms. Dudley endeavored to explain the rationale behind the Bush administration's January 2007 issuance of E.O. 13422,[631] revising Section 1(b)(1) of Clinton E.O. 12866. The revision generally requires federal agencies to identify and explain, *beforehand*, the specific 'market failure' ("such as externalities, market power, lack of information . . . or other specific problem . . . including . . . failures of public institutions)" necessitating corrective regulatory action.[632]

Ms. Dudley particularly noted the modus operandi of Clinton E.O. 12866 as set

> intended or foreseen. From this perspective, it is in *humanity's self-interest* [as well as in the interests of non-human life] to protect the basic biological processes that are the foundation of all life; humans can protect those processes by being conscious of humanity's environmental impact and by avoiding or mitigating that impact to the greatest extent necessary (accepting that some impact is unavoidable, and that ecological science has a crucial role in discovering the effects of human activities) . . . . *The challenge of the ecological approach was given global scope by the 'Brundtland Report' of the World Commission on Environment and Development. Articulating the goal of 'sustainable development,'* its forward describes the challenge this way: If we do not succeed in putting our message of urgency through to today's parents and decision makers, we risk undermining our children's fundamental right to a healthy, life-enhancing environment. *Unless we are able to translate our words into a language that can reach the minds and hearts of people young and old, we shall not be able to undertake the extensive social changes needed to correct the course of development* . . . We call for *a common endeavor and for new norms of behavior at all levels and in the interests of all.* The changes in attitudes, in social values, and in aspirations that the report urges will depend on *vast campaigns of education*, debate, and public participation" (emphasis added).

630. *See* Susan E. Dudley, 30 Years of Regulatory Oversight: Lessons Learned, Future Challenges, Presented at The Searle Center Northwestern University School of Law (Oct. 11, 2007), http://www.whitehouse.gov/omb/legislative/testimony/oira/dudley_101107.html.

631. *See* Executive Order: Further Amendment to Executive Order 12866 on Regulatory Planning and Review, Press Release, The White House (Jan. 18, 2007), http://www.whitehouse.gov/news/releases/2007/01/20070118.html; 72 FEDERAL REGISTER 2763 (Jan 23, 2007), http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-293.pdf.

632. *See* Memorandum for Heads of Executive Depts. and Agencies Reg., Executive Office of the President, Office of Management and Budget (Apr 25, 2007), http://www.whitehouse.gov/omb/memoranda/fy2007/m07-13.pdf.

forth in its accompanying Statement of Regulatory Philosophy and Principles: to promulgate regulations "made necessary by compelling public need, such as *material failures of private markets to protect or improve the health and safety of the public*, the environment, or the well-being of the American people."[633] She then highlighted why it was important for agencies to focus on identifying the 'market failure' prior to regulating. In that regard, she emphasized that the preferred regulatory philosophy should instead seek to harness the wisdom of 'decentralized crowds' possessing diverse, localized knowledge and a capability of processing dispersed information that no one individual (even a regulator) can obtain - a clear reference to decentralized market processes. As she explained, this approach will always be superior to a regulatory philosophy of "Government intervention [that] substitutes the judgment of a small group of experts for the wisdom of the crowds."[634] In her expert opinion, "*[G]overnment intervention. . . is best used in a limited way, such as in cases of a clear 'market failure' that cannot be adequately addressed by other means.*"[635]

Ms. Dudley's remarks were especially timely considering Europe's knack of identifying market failures that impede local, national, regional and global achievement of environment-centric sustainable development and require adoption and implementation of Helvetian-style 'legislation/regulation and education' campaigns[636] grounded on Europe's Precautionary Principle. It would also appear that she was cognizant of how such campaigns have interested and influenced the thinking of the Majority members of during the second session of the 110th Congress. Not surprisingly, E.O. 13422 was roundly criticized as an effort to broadly circumvent the authority of Congress and to diminish current

633. *See* Statement of Regulatory Philosophy and Principles: Executive Order 12866, *supra* note 610 (emphasis added).
634. *See* Susan E. Dudley, *supra* note 630.
635. *Id.* (emphasis added).
636. ERIC SAMUELSON, A BRIEF CHRONOLOGY OF COLLECTIVISM (1997), *citing* MORDECAI GROSSMAN, THE PHILOSOPHY OF HELVETIUS 16 (1926) (The philosophy of eighteenth century Frenchman, Claude Adrien Helvetius had left an indelible impression on the European social behaviorists of his time, and apparently, now, the politicians of today. Helvetian-favored communalism and utilitarian logic are most definitely the driving force behind the current indoctrination climate under which European cultural preferences are being converted into an almost universal and unquestioning acceptance of national, regional, and potentially, supranational governmental mandates to employ the hazard-based precautionary principle in every day economic life. Helvetius "advocated legislation . . . as the means by which happiness for the greatest number would be achieved."), http://www.mega.nu:8080/ampp/samuelson.html#preserve%20the%20rights.

environmental and health standards (e.g., the Clear Air Act).[637]

Based on the policy recommendations recently prepared for the Obama administration by New York University School of Law's Institute for Policy Integrity,[638] academics arguably hope to reintroduce and further refine the Clinton era model of economic cost-benefit analysis. If adopted, these recommendations would not only eliminate Ms. Dudley's 'compelling public need such as material failures of private markets' trigger for regulatory action that emphasizes net costs,[639] but they would also more broadly redefine *net benefits*.[640] In addition, these proposals would require that cost-benefit analysis consider moral and ethical concerns and sustainable development-type intergenerational equities as noted below.

> V. Net Benefits: *Agencies should focus on maximizing net benefits* – including quantified and unquantified benefits – not on minimizing regulatory costs. VI. Ancillary Benefits: When accounting for the indirect effects of regulation, agencies should pay equal attention to both the positive and negative indirect effects. VII. Future Generations: The current practice of discounting benefits for future generations at a constant rate consistent with the return on traditional financial instruments should be abandoned in favor of a valuation mechanism that reflects fundamental *moral and ethical* difficulties that arise with regulations that have intergenerational effects.[641]

Only time will tell whether President Obama's new OIRA administrator will accept these recommendations. No doubt, if he did, they would broaden the

637. *See* Curtis W. Copeland, Changes to the OMB Regulatory Review Process by Executive Order 13422, CRS Report for Congress (Feb. 5, 2007) at CRS-4, CRS-5, http://www.fas.org/sgp/crs/misc/RL33862.pdf.

638. *See* Richard L. Revesz & Michael A. Livermore, *Fixing Regulatory Review: Recommendations for the Next Administration*, Inst. for Pol'y Integrity, Report No. 2 (Dec. 2008), http://www.policyintegrity.org/documents/FixingRegulatoryReview.pdf.

639. *Id.* at Markup of Executive Order 12866 at 18-19 ("Regulatory Planning and Review Principles. Poorly-designed regulation, or the failure to regulate significant risks, imposes unacceptable and unreasonable costs on society . . . . Section 1. Statement of Regulatory Philosophy and Principles . . . . Federal agencies should promulgate regulations that are required by law, that are necessary to interpret the law, or that advance the public good by: correcting failures of private markets").

640. *Id.* at 19 ("Net benefits include both unquantified and quantified economic, employment, environmental, public health and safety, and overall welfare effects. When choosing between regulatory alternatives, agencies should take due account of distributive impacts, including impacts on future generations and equity. The American public should be given ample opportunity to comment on regulatory alternatives, and the regulatory process should be conducted expediently, without unnecessary delay, and with sufficient coordination between federal agencies and with State, local, and tribal governments").

641. *Id.* at Executive Summary, 1-2 (emphasis added).

opportunity for federal agencies to promulgate stricter environmental regulations on net benefit grounds that would appeal to environmental pressure groups because they are more consistent with Europe's Precautionary Principle.[642]

Furthermore, besides the executive orders noted above that focused on the economic costs of overly strict regulations, surviving Reagan E.O. 12630 [643] remains concerned about the implications of regulation for property rights. E.O. 12630 focuses on the degree to which government regulations, including public environment, health and safety regulations, can interfere with U.S. constitutionally protected private property rights.[644] Its objective has been "to ensure that government actions are undertaken on a well-reasoned basis with due regard for fiscal accountability, for the financial impact of the obligations imposed on the Federal government by the Just Compensation Clause of the Fifth Amendment, and for the Constitution."[645]

E.O. 12630 recognized, in other words, that "governmental actions that do not formally invoke the [eminent domain] condemnation power, including regulations . . . but which. . . substantially affect the value or use of private property, may [in fact] result in a taking for which just compensation is required,"[646] "even though the action results in less than complete deprivation of all use or value in the same private property."[647] To ascertain whether a regulatory taking within the meaning of the Just Compensation Clause of the Bill of Rights has occurred, the E.O. emphasized the effect of the regulation on the exercise and use of private property rather than the intent of the regulator or the policy objective of the regulation.[648]

642. *Id.* at 5 ("Retaking Rationality argues that cost-benefit analysis is a conceptually neutral tool to achieve a more rational system of regulation, but that this tool has often been used in the service of an ideological driven antiregulatory agenda. Due to this imbalance, *groups that favor an active regulatory role for government – such as environmental groups. . . have generally not participated in the debate over the methodology and uses of cost-benefit analysis.* As a result, both substantive and institutional biases with antiregulatory effects have emerged in cost-benefit analysis. Retaking Rationality identifies eight of these biases and proposes that *by embarking on a campaign to improve cost-benefit analysis, rather than end its use, pro-regulatory groups can have more success in pursuing their agenda* and promoting a more just and rational regulatory system")(emphasis added).

643. *See* 53 FEDERAL REGISTER 8859 (March 15, 1988), http://www.blm.gov/nhp/news/regulatory/EOs/eo_12630.html.

644. E.O. 12630, (was entitled "Governmental Actions and Interference With Civil Constitutionally Protected Property Rights").

645. *Id.* at Preamble.

646. *Id.* § 1(a).

647. *Id.* § 3(b).

648. *Id.* §3(e).

E.O. 12630 also established broad guidelines that require federal regulatory agency officials to consider whether proposed governmental actions and policies could have takings implications before rather than after they are pursued, i.e., to perform a "takings impact (implications) assessment" where there is a high probability that a government action or policy could affect the use of any real or personal property.[649] The Department of Justice drafted additional general guidelines during June 1988 which set forth an analysis of when governmental actions are likely to constitute a taking,[650] and thereafter, more specific supplemental guidelines for three of the four relevant U.S. federal agencies - the Army Corps of Engineers, Environmental Protection Agency and Department of Interior, but not the Department of Agriculture.[651] At least one think tank has noted how "[federal] agencies [could have] easily circumvent[ed] E.O. 12630 simply by routinely finding no 'takings implications' each time they perform the Takings Implication Assessment required by the Attorney General's guidelines for implementing the Order."[652] A 2003 General Accounting Office report subsequently found that these federal agencies during the Clinton administration had actually conducted few takings implications assessments as required by the executive order.[653]

Interestingly, E.O. 12630 set forth a more specific standard to determine whether environment, health and safety (EHS) regulations so affect the value or beneficial use of private property as to be deemed a taking for public use that is also entitled to just compensation. This E.O. predates the current international debate about whether costly and property right-impairing Precautionary Principle-based European environment and health regulations should also be adopted as the basis for U.S. regulation. Nevertheless, it eerily seems to have anticipated it.

> [T]he mere assertion of a public health and safety purpose is insufficient to avoid [having the regulation deemed] a taking. . . . Actions. . . asserted to be for the protection of public

649. *Id.* § 4, 5.
650. *See* Rulemaking Guide, Guidance on Takings; Centralized Library: U.S. Fish and Wildlife Service - Excerpt from Guidance on 'Takings' from the Department of Justice, 3-4, http://www.fws.gov/policy/library/rgtakingsguidance.pdf.
651. *See* Regulatory Takings: Implementation of Executive Order On Government Actions Affecting Private Property Use, United States General Accounting Office Report to the Chairman, Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives (Sep. 2003), 13, http://www.gao.gov/new.items/d031015.pdf.
652. *See* William G. Laffer, Realistic Options for Reducing the Burden of Excessive Regulation NEED PINCITE (Jan 19, 1993), http://www.heritage.org/Research/Regulation/CM15.cfm.
653. *Id.* at 16-18.

> health and safety, therefore, should be undertaken *only in response to real and substantial threats* to public health and safety, be designed to advance significantly the health and safety purpose, *and* be no greater than is necessary to achieve the health and safety purpose. . . .
>
> . . . .
>
> . . . In instances in which there is *an immediate threat to health and safety that constitutes an emergency* requiring immediate response, this analysis may be done upon completion of the emergency action.[654]

Consequently, it was no surprise that the regulatory and property rights philosophies underlying E.O. 12630 sparked considerable debate among environmentalists and policymakers who preferred the regulatory benefits approach taken by E.O. 12866. Apparently, at least one legal commentator, a supporter of greater environmental protection, believed that E.O. 12630 represented an effort to:

> undermine public health and environmental regulations through the back door by promoting an exaggerated and inaccurate version of regulatory takings doctrine. . . . Because the Executive Order so severely misstated the law, it was difficult to avoid the conclusion that the true purpose of the Executive Order was not to enforce the Constitution, but rather to attack regulatory protections. *On April 2, 1993, a number of prominent law scholars wrote to President Clinton urging him to rescind executive Order 12630.*[655]

Another legal commentator noted how the Reagan administrations had essentially approached regulatory takings assessments in much the same 'look before you leap' manner as the Clinton administration had used environmental impact assessments. Each type of impact assessment served to "provide publicly researched data to adversaries [either those opposed to new regulations or to less regulation] and to cause the public machinery to slow down in its development and promotion of new rules, regulations and laws [or its elimination or modification of

654. Exec.Order. No. 12630, Section 3(c), 4(d)(4) (emphasis added).

655. *See, e.g.*, Testimony of John D. Echeverria, Executive Director Georgetown Environmental Law & Policy Institute, Georgetown University Law Center, Oversight Hearing Based on the Report of the General Accounting Office on the Implementation of Executive Order 12630, before the Subcommittee on the Constitution Committee on the Judiciary, U.S. House of Representatives (10/16/03), at 4-5, http://www.law.georgetown.edu/gelpi/papers/2003testimony.pdf; *see also*, Folsom, R.E., *Executive Order 12630: A President's Manipulation of the Fifth Amendment's Just Compensation Clause to Achieve Control Over Executive Agency Regulatory Decisionmaking*, 20 B. C. ENVT'L AFF. L. REV 639, 650 - 659 (1993).

existing rules]."[656] Apparently, in this commentator's opinion, imitation was *not* the best form of flattery.

Therefore, a thorough review of E.O.s 12866 and 12630, and accompanying guidelines and congressional reports, should inform any rational analysis and discussion of how Senate ratification of the UNCLOS, might lead to federal implementing legislation or regulatory reinterpretation that results in adoption of Europe's Precautionary Principle as U.S. law, and consequently engenders U.S. constitutional violations. Such a version of the Precautionary Principle would most certainly impose new and more stringent environmental burdens and higher costs on industry, result in higher consumer prices for both goods and services, and almost certainly place a drag on the U.S. economy.

Perhaps this is one of the reasons why, during June 2006, the U.S. State Department's Office of the Legal Advisor issued a notice of final rulemaking updating the regulations implementing recent amendments made to 1 U.S.C. 112a and 112b.[657] Those statutes govern publication of U.S. international agreements and their transmittal to the Congress. According to the rule change, the Executive Office of Management and Budget must now be consulted whenever "a proposed international agreement embodies a commitment that could reasonably be expected to require (for its implementation) the issuance of a 'significant regulatory action' (as defined in section 3 of Executive Order 12866)."[658] Is it not arguable that the OMB was concerned about the U.S. entering into Precautionary Principle-based environmental treaties, including the UNCLOS (with Senate advice and consent), which would likely impose costly legislative and/or regulatory obligations on the U.S. government that raise the cost of living,[659] impair private property rights[660]

656. *See* Harvey M. Jacobs, *The Politics of Property Rights at the National Level - Signals and Trends*, 69 J. AM. PLAN. ASS'N. 2, 181-182 (2003).
657. *See* FEDERAL REGISTER: September 8, 2006 (Volume 71, Number 174)], cited as 22 C.F.R. PART 181, at 53007-009 (Sep. 8, 2006), http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/E6-14850.htm .
658. *Id.* at 53007.
659. *See, e.g.*, Danny Fortson, *Power Firms to Pocket £6bn From Carbon 'Handouts' in New Emissions Regime*, THE INDEPENDENT (Jan. 2, 2008), http://news.independent.co.uk/business/news/article3301065.ece; Nick Mathiason & Jo Revill, *Every UK Home to Face 15pc Energy Price Rise*, OBSERVER (Jan. 6, 2008), http://www.guardian.co.uk/money/2008/jan/06/householdbills.utilities.
660. Kogan, *Precautionary Preference: How Europe Employs Disguised Regulatory Protectionism To Weaken American Free Enterprise*, *supra* note 51, at 65-411; *The Invasion of the Property Snatchers*, INST. FOR TRADE, STANDARDS & SUST. DEV. (Oct. 31,

and compromise U.S. global competitiveness?[661]

2. Presidential Memoranda

Alternatively, presidents may rely on memoranda, "which fall under the rubric of presidential directives . . . to address executive branch officials."[662] "Memoranda are similar to orders and often accompany them, but there is no particular legal structure for creating or publishing them, and they may or may not be catalogued and compiled."[663] And, like executive orders, they may be used (some argue interchangeably)[664] to "initiate policy as well as direct agency actions."[665]

At least one study, however, has shown that presidents have increasingly tended to view memoranda as "different strategic tools."[666] It found generally that presidents relied on executive orders more than memoranda to enhance their support in Congress, and that lame duck presidents in particular, were more inclined to use executive orders to compensate for their lower political clout. However, the study also found that when a president's congressional support is low, he often chooses to use the lower profile memoranda, which generates less publicity, to circumvent Congress' will.[667]

For example, the same study documented how President Clinton had "demonstrated a strong inclination to use memoranda [in lieu of executive orders]

2006), http://www.itssd.org/Publications/Invasion.pdf; Kogan, *U.S. Private Property Rights Under International Assault*, *supra* note 18.

661. Kogan, *Exporting Precaution: How Europe's Risk-Free Regulatory Agenda Threatens American Free Enterprise*, *supra* note 45 at 17-42.
662. Margaret Tseng *supra* note 585, at 5.
663. *See* David Dehnel, Book Review of PHILLIP COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION, *supra* note 637.
664. Margaret Tseng, supra note 585, at 5, 19 (Presidents now use memoranda for all the same purposes as executive orders); *see* Randolph D. Moss, Acting Assistant Attorney General, Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order – Memorandum for the Counsel to the President, (Jan. 29, 2000) ("A presidential directive has the same substantive legal effect as an executive order. It is the substance of the presidential action that is determinative, not the form of the document conveying that action. Both an executive order and a presidential directive remain effective upon a change in administration, unless otherwise specified in the document, and both continue to be effective until subsequent presidential action is taken"), http://www.fas.org/irp/offdocs/predirective.html.
665. Margaret Tseng, *supra* note 585, at 8.
666. *Id.* at 19.
667. *Id.* at 20.

when he faced an uncooperative Congress." In particular, President Clinton was observed to use memoranda for the purpose of both averting an adverse Republican Congress and generating favorable publicity[668]:

> The decision to use memoranda in the cases of health care [creating a patient's bill of rights] and gun control [requiring child safety locks on guns issued by federal agencies and requiring regulation of weapons sold at gun shows] may have been Clinton's attempt to signal to the public that he was making an impact on these popular and controversial issues.[669]

President Clinton, however, also issued memoranda directing environmental policy. An example was the Presidential Memorandum on *Environmentally and Economically Beneficial Practices on Federal Landscaped Grounds*, which implemented the NPR discussed above. In particular, it focused on "increas[ing] environmentally and economically beneficial landscaping practices at Federal facilities and federally funded projects," which "mean[t] using regionally native plants and employing landscaping practices and technologies that conserve[d] water and prevent pollution."[670] It also emphasized that "although sustainable site design may have a higher initial cost, it may prove economical over the life of the project."[671]

A year later, this memorandum was elaborated upon by a guidance document issued by the Federal Environmental Executive.[672] According to the document, it would seem that the FEE had emphasized the time value of money in assessing the costs that would likely be incurred to prevent pollution at source in the present rather than in the future. However, the use of the term "cost" was somewhat deceiving, in that it effectively referred to the externalized cost to the environment (and indirectly to society)[673] of preventing pollution now versus the externalized

668. *Id.* at 21 ("Often times a president will focus on a controversial issue like gun control with multiple memoranda to draw the public's attention to the fact that he is fixing the problem").
669. *Id.* at 20-21.
670. *See* Presidential Memorandum, Envtl. Practices on Fed. Grounds, The White House (April 26, 1994), http://govinfo.library.unt.edu/npr/library/direct/memos/25f2.html.
671. *Id.*
672. *See* Office of the Federal Environmental Executive; Guidance for Presidential Memorandum on Environmentally and Economically Beneficial Landscape Practices on Federal Landscaped Grounds, (Aug. 10, 1995) 60 FR 154, 40837, http://www.epa.gov/fedrgstr/EPA-GENERAL/1995/August/Day-10/pr-664.html.
673. Environmental Externalities, OECD Glossary of Statistical Terms, ("Environmental externalities refer to the economic concept of uncompensated environmental effects of production and consumption that affect consumer utility and enterprise cost outside the

cost to the environment (and indirectly to society) of waiting to prevent pollution later, without referring to either the current or future economic costs of regulatory compliance. In other words, it does not seek to limit the amount of dollars society spends to prevent pollution (for regulatory compliance), but only to maximize the environmental and social benefits to be obtained from whatever dollars are spent. This arguably empowers the government while undertaking cost-benefit analysis to overstate the environmental benefits to be achieved and to understate the economic costs deemed necessary to achieve them.

Former President Bush, as well, has utilized memoranda on several occasions to generate positive publicity for the White House. For example, during May 2001[674] and September 2005 following Hurricane Katrina,[675] the President issued memoranda to promote energy conservation at Federal Facilities "direct[ing] the heads of executive departments and agencies (agencies) to take appropriate actions to conserve energy use at their facilities to the maximum extent consistent with the effective discharge of public responsibilities."[676]

C. Congressional Implementing Legislation or Presidential Executive Orders and Memoranda May Be Used to Ensure and/or Limit U.S. Federal Court Enforcement of UNCLOS Tribunal Decisions Involving Europe's Precautionary Principle

Additional research reveals how congressional implementing legislation and/or presidential executive orders could also be utilized to ensure that U.S. federal courts enforce international tribunal decisions for the ultimate purpose of incorporating international legal, political and social norms within U.S. federal law. This would undoubtedly facilitate greater U.S. submission to international environmental law and unaccountable international institutions in furtherance of

market mechanism. As a consequence of negative externalities, private costs of production tend to be lower than its 'social' cost. It is the aim of the 'polluter/user-pays' principle to prompt households and enterprises to internalize externalities in their plans and budgets"), http://stats.oecd.org/glossary/detail.asp?ID=824.

674. *See* Presidential Memorandum, Energy Conservation at Federal Facilities (May 3, 2001), http://www.whitehouse.gov/news/releases/2001/05/20010507-2.html.

675. *See* Presidential Memorandum, Energy Conservation at Federal Facilities (Sept. 26, 2005), http://www.whitehouse.gov/news/releases/2005/09/20050926-4.html.

676. *Id.*; *see also, Agencies Respond to President's Memorandum to Conserve Energy*, U.S. Department of Energy, Federal Energy Management Program (FEMP Focus Special Issue 2006) (Feb 26, 2007), http://www1.eere.energy.gov/femp/news/news_detail.html?news_id=9770.

global governance.[677] Notwithstanding public political declarations to the contrary, upon U.S. UNCLOS ratification, the U.S. would be subject to future adverse decisions handed down by the Seabed Disputes Chamber of the International Tribunal of the Law of the Sea (ITLOS), especially those involving "provisional measures" premised on Europe's *hazard-based* Precautionary Principle.

UNCLOS offers Treaty Parties with a complex menu of international tribunal choices through which to resolve treaty disputes which may foster some form of market-based judicial competition. These choices include special arbitral tribunals, the International Court of Justice and the ITLOS.[678] UNCLOS Parties, however, have no choice but to submit to the compulsory and binding jurisdiction of the ITLOS Seabed Disputes Chamber for any dispute arising between them in the Area,[679] which is unique among international environmental agreements.[680] UNCLOS Parties are also expressly required by Article 39 of Annex VI of the UNCLOS to ensure that their domestic courts enforce the decisions of the Seabed Disputes Chamber "in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought"[681]

Since the U.S. is a dualist[682] rather than a monist jurisdiction in which treaties

677. Ku, *International Delegations and the New World Court Order, supra* note 82, at 104, , (accompanying footnote #12, "[L]eading scholars have theorized that interaction between international tribunals and domestic courts form a central component of an international order characterized by respect for and submission to international law and international institutions . . . The two leading proponents of this approach are Dean Anne-Marie Slaughter of the Woodrow Wilson School of Public and International Affairs at Princeton University and Dean Harold Hongju Koh of the Yale Law School), http://ssrn.com/abstract=879237; *see also*, Laurence R. Helfer and Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 Cal. L. Rev. 900, 953-954 (2005), *available* http://ssrn.com/abstract=670821.
678. *See* Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. OF INTL. L., 414-416, 441-444, 447-448 (2007), *available at* http://ssrn.com/abstract=1071184.
679. UNCLOS, *supra* note 51, art.186-187, Annex VI.
680. *See* Gregory Rose & Lal Kurukulasuriya, Comparative Analysis of Compliance Mechanisms Under Selected Multilateral Environmental Agreements, United Nations Environment Programme (Dec. 2005) at 12, 28, 95, http://www.unep.org/Law/PDF/comp_analysis_compliance_mechanisms.pdf.
681. UNCLOS, *supra* note 51, Annex VI, art. 39, (The decisions of the Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought).
682. John H. Jackson, *Status of Treaties in Domestic Legal Systems*, 86 AJIL 310, reproduced in John H. Jackson, William J. Davey & Alan O. Sykes, LEGAL PROBLEMS OF

are generally not self-executing (part of the domestic law directly),[683] at least one legal commentator has argued that the self-executing effect of Article 39 of Annex VI arguably presents a potentially serious constitutional conundrum the resolution of which may likely require congressional or presidential action:

> [T]his provision appears to require U.S. courts to give more than 'full faith and credit' to judgments of this international chamber. Rather, it requires a U.S. court to treat such chamber decisions as equivalent to those of the U.S. Supreme Court. As far as I know, no prior treaty has ever committed the U.S. in quite this emphatic way.[684]

Since the U.S. federal courts would be bound (i.e., would lack the discretion not) to enforce the decisions of the Seabed Disputes Chamber pursuant to Article 39 of Annex VI, the U.S. Constitution's Article III allocation of judicial power to U.S. federal courts, including the U.S. Supreme Court, could conceivably be threatened (impaired).[685] However, it is also quite possible that Article 39's self-executing effect (i.e., the UNCLOS' requirement that U.S. federal courts enforce Seabed Disputes Chamber decisions as a matter of U.S. law) would conceivably vest such courts with an "excessive delegation of judicial power under Article III" which, in turn, would effectively be handed off to the Seabed Disputes Chamber. The problem, as this legal commentator explains, is that such excess delegation could not be readily addressed. One possible solution would be for the Senate to attach a declaration to its advice and consent papers stating that this provision is non-self-executing, as the former Bush administration would have liked.

INTERNATIONAL ECONOMIC RELATIONS, CASE MATERIALS AND TEXT 98, 4th Ed. (2002), ("In a dualist jurisdiction, international treaties are part of a separate legal system from that of the domestic law. Therefore, a treaty is not part of the domestic law, at least not directly . . . Generally . . . for a treaty rule to operate in the domestic legal system there must be an 'act of transformation.' This entails a government action of some kind (e.g., the legislative enactment of a statute incorporating the treaty language, an administrative body's adoption of regulations falling within the scope of its authority, or a court or tribunal decision) by the State that incorporates the treaty norm into its domestic law").

683. *Id.* ("In a monist jurisdiction, the domestic law is deemed to include international treaties to which such country is obligated. In other words, the international treaty has 'direct applicability' or a 'self-executing effect'. This entitles citizens of another treaty party to sue in the courts of the monist jurisdiction to require that they be treated in accordance with the treaty standard").

684. Julian Ku, *Why the Law of the Sea Treaty (Annex VI, Art. 39) Is Unconstitutional*, OPINIO JURIS (May 16, 2007), http://opiniojuris.org/2007/05/16/why-the-law-of-the-sea-treaty-annex-vi-art-39-is-unconstitutional.

685. *Id.* (Other commentators have taken issue with this interpretation of Annex VI, Article 39 exampled in section "Response of Tobias Thienel"); *see also* Julian Ku, *International Delegations and the New World Court Order*, *supra* note 82 at 154.

However, the Congress would subsequently need to pass legislation implementing the declaration, and this is likely to be construed by other treaty parties as an impermissible 'treaty reservation' that nullifies the very provision in question. And, Congress would still have to figure out some constitutional way to ensure that federal courts enforce an adverse ITLOS judgment.[686]

Perhaps, the best way to prevent activist U.S. Federal Courts from exercising excessive Article III authority (i.e., from enforcing, in rubber-stamp fashion, without sufficient foreign policy knowledge and experience the decisions of the UNCLOS Seabed Disputes Chamber) would be to subject U.S. Federal Court authority to the review and approval of the politically accountable branches of the U.S. government – namely, the U.S. President or the Congress.[687] U.S. Federal Courts should recognize this political override authority through resort to the judicial nondelegation doctrine. In other words, U.S. Federal Courts would recognize that the President (or Congress) must expressly and clearly authorize a U.S. Federal Court's delegation of Article III powers to an international tribunal by means of executive order (or implementing legislation).[688]

> Such a clear statement requiring judicial enforcement can be expressly provided by the treaty. Alternatively, a clear statement might be found in congressional legislation implementing the treaty, or in an executive order made by the President. *Applying the nondelegation doctrine* [. . .] *sharply limits, but does not eliminate the independent role of domestic courts in deciding how and whether to comply with international tribunal judgments.*"[689]

This approach appears logical considering that it is the President of the United

686. Ku, *International Delegations and the New World Court Order*, *supra* note 82, at 165.
687. *Id.* at 166-169 ("Forcing the political branches to clarify their intentions about judicial enforcement prevents them from avoiding responsibility for the consequences of an international tribunal's judgment . . . Political legitimacy is another related justification for the clear statement rule. By taking courts out of the enforcement process absent the clearest statement by a political branch, the political legitimacy of international tribunal judgments becomes enhanced. Why? Because rather than relying on domestic courts to enforce their judgments, international tribunals will have the imprimatur of Congress or the President for their judgments . . . By relying on the political branches to bring the U.S. into compliance with international obligations, courts ensure that the political branches have made the determination to comply with the international tribunal judgment . . . Finally, a super-strong clear statement rule shifts the decision on compliance with an international tribunal judgment to the institutions of the government with the greatest expertise in foreign affairs: the executive and legislative branches")(emphasis added).
688. Ku, *International Delegations and the New World Court Order*, *supra* note 82 at 107, 145-147.
689. *Id.* at 107-108 (emphasis added).

States who ultimately possesses the plenary authority, subject to the Treaty Power of the Congress, to conduct foreign affairs on behalf of the nation pursuant to Article II, Section 2, Clauses 1 and 2 of the U.S. Constitution.[690] Yet, depending on the political and policy leanings and proclivities of the U.S. President in office at the time an international tribunal renders an adverse decision against the United States, it may also effectively subject the U.S. Constitution and U.S. federal law to override by international law and institutions.

For example, the former Bush administration unexpectedly intervened in the recent U.S. Supreme Court case *Medellin v. Dretke*[691] for the specific purpose of ensuring that U.S. state courts enforced an adverse International Court of Justice (ICJ) decision that effectively overrode Texas criminal law and the U.S. Constitution's Tenth Amendment.[692] It did so citing the president's inherent and delegated authority to conduct foreign affairs on behalf of the Nation.[693]

According to one legal commentator, President Bush's involvement in the *Medellin* case demonstrated how "the executive branch can [try and] take responsibility for compliance with an international tribunal judgment."[694] In his estimation, the President's power to enforce foreign judgments as U.S. law is somewhat analogous to the President's power to alter domestic administrative or regulatory law through use of executive orders. But it may be even more expansive. For example, through supervision of administrative agencies, the President may "directly modify U.S. law by altering an administrative determination or regulation to comply with an international tribunal judgment," whether or not expressly authorized by statute. In addition, the President may initiate suit against a state or local government to compel "its compliance with an

690. U.S. Const. art. I, § 8, 10 (Congress that retains the authority to regulate commerce with foreign nations).

691. Medellin v. Dretke (Medellin II), 125 S. Ct. 686, 686 (2004), cert. dismissed, 125 S. Ct. 2088 (2005) (per curiam) ("In December 2004, the United States Supreme Court granted a petition for certiorari to consider whether a judgment of the International Court of Justice (ICJ) is binding on U.S. courts" where a Mexican national facing execution by the State of Texas sued to enforce the ICJ's ruling that U.S. courts must reconsider his claim for relief under the Vienna Convention on Consular Relations (VCCR) and the Court thus agreed to consider the important but unsettled question of an international tribunal judgment's status within U.S. law).

692. *See* Medellin v. Texas, Brief for the U.S. as Amici, S. Ct. of the U.S. at 8-10, http://www.scotusblog.com/movabletype/archives/MedCertAmicus.pdf.

693. *Id.* at 9-16.

694. Ku, *International Delegations and the New World Court Order*, *supra* note 82, at 166.

international agreement." Furthermore, the President may preempt a state law that contravenes an international judgment by invoking his plenary authority to conduct foreign policy.[695]

Although it was not unexpected in *Medellin* that several legal commentators and amicus parties favoring multilateralism and globally focused courts had argued in favor of such a result,[696] it nevertheless seemed to surprise the majority of the President's longtime supporters within his own political party.[697]

The great political and legal significance of this case evidently weighed on the minds of the Justices, with the Court ultimately holding that former President Bush had overreached his constitutional authority.[698] The Court was certainly aware that, had it ruled the ICJ judgment was to be enforced directly by the Texas Courts, it would have been viewed by Americans and the world as having effectively delegated to a foreign tribunal its exclusive Article III powers to interpret the Constitution's relationship with international law and the U.S. Constitution itself.

The hesitance of Justices Roberts and Scalia to cede such authority to the World Court was reflected in the comments they each made during the case's October 2007 oral arguments. According to the Washington Post,

> Roberts was one of several justices who seemed skeptical of the deference owed to the International Court of Justice, also known as the World Court. He asked Medillín's lawyer, Donald F. Donovan: If the Supreme Court thought a World Court ruling preempted federal law, 'We would have no authority to review the judgment itself?' Justice Antonin Scalia agreed, saying he has a constitutional problem with giving an international body such power. 'I am rather jealous of that authority,' Scalia said. 'I don't

695. *Id.* at 145-147.

696. *Id.* at 105 ("The briefing before the Supreme Court in *Medellin* reflected arguments advanced by these scholars. *The petitioner and various amici asked the Court to treat ICJ interpretations of U.S. treaty obligations as judgments binding on all domestic U.S. courts*, including the U.S. Supreme Court. In this way, the *Medellin* case represents an important first step in bringing a 'new world court order' to the U.S.") (emphasis added).

697. *Id.*; Frank J. Gaffney, *LOST Justice*, WASHINGTON TIMES COMMENTARY (Oct. 16, 2007), http://washingtontimes.com/news/2007/oct/16/lost-justice; Frank J. Gaffney, *Mugged By Legality*, NATIONAL REVIEW ONLINE (Jan. 22, 2008), http://article.nationalreview.com/?q=MjY3MTk1OGEwYjIwMzBiY2U1NmIwZWI4MmZmODE4Yzg.

698. *See* Jerry Seper *Court Says Bush Stretched Powers*, WASHINGTON TIMES (March 26, 2008), http://www.washingtontimes.com/news/2008/mar/26/court-says-bush-stretched-powers; *see also*, Robert Barnes, *Justices Rebuff Bush and World Court*, WASHINGTON POST (March 26, 2008), http://www.washingtonpost.com/wp-dyn/content/story/2008/03/25/ST2008032502998.html.

> know on what basis we can allow some international court to decide what is the responsibility of this court, which is the meaning of the United States law.[699]

With these concerns in mind, the Court proceeded to examine the nature of the particular treaties involved. In other words, it looked at whether they were self-executing[700] or required a further affirmative act by either the legislative or executive branch in order for an international tribunal decision falling within the scope of those treaties to be enforceable on U.S. domestic courts.

> This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law. The distinction was well explained by Chief Justice Marshall's opinion in *Foster* v. *Neilson*,. . .which held that *a treaty is 'equivalent to an act of the legislature,' and hence self-executing, when it 'operates of itself without the aid of any legislative provision'. . . . When, in contrast, '[treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect'* . . . . In sum, while treaties 'may comprise international commitments. . .they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' *and is ratified on these terms.*'[701]

In construing the nature of these treaties, the Court sought to discern whether the Constitution's Framers imposed any limitation on the Court's constitutional authority to determine on its own, without regard to international law, whether a given treaty is 'self-executing' or non-self-executing and whether the presumption of non-self-executing treaties[702] applies in a given case. A non-self-executing treaty is one "that was ratified with the understanding that it is not to have domestic effect of its own force."[703] It also looked to the Framers' intent

699. Robert Barnes, *Chief Justice Prolongs Executive Powers Debate*, WASHINGTON POST (Oct. 11, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/10/10/AR2007101002438.html.

700. Medellín v. Texas, 552 U.S. __ (2008), slip op., FN 2, *available at* http://www.law.cornell.edu/supct/html/06-984.ZO.html ("What we mean by 'self-executing' is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a "non-self-executing" treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.").

701. Foster v. Neilson, 27 U.S. 253, 315, slip op. at 8-9 (emphasis added).

702. *Id.* slip op. at 1 (Justice Stevens, in his concurring opinion, strongly disagreed that such a presumption existed at all. "There is a great deal of wisdom in JUSTICE BREYER's dissent. I agree that the text and history of the Supremacy Clause, as well as this Court's treaty-related cases, *do not* support a presumption against self-execution")(emphasis added).

703. *Id.* slip op. at 31.

concerning the extent of the constitutional limitations placed on the President's and the Congress' federal treaty making and enforcement powers.[704]

With regard to its own constitutional powers, the Court's Majority clearly found that the Framers had vested the Court with sufficient authority to make these determinations. It held that, "whether the treaties underlying a judgment are self-executing so that the judgment is directly enforceable as domestic law in our courts is, of course, a matter for this Court to decide." [705]

With regard to the extent of the constitutional powers vested in the political branches (the President and the Congress) to make and enforce treaties, the Court found that the Framers had carefully circumscribed them.

> Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, *subject to checks and balances*. U. S. Const., Art. I, §7. They also recognized that treaties could create federal law, *but again through the political branches, with the President making the treaty and the Senate approving it*. Art. II, §2.[706]

As the Court's Majority concluded, the Constitution, through separation of powers, places clear limitations upon the President's power to unilaterally enforce non-self-executing treaties as if they were self-executing, especially where the President and the Congress had not addressed the issue at the time the treaty was signed and ratified – thus, giving deference to the presumption against self-executing treaties noted above.

> The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress . . . . The requirement that Congress, rather than the President, implement a non-self-executing treaty derives from the text of the Constitution, which divides the treaty-making power between the President and the Senate. The Constitution vests the President with the authority to 'make' a treaty. Art. II, §2. If the Executive determines that a treaty should have domestic effect of its own force, that determination may be implemented 'in mak[ing]' the treaty, by ensuring that it contains language plainly providing for domestic

704. Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 413 (1998) (According to at least one constitutional scholar, "the records of the Virginia Ratifying Convention contain specific discussions of the scope of the treaty power. These discussions confirm that the Framers did in fact envision [constitutional] limitations on the treaty power.").

705. Foster v. Neilson, *supra* note 732, slip op. at 23.

706. *Id.* at 19 (emphasis added).

> enforceability. If the treaty is to be self-executing in this respect, the Senate must consent to the treaty by the requisite two-thirds vote . . . consistent with all other constitutional restraints. Once a treaty is ratified without provisions clearly according it domestic effect, however, whether the treaty will ever have such effect is governed by the fundamental constitutional principle that "'[t]he power to make the necessary laws is in Congress; the power to execute in the President.'[707]

The Court ultimately held that, in the absence of implementing congressional legislation, "the non-self-executing treaties at issue . . . did not 'express[ly] or implied[ly]' vest the President with the unilateral authority to make them self-executing."[708] Predictably, the multilateralists within the Court, most notably Justice Stevens, contrasted the non-self-executing nature of the treaties reviewed in *Medellin* with the 'self-executing' nature of the UNCLOS – in particular Annex VI, Article 39, the text of which expressly provides for the incorporation of International Seabed Disputes Chamber decisions within U.S. federal domestic law.[709]

However, in doing so, Justice Stevens conveniently sidestepped, as one scholar has noted, the complex issue that a future congress would, no doubt, face – namely, how to draft UNCLOS implementing legislation that restricts and conditions the application of UNCLOS Annex VI, Article 39 without also being construed as a violation of UNCLOS Article 309, which prohibits any reservations and exceptions that could be read to nullify any non-self execution declaration.[710] Apparently, the UN General Assembly's recent March 2008 resolution 62/215 had this issue in mind.[711]

Given the many political objectives sought to be achieved via tactical use of presidential executive orders and memoranda, would it be too much to expect that President Obama would issue executive orders and memoranda directing federal agencies to liberally reinterpret current federal environmental laws for the purpose of establishing a new more stringent regulatory standard based on the application of Europe's Precautionary Principle? And, wouldn't U.S. accession to the UNCLOS, the world's most complex and comprehensive environmental regulatory treaty in existence, which incorporates the spirit of said Precautionary Principle,

707. *Id.* at 30-31 (emphasis added).
708. *Id.*
709. *Id.* at 2.
710. *See* Ku, *International Delegations and the New World Court Order*, 82 at 165.
711. Oceans and the Law of the Sea G.A. Res. A/RES/62/215, (March 14, 2008), *supra* note 100, Preamble, para. 5.

provide him with adequate political 'cover' and ostensible legal justification to do just that?

IV. CONCLUSION

A. Recap

This article has explained in detail why the U.S. Congress must hold open and transparent public substantive hearings to discuss, evaluate and explain the significant environmental regulatory and judicial enforcement aspects of the U.N. Law of the Sea Convention before this treaty is resubmitted to the full Senate during 2009 for a vote of accession.

Contrary to the various assertions made by public officials and certain legal commentators, the evidence clearly reflects that the UNCLOS, both directly (explicitly) and indirectly (implicitly) harbors Europe's Precautionary Principle within its complex and expansive framework. The evidence also clearly shows how international UNCLOS environmental obligations assumed by the U.S. government upon accession would likely require that Congress and federal executive agencies enact, reinterpret, re-implement and more vigilantly enforce new and current federal environmental legislation and regulations. Many believe that this would better enable U.S. federal and state governments to protect the marine environment and natural resources from U.S. land, air and sea-based sources of marine pollution consistent with Europe's Precautionary Principle. Should the U.S. government not fulfill these UNCLOS environmental obligations, it would likely face legal challenges from *abroad.* They would be initiated by foreign nations within various UNCLOS tribunals and arbitral bodies that would be inclined to interpret these obligations broadly and consistently with Europe's Precautionary Principle (which is incorporated also within other relevant multilateral environmental agreements). The U.S. may even fall subject to binding and compulsory adverse rulings issued by the ITLOS and arbitral bodies.

In addition, UNCLOS environmental obligations could be thrust upon the U.S. government and the American public from *within* the United States via certain internal pathways. UNCLOS and Precautionary Principle proponents have long desired to bring U.S. environmental law into line with evolving international environmental law. Publicly and privately formed commissions, legal experts, environmentalists and a number of politicians, for example, have called for

Congress to amend key federal environmental statutes so that they would expressly or impliedly incorporate the Europe's Precautionary Principle, consistent with the UNCLOS. In addition, certain key federal environmental regulations have already been amended directly by U.S. agencies or reinterpreted pursuant to executive office directives that call for the indirect incorporation of Europe's Precautionary Principle, consistent with the UNCLOS and other MEAs. And new regulatory changes have since been proposed for other federal environmental regimes. Furthermore, the evidence shows that the Congress and the President may use their respective powers to enact legislation or to issue executive orders and memoranda for the purpose of ensuring that U.S. federal courts enforce UNCLOS tribunal judgments calling for the application of Europe's Precautionary Principle to resolve environmental disputes.

B. Open Questions

These conclusions only lead reasonable and inquisitive persons to ask more probing questions.

Why do U.S. proponents of the UNCLOS and Europe's Precautionary Principle still call for express language changes within the various federal environmental statutes and regulations discussed in this article, if Europe's Precautionary Principle already exists in spirit within them? Are these proponents trying to help the Europeans establish their version of the Precautionary Principle as both an express UNCLOS treaty rule and a norm of customary international law that would bind the U.S. even if it ultimately decides not to ratify the UNCLOS? Is it the intention of these proponents to facilitate a global paradigmatic change that formally locks the U.S. and all other nations into Europe's Precautionary Principle, for better or for worse?

Indeed, given the substantial political and economic influence the U.S. wields throughout the world, it would appear that these constituencies are actually endeavoring to facilitate U.S. UNCLOS accession to help Europe establish its Precautionary Principle as a peremptory norm of customary international law from which U.S. law could no longer derogate. Their ability to secure express (black letter law) language changes within a number of U.S. federal environmental statutes and regulations, and to achieve a more uniform federal implementation practice within administrative agencies and the judiciary, consistent with Europe's Precautionary Principle, would also evidence America's universal recognition of

and actual adherence to its evolving international environmental law obligations, as set forth within the UNCLOS and related MEAs. In other words, UNCLOS accession would ultimately enable a progressive U.S. government to show the existence of: (1) *opinio juris* (i.e., it has become a party to multilateral environmental agreements incorporating Europe's Precautionary Principle and has adopted it domestically out of 'a sense of legal obligation' since other countries have done so); and (2) *state practice* (i.e., it has actually made and acted on official statements of federal Precautionary Principle-based policy and undertaken general and specific uniform Precautionary Principle-based governmental acts domestically reflecting its legislative, regulatory and judicial adoption, implementation and enforcement of that sense of legal obligation).[712]

Why do UNCLOS proponents insist that U.S. functional (legal) sovereignty will not be challenged or undermined following U.S. accession to the UNCLOS? Is it not true that the EU and other nations such as Australia and Canada are already challenging the rights of the U.S. Navy and U.S. commercial shippers to freedom of navigation on the high seas and innocent passage in international straits and territorial waters by effectively invoking Europe's Precautionary Principle to restrict their activities?[713] Do UNCLOS proponents actually believe that by once

712. Rest. 3d of the Foreign Relations Law of the U.S., Comments and Illustrations (b),(c) §102 - Sources of International Law, http://www.kentlaw.edu/faculty/bbrown/classes/IntlLawFall2007/CourseDocs/RestatementSources.doc; *see* Kogan, *EU Regulation, Standardization and the Precautionary Principle*, National Foreign Trade Council (Aug. 2003) note 29-30, available at http://www.wto.org/english/forums_e/ngo_e/posp47_nftc_eu_reg_final_e.pdf, citing Franco Parisi, The Formation of Customary Law, Presented at the 96th Conference of the American Scientist Association, Geo. Mason University School of Law (Aug. 31-Sept. 3, 2000), at 4-5, http://www.gmu.edu/departments/law/faculty/papers/docs/01-06.pdf, and Anthony D'Amato, *Trashing Customary International Law*, 81 AM. J. OF INT'L L. 101 (1987), http://anthonydamato.law.northwestern.edu/Adobefiles/a87a-trashing.pdf.

713. *See, e.g.,* Lawrence Kogan, *U.S. Military Review of the Law of the Sea Treaty Lacking: Planning Outsourcing Risks Triggering Logistics Nightmare*, ITSSD Journal on the UN Law of the Sea Convention, *available* at http://itssdjournalunclos-lost.blogspot.com/2008/01/us-military-review-of-law-of-sea-treaty.html (explaining how, environmentally orientated foreign nations have employed the soft power strategy of 'lawfare' - which uses or misuses law as a substitute for traditional military means to achieve military objectives – to undermine U.S. military objectives, and that, because the U.S. military's plans call for doubling the outsourcing of its commercial, industrial and technology products and processes to private contractors within the next decade, the U.S. military will become more susceptible to the UNCLOS' strict environmental provisions, consistent with Europe's Precautionary Principle.). *See also*, "Letter from the Honorable James M. Inhofe to Lawrence Kogan (Dec. 7, 2005), *available at*

again reestablishing its global environmental leadership on sovereignty and territorial grounds, the U.S. will be able to prevent or repel such legal challenges?[714]

The facts seem to suggest otherwise. First, spurred on by environmental activist groups,[715] the governments of European coastal states have, since 1998, been steadily extending greater national sovereignty beyond their coastlines via

http://www.itssd.org/Correspondences/SenatorInhofelettersupportingITSSDresearch.doc (expressing interest and support for ITSSD research examining how other countries are reading a broader than agreed upon version of the Precautionary Principle into the UN Law of the Sea Treaty (LOST) text, and the likely impact that U.S. LOST ratification, under such circumstances, would have on U.S. national security and economic and technological competitiveness).

714. *See, e.g.*, Lawrence Kogan, *Myth & Realities # 2 Concerning UN Law of the Sea Treaty - U.S. Naval Freedom of Navigation and Avoidance of LOST Tribunal Jurisdiction, Despite Europe's Aggressive Use of the Precautionary Principle?*, ITSSD Journal on the UN Law of the Sea Convention, http://itssdjournalunclos-lost.blogspot.com/2008/01/myth-realities-2-concerning-un-law-of.html (arguing that: 1) the U.S. Navy will be unable to shape the interpretation, application and development of UNCLOS environmental and freedom of navigation rules in the secretariat bodies without also submitting itself and other U.S. executive agencies to the UNCLOS' dispute settlement procedures; 2) while the U.S. government's ability to restrict UNCLOS environmental jurisdiction only to UNCLOS Annex VIII Special Arbitration proceedings may provide it with a greater opportunity to select arbitral/tribunal panelists who are not necessarily hostile to U.S. interests, this does not guarantee a positive arbitral outcome; and 3) it is highly doubtful the U.S. military will be successful in unilaterally defining what are and are not 'military' activities for purposes of qualifying for the UNCLOS military exemption from jurisdiction, even from Special Arbitration proceedings.); *cf.* Roderick Kefferpütz & Danila Bochkarev, Expanding the EU's Institutional Capacities in the Arctic Region, Policy Briefing and Key Recommendations (2008), http://www.boell.de/downloads/Kefferpuetz_Bochkarev-Expanding_the_EUs_Institutional_Capacities_in_the_Arctic_Region.pdf (lamenting the UNCLOS' *weak* dispute settlement mechanism – "The fundamental drawback of the UN Convention on the Law of the Sea, however, is its particularly weak dispute settlement regime. Article 298 allows each nation to decline to accept any method of resolution for disputes, such as those surrounding territorial claims. States can therefore avoid an effective dispute settlement mechanism with a binding character that could solve territorial and resource disputes between the Arctic states.").

715. "Spurred by WWF's [World Wildlife Federation's] calls for action, Environment Ministers of 15 NE Atlantic States and [a] Member of the European Commission committed themselves in Sintra, Portugal in July 1998, to 'promote the establishment of a network of marine protected areas to ensure the sustainable use and protection and conservation of marine biological diversity and its ecosystems.' They signed Annex V to the OSPAR Convention and adopted the Strategy on the Protection and Conservation of Ecosystems and Biological Diversity of the Maritime Area." *See* Promoting a Network of Marine Protected Areas (MPAs) in the North-East Atlantic, WWF's Northeast Atlantic Programme, http://www.ngo.grida.no/wwfneap/Projects/MPA.htm. *See also* Legal Status of Marine Genetic Resources in Question, *supra* note 87.

establishment of 'marine protected areas' that effectively territorialize their EEZs.[716] This has come at the expense of the once sacrosanct UNCLOS 'freedom of navigation on the high seas' principle,[717] and is likely to spill over into the Artic region.[718] It is arguable, that if the U.S. government had not previously asserted that the Endangered Species Act extends through the U.S. EEZ and the high seas to the exclusive economic zones of foreign countries,[719] these governments would not now be acting in this manner.

Second, Australia and Canada have imposed their own environmental restrictions on vessel traffic moving along their coastlines through what the UNCLOS technically defines as 'international straits.'[720] During 2006, for example, Australia introduced compulsory pilotage requirements for all vessels traveling through the Torres Strait and the Great North East Channel, which it considers to be 'territorial waters,'[721] despite protests filed by both the United States and Singapore at the International Maritime Organization (IMO). These restrictions were imposed ostensibly to protect 'sensitive marine habitats' from possible future environmental harm.[722] Canada, meanwhile, has asserted sole

716. According to one international law scholar, "[t]he European Community and its member states seem on the verge of leading a new wave of territorialization against navigation itself in the name of environmental protection." Oxman, *supra* note 49 at 850.
717. *See* UNCLOS, *supra* note 41, art. 87.
718. "[T]he EU's leadership on climate change and environmental protection are needed in this fragile area. member-states have reiterated their concerns about the impact of climate change in the Arctic at a special session of the UNEP Governing Council in February 2008. *The European Union must ensure that any activity in this region is carried out according to the basic precautionary principle that such a fragile ecosystem will not be put at risk and that when in doubt we will choose to forgo those interferences that might endanger the Arctic.*" (emphasis added) Roderick Kefferpütz & Danila Bochkarev, Expanding the EU's Institutional Capacities in the Arctic Region, *supra* note 684, at 11.
719. Natural Resources Defense Council v. Department of the Navy, *supra* note 87.
720. See UNCLOS, *supra* note 41, Part III, Sections 1 and 2.
721. *See* UNCLOS, *supra* note 41, Part II, Section 2 "Limits of the Territorial Sea", all but Article 8; Similarly, prior to 1982, Malaysia and Indonesia had asserted sovereign jurisdiction over the Strait of Malacca, claiming it as 'territorial waters', though this claim was ultimately resolved with regional states assuming shared responsibility over maintaining the waterway as an international strait, within the meaning of UNCLOS Article 34; *see* James C. Kraska, *The Law of the Sea Convention and the Northwest Passage*, Chap. 3, in DEFENCE REQUIREMENTS FOR CANADA'S ARCTIC, Edited by Brian MacDonald, (Vimy Paper 2007) at 56-57, *available at* http://www.cda-cdai.ca/Vimy_Papers/Defence%20Requirements%20for%20Canada's%20Arctic%20online%20ve.pdf.
722. *See Compulsory Pilotage in the Torres Strait*, NEWSLETTER OF THE SEA POWER CENTRE OF AUSTRALIA, (Apr.7, 2007), http://www.navy.gov.au/spc/semaphore/issue7_2007.html.

functional jurisdiction over and claimed its right to impose strict national environmental laws (i.e., Arctic Water Pollution Prevention Act) in the Northwest Passage[723] which it treats as 'internal waters.'[724] At least one U.S. Navy legal officer has disputed this claim while nevertheless recognizing the application of Agenda 21, Chapter 17 principles.[725] Canada has employed these restrictions ostensibly because of environmentalist concerns that international tanker traffic could potentially result in harm to its waters and coastline which are located within the environmentally sensitive Arctic region.[726]

In addition, Canada has threatened to block liquefied natural gas (LNG) tanker shipments that may soon be headed to new terminals being built along Maine's coastline abutting Passamaquoddy Bay, located along the Canada-U.S. border.[727] The Canadian government, pressured by environmental groups, alleges that it is concerned LNG shipments transiting Canada's Head Harbor Passage, which is "narrow and difficult to navigate" and within its 'territorial sea,'[728] could result in "significant environmental and property damage should an accident (or even a terrorist attack) occur."[729] Unfortunately, Canada has acted at the expense of the important UNCLOS 'innocent passage' principle, which applies generally in 'international straits' and 'territorial seas.'[730]

And, the facts reveal that the U.S. itself has long engaged in these practices. Former President Clinton issued several Executive Orders on the Subject of

723. *See also* Doug Struck, *Dispute Over NW Passage Revived U.S. Asserts Free Use by All Ships - Canada Claims Jurisdiction*, WASHINGTON POST (Nov. 6, 2006) http://www.washingtonpost.com/wp-dyn/content/article/2006/11/05/AR2006110500286.html.
724. *See* UNCLOS, *supra* note 41, art. 8. Internal waters are not subject to the innocent passage rule.
725. James C. Kraska, *The Law of the Sea Convention and the Northwest Passage*, *supra* note 721, at 36, 52-54, 58.
726. *Id. see also* Andrea Charron, *The Northwest Passage in Context*, Canadian Military Journal (Winter 2005-2006), at 45-46, http://www.journal.forces.gc.ca/vo6/no4/doc/north-nord-02-eng.pdf.
727. *See* Passamaquoddy Bay LNG Terminal Controversy (Not So) Innocent Passage: International Law and the Passamaquoddy Bay LNG Terminal Controversy, A Panel Discussion Hosted by the University of New Brunswick and the Canadian Council for International Law (May 11, 2008), http://law.unb.ca/news/2007/04/unb_to_host_workshop_not_so_in.html.
728. UNCLOS, *supra* note 41, Part II, sec. 2.
729. *See* Duncan Hollis, *Passing Gas Through Passamaquoddy Bay*, Opinio Juris (5/9/07), http://opiniojuris.org/2007/05/09/passing-gas-through-passamaquoddy-bay.
730. *See* UNCLOS, *supra* note 41, art. 45.

Marine Protected Areas (MPAs) during his tenure,[731] which referenced the federal environmental laws discussed in this article as well as others. His first E.O. was issued during May 2000, and it established the U.S. Marine Protected Area program. It explained the purposes for MPAs and how they were to be established, protected and managed. The E.O. defines an MPA as, "[a]ny area of the marine environment that has been reserved by federal, state, territorial, tribal, or local laws or regulations to provide lasting protection to part or all of the natural or cultural resources therein."[732] On December 4, 2000, he issued Executive Order 13178, as later amended by Executive Order 13196, "establishing the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve (Reserve)."[733] At the time, it was billed as "the largest protected area (either terrestrial or marine) in the U.S. and the second largest MPA in the world."[734]

Not to be outdone in this environmental beauty pageant, former President Bush issued his own Executive Proclamation on June 15, 2006.[735] It designated the waters of the Northwestern Hawaiian Islands a national monument and "effectively creat[ed] the world's largest Marine, Protected Area."[736] "By declaring the islands a national monument, Bush. . . circumvent[ed] a year-long congressional approval process required in the designation of an area as a marine sanctuary, and will provide the area the highest regulatory protection possible under the law."[737] Most recently, during January 2009, in an act that environmentalists claim "will

731. *See* Jeffrey Zinn & Eugene H. Buck, Marine Protected Areas: An Overview, CRS Report for Congress #RS20810 (Feb. 8, 2001), http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-1864:1.
732. *See* Exec. Order No. 13,158 on Marine Protected Areas (May 2000) http://ceq.hss.doe.gov/nepa/regs/eos/eo13158.html.
733. *See* Exec. Order No. 13,196 (Jan. 18, 2001) 66 FR 7395, http://hawaiireef.noaa.gov/PDFs/EO13196.pdf.
734. *See U.S. Creates World's Second Largest Marine Protected Area*, MPA NEWS VOL. 2, NO. 6 (Dec. 2000 – Jan. 2001), http://www.flmnh.ufl.edu/fish/innews/MPA002.htm.
735. *See* Establishment of the Northwestern Hawaiian Islands Marine National Monument: A Proclamation by the President of the United States of America (June 15, 2006), http://www.whitehouse.gov/news/releases/2006/06/20060615-18.html.
736. *See* Bush Creates World's Largest Marine, Protected Area, U.S. Department of State (June 16, 2006), http://usinfo.state.gov/gi/Archive/2006/Jun/16-479649.html; *see Northwestern Hawaiian Islands Proclaimed a National Monument*, ENVIRONMENTAL NEWS SERVICE (June 15, 2006), http://www.ens-newswire.com/ens/jun2006/2006-06-15-03.asp.
737. *See* Juliet Eilperin, *Hawaiian Marine Reserve To Be World's Largest - Bush to Designate National Park in Pacific Waters*, WASHINGTON POST (June 15, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/06/14/AR2006061402455.html.

establish Bush ['43'] as the leader who has protected more of the oceans than anyone else in the world," the former President designated as National Monuments "the Mariana Islands in the western Pacific [a U.S. Commonwealth],[738] a chain of remote islands in the central Pacific [U.S. Wildlife Refuges administered as U.S. territories],[739] and the Rose Atoll off American Samoa [a U.S. territory][740]. . . some 195,280 square miles of . . . the Pacific Ocean."[741] This designation serves to protect "pristine coral reefs, vanishing marine species and the deepest places on Earth"[742] from fishing and energy exploration, thereby placing the region's economy at risk.[743]

This all seems to confirm that the United States is in legal competition with other nations to define the international environmental law of the oceans and corresponding airspace above and seabed and seafloor below, as well as, the scope of permissible international and national economic activities within the global commons and the sovereign areas beyond. At the very least, this means that our nation's continued functional sovereignty and the international rule of law are in a state of flux and potentially at risk. What is more, however, is that it appears that we are also in conflict with ourselves over how to define U.S. domestic environmental laws and the scope of Americans' domestic rights to engage in economic activities freely within our own sovereign space, consistent with the time-honored rule of law principles of private property, free markets, rational science, individual political and economic freedom and due process, all of which are embedded within the U.S. Constitution and its accompanying Bill of Rights. In light of these external and internal challenges, should not the U.S. Congress

738. *See* "Information About the Northern Marianna Islands'" U.S. District Court for the Northern Mariana Islands, at: http://www.nm*Id.*uscourts.gov/cnmi_info/cnmi_info.html.

739. *See* "United States Pacific Island Wildlife Refuges *(territories of the US)*," Central Intelligence Agency World Factbook, at: https://www.cia.gov/library/publications/the-world-factbook/geos/um.html (last updated on 22 January 2009).

740. *See* American Samoa, Office of Insular Affairs, http://www.doi.gov/oia/Islandpages/asgpage.htm .

741. *See* Suzanne Goldenberg, *Bush Designates Ocean Conservation Areas in Final Weeks as President*, THE GUARDIAN UK (Jan. 6, 2009), http://www.guardian.co.uk/environment/2009/jan/06/ocean-conservation-george-bush-pacific.

742. *Id.*

743. *See* Juliet Eilperin, *Bush Ocean Plan Is Criticized - Cheney Among Those Objecting Because of Economics*, WASHINGTON POST (Nov. 4, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/11/03/AR2008110303042.html.

assume its constitutional responsibility and uphold its members' oath of office by extensively reviewing, in an open, transparent and public manner, the substantive pros and cons of acceding to what one commentator refers to as "the most comprehensive and progressive international environmental law of any modern international agreement"?[744]

According to one international law scholar who is intimately familiar with the finer details, nuances and lacunae within the UNCLOS, it has always really been about how silence is golden and the ends justify the means.

> Like many complex bodies of written law, [. . . the Convention] is amply endowed with indeterminate principles, mind-numbing cross-references, institutional redundancies, exasperating opacity and inelegant drafting, not to mention a potpourri of provisions that any one of us, if asked, would happily delete or change. The trick, as we are fond of saying in the United States, is to 'keep your eye on the ball.' For those of us for whom strengthening the rule of law is the goal, and global ratification of the Convention is the means, it is essential to measure what we say in terms of its effect on the goal. Experienced international lawyers know where many of the sensitive nerve endings of governments are and how to avoid irritating them. This does not mean lawyers should abandon their *clients*, judges should misstate the law, or the academy should muzzle debate. What it does mean is that it is appropriate, indeed perhaps obligatory, for each to bear in mind his or her ethical obligation to consider the effect on the rule of law in carrying out his or her functions. Good lawyers routinely warn their *clients* about the risks of compromising their long-term interests in dealing with the problem at hand. Where those *clients* may have an interest in the promotion of the rule of law in international affairs generally, or in global ratification of the Law of the Sea Convention in particular, it is entirely appropriate to alert them to actions or statements that may prejudice that interest.[745]

If this characterization of he and his motives is *not* accurate why, then, does he not step forward and support popular calls for new explicative congressional hearings? Although more than a decade has passed since most nations decided to ratify the UNCLOS without fully understanding its contents or appreciating the true implications of their decision, the shroud of secrecy around its environmental articles nevertheless remains. Why? Is it not now time, finally, to open the hood and kick the tires to show Americans what is inside this treaty vehicle and explain how it operates? Are not the *primary clients* in this case, as a matter of law and ethics, the American people? Do they not deserve to be alerted to an ever-evolving

744. NATALIE KLEIN, DISPUTE SETTLEMENT IN THE U.N. CONVENTION ON THE LAW OF THE SEA (2005), *supra* note 233, at 145.

745. Oxman, *supra* note 20, at 357 (emphasis added).

international legal instrument that may be used to potentially prejudice their individual and collective interests, both now and in the foreseeable future?