

# SHARK LAWS WITH TEETH: HOW DEEP CAN U.S. CONSERVATION LAWS CUT INTO GLOBAL TRADE REGULATIONS?

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*Controversy surrounding application of the Shark & Fishery Conservation Act of 2010 (Shark Conservation Act) reflects a culmination of competing interests between environmental conservation and international free trade. Non-governmental organizations are pressuring the United States (U.S.) government to use the Shark Conservation Act to impose trade sanctions against countries that do not have specific regulations on shark finning. The implementation of such import bans, however, could negatively impact the nation's relationships with some of its principal trade partners and violate international obligations under multilateral trade treaties. This Note proposes that the U.S. cannot impose such an embargo on shark products without first laying a foundation for its actions in international custom or treaty.*

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## I. INTRODUCTION

The global community is perpetually vexed by a multitude of humanitarian, environmental, and economic challenges. In an effort to efficiently and effectively balance these demands, governments may

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establish laws yoking together competing interests. For example, the United States (U.S.) is currently a party to several free trade agreements with specific human rights provisions, as well as trade organizations with charters allowing conservation measures.<sup>1</sup> Such instruments incentivizing conservation are often used in domestic and international laws to avoid what economists refer to as a “race to the bottom”—a situation in which organizations or countries compete for a desired result, such as wealth, by making increasingly larger concessions in other fields, such as environmental responsibility.<sup>2</sup> But how closely can a government integrate competing interests? More specifically, how closely can the U.S. integrate its very real global trade policies with its more abstract conservation ideals?

Recently, this question came to a head in the Shark & Fishery Conservation Act of 2010 (Shark Conservation Act).<sup>3</sup> The Shark Conservation Act gives the U.S. the power to “take actions” against countries that have failed to establish comparable laws protecting endangered species of sharks.<sup>4</sup> In a letter to the federal government, Oceana, a non-governmental organization advocating conservation of the world’s oceans, insisted that the U.S. utilize that power by implementing a ban on the importation of shark products from countries without specific restrictions on “shark finning.”<sup>5</sup> Shark finning is the practice of removing and retaining a shark’s dorsal fin for commercial

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<sup>1</sup> *E.g.* Trade Act of 1974, 19 U.S.C. § 2432 (1988) (denying normal trade relations to countries that do not allow citizens the opportunity to emigrate); Agreement Establishing the World Trade Organization (Apr. 15, 1994) (available at [https://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](https://www.wto.org/english/docs_e/legal_e/04-wto.pdf) (accessed Nov. 17, 2012)) (providing that parties to the agreement seek “both to protect and preserve the environment”); *see also* James F. Smith, *NAFTA and Human Rights: A Necessary Linkage*, 27 UC Davis L. Rev. 793, 794–95 (1994) (providing instances in which the U.S. used trade sanctions or withheld trade benefits to protest human rights violations). Most recently, pursuant to its free trade agreement with Colombia, the U.S. implemented a Labor Action Plan, whereby Colombia agreed to end the violence directed at labor unions. Christina M. Fetterhoff, *The Human Rights Brief: Center for Human Rights and Humanitarian Law, Human Rights Vulnerability under the US–Colombia Free Trade Agreement*, <http://hrbrief.org/2011/10/human-rights-vulnerability-under-the-us-colombia-free-trade-agreement/> (Oct. 22, 2011) (accessed Nov. 17, 2012).

<sup>2</sup> Oxford U. Press, *Oxford English Dictionary Online*, <http://www.oed.com>; *select Quick Search*, *search* “race to the bottom” (accessed Nov. 17, 2012).

<sup>3</sup> Shark & Fishery Conservation Act of 2010, Pub. L. No. 111-348, §§ 102–103, 124 Stat. 3668 (2011) (amending the High Seas Driftnet Fishing Moratorium Protection Act and the Magnuson-Stevens Fishery Conservation and Management Act).

<sup>4</sup> *Id.* at § 102(c)(1)(G).

<sup>5</sup> Ltr. from Rebecca Greenberg, Marine Scientist, Oceana, to Natl. Marine Fisheries Serv., *Notice and Request for Information on Identification of Nations Whose Fishing Vessels are Engaged in Fishing in Waters beyond Any National Jurisdiction That Target or Incidentally Catch Sharks* (Aug. 1, 2011) (available at <http://oceana.org/sites/default/files/>

*Shark\_Conservation\_Act\_Import\_Restrictions\_Identification\_of\_Nations\_Aug\_1\_2011.pdf* (accessed Nov. 17, 2012)). Oceana is the “largest international organization focused solely on ocean conservation.” Oceana, *What We Do*, <http://oceana.org/en/about-us/what-we-do> (accessed Nov. 17, 2012).

sale, then discarding the dying fish at sea.<sup>6</sup> Although shark finning may sound obscure, banning products from countries that do not restrict the practice would impede trade between the U.S. and a number of its most important trade partners—including China, Japan, and Indonesia.<sup>7</sup> Such an embargo would have enormous negative effects on established trade relationships and, more significantly, might violate international law and obligations under multilateral free trade treaties.<sup>8</sup>

The call for an embargo under the Shark Conservation Act is only the most recent interpretation of statutory language authorizing the U.S. to “take actions” in the name of conservation.<sup>9</sup> While Oceana’s call to ban the import of shark products may appear extreme, no international or federal court has defined what it means to “take actions” in the context of conservation.<sup>10</sup> This Note proposes that even in the absence of an existing judicial interpretation, what form of “actions” the U.S. may take is limited by (1) the interactions among various international fishery and conservation agreements; (2) past World Trade Organization dispute resolutions; and (3) judicial definitions of “take actions” in other areas of international law. After consulting these sources, it seems clear that imposing the trade restrictions suggested by Oceana would far exceed that limit as it relates to the Shark Conservation Act.

Part I discusses past U.S. domestic and international conservation efforts, including the Shark Conservation Act and its predecessors. Part II considers the implications of what Oceana has asked of the U.S. by requesting that it place strict trade restrictions on fifteen foreign states—specifically in light of the relevant international agreements to

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<sup>6</sup> Humane Socy. Intl., *Help Stop Shark Finning*, [http://www.hsi.org/issues/shark\\_finning/tips/help\\_stop\\_shark\\_finning.html](http://www.hsi.org/issues/shark_finning/tips/help_stop_shark_finning.html) (May 24, 2012) (accessed Nov. 17, 2012); see also Lisa Ling, CNN, *Shark Fin Soup Alters an Ecosystem*, [http://articles.cnn.com/2008-12-10/world/pip.shark.finning\\_1\\_shark-fin-shark-populations-top-predator?\\_s=PM:WORLD](http://articles.cnn.com/2008-12-10/world/pip.shark.finning_1_shark-fin-shark-populations-top-predator?_s=PM:WORLD) (Dec. 10, 2008) (accessed Nov. 17, 2012) (discussing the threatened state of sharks).

<sup>7</sup> Intl. Trade Administration, *Top U.S. Trade Partners*, [http://www.trade.gov/mas/ian/build/groups/public/@tg\\_ian/documents/webcontent/tg\\_ian\\_003364.pdf](http://www.trade.gov/mas/ian/build/groups/public/@tg_ian/documents/webcontent/tg_ian_003364.pdf) (2012) (accessed Nov. 17, 2012); see Jeffrey J. Schott, State. Before the Comm. on Intl. Relations, U.S. House of Reps., *U.S. Economic Sanctions: Good Intentions, Bad Execution* (Washington, D.C. June 3, 1998) (copy of transcript available at <http://www.iie.com/publications/papers/paper.cfm?ResearchID=314> (accessed Nov. 17, 2012)) (discussing U.S. sanction policies); Raul Caruso, *The Impact of International Economic Sanctions on Trade: An Empirical Analysis*, 9 Peace Econ., Peace Sci. & Pub. Policy 7–8, 15–16 (2003) (discussing the impact of negative economic sanctions on international trade).

<sup>8</sup> *Infra* pt. II, sect. B (discussing the interaction of trade and conservation internationally).

<sup>9</sup> See e.g. The Lacey Act, 16 U.S.C. §§ 3371–3378 (2006) (providing for taking action in the form of civil penalties and criminal prosecution).

<sup>10</sup> This is likely due to the deference owed to agency decisions under the Administrative Procedures Act. See Lindsay J. Nichols, *The NMFS’s National Standard Guidelines: Why Judicial Deference May Be Inevitable*, 91 Cal. L. Rev. 1375, 1393–94 (2003) (discussing the limitations placed on judicial review under the Magnuson-Stevens Act).

which the U.S. is already a party. Finally, Part III presents a definition of “take actions” in the context of the Shark Conservation Act and considers what “actions” are permissible under that definition.

## II. A HISTORY OF CONSERVATION

This Note’s discussion of relevant conservation laws previously enacted by the U.S. proceeds in four sections. Section A highlights domestic conservation laws in which the U.S. clearly defines consequences for violations. While there are a wide variety of conservation laws currently in force in the U.S., the specific statutes discussed in Section A are similar to the Shark & Fishery Conservation Act of 2010 (Shark Conservation Act) in both goal and substance. Of particular interest is whether such domestic laws are enforceable against foreign entities in addition to U.S. citizens.

Section B expands this Note’s examination of U.S. conservation laws and policy to include international conventions. The U.S. is party to a number of multilateral conventions, international organizations, and regional treaties that are concerned with both conservation of endangered species and the promotion of international trade.<sup>11</sup> This Section brings to light some of the underlying customary and contractual limitations on “taking actions” against foreign states. Such limitations lay the framework for how “taking actions” can be defined in U.S. law.

Section C and Section D hone in on two specific U.S. statutes: the Pelly Amendment<sup>12</sup> and the Shark Conservation Act.<sup>13</sup> Section C focuses solely on the Pelly Amendment and its powers in relation to international conservation programs and trade restrictions. Section C examines the reasoning, method, and impact of significant implementations of the Pelly Amendment. Section D analyzes the Shark Conservation Act for a better structural and linguistic understanding of its contents. It further considers how the Shark Conservation Act amended the High Seas Driftnet Fishing Moratorium Protection Act and the Magnuson-Stevens Fishery Conservation and Management Act.<sup>14</sup>

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<sup>11</sup> See e.g. Driftnet Act Amendments of 1990, 16 U.S.C. § 1826 (2006) (supporting the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, also known as the Wellington Convention); 50 C.F.R. § 23.1 (2011) (discussing the purpose of the Convention on International Trade in Endangered Species of Wild Fauna and Flora).

<sup>12</sup> Also known as the Fishermen’s Protective Act, 22 U.S.C. §§ 1971–1980, the Pelly Amendment was incorporated by Pub. L. 92-219, 85 Stat. 786 (1971). The Amendment requires the Secretary of Commerce to report to the President when he or she determines that nationals of a foreign state are undermining the effectiveness of an international fishery conservation program, and authorizes the President to direct the Secretary of Treasury to prohibit importation of fish products from such offending nations as consistent with the General Agreements on Trade and Tariffs (GATT). The law’s scope was later expanded to all wildlife products. Pub. L. 95-376, 92 Stat. 714 (1978).

<sup>13</sup> Pub. L. No. 111-348, 124 Stat. 3668.

<sup>14</sup> *Id.*

A. *Trade-based Conservation Statutes with Defined Consequences*

The Lacey Act of 1900<sup>15</sup> is landmark legislation for the protection of wildlife.<sup>16</sup> The Lacey Act makes it illegal for any entity subject to U.S. jurisdiction to trade any fish, wildlife, or plant taken in violation of any U.S. or Indian tribal law, treaty, regulation, or foreign law.<sup>17</sup> The Lacey Act establishes penalties and sanctions for violations, including (1) civil penalties up to \$10,000 per violation as assessed during administrative judicial proceedings; (2) criminal penalties in the form of fines up to \$20,000 and no more than five years in federal prison; and (3) federal permit sanctions (relating to import/export, hunting, or fishing).<sup>18</sup> The Lacey Act further provides that any illegally transported wildlife and any vessel or vehicle used in furtherance of such transport is subject to forfeiture.<sup>19</sup> The Secretary of Commerce imposes all such penalties and forfeitures.<sup>20</sup>

Although the Lacey Act is a domestic law, the federal government has invoked it against defendants violating conservation laws of other countries.<sup>21</sup> In *U.S. v. One Afghan Urial Ovis Orientalis Blanfordi Fully Mounted Sheep*, an American killed a sheep—known as an Afghan Urial or *Ovis orientalis blanfordi*—in Pakistan and used a provincial permit to export the animal to the U.S. in violation of the laws of Pakistan.<sup>22</sup> Because the defendant's actions violated Pakistani law, the U.S. government seized all of the sheep products that had been imported.<sup>23</sup> *One Afghan Urial* and the Lacey Act demonstrate the power of the U.S. government to take actions against any entity violating U.S. conservation law, as well as any entity violating an established foreign conservation law.

Nearly a century after the passage of the Lacey Act, the U.S. implemented a series of fishery conservation acts in the 1980s, further reflecting U.S. efforts to uphold international conservation laws.<sup>24</sup> For example, the U.S. passed the Atlantic Salmon Convention Act of

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<sup>15</sup> 16 U.S.C. §§ 3371–3378.

<sup>16</sup> See Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 Pub. Land L. Rev. 27, 29–31 (1995) (stating that the Lacey Act is a “potent weapon” against illegal wildlife trafficking and provides “the most comprehensive coverage of all federal statutes”); see also Rebecca F. Wisch, Animal Leg. & Historical Ctr., *Overview of the Lacey Act*, <http://www.animallaw.info/articles/ovuslaceyact.htm> (2003) (accessed Nov. 17, 2012) (describing the Lacey Act as “one of the broadest and most comprehensive forces” in combating wildlife crime).

<sup>17</sup> 16 U.S.C. § 3372.

<sup>18</sup> *Id.* at § 3373.

<sup>19</sup> *Id.* at § 3374.

<sup>20</sup> *Id.* at § 3375.

<sup>21</sup> *E.g. U.S. v. One Afghan Urial Ovis Orientalis Blanfordi Fully Mounted Sheep*, 964 F.2d 474 (5th Cir. 1992) (finding that the U.S. established probable cause for forfeiture of sheep illegally imported into the U.S. in violation of the Lacey Act).

<sup>22</sup> *Id.* at 475, 477.

<sup>23</sup> *Id.* at 475.

<sup>24</sup> *Infra* nn. 25–41.

1982<sup>25</sup> in support of the Convention for the Conservation of Salmon in the Northern Atlantic Ocean (the “Convention for the Conservation of Salmon”).<sup>26</sup> The Atlantic Salmon Convention Act authorizes the Secretary of Commerce to implement any regulations, applicable to all persons or vessels subject to U.S. jurisdiction, that are necessary to enforce the Convention for the Conservation of Salmon, which restricts salmon fishing activity in international waters to certain defined areas.<sup>27</sup> In addition to forfeiture of any illegal fish obtained and any vessel used in connection with violation of the Atlantic Salmon Convention Act, a violator is subject to civil and criminal penalties.<sup>28</sup> A person who violates the Atlantic Salmon Convention Act is liable to the U.S. for personal civil penalties up to \$100,000 per violation, in rem civil penalties against the vessel used in violation, permit sanctions, and federal criminal prosecution resulting in up to \$200,000 in criminal fines and up to ten years in federal prison.<sup>29</sup>

In the same vein as the Atlantic Salmon Convention Act, the Northern Pacific Halibut Act of 1982<sup>30</sup> authorizes the Secretary of Commerce to enforce the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, as amended in 1979.<sup>31</sup> In addition to forfeiture of any fish obtained in violation of the Northern Pacific Halibut Act and seizure of any vessel used to illegally obtain such fish, violators are subject to civil and criminal penalties, defined as (1) a maximum of \$200,000 in civil fines for each offense, with each day of continuing violation constituting a separate offense; (2) revocation or suspension of fishing permits and imposition of additional restrictions on permits applied for by foreign fishing vessels; and (3) criminal fines up to \$400,000 and ten years in federal prison.<sup>32</sup> Unlike the Atlantic Salmon Convention Act, the Northern Pacific Halibut Act includes provisions for specific additional penalties against foreign vessels that violate it while under U.S. jurisdiction.<sup>33</sup>

The Pacific Salmon Treaty Act of 1985<sup>34</sup> similarly authorizes the Secretary of Commerce to enforce a bilateral treaty between the U.S. and Canada. The civil and criminal penalties under the Pacific Salmon Treaty Act are comparable to those imposed under the Northern Pa-

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<sup>25</sup> Atlantic Salmon Convention Act, 16 U.S.C. §§ 3601–3608 (2006) (as amended 1983).

<sup>26</sup> *Id.* at § 3601.

<sup>27</sup> *Id.* at § 3604.

<sup>28</sup> *Id.* at § 3606(b).

<sup>29</sup> *Id.* (citing 16 U.S.C. §§ 1858–1859).

<sup>30</sup> Northern Pacific Halibut Act, 16 U.S.C. §§ 773–773k (2006).

<sup>31</sup> *Id.* at §§ 773, 773c.

<sup>32</sup> *Id.* at §§ 773f–773h.

<sup>33</sup> Compare *id.* at § 773e(b) (Northern Pacific Halibut Act) with 16 U.S.C. §§ 3601–3608 (Atlantic Salmon Convention Act) (showing that the former prohibits any “foreign fishing vessel” from fishing for halibut in the fishery conservation zone, but the latter contains no analogous provision).

<sup>34</sup> Pacific Salmon Treaty Act, 16 U.S.C. §§ 3631–3645 (2006).

cific Halibut Act,<sup>35</sup> But the acts prohibited under the Pacific Salmon Treaty Act have a greater scope. While the Atlantic Salmon Convention Act and Northern Pacific Halibut Act, discussed above, define violations based on the actual capture of fish in violation of the restrictions imposed by international agreements, the Pacific Salmon Treaty Act prohibits any transportation, shipment, sale, purchase, import, export, or possession of the protected fish within U.S. jurisdiction.<sup>36</sup> Thus, the Secretary of Commerce's punitive authority reaches significantly further under the Pacific Salmon Treaty Act. The subsequently enacted North Pacific Anadromous Stocks Convention Act of 1992, which restricts any U.S. vessel from fishing for anadromous species in any jurisdiction,<sup>37</sup> continues this trend of broader restrictions.

Despite the congressional trend of imposing increasingly broad restrictions with each successive statute, it appears that it was not until the passage of the South Pacific Tuna Act of 1988 that the government was *obligated* to take action against violators of migratory fishing laws.<sup>38</sup> The South Pacific Tuna Act imposes criminal and civil penalties for violation of Pacific Ocean tuna fishing restrictions that are comparable to its predecessor statutes, but it also requires that the Secretary of Commerce pursue penalizing such violations.<sup>39</sup> The South Pacific Tuna Act requires the Secretary of Commerce to fully investigate, at the request of a Pacific island party, any alleged violation by a U.S. vessel.<sup>40</sup>

As indicated, despite the progressively broader scope of each of these acts, all impose substantially similar penalties: civil monetary penalties, permit sanctions, criminal fines, and federal imprisonment, as overseen by the Secretary of Commerce.<sup>41</sup> Under these domestic laws, the U.S. is not authorized to take any further international actions beyond the actions listed explicitly.<sup>42</sup>

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<sup>35</sup> *Id.* at § 3637(b)–(c); 16 U.S.C. §§ 773e–773g.

<sup>36</sup> 16 U.S.C. § 3637(a)(5).

<sup>37</sup> North Pacific Anadromous Stocks Convention Act, 16 U.S.C. § 5009 (2006); see Moritaka Hayashi, *Enforcement by Non-Flag States on the High Seas under the 1995 Agreement on Straddling and Highly Migratory Fish Stocks*, 9 Geo. Intl. Env'tl. L. Rev. 1, 9–10 (1996) (providing that the North Pacific Anadromous Stocks Convention Act of 1992 is among a number of treaties permitting boarding and inspection as well as seizure and arrest of vessels).

<sup>38</sup> South Pacific Tuna Act, 16 U.S.C. §§ 973–973r (2000).

<sup>39</sup> *Id.* at § 973h.

<sup>40</sup> *Id.* at § 973h(b).

<sup>41</sup> 16 U.S.C. §§ 773f–773g (Northern Pacific Halibut Act); 16 U.S.C. §§ 973e–973f (South Pacific Tuna Act); 16 U.S.C. § 3606 (Atlantic Salmon Convention Act); 16 U.S.C. § 3637 (Pacific Salmon Treaty Act); 16 U.S.C. § 5010 (North Pacific Anadromous Stocks Convention Act).

<sup>42</sup> See generally Edward M. Wise, *International Crimes and Domestic Criminal Law*, 38 DePaul L. Rev. 923, 927–28, 932–34 (1989) (requiring “express statutory condemnation of an act as criminal”).

### B. Conservation on a Global Scale

As illustrated above, international conservation efforts have a strong influence on domestic laws.<sup>43</sup> Even the Lacey Act, which does not cite a specific international agreement as its source, states:

It is unlawful for any person . . . to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, *treaty*, or regulation of the United States or in violation of any Indian tribal law.<sup>44</sup>

As a symptom of globalization, conservation treaties have become increasingly multinational and expansive.<sup>45</sup> In 1973, the U.S., along with seventy-nine other countries, signed the Convention on International Trade in Endangered Species of Wild Fauna<sup>46</sup> and Flora<sup>47</sup> (CITES).<sup>48</sup> CITES was drafted with the purpose of safeguarding certain species from over-exploitation through international trade, either as live specimens or other animal and plant products, and has acted as a conservation template for its member nations.<sup>49</sup> One hundred and seventy-six countries, including all but eighteen members of the United Nations (UN), are now party to CITES, which is overseen by a Secretariat and protects over 30,000 species.<sup>50</sup> Although participation in CITES is voluntary, all parties are legally bound by the convention.<sup>51</sup> Its five major requirements are: (1) all import, export, re-export, or introduction of a species covered by CITES must be authorized by a

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<sup>43</sup> See generally Thomas E. Skilton, *GATT and the Environment in Conflict: The Tuna-Dolphin Dispute and the Quest for an International Conservation Strategy*, 26 Cornell Intl. L.J. 455, 455 (1993) (finding that domestic environmental protection laws and international conservation are linked).

<sup>44</sup> 16 U.S.C. § 3372(a)(1) (emphasis added).

<sup>45</sup> See e.g. Christopher J. Carr & Harry N. Scheiber, *Dealing with a Resource Crisis: Regulatory Regimes for Managing the World's Marine Fisheries*, 21 Stan. Envtl. L.J. 45, 47, 51 (2002) ("The effort to establish global conservation-oriented management standards is a relatively recent phenomenon."); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum. L. Rev. 1955, 1956–58 (1999) (stating that the breadth and depth of treaties regulating conduct has broadened).

<sup>46</sup> *Webster's Third New International Dictionary* 829 (Philip Babcock Gove ed., Merriam-Webster, Inc. 2002) (defining fauna as the biological term for the animals or animal life of any particular environment).

<sup>47</sup> *Id.* at 874 (defining "flora" as the biological term for the plant life in any particular environment).

<sup>48</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora (Mar. 3, 1973), 27 U.S.T. 1087 [hereinafter CITES].

<sup>49</sup> 50 C.F.R. § 23.1 (2011); Cyrille de Klemm, *Guidelines for Legislation to Implement CITES*, 5–7 (IUCN 1993).

<sup>50</sup> U.S. Fish & Wildlife Serv., *What is CITES?*, <http://www.fws.gov/international/cites/what-is-cites.html> (accessed Nov. 17, 2012); CITES, *The CITES Species*, [www.cites.org/eng/disc/species.php](http://www.cites.org/eng/disc/species.php) (accessed Nov. 17, 2012).

<sup>51</sup> de Klemm, *supra* n. 49, at 7; Rosalind Reeve, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*, in *Making Treaties Work: Human Rights, Environment and Arms Control* ch. 6 (Geir Ulfstein ed., Cambridge U. Press 2007).



licensing system; (2) each party must designate management and scientific authorities to oversee the convention's implementation; (3) parties must establish law prohibiting trade that violates CITES; (4) violations must give rise to penalties; and (5) each party must have the authority to confiscate any materials moved in violation of CITES.<sup>52</sup> Thus, the convention does not replace any national law; rather, it provides a framework for its party countries to create their own implementing legislation.<sup>53</sup>

The convention itself does not explicitly authorize the Secretariat to take action against parties found in violation of the convention,<sup>54</sup> but the Secretariat has implemented a series of eleven penal resolutions against offending parties.<sup>55</sup> The resolutions include, among other things, mandatory Secretariat confirmation of all permits issued, suspension of the Secretariat's cooperation, a formal warning, a visit by the Secretariat to verify party capacity, a recommendation that all other parties suspend CITES-related trade with the offending party, and dictation of corrective measures the offending party must complete before resumed Secretariat cooperation.<sup>56</sup>

Although these measures sound as if they constitute "taking action," the Secretariat's penalties are more effective in theory than in practice.<sup>57</sup> All countries that are a party to CITES are legally bound by the convention under the principles of international law. Without any actual economic or physical enforcement power, however, there is little that the Secretariat can do aside from issuing warnings and abstractly "implementing" penalties.<sup>58</sup>

Some domestic laws within individual CITES member states have created opportunities for other members to take more meaningful action against violating countries. For instance, in light of national legislation like the Pelly Amendment, the U.S. and other countries have been able to take bilateral action against an offending state due to its

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<sup>52</sup> CITES, *supra* n. 48, at art. VIII; Ulrich Beyerlin & Thilo Marauhn, *International Environmental Law* 184–86 (Hart Publ'g 2011).

<sup>53</sup> As CITES is a non-self-executing treaty, its framework must be implemented via domestic law. de Klemm, *supra* n. 49, at 6–7.

<sup>54</sup> CITES requires any party reporting violations by another party to also propose remedial action for the Secretariat to consider. CITES, *supra* n. 48, at art. XIII.

<sup>55</sup> CITES Secretariat, Workplan: CITES Resolutions (Draft), SC45 Doc. 7.1/Annex 3 (available at <http://www.cites.org/eng/com/SC/45/E45-07-1A3.pdf> (accessed Nov. 17, 2012)).

<sup>56</sup> *Resolution Conf. 14.3, CITES Compliance Procedures*, <http://www.cites.org/eng/res/14/14-03C15.php> (2004) (accessed Nov. 17, 2012); Press Release, CITES, *CITES Acts to Curb Smuggling of Elephant Ivory and Rhino Horn* (July 31, 2012) (available at [http://cites.org/eng/news/pr/2012/20120731\\_SC62\\_results.php](http://cites.org/eng/news/pr/2012/20120731_SC62_results.php) (accessed Nov. 17, 2012)).

<sup>57</sup> See Reeve, *supra* n. 51, at 136–52 (stating that while the Secretariat has information and recommendation functions, "no CITES institution is empowered to make binding determinations of non-compliance"); see also Birnie et al., *International Law and the Environment* 665, 685–88 (3d. ed., Oxford U. Press 2009) (finding that despite the CITES enforcement mechanisms, smuggling is widespread and interpretive problems remain).

<sup>58</sup> Reeve, *supra* n. 51, at 142–43.

non-compliance with CITES.<sup>59</sup> In 1991, the U.S. used this method against Japan for the country's exploitation of the hawksbill turtle.<sup>60</sup> Pelly Amendment certification and subsequent sanctions persuaded Japan to modify its practices and create greater protections for the turtle.<sup>61</sup>

The UN is an international organization to which all but one of the 195 internationally recognized sovereign states are members.<sup>62</sup> The UN is not primarily concerned with environmental protection, but it has had a hand in several of the influential international conservation conventions.<sup>63</sup> The UN's stated aims include facilitating cooperation in international law, international security, economic development, social programs, human rights, and world peace.<sup>64</sup> Although the UN General Assembly occasionally passes resolutions concerned specifically with conservation—and, in some cases, even shark finning<sup>65</sup>—several subsidiary agencies specifically focus on international conservation efforts.<sup>66</sup> Of particular interest is the UN Environment Programme (UNEP), which was founded in 1972 to coordinate UN environmental activities and work with national governments and non-governmental organizations (NGOs) on a wide range of atmospheric, terrestrial, and marine ecosystem issues.<sup>67</sup>

One of the most significant agreements formed under the UNEP is the Convention on the Conservation of Migratory Species of Wild Animals (CMS).<sup>68</sup> Since it was signed in 1979, over 100 parties have joined the CMS, which operates as a framework for other global and

<sup>59</sup> Joseph Robert Berger, *Unilateral Trade Measures to Conserve the World's Living Resources: An Environmental Breakthrough for the GATT in the WTO Sea Turtle Case*, 24 Colum. J. Envtl. L. 355, 392–94 (1999).

<sup>60</sup> Keith Schneider, *U.S. Moves to Punish Japan for Trade in Turtles*, N.Y. Times A12 (Mar. 21, 1991) (available at <http://www.nytimes.com/1991/03/21/world/us-moves-to-punish-japan-for-trade-in-turtles.html?src=pm> (accessed Nov. 17, 2012)).

<sup>61</sup> Margaret Dupree, *Passing Through Enemy Waters: Marine Turtles in Japan*, 14 UCLA Pac. Basin L.J. 75, 86 (1995).

<sup>62</sup> U.S. Dept. of State, *Independent States in the World*, <http://www.state.gov/s/inr/rls/4250.htm#note4> (Jan. 3, 2012) (accessed Nov. 17, 2012). Vatican City is not a full member of the UN, but has Permanent Observer status. UN, *Permanent Observers: Non-member States and Entities*, <http://www.un.org/en/members/nonmembers.shtml> (accessed Nov. 17, 2012).

<sup>63</sup> See e.g. David A. Balton & Holly R. Koehler, *Reviewing the United Nations Fish Stocks Treaty*, 7 Sust. Dev. L. & Policy 5, 5 (2006) (discussing the UN's adoption of the UN Fish Stocks Agreement, Code of Conduct for Responsible Fisheries, and High Seas Fishing Compliance Agreement).

<sup>64</sup> UN Charter, art. 1, ¶ 1–2.

<sup>65</sup> UN ARES, 62nd Sess., 77th mtg., UN Doc. A/RES/62/177 (2008) The General Assembly's annual Sustainable Fisheries Resolution of 2004 called on nations to ban targeting sharks for their fins. The 2007 version of the same resolution considered a complete ban on finning by requiring the retention of the whole shark with its fin naturally attached. UN ARES, 59th Sess., 56th mtg., UN Doc. A/RES/59/25 (2005).

<sup>66</sup> Birnie et al., *supra* n. 57, at 58–61.

<sup>67</sup> *Id.* at 65–68.

<sup>68</sup> See *id.* at 681–85 (discussing that although CMS has weaknesses, there has been significant progress made with regard to reducing the rate of biodiversity loss).

regional agreements.<sup>69</sup> Ranging from legally binding treaties to less stringent memoranda of understanding, CMS-based agreements are enacted to protect terrestrial, marine, and avian species that cross national borders during migration and are deemed endangered by the CMS Secretariat within UNEP.<sup>70</sup> CMS currently lists seven shark species as endangered,<sup>71</sup> and the Secretariat recently completed a non-binding international Memorandum of Understanding with the goal of implementing multi-national plans of action for global shark conservation measures.<sup>72</sup>

Another specialized UN agency, the Food and Agriculture Organization (FAO), has also become concerned with shark conservation.<sup>73</sup> In 1999, the FAO adopted the International Plan of Action for the Conservation and Management of Sharks.<sup>74</sup> The plan calls for all shark-fishing nations to develop plans of action for shark conservation.<sup>75</sup> Most have not complied.<sup>76</sup> Like the CMS, however, the plan is not binding on members and the UN cannot impose penalties for non-cooperation.<sup>77</sup> The ineffectiveness of efforts like these is likely what led to the recent enactment of the Shark Conservation Act in the U.S. Although, on its face, the “take actions” clause of the Shark Conservation Act appears more enforceable than these previous efforts—it is at least binding on U.S. citizens—it may prove similarly toothless under international law.

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<sup>69</sup> *Id.* at 681.

<sup>70</sup> Convention on Migratory Species, *Introduction to the Convention on Migratory Species*, <http://www.cms.int/about/intro.htm> (accessed Nov. 17, 2012).

<sup>71</sup> UN Env. Programme, Convention on Migratory Species List of Common Names of Species Included in Appendices I and II, UN Doc. UNEP/CMS/Inf.10.3 (2011) (available at [http://www.cms.int/bodies/COP/cop10/docs\\_and\\_inf\\_docs/inf\\_03\\_common\\_names\\_e.pdf](http://www.cms.int/bodies/COP/cop10/docs_and_inf_docs/inf_03_common_names_e.pdf) (accessed Nov. 17, 2012)) (showing that spiny dogfish, great white, basking, whale shark, shortfin mako, longfin mako, and porbeagle sharks are considered endangered by CMS).

<sup>72</sup> Convention on Migratory Species, Memo. of Understanding on the Conservation of Migratory Sharks 4 (Feb. 12, 2010) (available at [http://www.cms.int/species/sharks/MoU/Migratory\\_Shark\\_MoU\\_Eng.pdf](http://www.cms.int/species/sharks/MoU/Migratory_Shark_MoU_Eng.pdf) (accessed Nov. 17, 2012)).

<sup>73</sup> UN Food & Agric. Org., *International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries, International Plan of Action for the Conservation and Management of Sharks, International Plan of Action for the Management of Fishing Capacity* 11–18 (1999) (available at <ftp://ftp.fao.org/docrep/fao/006/x3170e/X3170E00.pdf> (accessed Nov. 17, 2012)).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 13 (calling for member and non-member states to adopt shark plans by 2001). See also *id.* at 6 (defining “state” to include members and non-members).

<sup>76</sup> See UN Food & Agric. Org. Fisheries & Aquaculture Dept., *International Plan of Action for the Conservation and Management of Sharks*, <http://www.fao.org/fishery/ipoa-sharks/npoa/en> (accessed Nov. 17, 2012) (providing the twelve countries that have adopted shark conservation plans: U.S. (2001), United Kingdom (2001), Australia (2003, 2004), Taiwan (2004), Mexico (2004), Ecuador (2005), Malaysia (2006), Canada (2007), Seychelles (2007), Uruguay (2008), Argentina (2009), and Japan (2009)).

<sup>77</sup> UN Food & Agric. Org., *supra* n. 73, at 12 (“The [International Plan of Action]–Sharks is voluntary . . . [a]ll concerned states are encouraged to implement it.”).

Regional Fisheries Management Organizations (RFMOs) are international entities dedicated to the sustainable management of fisheries around the globe.<sup>78</sup> As their title suggests, RFMOs are generally regional, and each one tends to focus on a certain species of fish within its region.<sup>79</sup> The U.S., for example, is a member of the International Commission for the Conservation of Atlantic Tuna and the Inter-American Tropical Tuna Commission.<sup>80</sup>

RFMOs have the power to enact binding measures upon their members, but more often than not, RFMOs merely make recommendations that leave wide loopholes for noncompliance.<sup>81</sup> In 2004, the International Commission for the Conservation of Atlantic Tunas adopted a recommendation for its member countries to implement a weight ratio test.<sup>82</sup> Such a test requires that shark fins unloaded from a fishing vessel weigh no more than 5% of the unloaded shark carcasses.<sup>83</sup> By limiting the amount of unloadable fins to 5% of the total carcass weight, the test aims to discourage harvesting shark fins and disposing of the rest of the shark at sea.<sup>84</sup> By its very nature, however, the weight ratio test creates a loophole: it allows shark finning in moderation—as long as the collected fins are within the proper ratio.<sup>85</sup> Despite this flaw, the Inter-American Tropical Tuna Commission adopted the same measure in 2005.<sup>86</sup>

### C. *The Pelly Amendment: Conservation through Trade Restriction*

The U.S. Pelly Amendment, a section of the Fishermen's Protective Act, is a powerful tool for combating illegal or detrimental trade

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<sup>78</sup> U.S. Dept. of State, *Regional Fisheries Management Organizations*, <http://www.state.gov/e/oes/ocns/fish/regionalorganizations/index.htm> (accessed Nov. 17, 2012).

<sup>79</sup> UN Dept. of Pub. Info., Resumed Review Conference on the Agreement Relating to the Conservation and Management of Straddling Fish Stocks, UN Doc. DPI/2556 F (2010) (available at [http://www.un.org/Depts/los/convention\\_agreements/reviewconf/FishStocks\\_EN\\_F.pdf](http://www.un.org/Depts/los/convention_agreements/reviewconf/FishStocks_EN_F.pdf) (accessed Nov. 17, 2012)) [hereinafter *Fish Stocks*].

<sup>80</sup> U.S. Dept. of State, *supra* n. 78.

<sup>81</sup> Deep Sea Conserv. Coalition, *A Net with Holes: The Regional Fisheries Management System 1–2* (available at [http://www.savethehighseas.org/publicdocs/DSCC\\_RMFO.pdf](http://www.savethehighseas.org/publicdocs/DSCC_RMFO.pdf) (accessed Nov. 17, 2012)); see *Fish Stocks*, *supra* n. 79 (“One of the most critical issues in managing fishing on the high seas concerns enforcement, an issue that many countries believe involves the exercise of State sovereignty.”).

<sup>82</sup> See Intl. Commn. for the Conserv. of A. Tunas, *Recommendation by ICCAT Concerning the Conservation of Sharks Caught in Association with Fisheries Managed by ICCAT* (Apr. 10, 2004) (available at <http://www.iccat.int/Documents/Recs/compendi-odpdf-e/2004-10-e.pdf> (accessed Nov. 17, 2012)) (adopting a shark fin-to-body weight ratio) [hereinafter *Recommendation by ICCAT*].

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Mark Kinver, BBC News, *Shark Finning Continues Despite EU Ban, Says Report*, <http://www.bbc.co.uk/news/science-environment-11951562> (updated Dec. 9, 2010) (accessed Nov. 17, 2012).

<sup>86</sup> Inter-American Tropical Tuna Commn., *Resolution on the Conservation of Sharks Caught in Association with Fisheries in the Eastern Pacific Ocean* (June 20–24, 2005) (available at <http://www.iattc.org/PDFFiles2/Resolutions/C-05-03-Sharks.pdf> (accessed Nov. 17, 2012)).

that undermines conservation efforts. The Pelly Amendment authorizes the President to prohibit importation of products from countries that allow trade practices that diminish the effectiveness of international conservation programs.<sup>87</sup> Although, as originally enacted, the Pelly Amendment only applied to fishery conservation programs, it has since been expanded and invoked to protect all varieties of endangered species<sup>88</sup>—most famously, tigers, rhinoceroses, and sea turtles.<sup>89</sup>

Nevertheless, invoking the Pelly Amendment is not a simple process. Before the President can implement any trade barriers against a country that has violated the Pelly Amendment, either the Secretary of Commerce or the Secretary of the Interior must certify that the other nation's practices are adverse to global conservation interests as defined by international agreements.<sup>90</sup> Thus, if the shark finning practices of other countries were found to be adverse to global conservation interests, as formally defined by international agreements, then the Secretary of Commerce or the Secretary of the Interior could invoke the Pelly Amendment to certify those countries. Once a specific violation has been certified, trade sanctions can be imposed against the applicable country, or countries, and any individual who breaches those restrictions is subject to fines up to \$25,000 and forfeiture of the traded goods.<sup>91</sup>

Since the Pelly Amendment was added to the Fishermen's Protective Act in 1971, many certification petitions have been filed, but only a fraction of them have been certified.<sup>92</sup> This is, at least in part, because the threat of official certification—and ensuing sanctions—is often enough pressure for an offending country to change its practices.<sup>93</sup> In September 1993, however, the U.S. officially certified Taiwan for its trade in tiger and rhinoceros products.<sup>94</sup> In response, the President banned the importation of all wildlife specimens and products from Taiwan.<sup>95</sup> The prohibitions themselves were controversial because they were enforced against both endangered and non-endangered resources, which resulted in the embargo of approximately \$25

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<sup>87</sup> 22 U.S.C. § 1978(a)(4) (2006).

<sup>88</sup> Pub. L. No. 95-376, 92 Stat. 714.

<sup>89</sup> 56 Fed. Reg. 67627, 67632 (Dec. 31, 1991); 59 Fed. Reg. 22043, 22044 (Apr. 28, 1994); 62 Fed. Reg. 24502, 24502 (May 5, 1997); Ltr. from Gary Locke, U.S. Commerce Sec., to Barack Obama, U.S. Pres., *Report of Certification of Iceland under Pelly Amendment* 1 (July 19, 2011) (available at [http://www.noaanews.noaa.gov/stories2011/pdfs/pellygrantsignedletter\\_final.pdf](http://www.noaanews.noaa.gov/stories2011/pdfs/pellygrantsignedletter_final.pdf) (accessed Nov. 17, 2012)).

<sup>90</sup> 22 U.S.C. § 1978(a)(1)–(4).

<sup>91</sup> *Id.* at § 1978(e).

<sup>92</sup> Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 *Am. U. J. Intl. L. & Policy* 751, 772 (1994).

<sup>93</sup> *Id.*

<sup>94</sup> 59 Fed. Reg. at 22044; Daniel P. Blank, *Target-Based Environmental Trade Measures: A Proposal for the New WTO Committee on Trade and Environment*, 15 *Stan. Env'tl. L.J.* 61, 67 (1996).

<sup>95</sup> 59 Fed. Reg. at 22044.

million in goods.<sup>96</sup> These measures, however, also successfully encouraged Taiwan to modify its conservation policies, and as a result, the certification was lifted in 1995.<sup>97</sup>

Certification does not always mean that trade sanctions are actually enacted against the certified country.<sup>98</sup> Like the threat of certification, the threat of trade restrictions after certification may be enough to pressure the offending country to change its conservation policies. When Japan was certified in 1991, for instance, it strengthened its regulations to protect the endangered hawksbill turtle before the U.S. enacted any trade sanctions.<sup>99</sup> Alternatively, sometimes the U.S. will not implement sanctions against a certified country because doing so would violate World Trade Organization (WTO) policies or the General Agreement on Tariffs and Trade (GATT), which prohibit discriminatory trade restrictions except in a few very narrow circumstances.<sup>100</sup> An analysis of such instances is presented in Part III.

The most recent Pelly Amendment certification took place in July 2011, when the Secretary of Commerce certified Iceland for violating accepted whaling practices.<sup>101</sup> The International Whaling Commission (IWC) member nations could not agree on appropriate whale-population management measures, so the IWC decided to place a moratorium on commercial whaling until the members reached a consensus.<sup>102</sup> Iceland, however, violated this ban on whaling.<sup>103</sup> As of 2011, neither the U.S. nor Iceland had responded with changes in trade policy.<sup>104</sup>

#### D. Statutory Shark Initiatives

By signing the Shark Conservation Act into law, the U.S. placed itself at the forefront of global state-led shark conservation initia-

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<sup>96</sup> Blank, *supra* n. 94, at 62, 74 (providing that “although there is a relationship between the products targeted for import prohibition and the environmental problem being addressed, that relationship is not direct in the same way that prohibiting the import of the tigers and rhinoceroses themselves would be”).

<sup>97</sup> *Id.* at 62–63.

<sup>98</sup> *See id.* (stating that before the trade sanctions on Taiwan and China, “[t]he United States had threatened to use such environmental trade sanctions in the past but had never before actually implemented them”).

<sup>99</sup> 56 Fed. Reg. 67632, 67632 (Dec. 31, 1991).

<sup>100</sup> Agreement Establishing the World Trade Organization (Apr. 15, 1994), (available at [https://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](https://www.wto.org/english/docs_e/legal_e/04-wto.pdf) (accessed Nov. 17, 2012)); General Agreement on Tariffs and Trade pt. II, art. XIII (1986) (available at [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf) (accessed Nov. 17, 2012)) [hereinafter GATT].

<sup>101</sup> Ltr. from Gary Locke, *supra* n. 89, at 1.

<sup>102</sup> Ingrid M. Gronstal Anderson, *Jaws of Life: Developing International Shark Finning Regulations through Lessons Learned from the International Whaling Commission*, 20 *Transnatl. L. & Contemp. Probs.* 511, 515 (2011).

<sup>103</sup> *Id.* at 516. Though Iceland has stopped hunting whales due to diminished demand for the meat, it objects to the ban and maintains its own catch quotas. *Id.*

<sup>104</sup> *Id.*

tives.<sup>105</sup> In addition to the federal statutory ban on importing illegal shark fins, 2011 saw seven individual states or territories tighten their restrictions on the sale of shark fins: California,<sup>106</sup> Guam,<sup>107</sup> Hawaii,<sup>108</sup> Illinois,<sup>109</sup> Oregon,<sup>110</sup> the Northern Mariana Islands,<sup>111</sup> and Washington.<sup>112</sup> In Canada, shark finning within territorial waters is already illegal, and a bill currently pending in the Canadian Parliament would ban the import of detached shark fins altogether.<sup>113</sup> The European Union (EU) is considering an even more extensive law banning all EU boats and boats within EU territory from finning sharks.<sup>114</sup> Such a regulation would supplement the EU's existing shark conservation laws, which allow boats to remove shark fins with a permit—a system that is impractical to enforce and which creates many loopholes for boats docking at multiple ports.<sup>115</sup> The newly proposed law is unlikely to pass, however, because too many EU member states are unwilling to adopt the legislation without watering down its

<sup>105</sup> Morgan Erickson-Davis, *New Legislation Places U.S. at Forefront of Shark Legislation*, [http://news.mongabay.com/2010/1227-morgan\\_shark\\_act.html#](http://news.mongabay.com/2010/1227-morgan_shark_act.html#) (Dec. 27, 2010) (accessed Nov. 17, 2012).

<sup>106</sup> Cal. Assembly 376, 2011–2012 Reg. Sess. (Oct. 7, 2011) (as enacted) (available at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_0351-0400/ab\\_376\\_bill\\_20110909\\_enrolled.pdf](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0351-0400/ab_376_bill_20110909_enrolled.pdf) (accessed Nov. 17, 2012)).

<sup>107</sup> Guam S. 44–31, 31st Legis., 1st Reg. Sess. (Mar. 9, 2011) (as enacted) (available at [http://202.128.4.46/Public\\_Laws\\_31st/P.L.%2031-10%20SBill%20No.%2044-31%20.pdf](http://202.128.4.46/Public_Laws_31st/P.L.%2031-10%20SBill%20No.%2044-31%20.pdf) (accessed Nov. 17, 2012)).

<sup>108</sup> Haw. Sen. 2169, 25th Legis. (May 28, 2010) (as enacted) (available at [http://www.capitol.hawaii.gov/session2010/bills/GM606\\_.pdf](http://www.capitol.hawaii.gov/session2010/bills/GM606_.pdf) (accessed Nov. 17, 2012)).

<sup>109</sup> Ill. H. 4119, 97th Gen. Assembly (July 2, 2012) (as enacted) (available at <http://www.ilga.gov/legislation/publicacts/97/PDF/097-0733.pdf> (accessed Nov. 17, 2012)).

<sup>110</sup> Or. H. 2838, 76th Legis. Assembly, 2011 Reg. Sess. (June 2, 2011) (as enacted) (available at <http://www.leg.state.or.us/11reg/measpdf/hb2800.dir/hb2838.en.pdf> (accessed Nov. 17, 2012)).

<sup>111</sup> N. Mar. Is. H. 17–94, 17th Legis., 2010 Reg. Sess. (July 22, 2010) (as enacted) (available at [http://www.cnmileg.gov.mp/documents/house/hse\\_bills/17/HB17-094.pdf](http://www.cnmileg.gov.mp/documents/house/hse_bills/17/HB17-094.pdf) (accessed Nov. 17, 2012)).

<sup>112</sup> Wash. Sen. 5688, 62d Legis., 2011 Reg. Sess. (May 13, 2011) (as enacted) (available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Senate%20Passed%20Legislature/5688-S.PL.pdf> (accessed Nov. 17, 2012)).

<sup>113</sup> Bill C-380, An Act to Amend the Fish Inspection Act and the Fisheries Act (Importation of Shark Fins) 1st sess., 41st Parl., 2011 (available at <http://parl.gc.ca/House/Publications/Publication.aspx?Language=E&Mode=1&DocId=5315169&File=24#1> (accessed Nov. 17, 2012)).

<sup>114</sup> Press Release, European Commn., *Fisheries: Commission Proposes Full Ban on Shark Finning at Sea* (Nov. 21, 2011) (available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1384> (accessed Nov. 17, 2012)).

<sup>115</sup> European Commn. Reg. (EC) 1185/2003 on the Removal of Fins of Sharks on Board Vessels, OJEC 2003 L167 (available at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2003:167:SOM:EN:HTML> (accessed Nov. 17, 2012)); Don Melvin, *Huffington Post, Shark Finning Ban Proposed By European Commission*, [http://www.huffingtonpost.com/2011/11/21/european-commission-shark-finning-ban\\_n\\_1105282.html?ref=green](http://www.huffingtonpost.com/2011/11/21/european-commission-shark-finning-ban_n_1105282.html?ref=green) (Nov. 21, 2011) (accessed Nov. 17, 2012); Struan Stevenson, Pub. Serv. Europe, *MEPs Must Back 'Bold Step' to Ban Shark Finning*, <http://www.publicserviceeurope.com/article/1199/meps-must-back-bold-step-to-ban-shark-finning> (Dec. 2, 2011) (accessed Nov. 17, 2012).

terms by at least allowing boats to hunt shark for local use and research.<sup>116</sup>

Despite all of this new and pending shark-minded legislation, the U.S. Shark Conservation Act is unique. The Shark Conservation Act amends the language and content of two previous U.S. statutes: the High Seas Driftnet Fishing Moratorium Protection Act<sup>117</sup> (High Seas Driftnet) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens).<sup>118</sup> Magnuson-Stevens was signed into law in 1976 and has since been the primary law governing marine fisheries in the United States.<sup>119</sup> Magnuson-Stevens was enacted, *inter alia*, to conserve and protect U.S. fishery resources and to consolidate control over U.S. territorial water for optimal fishery development.<sup>120</sup>

Magnuson-Stevens was largely ineffective until High Seas Driftnet was passed in 1995 to address UN policies encouraging a global moratorium on driftnet fishing.<sup>121</sup> Magnuson-Stevens requires the Secretary of Commerce to work with the Secretary of State to “take actions,” including encouraging international organizations and their members to use market-related measures,<sup>122</sup> to combat illegal and unregulated fishing.<sup>123</sup> Failure to heed such recommendations has resulted in at least one lawsuit against federal officials.<sup>124</sup> Under the Shark Conservation Act amendments, added in 2010, the suggested “actions” include “seeking to enter into international agreements that require measures for the conservation of sharks, including measures to prohibit [finning] . . . that are comparable to those of the United States.”<sup>125</sup>

<sup>116</sup> Stevenson, *supra* n. 115.

<sup>117</sup> 124 Stat. at 3668–3670 (amending 16 U.S.C. §§ 1826i–1826k).

<sup>118</sup> 124 Stat. at 3670 (amending 16 U.S.C. § 1857).

<sup>119</sup> See 16 U.S.C. § 1801 (2006) (finding the U.S. needed a conservation and management program to prevent overfishing). The purpose of the management program extends to “all fish within the exclusive economic zone” (EEZ) and to anadromous species and Continental Shelf fishery resources beyond the EEZ. *Id.* at § 1801(b)(1)(A).

<sup>120</sup> *Id.*

<sup>121</sup> See Fisheries Act of 1995, Pub. L. No. 104-43, §§ 602–606, 109 Stat. at 391–392 (1995) (Title VI of the law, the High Seas Driftnet Fishing Moratorium Protection Act, was codified at 16 U.S.C. §§ 1826d–1826g and § 1826d prohibits any U.S. official from entering into an international agreement that would prevent “full implementation of the global moratorium on large-scale driftnet fishing on the high seas” as expressed in U.N. Resolution 46/215).

<sup>122</sup> 16 U.S.C. § 1826i(1)(A). “Market-related measures” cover several varieties of controls on the import and export of goods, in this case including: catch certification, trade documentation requirements, and import and export restrictions and prohibitions. UN Food & Agric. Org., *Stopping Illegal, Unreported and Unregulated (IUU) Fishing*, <http://www.fao.org/DOCREP/005/Y3554E/y3554e01.htm#bm1.6> (2002) (accessed Nov. 17, 2012).

<sup>123</sup> 16 U.S.C. § 1826i.

<sup>124</sup> *Humane Socy. of the U.S. v. Brown*, 920 F. Supp. 178, 180 (Ct. Intl. Trade 1996).

<sup>125</sup> 124 Stat. at 3669.



Therefore, unlike the penalties imposed by typical international-reaching U.S. conservation laws, the language inserted by the Shark Conservation Act seeks not to uphold the standards of an existing international treaty, but rather to impose an international standard—based on U.S. law—where one does not otherwise exist.<sup>126</sup> As discussed above, a majority of U.S. conservation laws are rooted in specific international treaties.<sup>127</sup> Such laws define violations and inflict penalties in accordance with such treaties. The terms of the Shark Conservation Act, however, do not correspond with any treaty; therefore, the penalties or “actions” suggested have little or no corresponding authority.<sup>128</sup> With this understanding, this Note now moves forward to consider permitted “actions” under the Shark Conservation Act in light of both what conservation-minded NGOs have requested and what international trade obligations require.

### III. THE SCOPE OF ALLOWABLE “ACTIONS”

The analysis of “taking action” under the Shark & Fishery Conservation Act of 2010 (Shark Conservation Act) proceeds in three parts. First, the requests made in the aforementioned Oceana letter<sup>129</sup> will be considered in light of the language of the statute, past U.S. behavior, and the countries at issue. Second, analysis will focus on existing U.S. international obligations, including global conservation and trade agreements, the World Trade Organization (WTO), and customary international law. Finally, this section will define the permissible scope of “take actions” in U.S. law generally, as well as under the Shark Conservation Act.

#### A. *Statistics*

On August 1, 2011, a marine scientist from Oceana, the largest international non-governmental organization (NGO) focused primarily on protecting the world’s oceans,<sup>130</sup> sent a letter to the National Marine Fisheries Service (NMFS) Office of International Affairs.<sup>131</sup> In that letter, Oceana profiles fifteen countries with “insufficient” conservation regulations in effect, focusing on verifiable import statistics, catch data, and regulatory programs.<sup>132</sup> Relying on the Shark Conser-

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<sup>126</sup> *Id.*

<sup>127</sup> See *supra* nn. 25–42 and accompanying text (discussing a number of fisheries conservation acts passed in response to corresponding international treaties and agreements as a means of giving the Secretary of Commerce enforcement powers against violators).

<sup>128</sup> See 124 Stat. at 3669 (suggesting that the U.S. “seek[] to enter into international agreements . . . that are comparable to those of the United States” but referencing no corresponding treaty authority) (codified at 16 U.S.C. § 1826i(3)).

<sup>129</sup> *Id.*

<sup>130</sup> Oceana, *What We Do*, <http://oceana.org/en/about-us/what-we-do> (accessed Nov. 17, 2012).

<sup>131</sup> Ltr. from Oceana, *supra* n. 5.

<sup>132</sup> *Id.* at 2.

vation Act, Oceana requested that NMFS impose economic sanctions against those foreign states. Observing that “[t]he United States now has a powerful tool to sanction countries that have not adopted a regulatory program for the conservation of sharks that is comparable to that of the U.S.,”<sup>133</sup> Oceana encouraged NMFS “to consider sanctions for the countries [Oceana has] identified . . . as their fishing activity and/or weak fisheries regulations are continuing to threaten sharks globally.”<sup>134</sup>

If the U.S. imposed trade sanctions on all fifteen profiled countries, the negative effects on established trade relations would be enormous.<sup>135</sup> On average, each of the fifteen profiled countries catches more than 20,000 metric tons (mts) of shark each year, with Indonesia leading the pack at around 90,000 mts.<sup>136</sup> Between January and May of 2011, however, the average country with available data had only exported approximately 10.29 mts to the U.S.<sup>137</sup> The alleged offender that exported the most shark product to the U.S. was Canada, at 43.23 mts.<sup>138</sup>

Imposing trade sanctions on Canada, as well as the other countries named by Oceana, would be detrimental to the U.S.’s greater international interests.<sup>139</sup> Most significantly, any sanctions imposed against Spain would influence the relationship between the U.S. and the entire European Union (EU).<sup>140</sup> The EU operates as a unit within the WTO and has the power to uniformly retaliate against the U.S. on behalf of a single country, as it did on behalf of the United Kingdom in

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<sup>133</sup> *Id.* at 1.

<sup>134</sup> *Id.* at 20.

<sup>135</sup> See e.g. Gary Clyde Hufbauer et al., Peterson Inst. for Intl. Econ., *US Economic Sanctions: Their Impact on Trade, Jobs, and Wages*, <http://www.iie.com/publications/wp/wp.cfm?ResearchID=149> (Apr. 1997) (accessed Nov. 17, 2012) (noting that bilateral sanctions often impose high costs on trade flows, reducing them by around 90% in 1985, 1990, and 1995).

<sup>136</sup> Ltr. from Oceana, *supra* n. 5, at 3–20.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 5–6.

<sup>139</sup> See e.g. Hufbauer et al., *supra* n. 135, at 1 (explaining that often sanctions do not have positive effects and may not change the behavior of the sanctioned countries as intended).

<sup>140</sup> Off. of the U.S. Trade Rep., Exec. Off. of the Pres., *European Union*, <http://www.ustr.gov/countries-regions/europe-middle-east/europe/european-union> (Oct. 10, 2011) (accessed Nov. 17, 2012).

1998,<sup>141</sup> Germany in 2000,<sup>142</sup> and Italy in 2001.<sup>143</sup> The U.S. imports \$367.9 billion worth of goods from the EU each year.<sup>144</sup> Fish products, as a whole, make up only a fraction of this value.<sup>145</sup> The same is true for the other alleged offenders, including China, which exports over \$399 billion worth of products to the U.S. on its own.<sup>146</sup> Oceana contends that the U.S. could change global conservation policy for the better by embargoing goods from these countries,<sup>147</sup> but such sanctions might actually affect U.S. economic and trade relations for the worse<sup>148</sup>—perhaps by soliciting retaliatory trade restrictions<sup>149</sup> or, as discussed in Section B, by undermining customary international law.

### B. Trade and Conservation Interacting on the Global Stage

The U.S. has used domestic law to influence the conservation policies of other countries in the past, but its ability to do so is limited by international laws.<sup>150</sup> The U.S. law that has most effectively influ-

<sup>141</sup> World Trade Org., *Dispute Settlement: Dispute DS138, United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds138\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds138_e.htm) (June 12, 1998) (accessed Nov. 17, 2012).

<sup>142</sup> World Trade Org., *Dispute Settlement: Dispute DS213, United States—Counter-vailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds213\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds213_e.htm) (Nov. 10, 2000) (accessed Nov. 17, 2012).

<sup>143</sup> World Trade Org., *Dispute Settlement: Dispute DS225, United States—Anti-Dumping Duties on Seamless Pipe from Italy*, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds225\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds225_e.htm) (Feb. 5, 2001) (accessed Nov. 17, 2012).

<sup>144</sup> Off. of the U.S. Trade Rep., *supra* n. 140.

<sup>145</sup> European Commn., *Economic Sectors: Fisheries*, [http://ec.europa.eu/trade/creating-opportunities/economic-sectors/fisheries/#\\_destinations](http://ec.europa.eu/trade/creating-opportunities/economic-sectors/fisheries/#_destinations) (Dec. 22, 2010) (accessed Nov. 17, 2012) (indicating that the EU exported 233 million of fish and fisheries products to the U.S. in 2010).

<sup>146</sup> Office of the U.S. Trade Rep., Exec. Off. of the Pres., *China*, <http://www.ustr.gov/countries-regions/china> (Oct. 10, 2011) (accessed Nov. 17, 2012).

<sup>147</sup> Ltr. from Oceana, *supra* n. 5, at 1, 20.

<sup>148</sup> See William Fulton, *Do Environmental Regulations Hurt the Economy?*, <http://www.governing.com/columns/eco-engines/Do-Environmental-Regulations-Hurt.html> (March 2010) (accessed Nov. 17, 2012) (suggesting that sometimes aggressive regulation creates economic drag and may not ultimately result in a net benefit); Patrik Jonsson, Christian Science Monitor, *Forest ‘Roadless Rule’: Environmental Victory or US Job-killer?*, <http://www.csmonitor.com/USA/2011/1022/Forest-roadless-rule-environmental-victory-or-us-job-killer> (Oct. 22, 2011) (accessed Nov. 17, 2012) (pointing out that many critics of environmental protection measures see them as job-killers and economic hindrances).

<sup>149</sup> See *supra* nn. 122–25 and accompanying text (discussing the Magnuson-Stevens Act and the use of market-related measures to combat illegal and unregulated fishing).

<sup>150</sup> See e.g. Panel Rpt. of the World Trade Org. on United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/R, adopted 15 Sept. 2011, 292 (available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/381r\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/381r_e.pdf)) (accessed Nov. 17, 2012) (holding that U.S. dolphin-safe provisions are more trade-restrictive than necessary to fulfill their legitimate objectives and are thus inconsistent with Article 2.2 of the Agreement on Technical Barriers to Trade) [hereinafter WTO Panel Rpt., U.S.—Tuna Products]; see also App. Body Rpt. of the World Trade Org. on United States—Import Prohibition of Certain Shrimp and Shrimp Products,

enced global conservation is the Pelly Amendment.<sup>151</sup> As discussed below, however, international obligations can constrict the scope of the Pelly Amendment's application.<sup>152</sup> These obligations are also the biggest obstacle to the U.S. "taking action" as requested by Oceana.<sup>153</sup>

### 1. *Using U.S. Law to Achieve International Goals*

Although the U.S. is involved in numerous international agreements at least tangentially concerned with shark conservation, at-risk shark species are protected by only a handful of internationally enforceable restrictions.<sup>154</sup> Of the multilateral conventions considered in Part I, only Regional Fisheries Management Organizations (RFMOs) have established a binding standard: the "weight ratio" test.<sup>155</sup> The weight ratio test requires that, upon arrival at port, the shark fins unloaded by a fishing vessel weigh no more than 5% of the total weight of the unloaded shark carcasses.<sup>156</sup> Even the success of that test, however, is contested.<sup>157</sup> The United Nations (UN), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and all of the programs encompassed therein have failed to implement effective laws and resolutions for the protection of sharks because, for the most part, their powers are limited to making recommendations and urging national initiatives.<sup>158</sup> Recommendations, however, are not substantial enough for the U.S. to act upon internationally.<sup>159</sup>

For example, the Lacey Act gives the U.S. jurisdiction over any vessel, domestic or foreign, that violates U.S. or foreign fishery management laws while in U.S. territorial waters or that attempts to import or sell goods procured in violation of those laws.<sup>160</sup> If a foreign vessel is caught finning sharks within U.S. territorial waters, then the

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WT/DS58/AB/R, adopted 12 Oct. 1998, 75 (available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/58abr.doc](http://www.wto.org/english/tratop_e/dispu_e/58abr.doc) (accessed Nov. 17, 2012) (holding that U.S. import restrictions on certain shrimp products amounted to arbitrary discrimination and thus were not entitled to the protection of Article XX of GATT 1994) [hereinafter WTO App. Body Rpt., U.S.—Shrimp Products].

<sup>151</sup> *E.g.* 56 Fed. Reg. at 67632 (finding that the U.S. Pelly Amendment certification of Japan caused Japan to decrease import of hawksbill turtle products).

<sup>152</sup> Blank, *supra* n. 94, at 68.

<sup>153</sup> *Id.* at 72.

<sup>154</sup> *See e.g.* Juliet Eilperin, *International Negotiators Rule on Shark Protection Measures*, Wash. Post (Nov. 19, 2011) (available at [http://www.washingtonpost.com/national/health-science/international-negotiators-rule-on-shark-protection-measures/2011/11/19/gIQAaznGcN\\_story.html](http://www.washingtonpost.com/national/health-science/international-negotiators-rule-on-shark-protection-measures/2011/11/19/gIQAaznGcN_story.html) (accessed Nov. 17, 2012)) (discussing the rejected attempt to create enforceable restrictions on shark finning).

<sup>155</sup> *Recommendation by ICCAT, supra* n. 82.

<sup>156</sup> *Id.*

<sup>157</sup> Kinver, *supra* n. 85.

<sup>158</sup> Gronstal Anderson, *supra* n. 102, at 528–32 (discussing the powers of these entities and analyzing the effectiveness of measures taken thus far).

<sup>159</sup> *See e.g.* 16 U.S.C. § 3372(a)(3)(A) (prohibiting possession of fish or wildlife taken in violation of any state or foreign law, but not international recommendations).

<sup>160</sup> *Id.*

federal government has the right to prosecute.<sup>161</sup> Furthermore, the federal government has the right to prosecute any foreign vessel that violates a foreign conservation law and subsequently attempts to import the illegally obtained goods into the U.S.<sup>162</sup> Like the importer in the *One Afghan Urial* case who had to forfeit a sheep that had been illegally obtained under Pakistani law,<sup>163</sup> a vessel owner that violates a foreign shark finning law and subsequently imports the acquired fins into the U.S. will be subject to federal prosecution.<sup>164</sup> When the finning occurs in the territorial waters of a nation that *has* no laws forbidding shark finning, however, a Lacey Act prosecution is impossible.

## 2. Pelly Amendment Limitations

Although Pelly Amendment certification is a viable alternative route for the U.S., the WTO and the General Agreement on Tariffs and Trade (GATT) impose sharp limits on its implementation.<sup>165</sup> The language of the statute requires that the offending country's actions undermine a global conservation effort before it can be properly certified by the Secretary of Commerce or Secretary of the Interior. Even then, any potential trade sanctions imposed by the President would have to be within the framework of WTO policies and international law.<sup>166</sup>

Therefore, there are several issues currently preventing shark finning from Pelly Amendment certification. First, there is no clearly defined global conservation effort to be undermined at this time—only regional agreements and NGO recommendations.<sup>167</sup> Second, per established WTO policies, unilateral trade restrictions can only be imposed if there is no viable alternative solution.<sup>168</sup> Third, customary international law establishes a general procedure for imposing countermeasures that requires warning and an opportunity for compromise before hitting a foreign state with sanctions.<sup>169</sup> The first of these issues, a lack of clearly defined global conservation effort, is discussed above.<sup>170</sup> The second and third issues are discussed in the following two sections.

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<sup>161</sup> *Id.* at § 3372(a)(1).

<sup>162</sup> *Id.* at § 3372(a)(2)(A).

<sup>163</sup> 964 F.2d at 477–78.

<sup>164</sup> 16 U.S.C. § 3372(a)(2)(A).

<sup>165</sup> Blank, *supra* n. 94, at 68.

<sup>166</sup> *Id.*; 22 U.S.C. § 1978.

<sup>167</sup> See e.g. UN GAOR, 62d Sess., 77th mtg. at 7, UN Doc. A/RES/62/177 (Feb. 28, 2008) (available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/474/39/PDF/N0747439.pdf?OpenElement> (accessed Nov. 17, 2012)) (calling on nations to ban targeting sharks for their fins); *Recommendations by ICCAT*, *supra* n. 82 (implementing a “weight ratio” test to decrease practice of shark finning).

<sup>168</sup> WTO Panel Rpt., U.S.—Tuna Products, WT/DS381/R, 262.

<sup>169</sup> *Infra* n. 189.

<sup>170</sup> See *supra* pt. I(B) (discussing conservation on a global scale).

### 3. *The WTO's "No Viable Alternative" Requirement*

Past conservation-minded trade restrictions have led to landmark WTO member disputes, recently culminating in a rule that limits the scope of allowable conservation-minded trade restrictions to only those measures necessary to achieve specific conservation objectives.<sup>171</sup>

In 1997, a WTO panel began consideration of the validity of such restrictions for the first time. The trade restriction in question was a U.S. embargo of shrimp products from countries using nets that allegedly endangered sea turtle populations.<sup>172</sup> The dispute, known as DS-58, was initially brought against the U.S. by India, Malaysia, Pakistan, and Thailand.<sup>173</sup> The WTO panel considered, among other issues, whether the U.S. import prohibition was a valid quantitative measure under GATT Article XI and whether the trade restriction could be justified under exceptions listed in GATT Article XX.<sup>174</sup> The panel decided against the U.S. on both questions, finding that: (1) the measure represented an unlawful "restriction" within the meaning of Article XI; and (2) the restriction posed a threat to the multilateral trading system such that it could not fall within the scope of Article XX.<sup>175</sup> The U.S. appealed the latter ruling.<sup>176</sup>

On appeal, the U.S. argued that the turtles protected by the restrictive shrimp net requirements were "exhaustible resources"<sup>177</sup> and that trade restrictions aimed at protecting them as resources were therefore allowable under GATT Article XX(g), which permits countries to enact trade measures to protect their exhaustible resources.<sup>178</sup> Although the Appellate Body acknowledged that the restriction served a legitimate environmental objective within the meaning of Article XX,

<sup>171</sup> WTO Panel Rpt., U.S.—Tuna Products, WT/DS381/R, 262.

<sup>172</sup> Panel Rpt. of the World Trade Org. on United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R adopted 15 May 1998 (available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds58\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm) (accessed Nov. 17, 2012)) [hereinafter WTO Panel Rpt. U.S.—Shrimp Products]; see also WTO App. Body Rpt., U.S.—Shrimp Products, WT/DS58/AB/R, 2 (the U.S. appeal of the panel decision).

<sup>173</sup> WTO Panel Rpt., U.S.—Shrimp Products, WT/DS58/R, 1.

<sup>174</sup> *Id.* at 276–78 (art. XI), 280–94 (art. XX).

<sup>175</sup> *Id.* at 278, 294.

<sup>176</sup> On appeal, the U.S. argued that the panel had erred when it found the trade restriction outside the scope of Article XX. WTO App. Body Rpt., U.S.—Shrimp Products, WT/DS58/AB/R, 6. The U.S. did not appeal the conclusion that the restriction violated Article XI:1. *Id.* at 13.

<sup>177</sup> WTO App. Body Rpt., U.S.—Shrimp Products, WT/DS58/AB/R, 11.

<sup>178</sup> See GATT at pt. II, art. XX(g); GATT 1947, art. XX(g); see also WTO App. Body Rpt., U.S.—Shrimp Products, WT/DS58/AB/R, 46–49 (discussing the concept of living natural resources as "exhaustible resources"); see also Terence P. Stewart & Mara M. Burr, *Trade and Domestic Protection of Endangered Species: Peaceful Coexistence or Continued Conflict? The Shrimp—Turtle Dispute and the World Trade Organization*, 23 Wm. & Mary Env'tl. L. & Policy Rev. 109, 127 (1998) ("Article XX provides that members may adopt and enforce measures that are *inter alia* necessary to protect . . . conservation of exhaustible natural resources.").

it upheld the panel's finding that the measure had been applied in an arbitrary and discriminatory manner.<sup>179</sup>

More recently, a WTO panel decided DS-381—a dispute concerning U.S. Department of Commerce requirements for certified “dolphin-safe” tuna labeling.<sup>180</sup> Mexico brought the DS-381 claim against the U.S., alleging that the U.S.'s strict requirements for “dolphin-safe” labeling were too restrictive to be excepted as conservation measures under GATT Article XX(g).<sup>181</sup> Such product-labeling schemes have gained recent popularity in the U.S., most notably under the Organic Foods Protection Act of 1990.<sup>182</sup> These types of regulations allow American consumers to express their preferences for products produced in compliance with their personal conservation ideals.<sup>183</sup> Although such domestic consumer activism might be an appropriate “action” under the Shark Conservation Act, the WTO has found these “dolphin-safe” restrictions to violate the GATT.<sup>184</sup>

In May 2012, a WTO appellate panel ruled on DS-381.<sup>185</sup> In its decision, the panel set forth a clear rule defining the scope of allowable conservation-minded trade restrictions: under the GATT's Article XX exception, a WTO member state can only restrict trade in the most efficient and least arbitrary way possible—if another member state or complainant can demonstrate a more viable alternative, then the restrictive measure will be deemed a violation of the GATT and WTO policy in general.<sup>186</sup>

Although no alternative has been proposed, it is unlikely that imposing sweeping import prohibitions against countries with lesser shark protections would be considered the most efficient and least arbitrary strategy for conserving shark populations. In doing so, the U.S. would essentially be pressuring foreign governments to legislate according to its own conservation agenda. Expanding and refining an existing shark conservation framework, however, might be a more viable alternative under WTO policies and the GATT. The weight ratio test, for example, has been used by several RFMOs since 2004.<sup>187</sup> Rather

<sup>179</sup> WTO App. Body Rpt., U.S.—Shrimp Products, WT/DS58/AB/R, 75.

<sup>180</sup> WTO Panel Rpt., U.S.—Tuna Products, WT/DS381/R, 2–6.

<sup>181</sup> *Id.* at 1–2.

<sup>182</sup> Jessica Karbowski, *Grocery Store Activism: A WTO Complaint Means to Incentivize Social Responsibility*, 49 Va. J. Intl. L. 727, 744 (2009).

<sup>183</sup> *Id.* at 727.

<sup>184</sup> WTO Panel Rpt., U.S.—Tuna Products, WT/DS381/R, 262.

<sup>185</sup> App. Body Rpt. of the World Trade Org. on United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R, 122, adopted 13 June 2012 (available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/381labr\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/381labr_e.pdf) (accessed Nov. 17, 2012)) [hereinafter WTO App. Body Rpt., U.S.—Tuna Products].

<sup>186</sup> *Id.* at 122.

<sup>187</sup> Shark Coalition, *Conventions & Agreements*, [http://www.coaliciontiburones.org/?page\\_id=35](http://www.coaliciontiburones.org/?page_id=35) (accessed Nov. 17, 2012) (explaining that “many of the other Regional Fisheries Management Organizations . . . adopted similar language” to that of the “weight ratio” test).

than the U.S. unilaterally initiating sanctions against certain countries, it might be more efficient and appropriate to implement the weight ratio test on a larger, multinational scale.<sup>188</sup>

#### 4. Countermeasures under Customary International Law

Customary international law defines the proper use of countermeasures.<sup>189</sup> In 1948, the UN General Assembly established the International Law Commission (ILC), and subsequently tasked it with codifying the customary laws of state responsibility.<sup>190</sup> In 2001, the ILC adopted the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Draft Articles), including six articles devoted to the proper implementation of countermeasures.<sup>191</sup>

The Draft Articles limit the imposition of countermeasures, such as coercive trade restrictions, to instances in which it is necessary to pressure a foreign state to comply with its international obligations.<sup>192</sup> Before enacting countermeasures, the enacting nation must repeatedly call on the offending state to fulfill its obligations, notify the offending state of its intent to impose countermeasures, and offer to negotiate.<sup>193</sup> Even then, such countermeasures must be proportional to the injury suffered as a result of the offending country's nonperformance, and at no point is the imposing state relieved of its obligations under any other international agreement.<sup>194</sup>

Since their inception, the ILC's Draft Articles have been widely adopted by international organizations and judicial bodies.<sup>195</sup> Although, as *draft* articles, they are not binding on any state, the Inter-

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<sup>188</sup> *Id.* (indicating that the "weight ratio" test is a reliable way to establish whether or not crews are finning sharks); *but see* Kinver, *supra* n. 85 (discussing the loopholes inherent in the weight ratio test).

<sup>189</sup> See Craig Scott et al., *A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo On Bosnia and Herzegovina*, 16 Mich. J. Intl. L. 1, 48–49 (1994) (noting that nothing in Article 51 of the UN Charter impairs a state's inherent right of self-defense "if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security").

<sup>190</sup> Intl. Law Commn., *Introduction, 1. Object of the Commission*, <http://www.un.org/law/ilc/> (accessed Nov. 17, 2012) (noting that the purpose of the ILC was the "promotion of the progressive development of international law and its codification").

<sup>191</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN GAOR, 53rd Sess., Supp. No. 10, UN Doc. A/56/10 (2001) (available at <http://www.unhcr.org/refworld/docid/3ddb8f804.html> (accessed Nov. 17, 2012)) [hereinafter Draft Articles].

<sup>192</sup> *Id.* at art. 49, 56 (outlining the limits of countermeasures).

<sup>193</sup> *Id.* at art. 52, 57–58 (discussing conditions relating to resort to countermeasures).

<sup>194</sup> *Id.* at art. 50, 57 (listing obligations not affected by countermeasures).

<sup>195</sup> Commentary on Draft Articles of Responsibility of States for Internationally Wrongful Acts, UN GAOR, 53d Sess., Supp. No. 10, UN Doc. A/56/10, 32 (2001) (available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) (accessed Nov. 17, 2012)) (giving examples of times when the International Court of Justice used the Draft Articles).



national Court of Justice has cited them as a codification of binding international custom.<sup>196</sup>

When considering the Draft Articles in the context of the Shark Conservation Act, the language of Article 49 raises a red flag: “An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its [international] obligations.”<sup>197</sup> As discussed above, the Shark Conservation Act is unique in that it has no foundation in an existing international treaty.<sup>198</sup> In fact, it seems to attempt to fill a void in far-reaching international obligations by coercing international compliance with U.S. anti-finning regulations—not just by limiting access to the U.S. market like the “dolphin-safe” labeling requirements invalidated by DS-381 did,<sup>199</sup> but by preventing the shark finning market altogether.

### C. “Taking Actions” Defined

The term “take action” should not be read to authorize trade embargos against any foreign state the U.S. determines to have insufficient anti-finning regulations. There is no reason to assume that the U.S. could enforce any trade embargo enacted under the Shark Conservation Act without violating even the most basic principles of international law. No countries have been certified for shark finning under the Pelly Amendment, nor has Oceana presented any proof that trade restrictions would be the most efficient and effective means of conservation.<sup>200</sup> Thus, the term “take actions” must be construed very narrowly. No foreign law, conservation measure, or international treaty

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<sup>196</sup> *Id.*

<sup>197</sup> Draft Articles, UN Doc. A/56/10.

<sup>198</sup> 124 Stat. at 3669 (showing that the suggested “actions” in the Shark Conservation Act amendments include “seeking to enter into international agreements that require measures for the conservation of sharks, including measures to prohibit [finning] . . . that are comparable to those of the United States . . .”).

<sup>199</sup> WTO App. Body Rpt., U.S.—Tuna Products, WT/DS381/AB/R, 122.

<sup>200</sup> See Nat’l Oceanic & Atmospheric Administration, *ESA Biennial Rpt. to Congress*, <http://www.nmfs.noaa.gov/pr/laws/esa/biennial.htm> (updated Sept. 24, 2012) (accessed Nov. 17, 2012) (providing an archive of the Endangered Species Act biennial reports that list Pelly Amendment certifications during a given period); see also Press Release, Oceana, *Oceana Calls on U.S. Government to Ban Import of Shark Products from Countries with Insufficient Shark Protections: Shark Conservation Act Allows U.S. to Take Action against Countries with Weaker Shark Conservation Regulations, Including China, Japan and Indonesia* (available at <http://oceana.org/en/news-media/press-center/press-releases/oceana-calls-on-us-government-to-ban-import-of-shark-products-from-countries-with-insuffi> (accessed Nov. 17, 2012)) (advocating for trade restrictions as a means to reduce demand for shark fins but neither identifying nor discussing any other potential conservation mechanisms); Oceana, *The International Trade of Shark Fins: Endangering Shark Populations Worldwide* (Mar. 2010) (available at [http://oceana.org/sites/default/files/reports/OCEANA\\_international\\_trade\\_shark\\_fins\\_english.pdf](http://oceana.org/sites/default/files/reports/OCEANA_international_trade_shark_fins_english.pdf) (accessed Nov. 17, 2012)) (same).

empowers the Shark Conservation Act.<sup>201</sup> Therefore, it cannot be enforced internationally under the Pelly Amendment or Lacey Act, nor can the President legally or formally enforce it through reliance on his authority to conduct the foreign affairs of the U.S.<sup>202</sup> RFMOs are the only international organizations to which the U.S. is a party that have enforceable shark finning regulations; however, the limited membership of RFMOs also limits the applicability of these regulations to countries that are willing members of those RFMOs.<sup>203</sup>

Furthermore, the U.S. must prove that such embargos are the only viable means of protecting sharks, which themselves must be proven an “exhaustible natural resource” within the scope of GATT Article XX.<sup>204</sup> Even if such trade prohibitions were deemed necessary and proper, under customary international law, the U.S. arguably has a responsibility to negotiate and propose less severe compromises before imposing actual trade sanctions.

The statutory language “take actions” may sound vague, but based on analysis of legislative and enforcement history, it can only be defined narrowly and enforced domestically.<sup>205</sup> The U.S. cannot comply with Oceana’s request to ban the importation of shark products from countries without specific restrictions on shark finning. The Shark Conservation Act does not authorize an embargo of the fifteen countries with “insufficient” shark conservation relations in comparison to the U.S. At this time, “take actions” can only be read to mean that the U.S. can specify its own policies, urge foreign states to implement stricter regulations, define civil and criminal penalties to be imposed against individual importers for violation of U.S. anti-finning standards, and—perhaps most importantly—seek to make *enforceable* conservation agreements with the fifteen countries singled out by Oceana.<sup>206</sup> Canada, China, Mexico, and other countries identified in the

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<sup>201</sup> Andrew Nowell Porter, Student Author, *Unraveling the Ocean from the Apex Down: The Role of the United States in Overcoming Obstacles to an International Shark Finning Moratorium*, 35 *Environ. L. & Policy J.* 231, 247, 268 (2012) (explaining that “[i]nternational cooperation is crucial to prevent the overexploitation of sharks, but there is no internationally agreed upon norm or regime for shark conservation”); *but see id.* at 268 (noting that shark finning bans currently exist in the U.S., Australia, Brazil, Canada, Cape Verde, Costa Rica, Ecuador, El Salvador, Egypt, Mexico, Namibia, Nicaragua, Oman, Panama, Seychelles, and South Africa).

<sup>202</sup> See A. Mark Weisburd, *Medellin, the President’s Foreign Affairs Power and Domestic Law*, 28 *Penn St. Intl. L. Rev.* 595, 610–13 (2010) (exploring the President’s authority to affect domestic law via his or her authority in conducting U.S. foreign affairs).

<sup>203</sup> European Commn., *The Common Fisheries Policy: A User’s Guide* 27 (European Communities 2009).

<sup>204</sup> GATT pt. II, art. XX(g).

<sup>205</sup> Sen. Rpt. 111-124 at 7 (Feb 4, 2012).

<sup>206</sup> See e.g. Paul L. Joffe, *Conscience and Interest: Law, Rights, and Politics in the Struggle to Confront Climate Change and the New Poverty*, 6 *Rutgers J.L. & Pub. Pol’y* 269, 293 (2009) (discussing global collective action with regard to the reduction of greenhouse gases); Justin S.C. Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 *Am. U. Intl. L. Rev.* 341, 357, 374 (2002) (emphasizing the importance of uniform standards for combating maritime terrorism).

letter are significant U.S. trade partners, and “taking actions” to preserve those relationships would likely be more productive than imposing embargos against them.

Although the U.S. may not have the legal authority to “take actions” by prohibiting certain imports from certain countries, it can still promote shark conservation by taking actions to lobby for an international ban on shark finning.<sup>207</sup> Similar to how the threat of Pelly Amendment certification persuaded some countries to change their animal conservation policies,<sup>208</sup> public condemnation of a particular country’s shark finning practices may also serve as a motivation for that country—as well as other nations with insufficient shark protections—to enact their own anti-finning laws.<sup>209</sup> The U.S., however, should begin by certifying countries under the Pelly Amendment for targeting shark species for their fins. Although Pelly Amendment certification would not give the U.S. the power to pressure foreign countries to establish their own finning restrictions, it would, as a start, give the U.S. the power to penalize any individual in violation of the laws of countries that do restrict shark finning.<sup>210</sup>

#### IV. CONCLUSION

The Shark & Fishery Conservation Act of 2010 (Shark Conservation Act) authorizes the U.S. to “take actions” against any other state without sufficient anti-finning measures. At this time, however, such “actions” cannot be trade embargoes. There is a small window for conservation-motivated restrictions on international trade, limited by the Pelly Amendment, the World Trade Organization, and the General Agreement on Tariffs and Trade, but the window is open. In order for the U.S. to impose such a strict ban on shark products from fifteen different countries, it must first lay a foundation for its actions—either in custom or treaty. Most similar statutory restrictions have been justified by international conventions, but there are currently none that place a direct ban on shark finning. In the context of the Shark Conservation Act, “take actions” can only refer to encouraging international organizations and foreign states to establish enforceable international laws against shark finning and—as is done with most other domestic conservation laws—charging individual offending vessels with criminal offenses and collecting civil fines.

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<sup>207</sup> See generally Humane Socy. of the U.S., *Losing the Taste for Shark Fins: Our Campaign to Save a Mighty Animal*, [http://www.humanesociety.org/issues/shark\\_finning/timelines/shark\\_fins.html](http://www.humanesociety.org/issues/shark_finning/timelines/shark_fins.html) (Mar. 11, 2011) (accessed Nov. 17, 2012) (outlining legislation prohibiting shark finning).

<sup>208</sup> See *supra* pt. I(C) (discussing use of the Pelly Amendment).

<sup>209</sup> *Id.*

<sup>210</sup> 22 U.S.C. §§ 1971–1979.

