ENDANGERED SPECIES AT SEA: APPLYING THE ESA TO MARITIME JURISDICTIONS

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SUMMARY

Although some species fall solely within the jurisdiction of one country, it is common for species to fall outside of one state's exclusive control. The United States protects endangered species in its territory and in international waters through the Endangered Species Act (ESA). But the extent of U.S. jurisdiction under the ESA is largely untested, and endangered species policy interacts with international law. This Article clarifies the protections of the ESA in U.S. jurisdiction and maritime regimes. It makes evident that the United States' narrow application of the ESA does not align with established principles of extraterritoriality or customary international law. It also illuminates the need for broader international actions to protect endangered species.

The Endangered Species Act (ESA)[1] protects species at immediate risk of extinction or threatened with a high likelihood of extinction.[2] The Act has several methods of protection, but consultation and takings prohibitions[3] serve as the main mechanisms for prevention of harm to endangered species while they remain in the wild. Takings and the consultation process raise issues of maritime jurisdiction, the focus of this Article. (The Act's trade restrictions are outside the Article's scope, as they restrict importation of endangered species into the United States regardless of their origin,[4] and therefore do not implicate rules unique to maritime jurisdictions).

The ESA outlaws the taking of endangered animals, and broadly defines taking as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[5] The ESA also requires government agencies to undergo a consultation process if their actions are likely to jeopardize the existence of the species or harm its critical habitat.[6] Legal ambiguity remains as to which provisions apply in which geographic regions. Jurisdiction may also be different for people under general U.S. legal jurisdiction and those outside of general U.S. legal jurisdiction, such as a foreign-flagged vessel on the high seas.

This Article looks at the major maritime zones and assesses which provisions of the ESA apply in each region. The zones are classified as the United States' territorial sea, the United States' exclusive economic zone (EEZ), the United States' outer continental shelf, international waters, foreign outer continental shelves, foreign EEZs, and foreign territorial seas.

For most of these regions, the agencies implementing the ESA have never issued a rule regarding enforcement or brought a case to court to affirm their enforcement power. The cases that go to court are often dismissed because the plaintiffs lack standing. Therefore, it is often necessary to look at the application of similar laws outside of U.S. territory to predict the applicability of the ESA. Further, the United States has not joined the United Nations Convention on the Law of the Sea (UNCLOS), but it generally tries to conform with customary international law.[7] Therefore, that treaty is still useful for understanding U.S. actions in an international context.

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1. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
2. 16 U.S.C. §1532(6).
3. *See generally* Congressional Research Service, The Legal Framework of the Endangered Species Act (ESA) (2019).
4. 16 U.S.C. §1538(a)(1)(A); 50 C.F.R. §17.21(b) (2020).
5. 16 U.S.C. §1532(19).
6. *Id.* §1536.
7. S. Res. 598, 115th Cong. (2018) ("the United States operates consistent with the United Nations convention on the law of the sea") (quoting the Honorable David Shear, Assistant Secretary of Defense for Asian and Pacific Security Affairs).

I. Take Prohibitions

The ESA's take prohibitions restrict the actions of people under U.S. jurisdiction.[8] They apply in U.S. territory and on the high seas.[9] This presents a relatively straightforward question of extraterritoriality: given the express application of take prohibitions outside of the United States' jurisdiction, in what geographic circumstances can the United States prevent people from taking endangered species?

A. The U.S. Territorial Sea

The United States' territorial sea extends 12 miles from base points drawn along the United States' landmass.[10] Before 1988, the territorial sea extended three nautical miles from the landmass, as laid out in the Neutrality Act of 1794.[11] The Neutrality Act actually used the phrase "one marine league," or 3.452 miles, but later acts adopted the three-nautical-mile standard. The United States expanded the territorial sea from three miles to 12 miles in 1988 by executive proclamation.[12] This proclamation was affirmed by the U.S. Congress and codified in §901(a) of the Antiterrorism and Effective Death Penalty Act of 1996.[13]

There is some ambiguity regarding applicability of the expansion to laws passed before 1988. The proclamation states that "[n]othing in this Proclamation: (a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom."[14] One may argue that no law passed before 1988 has effect beyond three nautical miles if it only applies to American territory. However, that interpretation has not been adopted by courts.[15] If the proclamation only applied prospectively to legislation, the proclamation would be extremely limited in scope at the time of its issuance. Any act of Congress applying only within the United States' territory, such as the majority of the United States' criminal code or administrative statutes, would have no power in a portion of the territorial United States.

A 1988 U.S. Department of Justice memo, advising the president before the issuance of the proclamation, addressed this concern.[16] It came to the conclusion that statutes that defined the territorial sea as three nautical miles would not be affected, but those statutes that did not define the geographic scope of the territorial sea may extend territorial jurisdiction up to 12 nautical miles absent contrary congressional intent.[17]

The ESA did not define the territorial sea. Therefore, the general presumption would hold that the territorial sea for the purposes of the Act is whatever area that the United States claims as territorial sea at the moment of enforcement. If, for the purposes of the ESA, an agency were to interpret "territorial sea" to mean the areas within three miles of shore, but not those areas between three and 12 miles from shore, it would create a new maritime zone. Endangered species occupying this region would be within the territorial limits of the United States but not entitled to the same protections. Without a clear statement limiting territorial jurisdiction to three nautical miles in the Act, such a reading would appear to conflict with congressional intent.[18] Additionally, several amendments and reauthorizations occurred after the 1988 proclamation.[19] Together, there is strong support that territorial jurisdiction up to 12 nautical miles applies.

Another issue of jurisdictional ambiguity that arises under the maritime application of the Act arises when foreigners take endangered species in the United States' territorial sea. In those circumstances, the ESA outlaws the behavior. Still, the United States may encounter difficulty in attempting to arrest or detain a violator.

A person cannot take species in the United States' territory, regardless of what country they come from or the flag under which their ship sales. Under customary international law, the coastal State has jurisdiction over people in its territorial sea.[20] The United States has long prevented foreigners from violating its laws in its territory.[21] However, it may be difficult to enforce take restrictions within internal waters when a foreign craft does not intentionally harm an endangered species.

Customary international law, which the United States generally tries to obey, states that a coastal State cannot hinder innocent passage.[22] Endangered species may be harmed in innocent passage, such as by a propeller strike to an endangered marine mammal. No court has resolved this conflict. However, the ESA contains a provision to address incidental take, which allows the agencies to avoid resolving the issue.

Additionally, UNCLOS allows a coastal State certain regulatory privileges while maintaining innocent passage. The coastal State may regulate navigational safety and "the

8. 16 U.S.C. §1538(a)(1)(B).
9. *Id.* §1538(a)(1)(B)-(C).
10. Proclamation No. 5928, Territorial Sea of the United States of America, 54 Fed. Reg. 777 (Jan. 9, 1989).
11. *See* Presidential Proclamation of Neutrality, Apr. 22, 1793; *see also* Neutrality Act of 1794, 1 Stat. 381 (codified at 18 U.S.C. §960).
12. Proclamation No. 5928, Territorial Sea of the United States of America, 54 Fed. Reg. 777 (Jan. 9, 1989).
13. 33 U.S.C. §3507(6).
14. Proclamation No. 5928, Territorial Sea of the United States of America, 54 Fed. Reg. 777 (Jan. 9, 1989).
15. *See* In re Air Crash Off Long Island, New York, on July 17, 1996, 209 F.3d 200, 213 (2d Cir. 2000) (stating that "the impact of the Proclamation must be assessed on a statute-by-statute basis"); *but see* United States v. One Big Six Wheel, 166 F.3d 498, 501 (2d Cir. 1999) (refusing to extend territorial jurisdiction from three to 12 miles from shore for gambling regulations because the underlying statute contained a provision defining "territorial sea" as the area three miles from shore, but making the ruling under the rule of lenity).
16. Memorandum Opinion for the Legal Adviser Department of State, Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea 253-54 (Oct. 4, 1988).
17. *Id.*
18. *Air Crash Off Long Island, New York, on July 17, 1996*, 209 F.3d at 213-14.
19. *See*, *e.g.*, Pub. L. No. 108-136, §318, 117 Stat. 1433 (2004); Pub. L. No. 111-8, 123 Stat. 607 (2009); Pub. L. No. 113-287, 128 Stat. 3178, 3267 (2014).
20. *See* Restatement (Third) of Foreign Relations Law §512 (1987).
21. *See generally* Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812); Cunard S.S. Co. v. Mellon, 262 U.S. 100, 124 (1923).
22. United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 17, 1833 U.N.T.S. 397, 405 [hereinafter UNCLOS].

conservation of the living resources of the sea,"[23] and therefore, under customary international law, the United States may be granted enforcement authority over reckless but innocent passage in its territorial sea.[24]

Still, courts have sometimes found that American law does not apply to foreigners in the United States' waters. However, the cases that have found U.S. law not to apply are distinguishable in relevant ways from the ESA. To apply the United States' law to a foreign-flagged vessel, the issue must concern the well-being of the United States and its territory, and not the internal working of the ship.[25]

In *Spector v. Norwegian Cruise Line Ltd.*, the U.S. Supreme Court held that the Americans With Disabilities Act applied to foreign-flagged ships in U.S. waters, including the EEZ, due to the effect the Act may have on Americans while on foreign-flagged vessels. The ESA directly applies to the well-being of the United States' territory while foreigners are within its jurisdiction. The protection of the environment is a fundamental sovereign right of a nation, protected even in the EEZ under customary international law.[26] Therefore, the United States should be allowed to generally exercise its laws in protection of its environment.

B. The EEZ

The applicability of the ESA to the territorial sea and the EEZ is supported by the express language of the Act, which says that "it is unlawful for any person subject to the jurisdiction of the United States to take any such species within the United States or the territorial sea of the United States [or] take any such species upon the high seas."[27] When this language was passed into law,[28] the United States had not declared an EEZ. Still, the high seas, to which the United States expressly sought to apply the ESA, is an area extending beyond the soon-to-be-declared EEZ.

The omission of the EEZ in the bill represents simply a lack of the concept of an EEZ in the United States and customary international law at the time. Congress clearly indicated, by the inclusion of the high seas within the Act, to exercise jurisdiction over areas that were outside the territorial sea but also outside the jurisdiction of other nations. Therefore, the area between the territorial sea and the areas completely outside of the United States' jurisdiction was impliedly included. Although it is possible to prohibit taking of endangered species in the U.S. territorial sea and the high seas but not the EEZ, such implementation would be nonsensical. There is no indication in the bill that the legislature sought to include a band of decreased protections between the territorial sea and the high seas.

At the time the bill was passed, the United States exercised some jurisdiction over the area that it would declare its EEZ in 1983.[29] The United States had declared a fishery management zone in 1976 extending 200 nautical miles, which occurred after the first passage of the bill but before the amendments in 1982.[30] Therefore, it can be assumed that the framers of the later amendments expected at least some of the portions of the Act to apply to the area of sea now declared the EEZ. However, it would be disingenuous to say that the area declared a fisheries management zone was thought of as part of the territorial sea. The Magnuson-Stevens Fishery Conservation and Management Act defined the outer boundary of the 200-nautical-mile fishery management zone as "a line drawn in such a manner that each point on it is 200 miles from the baseline from which the territorial sea is measured,"[31] indicating that the fisheries management zone and the territorial sea are different zones.

Further, the United States can prevent the take of endangered species in its EEZ by anyone regardless of the flag state of the vessel. Customary international law states that "[t]he coastal state is obligated to ensure, through proper conservation and management measures, that living resources in the exclusive economic zone are not endangered by overexploitation."[32] Although the United States does not have absolute jurisdiction over its EEZ, it has "'sovereign rights' for a specific purpose[33]—such as the management of natural resources and other economic activities."[34]

Similarly, the United States has regulated the taking of marine mammals by foreign vessels within a 200-nautical-mile fisheries exclusion zone under the Marine Mammal Protection Act.[35] The D.C. Circuit upheld the regulatory power of Congress within 200 nautical miles of the coast over foreign vessels, and enjoined administrative actions in contravention of the Marine Mammal Protection Act (MMPA).[36] Although the ESA does not speak specifically to the geographic range of its take protections, it exerts influence over anyone within the jurisdiction of the United States.

23. *Id.* art. 21(1)(d).
24. "Still, a State may adopt some measures to protect against passage through its territorial sea that is not innocent, including regulations relating to navigational safety and the prevention of pollution." UNCLOS, *supra* note 22, art. 21; *see also* Restatement (Third) of Foreign Relations Law, *supra* note 20, §513(2)(b).
25. Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 129 (2005) (distinguishing Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957), and McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) (which held that the U.S. law did not apply to labor disputes on foreign-flagged vessels without an express statement of extraterritorial applicability to Congress)).
26. UNCLOS, *supra* note 22, art. 61.
27. 16 U.S.C. §1538(a).
28. Pub. L. No. 93-205, 87 Stat. 884 (1973); Proclamation No. 5030, Exclusive Economic Zone of the United States of America, 48 Fed. Reg. 10605 (Mar. 14, 1983).
29. Proclamation No. 5030, Exclusive Economic Zone of the United States of America, 48 Fed. Reg. 10605 (Mar. 14, 1983).
30. Pub. L. No. 94-265, §101, 90 Stat. 331, 336 (1976) (codified at 16 U.S.C. §1811).
31. *Id.*
32. UNCLOS, *supra* note 22, art. 61(2); Restatement (Third) of Foreign Relations Law, *supra* note 20, §514.
33. *See* Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 129 (2005).
34. Restatement (Third) of Foreign Relations Law, *supra* note 20, §514.
35. Kokechik Fishermen's Ass'n v. Secretary of Commerce, 839 F.2d 795, 802, 18 ELR 20622 (D.C. Cir. 1988); Pub. L. No. 92-522, §3(15), 86 Stat. 1027, 1029 (1972) (codified at 16 U.S.C. §§1361-1421h, ELR Stat. MMPA §§2-410).
36. *Kokechik Fishermen's Ass'n*, 839 F.2d at 802.

Together, these cases show that anyone harming the marine environment within 200 miles of U.S. coasts is under the jurisdiction of the United States. Therefore, foreigners taking endangered species in the United States' EEZ would be considered under the jurisdiction of the United States in customary international law, and the ESA take prohibitions should apply.

Still, the exercise of the ESA within the EEZ may run up against the rights secured to foreigners in "navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea."[37] Although many potential harmful uses, such as fishing, will not be available to foreigners in the EEZ, some uses will present a conflict of rights under international law. Although the United States is not part of UNCLOS, the right to protect the environment within the EEZ is internationally recognized, as are the rights to transit and laying undersea infrastructure.[38] If transit or undersea infrastructure were to take an endangered species, two conflicting, international interests would be at stake between the United States and an international Party. Such an event has not yet been prosecuted or litigated, therefore the dominance of one right against another is not established. However, it would definitely present a unique and difficult question to any tribunal that would hear the case.

Finally, it is not likely that the ESA would apply differently in the contiguous zone as compared to the EEZ. President Bill Clinton declared a contiguous zone "[i]n accordance with international law, reflected in the applicable provisions of the 1982 Convention on the Law of the Sea."[39] The contiguous zone allows the United States to "exercise the control necessary to prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea, and to punish infringement of the above laws and regulations committed within its territory or territorial sea."[40]

Therefore, the contiguous zone does not necessarily represent a different legal regime for the ESA; instead, it represents a zone of enhanced enforcement for laws applying in the territorial sea. It is possible to think of a scenario where an action in the contiguous zone could affect a species in the territorial sea; however, the same restrictions to foreigners and U.S. citizens would apply in the EEZ. Neither foreigners nor citizens can take endangered species in the territorial sea, contiguous zone, or the EEZ.[41]

The only substantive difference between the contiguous zone and the EEZ in terms of the ESA are enforcement powers. The United States can arrest and hold a foreign-flagged vessel that takes an endangered species in the territorial sea but is caught in the contiguous zone as part of the customary international power to "punish infringement of the above laws and regulations committed within its territory or territorial sea."[42] The United States can also arrest such a ship violating environmental protection regulations if the violation or capture occurs in the EEZ under customary international law.[43] Still, if vessels are arrested in the EEZ, the "arrested vessels must be promptly released upon posting of reasonable bond or other security, and members of the crews may not be subjected to imprisonment or corporal punishment."[44] Such protection would not be ensured in the contiguous zone.

C. *The Outer Continental Shelf*

Similarly, the United States can prevent its citizens and foreigners from taking species on the outer continental shelf. The continental shelf is defined under customary international law as

> the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[45]

The United States regulates its continental shelf under the Outer Continental Shelf Lands Act of 1953.[46]

Similarly to the EEZ, the ESA does mention the continental shelf. However, the continental shelf lies within the geographic scope of the territorial sea and the high seas. Excluding the continental shelf from the protections of the ESA would oppose the simplest reading of the Act—applying the ESA to all U.S. citizens in all U.S. jurisdictions or on the high seas. Further, the United States has traditionally applied environmental laws, such as the National Environmental Policy Act (NEPA)[47] and the ESA, to the continental shelf,[48] and the Outer Continental Shelf Lands Act demands review of actions for environmental harm.[49]

Further, foreigners taking resources from the United States' outer continental shelf would likely be bound by the ESA, as they are bound in the U.S. EEZ. Customary international law states that the "coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources."[50] However, all states are allowed to lay cables and pipelines along

37. UNCLOS, *supra* note 22, art. 58(1).
38. *Id.*
39. Proclamation No. 7219, Contiguous Zone of the United States, 64 Fed. Reg. 48701 (Aug. 8, 1999).
40. *Id.*
41. Additionally, a foreign contiguous zone gives the coastal State enhanced enforcement powers as compared to the EEZ, but it does not restrict what laws the United States can apply to people under its jurisdiction as compared to a foreign EEZ.
42. UNCLOS, *supra* note 22, art. 33.
43. *Id.* art. 73.
44. Restatement (Third) of Foreign Relations Law, *supra* note 20, §514 (citing UNCLOS, *supra* note 22, art. 73).
45. UNCLOS, *supra* note 22, art. 76(1).
46. 43 U.S.C. §§1331 et seq.
47. 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.
48. Memorandum of Agreement, NEPA and Environmental Compliance, Bureau of Ocean Energy Management and Bureau of Safety and Environmental Enforcement (Oct. 1, 2018).
49. 43 U.S.C. §1344.
50. UNCLOS, *supra* note 22, art. 77(1).

the continental shelf,[51] a practice that may harm a sedentary species[52] on the continental shelf. Similar to the right of innocent passage in the territorial sea, customary international law may present a conflict of international rights of use with the regulatory rights generally exercised by the coastal State. This question has not come before a court, and the dominant right is not clear from any legislation, treaty, or international agreement.

D. The High Seas

The ESA also says that a person under U.S. jurisdiction cannot take species on the high seas.[53] Such a restriction is consistent with established principles of domestic law.[54] It does not prohibit foreigners from taking species on the high seas. However, it is unclear whether a U.S. citizen can take a species on a foreign-flagged vessel on the high seas. Generally, the laws of the flag state apply to all members of a ship.[55] Additionally, the United States would face great difficulty trying to enforce a prohibition on its citizens sailing on foreign-flagged vessels. Under customary international law, "[a] state has only such jurisdiction to prescribe and to enforce a rule of law for the conservation of the living resources of the high seas with respect to the nationals of another state as is permitted by the other state."[56]

Generally, the United States only exercises its own laws to its citizens outside of the U.S. territory when there is clear and convincing evidence of congressional intent. This principle is called the presumption against extraterritoriality. The Supreme Court detailed the doctrine in *Morrison v. National Australia Bank Ltd*.[57] The Court stated that the presumption entails a two-step process. In the first step, the court must look for clear intent for the Act to apply internationally, even if the Act does not expressly state extraterritoriality.[58] Continuing to the second step of the inquiry, the court looks to whether the focus of the conduct is foreign or domestic.[59]

Taking an endangered species on the high seas is clearly not domestic conduct. Neither the taking nor the administration of the taking occurs domestically. Therefore, the relevant question in take prohibitions is the intent of the Act to apply internationally. If the ESA's take prohibition is found not to apply internationally, then it would also fail the second prong of the test. However, if it is found to apply internationally, the second prong of the test is not relevant.

The Act clearly states an intention to apply to U.S. citizens aboard flagged vessels of the United States, a group of people traditionally viewed as under the United States' jurisdiction.[60] However, it is less clear as to U.S. citizens aboard foreign-flagged vessels on the high seas. Traditionally, the laws of the flag state apply.[61] Therefore, the natural assumption would be that the law does not apply.

The United States could try to exercise such jurisdiction, but it would be reliant on another State's compliance, which would be unlikely. The United States could not arrest a U.S. citizen taking endangered species on a foreign-flagged vessel until the citizen returned to the United States' jurisdiction. According to customary international law, foreign ships "are not subject to interference on the high seas" unless the ship is engaged in piracy, slavery, unauthorized bribery, sailing without nationality or a false nationality, or if the flag state gives the arresting nation permission.[62]

Thus, the United States does not attempt to constrain the actions of foreigners on the high seas. However, a stateless vessel is not entitled to the protection of this section against boarding and search.[63] Therefore, the United States may attempt to prevent the taking of endangered species by its citizens on stateless vessels.

E. Foreign Outer Continental Shelf

The United States does not regulate takings of endangered species by foreigners in foreign territory. However, the United States prevents its citizens from taking endangered species in all waters outside of a foreign territorial sea.[64] A foreign continental shelf, even when it lies underneath international waters,[65] is part of the land territory and not oceanic holdings of a coastal State.[66]

Under customary international law, the rights afforded to the coastal States in regard to its continental shelf only apply to sedentary species.[67] Therefore, if a U.S. citizen takes a foreign sedentary species on a foreign continental shelf, it is likely under the jurisdiction of the flag state. The United States does not prevent its citizens from taking an endangered species in foreign territory.[68] In contrast, if a U.S. citizen takes a mobile species while exploiting a for-

51. *Id.* art. 79.
52. Only sedentary species are considered part of the continental shelf under customary international law. *Id.* art. 77(4).
53. 16 U.S.C. §1538(a)(1)(c).
54. "A state has jurisdiction to prescribe a rule of law (a) attaching legal consequences to conduct of a national of the state wherever the conduct occurs . . ." Restatement (Second) of Foreign Relations Law §30 (1965); American Banana Co. v. United Fruit Co., 213 U.S. 347, 355-56 (1909) ("[I]n regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law . . .").
55. Restatement (Third) of Foreign Relations Law, *supra* note 20, §502.
56. Restatement (Second) of Foreign Relations Law, *supra* note 54, §36.
57. 561 U.S. 247 (2010). *See also* William S. Dodge, *The Presumption Against Extraterritoriality in Today's Supreme Court*, 33 Harv. L. Rev. 1582 (2020).
58. *Morrison*, 561 U.S. at 265.
59. *Id.* at 266.
60. Restatement (Third) of Foreign Relations Law, *supra* note 20, §502 (Rights and Duties of Flag State).
61. UNCLOS, *supra* note 22, art. 94.
62. Restatement (Third) of Foreign Relations Law, *supra* note 20, §522 (Enforcement Jurisdiction Over Foreign Ships on High Seas).
63. United States v. Cortes, 588 F.2d 106, 109-10 (5th Cir. 1979) (applying the 1958 Convention on the High Seas); *see also* Molvan v. Attorney Gen. for Palestine, [1948] A.C. 351, 369 (P.C.); Restatement (Third) of Foreign Relations Law, *supra* note 20, §522.
64. 50 C.F.R. §17.21(c)(1) (2020).
65. UNCLOS, *supra* note 22, art. 76(4), (6).
66. *See id.* art. 76(1) (defining the outer continental shelf as "the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin").
67. *Id.* art. 77(4).
68. 16 U.S.C. §1538(a)(1)(b).

eign continental shelf, the action would be subject to the regime of the surrounding water column.

F. Foreign EEZ

The ESA only regulates the taking of endangered species in U.S. territory and on the high seas.[69] The United States does not exercise jurisdiction over foreigners outside of its own geographic holdings.[70] Therefore, it will not attempt to stop a foreigner from taking endangered species on the high seas or in a foreign maritime regime. However, the same does not apply to U.S. citizens. For the purposes of takings under the ESA, the United States defines the high seas as "all waters seaward of the territorial sea of the United States, except waters officially recognized by the United States as the territorial sea of another country, under international law."[71] This interpretation fits with international and domestic law.

The United States may apply its law to its citizens in other countries, if the specific law allows.[72] However, there is not a clear legislative statement on the ESA's applicability to its citizens in a foreign EEZ. No person under the jurisdiction of the United States may take an endangered species.[73] The United States may choose to exercise jurisdiction over its citizens anywhere,[74] and the Act does not define "subject to the jurisdiction of the United States."[75] Additionally, the jurisdiction of the United States in foreign EEZs over its own citizens is not clearly barred by domestic or international laws.[76] Therefore, it seems possible, but not required, to outlaw citizens of the United States from taking a species in a foreign EEZ.

Further, restricting U.S. citizens from taking endangered species in foreign EEZs is consistent with the powers of the United States as an international power. Customary international law under UNCLOS gives management of living resources to coastal States.[77] However, nothing says that a non-coastal State cannot regulate the conduct of its citizens in a foreign EEZ. Further, foreign States would surely welcome the constraint of harmful environmental practices by a foreign State when it affects their EEZ. Such consent would be necessary to conduct an arrest in a foreign EEZ.[78]

G. Foreign Territorial Sea

The United States does not attempt to regulate the taking of endangered species in the territorial sea of another country. Such a prohibition may be permissible under international law; however, the ESA only prohibits the taking of endangered species "within the United States or the territorial sea of the United States,"[79] and "upon the high seas."[80] Under the framework of *Morrison*,[81] the ESA lacks clear intent to apply take prohibitions internationally. Therefore, agencies should continue the current policy of restricting take prohibitions to areas outside of foreign territory.

H. Summary

In summary, the ESA prevents the taking of endangered species by its citizens in the United States, the EEZ, and international waters. The United States can also prohibit anyone from taking an endangered species in U.S. territory or its EEZ. However, the enforcement of the ESA over foreigners in the EEZ has not been explicitly affirmed by the courts or agencies. Therefore, the courts and agencies should look to other statutes and international law to uphold and enforce the protections of the ESA over foreigners.

II. Consultation

The federal government must undergo a consultation process when its actions could jeopardize an endangered species or adversely modify its critical habitat,[82] to determine whether such harm is likely.[83] The consultation process has been the topic of much debate. Unlike takings cases, litigants often try to force consultation when a government project may affect an endangered species,[84] a process that would be much more difficult and less impactful if pursued against individuals that took endangered species. Fewer than 10% of all consultations find that jeopardy or adverse

69. *Id.* §1538(a)(1)(a) & (c).
70. *See* The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens.").
71. 50 C.F.R. §17.21(c)(1) (2020).
72. Restatement (Second) of Foreign Relations Law, *supra* note 54, §30 ("(1) A state has jurisdiction to prescribe a rule of law (a) attaching legal consequences to conduct of a national of the state wherever the conduct occurs . . .").
73. Restatement (Fourth) of Foreign Relations Law §402(1)(c) (2018).
74. United States v. Kaercher, 720 F.2d 5, 5 (1983) (prosecuting a citizen for a drug offense even though the conduct occurred on a foreign-flagged vessel on the high seas); Restatement (Second) of Foreign Relations Law, *supra* note 54, §30.
75. 16 U.S.C. §1538(a)(1).
76. Restatement (Third) of Foreign Relations Law, *supra* note 20, §514:
> The [Law of the Sea] LOS Convention does not explicitly designate the exclusive economic zone as part of the high seas . . . According to the United States and other maritime states, however, the Convention reflects the general understanding that, as a matter of customary law as well as under the Convention, the rights and freedoms of other states in the zone . . . are the same as on the high seas.

77. UNCLOS, *supra* note 22, art. 61(2).
78. Restatement (Third) of Foreign Relations Law, *supra* note 20, §433 ("(1) Law enforcement officers of the United States may exercise their functions in the territory of another state only (a) with the consent of the other state and if duly authorized by the United States; and (b) in compliance with the laws both of the United States and of the other state.").
79. 16 U.S.C. §1538(a)(1)(b).
80. *Id.*
81. Morrison v. National Austl. Bank Ltd., 561 U.S. 247, 255 (2010).
82. 16 U.S.C. §1536(c).
83. *Id.* §1536(a)(2):
> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species. . .

84. *See, e.g.*, Center for Biological Diversity v. Export-Import Bank of the United States, 894 F.3d 1005, 1014, 48 ELR 20108 (9th Cir. 2018).

modification of critical habitat is likely,[85] but the process does impose administrative burdens on some projects.

In particular, the designation of critical habitat is especially contentious. Critical habitat only affects the consultation process.[86] Overall, the role of critical habitat has been minimized in the administration of the Act. There have been no determinations that a project adversely modifies critical habitat without putting a species in jeopardy.[87] Therefore, critical habitat has not served to halt any action that would not be halted by another provision of the Act. Still, its designation is at the center of policy debates and litigation. Agencies in the future may rely on it more heavily in protecting endangered species and shaping actions. Therefore, it is useful to address its geographic limits.

A. *Consultation in the U.S. Territorial Sea, U.S. EEZ, U.S. Outer Continental Shelf, and the High Seas*

The consultation provisions apply in the U.S. territorial sea, the U.S. EEZ, the U.S. outer continental shelf, and the high seas. The Act does not explicitly state the scope of consultations, but rulemakings have defined federal actions that demand consultation to include actions in U.S. territory and on the high seas.[88]

Similarly to the take restrictions,[89] the United States' EEZ is included in the consultation requirement as an area between the territorial sea and the high seas. Under customary international law, the coastal State enjoys the privilege of maintaining and conserving the marine environment of the EEZ.[90] The practice of consultation in the EEZ is recognized by the federal government.[91] Despite the lack of a regulation in the *Code of Federal Regulations* explicitly applying consultation to the United States' EEZ, agency practice and established law indicate that the process is necessary.

The application of the consultation requirement to the outer continental shelf is supported by case law and long-standing policy. In *Conservation Law Foundation v. Andrus*, the U.S. Court of Appeals for the First Circuit found that the ESA §7 requirements applied to a lease on the continental shelf independent of the requirements of other legislation.[92] Additionally, a 1981 memorandum from the assistant solicitor general concludes that the outer continental shelf is subject to §7 consultations for federal actions.[93] In a 1981 hearing before the U.S. Senate's Subcommittee on Environmental Pollution, which was considering amendments to the Act, the deputy assistant administrator of fisheries for the National Marine Fisheries Service testified that the agency had completed §7 consultations for activities on the outer continental shelf.[94]

Consultation on the high seas was not central in the debates around the original ESA or its amendments, and it has not been the topic of high-profile litigation. Therefore, the current policy requiring consultation for federal actions on the high seas should stand as a reasonable agency interpretation of the statute.

B. *Consultation in Foreign Outer Continental Shelf, Foreign EEZ, and Foreign Territory*

The ESA and the regulations also do not mention foreign jurisdictions. The broadest, and favored, interpretation of the consultation requirement would not distinguish maritime areas in federal actions. However, current policy does not apply the consultation requirement to all federal actions, and instead only looks at those actions in the United States or on the high seas.[95] It is not completely clear if the United States views foreign EEZs or continental shelves as part of the high seas for the purpose of the Act.

The regulations surrounding the take prohibitions define the high seas as "all waters seaward of the territorial sea of the United States, except waters officially recognized by the United States as the territorial sea of another country, under international law."[96] This interpretation, if applied to consultation, would require government review of federal actions occurring in foreign EEZs. The point has not been resolved in court, although it has been raised and the ambiguity has been acknowledged.[97]

Overall, the clarification may not be needed. The consultation requirement does not present as simple a question as take prohibitions. Some courts and commentators have addressed consultation requirements under the same cloak of extraterritoriality: when is the U.S. government required to undergo ESA consultation for actions outside of U.S. territory?[98] However, one scholar notes that consultation

85. Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 61 Fla. L. Rev. 142, 165 (2012).
86. 16 U.S.C. §1536(a).
87. Owen, *supra* note 85, at 165.
88. 50 C.F.R. §402.01(a) (2020):
> Section 7(a)(2) of the Act requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species or results in the destruction or adverse modification of critical habit.

See also Stillwell v. U.S. Dep't of Commerce, No. 8:16-CV-02568-MSS-TGW, 2017 WL 6947420, at *1 (M.D. Fla. Nov. 27, 2017) (upholding consultation process for endangered sea turtles partially within the EEZ).
89. 50 C.F.R. §17.21(c)(1) (2020).
90. Restatement (Third) of Foreign Relations Law, *supra* note 20, §514.
91. Natural Res. Def. Council Inc. v. U.S. Dep't of Navy, No. CV-01-07781 CAS(RZX), 2002 WL 32095131, at *21 (C.D. Cal. Sept. 17, 2002) ("The Navy concedes that ESA applies to . . . actions in United States territorial waters and on the high seas, including the United States EEZ.").
92. 623 F.2d 712, 714-15, 10 ELR 20067 (1st Cir. 1979).
93. Memorandum From the Assistant Solicitor to the Solicitor, Overseas Application of Section 7 of the Endangered Species Act (Aug. 31, 1981).
94. *Endangered Species: Hearings on H.R. 6133 Before the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works*, 97th Cong. 113 (1981) (testimony of William H. Stevenson, Deputy Assistant Administrator of Fisheries for the National Marine Fisheries Service).
95. 50 C.F.R. §17.21(c)(1) (2020).
96. *Id.*
97. Hawaii County Green Party v. Clinton, 124 F. Supp. 2d 1173, 1183 (D. Haw. 2000).
98. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 22 ELR 20913 (1992); Consejo de Desarrollo Economico de Mexicali, AC v. United States,

may not even present a question of extraterritoriality.[99] Instead, U.S. agency actions are by definition domestic actions. Their effects may be felt abroad, but they fundamentally focus on the United States' law and officials on U.S. soil.[100]

It is difficult to ascertain the acceptance of this argument in court, although the Supreme Court's decision in *Morrison* may indicate some acceptance of this style of analysis.[101] Since *Lujan v. Defenders of Wildlife*, challenges to U.S. agency actions abroad have turned on standing,[102] and not the substantive law. However, if courts were to reach the merits of a case, it is possible that they would find that the consultation requirement applies to any federal action that harms endangered species, regardless of its location. In fact, the United States previously took the position that consultation applied wherever the federal government action occurred.[103]

No court has analyzed the consultation requirement under the framework of *Morrison*. However, at least one court has adopted an in-between view and analyzed the effect of the actions as they flow from the initial approval. In the U.S. Court of Appeals for the Ninth Circuit, the court found that plaintiffs challenging the financing of a natural gas project in the territory of Australia lacked standing.[104] However, the district court found standing.[105] That court held that the ESA consultation requirement did not apply on foreign territory, but the shipping of natural gas across international waters triggered the ESA's consultation requirement. While the extraction occurred on Australian territory, the federal action facilitated the transport of gas on the high seas and thus was under the consultation requirement.[106] Although this case did not determine that all federal actions were bound by the consultation requirement, it would have expanded the scope of actions subject to review if it were upheld on appeal.

The most expansive reading of the legislative provision under the *Morrison* framework for extraterritoriality would find that the consultation requirement is necessary for every federal action. The Act leaves ambiguity to its extraterritoriality, thus passing step one of the *Morrison* analysis.[107] The take prohibitions explicitly apply to the United States and the high seas, but the consultation requirement is not geographically defined. In step two,[108] the focus of the consultation process is a federal action. Although the federal action concerns a process that may occur in the jurisdiction of another country, the decision and the process of action are within the United States' jurisdiction. It is not as if the United States is trying to control the actions of foreign nations under the ESA. The consultation requirement is constraining U.S. government actions that are planned on U.S. soil through U.S. government agencies.

The current policy restricts consultation to the United States and the high seas. To affirmatively analyze this policy under the *Morrison* framework, the court must find in step one that the application of take prohibitions to U.S. jurisdiction and the high seas also applied to the consultation requirement. The melding of these two provisions lacks legislative support, and such an analysis has not been applied to other portions of the Act. The Act prohibits any person under U.S. jurisdiction to "ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species,"[109] and also provides for international cooperation in §8.[110] It is unclear why the take prohibitions would constrain the applicability of the consultation requirement if other sections of the bill have different geographic scopes.

Further, the narrow analysis of the federal actions fails to fully satisfy the test in the second step of *Morrison*. Even if the court were to look only at the final location where the environmental harm took place, it would be difficult to say that the harm does not enter into the jurisdiction laid out in the ESA. Federal actions often lead to products entering the global market,[111] and such attenuated effects are likely to implicate areas under U.S. jurisdiction. Altogether, there is strong support for abandoning current policy in favor of a universal consultation requirement.

438 F. Supp. 2d 1207, 1246 (D. Nev. 2006), *vacated and remanded sub nom*. Consejo de Desarrollo Economico de Mexicali, A.C. v. United States, 482 F.3d 1157, 37 ELR 20078 (9th Cir. 2007) ("Congress thus obviously thought about endangered species abroad and devised specific sections of the ESA to protect them. In this context, the absence of any explicit statement that the consultation requirement is applicable to agency actions in foreign countries suggests that Congress did not intend that §7(a)(2) apply extraterritorially."); John C. Beiers, *The International Applicability of Section 7 of the Endangered Species Act of 1973*, 29 Santa Clara L. Rev. 171 (1989) (arguing that §7(n) provides a "judicial review procedure in the Court of Appeals for the D.C. Circuit. . . . [and] thus, explicitly provides a forum for extraterritorial conflicts that happen outside of any of the court of appeals circuits"); Katherine M. MacRae, *We Are Not Alone: How Extraterritorial Application of the Endangered Species Act Can Preserve Endangered Species and Habitats*, 22 Ocean & Coastal L.J. 234 (2017).

99. Mary A. McDougall, *Extraterritoriality and the Endangered Species Act of 1973*, 80 Geo. L.J. 435, 437 (1991).
100. *Id.*
101. Morrison v. National Austl. Bank Ltd., 561 U.S. 247, 266 (2010) (holding that it is necessary to determine the geographic focus of the Act when actions are both domestic and international). *See also* Dodge, *supra* note 57 (detailing the current test for extraterritoriality as a two-step process where the court looks for a clear indication of geographic scope and continues to look at the focus of the legislation if there is not clear indication of geographic scope).
102. Center for Biological Diversity v. Export-Import Bank of the United States, 894 F.3d 1005, 1014, 48 ELR 20108 (9th Cir. 2018); Defenders of Wildlife v. Hodel, 658 F. Supp. 43, 17 ELR 20882 (D. Minn. 1987), *rev'd sub nom*. Defenders of Wildlife v. Hodel, 851 F.2d 1035, 18 ELR 21343 (8th Cir. 1988).
103. 42 Fed. Reg. 4869, 4871 (Jan. 26, 1977) (the Act "requires every Federal agency to insure that its activities and programs in the United States, upon the high seas, and in foreign countries will not jeopardize the continued existence of a listed species"). *See also* Memorandum on Federal Activities Jeopardizing Foreign Species From Associate Solicitor, Conservation and Wildlife, to Director, Fish and Wildlife Service (Apr. 12, 1977) ("We believe the Service's position is correct and conclude that the jeopardy clause applies to federal activities in foreign countries.").
104. *Center for Biological Diversity*, 894 F.3d at 1014.
105. Center for Biological Diversity v. Export-Import Bank of the United States, 2015 U.S. Dist. LEXIS 21481, at *20 (N.D. Cal. 2015), 36 Int'l Trade Rep. (BNA) 1473.
106. *Id.* at *21.
107. Morrison v. National Austl. Bank Ltd., 561 U.S. 247, 265 (2010).
108. *Id.* at 266.
109. 16 U.S.C. §1537(a)(1)(E).
110. *Id.* §1537.
111. *Center for Biological Diversity*, 2015 U.S. Dist. LEXIS 21481, at *20.

C. Critical Habitat Designation in the U.S. Territorial Sea, U.S. EEZ, and U.S. Outer Continental Shelf

Current policy states that "[t]he Secretary will not designate critical habitat within foreign countries or in other areas outside of the jurisdiction of the United States."[112] Although there may be some discretion in interpreting this rule, it has only been extended to the edge of the EEZ. No critical habitat is designated in international waters.

It is clear that the critical habitat provisions should apply to the United States' EEZ[113] and the outer continental shelf. The United States currently has listed critical habitat in its EEZ, notably for polar bears and other arctic species.[114] The debate around polar bears is long-standing.[115] As recently as 2009, Congress has expanded the Secretary of Commerce's ability to repeal rules under the ESA specifically in regard to the species.[116] However, the ability to list critical habitat in the EEZ remains. The Ninth Circuit upheld the critical habitat designation for polar bears in 2016.[117]

Additionally, the ability of the United States to designate critical habitat in all of its maritime jurisdictions is supported by international law. The United States has "sovereign rights for the purpose of exploring, exploiting, conserving, and managing the natural resources of the sea-bed and subsoil and of the superjacent waters" in its EEZ.[118] On the continental shelf, the United States has "sovereign rights over its continental shelf for the purpose of exploring it and exploiting its natural resources."[119] Critical habitat designations make up a long-standing aspect of the United States' traditional conservation and management of its natural resources. It has both the capability and the need to continue the practice in all areas under its jurisdiction. Therefore, the existing critical habitat in maritime areas should be protected and future projects should include the analysis in their environmental review.

D. Critical Habitat on the High Seas

International waters lie "outside of the jurisdiction of the United States," and therefore current policy states that the United States will not designate critical habitat in international waters.[120] In supporting that policy, the U.S. Department of the Interior cites *Lujan*.[121] In *Lujan*, the majority found that the challengers of the consultation policy lacked standing, and thus they never reached the merits of the case.[122] Justice John Paul Stevens, in concurrence, argued that the consultation requirements of the ESA did not apply to foreign nations.[123] The rulemaking goes further than both the majority and the concurrence.

The majority did not reach the merits,[124] and thus the opinion did not affirm the existing rule. Justice Stevens only claimed that consultation should not apply in foreign countries.[125] Consultation could occur on the high seas, and critical habitat could be designated on the high seas, without conflicting with the concurrence. The citation to *Lujan* is misplaced.

Further, the only real effect of a critical habitat designation is that it influences the government's review of actions in §7. The government has to undergo consultation for federal actions in international waters. However, under the current policy, the government cannot designate critical habitat in international waters. Therefore, even though the Act does not explicitly outlaw critical habitat designation in international waters, the government may only block a federal action in international waters if the action puts a species in jeopardy of extinction.

Areas that would otherwise be designated as critical habitat cannot be designated under current policy. Therefore, those areas can be degraded or destroyed by federal actions without any limitation. This restriction creates a two-tiered system of consultation not envisioned in the Act. Consultations within U.S. jurisdiction, which is not explicitly defined in the rulemaking, must consider critical habitat, while those on the high seas do not need to look for or protect critical habitat. This interpretation stretches the limits of permissible rulemaking.

However, the rulemaking does have some support in legislative history. The 1982 congressional committee report for the critical habitat amendments stated: "the critical habitat provisions of the act only apply to areas within the jurisdiction of the United States and that the designation of critical habitat in foreign countries or on the high seas would be inappropriate."[126] Still, while the legislative

112. 50 C.F.R. §424.12(g) (2020).

113. In a 1992 law, the United States declared that certain "areas defined in section 3(24) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1802(24)) shall be considered places that are subject to the jurisdiction of the United States for the purposes of the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.)." Pub. L. No. 102-251, §305, 106 Stat. 66 (1992), *as amended by* Pub. L. No. 104-208, §211(b), 110 Stat. 3009, 3009-41 (1996). These areas were recognized by the United States and Russia. Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, June 1, 1990, U.S.-U.S.S.R., art. 3(1), T.I.A.S. No. 11451.

As areas under the jurisdiction of the United States for the purposes of the ESA, it seems that the United States should be able to declare critical habitat in the region. However, it is unclear what other countries would think of the United States exerting jurisdiction over an area beyond 200 nautical miles from its coast that was delimited by a two-party agreement. Therefore, the full powers of the United States under this agreement are unclear.

114. Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Polar Bear (*Ursus maritimus*) in the United States, Final Rule, 75 Fed. Reg. 76086 (Dec. 7, 2010); Endangered and Threatened Wildlife and Plants; Final Determination of Critical Habitat for the Spectacled Eider, Final Rule, 66 Fed. Reg. 9146 (Feb. 6, 2001).

115. *Endangered Species: Hearings on H.R. 37 and 4758 Before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries*, 93d Cong. 193 (1973) (acknowledging that the sea ice habitat of the polar bear was at the time classified as the high seas).

116. Omnibus Appropriations Act, Pub. L. No. 11-8, 123 Stat. 523, 749 (2009).

117. Alaska Oil & Gas Ass'n v. Jewell, 815 F.3d 544, 550, 46 ELR 20042 (9th Cir. 2016).

118. Restatement (Third) of Foreign Relations Law, *supra* note 20, §514.

119. *Id.* §515.

120. 50 C.F.R. §424.12(g) (2020).

121. 81 Fed. Reg. 7413, 7428 (Feb. 11, 2016).

122. Lujan v. Defenders of Wildlife, 504 U.S. 555, 578, 22 ELR 20913 (1992).

123. *Id.* at 589.

124. *Id.* at 578.

125. *Id.* at 589.

126. *Endangered Species: Hearings on H.R. 6133 Before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries*, 97th Cong. 567 (1982).

history is not uniform,[127] the 1982 statement from the Subcommittee on Fish and Wildlife Conservation supports a two-tiered structure of consultation inside and outside of U.S. jurisdiction.

Also, §7 does provide for an exemption process for consultation that includes participation of "the Governor of the State in which an agency action will occur, if any." This provision could be used to argue that no consultation is meant to occur anywhere outside of the jurisdiction of a State. However, the Act acknowledges that an area may fall outside the jurisdiction of a State by including the clause "if any." Areas of the U.S. territorial sea fall outside the jurisdiction of any State, such as the areas around non-State territories or beyond three nautical miles. Therefore, this clause provides little illumination of the scope of §7.

E. Critical Habitat in Foreign Outer Continental Shelves, Foreign EEZs, and Foreign Territorial Seas

Nothing in the ESA bars the United States from designating critical habitat in foreign countries. The United States may even be obligated to undergo the full consultation process every time it enters into a federal action that may harm an endangered species. It would be odd if the Act implicitly omitted the critical habitat provision without a textual reference to the omission. However, even early regulations surrounding the Act did not apply the designation of critical habitat to foreign nations.[128] Therefore, the provision remains unclear under U.S. law, but regulations currently bar the designation of foreign critical habitat.[129]

Even if domestic law allowed the United States to declare critical habitat in a foreign EEZ[130] or on a foreign continental shelf, customary international law would bar such an action without consent of the foreign nation. In UNCLOS, the coastal State is given jurisdiction over marine scientific research in the EEZ. It would be essentially impossible to operate or to designate critical habitat without conducting marine scientific research.[131] Similarly, UNCLOS declares that "if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State." Therefore, the research necessary to designate critical habitat would be barred if such research explored the seabed.

Still, if the U.S. government were performing an action that required consultation in a foreign EEZ or continental shelf, it would likely need consent of the coastal State. Therefore, the United States could make critical habitat study and designation a necessary condition for international collaboration in any project that may harm endangered species. International law does not prevent the designation of critical habitat within the consultation process for federal actions in foreign countries, but it would make it more difficult. (See Table 1 next page.)

III. Other Legal Mechanisms of Protection

The ESA is not the only mechanism for protecting endangered species. The United States has passed several other laws for international conservation. The MMPA prevents the taking of marine mammals by U.S. citizens.[132] The Magnuson-Stevens Fishery Conservation and Management Act establishes a system for managing commercial fisheries in the United States and a 200-mile fisheries management zone.[133]

The United States is not a Party of UNCLOS, and so the United States does not need to review its ESA policy for its compatibility with the treaty. However, acting contrary to the most expansive international legal regime governing the high seas could create international conflict. Additionally, the United States is still a Member of many treaties that govern its actions on international waters. Some of the treaties already accomplish the conservation goals envisioned by the proposed regulatory changes. However, many of these treaties apply only to specific regions in international waters.

The Antarctic Conservation Act[134] affirms the United States' obligations as part of treaties it entered into to protect lands and resources around Antarctica. The United States is also part of the Convention on International Trade in Endangered Species of Wild Fauna and Flora,[135] which prevents commerce in endangered species. The International Convention for the Prevention of Pollution From Ships[136] regulates the emissions and pollution of oceanic vessels.

127. H.R. Rep. No. 714, at 19 (1989) ("the Committee also expects the [U.S. Fish and Wildlife] Service to continue to provide consultation on endangered species to United States agencies dispensing foreign assistance").
128. Endangered and Threatened Wildlife and Plants, Proposed Provisions for Interagency Cooperation, 42 Fed. Reg. 4868, 4869 (Jan. 26, 1977).
129. 50 C.F.R. §424.12(g) (2020).
130. Not all nations have declared an EEZ. Miljenko Petrak, *Should Croatia Declare an Exclusive Economic Zone?*, 40 Pravnik 123, 128 (2006). Therefore, an interesting question arises as to the United States' powers in the area beyond the territorial sea but within two miles of such a nation. Such a question has not come before any court to illuminate the breadth of the ESA. It is possible that a court could ignore the EEZ of a foreign nation whether it is declared or not given that the Act was passed before the concept became customary in international law. The Act refers only to "the high seas" without ever mentioning an EEZ.

    However, if a court were to find that the Act retroactively adopts the concept of an EEZ as an area separate from the high seas, the question of coastal State recognition may arise. Without further guidance from the legislature, it seems prudent that the United States exercise jurisdiction over its citizens in regard to endangered species to the maximum extent of the ESA. Therefore, it could designate critical habitat, if it had chosen to do so on the high seas, because the coastal State would not have exercised its authority over marine scientific research.
131. However, the ESA does include a procedure for foreign policy exemptions that may negate the conflict. 16 U.S.C. §1536(g)(1), (h), (i).
132. *Id.* §§1361-1407.
133. Pub. L. No. 94-265, §101, 90 Stat. 331, 336 (1976) (codified at 16 U.S.C. §1811).
134. Pub. L. No. 95-541, 92 Stat. 2049 (1978) (codified at 16 U.S.C. §2410).
135. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.
136. Protocol of 1978 Relating to the International Convention for the Prevention of Pollution From Ships, Feb. 17, 1978, 1340 U.N.T.S. 22484.

Table 1. Applicability of the Endangered Species Act for U.S. and Foreign Citizens in Maritime Jurisdictions

Actor	U.S. Citizen	Foreign Citizen	U.S. Agency Action	
	Is take prohibited?	Is take prohibited?	Is consultation required?	Can critical habitat be designated?
U.S. Territory	Take prohibitions apply	Take prohibitions apply	Consultation required	Eligible for critical habitat designation
U.S. EEZ	Take prohibitions apply	Take prohibitions apply	Consultation required	Eligible for critical habitat designation
U.S. Outer Continental Shelf	Take prohibitions apply	Take prohibitions apply	Consultation required	Eligible for critical habitat designation
High Seas	Take prohibitions apply	Take prohibitions do not apply	Consultation required	Not eligible for critical habitat designation (questionable)
Foreign Outer Continental Shelf	Take prohibitions apply to mobile species	Take prohibitions do not apply	Consultation requirement unclear	Not eligible for critical habitat designation (questionable)
Foreign EEZ	Take prohibitions apply	Take prohibitions do not apply	Consultation requirement unclear	Not eligible for critical habitat designation (questionable)
Foreign Territory	Take prohibitions do not apply	Take prohibitions do not apply	Consultation not required (questionable)	Not eligible for critical habitat designation (questionable)

However, treaties are not all-encompassing. For example, 15 countries and the European Union joined the Oslo and Paris (OSPAR) Conventions[137] to protect parts of the northern Atlantic Ocean. However, the vast majority of area in the northern Atlantic remains unprotected under OSPAR.[138] Not all relevant Parties sign important treaties. If only a few Parties sign a treaty, the unsigned Parties will still exploit the resources. A treaty will ultimately be necessary for international protections, but the treaty needs all major economic powers to sign if it is to be effective.

The Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction[139] provides solutions to some of the shortcomings of the ESA and the existing marine treaties. The international cooperation avoids the limitations of the ESA because the treaty can bind U.S. citizens and foreigners. If enough major economic powers participate in the negotiations, all Parties can assist in the protection of marine resources without worry of defectors taking advantage of the reduced competition. Domestic law will never provide the widespread and coordinated conservation measures necessary for the protection of endangered species. In the absence of international cooperation, the damages caused by the loss of biodiversity will cross borders.

IV. Conclusion

The threats facing endangered species in the oceans cross international and maritime boundaries. The actions of any one nation are unlikely to provide a comprehensive solution. However, in the absence of comprehensive interna-

137. Convention for the Protection of the Marine Environment of the North-East Atlantic, Mar. 6, 2006, 2354 U.N.T.S. 67.

138.

> By 31 December 2010, the OSPAR Network of [marine protected areas] MPAs comprises a total of 181 sites, including 175 MPAs situated within national waters of Contracting Parties [(CPs)] and six MPAs in Areas beyond National Jurisdiction (ABNJ). Collectively, these sites cover 439,679 km² or 3.15 % of the OSPAR maritime area in the North-East Atlantic. As the vast majority of sites have been designated in CPs' territorial waters, overall coverage of coastal waters by OSPAR MPAs is consequently higher at 14.1%. Overall coverage of offshore areas, i.e. the Exclusive Economic Zones of Contracting Parties, by OSPAR MPAs remains very low at 0.56%. The distribution of MPAs across the five OSPAR Regions is likewise imbalanced, resulting in major gaps of the MPA Network. The Greater North Sea, the Wider Atlantic and the Celtic Seas are the best represented OSPAR Regions, with 6.25%, 4.65%, and 3.53% coverage by OSPAR MPAs respectively. While coverage of the Arctic Waters is at 1.36%, the Bay of Biscay and Iberian Coast has less than 1% protected by OSPAR MPAs.
>
> OSPAR Commission, 2010 Status Report on the OSPAR Network of Marine Protected Areas (2011).

139. *International Legally Binding Instrument Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*, G.A. Res. 72/249, U.N. GAOR, 72d Sess., at 1, U.N. Doc. A/RES/72/249 (2017).

tional actions, individual nations should act to protect the species in their territory and abroad.

The ESA aims to constrain the actions of people under U.S. jurisdiction, both when they act in the United States and abroad. However, the Act has not been implemented to the fullest extent of its applicability under domestic and international law. A broader implementation of its jurisdictional requirements will help the United States fulfill its obligation as an international force.

The United States should prevent its citizens from taking an endangered species wherever possible, even if such a restriction cannot be enforced by arrest until the citizen returns to U.S. territory. Additionally, the United States should review the actions of its agencies wherever they occur if such an action is likely to harm an endangered species. Finally, the United States should designate critical habitat on the high seas when agencies take actions that may affect endangered species.

These actions would not overstep the jurisdiction afforded to the United States under customary international law. Such steps would not only better achieve the goals of Congress when it passed the ESA, they would support international efforts to protect global resources.