

Exporting Conservation: Going Abroad with U.S. Marine Mammal Protection

by A.L. Pannell

INTRODUCTION

Marine mammal protection in the U.S. has been largely successful since the Marine Mammal Protection Act of 1972 (MMPA). In the last 18 years, marine mammal deaths incident to fishing and recreation have decreased significantly, while populations of marine mammals have grown. Many species of seals and sea lions in particular have seen tremendous growth. A few species of whales have shown improvement as well. The recovery of the California grey whale from near extinction in 1890 (*see*, Scharff at 346) to an estimated population of 18,000 in 1988 (U.S. Dept. of Commerce - NMFS, Marine Mammal Protection Act of 1972, Annual Report 1987/88, Table 9), has increased hope that other whale species may recover also.

In contrast to these partial successes, it is distressing to note how inadequate protection is outside U.S. waters. The great whales and many other cetaceans (dolphins, porpoises) are still killed in relatively high numbers due to continued whaling practices and mammal-endangering fishing methods. Few countries voluntarily regulate their impacts on these mammals. Consequently, their numbers decline each year.

Ensuring the survival of marine mammals requires the cooperation of all the world's fishing and whaling nations, including the U.S., Japan, Korea, and the Soviet Union. The international community must enact a world-wide multi-species protection program. While voluntary compliance by individual nations is preferable, trade incentives may be useful in promoting an international agreement. This article examines how the MMPA could be used in conjunction with other legislation to provide a framework for exporting the United States' marine mammal protection policies.

I. THE MARINE MAMMAL PROTECTION ACT OF 1972 (MMPA)

The MMPA was one of a number of innovative conservation packages enacted in the late-60s and early-70s. The legislature responded to a public outcry

over the highly emotional details of the tremendous slaughter of porpoise in the tuna industry, the appalling clubbing deaths of baby fur seals for their still-white pelts, and the predicted impending extinctions of a number of whale species. The resulting statutes provide wide protection, departing from the previously prevalent focus on a single factor, region, or species.

The MMPA provides for a blanket moratorium on the "taking" of all marine mammals. "Take," for purposes of the act, means "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." (16 U.S.C. § 1362 (1988).) Taking incorporates disturbance of habitat (50 C.F.R. § 17.3 (1989)), but not leasing of tracts for oil or mineral exploration. (*State of Calif. v. Watt*, 520 F.Supp. 1359 (1981).)

The moratorium may be lifted in limited ways if the stock or species is considered healthy. Determining a species' health is based on the somewhat enigmatic concept of "optimum sustainable population" (OSP). OSP is defined as

the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat, and the health of the ecosystem of which they form a constituent element. (16 U.S.C. § 1362 (1988).)

A species or population is declared "depleted" if it is below its OSP, or it is endangered under the Endangered Species Act. (16 U.S.C. § 1531 *et seq.* (1988).) OSP was a marked improvement over the previous "Maximum Sustainable Yield," which represented the number of animals a population could lose (usually to whaling or hunting) and still survive.

This shift in focus onto the health, rather than the potential exploitation, of a species and increased emphasis on the ecosystem represented a significant change in U.S. conservation policy. In addition, the MMPA was the first national conservation program aimed at marine mammals as a group. Previous efforts were generally limited to single-species protection.

The MMPA, as a management rather than pure conservation act, features some major exceptions to marine mammal protection. Intentional takes for scientific research, public display, and species promotion, are allowed with approval from the Marine Mammal Commission. Additionally, "aboriginal" peoples in Alaska are granted whaling and hunting privileges for subsistence purposes and native handicraft use. (16 U.S.C. § 1371 (1988).)

The aboriginal exception has been highly criticized for allowing "depleted" mammals to be taken. Although bowhead whales are both depleted and endangered, Alaskan natives are allowed to harvest up to 35 a year, based upon a quota set by the International Whaling Commission (IWC). (MMPA Annual Report at 13.) A number of other Alaskan marine mammal populations which natives may use for subsistence and handicrafts are also depleted, including the Pribilof Island fur seal and Northern (Stellar) sea lion. (*Id.* at 27.)

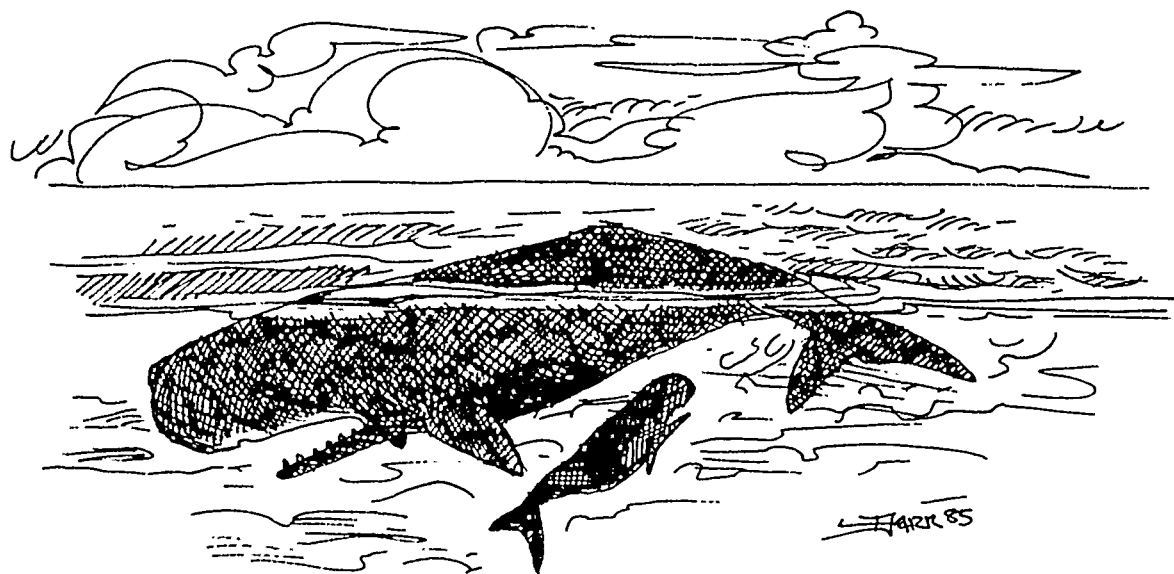
Incidental takes are allowed under a permitting system for commercial fisheries, and a small take permitting program for activities other than commercial fisheries. (16 U.S.C. § 1371 (1988).) The Secretary of Commerce grants 5-year permits authorizing incidental takes of nondepleted marine mammals as long as those takes have only a negligible impact. Small-take permits are limited to a specified geographical area.

These exceptions add flexibility to the Act, allowing for minor takings. However, caution is

required to keep takings low. Although the MMPA mandates a zero dolphin kill quota in the tuna industry, the U.S. quota today remains at 20,500 takings annually. Declining populations despite limited takings are disconcerting. However, while exceptions in the MMPA are limiting, they also strengthen its support by allowing for some lenience for those who frequently interact with marine mammals. Strong in its goals but flexible in its method, the MMPA provides a ready framework on which to build an international program.

II. CAN UNILATERAL ACTION LEAD TO INTERNATIONAL CONSERVATION?

Single nation conservation programs are inherently limited in scope. The MMPA is even more vulnerable because of the large number of highly migratory marine mammals, the number of influences on the marine environment (fishing, whaling, pollution, transportation, recreation, oil and mineral exploration, seismic activity, and formerly underwater nuclear warhead detonation), and the inadequacy of information on marine mammals and the marine environment in general. Critics of domestic policy have pointed out the international nature of the cetacean problem, which cannot be solved by unilateral U.S. action. However, insistence by one nation on a course of action may foment an international conservation program. International single-species marine mammal protection has been attempted in this manner, but with limited success.



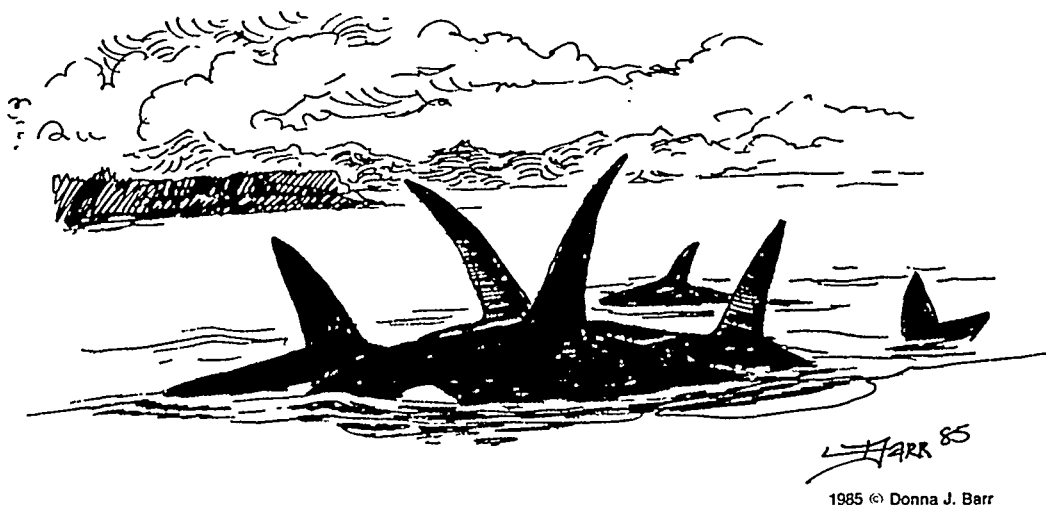
For example, the polar bear is one of the many species of marine mammals requiring protection. The U.S.S.R. unilaterally initiated polar bear protection in 1956. The U.S. followed with the passage of the MMPA in 1972. In 1973, Canada, Denmark, Norway, the U.S., and the U.S.S.R. signed the Agreement on the Conservation of Polar Bears, essentially banning intentional kills of polar bears within their entire habitat. (Kindt at 16.) Numerous exceptions weaken this protection, such as intentional kills permitted for aboriginal use or scientific study, and incidental kills. Other weaknesses in protection result from inadequate enforcement, incomplete information, and the effects of pollution. However, the overall effect of the Agreement has been to afford polar bears greater protection.

The Northern Pacific or Pribilof fur seals are also managed by an international agreement stemming from a single nation's policy; however, this agreement also affords only limited protection. A unilateral nondiplomatic U.S. seizure of Canadian sealships in 1886 led to a bilateral agreement between the two nations between 1892 and 1911, and later evolved into an international convention. (Travalio & Clement at 214-220.) In spite of this convention, according to the National Marine Fisheries Service (NMFS) (the agency primarily responsible for implementing the MMPA) the Pribilof Island population of Northern Pacific fur seals "declined from about 2.2 million in the 1950s to 800,000" in 1988. (MMPA Annual Report at 27.) A

commercial harvest by the U.S. between 1957 and 1984, allowed under the Interim Convention on Conservation of Fur Seals, was discontinued only after Congress declined to renew the convention, and after it was found that domestic law did not allow the hunt. The species was declared depleted under the MMPA in June of 1988. (*Id.* at 24, 27.)

Since 1946, whales and whaling have been regulated internationally under the International Convention on the Regulation of Whaling (ICRW). The ICRW's initial intent was to promote whale stocks for the benefit of the whaling industry. The priority of the IWC, formed by the ICRW to determine policy, shifted from whaling to conservation in the mid-1970s as individual nations began to prohibit whaling and to protect marine mammals. (Haskell at 555.) In 1982, after a ten-year debate sparked by U.S. passage of the MMPA and a UN subcommittee resolution, the IWC finally agreed to a three-year ban on whaling beginning in 1986. (Smith at 557.) The IWC, however, still suffers from its initial priority of promoting whaling. Any member nation may escape being bound by IWC regulations by formally objecting to them, (*id.* at 559) and may continue its whaling practices without sanction.

Cetaceans caught by the tuna industry present a formidable problem. For some unknown reason, yellowfin tuna often swim below pods of porpoise in the Eastern Tropical Pacific (ETP). Aware of this,



fishermen employ purse-seine nets to surround the porpoise. The nets are then drawn together at the bottom, so that the net is open only at the surface of the water. This practice of "setting on mammals" yields large amounts of desirable yellowfin tuna at a low-cost, but takes an enormous toll on the dolphins.

Dolphin mortality in the purse-seine tuna fishery has also been regulated transnationally. In order to reduce takings as mandated by the MMPA, the U.S. enlisted the aid of the Inter-American Tropical Tuna Commission (IATTC), a group founded by the U.S. and Costa Rica in 1950 to preserve marine resources for the benefit of the tuna industry. (Kindt at 7.) Despite the obvious conflict of interests between the tuna industry and marine mammal protection, the IATTC provides observers and training for observers. The IATTC has also overseen improvement of fishing gear and techniques which decrease mammal takings in the ETP yellowfin tuna fishery. During an initial two-year exemption in the MMPA for the tuna industry, dolphin mortalities were decreased by 60 percent. (Levin at 572.) However, the U.S. kill quota for this industry still remains at 20,500, with up to 103,000 killed by foreign nations. (MMPA Annual Report at 7.) These quotas do not ensure the safety of the marine mammal populations involved, and are nowhere close to the zero quota projected by the MMPA in 1972.

These examples show that while domestic activity can spark international conservation attempts, success is quite limited. Past attempts often failed to protect individual species and did nothing for marine mammals as a group. What is needed is a comprehensive program that recognizes and values marine mammals as a valuable part of the ecosystem.

III. INTERNATIONALIZING DOMESTIC MARINE MAMMAL PROTECTION

A successful marine mammal protection program must meet four goals: 1) effective conservation planning (taking into account external impacts on marine mammals and their environment, and the needs of different species); 2) consistent implementation and enforcement; 3) reliable verification of compliance with planning measures; and 4) adequate research and reevaluation of marine mammal and environmental health, so that planning may adapt to the changing needs of marine mammal stocks. The MMPA and

supporting legislation provide a good framework for expanding to an international protection program. Strengthening U.S. policy in the four areas discussed above increases the chance of successfully protecting mammals in the international arena.

A. Policy Formation and Planning

The MMPA has strong policy goals. It begins with an assumption that marine mammals have aesthetic, recreational, and economic value, that our knowledge of them is inadequate and should be expanded, and that

population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part.

(16 U.S.C. § 1361 (1988).) Such a broad and unequivocal policy statement has profound implications.

It has been argued that the difficulty in making an international marine mammal agreement with a nation such as Japan lies in the different ways marine mammals are perceived -- are they wildlife or a food source? (Zimmerman at 257.) Japan, in addition to its current "scientific" whaling, increasingly harvests smaller cetaceans in large-scale operations. Of the estimated 105,000 Dall's porpoise, Japan harvested 41,000 in 1988 and 29,000 in 1989; the meat is sometimes fraudulently marketed as whale meat. (Mulvaney at 11.) Japan clearly considers cetaceans a highly exploitable resource. The MMPA's policy directives acknowledge that marine mammals may be considered an economic resource, but insist that their value to the ecosystem is paramount to their economic value. While this may offend conservationists who believe in protection on a purely moral ground, it may also lead to greater international cooperation with countries such as Japan; simply ignoring Japan's concerns would accomplish nothing.

Domestic U.S. marine mammal policy has been criticized for its aboriginal subsistence and scientific research exceptions. While these exceptions have been approved both domestically and internationally (by the Endangered Species Act (16 U.S.C. § 1539 (1988) and the ICRW), conservationists claim that these exceptions are often abused. Japan uses scientific and aboriginal claims to escape IWC quotas on whal-

ing. (Zimmerman at 278-9.) Aboriginal whaling in Japan is conducted from motor boats; the meat, allegedly for subsistence, is sold in national markets. (*Id.* at 279 fn.131.) These exceptions must be more clearly defined to prevent abuses, or international marine mammal protection will fail.

B. Enforcement

Enforcing marine mammal protection standards, however, is the primary difficulty the U.S. must overcome. The moratorium on takes is applicable to foreign vessels only if they are within the U.S. Exclusive Economic Zone (EEZ), a 200-mile zone contiguous with the U.S. coastline. Consequently, the U.S. has relied on supplemental legislation, such as the Pelly Amendment, and threatened to cut off exports to the U.S. and foreign fishing rights within U.S. waters when nations do not meet U.S. standards for marine mammal conservation. However, this legislation does not affect countries which do not export to or fish in the U.S., or ships which fly the "flags of convenience" of such nations. In addition, judicial interpretation has jeopardized this legislation.

The Pelly Amendment, enacted in 1971, was an attempt to encourage foreign countries to comply with international fishery conservation measures, such as the International Convention for Northwest Atlantic Fisheries (which Denmark was violating by overfishing North American Atlantic Salmon). (*Id.* at 269 fn. 75.) It created a process by which the Secretary of Commerce would certify nations which had "diminish[ed] the effectiveness" of international conservation measures. Major violations of IWC whaling quotas were specifically determined to "diminish the effectiveness" of the ICRW. (Smith at 566.) After certification, the President would have the option of applying sanctions to restrict a nation's fishing rights and exports to the U.S. (22 U.S.C. § 1978 (1988).) This authority, however, was never exercised.

Frustrated by the President's unwillingness to sanction five nations (Japan, the U.S.S.R., Chile, Peru, and the Republic of Korea) certified by the Secretary between 1971 and 1978 for clear violations of the IWC's whaling quotas (Zimmerman at 271), Congress enacted the Packwood Amendment to the Fishery Conservation and Management Act (FCMA) in 1979. The Packwood Amendment required sanc-



tions reducing by fifty percent the fishing rights of all nations certified under the Pelly Amendment. (16 U.S.C. § 1821 (1988).)

The Packwood Amendment was weakened, however, when in November 1984, the Secretary of Commerce negotiated a compromise with the Japanese *Charges d'Affaires* in Washington, agreeing not to certify Japan for its whaling if Japan promised to be bound by future IWC regulations. (*Japan Whaling Association v. American Cetacean Soc.*, 478 U.S. 221 (1986).) In an action by conservation groups demanding Japan's certification for its scientific whaling proposal, the Supreme Court held that under FCMA, the Secretary has discretion to certify Japan based on whether he believes future compliance is in accord with the goals of the Pelly and Packwood Amendments. (*Id.*) This effectively canceled the effect of the Packwood Amendment and left enforcement of international marine mammal protections to administrative discretion. However, after two more lawsuits and pressure by conservation groups, in January 1988 the U.S. government finally certified Japan for its scientific whaling. (MMPA Annual Report at 36.)

In a more successful enforcement of MMPA standards, Alaskan fishermen brought suit protesting the Secretary's grant of a permit to the Federation of Japan Salmon Fisheries Cooperative to take nondepleted marine mammals (Dall's porpoise) when depleted marine mammals (including Northern fur seals) would also be taken. (*Kokechik Fishermen's Ass'n v. Sect'y of Commerce*, 839 F.2d 795 (D.C.Cir., 1988).) The court of appeals held that the MMPA prohibited issuance of a permit without a determination of whether the populations of protected mammals were depleted. (*Id.*) As a result, the Federation did not fish for salmon in the U.S. EEZ in 1988. (MMPA Annual Report at 35.)

The U.S. must increase its willingness to impose sanctions if its marine mammal protection policy is to be implemented internationally. For example, 1988 amendments to the MMPA initiated a comparability program for dolphin mortality in the ETP yellow-fin tuna industry which requires foreign nations to reduce their dolphin kill rate (measured in mammals "taken" each time a net is set) to no more than 1.25 times that of the U.S. fleet. (16 U.S.C. § 1371 (1988).) As a result, on October 18, 1990, a Federal judge declared that Mexico could not export tuna into the U.S. because its dolphin take was too high. (*Nightly Business Report* (PBS television broadcast, Oct. 18, 1990).)

Enforcement may be difficult, especially if it involves a large number of nations. It is estimated that several nations will not comply with a United Nations ban, scheduled to begin in 1992, on drift net fishing, a practice which ensnares up to 120,000 marine mammals annually in the North Pacific Ocean. ("Deadly Secret of the Deep," *Greenpeace* Nov.-Dec. 1990, at 17-18.) However onerous, unilateral enforcement is necessary if the U.S. is sincerely committed to international marine mammal conservation. Active enforcement under the Pelly Amendment and the creation of further sanctions could provide the incentives for compliance. Conservation standards are impotent without the credible threat of enforcement.

C. Verification

While sanctions may compel foreign nations to respect conservation efforts, enforcement requires valid evidence of violations. Verification procedures provide this evidence. Verification also keeps the public

aware of the compliance with or defiance of marine mammal regulations. One verification method is the observer program.

The observer program of the MMPA is a critical element of the Act. To ensure compliance with U.S. fishing standards, including those protecting marine mammals, fisheries with "frequent incidental taking of marine mammals" must have 20-35 percent of its fishing activities watched by on-board observers. (16 U.S.C. § 1383a (1988).) Within the U.S. EEZ, 100 percent of foreign fishing vessels must have observers. (50 C.F.R. § 611.8 (1989).) These observers, provided by both the NMFS and the IATTC, ride along on the fishing vessels and note the number of mammals taken. Boats with observers often report 6-10 times more marine mammal mortalities than boats without observers. (Levin at 584.) Currently, observers cover 100 percent of the U.S. ETP tuna industry, and only 33 percent of the foreign fleet. (Telephone interview with Brenda Killian of Earth Island Institute (Oct. 4, 1990).) Increased observation of the foreign fleet is vital because of the overwhelming number of casualties believed caused by these vessels.

Verification also increases American awareness of foreign compliance. Although American tuna companies announced in early 1990 that all future tuna would be "dolphin-safe," Earth Island Institute has been able to verify only two of those companies. (*Id.*) In fact, as recently as mid-September 1990, one American tuna company had its own purse-seine fishing boat in the ETP, calling into question the reliability of that company's claim of "dolphin-safe" tuna. (*Id.*) The Dolphin Protection and Consumer Information Act currently before Congress addresses false advertising claims of "dolphin-safe" products.

The MMPA also requires verification by importing nations. The Secretary of Commerce has the power to ban imports from any nation unless it submits "reasonable proof" that the fishing standards used in catching the fish did not exceed the U.S. standards for avoiding injuring marine mammals. (16 U.S.C. § 1371 (1988).) However, Japanese canneries which pack tuna for American companies merely require a signed letter from the tuna boat skipper to label a product "dolphin-safe." ("Anatomy of a Victory," *Greenpeace*, Nov.-Dec. 1990, at 4.) Clearly, relying upon the word of tuna boat captains, to whom the conservation measures are economic burdens, is insuffi-

cient to guarantee mammal safety. Objective, or pro-mammal, programs like the observer program would be more effective.

D. Research and Re-Evaluation

Successful marine mammal protection also requires a greater understanding of marine mammals and the marine environment as a whole. Kill quotas based upon inflated population estimates seriously endanger those populations. "Small take[s]" in recreation and oil-gas exploration under the MMPA must be shown to be insignificant, or the small take exemption must be reexamined. Ascertaining true population estimates and acquiring accurate information of man's influence on the marine ecosystem are central to the success of marine mammal conservation.

Numerous governmental, international, and charitable organizations conduct marine mammal research. However, the marine environment remains a mystery. Often, population estimates are based upon incomplete data. Also, ascertaining the effects of various events, such as oil spills or the recent plague affecting Atlantic dolphins, may take several years. In addition, conclusions may be highly speculative. Historically, this uncertainty has led to greater exploitation rather than less (M'Gonigle at 123), so this inadequacy of information is critical.

We must increase our knowledge of marine mammal populations if we hope to reform conservation policy. In the case of the Pribilof fur seals, management techniques were insufficient, so passive conservation measures (a ban on takes and cancellation of a state-sponsored commercial hunt) were enacted. In the case of West coast sea otters, taking prohibitions failed to increase populations, so active conservation measures were initiated. These included reintroducing sea otters to a previously abandoned habitat in the Santa Barbara Channel islands. In the case of the Hawaiian monk seal, expanding protected habitat was required. Because the marine environment is so varied, marine mammal policies must be flexible and adaptive to meet the changing requirements.

CONCLUSION

Although international agreements protecting single species of marine mammals have occurred, they have generally failed, compromised by flaws within

the agreement and the influence of unanticipated factors. Having experienced relative success domestically with the multi-species MMPA, the U.S. should use the program to export its standards for protection.

Relying on domestic sanctions on fishing imports and fishing rights will help encourage substantive international programs to protect all species of marine mammals. The U.S. also must enforce the standards of its current international program and initiate further international cooperation. In addition, we must expand our marine mammal research efforts, so that policies will meet the changing needs of marine mammals. Multi-species international marine mammal conservation has begun, but its success depends on the conviction of individual nations, such as the U.S., and their willingness to back convictions with economic weapons.

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Ariane Pannell is a first year law student at King Hall. She graduated from U.C. Santa Barbara and plans to specialize in environmental law.

Fisheries Management in the Northwest Atlantic: An Analysis of Canadian and American Policies

by Dawn Andrews

INTRODUCTION

In the past, fishermen considered the oceans' resources limitless. All nations, including Canada and the U.S., treated these fishing resources as common property; operating on a first come, first served basis and considering the ocean fisheries open resources with no need for management (common property approach). This mindset persisted internationally until World War II. After World War II, distant water fishing fleets with a tremendous capacity for catching and processing fish began appearing in the Northwest Atlantic. (Lamson, p.27.) These fleets with their large fishing capacities caused ocean resources in the Northwest Atlantic to diminish, giving the first sign of trouble.

A group of nations, including the U.S. and Canada, established the International Convention for the Northwest Atlantic Fisheries (ICNAF) in 1949, in an attempt to responsibly cooperate for resource protection, conservation and research. (Lamson, p.3.) However, the convention's lofty goals of protection, conservation and research failed due to its lack of regulatory measures and enforcement abilities. The Northwest Atlantic's valuable fishery resources needed stronger management policies to survive.

I. EVOLUTION OF FISHERIES MANAGEMENT

International management policies for fisheries have evolved from the common property concept. The concept of a commonly held, publicly owned resource allows free access and inspires open competition, rewarding people for individual effort. However, this free-for-all system, devoid of management, sets up the phenomenon known as the "Tragedy of the Commons." (Keen, p.4.)

The tragedy of the commons occurs when fish stocks decrease and prices increase, so that fishermen make the same amount of money from fewer fish. Fishermen then increase their efforts in order to catch the fewer available fish. Since the fishery resource is common property and the fishermen have no investment in its preservation, it collapses under the pressure of a first come, first served industry and is either depleted to unsustainable levels or destroyed.

Prior to the "new law of the sea," established at the United Nations Third Law of the Sea Conference (UNCLOS III)(discussed below), fisheries management evolved in two phases. The first phase of management consisted of maintaining the resource at a