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An International SOS (Save Our Sharks): How the International Legal Framework Should Be Used to Save Our Sharks

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AN INTERNATIONAL SOS (SAVE OUR SHARKS): HOW THE INTERNATIONAL LEGAL FRAMEWORK SHOULD BE USED TO SAVE OUR SHARKS

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ABSTRACT

The purpose of this Article is to shed light on the plight on sharks in international and domestic waters. An estimated 100 million sharks are killed every year. The cruel and wasteful practice of shark finning is responsible for a large portion of those killings. Shark fins are the most valuable part of the shark, because they are used as the key ingredient – and namesake – in an Asian delicacy known as "shark fin soup." This Article opens with background information on the dire situation sharks are facing in our oceans, and how the depletion of these top predators from the oceans has a drastic effect on the delicate balance of the marine ecosystem. Next, the Article examines on approaches to curb shark finning taken by the United States, European Union, and China and Hong Kong. Then the Article moves to a focus on the international legal framework for protecting sharks, specifically focusing on the United Nations Convention on the Law of the Seas (UNCLOS) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). This Article concludes with an analysis of how the current legal framework is insufficient to provide the necessary protection for sharks and examines what more can be done.

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I. INTRODUCTION

Humans have a love-hate relationship with sharks. Steven Spielberg's 1975 classic *Jaws*[2] had people around the world afraid to go into the water for years. Today, sharks are still trying to shake the image of being the cold-blooded killers they were portrayed to be in the movie. However, sharks have found some reprieve, most noticeably on the Discovery Channel's Shark Week, which is seen by millions of viewers in seventy-two countries.[3] Many people have a fascination with

[2] *Jaws*, INTERNET MOVIE DATABASE, http://www.imdb.com/title/tt0073195/?ref_=nv_sr_1 (last visited Nov. 29, 2013).

[3] *See* Ashley Fetters, *The Evolution of Shark Week, Pop-Culture Leviathan*, THE ATLANTIC (Aug. 13, 2012, 1:02 PM), *available at* http://www.theatlantic.com/entertainment/archive/2012/08/the-evolution-of-shark-week-pop-culture-leviathan/261063/.

sharks - whether based on fear, admiration, or a combination of the two. Unfortunately, it seems increasingly-too-likely that one day, we may see a world where many shark species no longer exist.

Shark populations are plummeting and a major culprit of this is a cruel process known as shark finning. Shark finning is a process that allows fisherman to maximize space on their vessels by slicing off the fins of sharks and disposing of the remainder of its body back into the ocean. The result has had devastating effects on the marine ecosystem, and will likely continue to burden the marine ecosystem until something is done to curb the practice. However, at this time sharks do not have any international protection. Section II of this Article will address the delicate marine ecosystem and the disastrous effects that occur when that ecosystem's top predator is taken out of the equation. Additionally the section will describe shark finning in detail from the process itself to the motivation behind engaging in the cruel act of shark finning. Section III will then go on to assess some of the domestic approaches that have been taken to combat this cruel practice and the consumption of shark fin soup. This section will examine the different approaches taken by the United States, the European Union, and the People's Republic of China, and how these country's respective approaches have evolved over time. Section IV, will examine the international protections for sharks or the lack thereof, and discuss the various obstacles that countries face in orchestrating protection on an international level. Finally, Section V will conclude this article by demonstrating that the current status quo provides insufficient protection for sharks, and that if changes are not made, the current system could result in catastrophic effects on the sharks and the marine ecosystem. Ultimately, this would adversely affect the humans whose livelihoods and diets depend on the ocean.

This Article is not meant to criticize Asian cultural practices, or even to demand that shark fin soup should be banned. People around the world have the absolute right to honor their culture as they see fit, and food is a cornerstone to nearly all cultures. However, cultures must be observed in ways that

does not negatively impose itself on the rest of the world, including the environment and those who depend on the environment in order to survive. This Article seeks only to find a way to ensure that sharks are fished responsibly. Responsible fishing means two things: first, that the process is not cruel or unnecessarily painful to the shark; second, that sharks are fished only to the extent in which their populations can support. The ocean is indeed vast, and it would be an illogical exaggeration to say that the only appropriate amount of shark fishing is no shark fishing. Such an unwavering stance is dangerous because meaningful change will only come if differences of opinion can be bridged through comprise.

II. SHARK FINNING

It has been well-documented that the ocean accounts for over seventy percent of Earth's surface area,[4] but underneath the ocean's surface lies a world which is largely unknown to humans. The ocean is home to ninety-nine percent of Earth's living species,[5] and humans have only explored a small fraction of the ocean.[6] With so much of the ocean unexplored, it is almost impossible for humans to know the damage their actions can produce. The ocean is a delicate ecosystem that requires balance; and such balance is produced only when all of its species depend on one another. Sharks have been a staple of the ocean for over 400 million years, long before dinosaurs walked the earth.[7] In recent years, however, shark populations have plummeted, with many shark species populations being estimated at less than ten percent of their original levels.[8] This

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[4] *Ocean Facts*, SAVE THE SEAS, http://www.savetheseas.org/STS%20ocean_facts.htm (last visited Nov. 29, 2013).

[5] *Id.*

[6] *Id.* (stating that roughly ten percent of the ocean has been explored by humans)

[7] The Ocean Portal Team, *Great White Shark*, SMITHSONIAN NATIONAL MUSEUM OF NATURAL HISTORY, http://ocean.si.edu/great-white-shark (last visited Nov. 27, 2013).

[8] Douglas Rader, *Why the World Needs More Sharks*, ENVIRONMENTAL

drop in shark population effects more that just the shark species, it threatens the stability of the entire marine ecosystem.[9]

Sharks are the ocean's top predator. As such, the shark population has a dramatic affect on the rest of the marine ecosystem. Douglas Rader illustrates the ripple effect:

> One example of that process is the rise in populations of certain rays – key shark prey – in regions where shark populations have declined. If there are too many bottom feeding rays, that may threaten seagrass beds and the shellfish that inhabit them. Those seagrass beds also serve as nurseries for many other species. So losing sharks may seriously degrade marine ecosystems, which could threaten the human fisheries tied to them.[10]

The drop in shark populations allows their prey to flourish. While that may not initially sound so bad, it can lead to devastating results.

There is no single culprit to blame for the plummeting shark populations. Pollution, habitat destruction, and sport fishing are just a few of the myriad of factors that have hastened the rate of depletion. However, one major activity has caused significantly devastating effects on shark populations, and that is a process known as shark finning. Shark finning is the process of catching and removing the fins of sharks at sea; and the remainder of the shark's body is thrown back into the ocean. Often times, the shark is still alive when its body is discarded into the ocean. Without their fins, the shark is unable to swim. As a result, the sharks drown and die by suffocation. Fishermen engage in this cruel practice because the fins are the only part of the shark with substantial value. Transporting only the fins allows for storage space onboard fishing vessels to be maximized, since the body holds little or no value. Shark finning enables commercial fishermen to kill hundreds, if not thousands, of sharks on a single expedition. A report by the In-

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DEFENSE FUND (Apr. 11, 2013), http://www.edf.org/blog/2013/04/11/why-world-needs-more-sharks.

[9] *Education - Shark Finning Facts*, SHARKWATER, http://www.sharkwater.com/education.htm (last visited Nov. 29, 2013).

[10] Rader, *supra* note 8.

ternational Union for the Conservation of Nature estimates that thirty-two percent of open ocean shark species are in danger of becoming extinct primarily because of overfishing.[11]

Shark fins are the key ingredient in an Asian delicacy known as shark fin soup. Ironically, the shark fin itself has little taste and the soup has to be flavored with other ingredients, such as chicken stock.[12] The shark fin is mainly used to provide texture to the soup.[13] The delicacy is very popular at banquets and weddings, as a sign of affluence.[14] A serving of shark fin soup can cost $100 per bowl.[15] In Hong Kong, high-end restaurants can charge $1,000 for premium shark fin.[16] Although shark fin soup is generally regarded as a status symbol for the wealthy, proponents cite health benefits from shark fins, claiming it is good for bones, kidneys and lungs and helps treat cancer.[17] While the practice of shark finning is not new, its devastating effects have been recently magnified. The vast majority of shark fin soup is consumed in China and Hong Kong. The economic emergence of China has brought about a rapidly increasing number of upper-class consumers in China. The growing population of the Chinese upper class has gone hand-in-hand with the increased consumption of shark fin soup. The increased demand has led to the overfishing of many species of sharks, causing devastating population decline.

Shark populations are particularly vulnerable to overfishing because of their long gestation period. Additionally, sharks "grow slowly, mature late, produce few young and have

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[11] Audrey McAvoy, *Hawaii Bans Shark Fins: First State in Nation to Do So*, HUFFINGTON POST (June 2,, 2010, 4:04 PM), *available at* http://www.huffingtonpost.com/2010/06/02/hawaii-bans-shark-fins-fi_n_598231.html.

[12] *Shark Fin Soup - what's the scoop?*, STOP SHARK FINNING, http://www.stopsharkfinning.net/shark-fin-soup-whats-the-scoop/ (last visited Jun. 20, 2015) (hereinafter *Shark Fin Soup*).

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] McAvoy, *supra* note 11.

[17] *Id*.

low rates of population increase."[18] In other words, sharks tend to be pregnant for long periods of time, they have only one offspring per pregnancy; and shark mothers also nurture their shark pups for extended periods of time. Sharks also tend to have long life expectancies, depending on the species, it can take anywhere between seven to twenty years for them to reach maturity.[19] This makes overfishing even more devastating to shark populations, because they do not have the physical ability to reproduce and replenish their lost population.

Given the amount of population depletion that has already occurred and the difficulties in replenishing shark populations, it is essential that the international community act now to reverse the trend and implement meaningful international laws banning the process of shark finning to protect the global shark population. Unfortunately, the ocean is particularly vulnerable to a phenomenon known as the tragedy of the commons. The idea behind the tragedy of the commons stemmed from feudal England, and is rooted in a basic concept: before the enclosure movements in England, tenants would share a common parcel of land upon which their livestock could graze. Since everyone shared this parcel, no one took responsibility for the parcel, and no one had a problem adding one more sheep to graze upon the common because, after all, it was the common property for everyone. Over time, the parcel became overgrazed and could no longer support the livestock, therefore everyone suffered. However, when the parcel was divided and closed off - with one individual or one family being responsible for each smaller parcel, and their livestock being limited to only their respective section of the parcel - the parcel flourished, because tenants were forced to act responsibly toward their parcel of land.[20] This is an essential problem with shark fin-

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[18] INTERNATIONAL UNION FOR CONSERVATION OF NATURE, WILDLIFE IN A CHANGING WORLD: AN ANALYSIS OF THE 2008 IUCN RED LIST OF THREATENED SPECIES 56 (Jean-Christophe Vié, Craig Hilton-Taylor & Simon N. Stuart eds., 2009), *available at* http://cmsdata.iucn.org/downloads/wildlife_in_a_changing_world_1.pdf.

[19] *Shark Fin Soup, supra* note 12.

[20] *See* Garrett Hardin, *Tragedy of the Commons*, LIBRARY OF ECONOMICS AND

ning in its current state. The ocean is vast and plentiful, but it is not an inexhaustible resource. When everyone feels they are justified to take more than their fair share, the results become tragic.

III. THE UNITED STATES', EUROPEAN UNION'S, AND CHINA'S APPROACHES

One major way to curb shark finning is for States to enact domestic legislations banning the process in its territorial waters. A coastal state has exclusive control over the fishing that occurs with a 200-mile radius surrounding its coastline; this is referred to as the exclusive economic zone. The United States and European Union have both tackled the issue of shark finning head on in recent years, by limiting or prohibiting shark finning within that 200-mile zone. Not surprisingly, the same success has not been had in China, which is responsible for the bulk of the shark fin consumption. However, there has been some modest, recent success with curving shark fin demand in China, partially due to Chinese domestic legislation. This article will evaluate these various approaches in turn.

A. UNCLOS and the Exclusive Economic Zone

The 1958 Geneva Convention on the Law of the Seas ("Geneva Convention") was the major original piece of international legislation regulating the ocean. Throughout history, the oceans had been seen as subject to the freedom of the seas doctrine. The belief was that, subject to exception for a narrow strip of sea off a State's coast, the seas should be open to anyone for fishing, exploration, or research. The Geneva Convention set the territorial limits for a State's claim over its coastal waters: the first three nautical miles off the coast line was considered the territorial sea. The zone derived from the "cannon shot" rule, which was that a cannon could generally be shot for a distance of three miles; therefore it was logical to allow a

LIBERTY, http://www.econlib.org/library/Enc/TragedyoftheCommons.html (last visited Nov. 30, 2013).

State complete sovereignty over that distance of its coastal waters.[21] The next six nautical miles were the contiguous zone. Past nine nautical miles (i.e., the end of the contiguous zone) was considered the high seas. In 1945 former American President Harry S. Truman initiated the concept of a zone of jurisdiction beyond the contiguous zone, when he issued a proclamation asserting the right to explore and exploit the Gulf of Mexico.[22] By 1982, it became custom for coastal States to routinely assert a twelve nautical mile territorial sea, twenty-four nautical mile contiguous zone, and 200 nautical mile economic zone.[23]

Today, the United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention") codifies the sea zone to which each coastal state is entitled.[24] The first twelve nautical miles - extending from the shoreline to the sea - are considered the territorial waters. "The sovereignty of a coastal State extends, beyond its land territory and internal waters . . . to an adjacent belt of sea, described as the territorial sea."[25] Within that zone, states have complete sovereignty over the activity they allow or disallow, subject only to the UNCLOS itself, and other rules of international law.[26] The next twelve nautical miles are called the contiguous zone. In this area, the coastal state continues to exercise some, but limited, sovereignty over the sea. The real work of UNCLOS was to establish the final sea zone of jurisdiction, known as the exclusive economic zone ("EEZ"). The EEZ extends for 200 nautical miles off of the coastline.

Within the EEZ, "[t]he coastal State shall determine the

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[21] *Law of the Sea: History of the Maritime Zones Under International Law*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN.: OFFICE OF COAST SURVEY, http://www.nauticalcharts.noaa.gov/staff/law_of_sea.html. (last visited [Date])

[22] *Id.*

[23] *Id.*

[24] *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

[25] *Id.* at art. 2(1).

[26] *Id.* at art. 2(3).

allowable catch of the living resources . . . ."[27] The coastal State is responsible for ensuring proper conservation and management of the living resources in it by taking into account the best scientific evidence available to it.[28] The Convention requires the coastal State to protect against over-exploitation, and to engage "competent international organizations, whether subregional, regional or global" in order to further this end.[29] UNCLOS unambiguously imposes a duty on coastal States to responsibly manage the living resources within its waters. However, minimal emphasis is placed on what constitutes meaningful regulation, or how to determine if a State is failing to adequately manage its living resources.

This conundrum presents the first problem with getting China to curtail the practice of shark finning. First, the Convention makes no mention whatsoever to fishing processes so it can be reasonably deduced that "finning" (i.e., catching the shark, removing its fins, and then throwing the body of back into the sea) is not forbidden under the Convention. Second, the Convention seems to leave it entirely up to the coastal State to determine how it defines "over-exploitation" or even how the State determines whether a species has indeed been over-exploited. Without any meaningful guidance, it seems that Article 61(2) could be meaningless. If real meaning was imputed into Article 61(2), then offending coastal States could be held accountable for their breaches. If it were indeed found, based on objective scientific evidence, that China was violating their Convention obligations by allowing the overfishing of sharks, then theoretically the international community would have standing to force China (or any State) to comply with its Convention obligations.

A uniform and harmonized interpretation of UNCLOS Article 61(2) should be established in order to ensure that coastal States are acting consistently with their treaty obligations. It is especially important because this is a situation

[27] *Id.* at art. 61(1).
[28] *Id.* at art. 61(2).
[29] *Id.*

where States have an extremely enticing incentive to act in opposition to their obligations. The EEZ contains an abundance of sea life, most notably the fish and species which humans have an economic interest in. The majority of these species live the entirety of their lives within 200 miles of the coast. One notable exception is highly migratory species, such as tunas, swordfish, billfish, and, yes, sharks.[30] These species will migrate long distances over the course of the year (usually from one State's EEZ to another State's EEZ), and have special management needs, requiring both domestic law and international cooperation.[31] For these species, it is paramount that coastal States work together to ensure that one State's actions do not hinder the rights of another State.

B. The United States

In many ways, the United States led the way in banning shark finning.[32] In December of 2000, President Clinton signed into law the Shark Finning Prohibition Act of 2000 ("SFPA").[33] The SFPA amended the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act") and was the first major effort by the United States to curb shark finning in United States waters.[34] Section 3 of the SFPA prohibits "any person under U.S. jurisdiction from: (i) engaging in the finning of sharks; (ii) possessing shark fins aboard a fishing vessel without the corresponding carcass; and (iii) landing shark fins

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[30] *Atlantic Highly Migratory Species Management Division*, NOAA FISHERIES: OFFICE OF SUSTAINABLE FISHERIES, http://www.nmfs.noaa.gov/sfa/hms.

[31] *Introduction to the Highly Migratory Species Management Division*, NOAA FISHERIES: OFFICE OF SUSTAINABLE FISHERIES, http://www.nmfs.noaa.gov/sfa/hms/intro_HMS.htm.

[32] *A Closer Look at Shark Conservation*, NOAA FISHERIES: OFFICE OF SUSTAINABLE FISHERIES, http://www.nmfs.noaa.gov/stories/2012/08/08_13_12new_shark_week_splash_page.html.

[33] *Reports to the Congress*, NOAA FISHERIES: OFFICE OF INTERNAL AFFAIRS, http://www.nmfs.noaa.gov/ia/intlbycatch/rpts_shark_finning.htm.

[34] *Reports to the Congress*, NOAA FISHERIES: OFFICE OF INTERNAL AFFAIRS, http://www.nmfs.noaa.gov/ia/intlbycatch/rpts_shark_finning.htm.

without the corresponding carcass." The SFPA prohibition applies to vessels in U.S. waters and on U.S.-flagged vessels internationally, thus making it an extremely far-reaching ban on shark finning.

In *United States v. Approximately 64,695 Pounds of Shark Fins* the Ninth Circuit found that the seizure of 64,695 pounds of shark fins by the U.S. government from a U.S. flagged vessel violated the due process rights of the Claimant, Tai Loong Hong Marine Products, Ltd. ("TLH").[35] In the case, the *King Diamond II* ("*KD II*") was a U.S. registered ship, chartered by TLH for the purpose of purchasing shark fins from foreign vessels in international waters, and transporting them to Guatemala for transfer to TLH.[36] The Court found that the vessel, while originally registered with a "Fishery" endorsement, had been reregistered with a "Registry" endorsement, which allowed it to engage in foreign trade at sea.[37] The text of the SFPA, however, while making it a blatant offense to remove shark fins at sea or land shark fins without the corresponding carcass, only made "custody, control, or possession of any such fin" illegal when onboard a "fishing vessel."[38] Since the *KD II* was not deemed to be a "fishing vessel," the court found that TLH did not have proper notice, and thus the seizure of its property was a due process violation.[39]

Over a decade after the SFPA was introduced, the Shark Conservation Act ("SCA") was established to close the loopholes that existed under the SFPA. most notably, the loophole pointed out in *Approximately 64,695 Pounds of Shark Fins* which allowed vessels to carry fins which were caught by another vessel. Subsection (iii) having been added in 2011 specifically to close the loophole. The Magnus-Stevens Act now reads, in pertinent part, that it is unlawful for any person:

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[35] United States v. Approximately 64, 695 Pounds of Shark Fins, 520 F.3d 976, 977 (2008).

[36] *Id.*

[37] *Id*. at 978.

[38] *Id.*

[39] *Id*. at 979.

> (i) to remove any of the fins of a shark (including the tail) at sea;
>
> (ii) to have custody, control, or possession of any such fin aboard a fishing vessel unless it is naturally attached to the corresponding carcass;
>
> (iii) to transfer any such fin from one vessel to another vessel at sea, or to receive any such fin in such transfer, without the fin naturally attached to the corresponding carcass; or
>
> (iv) to land any such fin that is not naturally attached to the corresponding carcass, or to land any shark carcass without such fins naturally attached.[40]

It is important to note that the federal legislation only applies to the act of shark finning or the possession, custody, or control of shark fins that are not naturally attached to the shark. There is no federal ban on consuming shark fins or federal prohibition against catching sharks and bringing them to shore, where only the fins will be harvested. The legislation is intended to protect the manner in which sharks are fished in U.S. waters or by U.S. vessels abroad, not to eliminate all shark fishing. The legislation is nonetheless an important protection for sharks, not just because it bans the cruel manner in which the fins are obtained, but because it severely reduces the efficiency of shark fishers. Due to onboard storage space limitations, having to bring the entire carcass to land means that the ship would have to make considerably more voyages to obtain the same number of fins that would otherwise be obtained from a single shipment. This in turn creates an additional benefit for sharks: it raises the overhead cost for fishing sharks, which is then passed along to the consumer via a higher retail price, which is outside the price range of many would-be consumers.

Despite shark fins and shark consumption not being illegal under federal law, U.S. states may impose "additional requirements for shark fisheries in state waters."[41] States are al-

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[40] 16 U.S.C. § 1857(1)(P).

[41] *A Closer Look at Shark Conservation*, NOAA FISHERIES: NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, http://www.nmfs.noaa.gov/stories/

so free to enact their own legislation banning the possession, sale, and distribution of shark fins in the jurisdiction, and several have done so. Hawaii led the way, with its 2010 bill that went into effect on July 1, 2011.[42] The legislation, which passed through the House and Senate with broad support, was no small victory in a state that has a 13 percent Chinese population and is dependent on Chinese tourism.[43] Several states have followed suit: Washington (in May 2011), Oregon (June 2011), California (October 2011), Illinois (July 2012), Pennsylvania (August 2012), Delaware (May 2013), and New York (July 2013).[44] Several other states, including Virginia, New Jersey, Maryland, and New York, have also introduced legislation aimed at banning the possession, sale, or distribution of shark fins within their respective jurisdictions.[45] In California, the legislation was met with strong resistance and a tough court battle. Chinatown Neighborhood Association sued California "over claims the state's ban on shark fin sales discriminates against people of Chinese origin for whom the fins are a cultural tradition" and sought a court order declaring the law unconstitutional.[46] In *Chinatown Neighborhood Association v. Brown,* the Ninth Circuit Court of Appeals upheld the denial of the preliminary injunction against enforcement of the legislation, reason-

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2012/08/08_13_12new_shark_week_splash_page.html.

[42] Audrey McAvoy, *Hawaii Bans Shark Fins: First State in Nation to Do So*, HUFFINGTON POST (May 29, 2010, 5:34 PM), http://www.huffingtonpost.com/2010/06/02/hawaii-bans-shark-fins-fi_n_598231.html.

[43] *Id*.

[44] *Losing the Taste for Shark Fins: Our campaign to save a mighty animal*, THE HUMANE SOCIETY OF THE UNITED STATES (May 1, 2013), http://www.humanesociety.org/issues/shark_finning/timelines/shark_fins.html [hereinafter *Losing the Taste*]; *Shark Fin Sale Bill becomes law, May 15, 2013*, SIERRA CLUB (last visited Feb. 21, 2014), http://delaware.sierraclub.org/content/2013-HB41-SHARK; *New York Ends Shark Fin Trade*, OCEANA (July 26, 2013), http://oceana.org/en/news-media/press-center/press-releases/new-york-ends-shark-fin-trade.

[45] *Id*.

[46] *California Shark Fin Sales Ban Challenged in Group's Suit*, BLOOMBERG (July 19, 2012, 12:01 AM), http://www.bloomberg.com/news/2012-07-19/california-shark-fin-sales-ban-challenged-in-group-s-suit.html.

ing that:

> Chinatown failed to show a likelihood of success on its Equal Protection Clause claim. The Shark Fin Law is facially neutral, and Chinatown presented no persuasive evidence indicating that the California legislature's real intent was to discriminate against Chinese Americans rather than to accomplish the Law's stated humanitarian, conservationist, and health goals.[47]

The court went on to deny relief based on Supremacy Clause and Dormant Commerce Clause arguments as well.[48]

Overall, the United States has made significant progress – on both domestic and federal levels – toward protecting this apex predator. In the United States we pride ourselves on our diversity and tolerance. That includes a tolerance of cultural practices that are not considered mainstream. Legislation must balance this consideration with the need to ensure the safety and sustainability of shark fishing.

C. European Union

The European Union passed its own legislation banning shark finning in 2003.[49] The legislation was similar to that already in effect in the United States: it was aimed directly at the practice of "shark finning" and applied both within European Community ("EC")[50] waters and onboard EC vessels.[51]

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[47] Chinatown Neighborhood Ass'n v. Brown, 539 F. App'x 761, 762 (9th Cir. 2013).

[48] *Id.* at 762-73.

[49] Council Regulation (EC) No. 1185/2003 of 26 June 2003, On the Removal of Fins of Sharks on Board Vessels, 2003 O.J. (L 167) 1.

[50] The EC was, at the time, distinguished from the European Union:

> European Community (EC), previously (from 1957 until Nov. 1, 1993) European Economic Community (EEC), byname Common ket, former association designed to integrate the economies of Europe. The term also refers to the "European Communities," which originally comprised the European Economic Community (EEC), the European Coal and Steel Community (ECSC; dissolved in 2002), and the European Atomic Energy Community (Euratom). In 1993 the three communities were subsumed under the European Union (EU). The EC, or Common Market, then became the principal component of the EU. It remained as such until 2009, when the EU legally replaced the EC as

However, the regulation had explicit exceptions written in, allowing for some onboard removal of fins, provided that the aim was "a more efficient use of all shark parts by the separate processing on board of fins and of the remaining parts of the sharks."[52] In order to qualify under this Article 4 exception, the vessel would have to be issued a special fishing permit. The permit was to be issued only to vessels which demonstrated a capacity to use all parts of the shark and where "need for the separate processing on board of shark fins and the remaining parts of the shark has been justified."[53] This exception made the EU's prohibition on shark finning "one of the weakest in the world."[54]

In the decade since Regulation (EC) No 1185/2003 was passed, the EU made steady progress toward closing the loopholes. After several resolutions by the European Parliament calling on strengthening the ban against shark finning, the EU "completed the final step to close loopholes in EU shark finning ban[b]y adopting a 'fins naturally attached' policy without exception . . . ."[55] The amended Regulation deleted Articles 4 and 5, which dealt with exceptions and record-keeping for exceptions, as well as all references to special fishing permits.[56] It

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its institutional successor.

European Community (EC), BRITANNICA (last visited Feb. 21, 2014), http://www.britannica.com/EBchecked/topic/196026/European-Community-EC.

[51] Council Regulation (EC) No. 1185/2003 of 26 June 2003, art. 1, 2003 O.J. (L 167) 2.

[52] Council Regulation (EC) No. 1185/2003 of 26 June 2003, 2003 O.J. (L 167) 1.

[53] Council Regulation (EC) No. 1185/2003 of 26 June 2003, art. 4, 2003 O.J. (L 167) 2.

[54] *Shark Finning and the European Union*, HUMANE SOCIETY INTERNATIONAL (June 29, 2011), http://www.hsi.org/world/europe/work/shark_finning/facts/shark_finning_Europe.html.

[55] *Id.*

[56] Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1185/2003, Brussels (May 23, 2013), *available at* http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=PE%2076%202012%20INIT.

required that all sharks, without exception, be landed with their fins naturally attached, and permitted for only a partial slice to allow for folding and easier storage.[57] This was a huge victory for shark conservationists, as the EU is one of the largest exporters of shark fins to Asia.[58]

Notably, the EU regulation seems to have avoided – from the outset – the loophole that arose in the United States in *Approximately 64,695 Pounds of Shark Fins*. Article 1 of the EU regulation applies to "the removal of shark fins, retention on board, transhipment [sic] and landing of sharks or shark fins . . . by vessels . . . ."[59] By using the broader "vessels" as opposed to the restrictive "fishing vessels" and by explicitly acknowledging "transhipment" it appears the EU insulated itself from a similar Due Process fight.

The EU regulation was opposed by the Portuguese and Spanish delegations.[60] Not surprisingly, both nations have large commercial shark operations. Spain ranks first in the EU and third in the world for average catch of sharks.[61] Even with such an active market for sharks, nearly ninety-five percent of Spanish citizens said they were in favor of measures to protect the endangered species of sharks. This ninety-five percent figure came after survey questions shed some light on the plight of sharks, much of which was not known to the Spanish survey-takers.[62] Less than one-third of those surveyed were

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[57] *Id*. art. 3.

[58] *HSI Applauds Final Step in Agreement to Close Loopholes in EU Shark Finning Ban*, HUMANE SOCIETY INTERNATIONAL (June 6, 2013), http://www.hsi.org/news/press_releases/2013/06/eu_shark_finning_060613.html.

[59] Council Regulation (EC) No. 1185/2003 of 26 June 2003, art. 1, 2003 O.J. (L 167) 2.

[60] Press Release, Luxembourg Council of the European Union, "Shark Finning": The Council Regulates Against the Practice (June 6, 2013), *available at* http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/agricult/137392.pdf.

[61] *Country Profiles: Spain*, SHARK ALLIANCE (last visited Feb. 22, 2014), http://www.sharkalliance.org/country_profile/default.asp?countryid=25&countryname=Spain.

[62] *Spanish Attitudes Towards Sharks*, survey by TNS Demoscopia (Sept.

aware that of the more than 100 species of sharks and rays in European waters, one-third of these species were threatened with extinction.[63] Shockingly, only a little over half of those surveyed understood the important role sharks played in the marine ecosystem due to their role as top predators.[64]

The European legal framework for protecting sharks is very similar to that in the US. Like in the US, cultural differences must be respected. The European Union arguably has an even greater gross to bear on this, because by its very nature the EU is incredibly diverse. Both the EU and the US have extended as much legislative protection to sharks as possible, but both need to step up their enforcement of the legislation to ensure that fishermen are not evading the law. More importantly, the US and EU need an international focus to ensure sharks are protected around the world.

D. China and Hong Kong

China and Hong Kong, as the primary consumers of shark fins and shark fin soup, do not have the legal framework available for protecting sharks against the cruel practice of finning. There is no legislation making the practice of shark finning or possession of unattached fins onboard vessels illegal. Despite this, there have been positive trends in shark fin consumption.

According to the South China Morning Post the Census and Statistics Department of Hong Kong, it has been reported that shark fin imports have reduced from 10,292 tons to 3,087 tons from 2011 to November 2012; over a 70% decline. Additionally, the chairman of the Hong Kong-based Shark Fin Trade Merchants Association told the South China Morning Post "the whole industry has recorded a 50% decrease of sales in the last year . . . mainly due to the omnipresent advocacy by

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2008), *available at* http://www.sharkalliance.org/country_profile/default.asp?countryid=25&countryname=Spain.

[63] *Id.*

[64] *Id.*

green groups."[65] The recent success can be attributed to several sources: (1) Anti-graft legislation out of both China and Hong Kong making shark fin soup illegal at government events; (2) action from conservation and environmental groups; and (3) younger generations with less interest in shark fin soup.

The first reason for the reduced consumption comes from government legislation. The legislation banned shark fin soup at official government banquets and receptions. Initially, the government merely cracked down on shark fin soup, and other extravagant dining and expenses, but in December 2013 the ban was codified into law.[66] The ban was part of President Xi JinPing's crackdown on government corruption in China – not conservation. Nonetheless, initial reports suggest a major impact on the quantity of shark fin soup consumption. It is important to note that the government plays a much more direct role in business in China, with many major companies being completely- or partially-State run. As such, it is very common in China for government officials to attend business banquets hosted by companies seeking to target certain government support. Banquets have historically been one of the most likely events to serve shark fin soup. Of the estimated seventy percent drop in Chinese shark fin consumption since, Zhao Ping, the deputy director of the Department of Consumption Economy Studies at the Chinese Academy of International trade and Economic Cooperation, claimed that as much as fifty percent of that could be related to the government crackdown.[67]

Environmental groups have also had a hand in seeing the drop in both shark fin availability and consumption. A coa-

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[65] *News: Brunei Institutes Asia's First National Shark Fin Ban*, WILDAID (June 7, 2013), http://www.wildaid.org/news/brunei-institutes-asia%E2%80%99s-first-nationwide-shark-fin-ban.

[66] *China Bans Shark-Fin Soup At State Banquets*, HUFFINGTON POST (Dec. 16, 2013, 9:31 ET), http://www.huffingtonpost.com/2013/12/16/china-shark-fin-soup_n_4452897.html [hereinafter *China Bans*].

[67] *China Corruption Crackdown Leads To 70 Percent Drop In Shark Fin Demand*, ECONOMY WATCH (Sept. 2, 2013), http://www.economywatch.com/news/china-corruption-crackdown-drop-shark-fin-demand.03-09.html.

lition of environmental groups, including Greenpeace, Sea Shepherd, and the Humane Society International, engaged in a letter-writing campaign aimed at stopping airlines and shipping lines from carrying shark fins into Hong Kong.[68] The campaign has successfully resulted in a total ban by Qantas and Air New Zealand and, allegedly, an agreement by "two major shipping lines" to no longer carry the product.[69] The groups claim that these efforts have reduced the import of shark fins by as much as thirty percent.[70] As encouraging as this is, if the demand for shark fin soup in China and Hong Kong is high enough, then fishers will find a way to get their goods to market.

Another of the environment and conservation groups' efforts – and perhaps the most effective way to reduce demand long-term – is spreading increased awareness of the cruel and unsustainable practice of shark finning. Celebrities, such as NBA star Yao Ming[71] and local celebrities such as actor Huang Haibo and actress Yang Mi have lent their voices to lead public-awareness campaigns against shark fin consumption. These public campaigns have slowly spread increased awareness. As a combination of a dying trend – likely fueled by the slowing Chinese economy – and conservation backlash, the Asian youth population has a decreased interest in shark fin soup, a promising sign for the future.

Unfortunately, even as significant strides are being made in China and Hong Kong, the two most critical shark fin markets, there is still significant work to be done. In a late 2013 study conducted by The Nature University of over 200 restau-

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[68] Simon Parry, *Shark fin imports to Hong Kong Tumble After Airlines Refuse to Carry Them*, SOUTH CHINA MORNING POST (Sept. 8, 2013, 12:00 AM), *available at* http://www.scmp.com/news/hong-kong/article/1305878/shark-fin-imports-hong-kong-tumble-after-airlines-refuse-carry-them.

[69] *Id*.

[70] *Id*.

[71] *China Bans*, *supra* note 66; *"Bye Bye, Shark Fins! Cycling for Sharks" Event in Beijing Raises Awareness of Cruel Shark Finning*, HUMANE SOCIETY INTERNATIONAL (Aug. 12, 2013), http://www.hsi.org/news/press_releases/2013/08/cycling_for_sharks_china_080813.html.

rants in Beijing, Shanghai and Shenzhen, it was found that seventy-six percent sold shark fin soup.[72] Also disappointing was the fact that of the fifty-two restaurants who were asked follow-up questions, only twenty-one – less than half – knew that many shark populations were at risk. Clearly, there is still much work to be done in China and Hong Kong.

IV. INTERNATIONAL REGULATION TO PROTECT SHARKS

At this time there is very little international protection for sharks, although recent years have seen positive trends in this area as well. Given the problems inherent in the UN Law of the Seas Convention – its vagueness and mandates for self-governance – popular opinion is turning toward the Conventional on International Trade in Endangered Species of Wild Fauna and Flora (CITES) to deal with international fishing issues. CITES' mission is to "ensure that international trade in specimens of wild animals and plants does not threaten their survival."[73]

> CITES is an international agreement to which States (countries) adhere voluntarily. . . . Although CITES is legally binding on the Parties – in other words they have to implement the Convention – it does not take the place of national laws. Rather it provides a framework to be respected by each Party, which has to adopt its own domestic legislation to ensure that CITES is implemented at the national level.[74]

The language of CITES was agreed upon on March 3, 1973.[75] On January 14, 1974, the United States was the first country to ratify the CITES. Eight other countries ratified

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[72] *Majority of China's High-End Restaurants Keep Cruel Shark Fin on Menu, Survey Finds*, HUMANE SOCIETY INTERNATIONAL (Dec. 19, 2013), http://www.hsi.org/news/press_releases/2013/12/china-restaurants-shark-fin-121913.html.

[73] *What is CITES?*, CITES (last visited Feb. 22, 2014), http://www.cites.org/eng/disc/what.php.

[74] *Id*.

[75] *Id*.

CITES in time for its July 1, 1975 entry into force.[76] Today, CITES has been ratified[77] by 180 nations worldwide, most recently Iraq whose accession to the convention occurred on February 5, 2014 (although it will not enter into force in Iraq until May 6, 2014).[78] Notably, China has been a party to CITES since 1981.[79]

A. The CITES Regime

CITES works by subjecting international trade in specimens of selected species to certain controls.[80] A licensing system is used to control imports and exports of certain protected species.[81] Species are subject to three levels of protection depending on where they are indexed: appendix I, appendix II, or appendix III. Appendix I, receiving the greatest level of protection, contains species which are threatened with extinction for which commercial trade is permitted only in exceptional circumstances.[82] Appendix II covers species, which are not yet threatened with extinction but may become extinct without trade controls.[83] Commercial trade is permitted at this level, but the fishery must obtain a permit from the exporting country that certifies the specimens were legally acquired and "will

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[76] In addition to the United States of America, Nigeria, Switzerland, Tunisia, Sweden, Cyprus, Ecuador, Chile, and Uruguay, had ratified CITES in time so that it entered into force in their respective countries on July 1, 1975, the first official day it entered into force as an international agreement. Canada, Mauritius, Nepal, Peru, and Costa Rica had also ratified CITES before July 1, 1975, but had delayed entry into force in their respective nations. *List of Contracting Parties*, CITES (last visited Feb. 22, 2014), http://cites.org/eng/disc/parties/chronolo.php [hereinafter *CITES Contracting Parties*].

[77] "Ratification" is the term some countries use to refer to their formal consent to be bound by a treaty, other nations may refer to it as "accession," "acceptance," "approval," "continuation," or "succession."

[78] *CITES Contracting Parties, supra* note 76.

[79] *Id.*

[80] *How CITES Works*, CITES (last visited Feb. 22, 2014), http://www.cites.org/eng/disc/how.php.

[81] *Id.*

[82] *Id.*

[83] *Id.*

not be detrimental to the survival of the species or its role in the ecosystem."[84] Appendix III covers species "for which a country has asked other CITES Parties to help in controlling international trade."[85] In order to list new species in either Appendix I or Appendix II, a two-thirds vote is required.[86]

Species listed in Appendix I are governed by CITES article III and, not surprisingly, are subject to the most demanding regulation. The export of any Appendix I species requires a "prior grant and presentation of an export permit."[87] An export permit will only be granted under special circumstances and when special conditions are met.[88] First, a Scientific Authority of the State requesting export must determine that the "export will not be detrimental to the survival of that species."[89] Second, a Management Authority of the State must confirm that the specimen was obtained legally under the laws of the State and that its taking is not in violation of any State law established to protect the flora or fauna.[90] Third, the Management Authority "is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment."[91] Finally, an import permit has been granted for the specimen.[92] All four of these provisions must be met for the specimen to be exported.

Similarly, CITES requires an import permit for Appendix I species and sets forth the limited circumstances under which

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[84] *CITES*, NOAA FISHERIES: NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (last visited Feb. 22, 2014), http://www.nmfs.noaa.gov/ia/agreements/global_agreements/cites_page/cites.html.

[85] *Id.*

[86] Convention on International Trade in Endangered Species of Wild Fauna and Flora art. II, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243[hereinafter CITES].

[87] CITES, art. III(2).

[88] *Id.*

[89] CITES, art. III(2)(a).

[90] CITES, art. III(2)(b).

[91] CITES,art. III(2)(c).

[92] CITES, art. III(2)(d).

an import permit may be granted.[93] The Scientific Authority must advise that the "import will be for purposes which are not detrimental to the survival of the species involved" and that the recipient is "suitably equipped to house and care for it."[94] Additionally, the State's Management Authority must be satisfied that the specimen is not being used for primarily commercial purposes.[95]

The import provisions are nearly identical to what must be met in order for a specimen to be introduced to the market. The "introduction from the sea" provisions of article III(5) regulate a species which is obtained domestically, rather than through import. CITES mirrors the import regulation by requiring it not be detrimental to the species, the recipient is suitably equipped, and it is not for a primarily commercial purpose.[96] A separate certificate must be obtained for re-exportation for Appendix I species.[97] The re-export certificate explicitly requires all of the provisions of the import permit be met[98] and to incorporate half of the export provisions (articles III(2)(c) and (d)), to require an import permit be granted[99] and that the specimen is prepared and shipped so as to minimize injury.[100]

Appendix II species are regulated by the less-stringent CITES article IV. For Appendix II species, an import permit is not required. An importer need only present a valid export permit (or re-export certificate) from the exporting State.[101] The export permit requirements for the exporting State are identical to that for Appendix I species, except, of course, for its requirement of an import permit be obtained.[102]

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[93] CITES, art. III(3).
[94] CITES, art. III(3)(a)-(b).
[95] CITES, art. III(3)(c).
[96] CITES, art. III(5)(a)-(b).
[97] CITES art. III(4).
[98] CITES art. III(4)(a).
[99] CITES art. III(4)(c).
[100] CITES art. III(4)(b).
[101] CITES art. IV(4).
[102] CITES art. IV(2)(a)-(c).

Appendix III specimens face the least stringent regulation. Appendix III listings require only a certificate of origin for trade in the species; when the import comes from a State which has listed the species under Appendix III, an export permit must also be presented.[103]

An export certificate can be obtained upon the showing "the specimen was not obtained in contravention of the laws of that State" and that the specimen will be prepared and shipped so as to minimize "injury, damage to health or cruel treatment."[104]

The Sixteenth Meeting of the Conference of the Parties to CITES was a historic and monumental occasion for conservationists and environmentalists. At the annual CITES meetings the Parties "agreed to increase protection for five commercially-exploited species of sharks and manta rays."[105] These species were the requiem shark (Carcharhinidae), three types of hammerhead shark, the Scalloped hammerhead, Great hammerhead, Smooth hammerhead (Sphyrnidae lewini, Sphyrna mokarran, and Sphyrna zygaena), and the porbeagle (Lamna nasus).[106] The entry into effect for these species was delayed by eighteen months, so it will not become law until September 14, 2014.[107]

Enforceability is the most important aspect of any international convention; even the most well-intentioned treaty is useless if Parties cannot be held accountable when they fail to abide by the terms. Enforcement of CITES is left to the Parties.[108] The convention enables parties to take "appropriate

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[103] CITES art. V(3).

[104] CITES art. V(2)(a)-(b).

[105] *Sharks and Manta Rays Receive Protection Under CITES*, NOAA FISHERIES: NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (Mar. 14, 2013), http://www.nmfs.noaa.gov/ia/slider_stories/2013/02/cites_cop16.html.

[106] Notification to the Parties, Convention on International Trade in Endangered Species of Wild Fauna and Flora, Amendments to Appendices I and II of the Convention (Apr. 19, 2013), *available at* http://www.cites.org/sites/default/files/eng/notif/2013/E-Notif-2013-012.pdf.

[107] *Id*.

[108] CITES, *supra* note 86, art. VIII(1).

measures" to "penalize trade in, or possession of, such specimens, or both" and "to provide for the confiscation or return to the State of export of such specimens."[109]

B. Strengths and Weaknesses of CITES

The CITES regime has clearly delineated strengths and weaknesses. A major strength of CITES is the enforceability and the ability for States to inflict real consequences on non-complying States. Because the majority of States are parties to CITES, a huge market (i.e., most of the world) is eliminated for Parties wishing to trade in endangered species. Market measures are often the most effective behavioral deterrent.[110] If there is no money to be made on the trade, then the trade will quickly cease to exist. However, CITES will not be successful in eliminating all markets as there will always be substantial illegal markets. Additionally, the markets are only eliminated (or drastically reduced) when the species gains Appendix I status.

Therein lies a major weakness of CITES. A two-thirds consensus among CITES members must be obtained before a new species can be listed under either Appendix I or Appendix II. That consensus is hard to come by; major fishing nations believe CITES to be an inappropriate tool for managing fisheries.[111] This means that even if a nation were open to increased regulation of a particular marine species, it may well reject any effort to do so through CITES, making the two-third majority particularly onerous. Even if a species can make its way to Appendix I status, a State can adhere to the exceptions and grant permits to continue the fishing.

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[109] CITES at art. VIII(1)(a)-(b).

[110] DARREN S. CALLEY, MARKET DENIAL AND INTERNATIONAL REGULATION: THE TARGETED AND EFFECTIVE USE OF TRADE MEASURES AGAINST THE FLAG OF CONVENIENCE FISHING INDUSTRY 174 (2012).

[111] MARGARET A. YOUNG, TRADING FISH, SAVING FISH: THE INTERACTION BETWEEN REGIMES IN INTERNATIONAL LAW 7 (2011).

V. CONCLUSION

In the battle to protect sharks, there are a few facts which are undeniable. First, too many sharks are being killed each year. Estimates put the number of sharks killed annually to be around 100 million.[112] The data suggests that each year and astonishing one in every fifteen sharks gets killed by fisheries.[113] This is unsustainable. Domestic legislation of the U.S. and EU have both reached about as far as they can. While both the U.S. and EU should increase efforts to enforce the legislation, the real problem lies with the insufficient international framework to protect sharks.

Both the United Nations Convention on the Law of the Seas (UNCLOS) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) are inadequate. The major problem with both conventions is that they require States to patrol themselves and set their own conservation standards for their fisheries. This provides too much latitude to States, which have a significant interest – usually monetary – to maintain lax regulations. The problem extends far past China and shark finning. For example, whaling is big business in Japan, and as such it has been very resistant to enhanced whaling protections.

CITES should only be seen as a good starting point for protecting sharks. The advantage of CITES is that it eliminates some of the ambiguities of UNCLOS. Whereas UNCLOS never mentions any specific species to be protected or any way of clearly defining which should be protected, CITES establishes a bright-line with its Appendices designations. Once listed, States must comply with the permit process in order to engage in trade in the species. This is a clear advantage over UNCLOS. However, as mentioned above, obtaining the pro-

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[112] Megan Gannon, *100 Million Sharks Killed Each Year*, DISCOVERY NEWS (Mar. 5, 2013), http://news.discovery.com/earth/oceans/100-million-sharks-killed-annually-130305.htm. Best estimates put the annual number around 100 million. Data, however, is insufficient and the actual number could be anywhere between 63 million to 273 million per year.

[113] *Id.*

tected Appendices designation is a very tedious process. The designation process should be made objective: abolishing the two-thirds vote requirement and instead basing it on independent science on species sustainability. There is a legitimate fear that member states will withdraw from CITES if they do not get their way. This fear can be alleviated by providing member states with the ability to not trade with non-member States. The pocketbook is the ultimate motivator. If non-member States are not able to sell their goods to the rest of the world, they will quickly find themselves in a very difficult financial situation. The vast majority of shark fins are sold into China and Hong Kong. It may seem as though taking away the rest of the world's markets would be a problem for non-member States wanting to sell shark fins; however, the opposite is actually true because the prohibition should be applied to *all* goods of non-member States. While the shark fin fishermen would be benefitting financially from being able to sell their products into China and Hong Kong, every other industry in the non-member country would suffer at the shark fin fishermen's expense. This in turn would lead businesses to put additional pressure of their government to bring their legislation in line with CITES, forcing the fishermen out of business.

In conclusion, the major downfall of UNCLOS and CITES is their reliance on self-regulation in a world where different countries have vastly different interests. However, all countries have an interest in protecting the seas. In fact, the countries which rely on fishing the most, are in most need of protecting the seas. CITES presents a solid starting point by eliminating some of the uncertainties in UNCLOS. However, in order for CITES to be effective it needs to go further, extending its reach to allow member States to hold non-conforming States accountable in all areas of trade, and thereby inflicting serious financial consequences. When States see a significant financial interest, sharks will be protected.