



The Role of the European Union in Relation to the Conservation of Endangered Shark Species

LLM in Natural Resources Law and International Environmental Law

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Abstract

Scientific evidence demonstrates a global decline of shark populations and encourages the international community to take actions to reverse this trend. As the EU has evolved an influential position in the shaping of international environmental law, also focusing on shark conservation, the objective of this thesis is to theorise, analyse and evaluate the role of the EU in relation to the protection of endangered species, with particular emphasis on sharks. The main features of the CITES, the CMS, the CBD and the Bern Convention, as well as their implementation into EU law in form of the Habitats Directive and the Shark Regulation are, therefore, introduced as tools aimed at tackling the protection of sharks.

The thesis focuses on three primary problems relating to whether the international legal framework is effectively protecting shark species: Firstly, the differences of the material scope and the substantive provisions of the international agreements, which have, *inter alia*, been engaged in the conservation of sharks, are addressed. Moreover the increasing inter-treaty co-operation of these in order to minimise their possible ineffectiveness is examined. Secondly, the function of the COP in these agreements, and how cross-party political unwillingness can sometimes preclude the necessary adjusting of the international legal tools is validated. In this respect the EU needs to use its growing international influence in order to encourage effective adjustments of the MEAs through sagacious COP decisions. This argumentation leads, finally, to the evaluation of the interaction between the EU and the international tools and their effectiveness.

The key aspects are approached mainly through comparison of the different international and EU instruments. Further, a research based examination of the increasing impact of international environmental law on EU law and *vice-versa*, as well as the measures, *de facto*, facilitated in relation to the conservation of sharks is provided.

The main finding of the thesis is that the international and EU's legislation need to be changed and modified. In order to promote an effective protection of endangered species relating to sharks, the thesis proposes the clustering of the CITES, the CMS, the CBD and the Bern Convention. Thus, the overlapping and the regulatory gaps arising in the legal framework could be avoided. The EU is, moreover, under an international obligation to utilise its political influence in order to impel the clustering of the respective legal tools and interact further with international environmental law to support the protection of endangered shark species.

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Abbreviations

Bern Convention	Convention on the Conservation of European Wildlife and Natural Habitats
CBD	Convention on Biological Diversity
CITES	Convention on International Trade in Endangered Species of Wild Flora and Fauna
CJEU	Court of Justice of the European Union
CMS	Convention on the Conservation of Migratory Species of Wild Animals
COM	Commission of the European Union
Conf.	Conference
COP	Conference/Conferences of the Parties
Dec.	Decision
Doc.	Document
<i>e.g.</i>	<i>exempli gratia</i>
ECR	European Court Reports
EEA	European Environmental Agency
Ed.	Editor
Edn.	Edition
Eds.	Editors
ELM	Environmental Law Methodology
<i>etc.</i>	<i>et cetera</i>
<i>et al.</i>	<i>et alia</i>
EU	European Union
f	following
ff	following
FAO	Food and Agriculture Organisation
Fn.	Footnote
GIELR	Georgetown International Environmental Law Review
<i>Ibid.</i>	<i>Ibidem</i>
IGO	International Governmental Organisation
IUCN	International Union for Conservation of Nature

JCMS	Journal of Common Market Studies
MARPOL 73/78	International Convention for the Prevention of Pollution From Ships, 1973 as modified by the Protocol of 1978
MEA	Multilateral Environmental Agreement
MEAs	Multilateral Environmental Agreements
MOC	Memorandum/Memoranda of Co-operation
MOS	Meeting of the Signatories
MOU	Memorandum/Memoranda of Understanding
NGO	Non-governmental Organisation
nei	not enough information
OJ	Official Journal
p.	page
pp.	pages
RECIEL	Review of European Comparative International Environmental Law
Res.	Resolution
SAC	Special Area of Conservation/Special Areas of Conservation
SCI	Site of Community Interest/Sites of Community Interest
t	tonnes
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
TRAFFIC	Trade Records Analysis of Flora and Fauna in Commerce
UK	United Kingdom
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environmental Programme
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume

Introduction

General Introduction

The International Union for Conservation of Nature (IUCN) assesses a quarter of the world's sharks as threatened with extinction;¹ another 24 % are considered to be near threatened.² According to the different studies conducted by the IUCN Shark Specialist Group, the results lead to the final conclusion that sharks are at a substantially high risk of extinction.³ The primary reasons behind the status of threatened or near threatened is overfishing in form of commercial shark fisheries as well as by-catch.⁴ Further, the continuously increasing problem of slicing off the shark's fins and discarding its body, so called finning, and the emerging market with the captured fins supports this trend. However, in the last decade, the estimated numbers of sharks caught ranges widely. According to the Food and Agriculture Organisation (FAO), the recorded catch of sharks adds up to 781.326t, in 2007.⁵ In contrast, Clarke *et al.*, propose a high end real catch estimation, not including by-catch of sharks, at 2.290.000t in 2006,⁶ Worm *et al.*, estimate the total mortality of sharks at 1.412.000t in 2010.⁷

The great disparity between these figures may be ascribed to the various diverse and complex aspects. The methods employed in the acquiring of such data differ. Whereas the FAO only includes shark landings based on national reports which are voluntarily submitted by the FAO states,⁸ Clarke and Worm base their data on the inclusion of, *inter alia*, by-catches, commercial shark fisheries as well as the amount of global exports and imports of shark products. Moreover, the lack of data in relation to unreported shark catches impedes the accurate determination of the annual shark catches and the actual situation of shark

¹ Dulvy, N., *et al.*, "Extinction Risk and Conservation of the World's Sharks and Rays", in *eLIFE*, <http://dx.doi.org/10.7554/eLife.00590>, 2014, pp. 1-34, at p. 3, accessed last on 19.8.2014.

² Camhi, M., *et al.*, *The Conservation Status of Pelagic Sharks and Rays: Report of the IUCN Shark Specialist Group – Pelagic Shark Red List Workshop*, Newbury, 2009, at p. 7.

³ Dulvy, N., *et al.*, 2014, at p. 1.

⁴ *Ibid.*

⁵ Camhi, M., *et al.*, 2009, at p. 17.

⁶ Clarke, S., *et al.*, "Global Estimates of Shark Catches Using Trade Records from Commercial Markets", in *Ecology Letters*, Vol. 9, 2006, pp. 1115-1126, at p. 1120.

⁷ Worm, B., *et al.*, "Global Catches, Exploitation Rates and Rebuilding Options for Sharks", in *Marine Policy*, Vol. 40, 2013, pp. 194-204, at p. 196.

⁸ *Ibid.*

populations.⁹ Concluding, this earmarks a new global issue, namely the overexploitation of shark populations resulting in the risk of the decline of shark species.

Therefore, the various researchers strive to raise awareness on the need of actions to counteract this alarming trend. Following the scientific research, the international community has taken legislative actions to counteract this development. Nevertheless, the therefore arising complicated global management of the conservation of sharks presents challenges for the *de facto* estimation of the numbers of shark catches and the need for the adoption and implementation of conservation measures.¹⁰ This thesis strives to primarily discuss the latter aspect analysing the role of the EU in relation to the conservation of endangered shark species.

The Scientific Background

To examine the role of the EU in relation to the conservation of endangered shark species in a comprehensive legal study it is integral to first determine scientifically the role of sharks in the ecosystem. Due to the variety of different shark species, it proves to be difficult to understand comprehensively their role within the marine environment. However, in terms of the study, the majority of shark species, which the respective legislative tools seek to address, are considered as having the role of top predators, also called apex predators.¹¹ Top predators according to Heupel *et al.*, are “species that occupy the top trophic position in a community.”¹² Many shark species are inherently classified as apex predators regulating other marine species in the respective ecosystem.¹³ Scientific research gives certain evidence that they mainly hunt weak parts of their prey and thus prevent diseases from spreading in those populations.¹⁴ Subsequently, the top predators, here shark species, occupy an important role supporting the healthy maintenance of the marine ecosystem.

⁹ Dulvy, N., *et al.*, “You Can Swim but You Can't Hide: the Global Status and Conservation of Oceanic Pelagic Sharks and Rays”, in *Aquatic Conservation: Marine and Freshwater Ecosystems*, Vol. 18, 2008, pp. 459-482, at p. 466.

¹⁰ *Ibid.*, at p. 473.

¹¹ Heupel, M. *et al.*, “Sizing up the Ecological Role of Sharks as Predators”, in *Marine Ecology Progress Series*, Vol. 495, 2014, pp. 291-298, at pp. 292 f.

¹² *Ibid.*, at p. 292.

¹³ *Ibid.*

¹⁴ See further Stevens, J.D. *et al.*, “The Effects of Fishing on Sharks, Rays, and Chimaeras (*Chondrichthyans*), and the Implications for Marine Ecosystems”, in *ICES Journal of Marine Science*, Vol. 57, 2000, pp. 476-494, at pp. 484 f.

Shark species are often characterised by late attainment of sexual maturity, slow growth of populations, long life spans and low fecundity.¹⁵ Thus, the artificial intervention in their habitats and the overexploitation of these species could have significant effect on the marine ecosystem.¹⁶ According to Stevens *et al.*, the fishing of shark species, whether commercially caught or as by-catch, could impact the size structure, life-history parameters and eventually lead to the extinction of the respective species.¹⁷

Objectives and Outline

The principle objective of this thesis is to examine the role of the EU in relation to the conservation of endangered species, with a particular emphasis placed on sharks. Therefore, it strives to examine three main research questions. Firstly, a distinctive discussion about the material scopes of the respective MEAs and the EU's Regulations and their interaction in relation to the global shark protection is stipulated. Secondly, the question how the political power of the EU and the treaty bodies contribute to the effectiveness of the adopted instruments regarding the protection of endangered species in relation to sharks will be discussed. Finally, the question of the EU's obligations in terms of improving the effectiveness of international as well as the EU's legislative tools will be analysed.

In order to address these issues, Chapter 1 gives an overview of the Convention on International Trade in Endangered Species of Wild Fauna and Flora,¹⁸ the Convention on Conservation of Migratory Species of Wild Animals,¹⁹ the Convention on Biological Diversity²⁰ and the Convention on the Conservation of European Wildlife and Natural Habitats²¹ which are tackling the protection of endangered species with particular relevance to sharks. To support a neatly arranged discussion, the Annex provides an overview of the shark species which the MEAs aim to conserve. Moreover, the Habitats Directive²² and the

¹⁵ *Ibid.*, at p. 490.

¹⁶ *Ibid.*, at p. 477.

¹⁷ *Ibid.*

¹⁸ Convention on International Trade of Endangered Species of Wild Fauna and Flora, Signed at Washington, DC on 3 March 1973, Amended at Bonn, on 22 June 1973, entered into force on 1 November 1975, published in 993 UNTS 243, in the following referred to as the CITES.

¹⁹ Convention on Conservation of Migratory Species of Wild Animals, signed on 23 June 1979 in Bonn, entered into force 1 November 1983, published in 1651 UNTS 28395, in the following referred to as the CMS.

²⁰ Convention on Biological Diversity, signed on 5 June 1992, entered into force on 29 December 1993, published in 1760 UNTS 79, in the following referred to as the CBD.

²¹ Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention), Bern 19.IX 1979, published in *ETS No. 104*, in the following referred to as the Bern Convention.

²² Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, published in OJ L 206, 22/07/1992, in the following referred to as Habitats Directive.

Shark Regulation²³ are additionally addressed in order to provide for the applicable Union legislation being necessary for the examination of the legislation in Chapter 2. There, the study seeks to raise awareness of legislative gaps between the various agreements and the need for inter-treaty relations as well as the growing co-operation between the respective MEAs. Furthermore, the participation of the EU in negotiating and implementing international treaties is addressed in conjunction with the associated factor of the EU's internal distribution of competences. This analysis is of importance in relation to Chapter 3, which strives to demonstrate the impact of international instruments and the, theoretically, self-executing character of international obligations in EU law. The examination of a possible direct applicability of the respective MEAs is complemented by the discussion in Chapter 4 on the measures taken by the international as well as EU instruments to promote shark conservation. Therefore, the issue of the internal ineffectiveness, which the CITES, the CMS, the CBD and the Bern Convention are facing as a cause of the political unwillingness of the respective parties to adjust the international tools to current trends, will be discussed. Finally, Chapter 5 stipulates the evaluation of the *de facto* effectiveness of the tools discussed in the study. The examination results in the discussion on the weaknesses the international framework confronts seeking to protect endangered species in relation to sharks. Furthermore, the study presents a possible solution to the issues addressed. Therefore, the clustering of the agreements is proposed in order to increase the inter-treaty co-operation and decrease the internal inflexibility. Further, the approach takes the growing impact of the EU on an international level into consideration in order to provide a conclusive solution.

²³ Council Regulation on the Removal of Fins of Sharks on Board Vessels EC 1185/2003, published in *OJ L 167/1 04/07/2003* and Regulation No 605/2013 of the European Parliament and of the Council of 12 June 2013 Amending Council Regulation No 1185/2003 on the Removal of Fins of Sharks on Board Vessels published in *OJ L 181/1 29/06/2013*, in the following referred to as Shark Regulation.

1 The Legal Foundation – An Overview

The extinction of a given species has remained an abiding natural process for centuries. However, the over-expanding world population and the subsequent increasing need for supplies, food and water has greatly impacted biological diversity and the status of species' population, both by directly harvesting and indirectly by diminishing habitats.²⁴ This has had an impact on natural processes and impels the reduction in some species' populations. The IUCN expresses serious concerns in relation to the global status of shark species' populations.²⁵ Consistent with the Shark Specialist Group, the main reasons for the global status of threatened or near threatened sharks relate on the one hand to overexploitation of their ecosystems, including increased fishing activities in their habitats and growing marine pollution, and on the other hand to the problem of by-catch.²⁶ Thus, the international community needs to make a concerted and unified effort to protect the most vulnerable shark species in order to reverse this situation. The international community has responded to the challenge. Several MEAs, which are meant to tackle the problem of the extinction of flora, fauna and habitats, have been adopted. As far as sharks are concerned some of these may be relevant.

In order to provide the necessary context for the analysis of the role of the EU in relation to the protection of endangered species, with a heavy emphasis on sharks, this Chapter firstly introduces and discusses some of the general principles of ELM; and secondly it provides an overview of the relevant MEAs and EU regulations that relate to the issue.

1.1 Environmental Law Methodology

In theorising and examining the role of the EU in protecting endangered shark species the used approach is influenced by environmental law methodology (ELM).²⁷ ELM's foundation was developed by Staffan Westerlund and is further evolved in his work.²⁸ The method

²⁴ Millenium Ecosystem Assessment, *Ecosystems and Human Well-Being: Synthesis*, Island Press, 2005, at p.1.

²⁵ Camhi, M., *et al.*, 2009, at p. 7.

²⁶ *Ibid.*, at p. 8. By-catch is the unintentional fishing of a species, in this relation to this thesis shark species, during commercial fishing targeting other species.

²⁷ See further *e.g.* Jóhannsdóttir, A., "The Value of Proactive Methodological Approaches for Understanding Environmental Law", in *Environmental Law, Scandinavian Studies in Law*, ed. Wahlgren, P., Vol. 59, Stockholm Institute for Scandinavian Law, 2014, pp. 243-258, at p. 245.

²⁸ The approach was originally developed by Westerlund, S., *En Hållbar Rättsordning - Rättsvetenskapliga paradigm och tankevändor*, Iustus förlag, 1997. It is, *inter alia*, further developed by Westerlund, S., in "Theory for Sustainable Development. Towards or Against?", in *Sustainable Development in International and National*

utilised in the study at hand is inspired by this methodological approach to examine the interaction between different MEAs and the impact of the rational of natural science and, therefore, to evaluate the instruments' *de facto* and not only *de jure* effectiveness.

Approaching the extinction of species, not only aspects of international law, but additionally several principles relating to the rational of natural sciences, the natural evolution of species and their ecosystems need to be taken into consideration.²⁹ One of the hallmarks of ELM is that it takes into account external factors, or the factual situation, in legal reasoning. In the case at hand, this can be underlined with an example of international exports of shark products. The wildlife trade monitoring network TRAFFIC has published information relating to the total export tonnage of shark products, which doubled between 1990 and 2005.³⁰ This data is based on catch reports which are submitted by states to the FAO on a voluntary basis. However, shark catches are often not reported at all, especially in case of by-catch. Further, when reported, the catch is not reported on a species basis.³¹ This means, that, as a rule, states report the amount of sharks that are caught, whether it is intentionally or as by-catch, but do not distinguish between the different shark species. Subsequently, it is difficult to obtain accurate information on the shark species that are caught and further exported unreported or even illegally.³² This is especially relevant in case of the species, or products of species, addressed under the CITES; see further Chapter 1.2.1. The lack of an effective reporting system leads to the issue of illegal or unreported trade and consequently a *de facto* violation of the purpose of the CITES, which is the protection of endangered species by the regulation of trade; see Article II of the CITES.³³ This results in a discrepancy between the environmental objectives the relevant MEAs are set out to reach, in this case the CITES, and the actual results in nature.³⁴

Law, eds. Bugge, H.C. and Voigt, C., Europa Law Publishing, Groningen, 2008, pp. 47-66, at p. 47. See also the approach used by Jóhannsdóttir, A., Cresswell, I. and Bridgewater, P., "The Current Framework for International Governance of Biodiversity: Is Doing More Harm Than Good", in *Review of European Comparative International Environmental Law* (RECIEL), Vol. 19, 2010, pp. 139-149, at p. 141.

²⁹ Westerlund, S., "The Generic Environmental Law," in *Nordic Environmental Law*, 2009, pp. 105-121, at p. 110.

³⁰ TRAFFIC illustrates that the export tonnage between 1990 and 2005 increased on 122 % to 94 542t of frozen shark products, fresh/chilled shark products. See further Lack, M. and Sant, G., *Illegal, Unreported and Unregulated Shark Catch: A Review of Current Knowledge and Action*, Department of the Environment, Water, Heritage and the Arts and TRAFFIC, 2008, at p. 38.

³¹ Only 20% of the reported shark catches are reported on a species basis. The other 80% are reported in groups as e.g. 35% of the catches were reported as "Sharks, rays, skates, nei". See further Lack, M. and Sant, G., 2008, at pp. 28, 35.

³² *Ibid.*

³³ See further *Ibid.*

³⁴ Jóhannsdóttir, A., 2012, at p. 254.

In addition, considering the example of the CITES further, the public perception of its effectiveness and the actual effects in restricting trade of endangered species are indifferent. While Lyster celebrates the CITES as one of the most successful MEAs in protecting endangered species, focusing mainly on the number of ratifications and the frequency of meetings of the Conference of the Parties (COP);³⁵ others, such as Bowman, criticise the CITES. The latter describes the MEA as an ineffective instrument when the considerable value on the black market, along with the unwillingness of states to implement measures fighting the illegal trade are taken into account.³⁶

To observe the potential negative effects, ELM provides a set of principles and reasoning which focuses on the functioning of the law itself. This approach influences this thesis, *inter alia*, in relation to the examination of the interaction between international and national law.³⁷ Moreover, ELM inspires the analysis of the inter-treaty co-operation between the different MEAs.³⁸ The inter-treaty co-operation between the discussed instruments is of particular relevance when it comes to the examination of their effectiveness relating to the conservation of sharks.³⁹ In relation to this study, it is important to underline that ELM's principles and argumentation inspire the examination of the effectiveness within the international and EU nature conservation law.⁴⁰ Consequently, some aspects of ELM are important to examine the role of the EU in relation to the conservation of sharks.⁴¹

³⁵ Lyster, S., *International Wildlife Law: An Analysis of International Treaties Concerned with the Conservation of Wild Life*, Cambridge University Press, 1985, at p. 240; Lyster discussed the development of CITES within its first ten years after adoption. He evaluates the importance and influence of CITES as making "real progress".

³⁶ Bowman, M., "A Tale of Two CITES: Divergent Perspectives upon the Effectiveness of the Wildlife Trade Convention", in *RECIEL*, Vol. 22, 2013, pp. 228-239, at pp. 228 f.

³⁷ Jóhannsdóttir, A. and Cresswell, I. and Bridgewater, P., 2010, at p. 143.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Flatt, V.B., "Adapting Laws For A Changing World: A Systemic Approach to Climate Change Adaptation" in *Florida Law Review*, Vol. 64, 2012, pp. 269-293, at p. 274; see also Jóhannsdóttir, A., 2009, at p. 68.

⁴¹ See further Jóhannsdóttir, A., "Effectiveness of International Biodiversity Targets", in *Pro Natura – Festschrift til Hans Christian Bugge på 70-årsdagen 2. Mars 2012*, eds. Backer, I.L., *et al.*, Oslo Universitetsforlaget, 2012, pp. 249-267, at p. 253.

1.2 Relevant International Instruments – An Overview

1.2.1 Convention on International Trade in Endangered Species

1.2.1.1 Background

In the late 1960s the international community began to recognise the increasing problem of species reduction.⁴² 80 states adopted the CITES in 1973 in Washington, DC, which came into force on 1 July 1975. Currently, 180 states have become parties to the CITES making it one of the most acknowledged and influential MEAs dealing explicitly with the conservation of endangered species so far.⁴³ As previously pointed out the high number of parties within the CITES does not necessarily make it one of the most efficient MEAs.⁴⁴ Originally, only states could become parties to the CITES. However, on 29 November 2013, with the entering into force of the so-called Gaborone Amendment, this situation has changed. According to Paragraph 2 of the Gaborone Amendment, regional economic integration organisations, such as the EU, are allowed to become parties to the Convention.⁴⁵ The EU is currently negotiating the accession to the CITES, but has not yet become a party.⁴⁶ The EU has, nevertheless, adopted the so-called CITES Regulation by which the EU voluntarily acknowledges the CITES obligations without has been entering an international commitment to comply with the MEA.⁴⁷ The Preamble of the CITES Regulation emphasises that the respective EU's

⁴² Bowman, M., Davies P. and Redgwell, C., *Lyster's International Wildlife Law*, 2nd Edn., Cambridge University Press, 2010, at p. 483. See further European Commission, *Wildlife Trade Regulations in the European Union: An Introduction to CITES and its Implementation in the European Union*, Luxembourg: Publications Office of the European Union, 2010, at p. 8.

⁴³ The list of Parties can be found on <http://cites.org/eng/disc/parties/alphab.php>, last accessed on 19 August 2014; See further Bowman, M., 2013, at p. 229.

⁴⁴ *Ibid.* As was already stressed out in regards to the methodology the critique on the CITES is tremendous even though it is recognised by more than 180 states. Even though most parties adopted legislative measures in order to comply with their international obligations arising under the CITES, the reality is scarred by an influential black market and the ongoing over-exploitation of endangered species.

⁴⁵ See further Paragraph 2 of the Gaborone Amendment. In relation to Article XXI of the Convention the COP proposed the amendment to permit accession by regional economic integration organisations. The Gaborone amendment required two third of the parties (54 parties) which were party to CITES on 30 April 1983 to deposit instruments of acceptance of the amendment. On 29 November 2013 the Gaborone Amendment entered into force in accordance to Article XVII(3) of CITES.

⁴⁶ The EU Commission proposed the accession of the EU to the CITES in: "Proposal for a Council Decision on the Accession of the European Union to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)", Brussels 6.12.2013, COM (2013) 867 final: 2013/0418 (NLE).

⁴⁷ Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein (the Basic Regulation) on 9 December 1996, published in *OJ L* 061, 03/03/1997. See further European Commission, 2010, at p. 13. The EU is not legally bound by the obligations established in CITES as it has not become party yet. The timeframe of the factual accession is not further determined so far. However, the EU

provisions do not affect any measures taken by the Member States of the EU. They may adopt national legislation in order to comply with their international obligation under the CITES provided they have become party to it.⁴⁸

1.2.1.2 CITES's Objectives and Main Structure

Currently, the CITES applies to more than 35.000 species; see further Appendices I-III. Depending on the species' conservation status and the impact of trade, the species enjoy different kinds of protection and are therefore placed in different Appendices.⁴⁹ The CITES consists of 25 Articles and three Appendices. Articles I-VII of the CITES define the principal obligations emphasising the regulation of trade aspects with endangered species. Articles VIII-XXV of the CITES further outline the obligations of the parties, as well as determine the competences of two main bodies of the CITES, the COP, see further Article XI, and the Secretariat; see further Article XII.⁵⁰

As stipulated in the Preamble and Article II of the CITES, its main purpose is the regulation of trade with endangered species in order to protect them. The CITES' objective is operationalised by using different Appendices listing the relevant species in need of protection, *inter alia*, several sharks species, which are subject to various kinds of protection; see further Article II. According to Articles III-V of the CITES, the Appendices list and categorise species and specimen and regulate the trade with the species or their products. Accordingly, Article III stipulates a general prohibition of any commercial trade with the species listed in Appendix I. In line with Article IV, the utilisation and the trade of species which are not necessarily facing extinction, but may face that risk in the event of unregulated trade, are to be found in Appendix II. Finally, in line with Article V regulating the trade with species which require regulation in relation to trade, where only some of the CITES parties

adopted the CITES Regulation which transposed the main duties under CITES in relation to the Regulation of trade voluntarily. However, the thesis shall not further address the CITES Regulation.

⁴⁸ See further Paragraph 3 of the Preamble of the Council Regulation (EC) No 338/87 97 on the protection of species of wild fauna and flora by regulating trade therein (the Basic Regulation) on 9 December 1996.

⁴⁹ CITES, Appendices I, II, III valid from 12 June 2013, corrected on 20 November 2013 published by the Convention on International Trade in Endangered Species of Wild Fauna and Flora, accessed on <http://www.cites.org/eng/app/appendices.php>; See further Sand, P.H., "Enforcing CITES: The Rise and Fall of Trade", *RECIEL*, Vol. 22, 2013, pp. 251-264, at p. 254.

⁵⁰ The competences of the Conference of the Parties and the calling of a meeting are regulated in Article XI CITES. The COP is entitled to adopt amendments and extend the Appendices according to Articles XV-XVII CITES with a two-thirds majority. The Secretariat's competences are mainly defined in Article XII of the Convention. As the duties and obligations of the bodies of the CITES are not within the focus of the thesis, this shall not be further analysed.

adopted measures to protect them, may be listed in Appendix III. These species are usually unilaterally determined by individual CITES' parties.⁵¹

In line with Articles XV-XVII, the Appendices can be amended by the COP. According to Articles XV(1) and XVI(1), the COP is bestowed with the authority to make decisions, including amendments to the Appendices, with a two-thirds majority. The amendments are legally binding to the parties unless they make a reservation with respect to the amendment in line with Articles XV(3) and XVI(3) of the Convention. It should be noted that the parties are not entitled to make a reservation to the CITES as such, but only to individual COP decisions; see further Article XXIII(1) of the CITES. The impact of these provisions on the applicability of the CITES and the *de facto* applicability will be further addressed in Chapter 6.1.3.

1.2.1.3 The Inclusion of Sharks

The CITES is not a sleeping MEA as the CITES' COP meets on a regular basis in order to review its implementation progress.⁵² According to Article XI(2), the COP meets biannually. In line with the above, the COP is authorised to negotiate amendments to the Appendices. Amendments to Appendices I and II may be proposed by any party to the CITES and can be adopted with a two-thirds majority of the COP; see further Article XV(1)(b). To add a species to Appendix III a particular procedure must be followed. Namely, a party submits a proposal to the Secretariat for the inclusion of a particular species, which is subject to regulation within that party's national jurisdiction. The Secretariat then inserts the respective species into Appendix III referring to the party that submits the proposal.

Some shark species' fins and meat have a high value on the trade market since especially Asian countries consider shark products as delicatessen.⁵³ In the year 2000 during COP11, the CITES' parties recognised the need for mandatory provisions relating to the protection of certain shark species to counteract the increasing trade. In this context the Secretariat listed the basking shark (*Cetorhinus Maximus*), on behalf of Great Britain, into Appendix III.⁵⁴ During COP12 in 2002, the parties agreed on listing the basking shark and

⁵¹ See further Favre, D., *International Trade in Endangered Species- A Guide to CITES*, M. Nijhoff Publishers, 1989, at p. 140.

⁵² Lyster, S., 1985, at p. 12.

⁵³ Scanlon, J.E., "CITES at Its Best: COP16 as a Watershed Moment for the Worlds Wildlife", *RECIEL*, Vol. 22, 2013, pp. 222-228, at p. 222.

⁵⁴ COP12 Doc. 41.1, Interpretation and Implementation of the Convention – Species Trade and Conservation Issues – Conservation of Sharks, Conservation and Management of Sharks, *Convention on International Trade*

the whale shark (*Rhincodon Typus*) into Appendix II.⁵⁵ Furthermore, during COP13 in 2004, the COP generally recognised the necessity for the adoption of protective measures in relation to the conservation of the great white shark (*Carcharodon Carcharias*) and inserted the species into Appendix II.⁵⁶ The issue of declining shark populations and the need to take actions on an international level was further raised during COP15 in 2010. The parties in question expressed deep concern pertaining to the relatively scant progress made, along with the ineffectual nature of the measures taken in order to reverse the growing trend of population decline.⁵⁷ These concerns led to a COP16 decision in 2013 to include the oceanic whitetip shark (*Carcharhinus Longimanus*), the scalloped hammerhead shark (*Sphyrna Lewini*), the great hammerhead shark (*Sphyrna Mokarran*), the smooth hammerhead shark (*Sphyrna Zygaena*), and the porbeagle shark (*Lamna Nasus*) into Appendix II; see the Annex.⁵⁸ These species have a high value on the trade market in relation to the trade of their fins and meat. Thus, they are increasingly targeted by shark fishing nations and are, therefore, considered as endangered species.⁵⁹ Although the insert of these species into CITES' Appendix II reflects the will of the parties to promote the conservation of sharks, the question whether the measures taken in this context will eventually turn out to be effective remains to be seen.

To comply with the COP' decisions the parties are requested to provide the Secretariat with a summary of the domestic legislation that regulates the landing of sharks and the trade in shark specimens; see further Article VIII(6), (7).⁶⁰ As the EU is not party to the Convention, it is not bound by this provision and does not have to comply with the

of *Endangered Species of Wild Flora and Fauna*, Twelfth Meeting of the Conference of the Parties, 03-15 November 2002, Santiago, available at <http://www.cites.org/eng/cop/12/doc/E12-41-1.pdf>. Already in 1994 the COP of the CITES acknowledged the threat international trade imposes on sharks. However, no sharks have been inserted at that time; see further Res. Conf. 9.17, *Status of International Trade in Shark Species*, in *Resolution of the Conference of the Parties*, Ninth Meeting of the Conference of the Parties, 09-20 June 1997, Harare, available at <http://cites.org/sites/default/files/eng/res/all/09/E09-17.pdf>, last accessed on 30 august 2014.

⁵⁵ Decision 12.47-12.49, *Sharks*, *Decisions of the Conference of the Parties to CITES (in affect after the 12th Meeting)*, 03-15 November 2002, Santiago, available at

<http://www.cites.org/sites/default/files/eng/dec/valid13/E12-Dec.pdf>, last accessed on 30 august 2014

⁵⁶ Notification to the Parties Concerning: Amendments to Appendices I and II of the Convention adopted by the Conference of the Parties at its 13th Meeting, No. 2004/073, (3)(d).

⁵⁷ Scanlon, J.E., 2013, at p. 222; See further COP15, Prop. 15-17, *Consideration of Proposals for Amendment of Appendices I and II*, *Fifteenth meeting of the Conference of the Parties Doha (Qatar)*, 13-25 March 2010, available at www.cites.org/eng/cop/15/prop/E-15-Prop-15.pdf.

⁵⁸ Decision 16.128, *Sharks*, *Decisions of the Conference of the Parties CITES superseded after its 16th Meeting (Bangkok 2013)*, 03-14 March 2013, Bangkok, available at www.cites.org/eng/dec/valid16/E16-Dec.pdf, last accessed on 30 august 2014.

⁵⁹ Scanlon, J.E., 2013, at p. 222.

⁶⁰ *Ibid.*

commitment to report to the Secretariat.⁶¹ However, many EU Member States are parties to the CITES and have to fulfil their reporting obligations. The impact of competing obligations of the EU and its Member States will be further discussed in Chapter 6.2.1. Despite the compliance of the parties with their reporting duties, the report system itself has turned out to be weak; see further Chapter 6.1.3.

1.2.2 Convention on the Conservation of Migratory Species of Wild Animals

1.2.2.1 Background

Another MEA supporting the conservation of endangered species is the Convention on the Conservation of Migratory Species of Wild Animals (CMS) which entered into force on 1 November 1983. Currently, the CMS has 120 parties.⁶² According to Article XV, the CMS is open for accession to regional economic integration organisations. Thus, in 1983, the EU was able to become party to the CMS and has been enjoying all rights and obligations under the Convention. In line with CMS' Article XVI the EU is obliged to adopt legislative measures to ensure the protection of the species listed in the Appendices. The EU approved the Convention within the Council Decision 82/461/EEC.⁶³

1.2.2.2 CMS' Objectives and Main Structure

In comparison to the great amount of species that the CITES protects under its treaty framework, the CMS covers only 500 marine species under its provisions; see Appendices. The CMS consists of 20 Articles and two Appendices. The Convention exclusively stipulates the protection and conservation of migratory species and their habitats. Articles I-VI of the CMS reflect the fundamental scope in relation to its objectives seeking to protect migratory species. The CMS operates in form of two Appendices listing endangered species in Appendix I and migratory species which are subject of agreements between the respective range states in Appendix II; see Articles III-IV. According to Articles VII-IX, the CMS has three main bodies, the COP, the Scientific Council and the Secretariat which seek to support the effective applicability of the objective of the CMS, namely the protection of migratory

⁶¹ *Ibid.*, at p. 223.

⁶² The list of Member States can be found on <http://www.cms.int/en/parties-range-states>, last accessed on 19. August 2014.

⁶³ Council Decision of 24 June 1982 on the Conclusion of the Convention on the Conservation of Migratory Species of Wild Animals (82/461/EEC), published in *OJ L 210*, 19/07/1982.

species.⁶⁴ Migratory species in terms of the CMS are defined in Article I(1)(a) CMS as follows:

Migratory species means the entire population or any geographically separate part of the population of any species or lower taxon of wild animals, a significant proportion of those members cyclically and predictably cross one or more national jurisdictional boundaries.

In order to provide an effective protection of migratory species covered by this definition, the CMS categorises and lists possibly endangered migratory species in two distinct Appendices depending on the particular need of protection; see further Articles III-IV. According to Article III(4), the parties shall endeavour from taking or removing species which are classified as endangered and are listed in Appendix I. In accordance to Article I(1)€, a species is endangered if it is “in danger of extinction throughout all or a significant portion of its range”. Article IV of the CMS strives to promote international co-operation between range states in order to improve the conservation actions on an international level in relation to migratory species having an unfavourable conservation status.⁶⁵ These species are inserted in Appendix II. The Appendices can be amended by the CMS’ COP’ decisions; see Article XI. The COP’ decisions are considered as soft law.⁶⁶ In line with Article XI(6) of the CMS the parties can make reservations to them. This means that the amendments do not become binding to the party making a reservation. According to Article XIV, however, the CMS as such cannot be made subject to reservation. The MEA is therefore unconditionally legally binding its parties.

⁶⁴ The COP is entitled to adopt amendments and extend the Appendices according to Articles X-XII of the CMS during ordinary or extra-ordinary meetings. The Scientific Council is introduced in Article VIII of the CMS, which emphasises on the Scientific Council’s duties and functions. Its main function is to provide the COP with scientific advice in taking its decisions. Article XI of the Convention defines the functions of the Secretariat further. The obligations of the Convention’s bodies shall not be deepened any further in this thesis.

⁶⁵ According to the definition of Article 1(1)(d) of the CMS, an unfavourable conservation status is taken if any of the conditions set out in Article 1(1)(c) are not met. These conditions are “(1) the population dynamics data indicate that the migratory species is maintaining itself on a long-term basis as a viable component of its ecosystems; (2) the range of the migratory species is neither currently being reduced nor is likely to be reduced, on a long-term basis; (3) there is, and will be in the foreseeable future sufficient habitat to maintain the population of the migratory species on a long-term basis; and (4) the distribution and abundance of the migratory species approach historic coverage and levels to the extent that potentially suitable ecosystems exists and to the extent consistent with wise wildlife management.”

⁶⁶ Beyerlin, U. and Marauhn, T., *International Environmental Law*, Hart Publishing (2011), at p. 258.

1.2.2.3 The Conservation of Sharks as Migratory Species

The CMS is highly relevant when it comes to the conservation of shark species. Many shark species fulfil the definition of migratory species in accordance with Article I(1)(a) of the CMS. Therefore, they are protected under the CMS provided they are listed in the Appendices. However, some shark species are considered to be only possibly migratory according to the IUCN Shark Specialist Group.⁶⁷ This basically means that there is scientific evidence that these species migrate into different jurisdictions even though their actual habitat remains unclear. Due to the status of being possibly migratory, these species do not fulfil the requirements of Article I(1)(a) of the CMS and are therefore excluded from the scope of the CMS.⁶⁸ Furthermore, to enjoy protection under the CMS, the species need to be listed in the Appendices; see further Articles III-IV. Currently, the Appendices of the CMS list six shark species. During COP6 in 1999, the whale shark was inserted into Appendix II.⁶⁹ The second species, the great white shark, was added to Appendices I and II during COP7 in 2002.⁷⁰ The third species, the basking shark, was listed in Appendices I and II in 2005 during COP8.⁷¹ Further, the shortfin mako (*Isurus Oxyrinchus*), the longfin mako (*Isurus Paucus*) and the porbeagle shark have been classified as having an unfavourable conservation status and are therefore listed in Appendix II; see further the Annex.

Due to the narrow scope of the Convention and the rather stringent definition of the term migratory species, many shark species do not enjoy protection under the CMS.

1.2.3 Convention on the Conservation of European Wildlife and Natural Habitats

1.2.3.1 Background

In 1979, the Council of Europe adopted the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention). The Bern Convention entered into force in 1982. Currently, 50 individual states and the European Union have become parties to the

⁶⁷ The IUCN issued an evaluation of the conservational status of sharks on behalf of the CMS. Therefore Camhi, M., *et al.*, have emphasised the decline in pelagic sharks; see Camhi, M., *et al.*, 2009, at p. 7.

⁶⁸ *Ibid.*

⁶⁹ See further Resolution 6.1 of the Sixth Meeting of the Conference of the Parties, *Concerted Actions for Appendix I Species*, UNEP/CMS/Res.6.1., 10-16 November 1999, Cape Town; See further Dulvy, N., *et al.*, 2008, at p. 478.

⁷⁰ See further Resolution 7.1 of the Seventh Meeting of the Conference of the Parties, *Concerted Actions for Appendix I Species*, UNEP/CMS/Res.7.1, 18-24 September 2002, Bonn.

⁷¹ See further Resolution 8.1 of the Eight Meeting of the Conference of the Parties, *Concerted Actions for Appendix I Species*, UNEP/CMS/Res.8.1, 20-25 November 2005, Nairobi.

Convention.⁷² According to Article 19(1) of the Bern Convention, the Convention is open for accession to all members of the Council of Europe, non-member states that participated in its elaboration, and the EU. Consequently, the EU was able to become party in 1979 and is under an international obligation to implement the Bern Convention into EU law, which it fulfilled by adopting the Birds Directive⁷³ and the Habitats Directive⁷⁴; see further Chapter 2.3.1.

1.2.3.2 The Objectives and Main Structure

The Bern Convention's objective is the protection of endangered species and their habitats in Europe; see Article 1. The Convention consists of 24 Articles and four Appendices. Articles 1-12 of the Bern Convention establish the general principles and provisions of the MEA and introduce the duties of the parties. In Articles 4-9 the operational approach of the Bern Convention in form of four Appendices is further specified. Articles 13-17 of the Convention regulate the competences of the Contracting Parties and the Standing Committee.⁷⁵

The Bern Convention aims on the conservation of all flora, fauna and their natural habitats in European territory; see Article 1. The Convention's focal point centers on the conservation of species which require cross-party co-operation in line with Article 1(1) of the Convention. Further, Article 1(2) encourages the parties to adopt measures protecting especially endangered and vulnerable species. According to the IUCN, species are considered vulnerable when they face a high risk of extinction.⁷⁶ In contrast, species are endangered when facing a threat to the survival and a very high risk of extinction.⁷⁷ Finally, Article 2 of the Bern Convention demands the parties to adopt measures on a national level to maintain the population of flora and fauna in balance with ecological, scientific and cultural requirements.

⁷²The list of the Parties is published under:

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=104&CM=8&DF=&CL=ENG>, last accessed on 19 August 2014.

⁷³ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the Conservation of Wild Birds, published in *OJ L 20*, 26/01/2010. This Directive will not be covered further in the thesis.

⁷⁴ Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, published in *OJ L 206*, 22/07/1992.

⁷⁵ The Standing Committee is entitled to adopt amendments to the Appendices in form of decisions in line with Articles 16-17 Bern Convention. The Standing Committee is the Meeting of all Contracting Parties to the Bern Convention and keeps the review of provisions of the Convention and the Appendices. The thesis shall not further examine the competences and obligations of the treaty bodies.

⁷⁶ Camhi, M., *et al.*, 2009, at pp. 5 f.

⁷⁷ Bowman, M., Davies P. and Redgwell, C., 2010, at p. 484. See additionally: Camhi, M., *et al.*, 2009, at pp. 5 f.

In accordance with Articles 4-9, the Convention distinguishes the protective need and vulnerability of species by classifying the different flora and fauna species and specimen in four different Appendices. In line with Article 4(1) of the Bern Convention, the Appendices I and II shall include endangered habitats of first flora and second fauna species. Articles 5-6 of the Convention seek to strictly protect these species. In accordance with Article 5 of the Bern Convention, flora specimen which are included in Appendix I should be strictly protected from picking, cutting or uprooting under national legislation. Further, Article 6 strives to prohibit and prevent killing, damage to breeding sites, disturbance, and destruction, as well as trade of any kind involving the species listed in Appendix II. Moreover, Article 7(2) of the Bern Convention aims to regulate any exploitation of wild fauna categorised in Appendix III. Article 7(3) of the Convention stipulates, further, the promotion of sustainable utilisation of the species listed in Appendix III in order to restore increasing population levels. According to Article 8 of the Convention, Appendix IV lists different prohibited means and methods of killing, capture and other methods of exploitation. To comply with their obligations under the treaty, parties are obliged to promote national legislation in order to conserve and protect flora, fauna and habitats.⁷⁸

1.2.3.3 Protection of Sharks in European Waters

Due to the high amount of commercial shark fishing activities, shark finning and the issue of by-catch of sharks in international and EU waters, the number of sharks has declined noticeable within the last decades.⁷⁹ The Bern Convention has listed two species in Appendix II as strictly protected in order to conserve the most vulnerable shark species in European waters. The species inserted are the great white shark and the basking shark. Additionally, the porbeagle shark, the shortfin mako, the blue shark (*Prionace Glauca*) and the angelshark (*Squatina Squatina*) has been inserted in Appendix III. This resultant factor is that measures will be implemented by the parties prohibiting fishing activities during, for example, breeding seasons, as well as the determination of fishing areas and the prohibition of trade with shark fishing products in line with Article 7(3)(c) of the Convention.

Furthermore, the Bern Convention indicates the promotion of the protection of endangered shark species in Article 10, as the provision aims at the conservation of migratory

⁷⁸ Díaz, C.L., "The Bern Convention: 30 Years of Nature Conservation in Europe", in *RECIEL*, Vol. 19, 2010, pp. 185-196, at p. 187.

⁷⁹ Dulvy, N. *et al.*, 2014, at p.4.

species. There, international co-operation between the parties of the Convention is particularly highlighted in order to ensure the protection of wide areas and habitats extending one state's jurisdiction in relation to the listed species. Article 10(1) of the Bern Convention requires the parties to “co-ordinate their efforts for the protection of the migratory species specified in Appendices II and III”. Many sharks meet the conditions as migratory species and cross national boundaries. Thus, Article 10 underlines the importance of co-operation between the individual parties to protect the shark species listed under the Convention's framework.

1.2.4 Convention on Biological Diversity

1.2.4.1 Background

Supported by the release of the Brundtland Report in 1987, the international community recognised the global decline of biological diversity and the need for international measures to reverse this trend.⁸⁰ These concerns resulted in the adoption of the Convention on Biological Diversity (CBD) that was finally agreed on during the Conference on Environment and Development on 5 June 1992 in Rio de Janeiro.⁸¹ In the following process, the CBD entered into force on 29 December 1993. Currently, the Convention stands at 194 parties.⁸² According to Article 33, the CBD is open to regional economic integration organisations which enabled the EU to become a party to the CBD in 1993. Consequently, the Union has entered an international commitment to implement the CBD into EU law and adopt legislative measures complying with the provisions.⁸³

⁸⁰ Report of the World Commission on Environment and Development, “Our Common Future”, transmitted to the General Assembly as an Annex to document A/42/427 – Development and International Co-operation: Environment (Brundtland Report), 1987, paragraph 30, at p. 31. The Brundtland Report recognises that several factors in the world's environmental development result in the reduction of genetic diversity of the world's ecosystem. The genetic diversity should be interpreted as a definition of biological diversity, which was adopted in Article 1 CBD.

⁸¹ See further Schrijver, N., *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, Pocketbooks of the Hague Academy of International Law, Martinus Nijhoff Publishing, 2008, at p. 263 f.

⁸² A list of the parties of CBD can be found on: <http://www.cbd.int/convention/parties/list/default.shtml>, last accessed on 19 August 2014.

⁸³ The EU adopted the Council Decision 93/626/EEC of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity, published in *OJ L 309 of 13 December 1993*.

1.2.4.2 CBD's Objectives and Main Structure

The CBD consists of 42 Articles. Its structure differs from the CITES, the CMS and the Bern Convention, as it does not operate through Appendices listing and categorising species which are in particular need of protection and conservation. The CBD adopts broad obligations which the parties are obliged to comply with. Furthermore, as its backbone lies in the all-round conservation of biological diversity, the CBD is by many seen as an umbrella treaty which covers other MEAs' scopes also.⁸⁴ Whereas the CITES, the CMS and the Bern Convention have a restricted material scope on certain aspects of conservation as MEAs, the CBD operates as an umbrella and is, in theory, covering all flora and fauna species. Article 1 of the CBD seeks to protect all biological diversity and to ensure the sustainable use of its components. Thus, the CBD *de facto* aims to prevent the extinction of animals as well as the destruction of habitats. The term biological diversity is defined in Article 2 of the CBD as follows:

Biological diversity means the variability among living organisms from all sources including, *inter alia*, terrestrial marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species between species and of ecosystems.

Thus the CBD applies to all genetic resources and stipulates the protection of all flora and fauna.⁸⁵

According to Article 8(f), the parties are obliged to promote the recovery of threatened species and implement management strategies in order to protect flora, fauna and habitats. Further, Article 10 of the CBD strives to introduce a guarantee of the sustainable use of biodiversity and the fair and equitable sharing of this utilisation.⁸⁶ To comply with these goals globally the CBD's COP has the competence to adopt programmes of work, guidelines, strategic plans and further measures; see further Article 23(4).⁸⁷

⁸⁴ Bowman, M., Davies P. and Redgwell, C., 2010, at p. 599 ff.

⁸⁵ See also Shine, C. and Kohona, P.T.B., "The Convention on Biological Diversity: Bridging the Gap Between Conservation and Development", in *RECIEL*, Vol. 1, 1992, pp. 278-289, at p. 279.

⁸⁶ See further European Commission, *The Convention on Biological Diversity. Implementation in the European Union*, Luxembourg: Publication Office of the European Union, 2006, at p. 6.

⁸⁷ Jóhannsdóttir, A., 2012, at p. 256.

1.2.4.3 The CBD and its Relation to Sharks

Article 2 of the CBD defines biodiversity as all “living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems.” Thus, the protection of marine ecosystems and therefore the natural habitats of shark species are included in the CBD’s scope. Subsequently, the CBD is relevant when it comes to the protection and conservation of endangered shark species. The CBD’s COP acknowledges the possibility to adopt guidelines and action plans in order to promote the protection of terrestrial and marine ecosystems under the CBD; see Article 23.

During COP2 in 1995, the COP agreed on the Jakarta Mandate.⁸⁸ Therein, the COP expressed concerns about serious threats to marine and coastal biodiversity and demanded international actions be taken in order to conserve marine biodiversity.⁸⁹ The Jakarta Mandate introduces the objective of sustainable use of coastal and marine living resources. The Mandate encourages the parties of the CBD to establish a domestic legal framework in relation to an integrated management of the marine and coastal ecosystems; see further Paragraph 3 of the Jakarta Mandate. The conservation of sharks is not explicitly mentioned in the Jakarta Mandate, but can be interpreted as being included in the general protection of the marine and coastal ecosystem. However, certain shark species are particular endangered and therefore require particular protective measures in order to conserve their habitats.⁹⁰ Although the Jakarta Mandate is not explicitly concerned with the protection of shark species, it demonstrates the implied willingness of the CBD’s COP to take certain measures in order to stipulate the conservation of endangered shark species by striving to protect their marine ecosystem.

In 2009, during COP9, the then Executive Secretary of the CBD Ahmed Djoghlaif further emphasised the necessity to protect sharks species since their decline is causing major damage to the marine environment and biodiversity.⁹¹ According to the scientific background provided above, sharks often have the role as apex predators within the marine ecosystem.⁹² At first sight, the reduction of apex species, which regulate other populations in a certain

⁸⁸ Decision II/10, “Conservation and Sustainable Use of Marine and Coastal Biological Diversity”, published in *Report of the Second Meeting of the Conference of the Parties to the Convention on Biological Diversity*, UNEP/CBD/COP/2/19, 30 November 1995, 6-17 November 1995, Jakarta, further referred to as Decision II/10.

⁸⁹ *Ibid.*

⁹⁰ See further, Dulvy, N., *et al.*, 2008, at p. 466.

⁹¹ Secretariat of the Convention on Biological Diversity, “Statement of Ahmed Djoghlaif”, in *Opening Session of the ninth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, Bonn, 2008, at p. 2.

⁹² Heupel, M., *et al.*, at p. 292.

ecosystem, may allow other species' stocks to increase their population, which may cause ecological imbalances. However, the predilection of apex predators to hunt weakened factions of a given species population also plays a significant role in the prevention of the spread of disease to other stocks.⁹³ Consequently, sharks participate in promoting the health of the marine ecosystems to prevent major damage. Djoghla's message had a particular impact on COP9. During COP9, the parties adopted Decision IX/20, which acknowledges the urgent need of co-operation between the CBD's parties in order to promote the protection of marine and coastal biodiversity. Furthermore, it urges the CBD's parties to adopt measures to perform their duties in relation to the protection of marine biodiversity.⁹⁴ As a supporting tool, Annex I of the Decision defines general scientific criteria in order to identify the marine ecosystem in need of further protection. These scientific criteria refer to sharks exemplarily as vulnerable species which require increased protection by legislative actions. They recover rather slowly in their population since sharks are species classified by low fecundity, slow growth, longevity and long time to sexual maturity and therefore need stringent protection.⁹⁵ However, this only stresses the vulnerability of sharks, but does not give any advice on how to adopt effective measures at a domestic level.⁹⁶

1.3 An Overview of the Relevant EU's Legislation

Since the EU has become party to the CMS, the CBD and the Bern Convention, it has an international obligation to implement the relevant provisions in EU's legislation. The implementation takes place through two instruments, which shall be introduced in the following section and further analysed in Chapter 3.3. These instruments are the Habitats Directive and the Shark Regulation.

⁹³ *Ibid.*

⁹⁴ Decision IX/20, "Marine and Coastal Biodiversity", published in *the Report of the ninth meeting of the Conference of the Parties to the Convention on Biological Diversity*, UNEP/CBD/COP/DEC/IX/20, 9 October 2008, 19-30 May 2008, Bonn, further referred to as Decision IX/20.

⁹⁵ *Ibid.*

⁹⁶ Decision IX/20 states that species with low fecundity, low growth, long time to sexual maturity, longevity (e.g. sharks) are especially vulnerable species in need of conservation and protection. It, therefore, urges states to introduce legislation taking this into consideration.

1.3.2 The Habitats Directive

1.3.2.1 Background

The Habitats Directive was adopted in 1992 in order to comply with the international commitments that the Union entered into by signing the Bern Convention. At that time the EU had 12 Member States. As Directives are binding the Member States, all EU Member States, are obliged to adopt sufficient measures in order to implement the Directive into national law. According to Article 288 TFEU, the Member States are free to choose the form and methods of implementation. Therefore, they need to transpose the Directive fully and accurately within their own legal systems.⁹⁷ The Court of Justice of the European Union (CJEU) has emphasised that the EU's legal instruments need to have direct effect *vis-à-vis* third parties and cannot only be binding for the Member State's authority.⁹⁸ In Case C-6/04, *Commission v UK*, the Commission argued that the UK had not transposed the Habitats Directive appropriately into its national legislation. The Court held that the UK's legislation was too general and that the Habitat's Directive needs to be transposed "with sufficient precision and clarity to satisfy fully the demands of legal certainty."⁹⁹

In addition, all new EU Member States need to implement the Habitats Directive into their national legislation in order to promote effective legislative harmonisation in the EU's territory in relation to the protection of certain habitats.¹⁰⁰ However, Member States enjoy some discretion when it comes to the national implementation. Therefore, the measures adopted by the Member States differ and the legislation and thus harmonisation may be fragmented.¹⁰¹ As the conservation of habitats is a multinational obligation to their often trans-boundary character, the effectiveness of the Habitats Directive could be doubted, as seen further in Chapter 6.2.

⁹⁷ Jans, J.H. and Vedder, H.H.B., *European Environmental Law*, 4th Edn., Europa Law Publishing, 2012, at p. 142; See further Case C-129/96 *Inter-Environnement Wallone ASBL v Waals Gewest* [1997] ECR I-7411.

⁹⁸ Jans, J.H. and Vedder, H.H.B., 2012, at p. 151; See further Case C-361/88 *Commission v Germany* [1991] ECR I-2567 (*TA Luft case*).

⁹⁹ Case C-6/04 *Commission v UK* [2005] ECR I-9017.

¹⁰⁰ See further Craig, P. and De Burca, G., *EU Law – Text, Cases and Materials*, 5th Edn., Oxford University Press, 2011, at pp. 264 f.

¹⁰¹ Jans, J.H. and Vedder, H.H.B., 2012, at p. 108.

1.3.2.2 Objective and Main Structure

The Habitats Directive currently covers around 1000 species and 200 habitat types.¹⁰² It consists of 24 Articles and six Annexes. The Directive reflects the need of conservation and protection of flora, fauna and habitats within the EU's territory, including marine territory; see Article 2(1). Therefore, the Habitats Directive strives to establish a common framework within the Member States in relation to the conservation of natural habitats and vulnerable species. According to Articles 2(1) and (2), the Habitats Directive aims mainly on the maintenance and restoration of EU's biodiversity. The protective measures adopted by the Member States should take into account economic, social and cultural requirements within the EU in order to provide an effective conservation of habitats and species; see Article 2(3).¹⁰³ Furthermore, Article 3 of the Habitats Directive obliges the Member States to designate and manage Special Areas of Conservation (SAC). SAC are designated according to the procedure pointed out in the Directive and are the primary measure stipulated in the Habitats Directive to ensure the protection of the respective habitats; see further Chapter 5.2.1. The Directive provides the legal foundation for more than 26.000 SAC within the EU.¹⁰⁴ The European Environmental Agency (EEA) estimates 2600 of these as based in EU's marine territory.¹⁰⁵

The Habitats Directive has six Annexes. Annex I lists all areas in European territory that are in need of actions promoting their conservation; see further Article 6(1). Additionally, Article 6(1) promotes the adoption of efficient legislation in the Member States in order to guarantee efficient habitats' protection of the species listed in Annex II. The Annexes distinguish between habitats generally inserted in the Annexes, and the habitats of explicitly listed species which require priority in order to protect them, and those which do not enjoy priority. Article 3 of the Habitats Directive refers the competence to designate SAC to the Member States. In addition, Article 4(1) requires the Member States to propose a "list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host". The Member States base their decisions to list a

¹⁰² See for a further listing: Annexes I-VI of the Habitats Directive.

¹⁰³ See also Paragraph 7 of the Preamble of the Habitats Directive; further Trouwborst, A., "Conserving European Biodiversity in a Changing Climate: The Bern Convention, European Union Birds and Habitats Directive and the Adaptation of Nature to Climate Change", in *RECIEL*, Vol. 20, 2011, pp. 62-77, at p. 67.

¹⁰⁴ See additional Sundseth, K., *The Habitats Directive. Celebrating 20 Years of protecting biodiversity in Europe*, Luxembourg: Publications Office of the European Union, 2012, at p.2; See further Trouwburst, A., 2011, at p. 65.

¹⁰⁵ European Environmental Agency (EEA), "Protected Areas in Europe – an Overview", in *EEA Report No. 5/2012*, Luxembourg: Publications Office of the European Union (2012), at p. 115.

particular site as a SAC on the criteria set out in Annex III. According to Article 4(2), Annex III and the lists of SAC designated by the Member States, the Commission is required to establish a list of sites of Community importance (SCI) identifying the priorities of certain habitats and species. The effect of the listing being performed by the Commission will be further tackled in Chapter 5.2.1. To comply with their obligations under the Directive, Article 6 urges the Member States to adopt necessary national conservation measures.¹⁰⁶ In addition, Articles 12 of the Directive implies the obligation of the Member States to requisite measures prohibiting all forms of deliberate capturing, killing, disturbing, *etc.* of the fauna species listed in Annex IV(a). Further, Article 13 demands the Member States to adopt measures prohibiting any picking, collecting, cutting or destruction of flora species listed in Annex IV(b) in their natural range. In line with Article 14(1), less stringent measures apply to species inserted in Annex V provided their favourable conservation status is maintained. Exploiting these species may be allowed under specific national surveillance and control mechanisms, but does not face prohibition. Finally, Annex VI specifies methods of capturing, killing and modes of transport which constitute derogations from Annex IV(a); see further Article 15 of the Habitats Directive.¹⁰⁷

1.3.2.3 The Conservation of Sharks' Habitats

The Habitats Directive seeks to protect marine species by including marine habitats and certain vulnerable species in its Annexes. No shark species have been listed in the Directive's Annexes so far. Additionally, only a few proposals have been made by the Member States to list endangered shark species in them. The Habitats Directive provides only indirectly the protection of shark species as it addresses the conservation of marine habitats.¹⁰⁸ However, to provide effective conservation of a certain habitat the EU Member States need to adopt sufficient legislative measures; see Article 6(1). The Member States are, therefore, under the obligation to take certain steps to prevent deterioration or disturbances of the species within a

¹⁰⁶ See further Jans, J.H. and Vedder, H.B.B., 2012, at p. 514.

¹⁰⁷ See Annexes I-VI of the Habitats Directive; see further Evans *et al.*, "Adapting Environmental Conservation Legislation for an Enlarged European Union: Experience from the Habitats Directive", in *Environmental Conservation*, 2013, pp. 1-11, at p. 3.

¹⁰⁸ The protected habitats and marine areas are sandbanks, posidonia beds, estuaries, mudflats and sandflats, coastal lagoons, large shallow inlets and bays, reefs, submarine structures made by leaking gases and finally, other rocky habitats. The relevant habitats for sharks depend on the species and their migratory status. Consequently, the actual influence of the Habitats Directive on the protection of shark species is not completely clear even though a potential positive impact is undeniable.

designated SAC.¹⁰⁹ Thus, the protection of shark species within their habitat depends on the Member States designating SAC and enforcing *de facto* effective protection.

1.3.3 The Shark Regulation

In 2003, the EU adopted the Shark Regulation (EC/1185/2003). It deals with the sustainable utilisation of sharks addressing exclusively the prohibition of shark finning, which has contributed to the decline of certain shark species within the last decades.¹¹⁰ According to the IUCN, finning can be described as the “slicing off a shark’s fin and discarding the body at sea”.¹¹¹ The first Shark Regulation was amended in 2013 by the Shark Regulation (EC/605/2013).¹¹² It now consists of four Articles. The Regulation applies to the EU’s marine territory as well as to all Union vessels flying a flag of a Member State in external waters; see Article 1(1). Due to the character as a Regulation, the legislative measure taken by the EU, the Shark Regulation is directly applicable within the Member States of the Union; see further Article 288(1) TFEU.

The core aspect of the Regulation is a ban of finning of sharks, in line with Article 3 of the Shark Regulation, in order to conserve shark species as they are of significant importance to the marine ecosystem.¹¹³ The Regulation focuses primarily on the practice of finning, but does not address any pressing issues of by-catch or other causes for the decrease of shark populations.¹¹⁴

Article 6 obliges the Member States to introduce a certain reporting system, requiring the Member States to report the landing of sharks in the particular state annually. Moreover, the Member States need to perform inspections of EU vessels. There, the compliance of the vessels with the national legislation implementing the Shark Regulation is monitored by a competent national authority. The enforcement actions and sanctions in case of non-compliance with the Shark Regulation must further be included in the following reports of the Member States to the EU Commission; see Article 6. The reporting system is criticised as not

¹⁰⁹ See further Jans, J.H. and Vedder, H.H.B., 2012, at p. 514.

¹¹⁰ Council Regulation on the Removal of Fins of Sharks on Board Vessels EC 1185/2003. Published in *OJ L 167/1* 04/07/2003.

¹¹¹ Dulvy, N., *et al.*, 2014, at p. 13.

¹¹² Regulation No 605/2013 of the European Parliament and of the Council of 12 June 2013 amending Council Regulation No 1185/2003 on the Removal of Fins of Sharks on Board Vessels, published in *OJ L 181/1* 29/06/2013.

¹¹³ Preamble, EC/605/2013. Similar to international agreements the Regulation refers to the “IUCN Red List of Threatened Species” and the need of action of management of conservation.

¹¹⁴ See further Passantino, A., “The EU Shark Finning Ban at the Beginning of the New Millennium: The Legal Framework”, in *ICES Journal of Marine Science*, 2013, 1-6, at p. 4.

being very effective.¹¹⁵ Often, Member States do not perform inspections or do not comply with their obligation to enforce punishment and sanctions in case of non-compliance. This results in a discrepancy between the *de jure* objectives and the *de facto* results regarding the protection of sharks in form of the prohibition of finning as unreported finning and illegal trade with fins could undermine the objectives of the Shark Regulation.¹¹⁶ Additionally, the Union's legislation does not explicitly manage the conservation of sharks since it only regulates finning, but no other threat to shark species; see further Chapter 6.2.1.

¹¹⁵ Lack, M. and Sant, G. (2008), at p. 38; See further Shivji, M.S., Chapman, D.D., Piktich, E.K. and Raymond, P.W., "Genetic Profiling Reveals Illegal International Trade in Fins of the Great White Shark, *Carcharodon Carcharias*", in *Conservation Genetics*, Vol. 6, 2005, pp. 1035-1039., at p. 1036.

¹¹⁶ *Ibid.*

2 Co-ordination of International Agreements and Regimes

The inter-treaty co-operation between international and EU's instruments in relation to the conservation of endangered shark species is of great relevance when it comes to the evaluation of the effectiveness of the respective tools. This Chapter serves the purpose to describe and analyse the co-operation between them. Moreover, the implementation of international law into EU law will be examined and evaluated relating to their applicability and effectiveness. In this context, the role of the EU in the treaty making process and its competence will be further addressed.

2.1 The Inter-Treaty Relation between MEAs

Several MEAs, *e.g.* the CITES, the CMS, Bern Convention and the CBD, have been adopted to take action against the decline in species. However, the quantity of the different legal tools being associated with a too fragmented regime in relation to the protection of endangered species raises the concern of their effectiveness.¹¹⁷ In order to support an effective transposition of an international tool into national law, the respective MEA needs to promote an active co-ordination of their provisions, actions and bodies.¹¹⁸ If the particular MEA does not co-operate effectively with other international agreements, the *de facto* protection of endangered species could possibly be at risk.¹¹⁹ To address this aspect an examination of the differences and similarities of the MEAs is essential. Moreover, the efforts made to increase the inter-treaty co-ordination need to be evaluated in order to analyse the effectiveness of the protection of endangered shark species.¹²⁰ Sharks often cross boundaries since they are migratory or possibly migratory species. This leads to the necessity of an international co-operation in the adoption of conservation measures.¹²¹ Consequently, in order to provide

¹¹⁷ Cooney, R., "CITES and the CBD: Tensions and Synergies", in *RECIEL*, Vol. 10, 2001, pp. 259-268, at p. 259.

¹¹⁸ See further Decision 19/1, annex: paragraph 3(b), SS.V/2, in *Report of the Executive Director, Governing Council of the United Nations Environmental Programme, Strengthening the Role of the United Nations Environment Programme in Promoting Collaboration Among Environmental Conventions*, UNEP/GC.20/16, 1999. The UNEP proposed the need of effective co-ordination within Member States of the different MEAs by *e.g.* the introduction of a harmonisation of reporting requirements.

¹¹⁹ Cooney, R., 2001, at p. 259.

¹²⁰ *Ibid.*

¹²¹ For the definition See further Article I(1)(a) CMS defining migratory species as "entire population[s] or any geographically separate part of the population of any species or lower taxon of wild animals, a significant proportion cross one or more national jurisdictional boundaries."

effective shark conservation measures on an international level, the different agreements should be under the commitment to co-operate with each other.

2.1.1 The Different Material Scopes of the Agreements

Due to the large variety of MEAs, the question arises whether this leads to a possibly fragmented regulatory framework in relation to the conservation of sharks.¹²² In general, the CITES, the CMS, the CBD and the Bern Convention share a comparable aim, namely the protection, conservation and sustainable use of biological diversity.¹²³ The individual material scopes nevertheless differ.

The CBD adopts a holistic approach in relation to the protection of biological diversity.¹²⁴ Article 2 of the CBD defines biodiversity as “the variability among living organisms from all sources including, *inter alia*, terrestrial, marine or other aquatic ecosystems.”¹²⁵ The international agreement, however, does not apply any Appendices categorising and listing the species, ecosystems or habitats in particular need of protection.¹²⁶ It further does not distinguish between different impacts endangering the conservation of biodiversity but strives to protect biodiversity from all possible negative impacts. Opposing, the CITES stipulates invariably the regulation of the impact that unregulated trade has on the conservation of endangered species; see further the Preamble of the CITES. There, the parties recognise the over-exploitation of wild flora and fauna through international trade and the resulting necessity of regulation. Moreover, the protected species are categorised in the three different Appendices; see Articles III-V of the CITES. Contrary, the CMS and the Bern Convention stress the necessity of the protection of species and their habitats from any external impact, but generally excluding the trade angle.¹²⁷ The species enjoying protection

¹²² Techera, E. and Klein, N., “Fragmented Governance: Reconciling legal strategies for shark conservation and management”, in *Marine Policy*, 2011, pp. 73-78, at p. 74.

¹²³ Caddell, R., “Inter-Treaty Cooperation, Biodiversity Conservation and the Trade in Endangered Species”, *RECIEL*, Vol. 22, 2013, pp. 264-281, at p. 264. See further Article II of the CITES, which defines its scope as the regulation of trade in order to ensure the survival of endangered species. Article II CMS describes the importance of the conservation of migratory species. Article 1 of the CBD defines the objective of the Convention as the conservation of biological diversity, the sustainable use of its component and the fair and equitable sharing of the benefits. Article I Bern Convention stresses the aim of the Convention as the conservation of flora, fauna and habitat. Further all preambles recognise the need of the conservation of flora, fauna and habitat to protect the global natural system in general. These instruments have all been adopted in relation to environmental and conservation challenges of that time.

¹²⁴ See also: Shine, C. and Kohona, P.T.B., 1992, at p. 279.

¹²⁵ See further Cooney, 2001, at p. 259.

¹²⁶ Bowman, M., Davies, P. and Redgwell, C. (2010), at p. 492.

¹²⁷ Article 1 of the CBD focuses on the protection of biological diversity. Article 1 of the Bern Convention emphasises the general protection of species in European territory. Article I CMS points out the protection and

under the CMS and the Bern Convention are further categorised in Appendices according to the protection of the species; see further Articles III-IV of the CMS and Chapter III of the Bern Convention. Moreover, the CMS's scope covers only migratory species, while the Bern Convention only applies in European territory. Accordingly, the international community has adopted a variety of MEAs which are focusing on different angles and scopes of the necessary Regulation of protection of endangered species relating to sharks.¹²⁸

To sum up, the aims of the CITES, the CMS, the CBD and the Bern Convention are almost identical. However, the actual scopes of the measures taken in order to promote the protection of endangered species differ. This leads to a fragmented framework fuelling doubts of the MEAs' effectiveness and, *inter alia*, the protection of endangered species; see further Chapter 6.1.3.

2.1.2 Different Tools – Different Measures

The CITES, the CMS and the Bern Convention stipulate the protection of species that have been explicitly inserted in their Appendices.¹²⁹ This applies also to sharks. Published scientific evidence has demonstrated that several shark species' populations are under a severe threat of extinction.¹³⁰ As the decline of shark species' populations has been gaining more attention internationally, the COP of the MEAs have proposed amendments to their Appendices in order to further promote the protection of sharks.¹³¹ In line with the above, the CITES newly inserted five shark species during COP16 in 2013. This development underlines the slowly growing promotion of shark species which the CITES' COP has begun in 2000 during COP11; see above. There, the COP listed the basking shark as first shark species in Appendix III of the CITES. Additionally, the CMS' COP inserted the whale shark and great white shark in its Appendices during COP6 and COP7 in 1999 and 2001.¹³² The CMS' Scientific Council further acknowledged the need to protect the basking shark as a

conservation of migratory species. All three instruments promote the conservation of species in relation to any external impact though. See further Caddell, R., 2013, at p. 264.

¹²⁸ Techera, E.J. and Klein, N., 2011, at p. 74.

¹²⁹ Caddell, R., 2013, at p. 267.

¹³⁰ See further Camhi, M. et al., 2009, at pp. 7f; Dulvy, N., *et al.*, 2008, Dulvy, N., *et al.*, 2014.

¹³¹ See also Caddell, R., 2013, at p. 267.

¹³² *Concerted Actions for Appendix I Species*, of the Sixth Meeting of the Conference of the Parties, in UNEP/CMS/Res.6.1., 10 November 1999, Cape Town; Resolution 7.1 of the Seventh Meeting of the Conference of the Parties, *Concerted Actions for Appendix I Species*, UNEP/CMS/Res.7.1, 18-24 September 2002, Bonn.

vulnerable species in 2003.¹³³ In addition, the Bern Convention has listed the great white shark and the basking shark as being strictly protected in its Appendices. In further amendments to the Appendices the Contracting Parties inserted other shark species which face possibly extinction in European waters; see above. It is notable that the basking shark and the great white shark are protected under the CITES, the CMS and the Bern Convention since all three instruments acknowledge their vulnerable status. The whale shark is protected under the framework of the CITES and the CMS.

However, the shark species inserted in the Appendices of the respective MEAs do not enjoy the same extent of protection. As an example, the great white shark is listed in CMS' Appendix I classifying the species as vulnerable and endangered. This means that the parties of the CMS are obliged to take measures conserving and restoring the habitat of the great white shark. Moreover, the parties are under the obligation to prevent, remove and compensate adverse effects that impede the migration of the species in their jurisdiction; see further Article III(4). The so-called range states are further under the obligation to prevent any hunting, fishing, capturing, harassing or killing actions of the shark species classified as endangered and vulnerable, and which are listed in Appendix I; see Article III(5).¹³⁴ In comparison, the CITES' COP inserted the great white shark in Appendix II, which requires Regulation of trade actions as the species may become endangered in case of unregulated trade. It does not entirely prohibit all trade with the products of the great white shark, but requires prior authorisation and an export permit by the national authority; see Article IV(3)-(5). An export permit is only granted if a competent authority of the particular state has evinced that the export will neither be detrimental to the survival of the species, nor that the species was obtained illegally in relation to the state's national legislation; see further Article IV. As the killing or hunting itself is not prohibited, but only trade aspects are regulated, the provisions of the CITES are not as stringent as the CMS regardless of the listing of the same species.¹³⁵

Nevertheless, often the sharks listed in the Appendices of the respective MEAs, which seek to protect endangered species, veer. Therefore, the shark species themselves classified as

¹³³ Report of the Secretariat 2002-2005, Convention on Migratory Species, Eighth Meeting of the Conference of the Parties, UNEP/CMS/Conf.8.3, 20 October 2005, 20-25 November 2005, Nairobi.

¹³⁴ According to Article I(h) of the CMS, Range States "in relation to a particular migratory species means any State [...] that exercises jurisdiction over any part of the range of that migratory species, or a State, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species". This means that Range States are states in which jurisdiction migratory species range.

¹³⁵ Fowler, S. *et al.*, "Shark fins in Europe – Implications for reforming the EU finning ban", European Elasmobranch Association and IUCN Shark Specialist Group, 2010, at p. 6.

endangered and in need of protection under the respective Appendices differ. Contrasting, Article 1 of the CBD stipulates the conservation of all biological diversity, which includes, in theory, all shark species. To underline the importance of the conservation and the sustainable use of marine resources, the CBD's COP2 agreed on the Jakarta Mandate in 1995.¹³⁶ However, sharks are not mentioned in the Mandate explicitly, but are indirectly addressed as it seeks to protect the marine ecosystem and the varying habitats within. A discussion within the COP on the necessity of the adoption of conservation measures in relation to the protection of the most vulnerable shark species did not take place until COP9 in 2009.¹³⁷ There, the COP adopted Decision IX/20 which recognises the vulnerability of sharks and the need for stricter protection. However, the CBD's COP has not yet adopted an enforceable action plan, which should be implemented by the parties to the CBD, seeking to protect shark species.¹³⁸ Consequently, the CBD has not introduced any explicit measures in order to protect endangered shark species so far. Regardless of the fact that the CBD strives to conserve all biological diversity, it appears that the CITES, the CMS and the Bern Convention could potentially be more effective in relation to the protection of sharks as they include several shark species in their Appendices. Thus, the respective agreements oblige the parties to comply with their international commitments to adopt certain legislative actions transposing the international tools into national law. Subsequently, the MEAs could influence the *de facto* and *de jure* behaviour of states in relation to the conservation of the listed shark species. The *de facto* effectiveness may still be doubted; see further Chapter 6.1.

2.1.3 Pick-and-Choose of the Most Favourable MEA

The CITES, the CMS, the CBD and the Bern Convention pursue the same goal, namely the conservation of endangered species. However, their material scope and the provisions approaching the *de facto* conservation vary. The respective MEAs introduce provisions which differ regarding the strength of the conservation measures taken as well as the particular species the Conventions seek to protect. This leads to the possibility of states to select the MEA which suits their policy best relating to a particular species. Thus, a state could pick-and-choose the regime which is most in favour of its own policy in terms of the conservation

¹³⁶ See further Decision II/10.

¹³⁷ Secretariat of the Convention on Biological Diversity, "Statement of Ahmed Djohhla", in *Opening Session of the ninth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, Bonn, 2008, at p.2.

¹³⁸ Decision IX/20.

measures taken. In terms of this thesis, a state could become party to a Convention introducing rather weak provisions in relation to a particular shark species, but could not become party to a Treaty imposing more stringent regulations concerning the conservation measures, which need to be taken to comply with the respective international agreement.¹³⁹ In line with the above, the example of the measures stipulating the protection of the great white shark shall be examined further. Whereas the CMS lists the great white shark as vulnerable and endangered, the CITES barely strives to regulate the trade with its products. The CITES, therefore, does not prohibit the hunting of the great white shark in general, but condemns only the unauthorised trade with its products. Thus, states which are engaged in a prospering trade with products of the great white shark may select to access the CITES instead of the CMS. In conclusion, if a state decides to become only party to a MEA imposing less stringent provisions in relation to a particular species, a *de facto* effective protection of the species is not assured; see further Chapter 6.1.2.

Additionally, the selective procedure of states to implement only some obligations arising under a MEA enjoys certain popularity in case of amendments of the Appendices.¹⁴⁰ In line with Article XXIII(2) of the CITES, Article XI(6) of the CMS and Article 22 of the Bern Convention, the parties are competent to make a particular amendment to the respective Appendices subject to reservation. If a party makes a reservation with regard to an amendment of an Appendix of a particular species, the party will not be bound by the amendment. Therefore, it is under no international obligation to adopt relevant legislative measures into national law in order to assure its compliance with the international commitment.¹⁴¹

This may have an impact on the effectiveness of MEAs stipulating the conservation of shark species.¹⁴² As an example, the reservations brought forward by Iceland and Norway in relation to the inclusion of the basking shark to Appendix II of the CITES will be briefly described. As these states have made the amendment subject to reservation, they are still allowed to trade with the basking shark and its product without former authorization by the competent authorities. The effectiveness of the CITES in relation to the basking shark is restricted in Iceland and Norway. Thus, if states make reservations to amendments to the

¹³⁹ Harrison, J., *Making the Law of the Sea: A Study in the Development of International Law*, Cambridge University Press, 2011, at pp. 240 f.

¹⁴⁰ Benvenisti, E. and Downs, G.W., "The Empire's New Clothes: Political Economy and Fragmentation of International Law", in *Stanford Law Review*, Vol. 60, 2007, pp. 595-631, at p. 617

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

Appendices of the international tools, they may endanger the MEAs' effective applicability. Consequently, reservations on amendments may diminish their effectiveness the *de facto* protection of endangered species relating to sharks; see further Chapter 6.1.3.

2.1.4 Increasing Co-ordination of MEAs

Despite the fragmented regulatory framework in relation to the conservation of endangered species with a heavy emphasis on sharks, the bodies of the CITES, the CMS, the CBD and the Bern Convention have increased their co-operation in order to successfully challenge conservation problems.

2.1.4.1 Measures of Co-operation between MEAs

The CITES, the CMS, the CBD and the Bern Convention have adopted certain Memoranda of Co-operation (MOC) and Memoranda of Understanding (MOU).¹⁴³ The MOU and MOC which are relevant for this study will be briefly introduced hereby.

On 23 March 1996 both the COP of the CITES and the CBD agreed on a Synergy MOC between their Secretariats in order to promote a protection of endangered species. Therefore, the CITES and the CBD facilitate for the participation of the Secretariats at each other's COP' meetings; see Article 1 Synergy MOC. Further, Articles 2-3 encourage both Secretariats to exchange information and co-ordinate programmes of work in order to co-operate towards the shared aim of the conservation of endangered species and their sustainable use. The primary focus lies in Article 4 encouraging "integration and consistency between national strategies, plans or programmes" of the CBD and the CITES.¹⁴⁴ In order to integrate national strategies, plans and programmes, in line with Article 4 of the Synergy MOC, the COP and the Secretariats of both MEAs are under the obligation to co-operate efficiently.¹⁴⁵ Further, the Secretariats are authorised by the CITES' and CBD's COP to

¹⁴³ Memorandum of Co-operation between The Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington DC, 1973) and The Secretariat of the Convention on Biological Diversity (Nairobi, 1992), signed on 23. March 1996, published in CITES Doc. 10.22(25), Evolution of the Convention, How to improve the Effectiveness of the Convention – Co-operations/synergy with other Conservation Conventions and Agencies, available at www.cites.org/sites/default/files/eng/cop/10/doc/E10-20to22.pdf, last accessed on 01 September 2014, further referred to as Synergy MOC.

¹⁴⁴ See further Bowman, M., Davies, P. and Redgwell, C., 2010, at p. 531.

¹⁴⁵ Memorandum of Co-operation, recognised in Decision III/21, "Relationship of the Convention with the Commission on Sustainable Development and Biodiversity-Related Conventions, Other International Agreements, Institutions and Processes of Relevance", in *Report of the third Meeting of the Conference of the Parties to the Convention on Biological Diversity*, UNEP/CBD/COP/3/38, 15 November 1996, 4-15 November 1996, Buenos Aires; recognised by CITES in Res. Conf. 10.4 (Rev. COP14), *Resolution of the tenth meeting of*

develop joint work plans according to Article 5 bis.¹⁴⁶ However, no joint work plan has yet been developed in order to promote the protection of shark species.

As this study focuses on the role of the EU in relation to the conservation of endangered shark species, the impact of this MOC on the EU's legislation needs to be examined. The EU has not yet become party to the CITES; however, the EU is party to the CBD. Article 4 of the MOC requires the integration and consistency of plans and programmes of both the CITES and the CBD which are required to be further implemented in national legislation. This generally applies to the EU as it is obliged to adopt national legislative measures in line with Article 33 CBD. Thus, the MOC may, in theory, have influence on the EU's legislation regarding the protection of sharks. However, the Secretariats of CITES and the CBD have not yet adopted joint plans or programmes. Consequently, the Synergy MOC has no direct influence on the applicability and effectiveness of the measures adopted by the EU stipulating the protection of endangered species in relation to sharks.

Moreover, the Secretariats of the CITES and CMS adopted on behalf of their COP a MOU¹⁴⁷ which seeks to ensure compatibility of adopted policies, the mutual representation at meetings, the exchange of information and the determination of joint activities according to Articles 1-4 of the MOU.¹⁴⁸ In 2004, the CITES Resolution 13.3 (b)(iii) expressly identified the need of joint activities and future conservation initiatives between the CITES

the Conference of the Parties to CITES, 20 June 1997, 09-20 June 1997, Harare, available at <http://www.cites.org/eng/res/16/16-04.php>. The CBD's COP adopted Decision II/13, "Cooperation with other Biodiversity-related Conventions", published in *Report of the Second Meeting of the Conference of the Parties to the Convention on Biological Diversity*, UNEP/CBD/COP/2/19, 30 November 1995, 06-17 November 1995, Jakarta, authorising its secretariat to coordinate with the Secretariats of other Conventions to explore potential coordination of the work programmes of these. The CITES' secretariat was requested to intensify co-operation between CITES and other MEAs as the CBD according to *the Report of the ninth Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 1994.

¹⁴⁶ Decision VI/20, "Cooperation with Other Organizations, Initiatives and Conventions", in *Report of the sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, UNEP/CBD/COP/6/20, on 19 April 2002, 07-19 April 2002, the Hague; CITES in Res. Conf. 10.4 (Rev. COP14), in *Resolution of the tenth meeting of the Conference of the Parties to CITES*, 15 June 2007, 03-15 June 2007, the Hague, available at <http://www.cites.org/eng/res/16/16-04.php>.

¹⁴⁷ The authorisation of this MOU was established on the side of the CMS according to Article IX CMS maintaining "liaison with, *inter alia*, international organizations concerned with migratory species". Additionally, Res. 6.4 of the CMS, Strategic Plan for the Convention on Migratory Species, in UNEP/CMS/Res. 6.4, 10-16 November 1999, Cape Town, demanded the secretariat to actively support co-operation with other MEAs. The CITES' secretariat's actions were authorized according to Dec. 12.5 and 12.6 adopted by COP12, *Memorandum of Understanding between CITES and the Convention on the Conservation of Migratory Species of Wild Animals (CMS)*, *Decisions of the Conference of the Parties to CITES (in affect after the 12th Meeting)*, 03-15 November 2002, Santiago, available at www.cites.org/eng/dec/valid13/E12-Dec.pdf.

¹⁴⁸ See further Caddell, R., 2013, at p. 274.

and the CMS.¹⁴⁹ The great white shark and the whale shark of South and Southeast Asia are explicitly addressed in the resolution as to be protected by joint activities. No explicit measures have been adopted yet.

In terms of the Bern Convention and its relation to the CBD, the CMS and the CITES, it shall briefly be noted that Article 1(1) of the Bern Convention recognises the importance of international co-ordination in order to ensure an efficient protection of endangered species and their habitats.¹⁵⁰ Further, the Bern Convention formally adopted MOC with the bodies of CBD and CMS.¹⁵¹ However, this is of no relevance to the conservation of shark species.

2.1.4.2 Memorandum of Understanding on the Conservation of Migratory Sharks

In 2010, the CMS' COP adopted the Memorandum of Understanding on the Conservation of Migratory Sharks (Sharks MOU) dealing with the conservation of migratory sharks in line with Section 1(1) of the Sharks MOU.¹⁵² Although with regard to the principles of international law, the Memorandum of Understanding is a non-binding instrument, According to Section 5, the Sharks MOU is legally binding for the signatories which sign and implement the instrument into national law.¹⁵³ The Sharks MOU is open for all parties of the CMS, which are range states to the species protected under the MOU, and for regional economic integration organisations; see further Section 10(29). The European Union became a signatory to the MOU in 2011. Currently, the Sharks MOU has acquired 36 Signatories. However, there are 120 parties to the CMS.¹⁵⁴ Thus only around one-third entered into an international commitment under the Sharks MOU in addition to the obligation arising under

¹⁴⁹ CITES Resolution Conf. 13.3, *Cooperation and Synergy with the Convention on the Conservation of Migratory Species of Wild Animals (CMS) on 14 October 2004, Thirteenth meeting of the Conference of the Parties*, available at www.cites.org/eng/res/index.php.

¹⁵⁰ Resolution No. 7 (on the medium-term strategic development of the Convention as it appears in appendix 3 to this report) printed the *Report of the Secretariat Memorandum established by the Directorate of Sustainable Development*, (T-PVS (2000) 75), 2000, with further reference to the Memoranda of Co-operation with the Secretariat of the Convention on Biological Diversity and the European Environment Agency, published in the *Report of the Secretariat Memorandum established by the Directorate of Sustainable Development* (T-PVS (2000) 14), 2000.

¹⁵¹ Memorandum of Co-operation between the Secretariat of the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention) and the Secretariat of the Convention on the Conservation of Migratory Species of Wild Animals (CMS), published in *Report of the 29th Standing Committee Meeting of the Convention on the Conservation of European Wildlife and Natural Habitats* (Doc. T-PVS 2009) 3; See further Bowman, M., Davies, P. and Redgwell, C., 2010, at p. 342.

¹⁵² Memorandum of Understanding on the Conservation of Migratory Sharks, adopted on 12 February 2010, entry into force 1 March 2010, available at http://www.cms.int/species/sharks/MoU/Migratory_Shark_MoU_Eng.pdf, further referred to as Sharks MOU.

¹⁵³ Techera, E.J. and Klein, N., 2011, at p. 74.

¹⁵⁴ The list of the Signatories is provided at: <http://sharksmou.org/list-of-signatories>, accessed 21.08.2014.

the CMS. Moreover, non-range states, inter-governmental organisations (IGOs), national non-governmental organisations (NGOs), as well as other relevant entities may become party as co-operating partners. However, these do not enjoy voting rights in the Meeting of the Signatories (MOS); see further Section 10(30). Further, co-operating partners are supposed to promote the co-ordination of the different entities in relation to the management of the conservation of sharks. Moreover, they are obliged to participate in the negotiation and adoption of a Conservation Plan, which is considered as an Annex to the Sharks MOU. The Conservation Plan is considered as legally binding to the Signatories to the MOU; see Section 5(15) of the Sharks MOU.

Sections 3 and 9 of the Sharks MOU emphasise the need for co-operation among NGOs, IGOs and governments. The engagement of the CMS with the CITES and the CBD is explicitly expressed as fundamental principle in the Sharks MOU and underlines the inevitability of global co-operation; see Section 3(6) MOU. Moreover, the CITES took part in the negotiation of the final draft. The Sharks MOU covers three shark species which are also protected under the CITES, namely the basking shark, the whale shark and the great white shark. However, CITES has not become Signatory to the Sharks MOU as it may introduce certain obligations for the CITES' COP and its parties, which may interfere with their international rights and obligations under the CITES in general, see above.¹⁵⁵

Furthermore, the Signatories of the Sharks MOU shall maintain a “favourable conservation status for migratory sharks”.¹⁵⁶ Therefore, *inter alia*, socio-economic values of shark species for the human being as described in Section 2 of the Sharks MOU should be taken into consideration when it comes to the compliance with the international obligations. Additionally, the Signatories were under the international obligation to adopt a Conservation Plan to promote the maintenance of a favourable conservation status. Therefore, a Conservation Plan was adopted on 27 September 2012 in line with Section 4 of the Sharks MOU.¹⁵⁷ The obligations of the Signatories under the Sharks MOU and the Conservation

¹⁵⁵Techera, E.J. and Klein, N., 2011, at p. 74; See further Caddell, R., 2013, at p. 275.

¹⁵⁶According to Section 1(3)(c) of the Sharks MOU, the “conservation status of migratory species” is characterised as all influences on migratory sharks that have impact on their long-term distribution and abundance. This is favourable if the conditions in Section 1(3)(d) are met: “i) population dynamics data relative to appropriate biological reference points indicate that migratory sharks are sustainable on a long term basis as a viable component of their ecosystems; ii) the distributional range and habitats of migratory sharks are not currently being reduced nor are they likely to be reduced in the future to levels that affect the viability of their populations in the long term; and iii) the abundance and structure of populations of migratory sharks remains at levels adequate to maintain ecosystem integrity;”.

¹⁵⁷ The MOS is the decision making body of the Sharks MOU; see Section 6 Sharks MOU. The first meeting took place on 24-27 September 2012. There the MOS adopted first the Conservation Plan in Annex 3 to the

Plan only apply to the sharks listed in Annex 1 of the Sharks MOU; see further Section 1(2). The shark species listed in Annex I to the Conservation Plan are the porbeagle shark, the whale shark, the basking shark, the great white shark, the shortfin mako and the longfin mako. Subsequently, the Sharks MOU may have a great impact on the *de facto* protection of these endangered shark species as it strives to introduce broad conservation measures. However, due to the small number of signatories, the impact of the Sharks MOU and the Conservation Plan on international and EU law needs to be awaited.

2.2. The Participation of the EU in MEAs

The EU has become party to the CMS, the CBD and the Bern Convention. The internal negotiations in relation to the accession to the CITES, however, are still ongoing.¹⁵⁸ The role of the EU in MEAs and the competences it requires to act within them need to be further discussed to examine the role of the EU in relation to the protection of endangered species. In order to address these aspects, the general participation of the EU in international agreements will be examined.

2.2.1 The Legal Basis – An Overview

The European Union is an actor of growing importance in relation to international environmental affairs.¹⁵⁹ According to Article 47 TEU¹⁶⁰ and Article 335 TFEU¹⁶¹, the EU has legal personality. Thus, the Treaties provide for external capacities and possibilities from the EU to participate in international law making and to become party to international treaties.¹⁶² One of the EU's duties is defined in Article 21(2)(f) TEU which reads as follows:

Sharks MOU, in *First Meeting of the Signatories to the Memorandum of Understanding on the Conservation of Migratory Sharks, Convention on Migratory Species*, CMS/Sharks/Outcome1.2, 27 September 2012. See further *First Meeting of the Signatories to the Memorandum of Understanding on the Conservation of Migratory Sharks, Convention on Migratory Species*, CMS/Sharks/MOS1/Report, 27 September 2012.

¹⁵⁸ See further Proposal for a Council Decision on the Accession of the European Union to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Brussels 6.12.2013, COM (2013) 867 final; 2013/0418 (NLE).

¹⁵⁹ Jans, J.H. and Vedder, H.H.B., 2012, at p. 64.

¹⁶⁰ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01.

¹⁶¹ Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C-115/49.

¹⁶² Jans, J.H. and Vedder, H.H.B., 2012, at p. 68; see also Case C-22/70 Commission v Council [1971], ECR 263 (*ERTA case*). There, the CJEU held that the legal personality covers “the whole extent of the field of objectives defined in the [...] Treaty.” Thus, the EU has competence to act with international legal personality, in line with Article 216(1) and Article 191(4) TFEU.

The Union shall define and pursue common policies and actions [...] in order to [...] help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources.

As environmental issues are often marked by a trans-boundary character, it is necessary to participate in international negotiations to address them in the environmental field.¹⁶³ Therefore, Articles 216-218 TFEU in relation to Article 191(4) TFEU provide the necessary competence of the EU and its Member States to co-operate with third countries and enter into negotiations with them. Accordingly, the EU is generally authorised to access international agreements aiming on the protection of the environment. Thus, in general, the EU is competent to participate in the making of MEAs stipulating the protection of endangered species.¹⁶⁴ However, the question of the Union's competence in relation to the implementation of these agreements into national law is of certain significance in relation to the effectiveness of MEAs regarding the conservation of sharks in European territory. This will therefore be examined in the following.

2.2.1.1 The Question of Competence

The EU is under the obligation to define an external environmental policy and is entitled to become party to agreements addressing international environmental issues.¹⁶⁵ The latter only applies if the international agreement is open to accession for regional economic integration organisations. The EU is capable to conclude international agreements in case the Treaties provide for the Union's competence; see Article 216(1) TFEU. In relation to a common external environmental policy, Article 191(4) subparagraph 1 TFEU entitles the Union to enter into international agreements focusing on the promotion of the protection of the environment.¹⁶⁶ However, Article 191(4) subparagraph 2 TFEU clarifies that the competence of the EU to enter into a MEA is without prejudice to the Member States' competence to negotiate themselves.¹⁶⁷ Article 4(2)(e) TFEU underlines this in so far as it defines the environmental policy as an area of shared competence between the Union and the Member

¹⁶³ Delreux, T., "The EU negotiates multilateral environmental agreements: explaining the agent's discretion", in *Journal of European Public Policy*, 2008, pp. 719-737, at p. 720. See further Delreux, T., *The EU as International Environmental Negotiator*, Ashgate Publishing Limited, 2011, at pp.17 f.

¹⁶⁴ See further Jans, J.H. and Vedder, H.H.B., 2012, at p. 64.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*, p. 67.

¹⁶⁷ *Ibid.*

States. Consequently, the EU, as well as its Member States are authorised to negotiate and to become party to MEAs.

2.2.1.2 The Relevance of Mixed Agreements

The EU's influence as an international actor on the global stage increases constantly.¹⁶⁸ This is supported by Article 3(5) TEU which reads as follows:

In its relation with the wider world, the Union shall uphold and promote its values and interest and contribute to the protection of its citizens. It shall contribute to [...] the sustainable development of the earth, [...], as well as to the strict observance and the development of international law.

To act as such, the EU first needs to define its internal competences within the Union and in relation to its Member States. Article 3 TFEU therefore defines areas that fall into the exclusive competence of the EU. Article 4 TFEU further stipulates the shared competences of the Union and the Member States. Legislation addressing the environment as an aspect of shared competence is emphasised in Article 4(2)(e) TFEU. This means that the Member States are only allowed to adopt legislative measures in case the EU has not exercised its right to regulate the respective aspects.¹⁶⁹

As this study analyses the role of the EU in relation to the protection of endangered shark species in an international framework, the competences of the EU in international environmental agreements need to be further examined. According to Article 191(4) subparagraph 2 TFEU, the EU is able to enter into international agreements in the field of environmental matters without prejudice to the Member States' competence to enter into negotiations themselves. Thus, the Member States as well as the Union as such can become party to an international agreement in case that the MEA provides accession for the possibility of regional economic integration organisations. These agreements are so-called mixed agreements. McGoldrick defines mixed agreements as "agreements where the European [Union] and the Member States genuinely share competence."¹⁷⁰ In mixed agreements neither the EU nor the Member States have exclusive competence in the matter covered by the respective agreement. Thus, both the Member States and the EU can become parties if the MEA provides for the necessary framework. Mixed agreements have certain

¹⁶⁸ Craig, P. and De Burca, G., 2011, at p. 303

¹⁶⁹ Jans, J.H. and Vedder, H.H.B., 2012, at pp. 67 f.

¹⁷⁰ McGoldrick, D., *International Relations Law of the European Union*, Longman, 1997, at p. 79.

impact on the EU's legislation as they bind the EU's institutions and its Member States.¹⁷¹ The Member States and the Union, nevertheless, have to define internally the competence in order to comply with the obligations in form of the national implementation under the respective MEA and the exercise of rights under the international agreements. Depending on the competence of the EU or the Member States, either of them needs to take legislative actions.¹⁷²

In terms of this study, the EU has adopted regulatory measures in order to comply with its international obligations in form of the Habitats Directive and the Sharks Regulation under its shared competence; see further Article 4(2)(e) TFEU. Thus, the adoption of these instruments can be interpreted as the transfer of competence of the Member States to the EU.¹⁷³ This means the Union took actions in line with its competence assigned under the Treaties. Consequently, the Union is entitled to adopt an external environmental policy in relation to the protection of endangered species emphasising on sharks, in terms of the agreements discussed in this study.

This is of further relevance in the context of the role of the EU in relation to the protection of shark species as the CMS, the CBD and the CITES are all open to the accession of both regional economic integration organization and its member states.¹⁷⁴ In addition, the Bern Convention is open to the EU according to Article 19(1) Bern Convention. In order to prevent a bias of votes of regional economic integration organisations and their Member States, most MEAs take the factor of shared competences between regional economic integration organisations and their Member States into account in their voting regulations. The CITES, the CMS, the CBD and the Bern Convention explicitly regulate the voting rights of regional economic integration organisations and their Member States. Article 31(2) of the CBD, Article I(2) of the CMS, Article 24 of the Bern Convention and Article XXI of the CITES in relation with Paragraph 5 of the Gaborone Amendment emphasise that a regional economic integration organisation shall exercise its right to vote according to the number of their members. However, this applies only, if the Member States do not exercise their right to

¹⁷¹ See further Craig, P. and De Burca, G., 2011, at p. 334.

¹⁷² As an example Article 34(2) CBD explicitly mentions this obligation under the agreement. The CMS, the CITES and the Bern Convention do not refer expressly to this matter. However, it is implied within and Article I(2) CMS, Article 24 Bern Convention and Article XXI CITES in relation to paragraph 5 Gaborone Amendment. See further Jans, J.H. and Vedder, H.H.B., 2012, at pp. 71 f.

¹⁷³ For the general legislative procedure of the EU See further Craig, P. and De Burca, G., 2011, at p. 124 f.

¹⁷⁴ Article XV CMS, Article 33 CBD, Article 19(1) Bern Convention; See further Hoffmeister, F., "Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organisations and Treaty Bodies", in *Common Market Law Review*, 2007, pp. 41-68, at pp. 45 f.

vote and *vice versa*. In case of the EU, the Union needs to clarify internally whether the Union or the Member States are entitled to take actions within the MEAs' COP; see above.

2.2.2 The EU's Impact in the Absence of Formal Membership

The EU's influence on the global stage increases simultaneously with its growing number of Member States as the EU is developing globally as the largest trading power as well as a major player on development aid and humanitarian assistance.¹⁷⁵ Therefore, the EU tries to participate in any international framework, which might be relevant to its further development. However, due to the principle of conferred powers, the EU is only competent to take international actions in case the Treaties provide for it; see further Article 5 TEU and Article 19(1) TFEU.¹⁷⁶ The EU is entitled to co-operate with third countries and competent international organisations in order to negotiate agreements between the Union and third parties striving to address environmental aspects. The CMS, the CBD and the Bern Convention provide provisions for the EU to participate in the creation of an international legal framework as it was able to become party. It can therefore heavily affect shaping the applicability of the respective agreements in the EU's territory.¹⁷⁷

However, the EU may additionally participate actively in the development of international agreements in the absence of formal membership.¹⁷⁸ This is the case in terms of the applicability of the CITES in the EU's territory. When the CITES entered into force in 1975, it did not allow for regional economic integration organisations to become parties. To accommodate the increasing influence of regional economic integration organisations during COP4 in 1983 the parties adopted the Gaborone Amendment, though.¹⁷⁹ However, it took thirty years to finally enter into force in 2013.¹⁸⁰ Thus, the EU has still not formally become party to the CITES. The lack of formal membership, however, does not prevent the EU from

¹⁷⁵ Craig, P. and De Burca, G., 2011, at p. 303.

¹⁷⁶ *Ibid.*, at p. 307.

¹⁷⁷ Gehring, T. and Oberthür, S. and Mühleck, M., "European Union Actorness in International Institutions: Why the EU is Recognized as an Actor in Some International Institutions, but Not in Others", in *JCMS*, Vol. 51, 2013, pp. 849-865, at p. 855

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*, at p. 856.

¹⁸⁰ The so-called Gaborone Amendment entered into force on 29 November 2013. The requirement for its entry into force was the ratifications of the Amendment by 54 parties to the CITES. The number of parties only applies to the parties being parties to the CITES on 30 April 1983. 54 parties are two-thirds of the states being party on 30 April 1983.

actively participating in the CITES and its implementation. This is characterized, *inter alia*, by the adoption of the CITES Regulation, which is referred to above.¹⁸¹

Regardless of the EU's legislative actions implementing the CITES voluntarily, the EU Member States, which are also party to the CITES, are under the international obligations to adopt national legislation implementing the CITES; see further Article XIII. Despite of the lack of formal membership the EU is of crucial importance to the CITES and its effective implementation and applicability within the EU Member States.¹⁸² However, the CITES faces severe problems in relation to its applicability within EU Member States. The EU has introduced the internal market within the EU's territory in line with Article 26(2) TFEU stating that "the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured." The EU and its Member States share the legislative competence in terms of regulatory acts relating to the internal market; see further Article 4(2)(a) TFEU and Article 114(1) TFEU in relation to Article 26 TFEU.¹⁸³ According to Article II of the CITES, the Convention primarily strives to protect endangered species by regulating the trade with their products. Consequently, the CITES' provisions affect the internal market of the EU as the parties are under obligation to adopt legislation pursuing the regulation of the trade angle. However, the majority of legislation in the EU regarding the internal market has been adopted by the Union and not the Member States.¹⁸⁴ EU Member States, which are also parties to the CITES, have repeatedly been sanctioned as they do not comply properly with the obligations under the CITES.¹⁸⁵ This

¹⁸¹ See further Reeve, R., *Policing International Trade in Endangered Species, The CITES Treaty and Compliance*, The Royal Institute of International Affairs, 2002, at p. 113.

¹⁸² Gehring, T. and Oberthür, S. and Mühlecke, M., 2013, at p. 856.

¹⁸³ Craig, P. and De Burca, G., 2011, at pp. 583 f.; Article 114 (1) TFEU reads "save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."

¹⁸⁴ Craig, P. and De Burca, G., 2011, at pp. 583 f.

¹⁸⁵ In CITES Doc. SC. 36.10, "Enforcement Issues", prepared by the Secretariat for SC36, in *Summary Report*, Thirty-sixth Meeting of the Standing Committee, Geneva, 30 January – 2 February 1996, available at www.cites.org/sites/default/files/eng/com/sc/36/E36-SumRep.pdf, last accessed on 31 August 2014, the Secretariat points out that despite of legislative efforts of the EU, eastern European countries, as e.g. Czech Republic, failed to implement effective legislation in relation to its obligations under the CITES. Further Reeve, R. 2002, emphasised that during COP9 in 1994, the CITES indicates that the EU had the implied obligation to adopt legislative measures which implement the CITES into EU law, at p. 113. However, it failed to comply with some obligations under the Convention which leads to an insufficient implementation of the MEA in the Member States of the EU, which are additionally parties to the CITES. Greece and Italy were further expressively sanctioned in *Italy: Recommendations of the Standing Committee Concerning Italy*, Convention on International Trade in Endangered Species of Wild Fauna and Flora, 24th Meeting of the Standing Committee, Notification to the Parties No. 675, (30.06.1992), available at

could be caused by the adoption of EU law being binding on the Member States, but potentially conflicting with the CITES' provision.¹⁸⁶ In line with the regulatory nature of the CITES Regulation, the EU Member States are bound by the Regulation without any further implementation into national law. Moreover, the Member States are not competent to adopt deviant legislation in order to implement the CITES any further in national law.¹⁸⁷ Consequently, the effective implementation of the CITES relies on the EU's participation in relation to the adoption of efficient legislation. Therefore, the EU and its regulatory actions are of crucial relevance for the effective implementation of CITES in EU Member States; see further Chapter 5.2.2.¹⁸⁸

2.3 The EU's Implementation of the CMS, CBD and the Bern Convention

The parties to a MEA are required to adopt national legislative measures in order to implement the international treaty efficiently. In line with Article XVI of the CMS, Article 18 of the CBD and Article 3(1) in relation to Articles 4-7 of the Bern Convention, the parties are under the international obligation to transpose the relevant aspects of these international frameworks into national legislation. However, the parties enjoy some discretion in relation to the adoption of the national measures implementing their international commitments, in the case at hand the Habitats Directive and the Shark Regulation.¹⁸⁹

2.3.1 The Bern Convention and its Implementation into EU law

The EU adopted the Habitats Directive and the Birds Directive in order to comply with its international obligation under Article 3(1) in relation to Articles 4-7 of the Bern

cites.org/sites/default/files/eng/notif/1992/675.doc, accessed last on 31 August 2014; For the first time the CITES sanctioned an EU Member State in form of the suspension of trade. Greece has faced similar sanctions in 1998. In Doc. SC. 41.10, *Implementation of the Convention in Individual Countries, Greece*, Convention on International Trade in Endangered Species of Wild Fauna and Flora, Forty-First Meeting of the Standing Committee, 8-12 February 1999, available at www.cites.org/sites/default/files/eng/com/sc/41/E41-10.pdf, last accessed on 31 August 2014, the CITES sanctioned the complete lack of implementation of the CITES in national law as Greece only referred to the CITES Regulation of the EU. See further Reeve, R., 2002, at pp. 115 f. and Gehring, T., Oberthür, S. and Mühleck, M., 2013, at p. 856.

¹⁸⁶ In relation to general EU law; See Craig, P. and De Burca, G., 2011, at pp. 583 f.; In relation to the CITES see also Gehring, T., Oberthür, S. and Mühleck, M., 2013, at p. 858; See further Reeve, R., 2002, at p. 113

¹⁸⁷ The impact of a Regulation in EU law is determined in Article 288 TFEU. Regulations have direct effect on the Member States and do not need to be transposed into national law by these. See further Craig, P. and De Burca, G., 2011, at pp. 583 f.

¹⁸⁸ Reeve, R., 2002, at p. 113.

¹⁸⁹ See further Bowman, M., Davies, P. and Redgwell, C., 2010, at p. 97.

Convention.¹⁹⁰ The Bern Convention requires its parties to take legislative measures to ensure the conservation of the wild flora and fauna species listed in Appendices I-III. As the Birds Directive is only concerned with particular bird species and their habitats, and thus has no relevance for the conservation of shark species, this study will only be focusing on the Habitats Directive. In order to implement the Bern Convention efficiently into EU law, its principle objectives and substantive provisions need to be transposed.¹⁹¹ In accordance with Article 12 of the Bern Convention, the parties enjoy the right to transpose more stringent national measures.¹⁹²

The Habitats Directive implements the aspects of the Bern Convention which pertain to non-avian species.¹⁹³ The Directive does neither explicitly refer to the Bern Convention nor does the Directive state that its purpose is the transposition of the Bern Convention. However, the Habitats Directive is generally considered to be applicable performing as the EU's implementation of the Bern Convention. The EU introduces a similar regulatory framework since the Directive's general aim and structure resembles the international framework. According to Article 2 of the Directive, it pursues the aim to contribute towards ensuring biodiversity through the conservation of natural habitat and wild flora and fauna in the European territory.¹⁹⁴ Similar to the Bern Convention, the EU introduces first the relevant definitions and the primary objectives in Articles 1-2 of the Habitats Directive. This is followed by provisions seeking to protect certain areas, see further Articles 12-16, and the conservation of species; see further Articles 17-21 of the Directive.¹⁹⁵

Both the Bern Convention and the Habitats Directive use Annexes, respectively Appendices, in order to categorise and list the different species that are in particular need of protection. In general, the EU enjoys some discretion concerning the implementation of the Bern Convention's Appendices as they are potentially subject to reservation; see further above. In accordance with Article 22 of the Bern Convention the Contracting Parties are

¹⁹⁰ See further Trouwborst, A., 2011, at p. 65.

¹⁹¹ Chalmers, D., Davies, G. and Monti, G., *European Union Law*, 2nd Edition, Cambridge University Press, 2010, at p. 650.

¹⁹² Epstein, Y., "The Habitats Directive and Bern Convention: Synergy and Dysfunction in Public International and EU Law", in *Georgetown International Environmental Law Review (GIELR)*, Vol. 26, 2014, pp. 139-174, at p. 153; See further Bowman, M., Davies, P. and Redgwell, C., 2010, at pp. 97, 334.

¹⁹³ *Ibid.*

¹⁹⁴ In comparison the Bern Convention strives to conserve wild flora and fauna and their natural habitats in line with Article 1(1).

¹⁹⁵ The Bern Convention emphasises the protection of areas in Article 5. The protection of species is further addressed in Articles 6-10; See further Epstein, Y., 2014, at p. 153.

permitted to make reservations to exempt species listed in Appendices I-III and methods of hunting and killing categorised in Appendix IV.¹⁹⁶

The Bern Convention categorises species in four Appendices while the Habitats Directive lists species in six Annexes. Thus, the Directive offers protection of species and areas in a more distinct operational than the Bern Convention. The Annexes I and III of the Habitats Directive are covering exclusively the protection of certain areas. These are, however, not at all addressed in the Bern Convention.¹⁹⁷ Further, Article 1(2) of the Bern Convention already implies that the focus of the Convention lies on the protection of species. Therefore, the primary aim focuses on the conservation of endangered and vulnerable species. The protection of areas is only addressed in Article 5 of the Bern Convention. In contrast, the conservation of species is addressed in Articles 6-11 and additionally in the Appendices of the Bern Convention. Thus, the Directive's scope is much wider than the Convention's objective as it covers extensively the protection of areas and species. Thus, it appears that the Habitats Directive seeks to transpose broader measures than the Bern Convention in order to protect endangered species since it focuses not only on the protection of species, but also introduces the protection of areas. The transposition of the Bern Convention into EU law providing a wider material scope may lead to a more effective protection of endangered species as it protects species relating to Articles 5-7 of the Bern Convention.¹⁹⁸ Moreover, the Habitats Directive stipulates a broad approach in relation to the protection of certain areas according to Article 4 of the Bern Convention. The EU is entitled to proceed in this way referring to Article 12 of the Bern Convention. The legislative tool allows for national measures to be more stringent and broader than the Convention itself.¹⁹⁹ Further, the effective transposition of the international agreement in EU law may support the effectiveness of the Bern Convention itself, as the EU is attributed a constantly growing impact; see further Chapter 5.2.2.

In addition, the EU enjoys certain discretion in relation to the implementation of the Appendices of the Bern Convention in EU law. The EU is enabled to make reservations to certain species listed in the Bern Convention's Appendices and is therefore not bound by obligations seeking to protect these species, in line with the. Furthermore, the parties of the Bern Convention are, due to their general discretion in relation to the implementation of the

¹⁹⁶ See further Bowman, M., Davies, P. and Redgwell, C., 2010, at pp. 313 ff.

¹⁹⁷ See further Epstein, Y., 2014, at p.153.

¹⁹⁸ *Ibid.*

¹⁹⁹ See further Bowman, M., Davies, P. and Redgwell, C., 2010, at pp. 333 f.

Convention, allowed to create new Appendices in order to establish a wider protection. The Appendices of the Bern Convention and the Habitats Directive are subsequently different.²⁰⁰ In this study, this is relevant in terms of the discussion of the implementation of conservation measures in relation to shark species. Whereas the Bern Convention lists six different shark species in its Appendices in order to ensure their conservation, the Habitats Directive does not insert any shark species in its Annexes.²⁰¹ The Directive strives only to protect sharks indirectly by protecting their natural habitats. No shark species is found in Annexes IV-VI that list the protected species, respectively Annex II that requires the protection of the listed species' areas. Annexes I includes criteria concerning the protection and conservation of their habitats in general, though. At first sight, it appears that the protection of the habitats of shark species could therefore be more effective as it includes measures which are not exclusively protecting a limited number of listed shark species, but all shark species indirectly. However, Article 6(1) of the Habitats Directive demands the Member States to establish a special area of conservation (SAC) in order to implement national measures protecting these. Further, the Member States are required to adopt conservation measures which ensure the protection of the species within the area. If a Member State does not establish SAC in order to protect shark species' habitats, the areas do not enjoy any protection under the Habitats Directive. Thus, by not directly including the most vulnerable shark species, the *de facto* protection of these species may not be that effective. In contrast, the Bern Convention seeks to conserve *e.g.* the basking shark by listing it in Appendix II. The Listing in Appendix II prohibits any kind of killing of the species. In addition, the porbeagle shark, the shortfin mako, the blue shark and the angelshark are listed in Appendix III which regulates hunting and killing techniques for the listed species. Thus, the international agreement does not seek to expressively protect their habitats, but the species themselves.

2.3.2 The Transposition of the CMS into EU's legislation

The EU approved the CMS in Decision 82/461/EEC on the conclusion of the convention on the conservation of migratory species of wild animals.²⁰² The Union has reserved a right to

²⁰⁰ See further Epstein, Y., 2014, at p. 153.

²⁰¹ The sharks protected under the Bern Convention are the great white shark and the basking shark (Appendix II), as well as the porbeagle shark, the shortfin mako, the blue shark and the angelshark (Appendix III).

²⁰² Decision 82/461/EEC, Council Decision of 24 June Conclusion of the Convention on the Conservation of Migratory Species of Wild Animals, published in *OJL 210*, 19/07/1982.

adopt any legal act to comply with its obligations according to the CMS.²⁰³ Although the Union has never made use of this right in form of a Directive or Regulation generally protecting migratory species, it has exercised its competence under Article 4(2)(e) TFEU in relation to Article XVI of the CMS partially when it adopted the Habitats Directive and the Shark Regulation.

Despite the fact that the Habitats Directive does not address the protection of any shark species in its Annexes and therefore does not include the conservation of shark species protected under the CMS, the Directive is able to transpose the CMS in so far as it regulates the protection of marine habitats in the EU's marine territory.²⁰⁴ In comparison, the CMS seeks to protect the species and their respective habitats explicitly listed in its Appendices; see Article II(1). As both the CMS and the Habitats Directive promote the protection of the habitats of migratory species, the Directive is effective in order to transpose the international obligations.

According to Article I of the CMS, the aim of the Convention is the conservation of migratory species. In contrast, the objective of the Shark Regulation is the protection of shark species by establishing a general prohibition of finning; see Article 1. Subsequently, the general aim of the CMS and the Shark Regulation are comparable as they both stipulate the protection of shark species. However, the CMS aims to protect all migratory species, while the Shark Regulation focuses only on the protection of sharks for the practice of finning. In addition, the CMS seeks to protect exclusively the migratory species which are listed in its Appendices. Currently only six sharks species are inserted in the CMS' Appendices that are tied to Articles III-IV. The Shark Regulation on the other hand strives to establish a stricter framework in relation to the protection of sharks as it protects all sharks species inhabitant in the EU's territory; see Article 2.

According to the IUCN and other scientific information, the act of finning threatens the survival of certain shark species significantly.²⁰⁵ The EU's Regulation recognises the scientific evidence indicating that sharks are under a threat of extinction, also caused by finning, and therefore in need of conservation in form of regulating this practice.²⁰⁶ Finning is not expressly mentioned in the CMS, but can be interpreted as an infringement of Article

²⁰³ Preamble of Decision 82/461/EEC.

²⁰⁴ See further Annex I-VI of the Habitats Directive. The marine habitats, which are protected under the Habitats Directive, are listed in Fn. 108.

²⁰⁵ Dulvy, N., *et al.*, 2014, at p.4; See further Fowler, S. *et al.*, 2010, at p. 6.

²⁰⁶ Preamble Paragraph 3-5 Shark Regulation; See further Fowler, S. *et al.*, 2010, at p. 6.

III(4)(c) CMS requiring the parties to “prevent, reduce or control factors that are endangering or likely to endanger the species”. This is particularly relevant in the case of the great white shark, the basking shark, the blue shark and the porbeagle shark, which are endangered since their fins are considered as especially valuable.²⁰⁷

Nevertheless, the Shark Regulation cannot be considered as a sufficient and complete implementation of all obligations arising under the CMS. As a general rule environmental issues are considered as an aspect of shared competence between the EU and its Member States. Thus, the latter are competent to implement their international obligations into national law as far as the EU has not exercised its competence; see further Article 2(2) TFEU.²⁰⁸ In case the EU has not adopted effective legislation in order to implement the CMS, the Member States are enabled to implement CMS obligations into their national legislation. The EU has adopted legislation implementing the CMS to a certain extent. The measures taken by the Member States shall not be discussed since this is not relevant for the analysis of the role of the EU.

Even though the EU shows certain effort promoting the conservation of sharks, the partial implementation of the CMS could result in *de facto* and *de jure* ineffectiveness of the MEA. The failure of the EU to implement the necessary harmonising legislation in order to transpose the obligations established within the CMS’ framework completely could result in an ineffective protective legal framework in relation to the relevant migratory shark species. The scope of the EU’s protection will be further tackled in Chapter 5.2.

2.3.3 Lack of Transposition of the CBD

The EU has become party to the CBD in 1993 as a regional economic integration organisation. With Council Decision 93/626/EEC concerning the conclusion of the CBD, the EU approved the international treaty.²⁰⁹ Although the EU has not adopted any legislation explicitly implementing the CBD as such into EU law, it has adopted certain legislative actions in order to implement the CBD’s protocols.²¹⁰ This does not provide for a complete

²⁰⁷ Scanlon, J.E., 2013, at p. 222; See further about the value of the fins and the illegal trade with these: Shivji, M.S., Chapman, D.D., Piktich, E.K. and Raymond, P.W., 2005, at pp. 1036 f.

²⁰⁸ See further Chalmers, D., Davies, G. and Monti, G., 2010, at pp. 209 f.

²⁰⁹ The EU adopted the Council Decision 93/626/EEC of 25 October 1993 Concerning the Conclusion of the Convention on Biological Diversity, published in *OJ L 309 of 13 December 1993*.

²¹⁰ The CBD’S COP has adopted the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, adopted on 29 January 2000 in Decision EM-I/1-3, “Decision on the Continuation of the First Extraordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity”, published in *Annex I of the Decisions Adopted by the Conference of the Parties to the Convention on Biological Diversity at*

transposition of the CBD itself, though. The implementation of the Protocols is of no further relevance in relation to the discussion of the role of the EU relating to the conservation of shark species.

the First Part of its First Extraordinary Meeting, UNEP/CBD/ExCOP/1/2, 22-24 February 1999, Cartagena, entry into force on 11 September 2003. Further, the CBD'S COP adopted the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS), adopted on 29 October 2010 in Decision X/1, "Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization", published in *Report of the Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, UNEP/CBD/COP/10/27, 18-29 October 2010, Nagoya. Entry into force will be on 14 October 2014.

3 The Impact of International Instruments on EU law

The EU's impact grows constantly as the EU's external policy places a greater emphasis on the participation in international law-making.²¹¹ In line with Article 3(5) TEU, the Union is obliged to “contribute [...] to the strict observance and the development of international law.” Due to the EU's internal competences it has great influence on the negotiation and applicability of MEAs in the EU. In addition, international instruments have a particular impact on the Union *vice versa*. This Chapter seeks to give a brief analysis of the effect international obligations have on EU legislation. Further, the question whether MEAs are directly applicable in the EU's territory, also in case of the lack of formal membership of the EU, will be considered.

3.1 International Environmental Law and its Effects on EU's legislation

The EU is bound by its international commitments in accordance with Article 216(2) TFEU. The provision stipulates that “agreements concluded by the Union are binding upon the Union and on its Member States.” Underlying is the principle of *pacta sunt servanda*, which obliges the parties to an agreement to fulfil their obligations in good faith.²¹² Subsequently, the Union is obliged to adopt efficient legislation in order to implement its international obligations in EU's territory and comply with their international commitments. The CJEU has been supporting this view since the early 1970s. In the *Haegeman decision*, the Court held that as soon as an international agreement, which has been concluded by the Union, enters into force, its provisions act as integral part of EU law. The EU is therefore, hypothetically, automatically obliged to comply with the agreement and supposed to adopt sufficient legislation.²¹³ The Union can implement the international agreement into EU law in form of a Regulation, which is directly applicable in the Member States, or in form of a directive, which needs to be transposed into national law by the Member State.²¹⁴ The implementation of international law into efficient national legislation guarantees the

²¹¹ See further Craig, P. and De Burca, G., 2011, at p. 303.

²¹² *Ibid.*, at p. 338.

²¹³ *Ibid.*; See further Case C-181/73 R. & V. Haegeman v Belgian State [1974] ECR 449. Further referred to as *Haegeman decision*.

²¹⁴ Craig, P. and De Burca, G., 2011, at p. 106. According to the CJEU, Directives are able to have direct effect in case of an insufficient incorporation. However, this will not be further discussed in the study.

applicability of the international agreement within the EU as well as the compliance of the EU with its international commitments.

The EU, however, may make reservations to certain provisions. According to the principles of international treaty law, reservations to international agreements are allowed unless they are a) prohibited by the treaty, b) only provided for specified provisions, or c) incompatible with the objective of the treaty; see further Article 19 VCLT.²¹⁵ The legal effect of a reservation is that the party is not bound by the provision to which the reservation applies.²¹⁶ In relation to the CMS, the CBD and the Bern Convention the EU is bound by the international agreements as such since reservations to the treaty texts are prohibited by these. However, the parties of MEAs are not necessarily bound by COP' decisions. In general, the COP' decisions are considered soft law.²¹⁷ They are not legally binding to the parties of an international agreement and are not subject to ratification.²¹⁸ As a general rule, the parties to a MEA need to accept COP' decisions autonomously. Moreover, the parties to the CITES, the CMS and the Bern Convention have the possibility to make reservations to amendments of the Appendices.²¹⁹ Thus, the parties may not be bound by these either. Consequently, the MEA itself is legally binding the EU and may affect the EU's legislation in so far as the EU is under the obligation to implement the international agreement as such into EU law.

In terms of the impact of international agreements dealing with the protection of endangered species in relation to sharks, the Union has not made any reservations in accordance to the amendments of the Appendices of the CMS and the Bern Convention. The EU has transposed both the CMS and the Bern Convention in form of the Shark Regulation and the Habitats Directive. In line with the above, the Shark Regulation is directly applicable in the Member States, whereas the Habitats Directive needed to be additionally implemented into national law to be legally binding.

²¹⁵ See further Article 19 of the Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969, entry into force on 27 January 1980, published in *United Nations – Treaty Series, Vol. 1155, I-18232*, pp. 331-512, further referred to as VCLT.

²¹⁶ Wallace, R.M.M. and Martin-Ortega, O., *International Law*, 7th Edn., Sweet and Maxwell, 2013, at p. 276. This is further specified in Article 21 VCLT.

²¹⁷ Wallace, R.M.M. and Martin-Ortega, O., 2013, at p. 276

²¹⁸ *Ibid.*; See further in the context of the CBD Jóhannsdóttir, A., 2012, at p. 262.

²¹⁹ In relation to this study, the parties to the CITES, the CMS, the CBD and the Bern Convention are entitled to make reservations in line with Articles XV(3), and XXIII(2) of the CITES, Article XI(6) of the CMS, and Article 22 of the Bern Convention; See further Wallace, R.M.M. and Martin-Ortega, O., 2013, at p. 276.

3.2 MEAs and the Monist Approach

3.2.1 Background

The aim of this section is, firstly, to tackle the question of what direct effect in EU law means in order to, secondly, analyse a comparable approach examining the legal effect of international environmental law on the EU. Direct effect in terms of EU law means that individuals are able to derive rights and obligations from legal rules established by the Union and can claim these rights before a national court.²²⁰ In terms of EU law, the EU's Regulations are directly applicable in the Member States without further transposition if the provisions are sufficiently clear and precise; see further Article 288 TFEU.²²¹ In contrast, the EU's Directives can under particular circumstances have direct effect, although that is not the general rule.

In terms of international law, the question whether international agreements have a similar legal effect has to be considered in order to analyse the role of the EU in relation to the conservation of endangered shark species. As a general rule the self-executing quality of international provisions depends on the constitutional set up of a state. National constitutions can determine if international agreements are directly applicable in national law or not. Therefore, the monist and the dualist approach used by individual states need to be distinguished. The majority of states follow the dualist approach.²²² States that follow the dualist approach need to adopt efficient national legislation in order to comply with their international obligations.²²³ This means that international and national law are considered as two independent legal systems. International obligations necessitate implementation into the domestic legal system in order to become legally binding and to confer rights and obligations to individuals. In contrast, states can also follow the monist approach.²²⁴ Under the monist approach the international agreement, in theory, becomes directly applicable in national law

²²⁰ Chalmers, D., Davies, G. and Monti, G., 2010, at p. 276. The CJEU established the foundations of the doctrine of direct effect in Case C-26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR I (*Van Gend en Loos*). There, the Court held that individual applicants are able to immediately enforce EU Treaty provisions in national courts in case the provision is clear, unconditional and contains no reservation.

²²¹ Craig, P. and De Burca, G., 2011, at p. 190. The direct effect of a Regulation was further underlined by the CJEU in Case C-39/72 *Commission v Italy* [1973] ECR 101 (*Slaughtered Cow case*) and Case C-253/00 *Munoz v Frumar Ltd* [2002] ECR I-7289 (*Munoz*).

²²² Wallace, R.M.M. and Martin-Ortega, O., 2013, at p. 38.

²²³ *Ibid.*, at p. 39.

²²⁴ *Ibid.*, at p. 38.

without being implemented additionally.²²⁵ Thus, international treaties could be directly applied in the domestic law of the state and, hypothetically, be claimed in front of a national court by individuals or legal entities. Applying the monistic approach, the particular agreement could transfer rights to individuals. The state as such may still need to ensure compliance with particular treaty obligations, *e.g.* in form of reporting mechanisms to the Treaty bodies. Consequently, the individual state following the monist approach needs to adopt certain measures to comply with its international obligations on a national level.²²⁶

The EU generally follows the monist approach.²²⁷ Thus, theoretically, international agreements concluded by the EU, do not need to be implemented additionally into EU law, but are supposed to be directly applicable. However, as most Member States follow the dualist approach, the EU still needs to take legislative actions in order to ensure the compliance of the Member States and the EU itself with the respective international obligations. Thus, it confers rights and obligations to the Member States and respectively individuals.²²⁸

3.2.2 The Direct Applicability of MEAs in Union Law

3.2.2.1 A Worrying Trend Against Direct Applicability?

In order to ensure the effectiveness of an international tool on the EU level, it is important to analyse whether the EU and its Member States may be bound by it without an explicit implementation. This could be the case if the international provisions are self-executing. This is of relevance as the EU is, theoretically, bound by MEAs under the monist approach.

In line with Article 3(5) TEU, the EU is obliged to contribute to the observance and development of international law. This is underlined by Article 216(2) TFEU which states that agreements concluded by the EU are binding on the EU and its Member States. Therefore, the question needs to be discussed whether these Treaty obligations provide for an international agreement to be directly binding on the EU. Thus, a potential direct applicability of MEAs on the EU Member States and subsequently individuals and legal entities is taken into account. Some scholars, as Marsden and Tierje, bring forward the argument that the

²²⁵ *Ibid.*; See also Marsden, S., “Invoking direct application and effect of international treaties by the European Court of Justice: Implications for international environmental law in the European Union”, in *International and Comparative Law Quarterly*, Vol. 60, 2011, 737-757, at p. 737.

²²⁶ *Ibid.*

²²⁷ Marsden, S., 2011, at p. 737; See further Craig, G. and De Burca, P., 2011, at pp. 341 ff.

²²⁸ *Ibid.*

respective Treaty provisions accommodate for a quasi-monist approach in EU law which argues, that international law, concluded by the Union, becomes an integral part of EU law without being additionally implemented, in line with the *Haegeman decision*.²²⁹ In order to be directly applicable, though, the international provisions need to be self-executing. The CJEU defines the term self-executing in the *Racke decision* as follows:

The wording and the purpose and nature of the agreement itself [...] contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.

In the *Racke decision*, the CJEU held that provisions of bilateral agreements had a self-executing effect on EU law and, subsequently, the law of the Member States.²³⁰ The Court adhered with this argumentation in the following years implying that international agreements do not enjoy direct applicability in general, but certain provisions can develop a self-executing nature in line with the requirements developed in the CJEU's jurisdiction.²³¹ Consequently, individuals are, hypothetically, able to challenge the legality of other EU provisions infringing the obligations under an international agreement in front of a national court under the given circumstances.²³² However, this has never happened so far.²³³

The Court also persisted with the general policy that single provisions of international agreements are capable of being directly applicable.²³⁴ However, in 2008, in the *Intertanko case* the CJEU adopted a new approach.²³⁵ The UK initiated a preliminary ruling on a

²²⁹ Marsden, S., 2011, at p.741; Tietje, C., "The Status of International Law in the European Legal Order: The Case of International Treaties and Non-Binding International Instruments", in Wouters, J., *et al.* eds., *The Europeanisation of International Law – The Status of International Law in the EU and its Member States*, TMC Asser Press, 2008, pp. 55-70, at p. 58.

²³⁰ Case C-162/96 A. Racke GmbH & Co. v Hauptzollamt Mainz [1998], ECR I-3655, further referred to as *Racke decision*, paragraph 30; See further Pavoni, R., "Controversial aspects of the interaction between international and EU law in environmental matters: direct effect and Member State's unilateral measures", in Morgera, E. ed., *The External Environmental Policy of the European Union*, Cambridge University Press, 2012, pp. 347-377, at p. 349.

²³¹ See *e.g.* Case C-104/81 Hauptzollamt Mainz v Kupferberg & Cie [1982] ECR I-03641; Case C-213/03 Syndicat professionnel coordination des pêcheurs, de l'étang de Berre et de la région v Électricité de France (*Syndicat v EDF*) [2004] ECR I-7375.

²³² *Racke decision*; See further Craig, P. and De Burca, G., 2011, at p. 344.

²³³ *Ibid.*

²³⁴ Pavoni, R., 2012, at p. 350. This can be further demonstrated by several decisions, as the Case C-293/03 Commission v France [2004] ECR I-09325, and Joined Cases C-120, 121/06 FIAMM and Others v Council and Commission [2008] ECR I-06513.

²³⁵ Case C-308/06, The Queen on the application of International Association of Independent Tanker Owners (Intertanko) International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Co-operation Committee, Lloyd's Register, International Salvage Union v Secretary of State for Transport [2008] ECR I-4057, further referred to as *Intertanko case*.

potential violation of the UN Convention on the Law of the Sea²³⁶ and the International Convention for the Prevention of Pollution from Ships (Marpol 73/78)²³⁷ by Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements.²³⁸ The Court argued, in general, that agreements concluded by the Union were binding on the EU and its Member States. Therefore, the international agreements had primacy over secondary EU law under the condition that the provisions are unconditional and sufficiently precise.²³⁹ However, the CJEU clarified that in this case the international agreements did not confer rights and obligations to individuals.

This restricting approach is further underlined in the *Slovak Brown Bear Case*.²⁴⁰ There, the CJEU judged that Article 9(3) of the Aarhus Convention did not “contain a clear and precise obligation capable of directly regulating the legal position of individuals.”²⁴¹ The recent development of the CJEU’s approach stresses that the Court restricts the possibility of direct applicability of international agreements in EU law. This is justifiable in so far as international agreements are addressed to states. They do not intend to apply to individuals or legal entities in order to give them the possibility to claim these rights in front of a national court.²⁴² International agreements, however, introduce provisions pointing out the obligation to implement the respective treaty into national law. Consequently, they indirectly confer rights to individuals transposed by national legislation. Therefore, they aim at the applicability of international agreements to individuals in form of conferred rights, which individuals are able to claim in front of a national court. Consequently, the recent developments are raising concerns in relation to the effectiveness of the agreements in case of an inefficient implementation of the EU and its Member States legislation; see further Chapter 5.2.1.

²³⁶ United Nations Convention on the Law of the Sea, adopted on 10 December 1982, entered into force on 16 November 1996, 1833 UNTS 397.

²³⁷ International Convention for the Prevention of Pollution From Ships, 1973 as modified by the Protocol of 1978, signed on 17 February 1973, entered into force on 2 October 1983, 1340 UNTS 61.

²³⁸ Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on Ship-Source Pollution and on the Introduction of Penalties for Infringements, published in *OJ L 255/11*. The Directive is of no further relevance for the study.

²³⁹ See *Intertanko case*, Paragraph 42; See further Jans, J.H. and Vedder, H.B.B., 2012, at p. 206.

²⁴⁰ Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-01255, further referred to as *Slovak Brown Bear case*.

²⁴¹ *Ibid.*, Paragraph 45.

²⁴² Craig, G. and De Burca, P., 2011, at p. 344.

3.2.2.2 The Potential Stagnation of Shark Conservation Legislation

As demonstrated above, the CJEU has continued to restrict the possibility of the self-executing quality of single provisions of international agreements on the EU. Thus, individuals are not able to derive rights from the international agreement which they can claim in front of a national court. A potential restriction of direct applicability of MEAs in terms of the conservation of shark species indicates an ineffective regime for the *de facto* protection of sharks. Therefore, the possible direct applicability of provisions of the CMS, the CBD and the Bern Convention will be examined.

The Court dealt with the question on whether the CBD and its provisions have self-executing effects on EU law in the *Biotech Patents case*.²⁴³ There, the Netherlands challenged Directive 98/44/EC on the legal protection of biotechnological inventions²⁴⁴ on the grounds that the Directive infringed the CBD. The Netherlands, *inter alia*, claimed that the Directive violates the principle of fair and equitable sharing of the benefit arising from genetic resources; see Article 1 CBD. The Council, however, argued that the CBD is not self-executing and consequently, the Netherlands could not refer to the international agreement in this case. The Court, finally, ruled that the CBD was capable to enjoy direct applicability as the CBD's nature and structure "is not strictly based on reciprocal and mutually advantageous arrangements."²⁴⁵ This means that the CBD was of a non-reciprocal nature and implemented unconditional obligations to the international community. In addition, the Court acknowledged the importance of MEAs, especially the CBD, in the context of countering environmental challenges and threats as common concerns of humanity.²⁴⁶ The CJEU clarified in the *Biotech Patents case* that the CBD needed to be recognised as source of *erga omnes*, which should be effectively applied in the international community as a tool challenging environmental threats. Consequently, the CBD is theoretically capable of being

²⁴³ Case C-377/98 Kingdom of the Netherlands v. European Parliament and Council of the European Union [2001] ECR I-7079, further referred to as *Biotech Patents case*. On the merits the CJEU dismissed any violations of the CBD by the Directive.

²⁴⁴ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions, published in *OJL* 213, 30.7.1998.

²⁴⁵ *Biotech Patents case*, paragraph 53. The CJEU referred to the direct applicability of WTO provisions. There, the Court compared the provision of the CBD and the WTO. In earlier decisions, the CJEU denied consistently that WTO provisions are directly applicable as they are based on reciprocal and mutually advantageous arrangements. This shall not be addressed any further in the study. See further Pavoni, R., 2012, at p. 350. For information about case law on WTO and its direct applicability see: Bronckers, M., "From Direct Effect to Muted Dialogue – Recent Developments in the European Courts, Case Law on the WTO and Beyond", in *Journal of International Economic Law*, Vol. 11, 2008, pp. 885-898.

²⁴⁶ *Ibid.*

directly applied in EU law in order to promote the conservation and protection of biodiversity.²⁴⁷ Furthermore, the Court underlined the importance to distinguish a self-executing approach of provisions of MEAs from their general binding effect. Therefore, even if a CBD provision does not confer individual rights, the national courts as well as the CJEU are, hypothetically, entitled to review the compliance of the EU's legislation with the provisions of international agreements.²⁴⁸ Thus, the CJEU acknowledged the capability of direct applicability in terms of certain CBD provisions in theory.

The CJEU underlined the direct applicability of certain provisions of MEAs further in the *Etang de Berre I* case. The Court indicated that a provision has direct effect if it is clear, precise and conditional in the light of its wording, purpose and nature.²⁴⁹ However, in its decision, the CJEU did not refer to the distinct right of national courts to review the compliance of the EU's legislation with international agreements as it was stressed in the *Biotech Patents* case. Thus, the CJEU did not follow its former jurisdiction which entitled theoretically national courts and the CJEU to address the issue of a potential lack of compliance with the EU's international obligations.²⁵⁰

This is of great importance in terms of the *de facto* protection of endangered species. In line with the jurisdiction, which is further stipulated by the Treaties, national courts are not entitled to challenge the EU's legislative measures as insufficient in terms of the implementation of international agreements.²⁵¹ This applies to treaties seeking to protect endangered species. Consequently, the CJEU weakens the direct impact of MEAs on EU law, instead of expanding it. In line with the above, the CJEU denied in the *Intertanko* case the direct applicability of the UNCLOS on EU law. Whereas the denial of self-execution of international agreements first concerned only the WTO,²⁵² the Court expanded its view on other international agreements. In the *Slovak Brown Bear* case this culminated in the denial of the potential self-executing qualities of the Aarhus Convention. Consequently, the CJEU starts to restrict the respective impact of international agreements on the EU also in the area of environmental matters.

²⁴⁷ *Biotech Patents* case, Paragraph 54; See further Pavoni, R., 2012, at p. 351.

²⁴⁸ *Ibid.*, Paragraph 54.

²⁴⁹ Case C-213/03 *Commission v France* [2004] ECR I-7357 further referred to as *Etang de Berre I*, paragraphs 39-43; See further Pavoni, R., 2012, at p. 352.

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² The Court denied direct effect of the provisions of the WTO agreement on EU law in the *Joined Cases C-120, 121/06 FIAMM and Others v Council and Commission* [2008] ECR I-06513.

This development bears the risk of a stagnation of the *de facto* effectiveness of the CMS, the CBD and the Bern Convention. So far the Court did not review its opinion in relation to the CBD. Further, it has not yet addressed a potential direct applicability of the CMS and the Bern Convention on EU law under the monist approach in its jurisdiction. Thus, the question whether individuals can derive rights from these MEAs is still open. However, the *de facto* situation indicates the refusal of direct applicability of MEAs and their provisions on EU law. Moreover, the current trend of the CJEU jurisdiction emphasises a rather restrictive approach in relation to the recognition of a self-executing quality of MEAs in EU law, and not a supportive tendency.²⁵³

Consequently, the applicability of the agreements on the EU level is completely dependent on the legislative measures taken by the EU to transpose these into EU law. The cause of this development arises from the increasing autonomy of the EU; see further Chapter 5.2.2. The EU implemented the CMS in form of the Shark Regulation, which is not an efficient transposition; see Chapter 3.2. Further, the Habitats Directive is supposed to implement the Bern Convention on an EU level. In line with the above, the protection of shark species, which the Bern Convention strives to achieve, is rather weak under the Habitats Directive.²⁵⁴ Subsequently, the denial of direct applicability of MEAs and the resulting risk in terms of their effectiveness in case of an insufficient transposition have an impact on the conservation of sharks.

3.2.3 Self-Executing Qualities and the Lack of Formal Membership

In the *Intertanko* case, the CJEU held that international agreements became an integral part of EU law in case the EU has concluded them.²⁵⁵ Moreover, the CJEU emphasised in the *Poulsen* decision the obligation of the EU to generally respect international law.²⁵⁶ This implies that international agreements, which the EU has not signed or implemented, could still have a certain effect on EU law. The EU, therefore, could take regulatory actions in relation to any international agreement having a possible impact on EU's territory. To discuss the role of the Union in relation to the protection of endangered shark species the situation in terms of the self-executing qualities of international agreements, which the EU has not

²⁵³ Pavoni, R., 2012, at p. 352.

²⁵⁴ See further Epstein, Y., 2014, at p. 153.

²⁵⁵ *Intertanko* case, Paragraphs 50-52. See further, Pavoni, R., 2012, at p. 354.

²⁵⁶ Case C-286/90 *Anklagemyndigheden v Poulsen and Diva Navigation* [1992] ECR I-6019, further referred to as *Poulsen* decision; See further Craig, P. and De Burca, G., 2011, at p. 341.

become party to, shall be addressed. The EU has not become party to the CITES yet. However, the CITES is one of the main MEAs seeking to protect endangered species. In line with the above, neither the decisions of the CITES' COP nor the CITES itself are therefore binding on the EU.²⁵⁷

Nonetheless, the CITES has had a significant effect on the EU as the Union aims to regulate the trade with endangered species in order to protect them.²⁵⁸ Trade related issues within EU's borders as well as the determination of external trade relations can be regulated by the EU and its Member States as it is a matter of shared competence; see Article 4(2)(a) TFEU. Regardless of the lack of international obligations under the CITES, the EU has been implementing the MEA in form of the CITES Regulation; see above.²⁵⁹ According to Article 288 TFEU, Regulations are directly legally binding the Member States and have direct effect on them. As EU Regulations aim to harmonise the Member States' legislation, they cannot take legislative measures infringing the EU's legal framework.²⁶⁰ However, this may result in an infringement of their obligations under international law, since the EU is not bound by the CITES directly and can adopt distinct legislation. In the case at hand, the EU adopted a more stringent legislation than required by the CITES.²⁶¹ Thus, the EU supports the compliance of the Member States with their obligations under the CITES as it adopts a legal framework which aims at the convergence of the Member States' legislation relating to the regulation of trade with endangered species.²⁶² Especially in terms of trade with endangered species, a Union wide legislation is advantageous in relation to the protection of vulnerable species. The trade within the internal market as well as between the EU and third states requires co-operation between the Member States and should not expose any loopholes for the Member States leading to a less effective protection of endangered species. As the EU adopted binding obligations in form of the CITES Regulation, the Member States need to comply with these and therefore support the effective application of the CITES within the EU's territory. However, the CITES provisions are not self-executing in relation to the EU itself as it is not

²⁵⁷ The EU Commission proposed the accession of the EU to CITES in: "Proposal for a Council Decision on the Accession of the European Union to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)", Brussels 6.12.2013, COM (2013) 867 final; 2013/0418 (NLE); see further European Commission, *Wildlife Trade Regulations in the European Union: An Introduction to CITES and its Implementation in the European Union*, Luxembourg: Publications Office of the European Union, 2010, at p. 8

²⁵⁸ Craig, P. and De Burca, G., 2011, at pp. 583 f.

²⁵⁹ The EU adopted Council Regulation (EC) No 338/97 on the Protection of Species of Wild Fauna and Flora by Regulating Trade Therein (the Basic Regulation) on 9 December 1996 in order to implement the CITES in EU law.

²⁶⁰ Craig, P. and De Burca, G., 2011, at p. 341.

²⁶¹ Pavoni, R., 2012, at p. 367.

²⁶² *Ibid.*; See further Marsden, S., 2013, at p. 744.

directly connected to the CITES as a party. Consequently, MEAs, which the Union has not signed, are only directly applicable on EU law in case the EU voluntarily adopted legislative acts meant to harmonise the Member States' legislation. This depends on the willingness of the EU to adopt these in order to create a binding effect of the MEAs on its Member States.²⁶³ Thus, the CITES has direct effect on the Member States in form of the legal nature of the CITES Regulation, but not the MEA itself. To sum up, international agreements, which have not been concluded by the Union, are not self-executing in general. Nevertheless, in case of the willingness of the EU to adopt harmonising legislation, they could be directly applicable.

²⁶³ *Ibid.*

4 General Measures

In order to evaluate the effectiveness of the respective international tools and the role of the EU in relation to the protection of endangered shark species, the relevant measures introduced on an international, as well as on EU level need to be analysed. This Chapter, therefore, strives to discuss the actions on the international platform in form of the compliance to COP decisions and the establishment of an international shark conservation action plan. Furthermore, the Chapter seeks to provide a debate about the EU's actions in relation to the conservation and protection of endangered shark species. Therefore, the compliance of the EU with international measures will be addressed. In addition, the EU's actions in form of the EU Shark Action Plan²⁶⁴ and the designation of SAC in relation to the Habitats Directive will be examined.

4.1 Actions on the International Level

The public awareness of the need to protect endangered species, including sharks, continually rises. Therefore, several international legal tools have been adopted. In order to strengthen the *de facto* protection of shark species in relation to the introduced instruments, the COP of the different agreements have the possibility to adopt decisions being relevant to the conservation of sharks. To examine the actions taken on an international level, the COP' decisions and their role within the MEAs will be discussed. Moreover, the Shark Memorandum will be used exemplarily to emphasise the effectiveness of the general measures implemented in context of the international agreements.

4.1.1 The impact of COP' Decisions

The international community attends to pressing developments in form of the participation in discussions and decision-making of COP in the relevant treaty framework. A COP is composed of representatives of all parties to a particular international agreement. The rights and obligations of the COP are determined by the respective treaty. Article XI(3)(b) of the CITES, Article VII(5) of the CMS, Article 23 of the CBD and Article 17 of the Bern Convention entitle the particular COP, respectively Standing Committee, *inter alia*, to adopt

²⁶⁴ Communication from the Commission to the European Parliament and the Council "On a European Community Action Plan for the Conservation and Management of Sharks", COM (2009) 40 final – Not published in the Official Journal, further referred to as Shark Action Plan.

amendments or adjustments to the Appendices of the respective MEA. In these terms the COP takes into account new scientific evidences and proposals of the parties to take certain actions in order to promote the conservation of endangered species. Furthermore, the COP can adopt decisions addressing the current challenges in relation to the particular treaty and clarifying the measures necessary to be taken by the MEA's parties.²⁶⁵ In this way the COP contributes to the development of new substantive obligations. Thus, the COP acts as a dynamic decision-making body and has the ability to address negative developments and concerning trends.²⁶⁶ In terms of the conservation of sharks, the COP of the CITES and the CMS as well as the Standing Committee of the Bern Convention have adopted substantive measures in line with the alarming developments of certain shark species' population.²⁶⁷ In line with the above, the COP of the CITES, the CMS and the Standing Committee of the Bern Convention have adopted amendments to the Appendices in order to counteract these developments.²⁶⁸ The COP, *prima facie*, appears to provide for flexibility in terms of the relevant MEA.²⁶⁹ Consequently, the COP of a MEA performs as a legislative or law-making body. The effectiveness of this procedure will be discussed further in Chapter 5.1.1.

Regardless of their consentaneous adoption, COP decisions are soft law. In order to become legally binding to the parties, the COP decisions require formal consent of the individual parties.²⁷⁰ Accordingly, the COP decisions do not have any legally binding effect unless they are formally accepted by the respective MEA's parties.²⁷¹ In addition, the parties enjoy the right to make reservations in relation to the COP decisions amending the MEAs' Appendices. By making a COP decision, which amends the Appendix of a MEA, subject to reservation the *de facto* protection of the particular species is endangered since the party

²⁶⁵ As an example, the CITES and the CMS adopted papers acknowledging the worrying situation of sharks. See e.g. Res. Conf. 9.17; Camhi, M., *et al.*, 2009. See further Resolution 6.1, *Concerted Actions for Appendix I Species*, of the Sixth Meeting of the Conference of the Parties, in UNEP/CMS/Res.6.1., 10 November, Bonn.

²⁶⁶ Gehring, T., "Treaty-Making and Treaty Evolution", in *The Oxford Handbook of International Environmental Law*, Bodansky, D. *et al.*, eds., Oxford University Press, 2008, pp. 467-497, at p. 480. Gehring, T., 2008, at p. 480.

²⁶⁷ In relation to the protection of shark species population, the parties of the CITES, the CMS and the Bern Convention took particularly the research of the IUCN into account. See e.g. Camhi, M., *et al.*, 2009, at p. 7; Dulvy, N., *et al.*, 2014. In general the functions of a COP see Churchill, R.R. and Ulfstein, G., "Autonomous Institutional Arrangements in Multilateral Environment Agreements: A Little Noticed Phenomenon in International Law", in *The American Journal of International Law*, Vol. 94, 2000, pp. 623-659, at p. 626.

²⁶⁸ Gehring, T., 2008, at p. 480.

²⁶⁹ Beyerlin, U. and Marauhn, T., *International Environmental Law*, Hart Publishing, 2011, at p. 258.

²⁷⁰ Wiersema, A., "The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements", in *Michigan Journal of International Law*, Vol. 31, 2009, pp. 232-287, at p. 235. In terms of this study the parties to the CITES, the CMS, the CBD and the Bern Convention can accept any amendments to the Treaty in line with Articles XVII(3) of the CITES, X(5) of the CMS, 29(4) of the CBD.

²⁷¹ Beyerlin, U. and Marauhn, T., 2011, at p. 258.

making the reservation is not bound by the obligations under the MEA relating to the amendment. In terms of the protection of sharks several states made reservations to the recent amendments to the CITES.²⁷²

The effectiveness of the CITES, the CMS, the CBD and the Bern Convention depends prevalingly on the compliance of the parties. The parties comply with the respective MEA by implementing the agreement into national legislation and by adopting additional national measures which are sufficient to transpose new COP decisions effectively. Thus, the state parties promote the effectiveness of the MEA by implementing the MEA as such as well as the Appendices. The COP' decisions and amendments are interrelated with the treaty itself. Therefore, the adoption of decisions and their transposition in national law contribute greatly to the effectiveness of the MEA itself.²⁷³ By making reservations to certain species, the parties are under no obligation to comply with the commitment to adopt new legislative measures. Thus, they endanger the effectiveness of the particular MEA as it cannot operationalise efficiently due to the lack of transposition of the amendments. In conclusion, the COP decisions are an important factor when it comes to the effectiveness of MEAs. In terms of the study, the holistic adoption of the decisions of the CMS' and the CITES' COP as well as the Standing Committee of the Bern Convention, which aim to extend their scope to other species by listing them in the Appendices, are crucial to strengthen the effectiveness of the instruments; see further Chapter 5.1.

4.1.2 The Sharks MOU's Impact on Sharks' Conservation

The CMS' COP adopted the Sharks MOU as an instrument in order to promote the conservation of sharks. The purpose of this section is to evaluate the impact of the Memorandum in relation to the protection of endangered shark species and its influence on EU legislation.

²⁷² In line with above *e.g.* Iceland and Norway made the listing of the basking shark in Appendix II of the CITES subject to reservation. Consequently, they are not bound by any trade regulations meant to restrict the trade with the basking shark or its products.

²⁷³ Wiersema, A., 2009, at p. 242.

4.1.2.1 The Legal Status of the Sharks MOU

As outlined in Chapter 2.1.4.2, the CMS' COP adopted the Sharks MOU in 2010. This section will discuss further the impact of the Sharks MOU to its Signatories and the CMS' parties in general.

According to Bowman, a MOU does not carry any determined connotation in international law.²⁷⁴ In general it may have legally binding effect on the parties of an international agreement. This is the case, if the parties to a MEA explicitly agree that the MOU should have such a legal effect. In line with Articles IV(3) and V of the CMS, the parties, which are range states, can adopt and conclude agreements in order to support the protection of a particular species, which are listed in Appendix II. These agreements are generally considered legally binding between the range states concluding the agreement.²⁷⁵ The Sharks MOU is not an agreement in the sense of Article V, though, as the CMS' COP in general describes the MOU's character as "political declarations of good will."²⁷⁶ This is typically the case if the MOU does not have its own institutional framework and is managed under the parent Convention, in this case the CMS.²⁷⁷ In the case at hand, at the first Meeting of the Signatories (MOS), the Signatories of the Sharks MOU came to the conclusion to establish an autonomous Secretariat, which is only responsible for matters of the Sharks MOU; see Section 8(27). In line with Section 7(24)-(26) of the Sharks MOU, the MOS, furthermore, established an Advisory Committee which is obliged to monitor the management of conservation actions in relation to the protection and conservation of migratory shark species. Consequently, the Sharks MOU introduced its own institutional framework and has to be discussed as a legally distinct body from the CMS. The Sharks MOU is not only a political declaration of good will, but an autonomous body within the CMS' framework.

Within this framework, the MOS is obliged to develop and adopt a Conservation Plan in order to complement the Sharks MOU; see further Section 4. Whereas the Sharks MOU already establishes certain conservation standards and principles, see further Section 2-3, the Conservation Plan strives to adopt, implement and enforce a regulatory framework in order to complement the conservation and management of migratory shark species sought to be

²⁷⁴ Bowman, M., Davies, P. and Redgwell, C., 2010, at p. 562.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

protected under the Sharks MOU; see further Section 4(12). In order to analyse the effectiveness of the international instrument, the Conservation Plan will be discussed more precisely.

4.1.2.2 The Conservation Plan

In line with Section 4 of the Sharks MOU, the Signatories of the MOU are obliged to incorporate a Conservation Plan as an Annex to the Sharks MOU.²⁷⁸ Therefore, the Signatories of the Sharks MOU are supposed to adopt, implement and enforce a legal, regulatory, and administrative framework in order to conserve and manage migratory shark species and their habitats; see Section 4(12).

During the first MOS to the MOU in 2012, the Signatories to the Sharks MOU adopted the Conservation Plan as Annex 3 to the Sharks MOU.²⁷⁹ Introductorily, the Conservation Plan points out its main principles; see further Section I-VIII. The main emphasis lies on the complementation, development, and promotion of the objectives and actions described in the Sharks MOU. In order to comply with these principles, the Signatories should implement measures promoting the co-operation and participation with other international organisations, *e.g.* the FAO or relevant biodiversity-related MEAs as the CBD and the CITES. Further, the Signatories should establish regional, sub-regional, and other co-operative agreements; see Section III. In addition, the Conservation Plan introduces five complementary objectives. Objective A demands the improvement of the understanding of migratory shark populations through ecological research, monitoring and data collection, as well as an increased exchange of information between the Signatories in relation to the scrutinized information. In accordance to Objective B, the Signatories agreed upon the increased endeavour of the co-operation between the Sharks MOU and biodiversity-related MEAs concerning fisheries-related research and data collection in order to support an effective stock assessment and sustainable management of shark populations, including monitoring, control and surveillance.²⁸⁰ Furthermore, the Conservation Plan promotes the regulation of by-catch on a domestic as well as international level by managing the gears

²⁷⁸ See Annex 3 of the CMS Memorandum on the Conservation of Migratory Sharks, CMS/Sharks/Outcome 1.2.

²⁷⁹ *Ibid.*

²⁸⁰ In Objective B, the Signatories agree on the establishment of several programmes establishing baseline data and facilitating reporting mechanisms in relation to the sustainable fishing of sharks. Further, the Signatories are required to “develop and adopt best practice guidance for the conservation and management of shark populations” and “develop programmes to monitor directed shark fisheries and by-catch”; see Section 4.2.

used relating to fisheries. It further encourages enhanced co-operation between the Signatories and the Sharks MOU and international bodies relating to trade, domestic policy and the issue of finning. In Objective C, the Signatories acknowledged the need of conservation activities in terms of the designation and management of conservation areas as well as an environmental impact assessment concerning coastal development projects interfering with the protection of shark species and their habitats. Objective D, furthermore, requires the raising of public awareness of threats to sharks and their habitats and enhancing public participation in conservation activities. Therefore, especially governmental institutions, NGOs, indigenous and local communities, commercial and recreational fishing communities, the private sector, scientists, academia, and the general public should be encouraged to actively participate in the further implementation of the Conservation Plan; see further Objective D, Section 13.1. Finally, in Objective E, the Conservation Plan stresses out the inevitable necessity of enhanced national, regional and international co-operation among governments, along with existing instruments and organisations related to shark conservation. Therefore, Section 15.1 emphasises the need for co-operation between the Signatories of the Sharks MOU with existing instruments, mentioning explicitly the CITES and the CBD.

4.1.2.3 A Possibly Dynamic Approach in Form of the Sharks MOU?

The validation of the effectiveness of the Sharks MOU and the Conservation Plan is of particular relevance for the role of the EU in relation to the protection of endangered shark species since the EU is a party to the CMS ,as well as to the Sharks MOU.

Therefore, firstly, the binding effect of the Sharks MOU on the EU will be analysed. In line with the above, the Sharks MOU only binds its Signatories. Only 36 of the 120 parties to the CMS are obliged to fulfil international obligations under the Sharks MOU.²⁸¹ In accordance with Objective B, Section 3.2 of the Conservation Plan, the Plan requires the Signatories to develop a programme in order to establish baseline data and introduce a distinct reporting system addressing shark catch rates, fishing gear used in shark fisheries, the amount of incidental and direct takings of sharks, the amount of waste and discards, the size and sex of individuals caught, and the fisheries methods. However, the reporting systems on

²⁸¹ See further Beyerlin, U. and Marauhn, T., 2011, at p. 258. See also Bowman, M., Davies, P. and Redgwell, C., 2010, at p. 562. In accordance with public international law, parties to multilateral agreements are not bound by the COP decisions, but can make reservations. In the context of MEAs, this means that the parties are entitled to make reservations to the amendments to the Appendices of the MEA. In addition, the parties are not obliged to enter Memoranda of Understanding.

the international level concerning the landing of sharks are, in accordance with the above, not efficiently introduced. Thus, the lack of an effective reporting system contributes to unreported shark fisheries and the subsequent endangering of shark populations.²⁸² Consequently, facilitating the reports and the strengthening of the reporting system itself in form of increased co-operation between the parties to the Sharks MOU is highly desirable in order to manage and promote the protection of endangered shark species effectively.

This is especially important as less than one-third of the CMS' parties have become Signatories to the Sharks MOU. Thus, the need of a highly distinct reporting and monitoring system is inevitable in order to ensure the most effective protection of migratory shark species within a rather limited number of Signatories. Nevertheless, the Sharks MOU and the Conservation Plan must be judged favourably. Contrary to other MOU of the CMS addressing the protection of *e.g.* Marine Mammals, the Sharks MOU establishes its own institutional framework, which makes it to a dynamic autonomous international instrument.²⁸³ During the first MOS, it established an autonomous Secretariat as well as an Advisory Committee in order to ensure the flexible functionality of the legal tool. Due to the small amount of Signatories, the MOS is, in theory, able to adjust the framework to current challenges. Thus, the MOS could adopt amendments to the Sharks MOU very quickly and therefore could guarantee a flexible protective framework in relation to migratory shark species.

Furthermore, the Sharks MOU and the Conservation Plan need to be distinguished from the CMS. There, the parties are entitled to make reservations in terms of the amendment of the Appendices. In contrast, the Sharks MOU does not provide any possibilities to make reservations relating to amendments. Thus, it is comprehensively binding to the Signatories. The Sharks MOU and the Conservation Plan call for a stringent protection of migratory shark species and introduce a specified framework which is legally binding the Signatories. Consequently, these tools are effective to stipulate the protection of sharks regardless of the rather small number of Signatories.

The EU takes part on the further designation of conservation measures and management by becoming Signatory to the Sharks MOU and subsequently the Conservation Plan. Although the Union has not taken any steps to implement the Conservation Plan in EU legislation, in 2009, the EU adopted the Shark Action Plan. The question will be discussed

²⁸² See further Lack, M. and Sant, G., 2008, at p.28.

²⁸³ Bowman, M., Davies, P. and Redgwell, C., 2010, at p. 562.

whether the Shark Action Plan is effective in order to implement the Conservation Plan and therefore to fulfil the international obligations of the EU; see further Chapter 4.2.2.

4.2 The EU's Actions

In order to comply with its international commitments and to make the respective MEAs operative on the EU level, the Union took several actions. The effectiveness of these actions in relation to the compliance with the international measures based on the CITES, the CMS, the CBD and the Bern Convention needs to be analysed. Therefore, the compliance of the EU with the relevant international measures in relation to the conservation of endangered species emphasising on sharks, will be exemplary scrutinized by means of the Habitats Directive and the EU Shark Action Plan as these two instruments are most relevant in terms of the study.

The study already examined the implementation of the CMS and the Bern Convention in EU law. However, the simple transposition of the international legal tools in an EU legislative framework does not guarantee an effective compliance of the EU with its obligations since the effectiveness further relates to the measures *de facto* taken by the EU and its Member States to conserve endangered shark species.

4.2.1 The Habitats Directive and the Absence of Conservation of Sharks

Article 3 of the Habitats Directive requires the designation of SAC in order to manage the conservation of certain habitats and species. The Directive, however, applies to the Member States as these areas are within the Member States' jurisdiction.²⁸⁴ Subsequently, this measure meant to protect endangered species does not affect the EU itself, but the Member States. The effectiveness is therefore dependent on the transposition of the Habitats Directive in the Member States. Nevertheless, the EU still takes part in the execution of the Directive within the designation of the SAC; see Article 4(2) of the Habitats Directive. The SAC are designated according to the procedure outlined in the Directive and in its Annex III. In line with Article 4(1), the Member States propose a list with all habitats and species which occur in their territory that are eligible of protection under the Habitats Directive. The Member States base their proposal on the criteria that are set out in Annex III (Stage 1). Stage 1 demands an assessment at the national level of the relative importance of sites for each natural habitat type listed in Annex I and species that are categorized in Annex II. In this

²⁸⁴ Jans, J.H. and Vedder, H.H.B., 2012, at p. 513.

context, several factors have to be taken into account. The Member States need to assess the area covered by a natural habitat type, the possibility of restoration of the territory, and the value of the site for conservation of the natural habitat type; see Annex III (Stage 1)(A). In relation to endangered species, the size and density of the population will have to be assessed. Furthermore, the restoration possibilities of the population, the natural range and the global assessment of the value of the site for conservation of the species listed in Annex II should be taken into consideration when certain species are proposed; see further Annex III (Stage 1)(B).²⁸⁵

In terms of the conservation of sharks, Article 4(1) is of relevance. The Article reads as follows:

For animal species ranging over wide areas these sites shall correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction. For aquatic species which range over wide areas, such sites will be proposed only where there is a clearly identifiable area representing the physical and biological factor essential to their life and reproduction.

Shark species are highly migratory aquatic species. Their range can cover vast areas of different jurisdictions. Therefore, the listing of these species and their habitats in addition to a close co-operation between the different Member States is inevitable. With some species, however, it is difficult or nearly impossible to determine the area “representing the physical and biological factor [which is] essential to their life and reproduction”, being required in Article 4(1). As the IUCN pointed out in its scientific research, some shark species are classified as possibly migratory, meaning the habitats of the shark species remain unclear.²⁸⁶ Subsequently, possibly migratory shark species cannot be included in the proposals of the Member States as it is not possible to determine their natural habitat and thus protect it. In line with the above, the Annexes of the Habitats Directive do not list any shark species directly, but are protecting them indirectly by listing their habitats in the Annexes. Consequently, the protection of sharks is rather restricted in terms of the proposals of the Member States in Stage 1.

In order to guarantee the most effective conservation of habitats and species under the Habitats Directive, the lists proposed by the Member States are transmitted to the

²⁸⁵ See further Jans, J.H. and Vedder, H.H.B., 2012, at pp. 514 f.

²⁸⁶ See further Camhi, M., *et al.*, 2009, at p. 7.

Commission, which in the following process establishes a list of sites of Community importance (SCI).²⁸⁷ In order to identify a natural habitat as a SCI, the Commission divides the lists of the Member States in two different categories. Firstly, in accordance with Annex III (Stage 2)(1) all sites which contain priority habitats and species are considered as SCI. This is the case if the habitat type or species is identified as priority by the Member State listing it. Secondly, the Commission can assess other sites on Member States' lists as a SCI if the site enjoys a value at national level and is of relevance in relation to the protection of migratory species listed in Annex II. Further, natural habitat types listed in Annex I or species categorised in Annex II need to be present on the site. Finally, the site must be unique in relation to its features; see Annex II (Stage 2)(2). After appointing a SCI, the Member States are obliged to designate the area as SAC. In the following process, they need to take effective measures to protect the area; see further Article 6(2)-(4).²⁸⁸ It is important to realise that the Member States are only obliged to offer protection to SAC which are listed as SCI, but not to any other habitat type or species.²⁸⁹ To fulfil these obligations, the Member States are supposed to designate the SAC and implement effective measures within six years; see Articles 4(4) and 6. Therefore, the Member States are encouraged to, *inter alia*, adopt effective management plans in order to regulate the deterioration of habitats in the SAC and the disturbance of species which are protected under the Directive. The measures taken by the Member States must be reported on a regular basis every six years; see further Chapter 5.2.1.

Hypothetically, the approach introducing SAC and SCI is desirable as the Member States co-operate with the EU's bodies in order to ensure the most effective protection. However, in terms of sharks the adoption of general conservation measures is rather weak. The Habitats Directive is not applicable to the protection of sharks directly. In addition, the inclusion of marine SAC is rather limited so far. Currently, the Commission has only identified around 2.600 marine SAC in EU territory.²⁹⁰ Whereas in average 33% of the coastal zones of the EU waters are protected as SAC, only 2% of the marine waters up to 200nm are covered under the Directive.²⁹¹ These could be defined as the habitats of most

²⁸⁷ This is duty of the Commission is appointed in Article 4(2) of the Habitats Directive. See further Jans, J.H. and Vedder, H.H.B., 2012, at p. 514.

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*; See further Epstein, Y., 2014, at p. 154.

²⁹⁰ EEA, 2012, at p. 115. In comparison, the Member States designated in total more than 26.000 SAC. Thus, the protected marine area commensurate only 10% of all designated SAC.

²⁹¹ *Ibid.*, at p. 114.

shark species.²⁹² Subsequently, the habitats of shark species are barely protected under the Habitats Directive. In addition, many states hunting and trading with shark products do not list marine territory and subsequent designate SAC. Therefore, the Habitats Directive does not offer any protection in these territories. As an example, Portugal is only protecting 0,1% of its total marine territory.²⁹³ It is one of the main shark fishing nations worldwide, and the third strongest shark fishing nation in the EU according to IUCN reports.²⁹⁴ In 2007, Portugal reported the landing of 18.464t of pelagic sharks.²⁹⁵ In comparison to the worldwide catch reports in 2007, Portugal is the tenth biggest pelagic shark fishing nation. Thus, the protection of marine habitats potentially inhabiting shark species could be considered ineffective under the Habitats Directive in Portugal. On the one hand, only a little number of marine habitats is protected in comparison to the overall number of SAC and the total area of marine habitats in EU territory. Especially, shark fishing nations as Spain and Portugal only designate a small amount of SAC in their marine territory.²⁹⁶ On the other hand, as sharks are not directly protected but only in terms of the protected SAC, there are hardly any conservation measures applied. Consequently, the Habitats Directive is not very effective when it comes to the conservation of sharks.

4.2.2 The EU Shark Action Plan

To provide an extensive examination of the role of the EU in relation to the protection of sharks, explicit measures that have been taken by the EU need to be discussed. It has adopted, complementing to the Shark Regulation, the EU Shark Action Plan. The Shark Action Plan does not function as a direct transposition of any international obligation into EU law. However, it still needs to be taken into account in relation to the analysis of the role of the EU supporting the conservation of endangered species.

In 2009, the European Commission communicated the EU Shark Action Plan in order to promote the conservation of endangered shark species. In terms of EU law, action plans and communications do not have an unconditional legally binding effect on the Member

²⁹² Dulvy, N., *et al.*, 2008, at p. 14.

²⁹³ EEA, 2012, at p. 115.

²⁹⁴ Camhi, M., *et al.*, 2009, at p. 16.

²⁹⁵ *Ibid.*

²⁹⁶ EEA, 2012, at p. 76. The EEA examined in its analysis the designation of SAC in marine territory. There, Portugal designated the least SAC with only 0,1% of its whole marine territory. Spain seeks to protect 2% of its marine territory. In line with the IUCN these two nations are, however, of great relevance concerning the global shark fisheries. See further Camhi, M., *et al.*, 2009, at p. 16.

States.²⁹⁷ The Shark Action Plan is, therefore, not legally binding to the Member States of the EU.²⁹⁸ However, the Shark Action Plan has a certain impact on the conservation of sharks as it aims at influencing the Member States' behaviour in relation to the protection of endangered shark species.

In the Shark Action Plan the Commission acknowledges the vulnerability of sharks which results from unregulated and intensive exploitation of shark species in EU marine territory.²⁹⁹ Introductorily, the Commission addresses the pressing global issue of the reduction of shark populations. The current biological situation is explained and awareness is sought to be created relating to the development of shark fisheries and the issue of unregulated harvesting which leads to the need for a regulatory framework and conservation management. The EU Shark Action Plan pursues several objectives. Paragraph 2 briefly analyses the current situation of shark fisheries in EU's territory as well as on the High Seas. Also, the current legislative framework and international instruments are introduced. According to Paragraph 2.3(a), the Shark Action Plan stipulates the raise of awareness in relation to the shark's role in the marine ecosystem and the impact of shark fisheries. In addition, the relevance of regulated sustainable shark fisheries as well as the stem of by-catch is addressed. In this context, the EU Shark Action Plan emphasises the importance of co-operation between the EU and international institutions to promote the conservation of sharks and regulation of by-catch in relation to commercial fisheries. Therefore, the introduction and Paragraph 2.3 refer to the necessity to co-ordinate actions in line with the CMS and the CITES. The Shark Action Plan recognises the influence of the CMS and the CITES in terms of the regulation of trade with sharks and shark products according to their Appendices.³⁰⁰ Further, Paragraph 3.2.2 of the EU Shark Action Plan expressively emphasises the support of regional co-operation and especially the co-operation between the EU, the CMS and the CITES to control shark fisheries and trade. Paragraph 3.2.2 reads as follows:

The Community will seek improved international co-operation through CMS and CITES to control shark fishing and trading.

²⁹⁷ Craig, P. and De Burca, G., 2011, at p. 107.

²⁹⁸ In Section 3 of the EU Shark Action Plan, the Commission points out the importance of the development of effective regulations and the modification of existing legislation on the Union as well as Member States level in order to ensure an effective protection of sharks. Therefore it seeks to take into account issues of shark fisheries, by-catch and exploitation of marine resources in general.

²⁹⁹ Shark Action Plan, at p. 2.

³⁰⁰ Shark Action Plan, 2.3.; See further Techera, E. and Klein, N., 2011, at p. 74. The interaction between CITES and the CITES Regulation shall not be discussed further.

Regardless of the fact, that the EU Shark Action Plan strives to improve the international relation between the different instruments meant to protect endangered shark species, it does neither provide any proposals on how to *de facto* and *de jure* improve the co-operation between them nor does it promote the adoption of effective measures.

Furthermore, Paragraph 3.3 points out that it seeks to modify existing regulations. These need to be implemented at Union level, as well as Member States level in order to be effective. As the implementation of new regulations seems to be a complex process, which may cause long-term commitments and therefore requires a lot of discussion within the EU, there are currently no legislative proposals pending.³⁰¹ However, the Shark Regulation, as an existing regulation, is one of the main instruments in relation to the conservation of endangered shark species; see above. In theory, it is supposed to be an effective regulatory framework prohibiting finning in all EU Member States and their marine territories. Its *de facto* effectiveness, however, can be doubted; see further Chapter 5.2.3.

The EU Shark Action Plan and its proposal to introduce new legislative measures and to modify existing legislation in order to conserve shark species within EU waters is not an effective tool. Furthermore, as the EU Shark Action Plan has still not been officially published, it also cannot be interpreted as an effective measure in order to implement the Sharks MOU and the Conservation Plan. Thus, the EU does not stipulate a comprehensive protection of endangered shark species in EU's marine territory, also in line with the Sharks MOU. Consequently, the EU Shark Action Plan is not an effective tool in relation to the regulation and management of the conservation of sharks.

³⁰¹ Shark Action Plan, Paragraph 3.3.

5 Concluding Remarks on the Effectiveness

With regards to sharks, the effectiveness of the respective MEAs and the associated role of the EU could be doubted in so far as neither the current EU's legislation nor the international legal instruments indicate that they contribute to the *de facto* protection of shark species. The final Chapter of this thesis aims to examine the applicability and effectiveness of the different instruments, including the CITES, the CMS, the CBD and the Bern Convention, as well as the Habitats Directive and the Shark Regulation. The differences between the *de facto* and *de jure* effectiveness of the instruments need to be taken into consideration to reach an efficient examination of the issue. The growing number and a potentially growing impact of the EU in relation to international treaty frameworks will be discussed in this context. Furthermore, this Chapter seeks to introduce some recommendations in order to provide for a more effective framework in form of clustering the respective instruments. Therefore, the recommended solutions strive to improve the protection of endangered shark species.

5.1 The MEAs' Weaknesses

Due to the alarming state of several shark species, the international community called for an international management of conservation and protection of shark species and their habitats.³⁰² As a response several instruments have been adopted. These are often not sufficient as they do not provide for an extensive protection and conservation of endangered shark species. The all too frequent *de facto* ineffectiveness can be caused by several factors. The most relevant causes are the lack of the necessary flexibility of the respective MEAs, the issue of competing interests and the lack of a holistic framework.

5.1.1 The Inflexibility of Decision-Making Bodies

Most MEAs, which stipulate the protection of endangered species and are of particular relevance in relation to the protection of sharks, have a considerable number of parties. The CITES is one of the biggest MEA addressing the protection of endangered species in relation to trade regulations and is currently having 180 parties. For comparison, the CMS has 120 parties and the CBD 194 parties. In contrast, the Bern Convention has only 51 parties,

³⁰² Bowman, M., Davies, P. and Redgwell, C., 2010, at p. 483; see further Dulvy, N., *et al.*, 2008.

however, including most European states. The main legislative organ of MEAs is the COP, in which all parties are able to act as decision-makers.³⁰³ The COP of the CITES, the CMS, the Bern Convention and the CBD meet on a biannual basis. According to Lyster, this is frequently a sign of an effective international legislative tool.³⁰⁴ The relevant COP can adopt decisions in order to amend the Appendices or acknowledge current trends and challenges.³⁰⁵ According to Article XV(1) of the CITES, Article XI(3) of the CMS, Article 16 of the Bern Convention and Article 29 of the CBD, each party present at the COP has one vote.³⁰⁶ As a rule, the COP adopts its decisions by a two-thirds majority of the parties participating in the voting. Regardless of the regular meetings, the COP of an international treaty is often not very efficient when it comes to the adoption or enforcement of the decisions. Due to the high number of parties the practice of reaching consensus between all parties is a rather difficult process as the parties try to enforce their political opinions and are often not ready to agree on compromises.³⁰⁷ This sometimes causes a significant delay in the adoption procedure adjusting the Appendices to global alarming trends relating to new scientific evidence. As an example, the COP of the CITES, *inter alia*, has recognised the necessity to adopt protective measures in relation to endangered shark species during COP15 in 2010. There, the parties discussed the listing in Appendix II of eight shark species facing extinction in case of ongoing unregulated trade with them.³⁰⁸ The COP, however, was not able to reach a consensus on the actual amendment of the Appendices and consequently the listing was unsuccessful.³⁰⁹ Three more years had to pass by until the COP eventually agreed on the listing of five of the eight endangered shark species in Appendix II.³¹⁰ During these years, the trade with the products of these shark species was not regulated by the international community, which had, according to Dulvey, *et al.*, a tremendous effect on the shark populations as especially the oceanic whitetip shark and the different hammerhead shark species were subject to increased fishing activities in order to harvest their fins and meat,

³⁰³ In general the functions of a COP see Churchill, R.R. and Ulfstein, G., 2000, at p. 626.

³⁰⁴ In line with above, Lyster stresses out that the CITES is not a sleeping MEA. As the CITES is meeting on a regular basis, he assumes that the CITES is effective in relation to the compliance of its purpose; see further Lyster, S., 1985, at p. 240;

³⁰⁵ See further Wallace, R.M.M. and Martin-Ortega, O., 2013, at p. 282.

³⁰⁶ This reflects further the principle of equality of states in terms of public international law; see for further information: Wallace, R.M.M. and Martin-Ortega, O., 2013, at p. 5.

³⁰⁷ Bowman, M, Davies, P. and Redgwell, C., 2010, at pp. 40 f; see further for general information Wallace, R.M.M. and Martin-Ortega, O., 2013, at p. 282.

³⁰⁸ Scanlon, J.E., 2013, at p. 222; See further COP15, Prop. 15-17.

³⁰⁹ Techera, E.J. and Klein, N, 2011, at p. 74.

³¹⁰ Decision 16.128.

which have significant value on the international trade market.³¹¹ Consequently, the decisions taken in order to protect sharks are not effective. Although the COP recognise new scientific evidence, they fail to adapt to changes and comply with the growing need of protection. Thus, a high number of parties does not make an international agreement effective, but rather indicates the inflexibility of the international agreement.

5.1.2 The Issue of Competing Interests

International law is shaped by the development of compromises of different interests.³¹² This is of special concern in relation to the conciliation of economic and environmental interests of individual states. In line with the principle of sustainable development, states are, hypothetically, supposed to evaluate economic, environmental and social interests equally.³¹³ However, as states often seek to promote their social and economic development rather than to support a widened protection of the environment, the parties to MEAs tend to validate economic interests higher than the interest of environmental protection.³¹⁴

As an example the assessment of measures seeking to promote the protection of shark species which are taken by states being highly involved in the trade with shark products shall be pointed out. Therefore, the reservations made by these are of considerable importance. Indonesia made reservations to the listing of, *inter alia*, the basking shark, the great white shark and the probeagle shark in Appendix II of the CITES.³¹⁵ This means that it is not bound by the categorisation of the species in Appendix II and therefore does not need to take legislative actions regulating its trade actions in relation to these species.³¹⁶ Especially the reservation of Indonesia in order to avoid the regulation of the trade with products of the basking shark is of great significance. According to the IUCN, Indonesia reported the landing of 116.820t of sharks in 2007, 15.049t of them are pelagic shark, including basking sharks, solely caught in the Pacific Ocean.³¹⁷ The report stresses out that within the decade between

³¹¹ Techera, E.J. and Klein, N., 2011, at p. 74; See further Dulvy, N., *et al.*, 2014, at p.4.

³¹² Wallace, M.M., and O., 2013, at pp. 3, 271; See further Bowman, M., Davies, P. and Redgwell, C., 2010, at pp. 78 ff.

³¹³ Schrijver, N., 2008, at p. 263 f.

³¹⁴ Bowman, M., Davies, P. and Redgwell, C., 2010, at pp. 78 ff; See further Shine, C. and Kohona, P.T.B., 1992, at p. 280.

³¹⁵ Decision 16.128.

³¹⁶ Benvenisti, E. and Downs, G.W., 2007, at p. 617

³¹⁷ Camhi, M., *et al.*, 2009, at p. 15.

1997 and 2007, the shark catches reported by Indonesia has increased by 21,6%.³¹⁸ However, these are only the reported numbers. The dark number of sharks being caught and the resulting trade with their product is hardly definable.³¹⁹ For the Indonesian economy, the export of shark products is one of the main economic sources of revenue.³²⁰ Consequently, Indonesia values its economic growth as more important than the protection of conservation of endangered shark species. This endangers the *de facto* effectiveness of the international agreement as the main players in commercial shark fisheries may not comply with the international frameworks.

Moreover, these states may refuse to insert economic valuable shark species in the Appendices of MEAs in order to exploit these further for economic reasons.³²¹ Thus, only a few species are included in the Appendices, although *e.g.* the Scientific Committee of the CMS, according to its obligation to give scientific advice under Article VIII(5)(a), testifies benefits for more than 30 species in case of their listing in the Appendices of the CMS.³²² Nevertheless, the shark fishing activities of the listed shark species has been decreasing. This is to some extent caused by the listing of some valuable, but endangered shark species, *e.g.* the basking shark, in the Appendices of the CITES and the CMS and the compliance of states with the resulting conservation measures.³²³ To promote the conservation of endangered shark species further, the inserting of more species, which face the risk of extinction; seems to be desirable.

Subsequently, an improved management of the conservation of natural resources becomes more pressing, as the competition of interests leads to compromises regarding the protection of endangered shark species. To adopt a holistic approach and to ensure an

³¹⁸ *Ibid.* According to the report, Indonesia reported in 1997 the landing of 95.998t of pelagic sharks. In 2007, the Indonesian authorities reported the landing of 116.820t of pelagic sharks. This is an increase of 21,6 % within ten years. The impact this increase has on the development and reproduction of endangered shark species remains to be seen.

³¹⁹ Lack, M. and Sant, G., 2008, at p.28.

³²⁰ *Ibid.*

³²¹ Fowler, S., 2010, at pp. 17 f. According to the analysis on the conservation status of migratory sharks the top shark-fishing countries reported from 2000-2009 measured in tonnes are Indonesia, India, Spain, Taiwan, Argentina and Mexico as well as the United States. Due to the influence of some of these states within the decision making process, it proves to be difficult to reach a two-third-majority to insert shark species into the respective Appendices.

³²² The comparability of different sharks is based on the "IUCN Red List of Threatened Species" on the basis of recorded population declines underlining the need of conservation. The list is accepted by the international community and therefore shall be referred to here; additionally one should take into account Camhi, M., *et al.*, 2009, implying the necessity of the inclusion of these species. Furthermore, the tables of Dulvy, N., *et al.*, 2008, shed light on the decline and danger of extinction of shark species.

³²³ See further Dulvey, N., *et al.*, 2008, at p. 20; the article demonstrates that the catch reports of the basking sharks, the longfin and shortfin mako as well as the porbeagle shark decreased due to the increasing protection of them under international agreements.

effective protection of endangered shark populations, the parties to the respective agreements need to validate the protection of the environment at least equally to the economic and social development.

5.1.3 The Lack of a Comprehensively Binding Regime

The conservation of shark species is a trans-boundary international obligation due to the migratory or possible migratory character of the majority of them. This makes it necessary for range states to take certain measures and co-operate with each other. Therefore, a comprehensive legally binding framework stipulating a holistic conservation of endangered shark species should be concluded. However, international law striving to protect endangered shark species has not yet evolved comprehensively.

5.1.3.1 Are MEAs Taking Full Legal Effect?

The CITES, the CMS, the CBD and the Bern Convention provide hard law obligations. The parties cannot make any reservations to the obligations arising under those as such. Thus, the Parties are supposed to comply with their international commitments established under the MEAs.³²⁴ In relation to the CBD, the parties are obliged to transpose its objectives in order to guarantee the protection of biodiversity. This includes also conservation actions in relation to shark species; see above. However, the wording of the CBD is rather broad and, therefore, allows for a wide scope of actions taken by the parties.³²⁵ Subsequently, the parties are entitled to implement legislation which complies with the international obligations with certain discretion in terms of the legislative measures adopted.³²⁶ In addition, the parties to the CITES, the CMS and the Bern Convention are not bound unconditionally by their international obligations when it comes to the compliance with COP' decisions striving to protect the listed shark species the individual states have made reservations to. This causes *de facto* ineffectiveness of the MEAs, as their operational ability depends on the acceptance of the Appendices. Consequently, the CITES, the CMS, the Bern Convention and the CBD do not take full legal effect in relation to the protection of endangered species relating to shark species, as the tools offer options and possibilities for the individual states to ease out of the comprehensive compliance with their international commitments.

³²⁴ Techera, E.J. and Klein, N., 2011, at p. 76.

³²⁵ *Ibid.*

³²⁶ *Ibid.*

5.1.3.2 The Self-Sabotage of an Effective Legal Regime

The international community has introduced several international agreements and legislative tools in relation to the conservation of endangered species. However, in spite of the many MEAs in the field of species protection and associated COP decisions in this field, there are certain issues arising relating to the large number of MEAs. The COP of the CITES, the CMS, the CBD and the Bern Convention recognise the worrying development in relation to the reduction of shark species' populations. In order to comply with the pressing demand for a regulatory framework, the international community has been showing growing effort to develop legal tools within the respective COP since they have listed several shark species in the Appendices and adopted MOU and MOC.

In these terms, *inter alia*, the Sharks MOU was adopted, which could function as an example of the overdevelopment of regulations in international environmental law. In line with the above, the parties of the CMS are under no obligation to sign and ratify the Sharks MOU. As a consequence, only 36 parties of the CMS have become party to the Sharks MOU. The MOS is, as a consequence, shaped by the lack of the major international sharks catching and trading nations, although many of these are CMS' parties. The reasons for the Sharks MOU and its Conservation Plan not being adopted broadly throughout the international community are various. On the one hand, the individual state parties to the CMS refuse to transfer their sovereign powers to another external body and therefore are not willing to adopt further legislations to comply with another international commitment. On the other hand, according to Montini, there is a "growing perception that international environmental law has become overdeveloped over the years, [which] happened in quite an uncoordinated way."³²⁷ States are unwilling to intensify their efforts in order to comply with their obligations under the MEAs. Thus, they do not anticipate positively to new regulatory frameworks, but refuse to enter these or develop existing MEAs further by amending, *inter alia*, their Appendices. This is a consequence of cross-party political unwillingness.

In addition, MEAs often do not co-operate with each other and therefore apply different scopes and obligations. The shark species which are protected under the CMS are not identically to the species the CITES or the Bern Convention seek to conserve; see above. This ceases in the unwillingness of states to enter into further negotiations resulting in

³²⁷ Montini, M., *EUI Working Papers, Academy of European Law, Revising International Environmental Law Through the Paradigm of Ecological Sustainability*, Vol. 2, 2013, at p. 2.

additional commitments under potential COP' decisions, MOU or MOC addressing shark species' conservation. Consequently, the international community has started to self-sabotage the effectiveness of their negotiated instruments in relation to the protection of endangered shark species.

5.1.3.3 The Ineffectiveness of the MEAs' Enforcement

The enforcement of the respective international treaties is another main aspect in relation to the examination of the effectiveness of MEAs striving to protect endangered shark species. The CITES, the CMS, the Bern Convention and the CBD do not provide for effective control mechanisms. The CITES' parties agreed in Article VIII(1) to take efficient measures in order to enforce the CITES' provisions in national law and prohibit and penalise illegal trade with protected species. Further, the parties should submit periodic reports on its implementation and its records of trade with species listed in the Appendices; see Article VIII(6). Similar articles can be found in the other MEAs applicable in this study. Article 26 of the CBD obliges the parties to present reports on measures which have been taken to transpose the CBD's provisions. Further, Article VI(3) of the CMS requires the range states to inform the COP through the CMS' Secretariat about the measures they have been taking in order to implement the CMS' provisions. The Bern Convention also specifies a similar reporting system in Articles 4-7. However, neither the CITES, nor the CMS, the CBD or the Bern Convention implement a mechanism actually introducing a mechanism monitoring the compliance with the MEAs and the implementation measures taken in order to enforce the international provisions. Thus, the MEAs' bodies do not have the authorisation to apply stringent sanctions on the individual parties which do not comply with their international obligations efficiently.³²⁸ These are necessary though, as, according to Bowman, in case of a state ban of the trade with a certain product "you'll soon get a thriving trade at astronomical prices."³²⁹ Thus, a flourishing black market could be established with the banned products. To undermine this effect and promote a positive impact on the *de facto* protection of endangered species under the MEA, the national law, implementing the respective international tool, needs to be enforced and controlled efficiently. To reserve negative effects as flourishing black markets, a competent monitoring authority of the Conventions could be implemented. Thus, the enforcement of the international tool on a national level could be

³²⁸ Bowman, M., Davies, P. and Redgwell, C., 2010, at pp. 110 ff.

³²⁹ Bowman, M.. 2013, at p. 232.

ensured by the imposition of sanctions against the parties in case of the failure to implement and enforce national measures.³³⁰ Consequently, the *de facto* compliance of individual parties with their international obligations could be efficient in case of the introduction of control mechanisms within the respective MEAs.

5.2 The Role of the EU in Relation to the Effectiveness of MEAs

As the EU gains more influence on the international level, its role in relation to the *de facto* effectiveness of the protection of endangered species has to be taken into consideration. The effectiveness of international legal instruments striving to protect endangered species is characterised by the adoption of legally binding tools not only on an international, but also on a national level. This Sub-Chapter will present the impact of the EU's transposition of its international obligations on the *de facto* and *de jure* effectiveness of the respective MEAs. Therefore, the interaction of the EU with the bodies of the CITES, the CMS, the CBD and the Bern Convention will be examined. Finally, the question whether the impact of the EU on the international framework is increasing with the growing number of Member States will attract attention.

5.2.1 The EU Faces Difficulties in the Application of MEAs

International agreements are an integral part of EU law.³³¹ In line with Article XVI of the CMS, Article 18 of the CBD and Article 3(1) in relation to Articles 4-7 of the Bern Convention the EU is obliged to adopt efficient legislative measures in order to transpose the respective agreements and their provisions.³³² The accession of the EU to several different MEAs and the transposition of the different provisions into national law indicate certain difficulties in terms of the applicability.

5.2.1.1 The Risk of an Insufficient Transposition

The growing number of respective agreements and the associated obligations could possibly increase the amount of legislative efforts of the EU and its Member States in relation to the

³³⁰ Ibid.

³³¹ Craig, P. and De Burca, G., 2011, at p. 338.; See further Case C-181/73 R. & V. Haegeman v Belgian State [1974] ECR 449. Further referred to as *Haegeman decision*.

³³² See further Bowman, M., Davies, P. and Redgwell, C., 2010, at p. 98.

adoption and implementation of international obligations.³³³ Many MEAs stipulating the protection of endangered species have a similar or even partially identical goal even though the material scope differs. In order to provide for the most effective framework in relation to the protection of endangered shark species, the Union adopted the Habitats Directive and the Sharks Regulation as legislative instruments, as well as the EU Shark Action Plan having no legally binding force.

The Habitats Directive combines several aspects of the CBD, the Bern Convention and the CMS as it includes the protective need of marine habitats and migratory species in its Annexes. It additionally underlines this in form of its objective, which is the general protection of endangered species and their habitats; see above.³³⁴ Consequently, the EU takes part in the adoption of effective protective measures seeking to conserve shark species in so far as its legal framework establishes conservation measures in accordance with its international obligations.

Nonetheless, the EU's transposition of its international commitments leaves open certain loopholes which could risk the *de facto* effectiveness of the taken EU's measures and as a consequence the international legal tools. Article 17(1) of the Habitats Directive requires the EU Member States to submit reports on the implementation of their measures taken under the Habitats Directive to the Commission. These reports are due every six years after the first adoption of laws, regulations and administrative provisions which are admissible to transpose the Directive in national legislation; see Articles 17(1), 23(1). The long duration in terms of the reporting system bears the risk of an inefficient implementation and consequently to ineffective conservation measures. Due to its character as a Directive, the Member States enjoy discretion concerning the form and method transposing the obligations of the Directive in national law.³³⁵ In order to provide an effective legal framework, the EU should rather seek to introduce a reporting system based on a more frequent basis.³³⁶ Thus, the EU could ensure that even though the Member States enjoy discretion, the national legislation efficiently complies with the EU's Directive.

Also, the obligation to designate SAC on a Member State's level could endanger the effectiveness of the Habitats Directive. The Member States are independent in relation to the

³³³ Oberthür, S., "Clustering of Multilateral Environmental Agreements: Potentials and Limitations", in *International Environmental Agreements: Politics, Law and Economics*, Vol. 2, 2002, pp. 317-340, at p. 318.

³³⁴ See further Oberthür, S., 2002, at p. 318.

³³⁵ Jans, J.H. and Vedder, H.H.B., 2012, at p. 143.

³³⁶ *Ibid.*

designation of SAC in their territory. If a state does not pursue to promote the protection and conservation of a certain area or species, it is under no obligation to designate the area as SAC, regardless of the potential listing of the type of area in the Annexes of the Habitats Directive.³³⁷ Consequently, the role of the EU in relation to the protection of endangered species exercised in form of the Habitats Directive could be improved in so far as to oblige the EU Member States to list certain habitats and species categorised under the Directive. This could improve the conservation of shark species as the relevant habitats could be protected as a designated SAC in national law.

In contrast, the EU Member States do not enjoy discretion in relation to the transposition of the Shark Regulation into national law.³³⁸ Nevertheless, the Member States are under the obligation to adopt actions in order to comply with reporting systems, as well as monitoring institutions. Article 6(1) of the Shark Regulation indicates the obligation to provide information to the EU's Commission in relation to the number of landings of sharks, the number and nature of cases of non-compliance with the Regulation and possibly sanctions, as well as total landings distinguished by species. In order to comply with these provisions, the Member States are supposed to implement a control system monitoring the compliance with the Shark Regulation on a national level. Moreover, the Member States are obliged to establish a competent authority carrying out the inspections which are mandatory under Article 6. The effectiveness of the reporting system, which was adopted in 2013, and the Shark Regulation as such remains to be seen, as the Member States have not submitted their reports yet. The adoption of the Shark Regulation prohibiting finning in EU waters and on vessels flying the flag of an EU Member State could, nevertheless, indicate a great step towards the strengthening of conservation measures in relation to shark species within the EU as it points the way to a complete prohibition of shark finning.

5.2.1.2 Potential Conflicts between Different Frameworks

The EU has adopted a substantial body of legislation relating to endangered species. In line with the above, the Union, *e.g.* took legislative measures to transpose the CITES into EU law although it is not formally a party to the MEA. Thus, the EU voluntarily adopted harmonising

³³⁷ *Ibid.*

³³⁸ The Shark Regulation has direct effect on the EU's Member States due to its regulatory character. Article 288 TFEU stresses that Regulations are directly binding the Member States and do not additionally need to be implemented into national law. See further Craig, P. and De Burca, G., 2011, at pp. 583 f.

legislation implementing the CITES' provisions.³³⁹ The Member States are under the obligation to comply with the EU's legislation as well as aspects of the respective international agreement provided the Member States are parties to the latter.³⁴⁰ The international and the EU's obligations may conflict with each other, though.³⁴¹ This is of particular relevance considering the applicability and effectiveness of the CITES in EU's territory. In comparison, the EU's Member States becoming party to the CITES are under the obligation to comply with it. The Union could therefore endanger the compliance of its Member States with their commitments under the MEA.

A conflict could arise between the regulation of external and internal trade managed by the EU's legislation and the obligations of the Member States relating to trade with third countries under the CITES.³⁴² The Member States could face difficulties on the international as well as the EU level in case of non-compliance with the respective obligation to comply with their commitments in form of sanctions or penalties; see, *inter alia*, Article 258 TFEU. Thus, the strong role of the EU in relation to the protection of endangered species could result in the *de facto* ineffectiveness of the international agreement. However, the Union adopted a rather strict regulatory approach in order to implement a harmonised legislation transposing the CITES into EU law and consequently within its Member States. Subsequently, the Union performs as a promoting tool of the applicability and effectiveness of the CITES, instead of jeopardising the transposition of the MEA.

5.2.2 Growing Number – Growing Impact?

Currently, the EU has 28 Member States and it is still growing as accession talks with several countries are ongoing.³⁴³ The Union acts on behalf of its Member States as party to the CMS, the CBD and the Bern Convention as a regional economic integration organisation; see above. According to the relevant provisions of the international agreements, regional economic integral organisations are entitled to the number of votes equivalent to the number of their Member States.³⁴⁴ Thus, the Union is eligible of 28 votes within the decision-making

³³⁹ Reeve, R., 2002, at pp. 115 f.

³⁴⁰ Jans, J.H. and Vedder, H.H.B., 2012, at p. 152.

³⁴¹ Oberthür, S., 2002, at p 318.

³⁴² *Ibid.*

³⁴³ Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2013-2014, COM (2013) 700 final, available on http://ec.europa.eu/enlargement/news_corner/key-documents/index_en.htm?key_document=08012624887cba0c, last accessed on 10. August 2014.

³⁴⁴ Hoffmeister, F., 2007, at pp. 45f

bodies of the CMS, the CBD and the Bern Convention. Therefore, EU's influence and voting rights on the international level increases simultaneously with its members.

This is of great significance when examining the role of the EU in relation to the Bern Convention. Additionally all EU Member States are individual state parties to the Bern Convention. The Bern Convention has currently 51 parties. With 28 Member States, the EU holds the majority of the 51 parties participating in the Standing Committee of the Bern Convention.³⁴⁵ Article 17 of the Bern Convention requires amendments to the Appendices to be adopted with a two-thirds majority of the Standing Committee. Although, the EU does not hold these two-thirds of the Standing Committee's votes, it has more than half of the votes. Therefore, within the legal framework of the Bern Convention no measure amending the Appendices can be taken without the factual consent of the EU and its Member States.³⁴⁶ Consequently, the EU is able to *de facto* veto all decisions of the Standing Committee; see further Article 17.

In general, the EU is able to strongly promote the adoption of amendments and decisions taken by the Standing Committee.³⁴⁷ This applies also to the adoption of actions which seek to conserve shark species. However, the Union decides beforehand upon its position in relation to the aspect issued by the Standing Committee. The EU Member States are under the pressure to find consensus on, *inter alia*, the amendment of the Appendices with certain species.³⁴⁸ In relation to the protection of sharks, this turns out to be difficult. Spain, Portugal and France are some of the global main actors of commercial shark fisheries. Therefore, they do not agree on the adoption of restriction of their activities in relation to shark fisheries.³⁴⁹ The determination of common grounds is difficult when it comes to the adoption of increased conservation measures relating to sharks and the restriction of actions endangering shark species' populations. Thus, the dominance of the EU within the Standing Committee of the Bern Convention could lead to inflexibility of the MEA

As the EU continues to grow reaching a consensus becomes more difficult. In terms of the protection of sharks and possible amendments of the Bern Convention's Appendices, there have been no proposals to list additional shark species yet. To reach consensus could be

³⁴⁵ See further Epstein, Y, 2014, at p. 143; See also the list of parties of the Bern Convention available on <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=104&CM=8&DF=&CL=ENG>. In Comparison to the Member States of the EU, available on http://europa.eu/about-eu/countries/member-countries/index_en.htm, last accessed on 25 August 2014.

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*

³⁴⁸ *Ibid.*

³⁴⁹ See Camhi, M., *et al.*, 2009, at p. 17; see further in general: Epstein, Y, 2014, at p. 153.

difficult, as the great EU shark fishing nations, namely Spain, France and Portugal, will most likely not agree to a proposal that could endanger their economic strength by limiting their fishing activities.³⁵⁰ However, the amendment of the Appendices requires consent which the Member States, which will, therefore, probably not agree on and thus any amendment to the Bern Convention is running the risk to fail. The EU subsequently highly influences and dominates the Bern Convention and its adjustment to environmental challenges. This could result in the *de facto* ineffectiveness of the Bern Convention as it is an inflexible instrument which is not able to support the actual protection of endangered shark species.

Moreover, the growing influence of the Union on the international level in general could have an effect on the CMS, the CBD and the CITES. The EU's increasing Member States' number leads automatically to a greater international impact as the EU represents a growing number of individual states in international agreements.³⁵¹ Even though, the Member States do not represent the majority in the CMS, the CBD and the CITES, its political actions could have influence on their applicability. The EU could make reservations to certain amendments to the Appendices and complementary provisions which are not consistent with the EU's policy. The EU would not be bound by these amendments and therefore could continue, *inter alia*, to exploit the species that they refuse to list and consequently conserve. Furthermore, the EU's large territory includes a wide marine territory inhabiting many endangered shark species. Therefore, the applicability of the international agreements within the EU's territory depends of course on the political willingness of the EU and its Member States to *de jure* and *de facto* conserve the endangered species. In case the EU denies the adoption of protective measures the impact on the marine ecosystem and the conservation of the endangered species is unforeseeable, also in relation to their development in international waters. To sum up, the EU and its Member States have a significant impact on the flexibility and the effectiveness of the MEAs, especially the Bern Convention, in relation to the protection of endangered species emphasising on sharks.

5.3 Clustering MEAs and the EU's Impact

As Montini argues, there is a growing perception of the overdevelopment of international environmental law in the international community which could result in an ineffective international and European framework in relation to the conservation of endangered

³⁵⁰ *Ibid.*; See further Shine, C. and Kohona, P.T.B., 1992, at p. 280.

³⁵¹ Craig, G. and De Burca, P., 2011, at p. 354.

species.³⁵² This study comprises international and EU's regulations aiming on the general protection of especially endangered shark species. The respective MEAs need to be taken into consideration when analysing the effectiveness of the conservation measures adopted by individual state parties to the MEAs. The high amount of different agreements leads to the obligation of the parties to comply with a variety of duties. This may lead to a normative system with obligations which are partly overlapping. This system also indicates severe gaps in the conservation measures introduced. Furthermore, the instruments lack a necessary management of co-ordination and a structured division of duties.³⁵³ States are entitled to choose which international treaties they become parties to. A state may become party to the most favourable framework which is not necessarily the most effective one.

Moreover, in relation to the conservation of shark species, the species, which the respective MEAs seek to protect, differ. In addition, the conservation measures which a state party has to take in order to comply with its international obligations also vary under the Conventions. These aspects can lead to a fragmented legislative framework in relation to the protection of endangered species.³⁵⁴ The EU has an important status in this relation. In line with the Habitats Directive and the Sharks Regulation, it strives to establish a harmonised legal framework in the EU's marine territory by stipulating a uniform protection of shark species and their habitats. The approach could be transferred into international law in order to introduce a new agenda providing for uniform harmonised conservation measures. This could ultimately result in a desirable harmonised legislative system in relation to the protection of endangered species.

One possibility facilitating for such a framework is the clustering of the respective agreements. According to Moltke, clustering in an international context can be defined as "grouping a number of international regimes together so as to make them more efficient and effective."³⁵⁵ In relation to the conservation of sharks, the CITES, the CMS, the CBD and the Bern Convention could, hypothetically, be organised to one group of international treaties in order to increase the effectiveness of these MEAs.³⁵⁶ By combining and grouping these on an international level, the double work and the conflicts arising between them could be eradicated.³⁵⁷ However, in order to actually accomplish the clustering of varying MEAs, the

³⁵² Montini, M., 2013, at p. 2.

³⁵³ *Ibid.*

³⁵⁴ Techera, E.J. and Klein, N., 2011, at p. 76.

³⁵⁵ Oberthür, S., 2002, at pp. 318 f.

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.*

respective COP, Secretariats as well as the parties themselves need to increase the inter-treaty co-operation and effective participation in the particular frameworks.³⁵⁸ The different bodies adopted MOU in order to improve the co-operation between the different instruments. In relation to the protection of sharks, the CMS and the CITES have closely co-operated when developing the Sharks MOU.³⁵⁹ There, the CITES participated actively during the negotiations between the parties of the CMS. However, the CITES has not become a Signatory to the Sharks MOU despite of the general possibility to do so; see further Section 10(30) of the Sharks MOU. Additionally, the MEAs have adopted MOC. Although the MOC between respective international tools do not evolve unconditional legally binding effects on the parties, they promote the co-operation between the Secretariats and the COP.³⁶⁰ The active participation of the respective international tool is therefore indicating the willingness to increase co-operation between the treaty frameworks in order to induce their uniform applicability and consequently support their effectiveness.³⁶¹ Subsequently, the trend of growing international co-operation is recognisable. This is necessary and desirable in order to support the clustering of MEAs dealing with the protection of endangered species in relation to sharks.

It is appropriate that the EU uses its impact, especially on the Bern Convention, in order to encourage an increased co-operation between the Bern Convention and the CITES, the CMS, and the CBD. The Union could utilise its influence arising through its constantly growing number of individual Member States within the treaty bodies to promote decisions seeking to support the co-operation between the respective MEAs further. Moreover, the Union could strive to integrate the different Appendices in order to reach a uniform listing of shark species that need to be conserved. Thus, the MEAs may end up establishing broader and possibly more efficient measures when it comes to the conservation of sharks. Therefore, the establishment of an effective international framework by clustering the agreements striving to protect endangered shark species could be supported by the EU utilising its growing powers.

³⁵⁸ *Ibid.*

³⁵⁹ Caddell, R., 2013, at p. 275; See further Techera, E.J. and Klein, N., 2011, at p. 76.

³⁶⁰ See as example: Memorandum of Co-operation, recognised in Decision III/21, "Relationship of the Convention with the Commission on Sustainable Development and Biodiversity-Related Conventions, Other International Agreements, Institutions and Processes of Relevance", published in *Report of the third Meeting of the Conference of the Parties to the Convention on Biological Diversity*, UNEP/CBD/COP/3/38, on 15 November 1996, 04-15 November, Buenos Aires.

³⁶¹ Techera, E.J. and Klein, N., 2011, at p. 77.

6 Conclusion

The importance of sharks as apex-predator for the marine ecosystem and the concerning decline in some shark populations are undeniable. The international conservation actions meant to respond to the situation of the reduction of shark populations are, however, facing some difficulties. In general, the exact determination of the development of shark species appears to be difficult as the data that has been provided by research institutions distinguish heavily due to different approaches to the topic. Moreover, an effective conservation of endangered shark species is challenged by a complicated legal environment that comprises both international agreements and EU's regulation. In this context, the thesis approached three main research questions:

Firstly, the interaction between international environmental law and EU environmental law in relation to global shark conservation measures was examined. The relevant instruments, namely the CITES, the CMS, the CBD and the Bern Convention as international tools and the Habitats Directive and the Shark Regulation as EU legislative tools, were introduced and discussed. The to some extent incomplete as well as partially overlapping character of the conservation measures under the respective tools became obvious within the examination of the tools, the relations between them and their inter-treaty co-operation. During the last decade, the international community has adopted measures addressing these issues, *inter alia*, in form of MOC and MOU that seek to promote the inter-treaty co-ordination. The Sharks MOU, adopted in 2010, is of particular relevance in this context, as it promotes the introduction of international measures to protect endangered shark species. The small number of Signatories to the Sharks MOU could reduce the applicability and effectiveness of the tool, though. Nevertheless, this needs to be awaited. Additionally, the legislative and general measures taken by the EU in order to reverse the decline in shark populations lead to the result of a growing impact of the Union within the respective MEAs.

Secondly, the effectiveness of the instruments in international environmental law regarding the protection of endangered shark species was examined. To discuss the *de facto* effectiveness of the legal tools a potential direct applicability of international instruments on EU law was discussed. Theoretically, single provisions of MEAs could be directly applicable in the EU. However, the CJEU's jurisprudence in relation to the applicability of international agreements is inconsistent. This leads to a fragmented approach in terms of the direct applicability of international provisions. The tendency appears to favour

the decrease of the direct applicability and influence of international instruments following the recent case law of the CJEU in form of the *Intertanko case* and the *Slovak Brown Bear case*. Nevertheless, the EU but is highly influenced by international environmental law.

In addition, the cross-party political unwillingness to adjust the international legislative tools to current challenges in relation to the conservation of endangered shark species was pointed out. The main global shark fishing nations refuse to adopt COP' decisions which aim at the strengthening of the regulatory framework relating to shark protection. The thesis analyses this aspect on the example of Indonesia and its flourishing shark fishing activities. This development results in the inflexibility and consequently ineffectiveness of the MEAs.

Keeping this in mind, finally, the EU's obligations improving the effectiveness of international as well as EU's legislative tools were addressed. The Union's influence on the international level increases continuously as more states are accessing. Thus, the EU represents more individual states and is able to culminate the individual Member States' votes to a uniform position concerning the negotiation and evolvement with MEAs. The Union's impact in relation to the Bern Convention is especially significant. Currently 28 of the 51 parties are EU Member States enjoying the majority of votes in its Standing Committee. The EU should utilise its growing power on the international stage to counteract the lack of co-operation and promote the convergence of the respective instruments. However, the EU suffers internal disputes as three major global shark fisheries nations, Spain, Portugal and France, do not approve political changes in relation to the increased shark protection within the EU or international agreements. Nevertheless, the EU should advocate the increase of the adjustments to current alarming trends, the applicability and therefore effectiveness of the legal tools. Consequently, the EU could have a great impact on the development of international environmental law.

The study concluded with a recommendation on how to address the arising difficulties in order to obtain the most effective approach in international and EU environmental law relating to endangered shark species. The proposed solution suggests to cluster the CITES, the CMS, the CBD and the Bern Convention to enhance the co-operation between the respective treaties and diminish regulatory gaps between them. To promote this development and to encourage further co-operation, it is essential that the EU uses its impact on the negotiation and implementation of MEAs, especially in relation to the Bern Convention. If the EU becomes more aware of its increasing impact and complies with its international

obligations, it could possibly support a very effective international and EU regulatory framework in relation to endangered shark species.

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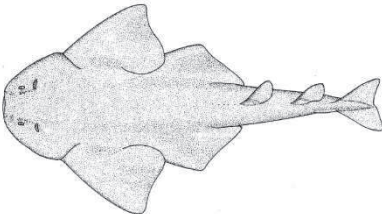
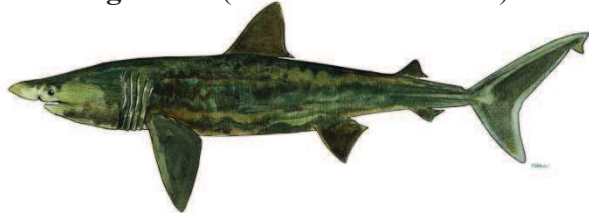

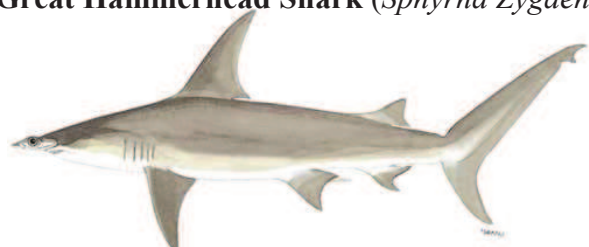

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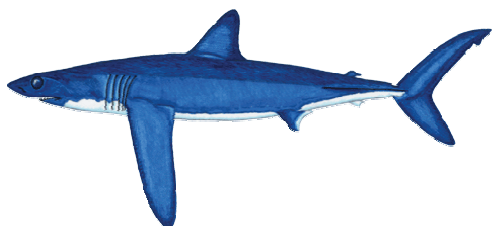
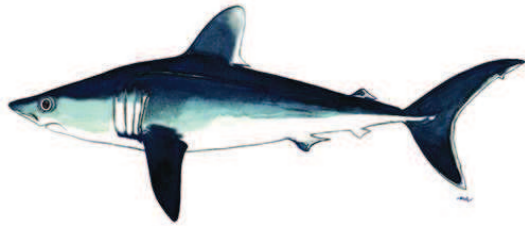



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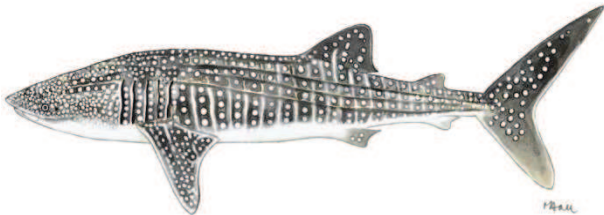
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Annex

Species	Size	MEA
Angelshark (<i>Squatina Squatina</i>)  Graphic: http://www.sharkacademy.com/images/fao/squa79.JPG	< 200 cm	The Bern Convention: Appendix III
Basking Shark (<i>Cetorhinus Maximus</i>)  Graphic: http://cites.org/eng/prog/shark/sharks.php	< 1200 cm	The CITES: Appendix II The CMS: Appendix I, II The Bern Convention: Appendix II
Blue Shark (<i>Prionace Glauca</i>)  Graphic: http://bigsharks.com/meet-the-sharks-gallery/2012/5/9/blue-shark.html	< 380 cm	The Bern Convention: Appendix III
Great Hammerhead Shark (<i>Sphyrna Zygaena</i>)  Graphic: http://cites.org/eng/prog/shark/sharks.php	< 600 cm	The CITES: Appendix II
Great White Shark (<i>Carcharodon Carcharias</i>)  Graphic: http://cites.org/eng/prog/shark/sharks.php	< 640 cm	The CITES: Appendix II The CMS: Appendix I, II The Bern Convention: Appendix II The Sharks MOU: Annex I

<p>Longfin Mako (<i>Isurus Paucus</i>)</p>  <p>Graphic: http://www.elasmobranch-research.org/education/shark_profiles/i_paucus.htm</p>	< 430 cm	The CMS: Appendix II The Sharks MOU: Annex I
<p>Porbeagle Shark (<i>Lamna Nasus</i>)</p>  <p>Graphic: http://cites.org/eng/prog/shark/sharks.php</p>	< 355 cm	The CITES: Appendix II The CMS: Appendix II The Bern Convention: Appendix III The Sharks MOU: Annex I
<p>Oceanic Whitetip Shark (<i>Carchaerhinus Longimanus</i>)</p>  <p>Graphic: http://cites.org/eng/prog/shark/sharks.php</p>	< 300 cm	The CITES: Appendix II
<p>Scalloped Hammerhead Shark (<i>Sphyrna Lewini</i>)</p>  <p>Graphic: http://cites.org/eng/prog/shark/sharks.php</p>	< 370 cm	The CITES: Appendix II
<p>Shortfin Mako (<i>Isurus Oxyrinchus</i>)</p>  <p>Graphic: http://floridasharkbait.blogspot.com/2010/05/shortfin-mako.html</p>	< 440 cm	The CMS: Appendix II The Bern Convention: Appendix III The Sharks MOU: Annex I

Smooth Hammerhead Shark (<i>Sphyrna Mokarran</i>)  Graphic: http://cites.org/eng/prog/shark/sharks.php	< 400 cm	The CITES: Appendix II
Whale Shark (<i>Rhincodon Typus</i>)  Graphic: http://cites.org/eng/prog/shark/sharks.php	< 1200 cm	The CITES: Appendix II The CMS: Appendix II The Sharks MOU: Annex I