Shark Finning: A Ban to Change the Tide of Extinction

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Table of Contents

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I. INTRODUCTION

Shark finning is the practice of catching a shark, cutting off one or more of its fins, and throwing the rest of the body back into the ocean—often alive.[1] This practice is controversial because it is wasteful, inhumane, and hazardous to the environment. The United States has responded to this controversy with a series of federal laws aimed at prohibiting domestic shark finning and by taking part in international agreements to conserve sharks. A few states have taken shark conservation into their own hands by enacting all-out bans on the sale and possession of shark fins. However, this scheme is insufficient to meaningfully conserve sharks and set a good example in the global community. The current patchwork of shark fin laws in the United States presents major problems of frustrated intent and effectiveness; in order to avoid potential conflicts with international trade law that could arise from simply banning imports on fins caught in countries without shark conservation measures in place, the United States should adopt a federal ban on all sale and possession of shark fins.

Part II of this Note discusses the background of the issue: the history of shark finning, the problems with the practice, and the significant import and export market for shark fins in the United States. Part III examines the current patchwork of federal laws, state laws, and international agreements pertaining to shark finning in the United States. Part IV discusses the problems with this scheme. Part V examines one solution to the problem — a potential ban on shark fin imports from countries without recognized shark conservation plans under relevant World Trade Organization laws and jurisprudence. Part VI concludes by proposing another solution to the shark finning problem—a federal ban on the shark fin trade—and discussing the positive policy consequences of such a ban.

II. BACKGROUND

Due to the fact that only a small quantity of fin meat can be obtained from a large shark, fins are highly prized and their collection is extremely wasteful. Shark fins are viewed as a precious food in traditional Chinese cuisine. Shark fins are typically harvested for shark fin soup, a delicacy in Chinese culture served at important occasions

1. NAT'L MARINE FISHERIES SERV., U.S. DEP'T. OF COMMERCE, 2010 SHARK FINNING REPORT TO CONGRESS vii (2010) [hereinafter 2010 SHARK FINNING REPORT].

such as weddings and notable dinners.[2] Shark fins have been used as food in China for centuries; their consumption has been documented as far back as the Ming Dynasty (1368–1644), and they have been long considered one of the eight treasured foods of the sea, served at important occasions to denote the host's respect for his or her guests.[3] Indeed, they remain one of the most expensive seafood items in the world, fetching at times more than $1,300 per fin to be made into a soup that can cost up to $100 per bowl.[4]

While the fact that only a small quantity can be obtained from a large shark makes this meat a precious commodity, this feature also makes fin collection a wasteful process.[5] Only two to five percent of the shark itself is used, and fishermen throw the rest of the protein and potential shark product back to the sea.[6] Furthermore, shark finning has caused outcry among animal welfare organizations due to the slow, painful death that sharks endure after their fins are cut off and they are thrown into the ocean to bleed to death or drown.[7]

Demand for shark-fin soup has contributed to a severe depletion of shark stock worldwide; this presents a serious environmental problem.[8] Up to 73 million sharks are killed every year due to this demand.[9] Species of shark typically hunted for shark-fin soup include the sandbar, bull, hammerhead, blacktip, porbeagle, mako, thresher, and blue sharks.[10] Populations of these species, among others, have plummeted in recent decades. hammerhead shark populations, for example, have decreased by as much as eighty percent since the 1970s.[11] The depletion

2. Krista Mahr, *Shark-Fin Soup and the Conservation Challenge*, TIME MAG. (Aug. 9, 2010), http://www.time.com/time/magazine/article/0,9171,2021071,00.html.

3. STEFANIA VANNUCCINI, U.N. FOOD & AGRIC. ORG., SHARK UTILIZATION, MARKETING, AND TRADE 6.2 (1999), *available at* http://www.fao.org/docrep/005/x3690e/x3690e00.htm.

4. John Platt, *Shark fin soup: CITES fails to protect five species of sharks from overfishing and finning*, SCI. AM. (Mar. 25, 2010), http://blogs.scientificamerican.com/extinction-countdown/2010/03/25/shark-fin-soup-cites-fails-to-protect-5-species-of-sharks-from-overfishing-and-finning/.

5. *Id.*

6. IMÈNE MELIANE, INT'L UNION CONSERVATION NATURE, SHARK FINNING 2 (2003), *available at* http://www.uicnmed.org/web2007/CD2003/conten/pdf/shark_FINAL.pdf.

7. *Shark Finning*, HUMANE SOC'Y INT'L, http://www.hsi.org/issues/shark_finning/ (last visited Mar. 20, 2013).

8. Mahr, *supra* note 2.

9. *The Truth About Sharks*, PEW ENV'T GRP., http://www.pewtrusts.org/our_work_report_detail.aspx?id=85899362732 (last visited Mar. 22, 2014).

10. Jessica Spiegel, Note, *Even Jaws Deserves to Keep His Fins: Outlawing Shark Finning Throughout Global Waters*, 24 B.C. INT'L & COMP. L. REV. 409, 413 (2001).

11. PEW ENV'T GRP., *supra* note 9.

of these populations is very harmful to marine ecosystems, as apex predators are necessary to maintain ecological balance.[12] For example, healthy tiger shark populations have been connected to healthy seagrass beds, as they prey on animals that, if overpopulated, can deplete the seagrass to a harmful degree.[13] Compounding problems associated with overexploitation, many shark species reach maturity quite late compared to other animals, grow slowly, and do not have high reproductive rates.[14] Furthermore, these depletion rates are especially problematic in light of the fact that, according to the International Union for the Conservation of Nature, thirty percent of the world's shark species are threatened with extinction, including species of sharks used for shark-fin soup, such as the scalloped hammerhead and the porbeagle.[15]

The United States is a major importer and exporter of shark fins despite the environmental problems associated with their controversial collection.[16] Shark fin imports and exports are a lucrative area of business—2011 imports were valued at approximately $31,000 per metric ton, and exports were valued at nearly $77,000 per metric ton.[17] In 2011, the United States imported approximately 31 metric tons of shark fins.[18] The most important markets (in terms of quantity and value) for shark fins exported from the United States are Hong Kong (by far the leader, importing 29 of the 38 metric tons exported from the U.S. in 2011), China, and Canada.[19] It is possible that the dramatic increase in export value from 2009 to 2010—$49,000 per metric ton in 2009 to $80,000 per metric ton in 2010—could be attributed to the fact that the volume of fins exported from the United States decreased from 77 metric tons in 2009 to 42 metric tons in 2010. This value, however, decreased to

12. HUMANE SOC'Y INT'L, *supra* note 7; *see also Global Shark Conservation*, PEW ENV'T GRP., http://www.pewenvironment.org/campaigns/global-shark-conservation/id/8589941059/ (last visited Mar. 31, 2014)

13. PEW ENV'T GRP., *supra* note 9.

14. 2010 SHARK FINNING REPORT, *supra* note 1, at vi.

15. PEW ENV'T GRP., *supra* note 12; *see also* Convention on International Trade in Endangered Species of Wild Fauna and Flora apps. I–III, Mar. 3, 1973, 993 U.N.T.S. 243 [hereinafter CITES Convention], *available at* http://www.cites.org/eng/app/appendices.php.

16. *See generally* NAT'L MARINE FISHERIES SERV., U.S. DEP'T. OF COMMERCE, 2012 SHARK FINNING REPORT TO CONGRESS (2012) [hereinafter 2012 SHARK FINNING REPORT].

17. *Id.* at 31–32.

18. *Id.* at 30 (12 metric tons of shark fins from China, 15 metric tons from Hong Kong, 24 metric ton from New Zealand, and small amounts from India and Australia).

19. *Id.*

about $77,000 per metric tons in 2011 despite a 4 ton decrease in the amount total exports.[20]

III. PATCHWORK OF STATE AND FEDERAL POLICIES

The United States currently regulates shark finning through a patchwork of laws at different levels of government with varying levels of stated intent, underlying regulation, and enforceability. Federal laws purport strong anti-finning intent yet contain noticeable loopholes and weak regulations. Some states have imposed all-out bans on the sale and possession of shark fins. The National Oceanic and Atmospheric Administration ("NOAA"), the agency in charge of shark fin regulation, subsequently attempted to promulgate a rule to preempt these bans but ultimately retreated due to public outcry. Additionally, the United States is a party to international agreements that promote shark conservation. These agreements are generally voluntary in nature and, as such, major shark finning countries often do not take part, undermining their efficacy.

A. Federal Laws

From their original inception, federal laws relating to shark finning have strong purported anti-finning and conservation intentions. However, their noticeable loopholes and weak supporting regulations, such as minimal requirements imposed upon importers, ultimately result in domestic commerce in hundreds of thousands of dollars' worth of imported and domestically caught shark fins. Shark finning implicates the Magnuson-Stevens Conservation and Management Act (carried into practice by the Shark Conservation Act), the High Seas Driftnet Fishing Moratorium Protection Act, and the Endangered Species Act.

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20. *Id.* at 31. Not all exporting countries necessarily catch and process the shark fins that they export; Indonesia, India, Taiwan, Spain, and Mexico actually catch the most sharks, as reported to Pew Environment Group. *See* Mahr, *supra* note 2. Indeed, while Hong Kong (as reported to the Food and Agriculture Organization of the United Nations) exported 4,919 metric tons of shark fins in 2009, Indonesia reportedly processed the most shark fins in 2009,1,367 metric tons, though Hong Kong did not report their processing statistics from 2004–2009. *See* 2012 SHARK FINNING REPORT, *supra* note 16, at 35. For a more dramatic example, compare India, which processed 1,624 metric tons of shark fins in 2009 but only exported 107 tons. Furthermore, this data supplied to the Food and Agriculture Organization has been voluntarily self-reported by the member countries. As such, at least some trade in shark fins likely goes unreported. *See also* John Platt, *Hong Kong Imported 10 Million Kilograms of Shark Fins Last Year*, SCI. AM. (July 18, 2012), http://blogs.scientificamerican.com/extinction-countdown/2012/07/18/hong-kong-imported-10-million-kilograms-shark-fins/.

Sharks in federal waters are managed under the Magnuson-Stevens Fisheries Conservation and Management Act.[21] Its corresponding regulation is the Shark Conservation Act, which is an outgrowth of the earlier Shark Finning Prohibition Act. The Shark Conservation Act was passed in order to close a loophole that was exploited in the Shark Finning Prohibition Act.

In 2000, President Bill Clinton signed the Shark Finning Prohibition Act into law.[22] Substantively, the Act prohibited fishermen from removing a shark fin and discarding the carcass at sea in waters that fall under U.S. jurisdiction.[23] The Act also made it unlawful to "have custody, control, or possession of any such fin aboard a fishing vessel without the corresponding carcass; or . . . to land any such fin without the corresponding carcass."[24] However, the Shark Finning Prohibition Act allowed fishing vessels to have shark fins on board if the total weight of the fins was less than five percent of the total weight of the shark carcasses on board; in practice, this allowed shark finning to occur but still be lawful, as long as the weight of the fins fell below the five percent restriction.[25]

The Shark Finning Prohibition Act applied only to "fishing vessels", a loophole that was successfully exploited in a 2008 case, *United States v. Approximately 64,796 Pounds of Shark Fins*.[26] This case arose when the government found and seized 64,796 pounds of shark fins on a U.S.-flagged Hong Kong-based vessel that had been ordered by a company called TLH to purchase the fins from other foreign vessels on the high seas and transport them to Guatemala.[27] The Ninth Circuit held in favor of TLH on the grounds that the boat was not a "fishing vessel" under the Shark Finning Prohibition Act, and thus neither the statute nor the regulations provided fair notice that it would be considered a fishing vessel; as such, the court held that making TLH forfeit the shark fins violated due process.[28]

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21. NAT'L MARINE FISHERIES SERV., U.S. DEP'T. OF COMMERCE, 2011 SHARK FINNING REPORT TO CONGRESS vi (2011) [hereinafter 2011 SHARK FINNING REPORT].

22. The stated purpose of the Act was "[t]o amend the Magnuson-Stevens Fishery Conservation and Management Act to eliminate the wasteful and unsportsmanlike practice of shark finning." Shark Finning Prohibition Act of 2000, Pub. L. No. 106-557, 114 Stat. 2772.

23. *Id.*

24. *Id.*

25. 2011 SHARK FINNING REPORT, *supra* note 21, at 2.

26. 520 F.3d 976 (9th Cir. 2008).

27. *Id.* at 977.

28. *Id.* at 983.

Mere weeks after the *Pounds of Shark Fins* decision, President Obama introduced and signed the Shark Conservation Act to close the exploited loophole in the Shark Finning Prohibition Act.[29] The stated purpose of the Act is "[t]o amend the High Seas Driftnet Fishing Moratorium Protection Act and the Magnuson-Stevens Fishery Conservation and Management Act to improve the conservation of sharks."[30] The Shark Conservation Act clearly states that it is illegal for all types of vessels to have shark fins on board unless they are naturally attached to the corresponding shark carcass.[31] Additionally, while the Act does retain the five percent rule from the Shark Finning Prohibition Act, the rule applies only after the sharks have been landed.[32]

The passage of the Shark Conservation Act also amended the High Seas Driftnet Fishing Moratorium Protection Act to include shark conservation measures in the international agreements that the United States negotiates. The Act addresses "the United Nations resolutions and decisions establishing and reaffirming a global moratorium on large-scale driftnet fishing on the high seas" and "prohibits the U.S. from entering into international agreements that would prevent the full implementation of the moratorium"[33] Notably, the definition of illegal, unreported, or unregulated fishing was amended to include fishing activities that violate shark conservation measures.[34] Practically, this means that countries without laws prohibiting shark finning and/or countries whose vessels engage in shark fishing in international waters may be labeled by Congress as engaging in illegal, unreported, or unregulated fishing.[35] This label currently does not have any direct consequences, but will foreseeably shape how the United States government addresses the shark finning problem.

To import shark fins into the United States, dealers must acquire a Highly Migratory Species International Trade Permit under Magnuson-

29. *Shark Conservation Act*, ANIMAL WELFARE INST., http://awionline.org/content/shark-conservation-act (last visited Apr. 4, 2013).

30. Shark and Fishery Conservation Act, Pub. L. No. 111-348, 124 Stat. 3668 (2010).

31. The Shark Conservation Act made it unlawful 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." *Id.*

32. *Id.*

33. High Seas Driftnet Fishing Moratorium Protection Act, 16 U.S.C. §§ 1826d–1826g (2012).

34. 2011 SHARK FINNING REPORT, *supra* note 21, at 2.

35. *Id.*

Stevens.[36] These permits cost $25.00 and require the applicant to fill out a one-page form.[37] However, unlike the trade of other Highly Migratory Species, dealers do not have to report with trade-tracking consignment documents.[38] Indeed, all other Highly Migratory Species imports regulated under the final rule that have been re-exported from another nation are required to have the intermediate importers certification of the original document.[39] Comments to the 2008 final rule indicated that, "Several commenters [sic] stated that shark fin traders could provide valuable information and should be required to report."[40] However, the National Marine Fisheries Service responded that,

> [it] considered additional reporting requirements for shark fin traders . . . but determined that permit requirements alone would be an effective initial step in achieving the rule's objective to further understand the international trade aspects of the industry.[41]

As of 2008, approximately 100 entities export shark fins to the United States.[42]

Shark finning also implicates the Endangered Species Act, which, in addition to protecting domestically listed endangered and threatened species, incorporates the listed species in the Convention for International Trade in Endangered Species ("CITES").[43] The Act can be implicated in at least two scenarios. First, if a fisherman catches a listed shark in U.S. waters, even if he does not remove the fins at sea, he could be liable for a "taking" under the Endangered Species Act.[44] Second, someone who sells fins or fin product from an endangered shark (whether domestically caught or imported) could violate the prohibitions on commercial activity in endangered species.[45]

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36. International Fisheries; Atlantic Highly Migratory Species; International Trade Permit Program, 73 Fed. Reg. 31,380 (June 2, 2008) (to be codified at 50 CFR pts. 300 and 635).

37. *Highly Migratory Species International Trade Permit*, NOAA, https://www.st.nmfs.noaa.gov/hms/hms_guidelines.html (last visited Apr. 4, 2014).

38. International Fisheries; Atlantic Highly Migratory Species; International Trade Permit Program, 73 Fed. Reg. at 31,380.

39. *Id.*

40. *Id.* at 31,381.

41. *Id.*

42. *Id.*

43. Endangered Species Act, 16 U.S.C. §§ 1531–44 (2012).

44. *Id.*

45. *Id.* § 1538 (a)(1).

B. State Laws

Driven by the public concern over shark finning, eight states and three U.S. territories have imposed intrastate restrictions and bans on the sale and possession of shark fins. These bans are more stringent than federal laws, which deal primarily with fishing practices.

In 2010, Hawaii became the first state to pass a shark fin ban. In relevant part, Hawaii's law provides that: "[i]t shall be unlawful for any person to possess, sell, offer for sale, trade, or distribute shark fins."[46] Hawaii's law defines "shark fin" as "the raw or dried fin or tail of a shark."[47] Penalties for violating the ban range from $5,000 to $15,000 for a first offense and a third or subsequent offense carries a maximum $50,000 fine, a year of imprisonment, or both.[48] Subsequent to Hawaii's law, California, Illinois, Maryland, Delaware, Oregon, Washington, New York, American Samoa, Guam, and the Northern Mariana Islands have passed legislation banning the sale, possession, and trade in shark fins.[49]

California's ban, which came into effect in January 2012, is very important to shark protection as Los Angeles and San Francisco have historically been two of the primary ports for shark fin imports to enter the United States.[50] The text of the California law takes a slightly more expansive definition of "shark fin" compared to the Hawaii law by including the "otherwise processed detached tail of an elasmobranch" within the definition.[51]

However, the California ban stirred up controversy as many Chinese-Americans live in the state. In July 2012, Asian-American activist groups filed suit in the United States District Court for the Northern District of California claiming that the ban unconstitutionally discriminates against Chinese-Americans, violates the Commerce Clause, and is preempted by the Federal Magnuson-Stevens Act.[52] Animal welfare and environmental groups such as the Humane Society of the United States, the Asian Pacific American Ocean Harmony

46. HAW. REV. STAT. § 188-40.7(a) (2010).

47. *Id.* § 188-40.7(g).

48. In addition, for the second offense and beyond, Hawaii authorizes the state to seize and forfeit any vessels, equipment, or licenses involved in a shark fin violation. *Id.* § 188-40.7(d)(2), (3).

49. Press Release, Humane Soc'y Int'l, Ill. Becomes Fifth State to Ban Shark Fin Trade (July 1, 2012), *available at* http://www.humanesociety.org/news/press_releases/2012/07/illinois_bans_shark_fin_trade_070112.html.

50. 2011 SHARK FINNING REPORT, *supra* note 21, at 27.

51. CAL. FISH & GAME CODE § 2021 (West 2014).

52. Chinatown Neighborhood Ass'n v. Brown, No. C 12-3759 PJH, 2013 WL 60919 (N.D. Cal. Jan. 2, 2013), *aff'd*, 539 F. App'x 761 (9th Cir. 2013).

Alliance, and the Monterey Bay Aquarium Foundation intervened as defendants to support the ban.[53] In January 2013, the court denied the Chinatown Neighborhood Association's requested injunction on the grounds that their claims would not likely succeed on the merits.[54] Interestingly, before the Ninth Circuit heard an appeal of the case, the United States government filed a tardy amicus brief in support of the plaintiffs' preemption claim.[55] However, in August 2013, the Ninth Circuit upheld the district court's decision, and accordingly, California's ban is still in place.[56]

1. NOAA's Attempt to Preempt State Bans

In May 2013, NOAA, the federal agency charged with carrying out the provisions of the Shark Conservation Act, proposed a regulation to "bring U.S. domestic shark fisheries into compliance with the requirements of the Shark Conservation Act." The regulation would expressly preempt state bans to ensure that "state laws did not restrict the possession of shark fins in a way that could create a problem for fishermen fishing legally for sharks in federal waters."[57] In response, environmental groups such as Oceana launched campaigns to raise public awareness urging NOAA to "protect sharks, not shark finners."[58] The proposed rule received about 50,000 comments, with submissions from members of the Wildlife Conservation Society and the Humane

53. *Id.*

54. "[B]ecause the Shark Fin Law neither discriminates on the basis of race, nor is based on a discriminatory purpose, and because it is rationally related to a legitimate government purpose, plaintiffs cannot meet their burden of showing a likelihood of success on the merits of the equal protection claim." *Chinatown Neighborhood Ass'n*, 2013 WL 60919, at *8.

55. Brief for the United States as Amicus Curiae in Support of the Plaintiffs-Appellants and Reversal on the Supremacy Clause Claim, Chinatown Neighborhood Ass'n v. Brown, No. 4:12-cv-03759 (N.D. Cal. July 22, 2013), *available at* http://www.defenders.org/publications/amicus-brief-shark-finning-CA.pdf.

56. *Chinatown Neighborhood Ass'n*, 539 F. App'x 761.

57. *Shark Conservation in the United States and Abroad*, NOAA (July 15, 2013), http://www.nmfs.noaa.gov/stories/2013/07/7_15_13shark_conservation_us_and_abroad.html; **Error! Hyperlink reference not valid.***see generally* Magnuson-Stevens Act Provisions; Implementation of the Shark Conservation Act of 2010, 78 Fed. Reg. 25,685 (proposed May 2, 2013), *available at* https://www.federalregister.gov/articles/2013/05/02/2013-10439/magnuson-stevens-act-provisions-implementation-of-the-shark-conservation-act-of-2010.

58. Press Release, Oceana News, Oceana Launches Metro Ad Campaign Asking NOAA to Protect Sharks, Not Shark Finners (Nov. 14, 2013), *available at* http://oceana.org/en/news-media/press-center/press-releases/oceana-launches-metro-ad-campaign-asking-noaa-to-protect-sharks-not-shark-finners-0.

Society of the United States comprising about 46,000 of the comments.[59] Since then, the agency seems to have backed down from its preemption stance; on February 4, 2014, NOAA issued letters to the state governments of California, Maryland, and Washington, stating that their laws banning the trade of shark fins are consistent with federal law, and therefore, will not be preempted.[60] Accordingly, as of the time of this writing, the state bans are still in place.

C. International Agreements

In addition to these state and federal level domestic regulations, the United States is a party to international agreements and treaties that mandate shark protection measures. In 2001, the United States prepared a National Plan of Action pursuant to the United Nations' Food and Agriculture Organization International Plan of Action for the Conservation and Management of Sharks.[61] Thirteen other countries, in addition to the United States, have prepared National Plans of Action; however, none of the three biggest exporters of shark fins to the United States, Hong Kong, China, and New Zealand, have Plans of Action, nor have two of the biggest exporters and producers globally, India and Indonesia.[62] Furthermore, the Plan does not specifically mandate that countries outlaw shark finning; it merely suggests that they do so in its list of aims, articulated as proposing that countries, "[m]inimize waste and discards from shark catches in accordance with Article 7.2.2(g) of the Code of Conduct for Responsible Fisheries" (for example, requiring the retention of sharks from which fins are removed).[63]

The Convention on the Conservation of Migratory Species of Wild Animals ("CMS") is an international agreement aimed at conserving migratory species.[64] The United States is not one of the 116 parties; however, in 2010, the United States signed a Memorandum of

59. *Implementation of the Shark Conservation Act of 2010*, REGULATIONS.GOV, http://www.regulations.gov/#!docketBrowser;rpp=100;so=DESC;sb=docId;po=0;dct=PS;D=NOAA-NMFS-2012-0092 (last visited Mar. 31, 2014).

60. January Jones & Andrew Sharpless, *NOAA Backs Down*, HUFFINGTON POST (Mar. 4, 2014), http://www.huffingtonpost.com/january-jones/noaa-backs-down_nub_4898018.html.

61. 2012 SHARK FINNING REPORT, *supra* note 16, at 36.

62. U.N. FOOD & AGRIC. ORG., INTERNATIONAL PLAN OF ACTION FOR THE CONSERVATION AND MANAGEMENT OF SHARKS (1999), *available at* ftp://ftp.fao.org/docrep/fao/006/x3170e/X3170E00.pdf.

63. *Id.* at 14.

64. *Introduction*, CONVENTION ON THE CONSERVATION OF MIGRATORY SPECIES, http://www.cms.int/en/legalinstrument/cms (last visited Mar. 31, 2014).

Understanding ("MOU") for migratory sharks under the CMS, aimed at coordinating international action on the threats faced by sharks and efforts to improve their conservation status.[65] China (with Hong Kong technically under its jurisdiction as a special administrative region) is neither a party to the convention nor signed onto the MOU.[66] New Zealand, however, is a party to CMS as of 2000 though they did not sign the MOU for sharks.[67] Neither India nor Indonesia, two of the most voluminous shark fin exporters globally, signed the MOU.[68]

Additionally, the United States is a member country to the Convention on International Trade in Endangered Species of Wild Fauna and Flora. CITES lists species in need of international protection (and regulates trade in them), organizing them in "appendices" based on their need for protection.[69] Several shark species that are hunted for fins are listed under CITES.[70] As mentioned, the U.S. Endangered Species Act incorporated the listed species from CITES; as such, someone who violates CITES with regard to fin collection of endangered sharks under U.S. jurisdiction would be liable under the Act.

The United States is also a member of the United Nations' International Union for Conservation of Nature ("IUCN"), a global conservation organization, through the U.S. Department of State and the Bureau of International Environmental and Scientific Affairs.[71] The IUCN conducts scientific research via thousands of scientific experts and member organizations from around the world and creates its own lists of species that are endangered or threatened, called the Red List. It is worth noting that CITES listings are the result of political negotiations while the IUCN Red List selections are based on scientific considerations. The

65. *See* 2012 SHARK FINNING REPORT, supra note 16.

66. CONVENTION ON THE CONSERVATION OF MIGRATORY SPECIES, *supra* note 64.

67. *Id.*

68. *Id.*

69. *What is CITES?*, CITES, http://www.cites.org/eng/disc/what.php (last visited Apr. 4, 2014).

70. CITES Convention, *supra* note 15, apps. I–III. In Appendix I, which lists species threatened with extinction (and generally forbidden in international trade) only sawfishes (except for the largetooth sawfish) are designated. Listed in Appendix II, which contains species that are not necessarily threatened with extinction but in which trade must be controlled in order to avoid overexploitation, are the basking shark, great white shark, the whale shark, and the largetooth sawfish. Appendix III, which contains species that are protected in at least one country which has asked other CITES parties for assistance in controlling the trade, lists the scalloped hammerhead and the porbeagle sharks. *Id.*

71. *Members' Database*, INT'L UNION CONSERVATION NATURE, http://www.iucn.org/about/union/members/who_members/members_database/ (last visited Apr. 4, 2014).

IUCN has a Shark Specialist Group comprised of shark experts and researchers from around the world that provides leadership for the conservation of threatened species of sharks.[72]

The Red List designates the scalloped hammerhead, a species often used for shark-fin soup, as "endangered" and the porbeagle as "vulnerable" with a decreasing population.[73] The 2013 CITES meeting was victorious for the scalloped hammerhead, the porbeagle, and three other species of commercially valuable sharks that were moved up from Appendix III to Appendix II.[74] Practically, this means that going forward, "they will have to be traded with CITES permits and evidence will have to be provided that they are harvested sustainably and legally."[75]

IV. PROBLEMS

The current state of the law regarding shark fins in the United States is problematic because, while many laws contain strong shark protection intent, loopholes, insufficient barriers to entering the shark fin trade, and conflicting interests ultimately frustrate this intent, thus harming the laws' effectiveness.

A. Frustrated Intent

On its face—indeed, even by its name—relevant federal law asserts a strong intent to eradicate shark finning. The original law passed on the matter titled the Shark Finning *Prohibition* Act evidences this; its stated purpose was to "eliminate" shark finning.[76] To that end, the strict rules that followed to prohibit shark finning in U.S. waters seemed well-tailored to that goal. By passing the Shark Conservation Act shortly after the major loophole in the Shark Finning Prohibition Act was exposed, Congress demonstrated intent to stop the "wasteful" and "unsportsmanlike" practice of shark finning.[77] However, two aspects of the governing federal law frustrate this intent: the "Five Percent Rule,"

72. SHARK SPECIALIST GRP., http://www.iucnssg.org/ (last visited Apr. 2, 2014).

73. *Id.*

74. *CITES conference takes decisive action to halt decline of tropical timber, sharks, manta rays and a wide range of other plants and animals*, CITES (Mar. 13, 2013), http://www.cites.org/eng/news/pr/2013/20130314_cop16.php.

75. *Id.*

76. Shark Finning Prohibition Act of 2000, Pub. L. No. 106-557, 114 Stat. 2772 (emphasis added).

77. *Id.*

which remains in place despite the passage of the Shark Conservation Act and the laughable ease with which dealers can obtain licenses to import shark fins into the United States. Compounded with the lucrative nature of the business, this statutory scheme does not present meaningful barriers to entering the shark fin trade. Additionally, the federal government struggles between two often conflicting forces: the aforementioned pro-conservation intent of laws regarding sharks and a pro-fishing statutory mandate, compounded by political power held by fishermen who wish to land sharks. This struggle could well inhibit the strength of future shark fin laws.

The Five Percent Rule, as it stood in the 2000 Shark Finning Prohibition Act, allowed fishermen to have detached shark fins on board their vessels as long as the weight of the fins did not comprise more than five percent of the total weight of the shark carcasses.[78] As discussed, in practice, this essentially provided a loophole through which fishermen could practice shark finning—the very act the law was designed to prohibit—albeit in a limited capacity. Beyond simply contradicting the stated purpose of the Shark Finning Prohibition Act, this loophole was problematic because, once severed from the body of a shark, it is extremely difficult to identify the species of shark from which that fin comes.[79] As such, fishermen could take endangered sharks and, unless caught in the act of finning, do so virtually undetected, providing a mechanism through which fishermen could violate the Endangered Species Act without getting caught. Also, the law requires potential offenders to self-report the species and type of the shark that they land. While most fishermen are likely honest, the high-profit nature of the shark fin trade provides a darkly tempting incentive for fishermen to inaccurately report illegal catches.

Accordingly, it would have made sense to eliminate the Five Percent Rule with the passage of the Shark Conservation Act. Instead, the Five Percent Rule remained but was amended to require that the sharks from which the fins be taken be landed (and thus, reported to the National Marine Fisheries Service) before removing their fins.[80] Presumably this approach, combined with a new regulation requiring certain tracking equipment be installed on commercial fishing boats, will help to mitigate the potential for endangered sharks to be caught in

78. *Id.*

79. PEW ENV'T GRP., ENDANGERED SHARK FOUND IN U.S. SOUP SAMPLES (2012), *available at* http://www.pewenvironment.org/uploadedFiles/FINAL_PEW_SharkSoup_Booklet.pdf.

80. Shark and Fishery Conservation Act of 2010, Pub. L. No. 111-348, 124 Stat. 3668.

domestic waters. However, the very fact that the Five Percent Rule remains means that at least some shark finning may very well continue to occur in U.S. waters.[81]

In addition to the five percent rule, it is currently very easy for dealers to obtain a permit to legally import shark fins into the United States. As mentioned, a Highly Migratory Species International Trade Permit costs $25.00 and requires only that the applicant to fill out a one-page form.[82] Unlike the trade of other Highly Migratory Species, dealers do not have to report with trade-tracking consignment documents.[83] This ease of importation frustrates the intent of the Endangered Species Act to restrict illegal importation of endangered species. A recent study by Stony Brook University and the Field Museum in Chicago found the DNA of IUCN-listed sharks in bowls of shark-fin soup served in different cities around the United States.[84] The United States imports several tons of shark fins per year, many of which are processed and have gone through multiple countries before they arrive. As discussed, even whole, raw shark fins are difficult for enforcement officers to identify once they have been severed from the shark; this problem is aggravated once the shark fins have been dried, shredded, or otherwise processed to make soup. Thus, despite our laws against trade in endangered species, it is practically difficult and costly to ensure that the fins of endangered sharks are not being imported to the United States.

Additionally, as evinced by NOAA's proposed state preemption rule combined with the government's support of the plaintiffs in *Chinatown Association v. Brown*, the federal government struggles between carrying out the pro-conservation intent of shark conservation laws and the statutory mandate "to assure that . . . a supply of food and other products may be taken" under the Magnuson-Stevens Act.[85] In the proposed rule, NOAA attempted to clarify their position by stating that:

> Neither the SFPA nor the SCA suggest that Congress intended to . . . prohibit the possession or sale of shark fins. Rather, Congress chose to prohibit discarding shark carcasses at sea, and required that fins be naturally attached to the carcass of the corresponding shark. The SCA

81. International Fisheries; Atlantic Highly Migratory Species; International Trade Permit Program, 73 Fed. Reg. 31,380 (June 2, 2008) (to be codified at 50 CFR pts. 300 and 635).

82. NOAA, *supra* note 37.

83. International Fisheries; Atlantic Highly Migratory Species; International Trade Permit Program, 73 Fed. Reg. 31,380.

84. This DNA included some from the endangered scalloped hammerhead, as well as vulnerable smooth hammerheads, school sharks, and spiny dogfish, and other near threatened species such as bull and copper sharks. *Id.*

85. 16 U.S.C. § 1802(5) (2012).

> therefore reflects a balance between addressing the wasteful practice of shark finning and preserving opportunities to land and sell sharks harvested consistent with the Magnuson-Stevens Act. Although state shark fin laws are also intended to conserve sharks, they may not unduly interfere with the conservation and management of federal fisheries.[86]

In this statement, NOAA makes clear that while shark conservation is a priority, it is unwilling to regulate beyond banning the physical practice of shark finning in U.S. waters, likely for financial and political reasons.[87] This is problematic because, as discussed in Part II, the United States is still a major importer of shark fins from countries who do not have shark finning bans. State bans seek to promote shark conservation by destroying the ultimate reason for which shark finning exists: the market for shark fins. The value of shark fins far surpasses the value of shark meat, and thus provides the primary incentive for fishermen to catch and sell sharks.[88] Allowing a market in shark fins to exist deeply undermines the intent of the Shark Conservation Act. While NOAA has backed down from their proposed rule, the deeper conflict between conserving sharks and appeasing fishermen remains.

Thus, with an under-regulated permitting and importation process combined with the lucrative nature of the shark fin trade and a federal government that struggles to fully effectuate shark conservation, the United States' statutory intent to conserve sharks is deeply frustrated.

B. Effectiveness Problems

Besides being difficult to enforce, the current laws regulating shark finning raise serious questions of effectiveness. This is because of the politically weakened scope of the laws themselves as well as their practical limitations given the migratory nature of sharks. Additionally, while state bans seek to address the root of the shark finning problem, limited enforcement resources may well undermine their effectiveness.

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86. Magnuson-Stevens Act Provisions; Implementation of the Shark Conservation Act of 2010, 78 Fed. Reg. 25,685 (proposed May 2, 2013), *available at* https://www.federalregister.gov/articles/2013/05/02/2013-10439/magnuson-stevens-act-provisions-implementation-of-the-shark-conservation-act-of-2010.

87. Tim Sakahara, *Shark fin proposal divides federal and state government in Hawaii*, HAW. NEWS NOW (June 28, 2013), http://www.hawaiinewsnow.com/story/22709601/shark-fin-proposal-divides-federal-and-state-government-in-hawaii (last visited Mar. 22, 2014).

88. CITES, CONSERVATION AND MANAGEMENT OF SHARKS: TRADE-RELATED THREATS TO SHARKS 4 (2006), *available at* http://cites.org/sites/default/files/eng/com/ac/22/E22-17-3.pdf.

The CITES appendices of endangered species are periodically updated to grant protected status to new species. Environmental groups largely viewed CITES 2013 as a success.[89] However, political pressures often lead to many species not receiving CITES protection, despite scientific evidence revealing a need for protection.[90] Even if the most recent CITES meeting was hopeful, CITES meetings happen only every three years. With populations declining so rapidly, sharks cannot afford any politically motivated delays to their protection.

In addition, even if U.S. and international laws were enforceable and complete in their scope, the migratory nature of sharks would likely undermine their effectiveness. Indeed, this presents a difficulty in ascertaining whether current federal policies are actually effective in terms of shark conservation; while shark finning is prohibited in waters under U.S. jurisdiction, many sharks tend to make lengthy migrations that cross borders around the world.[91] As such, sharks swim into waters where there may not be sufficient legal protection or enforcement of existing legal protection. In addition, most international agreements are voluntary in nature and difficult to police, and China (who has legal jurisdiction over Hong Kong, the largest shark fin market in the world), the primary importer and shark fins in the United States, has not produced an FAO Plan of Action for shark conservation or signed onto the CMS M regarding shark conservation even though they are a CITES member.[92]

As stated above, the state bans on shark fin trading seek to address the root cause of shark finning: the shark finning market. However, due to a shortage of staffing and resources available for enforcement, these bans may not be as effective as intended.[93] Indeed, in California, 240 fish and game wardens struggle to police 159,000 square miles of land—a sobering fact that may explain why only two citations regarding shark-fin

89. Rebecca Basu, *HIS and the HSUS Commend CITES Parties for their Final Decision Protecting Certain Shark and Manta Ray Species from International Commercial Trade*, HUMANE SOC'Y INT'L (Mar. 14, 2013), http://www.hsi.org/news/press_releases/2013/03/hsi_commends_final_shark_and_ray_uplistings_031413.html.

90. Platt, *supra* note 4.

91. 2011 SHARK FINNING REPORT, *supra* note 21, at 1.

92. *See* U.N. FOOD & AGRIC. ORG., *supra* note 62; CONVENTION ON THE CONSERVATION OF MIGRATORY SPECIES, *supra* note 64; *List of Contracting Parties*, CITES, http://www.cites.org/eng/disc/parties/alphabet.php (last visited Apr. 4, 2014).

93. Zusha Elinson, *Shark-Fin Bans Hard to Police*, WALL ST. J. (Feb. 24, 2014), http://online.wsj.com/news/articles/SB10001424052702303636404579393410962355346.

trading have been made in the past two years.[94] As of the time of this writing, however, Illinois has issued twenty citations to four businesses for state ban violations.[95] Accordingly, it is difficult to say at this time whether these state bans are an effective tool for shark conservation given the limitations on enforcement resources.

V. SOLUTION ONE: LIMIT IMPORTS AND POTENTIALLY VIOLATE INTERNATIONAL TRADE LAW

A. World Trade Organization Background

The United States could ban imports from countries without shark conservation measures, but it is currently unclear whether such a ban would withstand scrutiny under international trade law. While the United States can attempt to curb shark finning in domestic waters, it is impossible to ensure that our country is not contributing to the shark finning problem as long as fins harvested through shark finning can make their way into our market. As such, one solution (proposed in *Chinatown Neighborhood Association v. Brown*[96]) would be to ban imports of shark fins from countries that are not engaged in shark conservation measures. These "conservation measures" would conceivably be in line with the international relations mandate included in the Shark Conservation Act which, in short, requires that the U.S. government urge international fishery management organizations and parties to adopt measures prohibiting shark finning.[97] The countries

94. *Id.*

95. Chris Young, *Illinois Conservation Police Cite Businesses Selling Shark Fin Products*, ILL. DEP'T NAT. RESOURCES (Mar. 4, 2014), http://www.dnr.illinois.gov/news/Pages/IllinoisConservationPoliceCiteBusinessesSellingSharkFinProducts.aspx.

96. "With regard to any argument defendants might make that the Shark Fin Law protects sharks by halting the import of shark fins from foreign countries that do not have laws against shark-finning, plaintiffs respond that if that were the goal, the law could have banned the importation of shark fins from countries without protective laws, instead of enacting a blanket prohibition on all shark fin trade and possession." Chinatown Neighborhood Ass'n v. Brown, No. C 12-3759 PJH, 2013 WL 60919 (N.D. Cal. Jan. 2, 2013), *aff'd*, 539 F. App'x 761 (9th Cir. 2013).

97. "The Shark Conservation Act . . . amends the High Seas Driftnet Fishing Moratorium Protection Act to direct the United States to urge international fishery management organizations . . . to adopt shark conservation measures, including measures prohibiting removal of shark fins at sea, and seeking to enter into international agreements that require measures for the conservation of sharks, including measures prohibiting the removal of shark fins at sea." 2012 SHARK FINNING REPORT, *supra* note 16, at 2.

affected by this ban would be those that do not have laws against shark finning, evinced by a lack of domestic anti-finning law and/or a lack of adherence to the organizations and agreements that require finning bans and shark conservation measures).[98] Through such a ban, the United States would systematically block fins obtained by shark finning based on country of origin. At the time of this paper's writing, this hypothetical ban would exclude the biggest importers and exporters of shark fins to the United States, and in the world: China and Hong Kong.

World Trade Organization ("WTO") jurisprudence indicates that such a ban on imports would almost certainly be found to violate WTO law as discriminatory and, as the most on-point WTO case is currently being decided on appeal, it is unclear whether an origin-based ban would satisfy one of the enumerated exceptions.[99] To sum matters up very generally, the WTO, empowered by the General Agreement on Tariffs and Trade ("GATT"), exists to promote trade liberalization between member nations.[100]

Should one nation engage in a practice that another member feels is a violation of WTO rules, the complaining nation can bring litigation in the WTO dispute settlement forum.[101] A ban on shark fin imports based on their country of origin would potentially implicate at least four WTO rules: GATT Article I:1, which mandates fairness between imports from different places (called "Most Favoured Nation Treatment," or "MFN"); GATT Article XI, which prohibits quantitative restrictions on imports; GATT Article III:4, which prohibits internal regulations that serve to restrict free trade; and the Agreement on Technical Barriers to Trade ("TBT"), which ensures that technical regulations do not unduly restrict free trade.

98. *See supra* Part III.C.

99. Discussed further below, on March 17–19, 2014, Canada and Norway argued their appeals to the Panel Reports, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/401 (Nov. 25, 2013), before the WTO Appellate Body. The panel will release a decision within 90 days. *See Dispute Settlement: Dispute DS401*, WTO, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds401_e.htm (last visited Apr. 2, 2014).

100. *Understanding the WTO: What we stand for*, WTO, http://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm (last visited Apr. 4, 2014).

101. The matter is then either settled via negotiations between the two parties or litigated before a panel comprised of representatives from different member nations, and should the alleged offender be found to be in violation of WTO rules, they are given up to fifteen months to bring their measure into compliance with the result of the case. *Understanding the WTO: Settling Disputes, The Panel Process*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm (last visited Apr. 4, 2014).

The first provision of the GATT, Article I:1, articulates a general principle of fairness between local products and imports, and provides that:

> [A]ny advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[102]

To prove that an Article I:1 violation has occurred, a complainant must demonstrate that an advantage granted to a product is not accorded to a like product.[103]

Article XI of the GATT prohibits quantitative restrictions on imports. In relevant part, the text provides that:

> No prohibitions or restrictions other than duties, taxes, or other charges . . . whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any contracting party.[104]

To prove an Article XI violation, a complainant must show that the restriction, in the form of a quota, bans, or otherwise, is based purely on the fact that the product in question is imported.[105]

Article III:4 of the GATT addresses internal regulations (other than taxation) and states, in relevant part:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use.[106]

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102. General Agreement on Tariffs and Trade art. I:1, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT].

103. Panel Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/401 (Nov. 25, 2013) [hereinafter *Seal Products*].

104. GATT, *supra* note 102, art. XI:1 .

105. *See generally* Panel Report, *India—Measures Affecting the Automotive Sector*, WT/DS146/R (Apr. 5, 2002); Panel Report, *China—Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R (July 5, 2011).

106. GATT, *supra* note 102, art. III:4 .

Essentially, this provision exists to prevent "regulatory protectionism," occurring when regulations serve a protectionist purpose, i.e., insulating domestic markets, that discriminates against importing markets rather than a legitimate policy objective.[107] To successfully argue an Article III:4 violation, a complainant must first establish that the law at hand is an internal regulation affecting products.[108] Next, the complainant must establish that the import subject to the regulation and the domestic products are "like products."[109] Finally, the panel determines whether the imports are accorded "less favorable treatment" than like domestic products.[110] However, a less favorable effect upon imports alone is not sufficient to demonstrate "less favorable treatment" if the detrimental effect can be explained by factors or circumstances other than the foreign origin of the product.[111]

The TBT Agreement attempts to strike a balance between preventing countries from using regulations and testing standards as obstacles to trade and allowing them to regulate towards legitimate policy objectives.[112] In substance:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create.[113]

The TBT Agreement continues to delineate "legitimate objectives" as including, but not limited to: national security requirements, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment.[114]

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107. ANDREW T. GUZMAN & JOOST H.B. PAUWELYN, INTERNATIONAL TRADE LAW 277 (2d ed. 2012).

108. *Id.* at 275.

109. To examine if products are "like products," the panel will examine: (1) Whether the two products share physical characteristics, (2) The products' end uses, (3) Consumer tastes and habits, and (4) The Harmonized Tariff scheduling. *See* Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, ¶ 85 (Apr. 5, 2001).

110. This is determined by examining the structure, design, and architecture of the regulation, particularly whether it is origin-related. *Id.* ¶ 100.

111. Appellate Body Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 96, WT/DS302/AB/R (May 19, 2005).

112. *Technical barriers to trade*, WTO, http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm (last visited Mar. 23, 2014).

113. Agreement on Technical Barriers to Trade, Apr. 15, 1994, 1868 U.N.T.S. 120.

114. *Id.*

If the dispute settlement forum decides that a country's law violates WTO rules, a member country can try to defend it under the exceptions carved out in Article XX. Article XX provides mechanisms for member countries to violate their WTO obligations if the problematic regulations are:

> [n]ecessary to protect public morals; necessary to protect human, animal or plant life or health; . . . necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [GATT] . . . relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[115]

To qualify for an exception, a member country must satisfy both the specific requirements of the exception and the chapeau (introductory clause) of Article XX.[116]

B. Relevant Case Law: Shrimp and Seal Products

In the context of marine wildlife conservation, the *United States—Shrimp* case illustrates the test for the Article XX(g) exception that protects laws "relating to the conservation of exhaustible natural resources."[117] In this case, India, Malaysia, and Pakistan challenged a U.S. law prohibiting the importation of shrimp caught using certain commercial fishing nets as discriminatory.[118] The panel found that the regulation violated GATT Article XI as a quantitative restriction.[119] When the United States defended the regulation under Article XX(g), the complainants first alleged that sea turtles were not an "exhaustible natural resource" because, by their theory, the GATT drafters did not intend for living natural resources to be considered "exhaustible."[120] However, the panel found otherwise, citing the need to consider "contemporary concerns . . . about the protection and conservation of the environment," to uphold the notion that "natural resources" under Article

115. GATT, *supra* note 102, art. XX(a), (b), (d), (g).

116. GUZMAN & PAUWELYN, *supra* note 107, at 358.

117. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Nov. 6, 1998) [hereinafter *United States—Shrimp*].

118. Specifically, the United States regulation required that fishermen who wanted to import their shrimp into the United States use TEDS (turtle-safe shrimp nets). *Id.* ¶ 138.

119. *Id.* ¶ 188.

120. *Id.* ¶ 128.

XX(g) could in fact be living resources.[121] The panel also held that the resources in question, sea turtles, were indeed "exhaustible" under Article XX(g), as all of the species of sea turtles involved were listed in Appendix I of CITES.[122] Secondly, the panel examined what it meant to be "related to" the conservation of exhaustible natural resources. The panel thus asserted the "sufficient nexus" test, which, in the case of the sea turtle regulation, requires that there is a "sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of XX(g)."[123] The panel emphasized that the regulation was not "disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means [were], in principle, reasonably related to the ends."[124] As such, the panel held that the United States sea turtle regulation satisfied the particular requirements of Article XX(g).

The chapeau of Article XX provides that a regulation may be eligible for Article XX protection, "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[125] Unfortunately for sea turtle conservation, the United States failed to secure an Article XX defense in *United States—Shrimp* because the regulation failed to pass the "chapeau" of Article XX. The Appellate Body held that, despite satisfying the requirement that the regulation be "related to the conservation of exhaustible natural resources," the regulation failed to pass the chapeau because it constituted both unjustifiable and arbitrary discrimination.[126] The Appellate Body held that the discrimination was "unjustifiable" because of its "intended and actual coercive effect on the specific policy decisions made by foreign governments . . . . [The law] is, in effect, an economic embargo which requires all other exporting Members . . . to adopt essentially the same policy . . . as that applied to United States domestic shrimp trawlers."[127] Furthermore, the Appellate Body also held that the regulation was

121. *Id.* ¶ 129.

122. *Id.* ¶ 132.

123. *Id.* ¶ 135.

124. *Id.* ¶ 141.

125. GATT, *supra* note 102, art. XX.

126. *United States—Shrimp*, *supra* note 117, ¶ 186.

127. *Id.* ¶161. "The panel stated that, "it is not acceptable . . . for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other members." *Id* ¶165.

"arbitrary discrimination" because the United States restriction was not sufficiently transparent to satisfy Article X:3 of the GATT, and because there was little to no flexibility in how officials make the determination for certification.[128]

After the Appellate Body holding, the United States revised its law concerning the importation of shrimp to comply with the holding. Malaysia challenged these revisions under Article 21.5 of the WTO Dispute Settlement Understanding[129] claiming that they still constituted arbitrary and unjustifiable discrimination, and the Appellate Body upheld the revisions as meeting the chapeau requirements of Article XX.[130] First, the Appellate Body held that the United States' revisions no longer constituted unjustifiable discrimination because the United States provided comparable efforts to negotiate with each exporting country,[131] conditioned market access on exporting countries adopting a conservation program comparable in effectiveness (rather than essentially the same) as that of the United States, and allowed these conservation programs to reflect the different specific conditions prevailing in the exporting country.[132] Second, the Appellate Body held that the United States' revisions no longer constituted arbitrary discrimination because the procedure by which an exporting country could gain access to the United States market was sufficiently flexible[133] and the revisions provided exporting countries ample transparency and due process through notice, direct communication, and a holistic evaluation approach for market access that takes into account other turtle

128. *Id*. ¶¶ 183,177.

129. Article 21.5 is the provision of the Dispute Settlement Understanding intended to resolve disagreements about whether a losing defendant has come into compliance with a Panel or Appellate Body ruling. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 21(5), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

130. Appellate Body Report, *Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/ABRW (Nov. 21, 2001).

131. *Id*. ¶ 122. The Appellate Body continues by noting that "the negotiations need not be identical . . . yet the negotiations must be comparable in the sense that comparable efforts are made, comparable resources are invested, and comparable energies are devoted to securing an international agreement." The Appellate Body continues to note that, in order to avoid unjustifiable discrimination, the negotiating countries do not necessarily need to reach an agreement through negotiations because this would provide "in effect, a veto over whether the United States could fulfill its WTO obligations." *Id.* ¶123.

132. *Id.* ¶ 144.

133. *Id.* ¶ 148.

conservation measures in addition to shrimp harvesting methods.[134] This decision is significant because it was the first GATT/WTO case where an exception under GATT Article XX(g) was accepted, and furthermore, the decision opened the door to the WTO permitting at least some regulatory measures that look to a Process or Production Measure that takes place abroad.[135]

In the *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products* cases, Canada and Norway challenged the European Union's ban on the importation and marketing of seal products on three grounds: (1) that its exceptions for indigenous communities violated GATT Article I:1 because the advantage given to indigenous products originating in Greenland was not given to seal products from Canada, (2) that the exception for seal products harvested for marine resource management purposes violated Article III:4 because the ban treated imported seal products less favorably than domestic seal products, and (3) that the EU Seal Regime violated Article 2.2 of the TBT agreement because it comprised an unduly burdensome technical regulation.[136] On November 25, 2013, the WTO Panel agreed with two of Canada and Norway's complaints, and held that these exceptions did not satisfy the Article XX(a) exception for actions that are "necessary to protect public morals" because they did not establish that the exceptions were "not applied in a manner that would constitute arbitrary or unjustified discrimination" as required to satisfy Article XX chapeau.[137] However, the WTO Panel ultimately *upheld* the EU Seal Regime under TBT Article 2.2 stating that "it fulfills the objective of addressing *EU public moral concerns on seal welfare* to a certain extent, and no alternative measure was demonstrated to make an equivalent or greater contribution to the fulfillment of the objective."[138] This decision is controversial because it rests on a public morals clause not written into the text of the TBT Agreement and, indeed, deals with the tricky issue of balancing free trade with public policy objectives.[139] Accordingly Canada and Norway have appealed the decision.[140] The Appellate

134. *Id.* ¶ 147

135. GUZMAN & PAUWELYN, *supra* note 107, at 412.

136. *Seal Products*, *supra* note 103.

137. *Id.*

138. *Id.* This ultimate holding was based on the Panel's denying that the EU Seal Regime violated Article 2.2 of the Technical Barriers to Trade Agreement.

139. *Seal product ban upheld on 'ethical' grounds*, CBC NEWS (Nov. 26, 2013), http://www.cbc.ca/news/canada/newfoundland-labrador/seal-product-ban-upheld-on-ethical-grounds-1.2438904.

140. *Seal Products*, *supra* note 103.

Body's decision, the final say in the matter, will be released within ninety days of March 19, 2014.

C. Potential Challenges

Hypothetically, if the United States imposed a ban on shark fins caught by countries that do not implement recognized shark conservation plans, then China and Hong Kong could very well could bring a challenge under GATT Article I:1, Article XI, Article III:4, or TBT 2:2 (depending on how the Appellate Body rules on the *Seal Products* cases[141]) alleging that the ban is discriminatory against their shark fins or unduly burdensome. The nature of the challenge would depend upon whether China and Hong Kong view the ban as giving MFN treatment to other shark fin imports, quantitative restriction, or as an internal regulation.

1. Import Restriction Defended under the Article XX(g) Conservation Exception

Assuming that China and Hong Kong and potentially joined by other exporters would challenge a ban as an internal regulation preventing the sale and possession of sharks fins gathered through illegal shark finning practices, they would need to establish that their shark fins, which would be banned due to origin, and the shark fins caught domestically and sold in the United States are "like products." In terms of all four factors considered, the United States shark fins and the China/Hong Kong shark fins would theoretically be the same except for the Process or Production Measure.[142] Because of this, the panel would likely hold that they are indeed like products. This "like product" designation would mirror the situation in *United States—Restrictions on Imports of Tuna* because the only difference between the American and Mexican tuna in that case was the use of the purse seine fishing method,[143] and here the only difference between domestic shark fins and banned fins would be the method in which they were harvested (along

141. The EU raised the question of whether the EU regime counts a technical regulation was raised on appeal; they claim that it is an outright prohibition, rather than a technical regulation. *See WTO Hears Appeal in Seal Ban Dispute*, 18 BRIDGES WKLY. TRADE NEWS DIG., no. 10., 2014, *available at* http://ictsd.org/i/news/bridgesweekly/186987/.

142. *See generally* Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Apr. 5, 2001).

143. Panel Report, *United States—Restrictions on Imports of Tuna*, DS21/R-39S (Sept. 3, 1991) (not adopted).

with the whole shark, or detached through shark finning). Next, the panel would need to determine whether the imports are accorded "less favorable treatment" than like domestic products; this is determined by examining the structure, design, and architecture of the regulation, particularly whether it is origin-related.[144] Unfortunately, this prong could be a difficult one to fulfill because, like the regulation at stake in *United States—Shrimp*, an import restriction on shark fins could be read as an attempt to "coerce" other countries into adopting the regulatory schemes like that of United States. Based on *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, the panel would likely hold that a United States' ban indeed subjects the Hong Kong shark fins to less favorable treatment than "like" United States shark fins.

Due to the conservation-oriented goals of such a regulation, the United States would most likely assert a defense under Article XX(g) for regulations "related to the conservation of an exhaustible natural resource." First, the panel would need to determine whether this description is fulfilled. Here, at first blush, the regulation would quite resemble the one at issue in *United States—Shrimp* in that the "sufficient nexus" test between shark conservation and the ban on imports from countries lacking a recognized shark conservation plan would be satisfied because the means (cutting off market access to imports from such countries) would be reasonably related to the ends (conserving sharks). Also, because of the precedent set by *United States—Shrimp*, the panel could hold that sharks are a "natural resource." However, one issue that may arise is the designation of "exhaustible"; while not necessarily dispositive to the case, the fact that sea turtles are listed in CITES in Appendix I was highly influential in designating sea turtles as "exhaustible" in *United States—Shrimp*. Only one species of shark (sawfishes, which are not commonly used for shark-fin soup) is designated in CITES Appendix I. Other sharks commonly consumed in shark-fin soup, such as the porbeagle, whale shark, basking shark, and scalloped hammerhead, are designated in Appendices II and III. It is not known whether CITES designation requiring the highest-tier protection would be dispositive, or if IUCN "endangered" status would be persuasive in such a case.

If the requirements of Article XX(g) were satisfied, the United States would still need to satisfy the chapeau by proving that the ban did not present arbitrary or unjustifiable discrimination between countries where the same conditions prevail and that the ban was not a disguised

144. *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, *supra* note 142.

restriction on international trade. Regarding unjustifiable discrimination, the *United States—Shrimp* panel declared that it is unacceptable for one WTO member to use an economic embargo to require other members to adopt essentially the same comprehensive regulatory program as it has in force without taking into consideration different conditions which may occur in the territories of those other members. Here, an issue would present itself; on one hand, the hypothetical regulation does facially resemble the *United States—Shrimp* regulation in that it uses an embargo to promote a domestic conservation goal. However, in regard to whether the measure would constitute arbitrary or unjustifiable discrimination, one matter that might be helpful to the United States is that the regulatory standards are based on international standards via assent to certain international agreements.[145]

If, despite these considerations, the United States does decide to place a ban on shark fin imports from certain countries, the revised law that was ultimately approved in *United States—Shrimp 21.5* could serve as a good model for a trade restriction based on legitimate environmental concerns that can survive the chapeau of Article XX. Like the revised law in *Shrimp 21.5*, the United States would need to negotiate (though not necessarily reach a consensus) with every exporting country, base market access on countries' adoption of conservation programs that are comparable in effectiveness to that of the United States', and allow these conservation programs flexibility to reflect the different conditions prevailing in each exporting country. The United States would also need to consciously avoid the pitfalls in the original law that were the subject of the *Shrimp* litigation by providing countries ample notice and flexibility.

2. Import Restriction Defended as a TBT Article II:2 "Moral Concern"

The outcome of the *Seal Products* appeal is relevant to any import restriction that the United States may place on shark fins. Factually, some similarity would exist: such a ban would outlaw products that are, at this time, legal in most states, due to their Process or Production Measure; a ban would be at least partially motivated by public outcry

145. In the context of Technical Barriers to Trade, a technical regulation can be acceptable if it is based upon "international standards." *See* Agreement on Technical Barriers to Trade, supra note 113, art. 2.4. While it is unclear whether this same reasoning could be applied to an Article XX defense of an Article III(4) violation, it could help to rebuke accusations of "rigidity" or "lack of transparency" brought by the complainants.

against the inhumane nature of shark finning[146]; and a ban would deal with subject matter that is very culturally sensitive and polarizing. Legally, however, the appeal heard between March 17–20, 2014 will settle at least two major questions: first, whether the Panel utilized "public morality objective" rationale correctly, and second, whether such a ban indeed comprises a "technical regulation."[147] If the panel answers both of these questions in the affirmative, this will set a positive precedent for potentially defending restrictions on inhumanely procured products.

E. Other Considerations Regarding a Partial Import Ban

If such a ban were to be challenged regardless of careful construction, the generally lengthy time frame required for litigating and deciding a WTO decision, [148] even an adverse one, would work in favor of the United States government. Indeed, the time required to move a case through the dispute resolution process, combined with the fifteen months that countries are generally allowed to bring violating laws into compliance,[149] could allow the United States to buy time to adjust the import program to correct any inconsistencies that could arise from the panel or appellate body review of the program.

In conclusion, even if a ban on imports of shark fins from countries that have not undertaken comprehensive, recognized shark conservation plans were to be successfully defended under Article XX, the expense of WTO proceedings indicates that this may not be the best solution for fiscal reasons. Indeed, litigating a WTO case can cost up to $3–4 million.[150] This money comes from tax revenue, so burden and cost would not be a problem for conservation groups and interested organizations, though could be significant from the perspective of an ordinary taxpayer. Furthermore, because of deficiencies in the CITES listing process as well as the frustrated intent and ineffectiveness of current United States shark finning laws, such a ban would not be the most effective way for the United States to pursue the conservation of sharks even if a ban were in place.

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146. As discussed *supra* Part II, however, sharks are threatened with extinction, which is not the case for the seals hunted for seal products. Accordingly, a conservation defense would likely be better suited.

147. BRIDGES WKLY, *supra* note 141.

148. On average, it takes 550 days for a WTO decision to be litigated and decided. GUZMAN & PAUWELYN, *supra* note 107, at 146.

149. Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 129, art. 21.3(c).

150. GUZMAN & PAUWELYN, *supra* note 107, at 300.

VI. SOLUTION TWO: A NATIONWIDE BAN

If the United States means to pursue shark conservation in the most meaningful way possible, the most effective solution would be to enact a federal ban on the possession of and interstate and foreign commerce in shark fins. A federal ban would benefit U.S. foreign policy, promote domestic policy goals, and would do enough good to outweigh issues of cultural sensitivity.

As a matter of international relations, a ban on the possession of and sale of shark fins would be a positive move for the United States. A federal ban would set a good example in the international community and eliminate our country's participation in an environmentally destructive activity that does not present benefits justifying the level of destruction. While the United States is not among the top importers, processors, or exporters of shark fins in the global context, a federal ban could nevertheless impact the shark fin market by exerting pressure on other members of the global community. Perhaps the most receptive and crucial member of the global community would be the European Union, as Spain is a major producer of shark fins.[151] Furthermore, a full-scale federal ban on possession and sale would not be accompanied by the inconsistency that import restrictions present; indeed, the hypothetical import restriction, discussed in Part V above, would reach fins from the largest exporters, Hong Kong and China, but could allow imports from Spain or Japan.[152]

As demonstrated by the *Chinatown Neighborhood Association v. Brown* case, some Chinese-Americans believe that banning shark fins unduly discriminates against traditional Chinese culture.[153] However, many Chinese-Americans have spoken out in support of the California ban, to the extent of forming The Asian Pacific American Ocean

151. *US shark fin restrictions carry little weight in Hong Kong*, TERRADAILY (Dec. 26, 2010), http://www.terradaily.com/reports/US_shark_fin_restrictions_carry_little_weight_in_Hong_Kong_999.html.

152. Spain and Japan are both members of CITES. CITES, *supra* note 92. Japan has developed a National Plan of Action pursuant to the United Nations Food and Agriculture Organization's International Plan of Action for the Conservation and Management of Sharks, but Spain has not. 2011 SHARK FINNING REPORT, *supra* note 21, at 43. Japan has not taken on commitments in regard to the Convention on the Conservation of Migratory Species, but the European Union (of which Spain is a part) signed onto the Convention in 2011. *See* 2012 SHARK FINNING REPORT, *supra* note 16, at 47. Japan's government is involved in the IUCN via two state and government agencies, and Spain's government is involved through nine state and government agencies. INT'L UNION CONSERVATION NATURE, *supra* note 71.

153. *See generally* Chinatown Neighborhood Ass'n v. Brown, No. C 12-3759 PJH, 2013 WL 60919 (N.D. Cal. Jan. 2, 2013), *aff'd*, 539 F. App'x 761 (9th Cir. 2013).

Harmony Alliance which is an organization comprised of many Asian Pacific American citizens, prominent community leaders, celebrities, and politicians united to stop shark finning.[154]

Finally, regarding cultural sensitivity arguments against banning the sale and possession of shark fins, it is also important to note the very occasion-specific and expensive nature of shark-fin soup. Indeed, shark-fin soup provides little nutritional value and is consumed primarily on special occasions or as a symbol of affluence.[155] It is this latter trait that drives the price to approximately $100 per bowl, making it impossible to consume on a regular basis. In fact, shark fin consumption perpetuates a widespread waste in protein as there is virtually no market for shark meat besides the fin. As such, the meat simply sits in freezers or is disposed of (at the boat, in the case of fins caught from shark finning). The analysis would be different if shark fins were a major source of nutrition for many people, but this is not the reality surrounding this delicacy. On balance, shark finning perpetuates a brutal destruction of shark populations that is too grave to justify allowing support of the practice.

VII. CONCLUSION

The current regulatory scheme is insufficient to meaningfully conserve sharks to the best of our ability as a nation and to set a good example in the global community. The patchwork of United States shark fin laws presents major problems of frustrated intent and ineffectiveness. In order to avoid the potential conflicts with international trade law that could arise from simply banning imports on fins harvested in countries without recognized shark conservation plans, the United States should adopt a nationwide ban on all sale and possession of shark fins. As discussed, such a ban would quell the potential for WTO violations, set a positive example in the international community that could help to encourage other countries to take affirmative action to conserve sharks, and serve as a good domestic policy.

However, as the ICUN stated, "It is important to note that finning bans alone, even when well-enforced, will not prevent overfishing of sharks. Catch limits based on scientific advice and the precautionary approach are essential to ensure shark mortality and fisheries are

154. *About APAOHA*, ASIAN PAC. AM. OCEAN HARMONY ALLIANCE, http://apaoha.org/page2/page2.html (last visited Apr. 4, 2014).

155. *Why Ban Shark Fin?*, ASIAN PAC. AM. OCEAN HARMONY ALLIANCE, http://apaoha.org/page4/page4.html (last visited Apr. 4, 2014).

sustainable."[156] Indeed, a United States ban on the sale and possession of shark fins would need to serve as one aspect of many in a thorough, comprehensive shark protection plan including thoughtful changes to fishing methods and enforcement mechanisms. A ban on the sale and possession of shark fins would, however, be a good start in halting the tide of extinction.

156. *Shark Finning*, SHARK SPECIALIST GRP., http://www.iucnssg.org/finning (last visited Apr. 2, 2014).