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The Marine Mammal Protection Act and International Protection of Cetaceans: A Unilateral Attempt to Effectuate Transnational Conservation

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The Marine Mammal Protection Act and International Protection of Cetaceans: A Unilateral Attempt to Effectuate Transnational Conservation

ABSTRACT

This Note examines how the United States has used the Marine Mammal Protection Act to further international protection of cetaceans—dolphins, porpoises, and whales. The author first reviews the manifold reasons for protecting cetaceans. The author next describes the international operation of the Act as amended in 1984 by surveying those sections that have an impact on United States relations with other states and the regulations and cases that implement those sections. The author concludes that these restrictions have produced a decline in porpoise mortality, although more can be done. The author next describes the successes of the Act's treaty program. Several cetacean species are listed in a protective treaty as endangered, resulting in a prohibition on international trade in those species and their products. United States efforts have produced an international moratorium on whaling. The author continues by examining the 1988 Amendments to the Act. Under the amendments, many restrictions on commercial fishers have been lifted on an interim basis to give the United States Secretary of Commerce enhanced flexibility in dealing with both domestic and foreign fishing fleets. Tuna fishers, however, who pose a danger to porpoises, face even more stringent restrictions than previously, thus holding the Act true to its primary purpose. Finally, the author concludes that, although the Act has had some success, Congress has often been unwilling to impose economic burdens on fishers, and even in many instances when Congress has acted strongly, the executive has been lax in enforcement.

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I. INTRODUCTION

Congress passed the Marine Mammal Protection Act of 1972¹ (MMPA or Act), in reaction partially to threats of extinction of whales by whalers,² and especially to the incidental killing of porpoises by the United States tuna fleet purse-seining³ in the Pacific Ocean.⁴ These

1. Pub. L. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. §§ 1361-1407 (1988)).

2. See 16 U.S.C. § 1361(1) (1988); see also Recent Development, *Congress Amends the Marine Mammal Protection Act*, 62 OR. L. REV. 257, 258-59 (1983).

3. Purse-seining is a practice of fishers who take advantage of the fact that, in the eastern tropical Pacific Ocean, yellowtail tuna swim beneath schools of certain species of dolphins and porpoises. The fishers set their nets around the porpoises to trap the tuna. Many of the porpoises become entangled in the nets and are drowned. This practice is often referred to as setting "on" or fishing "on" the cetacean at issue. See Levin, *Toward Effective Cetacean Protection*, 12 NAT. RESOURCES LAW. 549, 562-64 (1979); Scarff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment* (pt. 1), 6 ECOLOGY L.Q. 323, 379 (1977). For a more detailed account of the effects of a purse-seining set on dolphins, see Brower, *The Destruction of Dolphins*, THE ATLANTIC, July 1989, at 35, 37.

According to one eye-witness, "These dolphins are rounded up with helicopters, explosives and speed boats. They are literally bombed into submission, captured in mile-long nets . . ." Transcript, *West 57th: Pacific Dolphins: Slaughter at Sea*, at 9 (CBS television broadcast, Apr. 1, 1989) [hereinafter *West 57th*] (statement of Sam LaBudde). On

mammals continuously face serious menaces. By the mid-1970s, whalers had reduced the world's number of whales from approximately 3.9 million to approximately 2.1 million.⁵ In the 1960s, whalers were particularly destructive, killing two or three times more whales than they had killed in any previous decade.⁶ Dolphins and porpoises were also endangered; when Congress enacted the MMPA, purse-seining for tuna was causing the death of over 250,000 porpoises each year.⁷ According to a 1988 estimate, since the 1960s, a total of six million porpoises were killed in purse-seining operations.⁸ In 1989, tuna fishers were still killing three hundred dolphins each day.⁹

In 1981, Congress amended the MMPA to correct some of its technical and linguistic inadequacies¹⁰ and to address the development of new fishing techniques that might lessen porpoise mortality.¹¹ In 1984, Con-

the other hand, some United States tuna fishers have gone to great lengths to prevent porpoise kills. Chris Croft, a government observer and marine biologist testifies, "I saw men trying to make a living and doing everything they could to keep from killing one dolphin. I've seen them swimming in the nets at night with sharks and trying to release as many dolphins as possible." *Id.*

4. Recent Development, *supra* note 2, at 259. For support for the proposition that the primary motivation for the Act was the deaths of porpoises in the nets of tuna fishers, see *American Tunaboat Ass'n v. Baldrige*, 738 F.2d 1013, 1014 (9th Cir. 1984); *Committee for Humane Legislation, Inc. v. Richardson*, 414 F. Supp. 297, 306 (D.D.C. 1976); *Brower, supra* note 3, at 38; *Zimmerman, Baldrige/Murazumi Agreement: The Supreme Court Gives Credence to an Aberration in American Cetacean Society III*, 14 B.C. ENVTL. AFF. L. REV. 257, 267 n.64 (1987). Although *Richardson* was revised on appeal, the United States Court of Appeals for the District of Columbia Circuit recognized that Congress enacted the MMPA to address porpoise mortality. *Committee for Humane Legislation, Inc. v. Richardson*, 540 F.2d 1141, 1144 (D.C. Cir. 1976).

5. Scarff, *supra* note 3, at 330; see *Kindt & Wintheiser, The Conservation and Protection of Marine Mammals*, 7 U. HAW. L. REV. 301, 323-27 (1985) (species-by-species review of the decline in whale populations).

6. Levin, *supra* note 3, at 560.

7. Scarff, *supra* note 3, at 379. Some put the estimates as high as 400,000 porpoise deaths per year. Levin, *supra* note 3, at 565.

8. *Drive to Stop Killing by Tuna Fleets is Given New Impetus*, *Christian Science Monitor*, Apr. 14, 1988, at 3, col. 1 [hereinafter *Drive to Stop*]; *Brower, supra* note 3, at 38. Six million is a conservative figure because the official estimates do not account for porpoise deaths from other causes, such as exhaustion and shark attacks. *Id.*

9. *West 57th, supra* note 3, at 9.

10. Recent Development, *supra* note 2, at 265-71.

11. *Id.* at 272-74. Between the 1972 enactment of the MMPA and 1977, porpoise deaths dropped from about 300,000 per year to about 27,000 per year because of improved fishing techniques. *Kindt, A Summary of Issues Involving Marine Mammals and Highly Migratory Species*, 18 AKRON L. REV. 1, 7 (1984). By 1980, this figure had further decreased to approximately 15,000. Recent Development, *supra* note 2, at 273.

gress again amended the Act in recognition of the prominent place foreign fleets had gained in the tuna industry.¹² Although foreign tuna fishers were responsible for only two percent of the tuna catch in the year before the MMPA's enactment, by the mid-1970s, the percentage was climbing rapidly.¹³ By the late 1980s, only sixteen percent of canned tuna came from the the United States tuna fleet.¹⁴ It is noteworthy that tuna fishing is not the only danger to dolphins and porpoises; for example, porpoises are also taken incidentally in Japanese salmon gill-net fisheries and in shark-net fisheries in Uruguayan waters.¹⁵ In November 1988, Congress again amended the MMPA to address the needs of both fishers and porpoises.¹⁶

This Note addresses the relation of the MMPA to international protection of cetaceans—dolphins, porpoises, and whales.¹⁷ Part II examines the importance of cetaceans and explores reasons for their protection. Part III discusses those sections of the Act as amended in 1984 that address international activities and the actions of the United States to enforce and comply with those sections. Part IV examines the 1988 amendments and considers their possible impact.

II. THE VALUE OF CETACEANS

The MMPA protects cetaceans and other marine mammals because they are "resources of great international significance, esthetic and recreational as well as economic."¹⁸ Other writers have set forth ecological,

Research and development, however, has slowed and has not produced any major developments since the late 1970s. Brower, *supra* note 3, at 58.

12. *Drive to Stop*, *supra* note 8.

13. Kindt & Wintheiser, *supra* note 5, at 347.

14. Croft, *America's Favorite Fish Tainted by Porpoise Deaths*, Los Angeles Times, Apr. 17, 1988, § V, at 3, col. 1, 6, col. 2.

15. Scarff, *supra* note 3, at 380.

16. *See infra* notes 223-25 and accompanying text.

17. Cetaceans are divided into two suborders: mysticeti (baleen whales) and odontoceti (toothed whales). These suborders roughly correspond to the categories generally used by the whaling industry—large cetaceans (whales) and small cetaceans. There is an overlap; sperm whales, which are odontocetes, are considered large cetaceans whereas pygmy right whales, which are mysticetes, are grouped as small cetaceans. Dolphins and porpoises are odontocetes. Scarff, *supra* note 3, at 329 & n.8.

18. 16 U.S.C. § 1361(6) (1988). This subsection reads in full:

[M]arine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and

scientific, moral, and ethical reasons for protecting cetaceans.¹⁹ These reasons are examined below.

A. Economic Value

Cetaceans have direct and indirect economic value.²⁰ Today, whales are used principally as a food source for both animals and humans.²¹ In 1972, the worldwide market for whale products was approximately \$100 million.²² At the same prices, a maximum sustainable harvest from undepleted stocks would have been worth approximately \$500 million.²³

Economic reasons also are used to justify the slaughter of small cetaceans by the fishing industry. At its peak, the United States tuna fleet employed 6,800 workers directly and 21,000 workers indirectly; another 10,000 individuals worked in tuna canneries.²⁴ The 1.5 billion cans of tuna produced in 1975 were worth \$820 million.²⁵ By 1989, the United States tuna industry was bringing in \$2 billion a year.²⁶ The Japanese and others in the South Pacific, North Atlantic, Black Sea, and West Indies eat dolphins and porpoises for an economical source of protein.²⁷ Fishermen in several parts of the world claim cetaceans interfere with their activities.²⁸ A market for live dolphins has also developed;

stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat.

Id. Some criticize this approach as protecting cetaceans for humanity's sake rather than for the sake of the cetaceans themselves. *See, e.g.,* Levin, *supra* note 3, at 577.

19. *See infra* notes 46-47, 52-67 and accompanying text.

20. For example, whale oil has been used for lamp fuel, margarine, candles, perfume, cosmetics, lipsticks, cold creams, crayons, textile oils, watch oil, printing ink, shampoo, soap, suntan oil, wax, and intercontinental missile lubricants. Scarff, *supra* note 3, at 341; Smith, *The International Whaling Commission: An Analysis of the Past and Reflections on the Future*, 16 NAT. RESOURCES LAW, 543, 544 n.11 (1984); Comment, *Enforcement Questions of the International Whaling Commission: Are Exclusive Economic Zones the Solution?*, 14 CAL. W. INT'L L. J. 114, 118 & n.37 (1984).

21. Scarff, *supra* note 3, at 341; Comment, *supra* note 20, at 118. Baleen whale meat, nutritious and considered "an excellent alternative" to beef, is eaten chiefly by humans. Scarff, *supra* note 3, at 341 & n.64.

22. Scarff, *supra* note 3, at 342.

23. *Id.*

24. Levin, *supra* note 3, at 561.

25. *Id.*

26. *West 57th*, *supra* note 3, at 10.

27. Coggins, *Legal Protection for Marine Mammals: An Overview of Innovative Resource Conservation Legislation*, 6 ENVTL. L. 1, 5 (1975).

28. Fishermen off the Florida coast complain that dolphin interference with fishing for Spanish and king mackerel, bluefish, pots, and pompano costs them approximately

Europeans have allegedly paid as much as \$23,000 for a healthy dolphin and price tags of \$5,000 to \$10,000 are commonplace.²⁹

Significantly, many experts claim that there are non-consumptive substitutes for most if not all cetacean by-products.³⁰ Economically, non-consumptive uses of cetaceans may outweigh consumptive uses. In 1976, a conservative estimate of the value of non-consumptive uses of all marine mammals was over \$225 million.³¹ While the assertion that "[t]he [tuna] industry is *as concerned as the public* in reducing marine mammal taking by the tuna fleet"³² may be an over-statement, the continued vitality of porpoises is important to tuna fishers because porpoise depletion potentially increases the difficulty of locating tuna.³³

B. *Ecological and Scientific Value*

The continued deliberate hunting and allowance of incidental deaths of cetaceans risks extinction of the species without full recognition of the ecological consequences.³⁴ Cetaceans generally breed only within biogeographically distinct groups known as population stocks. Once a stock is depleted within a geographical area, hundreds to thousands of years may elapse before that species reinhabits that area.³⁵ This depletion could result in "non-natural" evolution that might wreak havoc on the world's ecosystem.³⁶

Research on whales is difficult.³⁷ In the past, dead whales were the only source of scientific information.³⁸ Even though scientists now study live whales, basic information is still hard to acquire; the size of whales makes their study in captivity unfeasible, and their migrations over long

\$440,000 a year. Dolphins and killer whales also interfere with fishing in the Mediterranean and in the Pacific and Indian Oceans. Kindt & Wintheiser, *supra* note 5, at 343-44.

29. Levin, *supra* note 3, at 586.

30. For example, the jojoba, an easily cultivated desert shrub, produces "sperm oil." Travaglio & Clement, *International Protection of Marine Mammals*, 5 COLUM. J. ENVTL. L. 199, 204 n.31 (1979).

31. Scarff, *supra* note 3, at 342.

32. Recent Development, *supra* note 2, at 274 (emphasis added).

33. Levin, *supra* note 3, at 564; Kindt, *supra* note 11, at 18.

34. Travaglio & Clement, *supra* note 30, at 205.

35. Scarff, *supra* note 3, at 334-35.

36. *Id.* at 385-86.

37. Travaglio & Clement, *supra* note 30, at 205 n.38.

38. *Id.* Ironically, one of the reasons the Soviet Union and Peru gave for opposing the International Whaling Commission's moratorium on whaling was that it would hamper whale research. Comment, *supra* note 20, at 127 n.125.

distances make research very expensive.³⁹

Cetaceans are also of great interest to the scientific community for what they can teach us, about both themselves and humans. Cetaceans, especially dolphins, have long been considered highly intelligent.⁴⁰ Cetaceans, alone among animals, have brains of greater size and more convolutions—the measure of potential intelligence—than humans,⁴¹ but scientific investigation into their mental development is still in its early stages.⁴² Scientists have studied the long distance communications of fin whales⁴³ and contend that increased understanding of the respiratory adaptations of deep-diving whales may produce data capable of human utilization.⁴⁴ Scientists hope that additional understanding of whales and their relationships to their ecosystems will contribute to the field of sociobiology.⁴⁵ Dolphins have advanced scientific knowledge of mammalian physiology, neuroanatomy, and psychology.⁴⁶ From their place at the top of the ocean's food chains, small cetaceans are also good indicators of marine pollution.⁴⁷

C. *Recreational and Aesthetic Value*

Some writers assert that cetaceans are so unique that no further justification for their conservation is required.⁴⁸ Whales have long appealed

39. Comment, *supra* note 20, at 124 n.101. Most whale population studies base their figures on sightings (live whales actually seen and counted), markings (the identification of individual whales previously counted), and catch effort (a formula devised to reflect numerically the effort required to catch and kill whales). *Id.* at 127 n.122.

40. *Id.* at 119. High cetacean intelligence was recognized as early as 1671. *Id.*

41. *Id.* at 119 n.46. Cetaceans have had brains of this size almost thirty million years longer than humans. Travaglio & Clement, *supra* note 30, at 206.

42. Comment, *supra* note 20, at 119.

43. Scarff, *supra* note 3, at 343.

44. *Id.*

45. *Id.*

46. *Id.* at 377.

47. *Id.*

48. See, e.g., Kindt & Wintheiser, *supra* note 5, at 365. Dr. Victor Scheffer, former Chairman of the United States Marine Mammal Commission, writes:

Whales are different. They live in families, they play in the moonlight, they talk to one another, and they care for one another in distress. They are awesome and mysterious. In their cold, wet, and forbidding world they are complete and successful. They deserve to be saved, not as potential meatballs but as a source of encouragement to mankind.

Scarff, *supra* note 3, at 385 n.350 (quoting Scheffer, *The Status of Whales*, 29 *PACIFIC DISCOVERY* 2, 8 (1976)).

to artists and sculptors.⁴⁹ Today, hundreds of thousands of fascinated persons turn out in California and South America to watch whale migrations.⁵⁰ A pair of commentators phrased the aesthetic justification: "A world with diminishing natural beauty and wonder left to preserve should require substantial returns before sacrificing any of these unique and lovely forms of life."⁵¹

D. Moral and Ethical Reasons for Protection

Great minds have long considered the killing of cetaceans morally offensive.⁵² Some writers postulate that our ability to justify conservation on moral grounds may depend on the species's similarity to humans⁵³ or some other shared identity with the species.⁵⁴ Other writers propose that humans are not alone in their possession of self-consciousness and in their abilities to reason and to express themselves creatively.⁵⁵ Evidence of cetacean brain size and convolutions⁵⁶ suggests that cetaceans may share at least some of these "human" characteristics.⁵⁷ Cetaceans possess many distinct human attributes.⁵⁸ They are peaceful, playful, able to communicate both within their own species and with other marine mammals, and they form strong family and social units.⁵⁹ Cetaceans also seem to sense a unique relationship with mankind; they teach their young that humans are special and not to be injured.⁶⁰

Some argue that deliberate extinction is morally wrong because it un-

49. Scarff, *supra* note 3, at 343.

50. *Id.* at 342.

51. Travaglio & Clement, *supra* note 30, at 205.

52. In the second century A.D., a Greek poet wrote:

The hunting of dolphins is immoral, and that man can no more draw nigh the gods as a welcome sacrificer nor touch their altars with clean hands but pollutes those who share the same roof with him whoso willfully devises destruction of dolphins. For equally with human slaughter the gods abhor the deathly doom of the monarchs of the deep.

Scarff, *supra* note 3, at 383 n.341 (quoting Oppian of Cilicia).

53. *Id.* at 384 n.342.

54. Smith, *The Endangered Species Act and Biological Conservation*, 57 S. CAL. L. REV. 361, 377 (1984).

55. Levin, *supra* note 3, at 552.

56. See *supra* note 41 and accompanying text.

57. See Ridgway, *Physiological Observations on Dolphin Brains*, in DOLPHIN COGNITION AND BEHAVIOR: A COMPARATIVE APPROACH 31 (R. Schusterman, J. Thomas & F. Wood eds. 1986).

58. Travaglio & Clement, *supra* note 30, at 207.

59. *Id.* at 206-07.

60. *Id.* at 207.

necessarily deprives future generations of resources that potentially carry benefits not yet discovered.⁶¹ They claim that such destruction represents and further increases a devaluation of life generally, accompanied by an insensitivity to the suffering of other life forms.⁶²

The values emphasized above, however, are rather anthropocentric.⁶³ The elemental, non-human-centered, ethical arguments focus on the irreversible nature of total extinction of a unique life form;⁶⁴ this is morally wrong regardless of any effect on humanity.⁶⁵ Extinction permanently interrupts the cycle of life and death by leaving a void in the earth's interconnected biological community.⁶⁶ Some commentators even perceive human-created extinction as playing God: "Whatever the Nature of the Creator he surely did not intend that the forms on which he bestowed the gift of life should be exterminated by man."⁶⁷

III. THE INTERNATIONAL ASPECTS OF THE MARINE MAMMAL PROTECTION ACT

All aspects of the MMPA arguably transcend the boundaries of the United States. Because cetaceans frequently migrate into and out of United States territorial waters,⁶⁸ a taking—even inside United States waters—could easily have an impact on international relations. More frequently, much of the United States activity that harms cetaceans takes place on the high seas. Those activities, however, are beyond the scope of

61. Scarff, *supra* note 3, at 381; Smith, *supra* note 54, at 376.

62. Smith, *supra* note 54, at 376-77. Biologist Sam LaBudde observes, "[I]t bodes very poorly for the direction of our society and maybe for the future of our planet if we cannot even adopt a nurturing attitude toward a species as special in the hearts and minds of the American people as the dolphins." *West 57th*, *supra* note 3, at 12.

63. See, e.g., Brower, *supra* note 3, at 56 ("It's a little narcissistic of us, isn't it, to value dolphins because of [their intelligence].").

64. Smith, *supra* note 54, at 380.

65. Travalio & Clement, *supra* note 30, at 206; Scarff, *supra* note 3, at 381.

66. Senator Alan Cranston observes:

[T]he death of a species is profound, for it means nature has lost one of its components, which played a role in the interrelationship of life on earth.

Here the cycle of birth and death ends. Here there is no life, no chance to begin again—simply a void.

To cause the extinction of a species, whether by commission or omission, is unqualifiedly evil. The prevention of this extinction, thus, must be a tenet among man's moral responsibilities.

Scarff, *supra* note 3, at 381 n.326 (quoting 116 CONG. REC. 17,198 (1970) (statement of Sen. Cranston)).

67. *Id.* (quoting G. SMALL, *THE BLUE WHALE* 213 (1971)).

68. Kindt, *supra* note 11, at 9.

this Note. The focus here is on the requirements of the Act that affect United States relations with other states.

A. *The Restrictions of the Marine Mammal Protection Act*

1. The Moratorium

The MMPA provides for a moratorium on the taking and importation of cetaceans and cetacean products.⁶⁹ The Act defines "moratorium" as a "complete" prohibition on such taking and importation.⁷⁰ There are, however, important exceptions to the moratorium. The United States Secretary of Commerce may issue permits⁷¹ for taking or importation if certain conditions specified in the Act are met.⁷² A party may take or import cetaceans for research or public display provided an application for a permit is reviewed by both the Marine Mammal Commission (MMC) and the Committee of Scientific Advisors on Marine Mammals and provided both bodies find that granting the permit is consistent with the purposes of the Act.⁷³ If these bodies recommend the requested action and the Secretary approves importation, the importer receives a certificate to present to customs officials.⁷⁴

The Act allows the incidental taking of cetaceans in commercial fishing operations pursuant to regulations and permits, but it grants the United States Secretary of the Treasury the power to ban the importation of fish or fish products caught in such operations if the technology used results in cetacean deaths or injuries that exceed the numbers allowed by United States standards.⁷⁵ The government of the fish exporting state must supply "reasonable proof" of the effects of its fishing technology on cetaceans to determine whether a party has met the United States standards.⁷⁶ If yellowfin tuna caught through purse-seining in the

69. 16 U.S.C. § 1371(a) (1988). According to the Act, "[t]he term 'take' means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." *Id.* § 1362(12). The MMPA does not define importation. *See id.* § 1362.

70. *Id.* § 1362(7).

71. For a more detailed description of the permit requirements, see *infra* part III, section A.4.

72. 16 U.S.C. § 1371(a). The United States Department of Commerce administers the part of the MMPA that governs cetaceans. Recent Development, *supra* note 2, at 261. For a discussion of the conditions under which taking or importation is allowed, see *infra* notes 73-81 and accompanying text.

73. 16 U.S.C. § 1371(a)(1). For a statement of the purposes and policies of the MMPA, see *id.* § 1361.

74. *Id.* § 1371(a)(1).

75. *Id.* § 1371(a)(2).

76. *Id.* § 1371(a)(2)(A).

eastern tropical Pacific are imported, the government of the exporter must meet a further two-part test by producing "documentary evidence" that it has regulations governing incidental takings of cetaceans comparable to the United States program and that those regulations have produced an average incidental taking rate comparable to that of United States vessels.⁷⁷

In conformity with the purposes and policies of the Act, the Secretary, in consultation with the MMC, may waive the requirements of the moratorium section, promulgate regulations, and issue permits if the "best scientific evidence available" suggests that this is proper.⁷⁸ Even under this subsection, however, importation is not allowed if the exporting state does not have a program certified as consistent with the purposes of the MMPA.⁷⁹ Importation from a non-certified state is not allowed even if the product is imported merely to be processed for exportation.⁸⁰ Only scientific researchers may take or import depleted species during the moratorium.⁸¹

2. The Prohibitions

The MMPA contains several prohibitions. Unless provided in a treaty to which the United States is party, no one may take a cetacean within United States territorial jurisdiction or use any place within United States territorial jurisdiction for any purpose connected with cetacean taking or importation.⁸² Those subject to United States jurisdiction may not take cetaceans on the high seas,⁸³ yet, even United States citizens may take cetaceans in the territorial waters of another state.⁸⁴ In *United States v. Mitchell*, the United States Court of Appeals for the Fifth Circuit struck down a National Marine Fisheries Service (NMFS) regulation that prohibited, without geographical restriction, all subjects of United States jurisdiction from violating the Act.⁸⁵ The court noted that Congress had the authority to pass legislation controlling the conduct of citizens within foreign territory⁸⁶ but determined that the con-

77. *Id.* § 1371(a)(2)(B).

78. *Id.* § 1371(a)(3)(A).

79. *Id.*

80. *Id.*

81. *Id.* § 1371(a)(3)(B); *see supra* notes 71-73 and accompanying text (limits on taking and importation by researchers).

82. 16 U.S.C. § 1372(a)(2) (1988).

83. *Id.* § 1372(a)(1).

84. *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977).

85. *Id.* at 999, 1005.

86. *Id.* at 1001.

spicuous absence of such a restriction in the presence of controls over activities within United States territory and on the high seas meant that Congress had decided that the activity should go unregulated.⁸⁷ Finding that the nature of the MMPA does not require extraterritorial application and that there is implicit congressional intent not to do so, the court reversed Mitchell's criminal conviction for taking dolphins in Bahamian waters.⁸⁸

Except as permitted for scientific research, a party may not import cetaceans if the cetaceans are pregnant, are nursing or are less than eight months old when taken, are taken from a depleted species or population stock, or are taken in an inhumane manner.⁸⁹ At least one court has strictly interpreted these restrictions. In *Animal Welfare Institute v. Krops*,⁹⁰ the United States Court of Appeals for the District of Columbia Circuit invalidated a waiver of the moratorium that allowed the importation of underage and nursing marine mammals.⁹¹ The court held that the age requirement refers to individual marine mammals, not groups or populations of marine mammals, and noted that while a few of these marine mammals are still imported accidentally, blatant importation is forbidden.⁹² On the issue of the nursing restriction, the Government tried to draw a distinction between obligatory and convenience nursing. But the court found that the nursing prohibition was not enacted to maintain populations as the Government's position implied; rather, the prohibition served "as a measure of infancy, of vulnerability and [of] helplessness."⁹³ The court considered the statute an emotional rather than scientific enactment aimed at stopping actions considered "intolerably cruel."⁹⁴ In so doing, the court strictly construed the statute according to its plain meaning.⁹⁵ Although *Animal Welfare Institute* dealt with sealskins,⁹⁶ it may well serve as precedent for cetacean cases.

87. *Id.* at 1004.

88. *Id.* at 997, 1002-03.

89. 16 U.S.C. § 1372(b) (1988). The only apparent limits on such importations by scientific researchers are those imposed by section 1371(a)(1). *See supra* notes 71-73 and accompanying text.

90. 561 F.2d 1002 (D.C.Cir. 1977), *cert. denied sub nom.* Fouke Co. v. Animal Welfare Institute, 434 U.S. 1013 (1978).

91. *Id.* at 1014.

92. *Id.* at 1011.

93. *Id.* at 1011-12.

94. *Id.* at 1012.

95. *Id.* ("The statute is plain; it bars importation of any animal which was 'nursing at the time of taking.' [W]e [refuse] to narrow the unambiguous command of the statute. . . .").

96. *Id.* at 1004.

A party may not import cetaceans if they are taken in violation of the exporting state's laws,⁹⁷ if the animal from which a cetacean product is made is illegal to import, or if the sale of the product is illegal in the exporting state.⁹⁸ If fish are caught in a manner impermissible to those subject to United States jurisdiction, a party may not import these fish regardless of whether cetaceans were actually taken when the fish were caught.⁹⁹

3. The Regulations

The United States Secretary of Commerce is empowered to prescribe regulations concerning the taking and importing of cetaceans.¹⁰⁰ The Secretary is directed to promulgate species-specific regulations which may focus even on a single population stock.¹⁰¹ Consistent with the purposes of the Act, the regulations shall insure that species and population stocks are not disadvantaged.¹⁰² The Act provides several factors that the Secretary may consider when prescribing the regulations.¹⁰³ These factors include the possible effects of the regulations on

- (1) existing and future levels of [cetacean] species and population stocks;
- (2) existing international treaty and agreement obligations of the United States;
- (3) the marine ecosystem and related environmental considerations;
- (4) the conservation, development, and utilization of fishery resources; and
- (5) the economic and technological feasibility of implementation.¹⁰⁴

The Act also provides a non-exhaustive list of possible regulatory restrictions concerning various factors: (1) the number of cetaceans taken or imported pursuant to permits; (2) the age, sex, size, or any combination thereof of cetaceans taken or imported, even if the regulations do not prescribe a quota for the species; (3) the time period in which cetaceans may be taken or imported; (4) the manner of taking; (5) the location where cetaceans may be taken or imported; and (6) fishing techniques causing excessive kill rates of cetaceans.¹⁰⁵ Prior to or concurrently with notification of an intention to prescribe regulations, the Secretary must

97. 16 U.S.C. § 1372(c)(1) (1988).

98. *Id.* § 1372(c)(2).

99. *Id.* § 1372(c)(3).

100. *See id.* §§ 1372(c)(3), 1373(a).

101. *Id.* § 1373(a).

102. *Id.*

103. *Id.* § 1373(b).

104. *Id.*

105. *Id.* § 1373(c).

publish statements of the estimated level of the species and population stocks in question, of the anticipated impact of the regulations on those species and stocks, and of the evidence on which the regulations are based, as well as any studies commissioned by the Secretary or recommendations of the Secretary or the MMC relating to the regulations.¹⁰⁶

The National Oceanic and Atmospheric Administration (NOAA)¹⁰⁷ through NMFS has promulgated highly detailed regulations. Although some are simply reiterations of portions of the MMPA,¹⁰⁸ most of the regulations go beyond the Act and specify how to execute it. For example, one regulation gives NMFS enforcement powers, although by agreement it may act in coordination with other federal agencies or with officials from the states and territories.¹⁰⁹ In a crucial section, the regulations set forth the conditions that allow a party to import fish caught under circumstances where incidental takings of cetaceans are likely to occur.¹¹⁰

The regulations forbid the importation of certain fish caught under circumstances in which regulations required a United States citizen to have a certificate of inclusion in a general permit—even if no cetaceans were actually taken¹¹¹—unless it was found that, although the specific United States requirements were not met, only comparable rates of incidental mortality and serious injury were achieved.¹¹² This prohibition covered fishing for yellowfin tuna, salmon, and halibut.¹¹³ Yellowfin Tuna Certificates of Origin and bills of lading from all states whose flag vessels were involved in catching the tuna in question had to accompany all yellowfin tuna imports.¹¹⁴ The Yellowfin Tuna Certificate of Origin had to include (1) the fishing vessel's state of origin; (2) the identities and addresses of the exporter and consignee; (3) the identity and quantity of the tuna being imported; (4) the names of the fishing vessels; (5)

106. *Id.* § 1373(d).

107. Recent Development, *supra* note 2, at 261.

108. Compare 50 C.F.R. § 216.11(a)-(b) (1988) with 16 U.S.C. § 1372(a)(1), (a)(2)(A); 50 C.F.R. § 216.12 with 16 U.S.C. § 1372(b)-(c); 50 C.F.R. § 216.13 with 16 U.S.C. § 1372(a)(2)(B), (a)(3)-(5). 50 C.F.R. § 216.11(c), which does not correspond to any provision of the Act, was the regulation at issue in *Mitchell*. See *supra* notes 84-88 and accompanying text.

109. 50 C.F.R. § 216.8.

110. *Id.* § 216.24(e).

111. See *id.* § 216.24(b)-(d) (setting out requirements for general permits and certificates of inclusion for United States citizens).

112. *Id.* § 216.24(e)(1).

113. *Id.* § 216.24(e)(2).

114. *Id.* § 216.24(e)(4)(i).

the fishing method used; and (6) any other documentation that the appropriate administrator required.¹¹⁵ Either an official of the vessel's state or the vessel master had to sign a statement certifying that the fish were caught in a proper manner and that all the information was true.¹¹⁶ The exporter had to sign a declaration that the tuna were caught by vessels of a state in compliance with the regulations.¹¹⁷ A party could not import tuna for consumption from states whose vessels purse-seined for yellowfin tuna in the eastern tropical Pacific until further requirements were met, including submitting to NMFS a description of the fishing technology utilized and a report of how many marine mammals were killed or seriously injured while fishing "on" porpoise¹¹⁸ during the previous year.¹¹⁹ The regulations for salmon and halibut were similar albeit less stringent.¹²⁰

The 1984 amendments to the Act required the Commerce Department to draw up stronger regulations governing foreign fishing.¹²¹ NMFS, however, did not present the regulatory amendments until March 1988, and these set absolute compliance for 1991.¹²² The delays prompted United States Senator John Kerry to accuse the United States Commerce and State Departments of "malaise,"¹²³ although NMFS responded that the issue was too complex to be dealt with through simple, quickly written rules.¹²⁴ One important concern, according to NMFS, was that affected foreign fleets would simply switch to less demanding markets.¹²⁵ In a more sinister turn, however, a senior NMFS official admitted that more stringent regulations were withdrawn after tuna fishers, both domestic and foreign, found them unacceptable.¹²⁶

The new rules promulgated by NMFS amend section 216 of 50

115. *Id.* § 216.24(e)(4)(ii).

116. *Id.*

117. *Id.*

118. For an explanation of fishing "on" dolphin, see *supra* note 3.

119. *Id.* § 216.24(e)(5).

120. *Id.* § 216.24(e)(3).

121. *Saving the Sea Creatures*, Los Angeles Times, Sept. 17, 1988, § II, at 8, col. 1.

122. 53 Fed. Reg. 8910, 8913 (daily ed. Mar. 18, 1988); Croft, *supra* note 14, at 3, col. 1.

123. *Senate Panel Urged to Toughen Curbs on Killing of Dolphins*, N.Y. Times, Apr. 14, 1988, at A31, col. 1.

124. *Id.*

125. *Id.*; see also 53 Fed. Reg. at 8911-12.

126. Charles Fullerton, NMFS Southwest Division Director, observes, "We developed some [regulations] which were not acceptable either to the tuna industry or to the foreign nations. So we went back to the drawing board and developed a whole new set . . ." Brower, *supra* note 3, at 58.

C.F.R. generally and subsection 216.24(e) in particular.¹²⁷ Many of the changes, however, constitute little more than linguistic streamlining, ridding the regulations of redundant language. For example, the practical effects of both the old subsection 216.24(e)(1) and the amended version are arguably the same; although the amended subsection 216.24(e)(1) no longer requires a finding of incidental mortality and injury rates,¹²⁸ the appropriate administrator must still make findings of a similar nature under other paragraphs of this regulation.¹²⁹ Although NMFS observed the letter of its obligation, the regulations on their face do not appear to effect much, if any, real change other than simplifying the requirements imposed on importers.¹³⁰

The real teeth of the NMFS rule do not appear in the amended regulations themselves but in the initial import certification requirements¹³¹ and the "Guidelines for Comparable Regulatory Programs and Mortality Rates."¹³² Any state that is tuna fishing in the eastern tropical Pacific with vessels large enough to set "on" dolphins must receive a finding of conformity from NMFS before yellowfin tuna from that state can be imported.¹³³ To obtain an initial finding of conformity, a state must at least provide "reliable and verifiable" documentation of (1) the technological and procedural requirements mandated by its laws, guidelines, and regulations and the accompanying enforcement program; (2) an observer program to monitor marine mammal mortality with specific and detailed reporting requirements; (3) a program to help individual fishers improve their performance; (4) a list and description of all vessels purse-seining in the eastern tropical Pacific; and (5) detailed purse-seining performance data for previous years, including tons of yellowfin tuna caught and numbers of marine mammals killed.¹³⁴ Any purse-seining set "on" marine mammals causing the death of fifteen or more mammals is considered a "problem set" requiring additional effort by that state to re-

127. 53 Fed. Reg. at 8917-20 (codified at 50 C.F.R. §§ 216.3, 216.24 (1988)).

128. Compare 50 C.F.R. § 216.24(e)(1) (1987) with 50 C.F.R. § 216.24(e)(1) (1988).

129. See, e.g., 50 C.F.R. § 216.24(e)(4)(iii), (e)(5)(i)-(ii), (v)-(vi) (1988).

130. Bills of lading, a delineation of fishing method, and exporter declarations are no longer required. Additionally, the statement signed by the government official or the vessel master is much simplified. Compare 50 C.F.R. § 216.24(e)(4) (1987) with 50 C.F.R. § 216.24(e)(3) (1988).

131. 53 Fed. Reg. 8910, 8913-14 (daily ed. Mar. 18, 1988).

132. *Id.* at 8914-16.

133. *Id.* at 8913.

134. *Id.* at 8913-14.

duce its mortality rate.¹³⁵

Once a state obtains initial certification it must annually supply documentation to meet a two-pronged comparability test concerning the regulatory program and mortality rate.¹³⁶ The regulatory program test sets out specific minimum obligations for comparable gear and procedural requirements, observer programs, and advisory groups.¹³⁷ These obligations include backdown procedures, strong lighting systems for nighttime fishing, and observers on approximately one-third of all purse-seining trips.¹³⁸ This test went into effect in 1988.¹³⁹ Under the mortality rate test, states must produce a decline in their kill-per-ton¹⁴⁰ rates until, in 1991, their kill rate, based on the lower of either a five year average or the most recent year, is comparable to the United States kill rate for the same period.¹⁴¹

4. The Permit Requirements

The Act authorizes the United States Secretary of Commerce to issue permits for taking or importing cetaceans.¹⁴² The permit must specify the number and species to be taken or imported, the location and humane manner of the taking¹⁴³ or the location from which they are to be imported, the time period for which the permit runs, and any other appropriate conditions.¹⁴⁴ If the applicant seeks to take cetaceans due to species or population stock over-population, the Secretary may not grant the permit if he determines that it would be better to transplant some of the animals to any area previously but not currently inhabited by the species or stock.¹⁴⁵ If the applicant seeks to take the cetaceans for display or research, the permit must also specify methods of capture, supervision,

135. *Id.* at 8914. Generally only a few porpoises will die in any one set, but so-called "disaster sets," in which hundreds or thousands die, do occur. Brower, *supra* note 3, at 37.

136. 53 Fed. Reg. at 8914.

137. *Id.*

138. *Id.*

139. *Id.* at 8913.

140. Kill-per-ton is defined as "the number of small toothed cetacean marine mammals killed per ton of yellowfin tuna caught in sets made on marine mammals." 50 C.F.R. § 216.3 (1988).

141. 53 Fed. Reg. at 8914-15.

142. 16 U.S.C. § 1374(a) (1988).

143. The MMPA defines a humane taking as one that "involves the least possible degree of pain and suffering practicable to the mammal involved." *Id.* § 1362(4).

144. *Id.* § 1374(b)(2).

145. *Id.* § 1374(b). The number the Secretary decides to transplant cannot exceed the number that the applicant requests to take. *Id.*

care, and transportation. The permit holder must subsequently file a report on its activities with the Secretary,¹⁴⁶ who may modify, suspend, or revoke the permit if the holder violates it.¹⁴⁷

The permit requirements have generated considerable litigation by both environmental and fishing organizations. Perhaps the most prominent case is *Committee for Humane Legislation, Inc. v. Richardson*.¹⁴⁸ In *Richardson*, fourteen environmental organizations¹⁴⁹ complained that the regulations governing the issuance of permits for the incidental taking of porpoises did not comply with the Act's requirements.¹⁵⁰ Under the Act, the Secretary may waive the moratorium and issue permits for takings and importation only if the Secretary is "assured" that such actions are scientifically sound and in accordance with the purposes of the Act.¹⁵¹ The Act places this burden of proof on the permit seeker.¹⁵² The resulting permit must identify "the number and kind of animals . . . authorized to be taken or imported."¹⁵³ NMFS granted the American Tunaboat Association a general permit containing restrictions on techniques and technology but without any apparent constraint on the number or species of animals to be taken.¹⁵⁴ NMFS did this despite the requirements¹⁵⁵ and despite receiving a letter from the MMC stating that without extensive population studies, the MMC was not prepared to state that the Secretary was properly assured of an increase in porpoise populations if any takings occurred.¹⁵⁶ NMFS already conceded that it knew neither the population levels of the regulated animals nor the likely effects of the regulations on those levels.¹⁵⁷

The United States District Court for the District of Columbia granted summary judgment for the plaintiffs and enjoined the issuance of the permit until NMFS complied with the Act.¹⁵⁸ The court indicated its rationale quite clearly: "Congress . . . required that [NMFS] act only on

146. *Id.* § 1374(c).

147. *Id.* § 1374(e).

148. 414 F. Supp. 297 (D.D.C. 1976), *modified* 540 F.2d 1141 (D.C. Cir. 1976).

149. 414 F. Supp. at 299. Non-named plaintiffs, plaintiff-intervenors, and amicus curiae included Fund for Animals, Environmental Defense Fund, and Pacific Legal Foundation. *Id.*

150. *Id.*

151. *Id.* at 302.

152. *Id.* at 303.

153. *Id.* (quoting 16 U.S.C. § 1374(b)(2)(A)).

154. *Id.* at 305.

155. *Id.* at 302-03.

156. *Id.* at 305.

157. *Id.* at 303.

158. *Id.* at 314-15.

the basis of the very knowledge which the agency admits is unknown: the effect of any proposed taking on optimum sustainable population levels."¹⁵⁹

The court derived its rationale from both the clear language of the Act¹⁶⁰ and its legislative history,¹⁶¹ especially a statement by Congressman Dingell, who declared:

Before issuing any permit for the taking of a marine mammal, the Secretary must first have it proven to his satisfaction that *any* taking is consistent with the purposes and policies of the act—that is to say, that taking will not be to the disadvantage of the animals concerned. *If he cannot make that finding, he cannot issue a permit. It is that simple.*¹⁶²

On appeal, the United States Court of Appeals for the District of Columbia Circuit generally affirmed the district court's factual and legal findings, but it nevertheless stayed the injunction to prevent a shutdown of the tuna fleet, reasoning that Congress did not want the Act to be so stringently enforced that such burdensome consequences would flow.¹⁶³

In the late 1980s, permit litigation took an international turn in *Kokechik Fishermen's Association v. Secretary of Commerce*.¹⁶⁴ There, the Center for Environmental Education and the Kokechik Fishermen's Association, an Alaskan commercial fishing organization, joined forces to protest a permit that allowed the Federation of Japan Salmon Fisheries Cooperative Association incidentally to take a certain number of Dall's porpoise while fishing in United States waters.¹⁶⁵ The fishing techniques that the Japanese used made it likely that they would take not only Dall's porpoises but several other species of marine mammals.¹⁶⁶ While

159. *Id.* at 311.

160. *Id.* at 309-10.

161. *Id.* at 310-11.

162. *Id.* at 310 (quoting 118 CONG. REC. 7686 (1972) (emphasis added by the court)).

163. *Committee for Humane Legislation, Inc. v. Richardson*, 540 F.2d 1141 (D.C. Cir. 1976). The court observed, "It is clear that Congress did not intend that the Marine Mammal Protection Act would force American tuna fishermen to cease operations . . ." *Id.* at 1149. The Committee Report read, "It is not the intention of the [Senate Commerce] Committee to shut down or significantly to curtail the activities of the tuna fleet so long as the Secretary is satisfied that the tuna fishermen are using economically and technologically practicable measures to assure minimal hazards to marine mammal populations." *Id.* at 1148 (quoting S. REP. NO. 863, 92d Cong., 2d Sess. 16 (1972)).

164. 839 F.2d 795 (D.C. Cir. 1988), *cert. denied sub nom. Verity v. Center for Environmental Education*, 109 S. Ct. 783 (1989).

165. *Id.* at 796-97.

166. *Id.* at 799-800. The other species likely taken by the Japanese fishing techniques included northern fur seals, northern sea lions, harbor porpoises, Pacific white-

the Act does permit *de minimis* incidental takings by United States citizens,¹⁶⁷ it does not also grant that privilege to foreign fishing fleets, nor does it allow the United States Secretary of Commerce to do so by fiat.¹⁶⁸ As the United States Court of Appeals for the District of Columbia Circuit clearly stated, "The Secretary has no authority, by regulation or any other action, to issue a permit that allows conduct prohibited by that Act."¹⁶⁹ The Secretary apparently contended that to interpret the MMPA so strictly as to deny the permit because of negligible takings of marine mammals¹⁷⁰ would prevent him from properly carrying out the balancing required by the Act and the regulations. The court disagreed, declaring that "[t]he MMPA does not allow for a Solomonian balancing of the animals' and fisheries' interests."¹⁷¹ The court added that if the Secretary thought that the statute wrongly denied him the flexibility to do his job, then he should seek his remedy in Congress rather than through blatantly ignoring the Act's provisions.¹⁷²

5. The Results of the Restrictions

The United States apparently enacted the restrictions because it has a large market for cetaceans and cetacean products and for fish whose catching involves incidental takings of cetaceans; import restrictions should cause other states to fall in step with United States efforts to aid global conservation.¹⁷³ Some commentators debate whether the United States really has a large enough market for whale products for the import restrictions to have much effect on international protection for whales.¹⁷⁴ The MMPA has lived up to predictions, however, that its

sided dolphins, and killer whales. *Id.* at 800.

167. 16 U.S.C. § 1371(a)(4) (1988).

168. 839 F.2d at 802 ("It . . . appears that Congress did not intend to loosen MMPA requirements in order to accommodate Federation needs . . .").

169. *Id.*

170. Despite this, the Secretary was unable to determine whether the impact of the takings would actually be negligible. *Id.* at 801.

171. *Id.* at 802.

172. The court wrote, "If the Secretary believes the Act needs amendment, then it is Congress he must address. The horse must stay ahead of the cart." *Id.* The court continued, "If it is appropriate to grant foreign commercial fishermen some leeway to take marine mammals incidentally in carrying out their commercial fishing operations for salmon, it is for the Congress, not the Secretary to decide." *Id.* Congress has to an extent given the Secretary his remedy. See *infra* notes 235-38 and accompanying text.

173. *E.g.*, Kindt, *supra* note 11, at 13. Half of the world's canned tuna is marketed in the United States. *West 57th, supra* note 3, at 10.

174. Compare Scarff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment* (pt. 2), 6 *ECOLOGY L.Q.* 571, 600-01 (1977)

restrictions would have an international impact¹⁷⁵ and cause a serious decline in porpoise mortality.¹⁷⁶

It is possible to frustrate the purposes of the MMPA. United States tuna fishers avoid the Act by adopting a flag of convenience,¹⁷⁷ the practice of registering and sailing a vessel under the flag of another state that exerts little effective control over the ship.¹⁷⁸ Some commentators estimate that one-half to two-thirds of the United States fleet engage in this practice.¹⁷⁹ The tightening of import restrictions should make this a less attractive and less effective alternative to taking the required conservation measures. The Act, however, has been unable to prevent tuna fishers from simply selling their catch in more availing markets,¹⁸⁰ and NMFS has expressed concern that its more stringent regulations will encourage sales to these alternative markets.¹⁸¹

Despite these loopholes, the MMPA has successfully protected cetaceans. In 1976 and 1977, the United States Government forced the United States tuna fleet to stop purse-seining because of excessive por-

(observing that the MMPA, along with the Endangered Species Act, 16 U.S.C. § 1531-43, "had a significant impact on the international trade in whale products, because [in the early 1970s] the United States accounted for about one-fifth of the entire world market for whale products") with Smith, *supra* note 20, at 566 (declaring that "[b]ecause the whaling nations are not dependent upon the American market, the Marine Mammal Protection Act and the 1969 and 1973 Endangered Species Acts have been unsuccessful in limiting worldwide whaling simply by closing the American market").

175. *E.g.*, Kindt, *supra* note 11, at 7 ("U.S. control of the market for yellowfins coupled with the MMPA's import restrictions on fish caught in violation of its guidelines should encourage other countries to implement their own conservation programs.").

176. For figures detailing the annual estimates for porpoise takings by United States fishers in the eastern tropical Pacific from 1972-81, see Recent Development, *supra* note 2, at 273 n.91 (quoting 1981 MARINE MAMMAL COMMISSION, ANNUAL REPORT 42 (1982)). In 1987, United States tuna fishers killed 14,000 porpoises. *Saving the Sea Creatures*, *supra* note 121, at 8, col. 1. Foreign fleets kill many more, *id.* at col. 2, but the effects of the MMPA on them have been strong. See *infra* notes 186-91 and accompanying text.

177. Kindt & Wintheiser, *supra* note 5, at 347.

178. Comment, *supra* note 20, at 130.

179. *West 57th*, *supra* note 3, at 10. States to which United States ships have reflagged include Panama, Ecuador, Venezuela, Korea, Mexico, and Vanuatu. *Id.* As one commentator notes, "The separation of the U.S. and foreign tuna industries is in fact a kind of myth." Brower, *supra* note 3, at 58. For example, six boats operating out of Vanuatu are ultimately owned by a United States company. In another case, a Mexican company, forty-nine percent owned by a United States cannery, owns another ten tuna fishing boats. *West 57th*, *supra* note 3, at 11.

180. Comment, *supra* note 20, at 136 n.230.

181. 53 Fed. Reg. 8910, 8911 (daily ed. Mar. 18, 1988).

poise takings.¹⁸² In October 1986, NMFS repeated this action, banning purse-seining on dolphins for the rest of the year to prevent mortality rates from surpassing the annual quota.¹⁸³ Because of the 1984 amendments,¹⁸⁴ this action not only affected the United States fleet but also prevented importation of yellowfin tuna from states not in compliance with the order.¹⁸⁵

Although alternative markets for yellowfin tuna may exist, all states, with the exception of Mexico, which have the required findings of conformity are "very dependent" on the United States to buy their catch from the eastern tropical Pacific.¹⁸⁶ The regulations prevented some importation from the Congo, El Salvador, Mexico, Peru, Senegal, and the Soviet Union.¹⁸⁷ As a result of the MMPA, the Congo, New Zealand, Senegal, and Spain suggested that their fleets follow United States porpoise release procedures.¹⁸⁸ More important, Bermuda, Canada, the Republic of Korea, Nicaragua, and New Zealand stopped purse-seining in the eastern tropical Pacific; the Congo, Peru, and Senegal removed their fleets from that area entirely.¹⁸⁹ In October 1988, NMFS announced that the United States would enforce the 1988 regulations and would no longer accept yellowfin tuna imported from Ecuador, Panama, Vanuatu, and Venezuela because those states failed to submit the proper documentation for a finding of conformity.¹⁹⁰ NMFS also continued a previously announced embargo of yellowfin tuna from El Salvador and the Soviet Union.¹⁹¹

182. Recent Development, *supra* note 2, at 272.

183. *U.S. Bans Dolphin Kills for Rest of Year*, Los Angeles Times, Oct. 15, 1986, § I, at 3, col. 1 [hereinafter *U.S. Bans*].

184. See *supra* notes 10-16, 121-26 and accompanying text.

185. See *U.S. Bans*, *supra* note 183, at 23, col. 2.

186. 53 Fed. Reg. at 8911. These states include the Cayman Islands, Costa Rica, Ecuador, Panama, Spain, Vanuatu, and Venezuela. *Id.*

187. *Id.*

188. Kindt, *supra* note 11, at 7-8.

189. 53 Fed. Reg. at 8911.

190. 53 Fed. Reg. 39,743, at 39,743-44 (daily ed. Oct. 12, 1988). In December 1988, NMFS also banned importation from Spain for failure to submit documentation. This was the result of one Ecuadorian-based vessel sailing under the Spanish flag. NMFS suggested that if Spain could prove that the vessel was actually operating under Ecuadorian law, the ban could be lifted. 53 Fed. Reg. 50,420 (daily ed. Dec. 15, 1988).

191. 53 Fed. Reg. at 39,743.

B. *The Marine Mammal Protection Act's Treaty Program*

The MMPA does not explicitly pre-empt any existing treaties or implementing statutes.¹⁹² If the United States Secretary of Commerce finds that the Act has been applied in contravention of such a treaty or statute, the Secretary may order the Act's penalty provisions not to apply to that party.¹⁹³

To prevent conflicts between the MMPA and international agreements and to enhance international compliance with United States conservation goals, the Act directs the United States Secretaries of Commerce and State to seek further international agreements to protect cetaceans.¹⁹⁴ The general provision, entitled the Act's International Program, instructs these Secretaries (1) to negotiate international protection treaties,¹⁹⁵ in particular with states whose commercial fishing fleets are "unduly harmful" to cetaceans;¹⁹⁶ (2) to promote treaties that support conservation in specific geographic areas that are critical to cetacean protection,¹⁹⁷ (3) to negotiate amendments to existing international protection treaties to make them compatible with the MMPA;¹⁹⁸ and (4) to convene an international marine mammal summit to further these efforts.¹⁹⁹

More specifically, the Act instructs the Secretaries to negotiate with the Inter-American Tropical Tuna Commission to bring member states into compliance with the regulations that are designed to reduce incidental takings by tuna fishers. Pursuant to MMPA, the Secretaries must also request the organization's Director of Investigations to advocate the use of improved fishing gear developed by the United States research and

192. 16 U.S.C. § 1383 (1988).

193. *Id.*

194. *See generally id.* §§ 1378(a), 1381(c).

195. *Id.* § 1378(a)(1).

196. *Id.* § 1378(a)(2)(A). To help meet this requirement, the Secretary of State is to "prepare a draft agenda relating to this matter for discussion at appropriate international meetings and forums." *Id.*

197. *Id.* § 1378(a)(3). For example, in 1980 the United States entered into the Convention on the Conservation of Antarctic Marine Living Resources, *done* May 20, 1980, 33 U.S.T. 3476, T.I.A.S. No. 10,240. In 1989, the Department of Commerce issued regulations bringing the act implementing the Convention into line with the MMPA. 54 Fed. Reg. 6407 (daily ed. Feb. 10, 1989) (to be codified at 50 C.F.R. 380).

198. 16 U.S.C. § 1378(a)(4) (1988). For example, the Convention for the High Sea Fisheries of the North Pacific Ocean, *done* May 9, 1952, United States-Canada-Japan, 4 U.S.T. 380, T.I.A.S. No. 2786, 205 U.N.T.S. 65, was re-negotiated to make the Japanese subject to the MMPA's requirements. Kindt & Wintheiser, *supra* note 5, at 353.

199. 16 U.S.C. § 1378(a)(5).

development program.²⁰⁰

1. The Convention on International Trade in Endangered Species

Since the passage of the MMPA, the United States has entered into several treaties for the protection of marine mammals, although not all of these involve cetaceans.²⁰¹ Perhaps the most important of these is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).²⁰² This treaty, which seeks to protect endangered species from depletion from trade,²⁰³ declares that trade in species threatened with extinction must be allowed only in "exceptional circumstances"²⁰⁴ and that trade in those species that may later become threatened with extinction must be regulated to avoid over-exploitation.²⁰⁵ The treaty also gives any party the right to adopt even stricter regulations.²⁰⁶ The treaty indicates that six species of cetaceans are threatened with extinction and, therefore, effectively prohibits their trade among parties.²⁰⁷ CITES does not list any cetaceans that may later become threatened by extinction.²⁰⁸ Critics claim that the treaty has loopholes²⁰⁹ and worry that enforcement may be difficult since it is often impossible to determine whether a product being traded contains parts from protected species.²¹⁰ Despite these criticisms, the treaty represents a significant international stand favoring the protection of species threatened with depletion.

200. *Id.* § 1381(c). The research and development program is set out in subsection 1381(a).

201. *E.g.*, Agreement on the Conservation of Polar Bears, *done* Nov. 15, 1973, 27 U.S.T. 3918, T.I.A.S. No. 8409.

202. *Done* Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249 [hereinafter CITES].

203. *Id.* preamble.

204. *Id.* art. II, para. 1.

205. *Id.* art. II, para. 2.

206. *Id.* art. II, para. 3.

207. *Id.* art. II, appendix I. These species are the Ganges susu, the gray whale, the blue whale, the humpback whale, the bowhead whale, and the right whale. *Id.* appendix I. For a translation of the scientific names listed in CITES to their common names, see S. LEATHERWOOD & R. REEVES, THE SIERRA CLUB HANDBOOK OF WHALES AND DOLPHINS 32, 37, 47, 72, 77, 281 (1983).

208. *See* CITES, *supra* note 202, art. II, appendix II. Unlike appendix I, appendix II has no listing for cetacea.

209. *E.g.*, Coggins, *supra* note 27, at 13.

210. Scarff, *supra* note 174, at 602-03.

2. The Whaling Convention

The United States also acts to increase international protection of cetaceans, especially whales, through the International Whaling Commission (IWC), established by the Convention for the Regulation of Whaling (Whaling Convention).²¹¹ In 1979, the IWC created a ten-year International Whale Sanctuary in the Indian Ocean.²¹² In 1982, acting pursuant to its MMPA obligations,²¹³ the United States convinced the IWC to pass an amendment to the Whaling Convention that created a moratorium on commercial whaling.²¹⁴

The moratorium, however, binds only those who agree to be constrained; an IWC member who objects to an amendment within ninety days of the vote is not bound.²¹⁵ Japan, the Soviet Union, Chile, Norway, and Peru objected to the moratorium and, therefore, are not bound.²¹⁶ Because Japan and the Soviet Union are the world's foremost

211. *Done* Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S 72 [hereinafter Whaling Convention].

212. Kindt, *supra* note 11, at 11.

213. 16 U.S.C. § 1378(a)(4) (1988) (requiring the United States to seek amendment of existing treaties to bring them in line with the MMPA). For support for the proposition that the United States decision to press for the moratorium was prompted by the MMPA, see Kindt & Wintheiser, *supra* note 5, at 352; Zimmerman, *supra* note 4, at 268.

214. Comment, *supra* note 20, at 115. The amendment reads:

Catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.

Id. at 115 n.7.

The following states voted for the moratorium: Antigua, Argentina, Australia, Belize, Costa Rica, Denmark, Egypt, France, India, Kenya, Mexico, Monaco, the Netherlands, New Zealand, Oman, St. Lucia, St. Vincent, Senegal, Seychelles, Spain, Sweden, the United Kingdom, the United States, Uruguay, and West Germany. Brazil, Iceland, Japan, Norway, Peru, South Korea, and the Soviet Union opposed the moratorium. Five states—Chile, China, the Philippines, South Africa, and Switzerland—abstained. Dominica and Jamaica were not present. Smith, *supra* note 20, at 557 n.109.

215. Whaling Convention, *supra* note 211, art. V, para. 3. Once one member objects, the ninety day period begins to run anew. *Id.* Members also have the power to withdraw after six months notice and have been known to threaten to use this power to block protectionist action by the IWC. Smith, *supra* note 20, at 548.

216. Smith, *supra* note 20, at 557-58. Japan claims that its opposition is not only commercial but also cultural, citing a "desire for whale meat [that] has traditional roots deeply imbedded in the Japanese psyche." *Id.* at 558 n.113 (citing N.Y. Times, Aug. 14, 1982, at A22, col. 1). Several states also claim that the moratorium violates the Whaling

whaling states,²¹⁷ their objections severely undercut the effectiveness of the moratorium. It is relatively easy to avoid IWC regulations, including the Whaling Convention moratorium, by using a flag of convenience.²¹⁸

Some claim that the IWC is not the proper vehicle for protection of cetaceans generally.²¹⁹ The IWC itself repeatedly rebuffs attempts to expand its authority to cover small cetaceans.²²⁰ Still, many continue to argue that, especially given its emerging tendency toward conservation, the IWC should be expanded to cover cetaceans rather than create a new organization.²²¹ At the very least, the IWC is the proper organization for the regulation of whaling because it contains the most important whaling states. A new and intensely conservationist, international organization would not contain whaling states and therefore would have little effect on whaling.²²²

IV. THE 1988 AMENDMENTS

In 1988, concerned about the implications of the *Kohechik* decision²²³ but still desiring to protect porpoises from tuna fishers,²²⁴ Congress amended the MMPA.²²⁵ The most important amendments are a new section creating an "Interim period for commercial fisheries"²²⁶ and additions to the sections governing the moratorium²²⁷ and treaty

Convention because it does not consider the interests of whale consumers. Comment, *supra* note 20, at 123 n.90.

217. Travaglio & Clement, *supra* note 30, at 210 n.77.

218. Scarff, *supra* note 174, at 598; *see also supra* notes 177-79 and accompanying text (describing a flag of convenience).

219. *E.g.*, Comment, *supra* note 20, at 116.

220. For example, in 1974 the United States offered an amendment to the Whaling Convention to extend the IWC's management power to small cetaceans, but consideration of this was postponed pending the resolution of the Third United Nations Conference on the Law of the Sea. Scarff, *supra* note 174, at 618-19. In 1975, the IWC's Scientific Committee proposed a similar but more narrow amendment, which the IWC did not pass. Scarff, *supra* note 3, at 374.

221. *E.g.*, Kindt, *supra* note 11, at 12.

222. Smith, *supra* note 20, at 562.

223. 839 F.2d 795 (D.C. Cir. 1988), *cert. denied sub nom.* Verity v. Center for Environmental Education, 109 S. Ct. 783 (1989); *see supra* notes 164-72 and accompanying text; H.R. REP. No. 970, 100th Cong., 2d Sess. 18-19 (1988), *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 6154, 6159 [hereinafter HOUSE REPORT].

224. HOUSE REPORT, *supra* note 223, at 6170.

225. Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100-711, 102 Stat. 4755 (codified in scattered sections of 16 U.S.C.).

226. 16 U.S.C. § 1383a (1988).

227. *Id.* § 1371(a)(2).

negotiations.²²⁸

A. *The Interim Exemption*

To avoid penalizing or shutting down many fishers,²²⁹ Congress amended the MMPA by creating a five-year period for both United States and foreign fishers²³⁰ during which time the United States Secretary of Commerce may grant exemptions that authorize commercial fishers to take cetaceans incidentally, even from depleted stocks.²³¹ The Secretary divides commercial fisheries into three categories: (I) those where fishers frequently take marine mammals incidentally; (II) those where fishers occasionally take marine mammals incidentally; and (III) those where fishers never take marine mammals incidentally or have only a remote likelihood of so doing.²³² Fishers in Category III fisheries pose little threat to preservation and are, therefore, largely left alone.²³³ Those who fish in Category I and II fisheries may receive exemptions by meeting simple requirements.²³⁴

An exemption means that the United States will not penalize a vessel for incidental takings.²³⁵ To maintain the exemption, the vessel owner

228. *Id.* § 1378(a).

229. 54 Fed. Reg. 21,910 (daily ed. May 19, 1989).

230. 16 U.S.C. 1383a(a)(1).

231. *Id.* § 1383a(b)(2)(C). Permits cannot authorize intentional takings of cetaceans that result in death. *Id.*

232. *Id.* § 1383a(b)(1)(A). According to the NMFS regulations, Category I fisheries are those in which there is a great likelihood that a vessel selected at random will take more than one marine mammal in a twenty day period. 54 Fed. Reg. 21,910, at 21,922 (daily ed. May 19, 1989) (to be codified at 50 C.F.R. § 229.3 (b)(1)). In a Category II fishery, a vessel selected at random would probably not take more than one marine mammal during a twenty day period. *Id.* (to be codified at 50 C.F.R. § 229.3(b)(2)). A vessel in a Category III fishery would probably not take any marine mammals during a twenty day period. *Id.* at 21,922-23 (to be codified at 50 C.F.R. § 229.3(b)(3)). For a list of fishery categorizations, see *id.* at 16,072.

233. 16 U.S.C. § 1383a(b)(3)(E). The only statutory requirement on owners of such vessels is that they report, after the fact, any takings resulting in death. *Id.* The regulations issued pursuant to the 1988 amendments allow vessels in Category III fisheries to take marine mammals intentionally "to protect catch, gear or person during the course of commercial fishing operations." 54 Fed. Reg. at 21,924 (to be codified at 50 C.F.R. § 229.7(d)). If the fishers take such actions and they are unsuccessful at preventing "substantial and immediate damage," the regulations authorize lethal takings, although NMFS prohibits such takings of several marine mammal species, including all cetaceans. *Id.* (to be codified at 50 C.F.R. 229.7(e)).

234. 16 U.S.C. 1383a(b)(2)(A).

235. *Id.* 1383a(b)(3)(D). Exempt vessels must display a decal issued by NMFS. 54 Fed. Reg. at 21,923 (to be codified at 50 C.F.R. 229.6(a), (b)). Some have expressed

must submit a report to the Secretary either yearly or at the close of each fishing season.²³⁶ The report must include (1) the date, time, and location of all takings; (2) the fishing gear used and the fish sought; (3) the number and species of the marine mammals taken in each taking; and (4) the marine mammals' reactions to the fishing gear.²³⁷ If the vessel does not incidentally take any marine mammals, it must also report this fact.²³⁸

The exemption amendment generally requires the Secretary to place observers on twenty to thirty percent of all exempted vessels to obtain "statistically reliable information" on the takings.²³⁹ Observers are not required if the Secretary finds that the information usually gathered will not assist in conservation of marine mammals or the marine ecosystem.²⁴⁰ Even if the Secretary does place observers on exempt vessels, there is some question as to how "statistically reliable" the information they provide will be. Past observers have reported harassment, bribery attempts, and threats on their lives by crews and captains who wanted the reports of kills to be lower than the actual figures.²⁴¹ New NMFS

fears that this could stigmatize the vessels and provoke attacks by "radical animal rights groups." *Id.* at 21,912.

236. 16 U.S.C. § 1383a(c).

237. *Id.*

238. *Id.*

239. *Id.* § 1383a(e)(1). This provision sets priorities for observers: Category I vessels receive first priority. If there are not enough observers to cover all Category I fisheries, then the provision gives priority first, to those Category I fisheries where depleted marine mammals are taken; second, to those Category I fisheries where population stocks are declining; third, to Category I fisheries not listed above where the most incidental takings occur; and last to any other Category I fishery. 54 Fed. Reg. at 21,914.

240. 16 U.S.C. § 1383a(e)(5).

241. Kenneth Marten, a government observer, declared in a sworn affidavit that [t]he fishermen resented the presence of a government observer and engaged in every possible form of harassment and coercion. . . . I was prevented, on many occasions, from counting the actual number of animals killed. The fishermen would throw seal bombs at me so that I would retreat from the observation post. Brower, *supra* note 3, at 48. On another occasion, Marten felt that the captain threatened his life after reading Marten's log book account of the number of deaths incurred in an illegal set on eastern spinner dolphins. *Id.* at 52. Another observer reported that

it was made clear to me that if I reported lower kill figures than actually occurred I would be treated by the captain and crew in a much better manner. There were a variety of offers made to me to report lower kill figures, all of which constituted in my mind a form of bribery. The pressure put on observers in this capacity is almost indescribable.

Id. at 48 (statement of Thomas Jefferson).

regulations prohibit these coercive activities,²⁴² but these prohibitions are undercut by another NMFS regulation that prevents observers from bringing civil suits against vessels or their owners unless the observer was injured while working as a crew member or by the owner's "willful misconduct."²⁴³ Despite new NMFS regulations, "negligent" harassment probably will increase. NMFS has also announced plans to create another program to verify takings,²⁴⁴ although this program is directed more at vessels with inadequate facilities for observers than at increasing the accuracy of observer reports.²⁴⁵

If the Secretary finds that the exempted incidental takings are having an immediate and severe detrimental impact on a population stock, the Secretary must promulgate emergency regulations.²⁴⁶ These regulations are to be as limited as possible and reflect the needs of the affected stock, the likely economic impact of the regulations on the fishers, and the existence of the appropriate technology to put an end to the emergency.²⁴⁷ If it appears that a severe detrimental impact is likely but not immediate, the Secretary must merely request the appropriate regional management authority to consider mitigating actions.²⁴⁸ The amendments direct the MMC and the Secretary to draft guidelines and additional legislation to go into effect when the exemption ends in 1993.²⁴⁹

Through these additions to the MMPA, which create simple exemption requirements²⁵⁰ and allow a wide range of incidental takings, including the intentional mortal takings of some non-cetacean marine mammals,²⁵¹ Congress fulfilled much of the Secretary's desired flexibility in issuing permits, which was denied in *Kokechik Fishermen's Association v. Secretary of Commerce*.²⁵² While these amendments were in fact prompted by the *Kokechik* decision,²⁵³ Congress explicitly left undisturbed the factual holding in that case and, thus, precluded the operation

242. 54 Fed. Reg. at 21,923 (to be codified at 50 C.F.R. § 229.4(2)).

243. *Id.* at 21,924 (to be codified at 50 C.F.R. § 229.6(c)(3)(vi)).

244. *Id.* at 21,913-14.

245. *Id.* at 21,913. NMFS plans to station observers some place other than the fishing vessel being observed. *Id.* at 21,913-14.

246. 16 U.S.C. § 1383a(g)(2).

247. *Id.*; HOUSE REPORT, *supra* note 223, at 6166.

248. 16 U.S.C. § 1383a(g)(3).

249. *Id.* § 1383a(b)(1), (3)-(4).

250. *Id.* § 1383a(b)(2)(C).

251. *Id.* § 1383a(c).

252. 839 F.2d 795 (D.C. Cir. 1988), *cert. denied sub nom.* Verity v. Center for Environmental Education, 109 S. Ct. 783 (1989); *see supra* notes 164-72 and accompanying text.

253. HOUSE REPORT, *supra* note 223, at 6159.

of the Japanese salmon gillnet fleet in the United States Exclusive Economic Zone.²⁵⁴

B. *Additional Protection for Porpoises from Tuna Fishers*

The interim exemption does not apply to incidental takings by commercial yellowfin tuna fishers;²⁵⁵ existing provisions and additions to them will govern these actions. The additions to the moratorium tighten the requirements for a finding that a state has a regulatory program comparable to that of the United States.²⁵⁶ A comparable program must include (1) prohibitions on the encirclement of pure schools of cetaceans, on sundown sets, and on other activities prohibited to United States vessels; (2) an average incidental taking rate that is no more than 125 percent of that of United States vessels by the end of 1990; (3) incidental takings that are comprised of no more than fifteen percent eastern spinner dolphin and no more than two percent coastal spotted dolphin; (4) monitoring through a reliable observation program;²⁵⁷ and (5) compliance with reasonable scientific research requests by the United States Secretary of Commerce.²⁵⁸ Intermediary states²⁵⁹ exporting yellowfin tuna to the United States must certify and supply "reasonable proof" that they have prohibited importation of tuna from any state that could not directly export tuna to the United States.²⁶⁰ States that are both har-

254. *Id.* at 21. This preclusion is a result of the provision that requires foreign fishers to have a valid permit issued under the Magnuson Act. *Id.* The United States Department of Commerce opposed this limitation because it feared damage to United States-Japanese relations and foresaw difficulties in negotiations on other fisheries issues. Letter from Linda A. Townsend, Department of Commerce, to Gerry E. Studds, Chairman, House Subcommittee on Fisheries and Wildlife Conservation and the Environment (Sept. 13, 1988), *reprinted in id.* at 6179 [hereinafter Commerce Letter].

255. 16 U.S.C. § 1383a(a)(2) (1988).

256. *Id.* § 1371(a)(2)(B).

257. NMFS has suggested the Inter-American Tropical Tuna Commission's international observer program as one such program capable of providing "sufficiently reliable documentary evidence," 54 Fed. Reg. 20,171 (daily ed. May 10, 1989), despite "differences in sampling objectives." *Id.* at 20,173. Fleets from Ecuador, El Salvador, Mexico, Panama, Spain, the United States, Vanuatu, and Venezuela took part in this program in 1988. *Id.* at 20,171. For a discussion of the reliability of observer programs, see *supra* notes 239-45 and accompanying text.

258. 16 U.S.C. § 1371(a)(2)(V)(B).

259. Amended regulations issued pursuant to this provision define an intermediary state as one "which exports yellowfin tuna or tuna products to the United States, and which imports yellowfin tuna or tuna products." 54 Fed. Reg. 9438, 9448 (daily ed. Mar. 7, 1989) (to be codified at 50 C.F.R. § 216.3).

260. 16 U.S.C. § 1371(a)(2)(B)(C). The United States Department of Commerce

vesters and intermediaries must meet both sets of requirements.²⁶¹

The amendments direct the United States Secretaries of Commerce and State to begin discussions through the Inter-American Tropical Tuna Commission or some other appropriate organization to conclude agreements with states that are purse-seining in the eastern tropical Pacific.²⁶² The agreements should contemplate the protection of marine mammals incidentally taken by those fishers. They should also provide for research into both tuna fishing methods that do not harm cetaceans and the condition of their population stocks so that the states party to these agreements can monitor takings, limit take levels, and determine the most economically and technologically feasible fishing equipment capable of seriously reducing takings.²⁶³

In the face of actions to give more leeway to commercial fishers who incidentally take marine mammals, these amendments hold the MMPA true to its primary purpose of protecting porpoises from purse-seiners.

V. CONCLUSION

The tide will not turn in the battle for protection of cetaceans until that effort becomes much more fully multilateral. Until that time, it is important for the United States to keep pressing forward in unilateral attempts to use its vast economic and political power to provide what protection it can beyond its boundaries. It is difficult to gauge how far the United States is willing to go to achieve a transnational impact. So far, Congress is at best sporadic in creating effective legislation, and enforcement by the executive branch is embarrassingly lax.

As the United States District Court for the District of Columbia stated in *Committee for Humane Legislation, Inc. v. Richardson*, "Steps which ensure the protection and conservation of our national environment must, almost inevitably, impose temporary hardships on those commercial interests which have long benefited by exploiting that environment."²⁶⁴ The same is true for protection of the international

opposed this provision, finding it overbroad and "counterproductive" and suggested its own watered-down alternative. Commerce Letter, *supra* note 254, at 6181.

261. 54 Fed. Reg. at 9448 (1989) (to be codified at 50 C.F.R. § 216.24(e)(3)(i)). For a more detailed account of the requirements that the United States is likely to impose on both categories of states, see the information and interim final rule set forth in *id.* at 9438-51 (regulations to be codified at 50 C.F.R. § 216).

262. 16 U.S.C. § 1378(a)(2)(B).

263. *Id.*

264. 414 F. Supp. 297, 314 (D.D.C. 1976), *modified*, 510 F.2d 1141 (D.C. Cir. 1976).

environment. For the most part, however, Congress is unwilling to take the necessary protective steps when there are resulting economic hardships to the commercial interests of parties related to the United States.²⁶⁵

Optimistically, the United States followed its legislative mandate and ardently pursued the interests of whales with the IWC. The fervor of United States efforts in this endeavor can perhaps be explained, however, by the small cost, barring retaliation by Japan, of the whaling moratorium to United States commercial interests.

When United States economic interests are more directly and obviously involved, the United States provides little more than paper protection for cetaceans. With the exemption provided in the 1988 amendments, Congress allows exploitation of cetaceans to continue. More ominously, even in areas in which Congress takes strong protectionist action, the executive branch favors commercial interests with lax enforcement²⁶⁶ and a regulatory program easily influenced by fishing industry lobbyists.²⁶⁷

One hopes the interim exemption will be simply a temporary measure which Congress will replace with a tighter set of rules to further protect cetaceans and that Congress will also strengthen the rules that currently protect porpoises from tuna fishers. It is perhaps wise to remember, however, that the need for strong statutory language is surpassed by a need for strong executive enforcement; without the latter, fulfillment of the former is meaningless.

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265. See, e.g., *supra* notes 177-79 and accompanying text (describing flags of convenience).

266. See Brower, *supra* note 3, at 52 (details of a 1987 United States Department of Commerce investigation). Brower observes, "Fines have been so low compared to incomes that skippers have knowingly violated the regulations and accepted the fines." *Id.*

267. In 1980, tuna lobbyists convinced NMFS to withdraw a regulation banning sundown sets only eight days after it went into effect. *Id.* at 58; see also *supra* note 125 and accompanying text.