Ocean and Coastal Law Journal

Volume 23 | Number 1 Article 3

January 2018

Race to Extinction: Shark Conservation Under International and European Law and its Limits

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SHARK CONSERVATION UNDER INTERNATIONAL AND EUROPEAN LAW AND ITS LIMITS

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ABSTRACT

The purpose of this paper is to clarify the existing (global and regional) legal standards on shark conservation from over-exploitation. First, an analysis of the current international legal framework (law of the sea, sustainable fisheries management, wildlife law) applicable to shark protection is provided (Part I). Next the paper explores the evolution of the European Union (EU) policy on shark finning, since the EU − in line with the United States (Shark Conservation Act) − opted for a strict fins-attached policy, or Fins-Naturally Attached (FNA), The new policy eliminated the major pitfall of its previous regulation, based on a fin-to-carcass weight regime, that allowed separate landing of the fins detached and of the shark carcass. This paper considers whether this turn of the EU – the first intergovernmental organization to adopt a binding act on shark finning – can be considered as a breakthrough and whether FNA can be the solution to the threat of extinction of sharks, arguing for a different solution.

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I. INTRODUCTION

As far as 2001, Jessica Spiegel, in one of the first essays on shark finning and the law, outlined the lack of "binding international treaties or strategies for the management of sharks, including regulating or outlawing finning".[2]

What is the state of the art more than 15 years later? Yet, despite significant legal developments, many pelagic sharks` existence is being threatened facing significant decline, as witnessed by the well-known documentary of Louie Psihoyos "Racing Extinction".[3] Sharks, skates, and rays belonging to the class *Chondrichthyes*, as well as other species of fish, are experiencing a rapid decline as a result of overfishing and unsustainable fishing across the world, including Illegal, Unregulated and Unreported Fishing (IUU),[4] deliberate or accidental catch, bottom trawling and destruction of reproductive habitats.[5]

In addition, the growing demand for shark fins in Asian countries for fin soup, a delicacy of Chinese cuisine, boosted the market for shark finning, risking the extinction of several shark

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[2] Jessica Spiegel, *Even Jaws Deserves to Keep His Fins: Outlawing Shark Finning Throughout Global Waters*, 24 B.C. INT'L & COMP. L. REV., 409, 427 (2001).

[3] RACING EXTINCTION (Ocean Preservation Society 2015).

[4] According to the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) of 2001, "IUU fishing can lead to the collapse of a fishery or seriously impair efforts to rebuild stocks that have already been deplete" (Introduction).

[5] Nicholas K Dulvy et al, *Extinction risk and conservation of the world's sharks and rays*, eLife, (2014), https://elifesciences.org/articles/00590.

species.[6] As a consequence, more and more species of sharks are listed in the IUCN Red List of Threatened Species.[7] Three European Union (EU) Countries, namely Spain, Portugal, France, are amongst the world's top shark fishing countries, along with Indonesia, India, Taiwan, Argentina, Mexico, USA, Pakistan, Malaysia.[8] The key problem lies in the fact that

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[6]Jeremy Iloulian, *From Shark Finning to Shark Fishing: A Strategy for the U.S. & EU to combat Shark Finning in China & Hong Kong*, DUKE ENV. LAW & POLICY FORUM, 345, 347 (2017).

[7] *See* Int'l Union for Conservation of Nature & Nat. Resources, THE IUCN RED LIST OF THREATENED SPECIES, http://www.redlist.org [https://perma.cc/E52W-B7WG] (last visited Nov. 21, 2017). IUCN Shark Specialist Group has evaluated a high threat of extinction of one quarter of sharks, rays and chimaeras. Statistical data report 100 million sharks fished every year Austl. Marine Conservation Soc'y, *Shark Finning*, AUSTL. MARINE CONSERVATION SOC'Y, https://www.marineconservation.org.au/pages/shark-finning.html [https://perma.cc/57FN-5ZGS] (last visited Nov. 21, 2017). *See also* Nicholas K. Dulvy et al., *Extinction Risk and Conservation of the World's Sharks and Rays*, ELIFE, (Jan. 21, 2014), http://elifesciences.org/articles/00590 [https://perma.cc/HA6C-UPV9]. The four factors responsible of the decline of the population of fish stocks, identified in the report, are: overfishing, habitat destruction, pollution and climate change.

[8] Felix Dent & Shelley Clarke, *State of the Global Market for Shark Products*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS 17 (2015), http://www.fao.org/3/a-i4795e.pdf [https://perma.cc/2QUK-22MW]. *See also* Victoria Mundy-Taylor and Vicki Crook, *Into the Deep: Implementing CITES Measures for Commercially Valuable Shark and Manta Rays*, EUR. COMM'N, 3 (2013), http://ec.europa.eu/environment/cites/pdf/reports/traffic_pub_fisheries15.pdf [https://perma.cc/G872-9EP2].

several of those countries do not report in a transparent manner the number of their catches to the relevant monitoring bodies established by Regional Fisheries Management Organizations (RFMOs). Therefore shark finning is related to the economic interests of fishing States that often do not respect the Total Allowances Catches (TACs) and practice IUU fishing on a large scale through their vessels.[9]

Despite this alarming picture, significant developments in shark conservation at international and at regional level are registered, and are the core of the present paper. These improvements comprehend specific banning measures adopted by the EU (shark finning) and relevant RFMOs (incidental capture of pelagic sharks).

The EU, in line with several domestic policies (i.e. Shark Conservation Act in the United States), opted for a fin-attached policy with the adoption of Regulation (EU) No 605/2013.[10]

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[9] One cause of IUU and unsustainable fishing – as highlighted in a EU study – is represented by harmful fisheries subsidies for catch fisheries. *See generally* EUR. COMM'N, Study on the Subsidies to Fisheries, Aquaculture, and Marketing and Processing Subsections in Major Fishing Nations Beyond the EU (October 2016) https://perma.cc/QT7C-DZLX (Study on the subsidies to the fisheries, aquaculture, and marketing and processing subsectors in major fishing nations beyond the EU). Also Goal 14 of the UN Sustainable Development Goals ("Conserve and sustainably use the oceans, seas and marine resources") underlines that subsidies for fishing are at the root of the rapid depletion of many fish species. *See Goal 14: Conserve and Sustainably Use the Oceans, Seas and Marine Resources*, UNITED NATIONS SUSTAINABLE DEVELOPMENT GOALS, http://www.un.org/sustainabledevelopment/oceans/ [https://perma.cc/SD77-6J5H] (last visited Nov. 21, 2017).

[10] Regulation 605/2013, 2013 O.J. (181) 1 (EU) (amending Regulation 1185/2003, 2003 O.J. (EC) on the removal of fins of sharks on-board vessels).

A fins-attached policy, or Fins-Naturally Attached (FNA) – aimed at a sustainable exploitation of sharks – implies that the shark fins and the carcass cannot be landed separately.[11] It is undoubtedly a breakthrough if compared to the 'traditional' fin-to-carcass ratio, which allows fishermen to cut shark fins off at sea and to land the fins and the carcass separately (therefore fostering IUU).[12] This latter ratio allows competent authorities to evaluate whether fins and carcasses landed are an appropriate proportion (the EU carcass ratio was fixed at 5% of the shark's whole weight), but complicates the identification of species as

[11] Simon J.B. Gulak, Heather E. Moncrief-Cox, Thomas J. Morrell, Alyssa N. Mathers, John K. Carlson, *A Guide to Landing Shark Species with Fins Naturally Attached*, U.S. Department of Commerce, NOAA Technical Memorandum NMFS-SEFSC-712, August 2017, https://www.sefsc.noaa.gov/P_QryLDS/download/TM1007_TM-712.pdf?id=LDS. *See also* Shart Trust, *Fins Naturally Attached (FNA)*, https://www.sharktrust.org/en/fins_naturally_attached.

[12] Stop Shark Finning. Shark Trust Finning Facts, 2009, available at http://stopsharkfinning.net/docs/StopSharkFinningCampaignFactsheet.pdf. (For more information, see Resolution 05/05 Concerning the conservation of sharks caught in association with fisheries managed by IOTC, Indian Ocean Tuna Commission, 3 October 2017. In particular, Para. 3 (a) states that ("CPCs shall prohibit the removal of shark fins on board vessels. CPCs shall prohibit the landing, retention on-board, transhipment and carrying of shark fins which are not naturally attached to the shark carcass until the first point of landing.").

well as of their age and sexual maturity, and monitoring, control and surveillance of illegal fishing.[13]

This paper argues that the EU has missed the opportunity to ban completely shark finning, since despite shark fishing being widely restricted with the fins naturally attached policy, it has not yet been completely banned.

In depth, it will analyze the existing international and regional legal framework and their progresses aimed at preserving sharks from overexploitation. Such legal framework is based on the interaction of two legal regimes: sustainable fisheries management and wildlife protection.

Part I will explore the fisheries and wildlife legal regime relevant to shark protection, focusing on the relevant rules on sustainable fishing enshrined in the UN Convention on the Law of the Sea (UNCLOS) and in the Straddling Fish Stocks Agreement, and on illegal trade contained in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Convention on the Conservation of Migratory Species of Wild Animals (CMS) (highlighting that new shark species have been recently included in Appendix I of CITES).

Part II will assess the importance of the new EU policy on shark finning, including the adoption of an amendment to its Regulation n. 1185/2003 on shark finning. In particular, I will focus on the main issues related to the implementation of the amended Regulation, discussing about its foundations that can be traced in the concept of animal welfare, wondering whether this measure is able to decrease the amount of sharks caught.

[13] S. Hindmarsh, *A Review of Fin-weight Ratios for Sharks*, Report presented to the Indian Ocean Tuna Commission Working Party on Ecosystems and Bycatch, IOCT-2007-WPEB-14, http://www.iotc.org/fr/documents/review-fin-weight-ratios-sharks.

The conclusions will underline which are the main limits of policies on shark finning, ranging from a fin-to-carcass weight regime (outdated), a Fins-Attached Policy (FNA) (valid but not enough), to a global ban of shark fishing (the optimum). In particular, the reason of the inadequacy of FNA is twofold. First, this policy does not *ban* entirely shark fishing (in only regulates *how* sharks are caught and landed), therefore admitting exploitation of shark. Second, while shark finning is slightly diminishing, the consumption of shark meat is growing. This is a side effect of the fin-port ratio, that requests to land the carcass of the shark. On the one hand, this policy discourages and prevents IUU, but on the other hand, it indirectly promotes the shark meat market because once the carcass is landed, fishermen tend to sell the meat of the shark and promote their sell.

On its own, the multilevel protection of sharks represented by the interaction between the sustainable fisheries management regime altogether the wildlife conservation regime presents the limit of prohibiting fishing and trading of only few shark species (those that are threatened to extinction). Therefore, a shark species is entitled to a special protection only when it is at the brink of extinction, when probably it is too late to recover the number of a targeted species to pre-exploitation levels.

Possible solutions will be discussed, such as a global prohibition of shark fishing in the high sea, implying a turn of animal welfare policy towards an abolitionist stance.

II. PART I: INTERNATIONAL AND REGIONAL STANDARDS ON SHARK PROTECTION

A. Sustainable Fisheries Management

Mankind is realizing that fish stocks are not an unlimited resource: the United Nations in the 2030 Agenda for Sustainable Development called on the world “to conserve and sustainably

use the oceans" (Goal 14),[14] and the General Assembly (GA) promoted in 2015 a convention on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.[15]

The concept of sustainable fisheries is also promoted under the auspices of Food and Agricultural Organization (FAO), by adopting the Code of Conduct for Responsible Fisheries (1995).[16] In the light to the sharp decline of fish stocks, RFMOs are now also dealing with conservation issues, rather than exclusively focusing on fisheries management. Therefore, they now play a central role in fish stocks conservation, since the wildlife regime – as we will soon discuss – has structural weaknesses hindering a full protection of sea life.

In addition to measures addressing sustainable fisheries, it is worth mentioning the FAO International Plan of Action for the Conservation and Management of Sharks (1999), developed and adopted within the framework of the Code of Conduct for Responsible Fisheries, which is the most important instrument explicitly devoted to shark conservation (IPOA-Sharks). Its overall goal is to ensure the conservation and management of sharks and their long-term sustainable use. This is, however, a soft law instrument, which is not binding

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[14] G.A. Res. 70/1, (25 September 2015), (Transforming our world: the 2030 Agenda for Sustainable Development).

[15] G.A. Res. 69/292, at 1 (June 19, 2015). (Development of an 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). Efstathia Laina, *Moving Toward a Treaty on Conservation and Sustainable Use of Ocean Resources*, 46 ENVTL. POL. & L. 201, 201-205 (2016).

[9] Food & Agric. Org. of the United Nations [FAO], FAO Code of Conduct for Responsible Fisheries, at Intro, [https://perma.cc/S3M6-USE2].

and does not envisage any enforcement measure. It simply invites FAO Member States that are involved in shark fishing, to submit and implement a national plan of action for conservation and management of shark stocks (Shark-plan). More compelling rules on shark protection are foreseen, as we will soon analyze, in the fisheries management regime and in wildlife law.

B. Law of the Sea and UNCLOS

Sharks are first and foremost migratory species that shift between the territorial sea and the Economic Exclusive Zone (EEZ) of maritime States and the high sea. International cooperation through international treaties is therefore the *conditio sine qua no* to avoid their extinction.

The first layer of protection for high-sea species, such as sharks and rays, is guaranteed by the law of the sea, codified in the United Nations Convention on the Law of the Sea (UNCLOS) or Montego Bay Convention,[17] which delineates, *inter alia*, the general framework on the conservation and sustainable use of the natural resources of the sea, including fishing. The principles set out in the Convention, which embodies the 1958 Conventions related to the high sea, fishing, and the continental shelf (relevant for sedentary stocks), contributed to the development of the current fisheries regime.

[17] The Montego Bay Convention on the Law of the Sea was opened for signature on 10 December 1982 and entered into force on 16 November 1994. *See generally* Tullio Scovazzi, *The Evolution of International Law of the Sea: New Issues, New Challenges, in* 286 RECUEIL DES COURS 39 (2000).

It was only in 1974, during the first session of the UN Conference on the Law of the Sea held in Caracas, that the international community began to show an interest in the protection and conservation of natural resources, not only as a commodity to be commercialized, but as a non-renewable resource.[18] This interest in the protection of the marine environment and of its natural resources resulted then in the adoption of UNCLOS, which strongly limited the traditional principle of free access to the living resources of the sea and determined the emergence of a new international law of marine fisheries.[19]

However, certain principles concerning marine environment protection were already set forth in the 1972 Stockholm Declaration on Human Environment, by implying the duty of maritime States "to take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea."[20]

Part XII of the United Nations Convention on the Law of the Sea is expressly devoted to the protection of marine environment. In particular, Article 192 imposes upon Member States the duty to protect and preserve the marine environment and Article 194, Paragraph 5, requests then to protect the habitat of endangered species.[21] Its rules concerning the management and

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[18] JAMES C. F. WANG, HANDBOOK ON OCEAN POLITICS & LAW, 30-32 (1992).

[19] Ben M. Tsamenyi, Shilpa Rajkumar, Lara Manarangi-Trott, *The International Legal Regime for Fisheries Management*, U. Wollongong Australia 1, 4 (2004), http://ro.uow.edu.au/lhapapers/189/.

[20] Rep. of the United Nations Conference on the Human Env't, 4,Stockholm (June 1972).

[21] United Nations Convention on the Law of the Sea, Part XII, art. 192-194, Dec. 10, 1982, 1833 U.N.T.S. 397 (Article 192 of UNCLOS establishes that "States have the obligation to protect and preserve the marine Environment", and Article 194, Paragraph 5 states that "The

conservation of fisheries in the Economic Exclusive Zone (EEZ)[22] and in the high sea[23] codified existing customary international law.[24]

UNCLOS establishes that the States within a 200-mile maximum limit (EEZ) have an exclusive fisheries jurisdiction. In particular, coastal States must guarantee the optimal exploitation of their biological resources, establishing the maximum volume of catch ('maximum sustainable yield')[25] allowed in its EEZ, according to the reproductive capacity of the considered stock of fishes (Article 61, Para. 1).[26]

In this regard, the Coastal State has the specific obligation to ensure that "maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation and that proper conservation and management measures are adopted" (Art. 61, Para. 2).

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measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.")

[22] *Id.* at art. 55-75.

[23] *Id.* at art. 86-120.

[24] YOSHIFUMI TANAKA, THE INTERNATIONAL LAW OF THE SEA, 219-252 (2012).

[25] Maximum sustainable yield refers to the largest catch that can be taken from a species while maintaining its population's maximum growth rate; http://awsassets.panda.org/downloads/wwf_msy_oct2011_final.pdf.

[26] *See* UNCLOS, *supra* note 20 at art. 61; Marion Markowski, The International Legal Standard for Sustainable EEZ Fisheries Management, in TOWARDS SUSTAINABLE FISHERIES LAW. A COMPARATIVE ANALYSIS, 3, 5, (Gerd Winter ed. 2009), IUCN Environmental Policy & Law Paper No. 74.

The general duty of conservation enshrined in Article 61 applies to 'special stocks': transboundary or straddling stocks (Article 63), high migratory species (Article 64), anadromous stock (Article 65), catadromous stock (Article 67).

As far as the high sea is concerned, States enjoy freedom of fishing (Article 87, Para. 1, *e*), which is one of the liberties that since ever characterize the international legal regime of the high sea (freedom of navigation; freedom of overflight; freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations, freedom of scientific research).[27] In the high sea, indeed, the flag State has the competence to regulate the conduct of its ships, even in the field of fishing.

This freedom is however no longer absolute, but must be exercised "with due regard for the interests of other States in their exercise of the freedom of the high seas" (Article 87, Para. 2) and by adopting those measures – addressing the subjects under their nationality – that are necessary in order to assure the sustainable conservation of the biological resources of the high sea, and to cooperate with other States in the adoption and implementation of those measures (Article 117).[28] As observed by *Merialdi* and *Trevisanut,* the gradual imposition of those duties at level of customary law and codification treaties is the consequence of the interaction between three competing interests: those of the international community to the preservation of the natural resources of the sea, those of the coastal States fearing that an

[27] Fansico Orrego Vicuna, THE CHANGING INTERNATIONAL LAW OF HIGH SEAS FISHERIES, 14 (James Crawford & David Johnson eds., 1999); James Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 299 (8th ed. 2012) (discussing that freedom of fishing in the high sea was already recognized by the ICJ in the decision on the *Anglo-Norwegian Fisheries* Case).

[28] DONALD R. ROTHWELL & TIM STEPHENS, THE INTERNATIONAL LAW OF THE SEA, 166-67 (2d ed. 2016).

indiscriminate on large scale fishing in the high sea might diminish the stock of fish within their EEZ, and those of single States to the exercise of the freedom of fishing in the high sea.[29] In this regard, UNCLOS recognized, in a more incisive manner with respect to the former 1958 Convention on Fishing, that freedom of fishing on the high sea, enshrined in Article 116, is no longer absolute.[30] Therefore, fishing must be carried out under the conditions and limits established by the Convention, including general obligations to protect and preserve the marine environment (Part XII) and to conserve and manage high seas living resources (Part VII, Section 2).[31]

Indeed, "States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas" (Article 118); as a part of this cooperation, State shall adhere to regional fishery organizations. In addition, States have to establish the total allowable catch (TAC) for their fishing vessels and to adopt other conservation measures based on the best scientific evidence available to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield (Article 119, Para. 1, *a*).

[29] Angelo Merialdi & Seline Trevisanut, *La protezione dell'ambiente marino, in* LA PROTEZIONE DELL'AMBIENTE NEL DIRITTO INTERNAZIONALE 315, 320 (Alessandro Fodella & Laura Pineschi eds., 2009).

[30] François Feral, *The Fishery Management Institutions*, in A Fishery Manager's Guidebook 135, 137 (Kevern L. Cochrane, Serge M. Garcia, 2009).

[31] *See* JOSE A. DE YTURRIAGA, THE INTERNATIONAL REGIME OF FISHERIES. FROM UNCLOS 1982 TO THE PRESENTIAL SEA 68-78 (1997).

However, the obligation to establish and adhere to TACs is determined by "relevant environmental as well as economic factors, including . . . special requirements of developing States"; therefore, there is an absence of a specific duty to pursue the goal of MSY.[32]
With reference to migratory species such as oceanic sharks, States Parties agree to cooperate "with a view to ensuring conservation and promoting the objective of optimum utilization of such species" (Article 64).[33] Shark conservation and management, is however complicated by the migratory nature of several shark species that do not respect maritime boundaries.

C. UN Fish Stock Agreement

The impact of the dispositions of UNCLOS on the problems related to overfishing and IUU has however been weak; some scholars, in particular, argued that the 'open access' regime concerning high seas fishing was a major weakness of the entire structure of the Convention, which favored, instead of limiting, the exploitation of the natural resources of

[32] DAVID FREESTONE, *Fisheries, High Seas*, THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 66, 68 (2009).

[33] Article 64 affirms "The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone." Oceanic sharks listed in Annex I of the UNCLOS are: *Hexanchus griseus*; *Cetorhinus maximus*; Family *Alopiidae*; *Rhincodon typus*; Family *Carcharhinidae*; Family *Sphyrnidae*; Family *Isurida*.

the sea.[34] Indeed, the simple reference to the necessity to cooperate in fishing management, and the absence of any article, aimed at mitigating illegal and unreported fishing form the "unfinished agenda" of the UNCLOS III negotiations.[35]

The failure of UNCLOS in ensuring the sustainability of high seas fishery resources, determined an increasing of fisheries activities in the high seas. Growing concerns at international level about over-exploitation of marine natural resources comported the necessity to negotiate an additional treaty to UNCLOS containing more detailed rules on the management of high seas fisheries.[36]

The UN Fish Stock Agreement (1995),[37] further developed the high seas regime (Part VII UNCLOS). It establishes a detailed mechanism for the conservation and management of straddling fish stocks and highly migratory fish stocks on the high seas.[38] The objective, as provided in Article 2 of the UN Fish Stocks Agreement is "to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish

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[34] Erin A. Clancy, *The Tragedy of the Global Commons*, 5 Ind. J. Global Stud. 601, 609 (1998).

[35] DAVID FREESTON & GERARD J. MANGONE, THE LAW OF THE SEA CONVENTION: UNFINISHED AGENDAS AND FUTURE CHALLENGES, 10 (1995), https://perma.cc/KZ6J-K3CV.

[36] C. DE FONTAUBERT & I. LUTCHMAN, ACHIEVING SUSTAINABLE FISHERIES. IMPLEMENTING THE NEW INTERNATIONAL REGIME, 3 (2003), https://portals.iucn.org/library/files/documents/2003-007.pdf.

[37] United Nations 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 s adopted on 4 August 1995 and entered into force on 11 December 2001.

[38] PHILIPPE SANDS & JACQUELINE PEEL, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, 407 (Cambridge Univ. Press eds., 3rd ed. 2012).

stocks through effective implementation of the relevant provisions of the LOS Convention." . Article 5, *(a)* and *(c)*, in particular, requests Member States to "adopt measures to ensure long-term sustainability of straddling fish stocks and highly migratory fish stocks and promote the objective of their optimum utilization", rendering compulsory the "precautionary principle".[39]

As stated by Scovazzi, the rules contained in this Agreement substantially sanction the end of the freedom of fishing in the high seas.[40] In fact, all the States that have a real interest in a fishing area in the high seas are now entitled (and obliged) to become member of a RFMO (Art. 8, para. 3).[41] In respecting the catch limits established by RFMOs, therefore, States must *minimize* the catch of non-targeted species, such as sharks.[42] The Fish Stock Agreement is therefore the legal framework upon which the subsequent legislation on shark protection was developed on the international, European and domestic level.

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[39] Runyu Wang, *The precautionary principle in maritime affairs*, 10 WMU JOURNAL OF MARITIME AFFAIRS, 143, 144 (2011).

[40] TULLIO SCOVAZZI, *Il diritto internazionale del mare. Fra usi antichi e nuove forme di utilizzazione*: *Considerazioni generali in tema di sicurezza della navigazione marittima*, 66 (Pubblicazioni della Societá Italiana di Diritto Internazionale eds., 2009).

[41] ULRICH BEYERLIN & THILO MARAUHN, INTERNATIONAL ENVIRONMENTAL LAW, 138 (2011).

[42] It is interesting to note that this Agreement not only allows enforcement by non-flag States against the vessels of other flag States, but also against States non-parties to RFMOs (art. 12). *See* Moritaka Hayashi, *Enforcement by Non-Flag States on the High Seas under the 1995 Agreement on Straddling and Highly Migratory Fish Stocks*, 9 GEO. INT. ENVTL. L. REV., 1, 27-34 (1996-1997).

D. Regional Fisheries Management Organizations

RFMOs are international organizations created by States with fishing interests in a particular area or of a particular species. They have a normative power, and can adopt compulsory conservation measures addressed to Member States (conservation and management measures). RFMOs have the dominion over fishing management on specific sectors of the high seas (Atlantic Ocean, Indian Ocean, Pacific Ocean), now defined as a "fine-tuned mare clausum".[43] The international fisheries regime crafted by RMFOs is aimed at reducing the impact of overfishing and bycatch on the populations of fish stocks (since their depletion can have a negative impact on the fishing industry).[44]

Some of them deal with highly-migratory species, mainly tuna and tuna-related species,[45] while others manage fish stocks by geographical area.[46] RFMOs which manage tuna fishing

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[43] HELMUT TUERK, REFLECTIONS ON THE CONTEMPORARY LAW OF THE SEA, 177 (Publications Ocean Dev. Eds., Volume 71 2012).

[44]MICHAEL BOWMAN, PETER DAVIES, CATHERINE REDGWELL, LYSTER'S INTERNATIONAL WILDLIFE LAW (2010), 132-149 (On the role of RFMOs as a tool to manage and conserve highly migratory species.).

[45] They are the International Commission for the Conservation of Atlantic Tunas (ICCAT), the Indian Ocean Tuna Commission (IOTC), the Western and Central Pacific Fisheries Commission (WCPFC), the Inter-American Tropical Tuna Commission (IATTC), the Agreement on the International Dolphin Conservation Programme; Commission for the Conservation of Southern Bluefin Tuna (CCSBT).

[46] Among them are North-East Atlantic Fisheries Commission (NEAFC); Northwest Atlantic Fisheries Organization (NAFO); North Atlantic Salmon Conservation Organization (NASCO); South-East Atlantic Fisheries Organization (SEAFO); South Indian Ocean Fisheries Agreement (SIOFA);South Pacific Regional Fisheries Management Organization

have a collateral interest in shark protection, because pelagic sharks are often accidentally captured by fishing vessels that should primarily target tuna and tuna-like species (in fact, many of the measures developed within RFMOS target the incidental catch of pelagic sharks). Shark conservation issues have acquired major attention within RFMOs in line with growing domestic developments on shark protection and management. Therefore RFMOs have recently adopted a series of recommendations banning the fishing and trading of the most threatened species of sharks, in the light of the increasing worldwide attention in the conservation of natural resources on the high seas (some of them opting for a fin to carcass ratio or a FNA).[47]

In general terms, RFMOs stipulate that all fishing States shall forbid in their domestic legislations retention on board, trans-shipment, landing or storing of any part or the whole carcass of sharks. Additionally, some of the measures developed within RFMOs require captured sharks to be promptly released unharmed and/or further state that trading, selling or offering for sale is also prohibited.[48]

(SPRFMO); Convention on Conservation of Antarctic Marine Living Resources (CCAMLR); General Fisheries Commission for the Mediterranean (GFCM); Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (CCBSP). *See* Bradford E. Brown, *Regional Fishery Management Organizations and Large Marine Ecosystems*, 17(1) ENVTL DEV., 202-210 (2016).

[47] ERIKA J TECHERA & NATALIE KLEIN, INTERNATIONAL LAW OF SHARKS: OBSTACLES, OPTIONS AND OPPORTUNITIES, 14 (Legal Aspects of Sustainable Dev. Eds., 2017).

[48] *See* Mariana Travassos Tolotti et al, *Banning is not Enough: The Complexities of Oceanic Shark Management by Tuna Regional Fisheries Management Organizations*, 4 GLOBAL ECOLOGY & CONSERVATION, 1, 1–7 (2015).

By way of example, ICCAT approved a series of *ad hoc* measures on sharks, such as the Resolution on Atlantic Sharks (Resolution 01-11) and the Recommendation Concerning the Conservation of Sharks Caught in Association with Fisheries Managed by ICCAT (Recommendation 04-10). With the former Recommendation, ICCAT prohibited the discharge at sea of caught sharks, establishing that "CPCs shall take the necessary measures to require that their fishermen fully utilize their entire catches of sharks. Full utilization is defined as retention by the fishing vessel of all parts of the shark excepting head, guts and skins, to the point of first landing" (Para. 2). ICCAT opted for a shark-fin-to-body-mass ratio of 5%.[49] It is also worth mentioning the Recommendation on Management Measures for the Conservation of Atlantic Blue Sharks Caught in Association with ICCAT Fisheries (Recommendation 16-12). This Recommendation establishes that after a transitional period of two years, if the Commission shall observe a trend of decline of the population of Atlantic Blue Sharks, it shall consider additional measures in order to protect such species (Art. 2). Overall, the adoption of shark management measures by RFMOs is an important tool for shark management and conservation, but despite their efforts, their activity is not devoid of critics.[50]

[49] Paragraph 3 of Recommendation 04-10 (Recommendation by ICCAT concerning the conservation of sharks caught in association with fisheries managed by ICCAT states: "CPCs shall require their vessels to not have onboard fins that total more than 5% of the weight of sharks onboard, up to the first point of landing. CPCs that currently do not require fins and carcasses to be offloaded together at the point of first landing shall take the necessary measures to ensure compliance with the 5% ratio through certification, monitoring by an observer, or other appropriate measures".

[50] MARGARET A. YOUNG, TRADING FISH, SAVING FISH: THE INTERACTION BETWEEN REGIMES IN INTERNATIONAL LAW 39-40 (2011).

RFMOs' failure can be attributed to a few pervasive problems: lack of affordable data and enforcement measures in case of illegal, IUU fishing, lack of sanction powers upon Member States, the intersection between conservation interests on one side, and the economic interests of the fishing industry on the other side.[51] As stated by Tyler, the unwillingness of some States to force their flag vessels to comply with conservation measures is "the core of the problem facing RFMO enforcement".[52]

With particular reference to pelagic sharks, one of the weaknesses of the RFMOs' legal regime relies first in the lack of a general ban on the capture of the most threatened species of sharks (essentially, the aim of RFMOs measures is to give the stocks the opportunity to recover to pre−exploitation levels, not to protect a particular fish stock). Furthermore, existing regulations are limited to prohibit retention, finning and trade, but do not act at the bottom of the issue, that is how to avoid shark bycatch and how to discourage fishermen to illegally trade shark fins. [53]

III. WILDLIFE CONSERVATION

[51] Sarika Cullis-Suzuk, Daniel Pauly, *Failing the high seas: A global evaluation of regional fisheries management organizations,* (34) 5 MARINE POLICY, 1036-1042 (2010).

[52] Zachary Tyler, *Saving Fisheries on the High Seas: The Use of Trade Sections to Force Compliance with Multilateral Fisheries Agreements*, 20 TUL. ENVTL. L. J., 43-96 (2006).

[53] Tolotti, *supra* note 44, at 2. On the weaknesses of RFMOs *see* also Andrew Serdy, *Pacta Tertiis and Regional Fisheries Management Mechanisms: The IUU Fishing Concept as an Illegitimate Short-Cut to a Legitimate Goal*, OCEAN DEVELOPMENT & INTERNATIONAL LAW, 1-20 (2017).

The wildlife conservation regime is of course relevant to shark protection, although only complementary with respect to the fishing management regime, since it exclusively addresses species that are already or almost threatened.[54]

It is mainly aimed at the prohibition of the criminal behavior that led or can lead a species to the brink of extinction, such as habitat destruction or illegal trade, but it does not intend to regulate or to forbid fishing, finning or hunting.[55] On contrary, fisheries law has the main goal to set fishing quotas, ensuring at the same time a sustainable use of the biological resources of the sea.[56]

A consistent corpus of legal rules had been developed since the 70s.[57] The two pillars of the international regime on the protection of wildlife are represented by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) adopted in Washington in 1973,[58] and the Convention on the Conservation of Migratory Species of Wild Animals (CMS), adopted in Bonn in 1979.[59] Those treaties form – along with the Ramsar

[54] *See e.g.* EVELYNE MELTZER, THE QUEST FOR SUSTAINABLE INTERNATIONAL FISHERIES: REGIONAL EFFORTS TO IMPLEMENT THE 1995 UNITED NATIONS FISH STOCKS, 101 (2010).

[55] PATRICIA BIRNIE, ALAN BOYLE, CATHERINE REDGWELL, INTERNATIONAL LAW & THE ENVIRONMENT, 702 (2008).

[56] SHARKS OF THE OPEN OCEAN: BIOLOGY, FISHERIES, AND CONSERVATION 432-33 (Merry D. Camhi et al. eds., 2008).

[57] *See generally* ERIK T. FREYFOGLE, DALE D. GOBLE, WILDLIFE LAW. A PRIMER (2009).

[58] THOMAS G. KELCH, GLOBALIZATION AND ANIMAL LAW: COMPARATIVE LAW, INTERNATIONAL LAW AND INTERNATIONAL TRADE 222 (2011).

[59] MURUGAN ANNAMALAI, INTERNATIONAL REGIME OF ENVIRONMENTAL LAW, (2016) (On the main characteristics of these treaties.).

Convention on Wetlands (1972) – the first generation of environmental treaties with a universal vocation, establishing protected areas.[60] They are an expression of the sectorial approach that characterized international environmental law in the first phase of its development; referred to as environmental functionalism.[61]

Both treaties request different levels of duties upon Member States depending on where a particular species is listed in specific appendices.[62] CITES includes three appendices: in appendix I are listed the most threatened species, which implies strict limitations to trading.[63] Appendix II contains the species not currently endangered, but that could become

[60] Mark A. Drumbl, *Actors and law-making in international environmental law in* Research Handbook on International Environmental Law 3, 15 (M. Fitzmaurice, D.M. Ong, P. Merkouris, 2010).

[61] Dimitris Stevis & Clifton Wilson, *The Institutionalization of International Environmental Policy: International Environmental Law and International Organizations in* International Organizations and Environmental Policy 121, 123 (R.V. Bartlett et. al., 1995).

[62] Leslie Couvilion, *Habitat Loss, Agrobiodiversity, and Incidental Wildlife Loss in* International Farm Animal, Wildlife and Food Safety Law, 755, 766 (G. Steier, K.K. Patel, 2017).

[63] Convention on the International Trade in Endangered Species of Wild and Flora, Article II, Para. 1, Mar. 3, 1973 (states "Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.").

in danger if their trade would not be properly managed.[64] Appendix III concerns the species declared unilaterally in danger by Member States that request an unilateral cooperation.[65]

[64] *Id.* at Para. 2 (affirms "Appendix II shall include: (a) all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival; and (b) other species which must be subject to regulation in order that trade in specimens of certain species referred to in sub-paragraph (a) of this paragraph may be brought under effective control". Article IV of CITES ('Regulation of Trade in Specimens of Species Included in Appendix II') states "the export of any specimen of a species included in Appendix II shall require the prior grant and presentation of an export permit.").

[65] The criteria for the inclusion of a species in Appendix I of CITES have been established during the Conference of States Parties in Berne in 1979 (the Berne criteria): "to qualify for Appendix I, a species must be currently threatened with extinction." WILLEM WIJNSTEKERS, THE EVOLUTION OF CITES 101 (9th ed. 2011) https://cites.org/sites/default/files/common/resources/Evolution_of_CITES_9.pdf Proposals for the inclusion of a species in Appendix I or II of CITES, implies a request for amendment that should be approved by a two-thirds majority of Parties present and voting Convention on International Trade in Endangered Species of Wild Fauna and Flora art. XV § 1(b), Mar. 3, 1973 (IUCN) https://www.cites.org/sites/default/files/eng/disc/CITES-Convention-EN.pdf.

The shark bay mouse and the smalltooth sawfish have been listed in Appendix I of CITES since its adoption. The basking shark and the whale shark were included in Appendix II of CITES in 2002 (COP 12)[66] and the great white shark in 2004 (COP 13).[67]

In response to growing concerns about over-exploitation, further five shark species and all manta rays (oceanic whitetip shark, porbeagle shark, scalloped hammerhead shark, greath hammerhead shark, smooth hammerhead shark, great hammerhead shark and manta spp.) were then listed in Appendix II of CITES (3-4 March 2013 – COP 16, Bangkok).[68] At Johannesburg (COP 17), States Parties decided to list silky shark, all thresher sharks (from October 4, 2017) and all devil rays (from April 4, 2017) in CITES Appendix II.[69]

[66]United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora, Amendments to Appendices I and II of the Convention, Nov. 3-15, 2002, available at https://www.cites.org/sites/default/files/common/cop/12/appendix_notice.PDF.

[67] United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora, Amendments to Appendices I and II of the Convention, Oct. 2-14, 2004, available at https://cites.org/sites/default/files/eng/notif/2004/073.pdf.

[68] United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora, Amendments to Appendices I and II of the Convention adopted by the Conference, Mar. 3-14, 2013, available at https://www.cites.org/sites/default/files/eng/notif/2013/E-Notif-2013-012.pdf.

[69] United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora, Amendments to Appendices I and II of the Convention, Sept., 24 – Oct., 4, 2016, available at https://cites.org/sites/default/files/notif/E-Notif-2016-063.pdf.

Only three shark species (the whale shark, the basking shark and the white shark) are instead listed in Appendix I of CMS.[70] A relevant development within CMS is represented by the Memorandum of Understanding (MOU) on the Conservation of Migratory Sharks, adopted on 1st March 2010, which is the first global instrument devoted to the conservation of migratory species of sharks (although not legally binding).[71]

It was signed by the United States (although it is not a Party to CMS) and Portugal and by a consistent number of Pacific States, including Australia, Nauru, Papua New Guinea, Tonga, Tuvalu and the Solomon Islands, but not by the leading importers of shark meat of South East Asia (China, India Indonesia, Japan, Malaysia) and of South America (Brazil) nor by the leading exporters (Spain, France, Argentina, Uruguay).[72]

The objective of the MOU, as enshrined in Section 2 is "to achieve and maintain a favorable conservation status for migratory sharks based on the best available scientific information, taking into account the socio-economic and other values of these species for the people of the Signatories". The MOU is aimed at facilitating international coordination for the protection, conservation and management of the sharks involved, through multilateral, intergovernmental discussion and scientific research.

Signatories, in particular, are invited (on the basis of available resources) to "enact legislation or regulation already in place, enact legislation or regulations to prohibit shark finning,

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[70] The Convention on Migratory Species, *Appendix I &II of CMS*, CMS http://www.cms.int/en/page/appendix-i-ii-cms. (last visited Nov. 1, 2017)

[71] *see* Holly Edwards, When Predators Become Preys: The Need for International Shark Conservation, 12 OCEAN & COASTAL L.J. 305 (2006) (On the importance of MOU for shark protection).

[72] CMS, *supra* note 69 at *CMS Sharks MOU*, http://www.cms.int/sharks/legalinstrument/sharks-mou.

including by considering taking measures, as appropriate, to require that sharks be landed with each fin naturally attached" (Article 13, *h*).

Significant progress was registered at the meeting of signatories Parties held on 15-19 February 2014 in San Jose, Costa Rica; they agreed to include 22 additional shark and ray species under the MOU, including five sawfish species, two species of manta rays, nine mobula ray species, silky sharks, two species of hammerhead sharks, and three thresher shark species.[73] This brought the number of listed species from seven to 29 – a four-fold increase.

Despite not being solely addressed to shark, CITES has an asset – if compared to CMS and its MOU – that makes it particularly suitable for protecting sharks from overexploitation. It is represented by Article VIII which obliges its Parties to prohibit trade in specimens in violation of the Convention, to penalize such trade and to allow for the confiscation of specimens illegally traded or possessed, which means to punish and prevent the illegal trade of listed shark species. Therefore, who lands and sells parts of those sharks listed in Appendices I and II of CITES, caught therefore in clear violation of the Convention, is liable under domestic laws that implement CITES (i.e. in the United States under the Shark Conservation Act).

[73] The Memorandum of Understanding on the Conservation of Migratory Sharks, Second Meeting of the Signatories, San José, Costa Rica, Feb. 15-19, 2016.

Inf.11, Amendments to Annex 1 of the Sharks MOU: Species covered by this memorandum and their ranges, CMS/Sharks/Outcome/2.2, Feb. 20, 2016, http://cms.int/sharks/sites/default/files/document/CMS_Sharks_MOS2_Outcome_2%20%281%29.pdf.

On the other side, the main limit of CITES is that its rules become applicable only if sharks listed in Appendices I or II are illegally caught for being commercialized (therefore, there are no penalties if they are hypothetically caught for human consumption).[74]

Another shortcoming of CITES relies in its nature: as highlighted by Wiggington, "it is responsive and not preventative".[75] In other words, CITES is not a treaty whose goal is to prevent the harvesting of a particular species, but instead it aims at protecting a determined species only when it is at risk of extinction and has therefore passed a determined threshold. In fact, a species must reach an extinction threshold in order to be listed in Appendices I or II, which implicates that the protection is guaranteed *ex post* and not *ex ante.* In addition, Article 15, Para. 1, (*b*), requests a vote of two-thirds majority to adopt an amendment to CITES and therefore to pass a species from Appendix II to Appendix I. This problem arose with reference to polar bears, as the United States proposed at COP 16 in Bangkok to include polar bears in Appendix I. The lack of sufficient data hindered the delisting of polar bear from Appendix II, since several States led by Canada retained that the level of trade concerning polar bears (mostly by native Inuit hunters), was not detrimental to the survival of the species, mostly threatened by other factors, such as climate change and habitat depletion.[76]

In general terms, international wildlife law is not exempted by criticism, in the light of its structural weakness, which is then that of international law: the lack of an adequate

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[74] SOLENE GUGGISBERG, THE USE OF CITES FOR COMMERCIALLY-EXPLOITED FISH SPECIES: A SOLUTION TO OVER EXPLOITATION AND ILLEGAL, UNREPORTED AND UNREGULATED FISHING? 216, 447 (JURGEN BASEDOW ET AL. EDS., 2016).

[75] JARED R. WIGGINGTON, *GOVERNING A GLOBAL COMMON. SHARKS IN THE HIGH SEA*, 25 VILL. ENVTL. L.J. 431, 448 (2014).

[76] Laurel Neme, *Did Polar Bears Really Lose at CITES?*, NAT'L GEOGRAPHIC SOC'Y (March, 29 2013) [https://perma.cc/PN4M-5YLZ].

enforcement mechanism that can force States to comply with the established rules, and the conditioning of the implementation to economic interests and available resources (that are often scarce in developing countries).

A. Regional Standards: the case of the European Union

European fisheries operate in EU waters (in the North Sea, the North East Atlantic, in Norwegian and Faroes waters), as well as in all the world oceans (in the Atlantic, Indian and Pacific Oceans). The EU was labelled as the world's largest shark finning entity.[77] Sharks are also caught in deeper water fisheries in the North East Atlantic Fisheries Commission (NEAFC) area.

IV. EU FISHING POLICY

[77] SARAH FOWLER & BERNARD SERET, SHARK FINS IN EUROPE: IMPLICATIONS FOR REFORM IN THE EU 3 (2010) https://cmsdata.iucn.org/downloads/sharks_fin_in_europe_implication_for_reforming_the_eu_finning_ban.pdf (noting that Spain and Portugal are amongst the top shark fishing countries, and they mainly catch blue sharks, rays, makos, and deep-water species).

The EU is the world's major fishing region with about 5 million tonnes of fish stocks caught annually (Denmark, Spain and the United Kingdom contribute to almost half of total catches).[78]

Fishing, alongside agriculture, is included amongst the concurrent competencies of EU Member States (Article 4, *d*, TFEU),[79] while the conservation and sustainable management of fishing resources (including the protection of the marine environment) – within the Common Fisheries Policy (CFP) – is an exclusive competence of the EU (Article 3, *d*, TFEU).[80] The CFP "shall apply the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield".[81]

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[78] *Eurostat, Sustainable Development in the European Union: A Statistical Glance from the Viewpoint of the UN Sustainable Development Goals*, at 117 (2016) [https://perma.cc/G5WG-9S7G].

[79] Consolidated Version of the Treaty on the Functioning of the European Union art. 4(2)(d), Sept. 5, 2008, 2008 O.J. (C 115) 47, 50. [Hereinafter TFEU].

[80] TFEU art. 3(1)(d) at 51. The CFP was under a reform process, which culminated in the adoption of Regulation No. 1380/2013 of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC. According to Article 1(1)(a), "[t]he Common Fisheries Policy shall cover: (a) the conservation of marine biological resources and the management of fisheries and fleets exploiting such resources." Regulation 1380/2013 art. 1(1)(a), 2013 O.J (L 354) 22, 28 (EU).

[81] *Id*. art. 2 at 29.

The Council is responsible, according to Article 43, Para. 3, of the TFEU, for establishing, upon the proposal of the Commission, the total allowable catches (TACs) concerning all regulated fish species – in line with the principles on sustainable fishing enshrined in Regulation (EU) No 1380/2013 – on the basis of available scientific advice.[82] Regulation (EU) No 1380/2013 delineates the key elements of the CFP that should be based on the principle of sustainable exploitation of marine biological resources (Preamble, Para. 9). It requires that conservation measures be adopted taking into account available scientific, technical and economic advice.

In recent years, growing attention by EU institutions to shark conservation comported the enactment of sets of rules devoted to (a) shark finning, in which regard a policy reform culminated in the adoption in 2013 of a fins-attached policy, that does not, however, intend to completely ban shark fishing, but only to ensure sustainable fishing; (b) shark fishing, by seriously limiting or banning the fishing of some shark species.

V. THE EU SHARK FINNING BAN IN CONTEXT

The EU shark finning policy can be included within the more general EU policy of special care to animal welfare. Indeed, Article 13 of the TFEU specifically recognizes that the EU must give full regard to the welfare requirements of animals (also in the field of fishing), "[i]n formulating and implementing the Union's agriculture, *fisheries*, transport, internal market, research and technological development and space policies." Animal welfare is a European

[82] TFEU art. 43(3). ("The Council, on a proposal from the Commission, shall adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities.").

concern since the EU recognized that animals are *sentient* beings, able to experience suffering and psychological and physical pain. This led to a more ethically sound legislative coverage regarding the use of animals, also in sensitive areas such as, for example, cloning of farm animals for food or experimentation.[83]

Therefore, the EU, in dealing with shark finning, has now taken into account ethical issues regarding the reduction of suffering in those animals, as a consequence of the cruelty inherent the practice of cutting the shark fins that implies throwing the body of the shark back into the sea (in addition to the traditional concerns related to fisheries management to avoid over exploitation of fish stocks).

A. Rules on Shark Finning

The need for the EU to regulate the practice of shark finning traces back to the decision of the Commission to "integrate environmental concerns into the management of the CFP".[84] In fact, Council Regulation (EC) No 1185/2003 on the removal of fins of sharks on board represents a measure that addresses both shark finning management and shark conservation. Therefore, this Regulation can be included within the technical measures "aimed at protecting the marine

[83] *See* Diane Ryland & Angus Nurse, *Mainstreaming After Lisbon: Advancing Animal Welfare in the EU Internal Market*, Eur. Energy & Envt'l. L. Rev. 101 (2013).

[84] Communication of the European Communities, Setting out a Community Action Plan to Integrate Environmental Protection Requirements into the Common Fisheries Policy, at 3, COM (2002) (May 28, 2002).

environment…"[85] alongside Regulation 812/2004 on the protection of whales, dolphins and porpoises against incidental catch.[86]

The Regulation has its foundations on the high vulnerability to over-exploitation of sharks, skates and rays, given their low rate of reproduction (Recital 2). Therefore, it recognizes the serious threat to many species of sharks and blames the practice of shark finning which leaves to excessive deaths and stock depletion.[87] It establishes a general prohibition of the practice of 'shark finning' (Article 1), defining it as "a practice whereby a shark's fins are removed and the remainder of the shark is discarded at sea". It applies to shark fishing activity carried out both in EU waters and onboard EU vessels that operate outside EU waters (Article 1). However, the Regulation in its original formulation was based on a 'fin-to-carcass' ratio instead of a fins-attached policy or a comprehensive ban of shark finning. This implied the possibility by EU shark fisheries – after on board processing – to land in separate harbors the fins and the carcasses of sharks, easily skipping fisheries control and enforcement.[88] In

[85] Communication from the Commission to the Council and the European Parliament - Towards a strategy to protect and conserve the marine environment, at 16, COM (2002) final (Oct. 2, 2002).

[86] Council Regulation 812/2004, Laying Down Measures Concerning Incidental Catches of Cetaceans in Fisheries and Amending Regulation (EC) No 88/98, art. 1 2004 O.J. (L 150) 1,3; *See*, Sarah Dolman et al., *Towards an EU Action Plan on Cetacean Bycatch*, 72 MARINE POL'Y, 67, 75 (2016).

[87] Proposal for a Council Regulation on the Removal of Fins of Sharks on Board Vessels, at 2 COM (2002) 449 final (Aug. 5, 2002).

[88] *Fact Sheets on the European Union: Fisheries Control and Enforcement*, (June 2017) http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.3.3.html [https://perma.cc/85S7-MA6D] (last updated November 2017).

addition, the fin-to-carcass weight regime established a threshold of 5%, allowing the landing of fins weighing 5% of the total weight of the caught shark.[89] While this may seem a minor point, it, in fact, does make a very great difference to the number of sharks that are and can be finned because a shark's liver and head are extremely heavy in relation to its whole body weight.

In addition, the Regulation had a legal vacuum: Article 4 provided the possibility for competent authorities to grant special fishing permits, allowing – in derogation to the general prohibition of shark finning – on-board removal of fins and the discharging of fins and the rest of the carcass in different harbors. The exception was justified by the EU Commission on the basis that "for certain fisheries there could be a practical need to remove shark fins on-board and for separate on-board processing of fins and bodies, even when the carcass is retained (freezer vessels)".[90]

In the light of alarming reports of the strong decrease in the number of shark populations worldwide and in EU waters, it became ever more clear to the EU institutions that the system of weight ratios, permitting separate landings of fins and carcasses, did not prevent IUU, and a reform was therefore necessary. Following a public consultation to collect opinion from all the stakeholders involved, including shark conservation organizations and the general public on all relevant aspects of shark finning the EU adopted on June 12, 2013 Regulation (EU) No

[89] Robin Churchill &, Daniel Owen, THE EC COMMON FISHERIES POLICY 188 (2009).

[90] Report from the Commission to the Council and the European Parliament on the operation of Council Regulation (EC) No. 1185/2003 on the Removal of Fins of Sharks on Board Vessels, 3, COM (2005) 700 (Dec. 23, 2015).

605/2013.[91] The amended Regulation closed the loopholes on shark finning, establishing a Fins Naturally Attached policy without exceptions (Article 4 and 5 of the Regulation that dealt with special permissions are indeed cancelled). The amended Regulation establishes that sharks can only be landed with their fins attached.[92] In response to concerns raised by the fishing industry on the storage problems on board caused by a fins-attached policy, the Regulation allowed a certain degree of flexibility, adopting a 'partial cut' method which permits efficient storage. Indeed, the new Article 3, paragraph 1 (*a*) states that "in order to facilitate on-board storage, shark fins may be partially sliced through and folded against the carcass, but shall not be removed from the carcass before landing". The fins-attached requirement, also established by the US new Shark Conservation Act (*Shark Finning Prohibition Act*), is generally considered as the most effective measure to prevent shark finning.[93]

In addition, according to Article 6 (Reports), Member States with fishing vessels are obliged to submit periodic reports to the Commission, providing detailed data on the number of landing of sharks by species and by port; the number, date and place of the inspections that have been carried out; and the cases of violations of the Regulation, including the identification of the vessel involved and the sanction adopted.

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[91] Commission Regulation 605/2013 of June 12, 2013, Amending Council Regulation (EC) 1185/2003 on the Removal of Fins of Sharks On-board Vessels, 2013 O.J. (L181) 1,1 [https://perma.cc/D6V3-S2W6].

[92] *Id*. art. 1(2) at 2. ("[S]hark fins…shall not be removed from the carcass before landing.").

[93] D.S. Shiffman & N. Hammerschlag, *Shark Conservation and Management Policy: A Review and Primer for Non-specialists*, 19 ANIMAL CONSERVATION 401, 403 (2016).

Spain and Portugal, however, issued a joint declaration deploring the adoption of the amended Regulation.[94] Those countries, having a strong economic interest in the shark market,[95] argued that the fins-attached policy is not the solution to the problem of sharks extinction, since it does not affect the finning activity of extra-EU vessels and damages exclusively the economic gains of EU vessels.

The European Commission, in its report of April 15, 2016, noted that, in light of the State reports submitted according to Article 6 of the amended Regulation, only few States continue to practice large-scale shark fisheries.[96] Seven States reported huge landings of shark carcasses in 2013: Spain 61,572 tonnes, France 16,085 tonnes, Portugal 8,218 tonnes, Ireland 1,367 tonnes and the United Kingdom 289 tonnes (in the face of 8,572 number of landings and 14,313 tonnes in 2014). [97] Spain and Portugal continue to have the highest ratios of

[94] Council of the European Union 9692/1/13, Joint Declaration of Spain and Portugal (June 4, 2013) [https://perma.cc/ZH9Q-6KPP].

[95] SHARK ALLIANCE, EU SHARK CONSERVATION: RECENT PROGRESS AND PRIORITIES FOR ACTION 1 (n.d), http://eulasmo.org/wpcontent/uploads/2016/09/EU_Shark_Conservation_Recent_Progress_Priorities_Action.pdf, [https://perma.cc/ZH9Q-6KPP].

[96] Report from the Commission to the European Parliament and the Council on the Operation of Council Regulation (EC) No 1185/2003 on the Removal of Fins of Sharks on Board Vessels, as Amended by Regulation (EU) No 605/2013, and on the International Developments in this Field, at 4, COM (2016) 207 final (Apr. 15, 2016).

[97] Annex to the Report to the European parliament and to the Council on the Operations of Council Regulation (EC) 1185/20003 on the Removal of Fins of Sharks on-board Vessels, as Amended by Regulation (EU) 605/ 2013, and on the International Developments in this

volumes per landing (in particular, blue shark).[98] States such as Finland and Sweden have adopted specific policies against catching, retaining on-board, trans-shipping or landing sharks. Cases of by-caught sharks have been for instance recorded by Ireland, while France communicated that on 480 inspections carried out by the French authorities in the Martinica (Fort-de-France), only one case of violation of the shark finning on-board ban was found.[99] The report highlights that the practice of shark fishing and finning is yet practiced by few EU Member States, such as Spain, Portugal, France and the United Kingdom.

Since shark finning is not completely banned by the European Union, TACs and quotas acquire a significant role in determining which species of sharks can still be caught, and which are instead protected by EU law.

B. Rules on shark fishing

The European Commission's Action plan for the Conservation and Management of Sharks of February 5, 2009, which requests sustainable fishing of sharks and a proper regulation of by-catching,[100] is the key document that inspires the EU policy concerning sustainable shark fisheries.

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field, at 4, COM (2016) 207 Annex 1 (Apr. 15, 2016), http://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM:2016:207:FIN.

[98] In 2014 Spain reported 32,082 shark landings, which amounts to 59,251 tonnes.

[99] This is displayed in Table 2 of the Annex to the Report to the European parliament.

[100] Communication from the Commission to the European Parliament and the Council on a European Community Action Plan for the Conservation and Management of Sharks, COM (2009) 40 final (Feb. 5, 2009) [https://perma.cc/YK2B-EYQV].

A special protection is now provided by EU legislation with regard to deep-sea sharks, such as the greenland shark (*Somniosus microcephalus*) or the black dogfish (*Centroscyllium fabricii).* This safeguard is included within records requirements of fishing below 400 meters.[101] Moreover, Regulation (EC) No. 2347/2002 establishes specific access requirements and associated conditions applicable to fishing for deep-sea stocks, including a wide range of deep-water sharks.[102] Regulation No 1367/2014 recognizes that the main commercial species of deep sea sharks "are considered depleted and, therefore, *no directed fishing* should take place."[103]

Regulation (EU) No. 2015/104 observes that for certain species of sharks, even a limited fishing activity can result in a serious risk to their conservation; therefore "it is appropriate to prohibit the fishing of those species in the areas concerned." [104]

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[101] Proposal for a Regulation of the European Parliament and of the Council establishing specific conditions to fishing for deep-sea stocks in the North-East Atlantic and provisions for fishing in international waters of the North-East Atlantic and repealing Regulation (EC) No 2347/2002, at 16-17, COM (2012) 371 final (July 19, 2012).

[102] Council Regulation 2347/2002 of 16 Dec. 2002 establishing specific access requirements and associated conditions applicable to fishing for deep-sea stocks, Annex 1, 2002 O.J. (L 351) 6, 9 (EC).

[103] the fishing opportunities for Union fishing vessels for certain deep-sea fish stocks, Preamble (8), 2014 O.J. (L 366) 1, 2 (EU) (Dec. 15, 2014) (fixing 2015 and 2016).

[104] The Council Regulation 2015/104 of 19 January 2015 fixing for 2015 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union vessels, in certain non-Union waters, amending Regulation (EU) No 43/2014 and repealing Regulation (EU) No 779/2014, Preamble (6), 2015 O.J. (L 22) 1, 2 (EC).

In general terms, Article 12 ("Prohibitions") of Regulation (EU) No. 2017/127[105] provides a total ban of fishing, retaining on board, trans-shipping or landing of several shark species, such as white shark, basking shark, porgeable, reef manta ray and giant manta ray.[106] Therefore, EU vessels operating in EU waters, as well as outside EU waters, are absolutely prohibited from fishing those species and shall promptly release accidentally caught specimens (article 12, Para. 2).[107]

A partial ban (fishing ban is limited to EU waters) concerns the angel shark and the picked dogfish. For other species, such as starry ray, leafscale, gulper shark and portuguese dogfish, the Regulation provided a partial ban in the sense that fishing is allowed only in specific areas of the sea.

However, there are still no catch limits for more common and more exploited shark species, such as blue sharks, makos, smoothhounds and catsharks.

VI. CONCLUSIONS

[105] Council Regulation 2017/127 of 20 January 2017 fixing for 2017 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters, art. 12(1)(b),(e),(l)-(n) 2017 O.J. (L 24) 1, 13-14 (EU).

[106] *Id*. art. 12(m)-(n) at 14. (Several species of mobula rays (devil fish, lesser guinean devil ray, spinetail mobula; smoothtail mobula; longhorned mobula; munk's devil ray; chilean devil ray; shortfin devil ray; lesser devil ray) and of sawfish (pristidae, narrow sawfish; dwarf sawfish; smalltooth sawfish; largetooth sawfish; green sawfish) are also protected under this Regulation. *See also Id*. at art. 12(o)-(p) at 14-15.

[107] Art. 12, para. 2, states "2. When accidentally caught, species referred to in paragraph 1 shall not be harmed. Specimens shall be promptly released.".

Sharks, as well as other fish stocks, are engaged in a "race to extinction" due to unsustainable fishing (overfishing, by-catch, illegal, unregulated and unreported fishing, the destruction of the maritime habitats). Finning is only one of the threats to sharks' survival.

The EU opted for a fishing policy which aims at sustainable fishing of sharks at a level that does not imperil the survival of specific populations. To this aim, it adopted a FNA policy[108] and at the same time it banned the finning of some shark species.[109]

Therefore, we should ask ourselves whether a fins-attached policy, already adopted by several States, such as Australia, Canada and the United States, is the solution to the extinction of sharks. Probably not, since the main problem relies in the nature of shark fins policies. The issue is not to discuss whether a fins-attached policy is more efficient in shark conservation than a fin to carcass ratio: of course it is. The key question is that the policies discussed only regulate *how* sharks are killed and finned, rather than establishing a *general ban* of shark fishing. The total amount of sharks and the species that can be caught are, indeed, determined by the annual TACs and quotas established by RFMOs and the EU.

Accordingly, a fins-attached policy alone is not enough: additional safeguards must be provided by fisheries management law, for instance banning the fishing of those sharks mostly at risk of extinction and establishing the duty of immediate release of the accidentally caught

[108] *Id*.; Commission Regulation 605/2013 of June 12, 2013, Amending Council Regulation (EC) no. 1185/2003 on the Removal of Fins of Sharks On Board Vessels.

[109] *Id*., Council Regulation 2017/127 fixing for 2017 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters.

shark. These safeguards are already provided by Regulation N. 127/2017,[110] but the number of shark species protected is still too low.

However, the EU, with the option for an FNA policy confirms its particular attention to animal welfare. This principle, codified in Article 13 of the TFEU, is at the basis of several bans concerning marine goods, ranging from the importation of seals products into the EU, to the prohibition of whaling. However, the fact that the EU policy on shark finning and the EU policy on farm animals and lab animals is based on a welfare approach ('New Welfarism'),[111] can be considered as a weakness. Indeed, this philosophical view does not intend to discuss the legitimacy of human exploitation of animals, unlike the animal rights perspective, which instead focuses on the abolition rather than the regulation of animal use.[112] Therefore the EU policy does not challenge the bottom of the issue, represented by shark fishing, which is not entirely banned.

[110] For instance, Regulation 2017/217 prohibits retaining on board, transhipping or landing any part or whole carcass of bigeye thresher sharks (Article 18, Para. 1), of hammerhead shark (Article 18, Para. 3) and of oceanic whitetip sharks (Article 18, Para. 4), directed fishery for species of thresher sharks (Article 18, Para. 2) and Retaining on board silky sharks (Article 18, Para. 5).

[111] New Welfarism, a term critically coined first by GARY L. FRANCIONE in RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT (1996), is an evolution and a crossing of the classic welfare concept and tries to conciliate the animal rights and the animal welfare positions.

[112] On animal welfare theories, GARY L. FRANCIONE, ANNA CHARLTON, ANIMAL RIGHTS: THE ABOLITIONIST APPROACH, (2015).

The next steps by the EU should move towards a general prohibition addressed to EU countries (in particular Spain and Portugal) to sell shark fins to China, and the enlargement of the number of shark species for which fishing is prohibited, embracing hence some stances of the abolitionist view on the animal issue. These measures would put the EU and its Member States in line with the 14th Sustainable Development Goal "Life Below Water", which requests States to end overfishing, to ban destructive fishing practices and to restore fish stocks.[113]

In this regards, as argued by Guggisberg, CITES as the most important global treaty regime dealing with trade in endangered species – included sharks listed in Appendix I – can be the most important legal tool to avoid shark fins trade towards the Asian markets.[114] In this regard, an adequate interplay between wildlife law and fisheries management law is the key ('inter-regime linkages', a term coined by Young to address the "interplay among distinguishable, institutional arrangements").[115] In practical terms, fishing and not only trading of species protected by annexes of conservation treaties must be forbidden. In this sense wildlife law (i.e. CITES enforcement measures) can be a useful tool to address gaps and complement the fisheries regime with regard to IUU fishing.

There are other emerging issues. Given the migratory nature of sharks, an adequate and efficient cooperation between States is the only solution. Unilateral or domestic measures are inadequate. States should promote a global ban on shark finning and isolate shark meat

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[113] Welcome to the United Nations, SUSTAINABLE DEVELOPMENT GOALS: 17 GOALS TO TRANSFORM OUR WORLD, *Goal 14: Conserve and sustainably use the oceans, seas, and marine resources*, http://www.un.org/sustainabledevelopment/oceans/.

[114] Guggisberg, *supra* note 72, at 223.

[115] Oran R. Young, Institutional Linkages in International Society: Polar Perspectives, 2 GLOBAL GOVERNANCE, 1-24, at 2 (1996).

exporters and importers, and this can only be realized at the regional or sub-regional level through the normative power of RFMOs. Sharks, in particular, should be included within the scope of the future treaty on conservation and sustainable use of ocean resources, entirely banning shark fishing at the high seas.