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4. Fisheries and Marine Mammals

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Published in:
Yearbook of International Environmental Law

DOI:
[10.1093/yiel/yvab013](https://doi.org/10.1093/yiel/yvab013)

Published: 06.12.2021

Document Version
Publisher's PDF, also known as Version of record

Citation for published version (APA):
Kirchner, S. (2021). 4. Fisheries and Marine Mammals. *Yearbook of International Environmental Law*, 31/2020.
<https://doi.org/10.1093/yiel/yvab013>

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4. Fisheries and Marine Mammals

Concerning the protection of marine mammals, the past year exposed regulatory needs that are still unmet: the COVID-19 pandemic and the associated reduction of marine traffic made it possible to conduct research into the effect of noise on cetaceans. It has long been known that noise harms whales, a concern that has been confirmed recently. In late 2019, the explosive removal of unexploded ordnance in the Baltic Sea during a military exercise off the coast of Germany was thought to have caused the deaths of at least eighteen harbour porpoises, leading to more attention for the issue in Europe. In addition to such single events, noise pollution at sea in general poses a risk to the well-being of marine mammals. This includes noises from the regular operation of ships as well as noises caused by seismic tests that are conducted in the exploration of hydrocarbon deposits at sea. The impact of noise on marine mammals is not a new issue in international environmental law; indeed, it was already addressed in international regulation in the 1990s—for example, in the Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS) and the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS), which were concluded in 1992 and 1996 respectively. Under ACCOBAMS, ASCOBANS, and the Convention on the Conservation of Migratory Species of Wild Animals (CMS), a working group on human-made noise was established and has been active for some time.

As climate change makes the Arctic ocean more accessible, marine traffic along the Northern Sea Route is increasing (albeit still at a very low level, compared to other main shipping routes). Already today, the significant cargo traffic transporting raw materials—in particular, hydrocarbons from the Russian port of Sabetta to China, South Korea, or Japan—leads to increasing traffic. Despite the pandemic, cargo traffic between Asia and Europe remains significant and the Arctic cruise tourism boom might restart if the threat posed by COVID-19 can be countered effectively in the near future. What used to be the outer limit of Indigenous fishing and hunting areas is, more and more, becoming a tourist destination and a source of natural resources. Overall, it appears likely that traffic volume in the Arctic will grow and, with it, noise pollution. The International Agreement to Prevent Unregulated Fishing in the High Seas of the Central Arctic Ocean (Central Arctic Ocean Fisheries Agreement) limits fishing in the high seas part of the Arctic Ocean, but the protection of the marine fauna in the Arctic region remains limited, even though the 1973 Agreement on the Conservation of Polar Bears marked the starting point for the international cooperation to protect Arctic wildlife. While fish are somewhat protected, increasing marine traffic in the Arctic will have an impact on marine mammals in the region. As water temperatures rise due to anthropogenic climate change, not only fish stocks, like mackerel, but also marine mammals, like orcas, are expanding their ranges northward.

As marine traffic increases in areas that used to provide some refuge for whales, habitats are shrinking. In 2008, the geographical scope of ASCOBANS was expanded beyond the North Sea and the Baltic Sea to include the Irish Sea and the North-East Atlantic and an expansion of the geographical scope of ASCOBANS, or the creation of a similar instrument for the Arctic, should be considered. Regulation can contribute significantly to the protection of marine mammals against noise pollution. Speed limits at sea—as have been imposed, for example, in the Pelagos Sanctuary in the Mediterranean Sea for ships that lack the technical ability to detect marine mammals and avoid collisions—reduce not only noise but also the risk of collisions between ships and cetaceans. The COVID-19 lockdowns this year also impacted the movement of pleasure craft. In connection with reduced traffic due to the first lockdown early in the year, a change in the behaviour of marine mammals in the Mediterranean Sea could be detected as marine mammals returned to areas that they had avoided earlier. The past year has revealed the urgency of the creation of expanded rules—not only with regard to ship emissions but also concerning seismic surveys, which continue to be a major source of noise pollution at sea. The transition away from hydrocarbons to renewable energy, therefore, also contributes to the protection of marine mammals. Increasing regulation at the level of the International Maritime Organization (IMO), following the Pelagos Sanctuary model, will be needed for the foreseeable future. Here is a real regulatory gap that had to be filled.

The IMO has come under heavy criticism due to its perceived lack of action (or the slow speed of any reaction) in connection with the *Wakashio* oil spill in the waters off Mauritius. The vessel's voyage data recorder was reported to not have contained an audio recording, despite the requirement of Chapter 5, Regulation 20 of the Safety of Life at Sea Convention. Effectively protecting marine mammals will require not only stricter rules for ship operations but also their effective enforcement by flag states. The need to rethink flag state supervision of vessels has become rather acute in the past year, not least due to the mistreatment of seafarers and health risks on board ships in connection with the pandemic. New technical developments, such as satellite technology, should be taken into account in considering monitoring of compliance,

On a positive note, marine mammal by-catch was tackled more aggressively when the United States National Oceanic and Atmospheric Administration (NOAA) established import criteria. After 31 December 2022, foreign importers of fish into the United States will need to have a certification by NOAA showing that their respective states have rules in place in their domestic legal systems that are comparable to the domestic standards for the prevention of marine mammal by-catch in the United States. Due to the COVID-19 pandemic, the deadline to apply for a finding of comparability by NOAA was extended until 13 November 2021. Given the size and relative attractiveness of the US market, this can have a positive impact. While national regulators can serve as trailblazers, in the long run international standards will be required that will also have to take into account the large markets elsewhere. The measures taken by NOAA can be seen as a step in the right direction when it comes to limiting marine mammal by-catch.

This regulatory measure also highlights the need for holistic approaches to the protection of marine life. Protecting marine life, which in the parlance of the international law of the sea is mainly perceived as marine living resources, is not restricted to the ocean. Large parts of marine pollution have their origins on land—for example, in the form of fertilizer runoff or industrial pollution affecting waterways. Anadromous and catadromous fish species, such as salmon or eel, are doubly affected by pollution of rivers and seas. Also, other migrating animals require protection that goes beyond the confines of national borders. The CMS as a regulatory tool has been well used in this regard as a number of species, such as white-tipped

sharks, were added to the list of protected species during the 2020 meeting of state parties to the CMS, and it is expected that migratory species will be given significant attention during the 2021 meeting of state parties to the Convention on Biological Diversity. The long-term move in the protection of the marine environment away from borders and zones towards habitats and ecosystems is paving the way for a more holistic approach in environmental law. Such a holistic approach to the protection of the natural environment can be connected to the 'One Health' concept, which links human health, animal health, and the protection of the natural environment, and which has gained more attention due to the zoonotic nature of COVID-19. In the same context, the destruction of habitats and the loss of biodiversity have been noted as issues that can affect humans directly. Also at sea, biodiversity is under threat. Climate change plays a particularly important role in this regard as the water temperature in the oceans is rising as well. By 2020, it was thought that the temperature had already risen approximately 1.5 degrees Celsius from the level of the pre-industrial era. This also affects fish and marine mammals. In addition, plastic pollution of the seas continues a problem that directly threatens marine life—in particular, marine animals, which ingest plastic particles or floating plastic bags. While some efforts are underway—for example, by the European Union (EU)—the continued reliance on disposable plastic packaging in many parts of the world continues to worsen the problem. Here, too, 2020 has made the problem more visible. Specific action will have to come from nation states.

In the context of fisheries and marine mammals, it has to be feared, though, that commercial concerns will trump conservation motives. For example, hundreds of Steller sea lions and California sea lions were killed legally under US law in the past year. The killing was approved in order to protect the salmon population in the Western states of the mainland United States. A more complete view of the marine ecosystem could have prevented these killings. Also last year, Norway hunted over one hundred whales, more than in recent years. There is, however, no longer a domestic market for the amount of whale meat produced there. Domestic regulation failed here through inaction and because the whale meat producers in Norway, in an effort to delay the collapse of the ailing industry, have made maximum use of the permitted hunting and are forced to export their products to the Faroese, Iceland, or Japan. A struggling industry based on the killing of sentient marine mammals is kept alive artificially and whale meat is reported to be used for dog food or animal feed, including animal feed for the fur industry. Like in the case of industries that are being phased out due to the fight against climate change, such as the coal industry, the whale hunt for industrial purposes (rather than for subsistence and to ensure food security, such as practiced by some indigenous communities in remote parts of the Arctic), which is already becoming economically unfeasible, will eventually have to follow the example of the coal industry in many countries and will have to provide for a fair and just transition to other careers for the people still employed in this field. 'Business as usual' is only delaying the inevitable—at an enormous cost to marine mammals.

But while Norway at least regulates the hunt for marine mammals, unregulated hunting is becoming a growing problem—for example, off the coast of West Africa. During last year's CMS conference of parties in Gandhinagar, India, the state parties to the CMS agreed on an action plan against unregulated hunting of marine mammals, also referred to as 'aquatic bushmeat.' The problem is not limited to West Africa and can also be encountered in the Caribbean and elsewhere, especially turtles, which lack protection under the domestic laws of many countries (with the notable exception of the United States). Like in the case of whaling, the hunt for aquatic wild meat is distinct from Indigenous subsistence hunting. The latter is undertaken within a wider legal framework, while the former is illegal, unreported, and unregulated. Here, too, is an urgent need for action on the part of nation states. Where fisheries

are regulated, overfishing remains a serious problem. Demand for fish continues to grow in the long term, and it seems likely that any reprieve marine animals won this year due the pandemic will only be short-lived. The increasing importance of fisheries could also be seen towards the end of the year when fishing became a serious issue of contention in the talks between the EU and its former member state, the United Kingdom, concerning the future relationship between the EU and the United Kingdom after the post-Brexit transitional period ended at the end of 2020. In the meantime, the United Kingdom and Norway have already concluded a fisheries agreement, while, in early 2021, the EU allocated fishing quotas for the waters around Norway's Svalbard archipelago, where Norway has declared a fisheries protection zone but not an exclusive economic zone. Fisheries will remain a 'hot' political topic also in years to come—but likely, more than ever before, not for environmental reasons but for commercial reasons. While developments regarding the protection of biodiversity are somewhat promising, this year did not see major progress towards the solution of problems that are becoming more and more visible.

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doi:10.1093/yiel/yvab013