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## In the Wake of *Tuna II*: New Possibilities for GATT-Compliant Environmental Standards

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From its inception, the General Agreement on Tariffs and Trade (GATT)<sup>1</sup> has focused on economic matters, often to the exclusion of environmental concerns.<sup>2</sup> Conversely, the U.S. Congress has passed a great deal of environmental legislation in recent years, largely in response to increased societal awareness.<sup>3</sup> The GATT's torpidity in following this trend has resulted in frequent conflicts between U.S. environmental laws and the GATT<sup>4</sup> and intense debates over the compatibility of environmental safeguards and free trade.<sup>5</sup> A 1991 GATT dispute panel

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1. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

2. See Matthew Hunter Hurlock, *The GATT, U.S. Law and the Environment: A Proposal to Amend the GATT in Light of the Tuna/Dolphin Decision*, 92 COLUM. L. REV. 2098, 2098 (1992). The Agreement's preamble states that international trade "should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, *developing the full use of the resources of the world*, and expanding the production and exchange of goods." GATT, *supra* note 1, at pmb1. (emphasis added). The GATT's focus on "developing resources" and "products," and the absence of the word "environment" from the Agreement's text indicate that the drafters overlooked the environmental effects of international trade. Hurlock, *supra* at 2100.

3. Recent U.S. environmental protection statutes include: the Fishermen's Protective Act of 1967, 22 U.S.C. §§ 1971-80 (1994) (addressing conservation of Atlantic Salmon); the Magnuson Fishery Conservation and Management Act (FCMA), 16 U.S.C. §§ 1801-82 (1994) (authorizing the President to impose trade sanctions in response to other countries' treatment of whales); and the Endangered Species Act, 16 U.S.C. §§ 1531-44 (1994) (relating to conservation of threatened and endangered species). See also *infra* part I.

4. See generally Ted L. McDorman, *The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles*, 24 GEO. WASH. J. INT'L L. & ECON. 477 (1991) (examining the conflict between enforcement mechanisms for various U.S. environmental protection statutes and U.S. obligations under the GATT).

5. See generally Hurlock, *supra* note 2 (discussing the need to amend the GATT in order to accommodate environmental interests); HILARY F. FRENCH, *COSTLY TRADEOFFS: RECONCILING TRADE AND THE ENVIRONMENT* (Worldwatch Institute Worldwatch Paper No. 113, 1993) (evaluating strategies to reconcile conflicts of interest between free-trade and environmental groups); John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Con-*

ruling<sup>6</sup> which invalidated the Marine Mammal Protection Act (MMPA)<sup>7</sup> confirmed fears that the conflict between trade and the environment was indeed a reality. When a subsequent GATT panel again found the MMPA in violation of the GATT in 1994, environmentalists saw further support for these fears.<sup>8</sup> The environmentalists, however, overlooked subtle differences in the panels' reasoning which may provide a framework under which the U.S. Congress may formulate GATT-compatible environmental laws.

This Note examines the distinctions between the first and second Tuna - Dolphin decisions and the opportunity for environmental legislation that complies with the GATT. Part I discusses the background and rationale behind the MMPA. Part II summarizes the findings of the first tuna - dolphin panel and U.S. responses to their reasoning. Part III analyzes the second tuna - dolphin decision as compared to the first. Part IV considers U.S. responses to the second panel decision, the potential impact of the changes made by the second panel, and the possible channels which these changes open for future U.S. environmental laws. This Note concludes that the framework which arose from the second panel decision will permit a modified MMPA to pass GATT scrutiny without sacrificing its conservationist intent.

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*flict?*, 49 WASH. & LEE L. REV. 1227 (1992) (discussing areas of conflict between GATT and environmental policies); Eliza Patterson, *International Trade and the Environment: Institutional Solutions*, 21 ENVTL. L. REP. 10,599 (1991) (explaining the need to incorporate environmental concerns into the international trade framework).

According to David C. Phillips, executive director of the Earth Island Institute, "free trade and efforts to protect the global environment are on a collision course." James Brooke, *America — Environmental Dictator?*, N.Y. TIMES, May 3, 1992, at § 3, at 7. The effect of environmental safeguards is to subsidize foreign producers because they need not incur costs to comply with the environmental regulations of the other nation. Robert F. Housman & Durwood J. Zaelke, *The Collision of the Environment and Trade: The GATT Tuna / Dolphin Decision*, 22 ENVTL. L. REP. 10,268, 10,275 (1992). The foreign producer can pass on the resulting savings in production costs to consumers in the form of lower prices. *Id.* When American environmental laws threaten the competitiveness of American products on the open market, public sentiment in favor of environmental protection is likely to diminish. *Id.*

6. See *infra* part II, discussing the first Tuna - Dolphin Decision.

7. 16 U.S.C. §§ 1361-1407 (1988), as amended by U.S.C.A. §§ 1361-1407 (West 1994).

8. See *infra* part III, discussing the second Tuna - Dolphin Decision.

## I. IMPETUS FOR THE MMPA

For unknown reasons, schools of yellowfin tuna swim beneath pods of dolphins in the Eastern Tropical Pacific Ocean (ETP).<sup>9</sup> Commercial fishermen have long exploited this phenomenon by using the dolphins as a means of locating the schools of tuna which accompany them.<sup>10</sup> Through a process known as "setting on dolphin,"<sup>11</sup> fishing boats chase dolphin pods and encircle them with purse seine nets to catch the tuna below the dolphins.<sup>12</sup> To expedite the process, some tuna boats use explosives and smaller boats to incite panic in the dolphins and drive the frenzied pod into the center of their nets.<sup>13</sup> As an incidental effect of this procedure, many dolphins become entangled in the nets and either drown when they cannot reach the surface to breathe or are maimed while extricating themselves from the nets.<sup>14</sup> Dolphins not immediately killed often die later as a direct result of their injuries or, weakened by their struggle, as defenseless victims of sharks or other predators.<sup>15</sup>

The use of the purse seine technique has caused the deaths of over six million dolphins over the past 30 years.<sup>16</sup> Public con-

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9. Raul Pedrozo, *The International Dolphin Conservation Act of 1992: Unreasonable Extension of U.S. Jurisdiction in the Eastern Tropical Pacific Ocean Fishery*, 7 TUL. ENVTL. L.J. 77, 79 n.4 (1993). One theory suggests that the association results from the similar diet of yellowfin tuna and certain species of dolphins. *Id.* The Eastern Tropical Pacific Ocean is the area of the Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west longitude, and the coasts of North, Central and South America from Chile to Southern California, with an area of approximately five to seven million square miles. Dan Mayer & David Hoch, *International Environmental Protection and the GATT: the Tuna/Dolphin Controversy*, 31 AM. BUS. L.J. 187, 189 n.17 (1993).

10. Dolphins are readily visible to fishermen because, as mammals, the dolphins must swim in the upper levels of the ocean and break the surface to breathe.

11. Setting on dolphin is practiced only by yellowfin fishermen, and almost exclusively in the ETP. Mayer & Hoch, *supra* note 9, at 199 n.79.

12. Hon. R. Kenton Musgrave & Garland Stephens, *The GATT - Tuna Dolphin Dispute: An Update*, 33 NAT. RESOURCES J. 957, 958 n.1 (1993). A purse seine net is a net weighted on one end and buoyed on the other. *Id.* After a school of fish is encircled by the net, the bottom of the net is closed by drawing a line through rings attached to the weighted end in a manner similar to the form of closure found on some purses. *Id.*

13. *Earth Island Institute v. Mosbacher*, 746 F.Supp. 964, 967 (N.D.Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991).

14. Pedrozo, *supra* note 9, at 79 n.7.

15. *Id.*

16. See *Earth Island Institute*, 746 F.Supp. at 928 n.2. The perfection of the technique has drawn greater numbers of fishermen to the ETP. By the early 1970s, the U.S. purse seine fleet consisted of over 100 vessels, with an

cern over this high rate of "incidental takings" encouraged Congress to enact the MMPA.

The MMPA addresses the detrimental effects of commercial fishing on marine mammals and applies specifically to the protection of dolphins in relation to yellowfin tuna fishing.<sup>17</sup> Although the Act imposes a moratorium on the taking and importation of marine mammals and marine mammal products,<sup>18</sup> it contains a special exception for commercial tuna fishing.<sup>19</sup> This exception allows for a level of incidental dolphin mortality provided that the fishermen implement the best available safety techniques.<sup>20</sup> Parties must obtain a permit from the Secretary to qualify for the exception.<sup>21</sup> Permits are not freely granted under this provision; the only domestic entity that has received one is the American Tunaboat Association.<sup>22</sup> The permit allows the taking of 20,500 dolphins annually.<sup>23</sup>

The MMPA's provisions apply to all takings within waters under the jurisdiction of the United States.<sup>24</sup> The Act also ap-

annual dolphin mortality rate of over 300,000 attributed to the U.S. fleet alone. Mayer & Hoch, *supra* note 9, at 198 nn.75-76.

17. McDorman, *supra* note 4, at 490.

18. 16 U.S.C. § 1371(a) (1994). The statute provides:

[t]here shall be a moratorium on the taking and importation of marine mammals and marine mammal products . . . during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States except [in the enumerated cases].

*Id.*

19. 16 U.S.C. § 1371(a)(2) (1994). This exception states that "[m]arine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued therefore under section 1374 of this title." *Id.*

20. *Id.* The statute provides:

it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate; provided that this goal shall be satisfied in the case of the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna by a continuation of the application of the *best possible marine mammal safety techniques* and equipment that are economically and technologically practicable.

*Id.* (emphasis added).

21. 16 U.S.C. § 1371(a)(3)(A) (1994).

22. Stanley M. Spracker & David C. Lundsgaard, *Dolphins and Tuna: Renewed Attention to the Future of Free Trade and Protection of the Environment*, 18 COLUM. J. ENVTL. L. 385, 390 (1993). The procedure by which "incidental take" permits are issued is codified at Regulations Governing the Taking and Importing of Marine Mammals, 50 C.F.R. § 216.24 (1992). Spracker & Lundsgaard, *supra* at 390 n.23.

23. Spracker & Lundsgaard, *supra* note 22, at 390.

24. 16 U.S.C. § 1372(a)(2) (1994). The Act defines "waters under the jurisdiction of the United States" as:

plies to takings on the high seas by any persons or vessels which are subject to U.S. jurisdiction.<sup>25</sup> In addition, the MMPA requires that foreign producers of tuna exported to the United States conform to the standards set by the U.S. tuna fleet.<sup>26</sup> As initially enacted, this provision used discretionary language relating to enforcement and was not strictly applied against foreign vessels.<sup>27</sup> Many U.S. tuna boats subsequently avoided compliance by reflagging under foreign sails.<sup>28</sup> As a result, while incidental killings by U.S. tuna fishing vessels decreased after implementation of the MMPA, dolphin deaths by foreign tuna fleets increased substantially.<sup>29</sup>

Congress recognized that foreign fleets caused the majority of dolphin deaths in the ETP and that foreign tuna fishermen had gained a comparative advantage over American tuna fishermen due to their countries' less stringent dolphin conservation policies.<sup>30</sup> In response, Congress attempted to increase foreign compliance with the MMPA's requirements by amending the MMPA to require an embargo of tuna from any nation whose dolphin kill rate was significantly greater than that of the

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(A) the territorial sea of the United States, and

(B) the waters included within a zone, contiguous to the territorial sea of the United States, of which the inner boundary is a line coterminous with the seaward boundary of each coastal State, and the outer boundary is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

16 U.S.C. § 1362(15)(A) and (B) (1994).

25. 16 U.S.C. § 1372(a)(1) (1994).

26. 16 U.S.C. § 1371(a)(2) (1994).

27. Mayer & Hoch, *supra* note 9, at 204. The NMFS was reluctant to enforce the regulations due to protests from the tuna industry and foreign nations that the regulations were unacceptable. *Id.* at 205.

28. *Id.* at 203 (citing David Phillips, Statement on the Implications of the GATT Panel Ruling on Dolphin Protection and the Environment, before the Subcommittee on Health and the Environment of the House Energy and Commerce Committee 4 (Sept. 27, 1991) (transcript on file with author)).

29. *Id.* at 204. In 1972, when the MMPA was enacted, foreign tuna fleets caused less than 15% of the dolphin deaths in the ETP; by 1989 this percentage had risen to 80%. *Id.* at 204 n.126. The increase in dolphin mortality among foreign tuna fleets resulted both from an increase in the number of fishing vessels and because these nations extended their coastal water jurisdiction. JAMES JOSEPH, PH.D., FACT SHEET, (Apr. 1993) (on file with *Minnesota Journal of Global Trade*) [hereinafter FACT SHEET]. As these nations' fishing fleets increased in number, their dolphin kill levels increased correspondingly.

30. At the Hearings on Reauthorization of the MMPA, Senator Breaux noted that "[t]he problem is not with our tuna industry. The problem is with the foreign fishermen, who take four times more porpoises than our industry does." *Earth Island Institute v. Mosbacher*, 746 F.Supp. 964, 968 (N.D.Cal. 1990), *aff'd* 929 F.2d 1449 (9th Cir. 1991) (citing *Hearings on Reauthorization of the MMPA*, 100th Cong., 2d Sess. 4 (1988) (statement of Senator Breaux).

United States.<sup>31</sup> Nations exporting tuna to the United States were also required to conform to U.S. standards by providing evidence that they had adopted a comparable program regarding the taking of marine mammals in the course of tuna harvesting.<sup>32</sup> The incidental taking of dolphins was to be monitored by the Inter-American Tropical Tuna Commission (IATTC)<sup>33</sup> or an equivalent observer program.<sup>34</sup>

The MMPA amendments also imposed a secondary embargo on yellowfin tuna exported to the United States.<sup>35</sup> This provision attempted to preclude nations against which a primary embargo was imposed from circumventing the embargo by simply exporting their tuna products to an intermediary nation as a stepping stone to the United States. In order to avoid an embargo on their exports to the United States, such intermediary nations were required to provide proof that they had acted to prohibit tuna imports from nations whose direct exports of tuna had been banned under the Act.<sup>36</sup>

The final major change brought about by the amendments was the addition of the requirement that the Secretary of Commerce notify the President within six months of the imposition of any embargo on a country's tuna products.<sup>37</sup> The significance of the notification is that it invokes the Pelly Amendment to the Fishermen's Protective Act of 1967.<sup>38</sup> The Pelly Amendment authorizes the President to ban all fish products from any country whose policies diminish the effectiveness of any international

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31. 16 U.S.C. § 1371(a)(2)(B)(II) (1994). Foreign nations' dolphin kill rates could not exceed twice the U.S. rate for the period before 1989 and 1.25 times the U.S. rate in 1990 and thereafter. *Id.* In addition, incidental kill rates for the eastern spinner and coastal spotted dolphins were limited to fifteen and two percent, respectively, of the total incidental kills in the ETP. 16 U.S.C. § 1371(a)(2)(B)(III) (1994).

32. 16 U.S.C. § 1371(a)(2)(B)(I) (1994).

33. For a discussion of the IATTC and its activities, see *infra* part II.B.2.

34. 16 U.S.C. § 1371(a)(2)(B)(IV) (1994). Whatever program of observation was implemented, it had to provide a level of observer coverage equal to that imposed upon U.S. vessels. Pedrozo, *supra* note 9, at 90 n.75. Foreign vessels were not required to adhere to the U.S. observer standard if their program was "determined to provide sufficiently reliable documentary evidence of the nation's incidental take rate." *Id.*

35. 16 U.S.C. § 1371(a)(2)(C) (1994).

36. *Id.* Failure to comply with these requirements would result in an embargo against tuna exports from the intermediary nation without regard to whether that nation's own fishermen complied with U.S. regulatory guidelines. *Id.*

37. 16 U.S.C. § 1371(a)(2)(D) (1994).

38. 22 U.S.C. § 1978 (1994).

fisheries conservation program.<sup>39</sup> Thus, under the new MMPA, a nation which resisted U.S. pressure to change its tuna harvesting methods risked a complete ban of all of its fish exports to the United States.

Despite these attempts to extend the MMPA's international effect, no import bans had been imposed on any nation as of 1990 nor had the Secretary of the Treasury reported on the comparability of tuna exporters' dolphin protection programs.<sup>40</sup> Thus, there had been no indication that the provisions of the MMPA were being enforced. In response to this inaction by the government, Earth Island Institute brought suit in federal court.<sup>41</sup> On August 28, 1990, the U.S. District Court for the Northern District of California granted the Institute's request for a preliminary injunction enjoining tuna imports from Ecuador, Mexico, Panama and Venezuela until adequate comparability findings had been made.<sup>42</sup> Pursuant to favorable findings by the Commerce Department, the restriction was removed from Mexico, Venezuela and Vanuatu on September 7, and later from Ecuador and Panama when they prohibited their tuna fleets from setting on dolphin.<sup>43</sup> Earth Island Institute then issued another challenge, this time alleging that the NMFS had incorrectly applied the MMPA in finding that Mexico had not violated the eastern spinner dolphin limits.<sup>44</sup> The District Court issued a temporary restraining order on October 10, 1990 which was converted to a preliminary injunction banning imports from Mexico on October 19.<sup>45</sup> The Ninth Circuit Court of Appeals stayed the embargo on November 14, but the embargo against

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39. 22 U.S.C. § 1978(a)(4) (1994). The ban may be continued for any duration which the President deems appropriate. *Id.*

40. Earth Island Institute v. Mosbacher, 746 F.Supp. 964, 968 (N.D.Cal.1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991).

41. *Id.* Earth Island Institute is a national, non-profit corporation based in San Francisco, whose members share a commitment to the protection of marine mammals. *Id.* at 966.

42. *Id.*

43. GATT Dispute Settlement Panel, *United States — Restrictions on Imports of Tuna*, BISD 39th Supp. 155 (1991), *reprinted at* 30 I.L.M. 1594, para. 2.7 [hereinafter Tuna I].

44. Earth Island Institute v. Mosbacher, 929 F.2d 1449, 1451-52 (9th Cir. 1991). The dispute concerned the time period for calculation of eastern spinner dolphin mortality. *Id.* at 1451. The NMFS had based its comparability findings on statistics for the first six months of 1990 only. *Id.* The Earth Island Institute asserted that comparability findings were to be made on a yearly basis, thus rendering the NMFS's finding invalid. *Id.*

45. Spracker & Lundsgaard, *supra* note 22, at 393. The district court held that the regulation allowing "reconsideration" of the 1989 embargo based on only six months of 1990 data violated the language and purpose of the statute



Mexican tuna imports went into effect when the stay was lifted on February 22, 1991.<sup>46</sup>

## II. THE FIRST TUNA - DOLPHIN DECISION

On November 5, 1990, Mexico requested consultations with the United States concerning the tuna import restrictions.<sup>47</sup> When the two countries failed to reach an agreement, Mexico requested creation of a dispute panel to examine the matter under Article XXIII(2) of the GATT.<sup>48</sup> In determining whether the MMPA conflicted with the GATT, the panel examined whether the ban constituted a "quantitative restriction" prohibited by Article XI of the GATT<sup>49</sup> or an "internal regulation" subject to Article III (4).<sup>50</sup> The panel determined that Article III did

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which, in the court's opinion, required a full year's data. Earth Island Institute, 929 F.2d at 1451.

46. Tuna I, *supra* note 43, at para. 2.7. The Ninth Circuit Court of Appeals granted the government's motion for an emergency stay pending appeal and expedited the appeal. Earth Island Institute, 929 F.2d at 1452 n.3. The stay was lifted at the time of the appeal. *Id.*

47. Tuna I, *supra* note 43, at para. 1.1. The GATT dispute settlement mechanism requires signatories to "make their best efforts to reach a mutually satisfactory solution" before requesting establishment of a dispute resolution panel. GATT, Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, BISD 26th Supp. 56-83, at Article 17 (1980).

48. Tuna I, *supra* note 43, at para. 1.1. Under GATT Article XXIII(2), "[i]f no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time . . . the matter may be referred to [a GATT dispute resolution panel]." GATT, *supra* note 1, at art. XXIII(2). The GATT charges its dispute settlement panels with hearing the complaints of one member country against another, reaching a conclusion based on each side's testimony, and submitting a report to the GATT Council for possible adoption. Mayer & Hoch, *supra* note 9, at 206-07. Until the first tuna-dolphin dispute, the Council had never failed to adopt a panel report. *Id.*

49. GATT Article XI (1) provides:

No prohibitions or restrictions . . . whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party.

GATT, *supra* note 1, at art. XI (1).

50. GATT Article III (4) provides:

The products of any territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

GATT, *supra* note 1, at art. III (4). Thus, under this provision, the United States could place regulations on imported tuna once it was in the United States, as long as domestically produced tuna was subject to the same treat-

not apply and that both the primary and secondary embargo provisions violated the GATT's ban on quantitative restrictions.<sup>51</sup>

#### A. ANALYSIS OF THE PANEL DECISION

The panel first categorized the import restriction as a regulation of the *process* by which a product is manufactured, rather than a regulation of the *product* per se. The panel determined that Article III only permits a country to regulate a product as a product; it does not allow a country to regulate the process which results in the product.<sup>52</sup> Since the fishing prohibitions imposed by the MMPA were not based on differentiations of tuna as a product, and absent a U. S. contention to the contrary, the panel found that the restriction violated Article XI.<sup>53</sup>

The panel then examined U.S. assertions that the MMPA provision was justified under Article XX.<sup>54</sup> The United States argued that the tuna ban was justified both by Article XX (b), which provides an exception for measures "necessary to protect human, animal or plant life or health," and by Article XX (g), which provides an exception for regulations "relating to the conservation of exhaustible natural resources."<sup>55</sup> The panel rejected each of these arguments.

With respect to Article XX(b), the panel concluded that measures such as the MMPA could not be applied outside of the imposing nation's jurisdiction.<sup>56</sup> Because the exception was ambiguous as to extra-jurisdictional application, the panel chose to construe it narrowly in order to limit conflicts with the GATT's broader purposes.<sup>57</sup> Moreover, the panel found that the tuna

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ment. Because the applied standards which determined whether a ban would be imposed were by definition comparable to those applied to domestic tuna, the United States argued that the "national treatment" requirement was satisfied.

51. Tuna I, *supra* note 43, at paras. 5.18, 5.36.

52. *Id.* at para. 5.11. Tuna I was the first GATT panel report to make such a product - process distinction. See Mayer & Hoch, *supra* note 9, at 210-11.

53. Tuna I, *supra* note 43, at para. 5.18.

54. Article XX of the GATT provides exceptions to the general prohibition on restrictive trade measures, where such measures are necessary to pursue public policy objectives including: protection of public morals; protection of human, animal, or plant life or health; compliance with other laws or regulations; measures relating to products of prison labor; protection of national artistic or historic treasures; and conservation of exhaustible natural resources. GATT, *supra* note 1, at art. XX.

55. *Id.*

56. Tuna I, *supra* note 43, at para. 5.26.

57. *Id.* The GATT's broadest and primary purpose is to facilitate trade. See *supra* note 2. The panel noted that in a previous draft, exception (b) read:

ban did not meet Article XX(b)'s necessity requirement<sup>58</sup> because the alternative method of international cooperation was available to the United States.<sup>59</sup>

The panel used similar reasoning in its evaluation of Article XX(g), noting that the extra-jurisdictional application sought by the United States would allow contracting parties to "unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement."<sup>60</sup> The panel found that even in the absence of the extrajurisdictionality issue, the U.S. measures would not meet the standard for Article XX(g) due to the MMPA's unpredictable standards for compliance.<sup>61</sup> The MMPA linked the maximum dolphin kill rate for other countries for a particular period to the actual dolphin kill rate of U.S. boats for the same period. As a result, foreign fisherman did not know whether their policies conformed to those of the United States until after the period had passed, thus rendering compliance impossible. The panel found that such unpredictable conditions could not be regarded as primarily aimed at the conservation of dolphins.<sup>62</sup>

The panel disposed of three other issues rather quickly. First, in considering the intermediary import ban, the panel noted that it existed solely as a means by which to enforce the

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"[f]or the purpose of protecting, human, animal, or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country." Tuna I, *supra* note 43, at para. 5.26 (emphasis added). The panel interpreted this language to indicate that the purpose of the exception was to safeguard the life or health of humans, animals or plants only within the jurisdiction of the importing country. *Id.*

58. GATT, *supra* note 1, at art. XX (b). Article XX (b) provides an exception for any measures "necessary to protect human, animal or plant life or health." *Id.* The Tuna I panel found that the United States had not exhausted all options reasonably available to pursue dolphin protection objectives through measures consistent with the GATT. In particular, the panel noted that the United States should have sought negotiation of international cooperative arrangements. Tuna I, *supra* note 43, at para. 5.28.

59. *Id.* at para. 5.28. The panel apparently determined that the 60-day stalemate which resulted under the GATT-mandated negotiation period was an insufficient amount of time to pursue cooperative means of dispute resolution. The panel gave no indication, however, as to what would constitute a proper duration for such negotiations. In addition, the panel overlooked repeated efforts by the United States to negotiate international conservation agreements. See *infra* notes 98-107 and accompanying text.

60. Tuna I, *supra* note 43, at para 5.32.

61. *Id.* at para. 5.33.

62. *Id.*

direct import ban.<sup>63</sup> The panel then concluded that since the direct import ban was inconsistent with the GATT, so too was the intermediary ban.<sup>64</sup> Second, the panel considered the possible use of the Pelly Amendment to impose broader import restrictions.<sup>65</sup> The panel noted that the Pelly Amendment did not require the President to impose such a ban, but left the decision to his discretion.<sup>66</sup> Although such action, if taken, may violate the GATT, the panel found that legislation which merely permitted such action did not itself constitute a violation.<sup>67</sup> Thus, because the Pelly Amendment did not require trade measures to be taken, the panel found that it did not violate the GATT.<sup>68</sup>

The final issue the panel considered was the validity of the Dolphin Protection Consumer Information Act of 1990 (DPCIA).<sup>69</sup> The DPCIA states that it is a violation of the Federal Trade Commission Act<sup>70</sup> to label any tuna product "dolphin safe" that is exported to or offered for sale in the United States if purse seine nets or driftnets were used in harvesting the tuna.<sup>71</sup> The panel noted that the DPCIA applied equally to all nations fishing for tuna and that it did not restrict the sale of tuna products, but only their labeling.<sup>72</sup> Thus, any possible advantage from displaying the label resulted entirely from consumer preference and not from the labeling provision itself.<sup>73</sup> For these reasons, the panel found that the DPCIA was consistent with U.S. obligations under the GATT.

## B. U.S. RESPONSES TO THE FIRST TUNA - DOLPHIN DECISION

Despite the approval of the DPCIA and the fact that Tuna I has not been adopted,<sup>74</sup> the panel report alarmed environmen-

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63. *Id.* at para. 5.40.

64. *Id.*

65. *Id.* at para. 5.20. *See supra* text accompanying notes 38-39 (discussing the Pelly Amendment).

66. Tuna I, *supra* note 43, at para. 5.20.

67. *Id.* at para. 5.21.

68. *Id.*

69. *Id.* at paras. 5.41-5.44. The DPCIA is found at 16 U.S.C. § 1385 (Supp. II 1990).

70. 15 U.S.C. § 45 (1994).

71. 16 U.S.C. § 1385(d)(1) (Supp. II 1990).

72. Tuna I, *supra* note 43, at para. 5.42.

73. *Id.*

74. Since 1968, panel reports have been adopted by the GATT Council on behalf of the Contracting Parties or directly by the Contracting Parties at their annual Session. GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 708 (6th ed. 1994). At the March, 1981 Council Meeting, the Council Chairman noted that the Council normally makes its decisions by consensus. *Id.* In his

tal groups who characterized the ruling as the paradigm example of the disastrous effect of free trade agreements on the environment.<sup>75</sup> Pressure from environmental groups and the general public<sup>76</sup> prompted Representative Barbara Boxer of California<sup>77</sup> and sixty-two other members of Congress to write a letter to the President and the U.S. Trade Representative indicating that they would not support any attempt to repeal the laws that the Tuna I panel found to be inconsistent with the GATT.<sup>78</sup> Because a GATT ruling amounts to no more than a suggestion that a country amend its laws to conform with the panel's findings, this opposition to the panel report by members of Congress was quite significant.<sup>79</sup> The Bush administration subsequently sought a way to address these environmental concerns and comply with the GATT.

### 1. Attempts by the Bush Administration to Lift the Import Ban

Shortly after the GATT panel announced its findings, the United States and Mexico agreed that Mexico would not seek to have the panel decision adopted.<sup>80</sup> The two nations then com-

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view, consensus was understood in GATT to mean that no delegation objected to a text or attempted to prevent its adoption. *Id.* Because Mexico did not place the Tuna I panel report before the Council or the Contracting Parties for adoption, it has not been subjected to this process.

75. See, e.g., *Environmental Group Says GATT Tuna Report Could Have Disastrous Conservation Impact*, 8 Int'l Trade Rep. (BNA) 1325 (Sept. 11, 1991).

76. One method environmental groups used to protest dolphin-unsafe fishing practices was organizing consumers to boycott canned tuna that was not dolphin-safe. Pedrozo, *supra* note 9, at 90. In response to the public relations problems caused by these boycotts, the three largest U.S. tuna producers implemented voluntary plans under which they would purchase only dolphin-safe tuna for the U.S. market. *Id.* Although these events occurred before the Tuna I panel issued its report, they contributed significantly to Congress' reaction to the panel decision.

77. Barbara Boxer, author of the DPCIA, has since been elected Senator.

78. *Members of Congress Protest Recent GATT Ruling on U.S. Embargo of Mexican Tuna*, 8 Int'l Trade Rep. (BNA) 1399 (Sept. 25, 1991).

79. Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 STAN. J. INT'L L. 479, 507-08 (1990). Even assuming that the GATT has become U.S. law, only U.S. laws enacted before 1947 will be trumped by the GATT because of the later-in-time rule. *Id.* at 508. According to U.S. Trade Representative Mickey Kantor, it will be up to Congress and other interested parties in the United States to decide what, if any, legislative action is appropriate. *Kantor Says United States Will Ask for Full Review in Tuna - Dolphin Ruling*, 11 Int'l Trade Rep. (BNA) 814, 815 (May 25, 1994).

80. *Mexico Agrees to Defer Action on Complaint on U.S. Tuna Embargo*, 8 Int'l Trade Rep. (BNA) 1351 (Sept. 18, 1991). Mexico's failure to press for adop-

menced negotiations aimed at promoting dolphin conservation in the ETP.<sup>81</sup> In exchange for Mexico's promise of increased dolphin conservation measures,<sup>82</sup> the Bush Administration promised to seek legislation lifting the tuna import ban.<sup>83</sup> The Administration subsequently proposed legislation "aimed at promoting international dolphin protection and resolving the GATT issue, by lifting the MMPA ban against any country that agreed to a five year moratorium on setting on dolphin."<sup>84</sup> This legislative proposal was eventually enacted as the International Dolphin Conservation Act (IDCA) of 1992.<sup>85</sup>

The IDCA amended the MMPA by adding Subchapter IV — Global Moratorium To Prohibit Certain Tuna Harvesting Practices.<sup>86</sup> This provision authorizes the Secretary of State to enter into international agreements to prohibit the harvesting of tuna by encircling dolphins or other marine mammals with purse seine nets.<sup>87</sup> Agreements reached under the IDCA must also: (1) establish an international research program to develop alternative methods to harvest tuna in light of the moratorium; (2) require each party to the agreement to take all necessary steps to comply with the moratorium; and (3) encourage each party to persuade other tuna fishing nations to become parties to the agreement.<sup>88</sup> Once such an agreement has been reached, the research program must continually work toward developing fishing methods that are safer for dolphins.<sup>89</sup> Vessels participating in the research program must carry an observer and at least half

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tion of the panel report is almost certainly due to the negative effects of such action on the future of NAFTA. *Id.*

81. Frances Willaims, *U.S. Nears Tuna Deal with Mexico*, FIN. TIMES, Mar. 19, 1992, at 3.

82. Immediately following the issuance of the Panel's report, Mexican President Carlos Salinas de Gortari announced that Mexico would allow international observers on all of Mexico's tuna fishing boats. Juanita Darling, *Tuna Turnabout: Mexico Announces a Dolphin Protection Plan*, L.A. TIMES, Sept. 25, 1991, at D6.

83. Steve Charnovitz, *Dolphins and Tuna: An Analysis of the Second GATT Panel Report*, 24 ENV'T'L. L. REP. 10,567, 10,571 (1994).

84. Musgrave & Stevens, *supra* note 12, at 969. According to one House member, the proposed legislation "resolves the GATT problem by removing the comparability standards and immediately lifting the embargo." *Id.* at 969 n.76 (citation omitted).

85. 16 U.S.C. § 1411 (1994).

86. *Id.*

87. 16 U.S.C. § 1412(a) (1994). The Act requires such agreements to be of at least five year durations. *Id.*

88. 16 U.S.C. § 1412(b) (1994).

89. 16 U.S.C. § 1413 (1994).

of all observers must be supervised by a "competent regional organization."<sup>90</sup>

The IDCA also contains provisions for trade sanctions if a country fails to comply with a moratorium to which it agreed.<sup>91</sup> The Act requires the Secretary of Treasury, in consultation with the Secretary of State, to periodically determine whether obligated countries have adhered to the moratorium's terms.<sup>92</sup> If a country violates the moratorium, the Secretary of Treasury must notify the President and Congress and then ban all tuna imports from that country.<sup>93</sup> If the country whose tuna imports have been banned does not certify within sixty days that it has complied with the moratorium, the IDCA requires the President to implement a ban of other fish products totaling forty per cent of fish exports from that country.<sup>94</sup> This ban remains in effect until the Secretary of State determines that the country has implemented the agreement.<sup>95</sup>

The IDCA adopts the "dolphin safe" standard of the DPCIA and gives it greater effect. Since June 1, 1994, it has been unlawful under the IDCA for any person to sell, purchase, offer for sale, transport or ship in the United States any tuna or tuna product that is not "dolphin safe."<sup>96</sup> Although the IDCA determines compliance using a ship-by-ship rather than a country-by-country basis, the Act still does not bring the U.S. legislation into conformity with the GATT due to its provisions for the im-

90. 16 U.S.C. § 1413(a)(3) (1994). For the ETP, "competent regional organization" is defined as the IATTC. 16 U.S.C. § 1362(17) (1994).

91. 16 U.S.C. § 1415 (b)(2) (1994).

92. 16 U.S.C. § 1414 (1994).

93. 16 U.S.C. § 1415(b)(1) (1994).

94. 16 U.S.C. § 1415(b)(2) (1994). The statute provides:

The one or more fish and fish product categories to which the President imposes an import ban under subparagraph (A) with respect to a country must be a fish and fish product category or categories with respect to which the articles classified thereunder and imported from that country in the base year had an aggregate customs valuation equal to 40 percent of the aggregate customs valuation of all articles classified under all fish and fish product categories that were imported from that country during the base year.

16 U.S.C. § 1415 (b)(2)(B) (1994).

95. 16 U.S.C. § 1416(b)(3) (1994). The Secretary determines that a country is in compliance with its obligations under the agreement based upon a formal communication in which the country commits itself to the agreement's terms. *Id.*

96. 16 U.S.C. § 1417(a)(1) (1994). "Dolphin safe" has been defined for the ETP as tuna harvested by methods other than setting on dolphin or other marine mammals, or harvested on the high seas using drift nets. *See supra* text accompanying note 71.

position of unilateral trade sanctions by the United States.<sup>97</sup> The Act nevertheless represents a significant effort by the United States toward resolution of the GATT problems through the use of multilateral agreements.

## 2. The IATTC and U.S. Efforts to Reach a Multilateral Solution

The Tuna - Dolphin Panel Report condemned the MMPA for unilaterally imposing U.S. environmental policies on other nations<sup>98</sup> and failed to acknowledge repeated attempts by the United States to negotiate bilateral and multilateral agreements with other nations engaged in fishing practices that were harmful to dolphins.<sup>99</sup> The United States had unsuccessfully sought an international agreement for dolphin protection since the 1970's.<sup>100</sup> The failure of these efforts prompted the U.S. government to ask the Inter-American Tropical Tuna Commission (IATTC) to address the problem.<sup>101</sup> The specific objectives of the IATTC's involvement were: (1) to estimate the levels of dolphin mortality caused by the Eastern Pacific fishing fleet; (2) to assess the impact of these mortalities on the dolphin populations; and (3) to develop methods and procedures to reduce mortality.<sup>102</sup> While this effort was eventually successful,<sup>103</sup> there is

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97. 16 U.S.C. § 1415 (b)(2) (1994).

98. Tuna I, *supra* note 43, at para. 5.32.

99. See Charnovitz, *supra* note 83, at 10,570-71.

100. *Id.* Early efforts focused on organizing international conferences on marine mammal conservation. *Id.*

101. The IATTC is an international research organization based at Scripps Institute of Oceanography in La Jolla, California, that is responsible for the study and conservation of tunas in the Eastern Pacific Ocean. FACT SHEET, *supra* note 29, at 1. The United States has provided the majority of the financial support for the IATTC's dolphin conservation program as well as technical assistance to underdeveloped countries to implement dolphin-safe fishing methods. Charnovitz, *supra* note 83, at 10,571.

102. *Id.* Proposed alternatives to purse-seine fishing have included: separating tunas and dolphins prior to encirclement, using acoustic stimuli, prey, or other stimuli. . . . Using paired-trawls to capture tunas associated with dolphin without encirclement. . . . Initiat[ing] tracking and other behavioral studies of tunas and dolphins. . . . Locating large yellowfin tuna with [Fish Aggregation Devices] FADs, light detecting and ranging devices (LIDAR) or other optical sensors, and aggregating tunas with bait [and] . . . predicting the spatial distribution and catchability of large yellowfin tuna with oceanographic data. Pedrozo, *supra* note 9, at 98 n.128 (citing 57 Fed. Reg. 21,081 (1992)).

103. The IATTC estimated that 133,000 dolphins were killed in the ETP in 1986, the first year in which the program was fully operational. FACT SHEET, *supra* note 29, at 1. The IATTC subsequently accelerated its studies of the impact of this mortality level on overall dolphin populations and intensified its



debate as to whether the IATTC's success could have occurred if the United States had not also imposed trade sanctions.<sup>104</sup>

As part of its efforts, the IATTC organized negotiations among member nations to reach a consensus as to how to limit dolphin mortality.<sup>105</sup> In April 1992, the participating nations agreed to place observers on large tuna fishing vessels and pledged to reduce overall dolphin mortality to less than 5,000 by 1999.<sup>106</sup> The United States actively participated in these negotiations which occurred at the same time that the GATT Panel was deliberating the first tuna-dolphin dispute.<sup>107</sup> Mexico, by contrast, had quit the IATTC in 1978, shortly after the Commission began to study tuna-dolphin interactions.<sup>108</sup> Despite the IATTC's efforts to reach a cooperative, multinational resolution to the issue of dolphin mortality, the MMPA remained a point of contention and was soon subjected to another round of GATT scrutiny.

### III. TUNA II: THE EU - NETHERLANDS COMPLAINT

The Tuna I Panel Report declared both the primary and secondary embargoes of the MMPA illegal under the GATT.<sup>109</sup> Although Mexico negotiated with the United States to end the

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efforts to encourage the use of more dolphin-friendly fishing methods. *Id.* at 2. As a result of the increasing use of these techniques, estimates of overall dolphin mortality fell to 100,000 in 1987; less than 85,000 in 1988; 27,000 in 1991; and 15,500 in 1992. *Id.* at 2-3.

104. See James Brooke, *Ten Nations Reach Accord on Saving Dolphins*, N.Y. TIMES, May 12, 1992, at C4.

105. FACT SHEET, *supra* note 29, at 2.

106. *Id.* The agreement imposed rigid kill limits for each fishing boat, which were to be verified by observers who would accompany each vessel on every fishing excursion. *Id.* Any vessel in violation of the kill limits would incur severe, uniform sanctions by its home nation. *Id.* The program also established an international review panel and charged the IATTC with establishing a research program to develop new fishing practices that could be implemented in place of setting on dolphin. *Id.*

The parties to the agreement were Colombia, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Spain, the United States, Vanuatu and Venezuela. Pedrozo, *supra* note 9, at 82 n.25. Mexico and Venezuela initially refused to join the IATTC, but under pressure caused by bad publicity and dropping exports, both nations agreed to allow IATTC observers on their fishing vessels and pledged money for scientific research. Brooke, *supra* note 104, at C4.

107. Charnovitz, *supra* note 83, at 10,571.

108. *Id.* Mexico's purported reason for leaving was a conflict over fishing rights. *Id.* The Commission began its work with tuna and dolphins in 1976. *Id.* at 10,571 n.44. Although Mexico has announced plans to rejoin the IATTC, it has yet to do so. *Id.* at 10,571.

109. See *supra* part II.A.

primary embargo of its products, the countries affected by the secondary embargo found this to be an unsatisfactory method of obtaining relief. This prompted the European Union (EU)<sup>110</sup> and the Netherlands to file a new complaint with the GATT, in July 1992, seeking to invalidate the secondary embargo which affected them.<sup>111</sup> In November 1992, the EU requested that the panel postpone its consideration of the issue due to pending U.S. legislation — the IDCA.<sup>112</sup> In February 1993, after reviewing the IDCA's provision regarding termination of the primary embargo, the EU requested that the panel resume its deliberations.<sup>113</sup> The Tuna II panel deliberated for over 18 months before reaching its decision.<sup>114</sup>

Although the Tuna II panel ultimately found that the MMPA's embargo provisions violated the GATT, its reasoning differed significantly from that of the first panel. The Tuna II panel reasoned similarly to the Tuna I panel in finding that Article III did not apply and that the MMPA violated Article XI.<sup>115</sup> Having found that the MMPA violated GATT Article XI, the panel turned to U.S. arguments that the Act could be justified as

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110. Ironically, the EU has banned imports of fur obtained from animals captured by leg-hold traps which "do not meet internationally agreed humane trapping standards." See Council Regulation 3254/91, 1991 O.J. (L 308) cited in William J. Snape, III & Naomi B. Lefkowitz, *Searching for GATT's Environmental Miranda: Are "Process Standards" Getting "Due Process?"*, 27 CORNELL INT'L L.J. 777, 791 n.89 (1994). Thus, while the EU sought to overturn the MMPA in the name of free trade, it took affirmative steps to block trade in the interest of the humane treatment of animals. *Id.*

111. The secondary embargo provision of the MMPA affected, among other nations, France, Italy, Spain, and the Netherlands Antilles. GATT Dispute Settlement Panel, *United States — Restrictions on Imports of Tuna* (1994), reprinted at 33 I.L.M. 839, paras. 2.13, 2.15 (1994) [hereinafter Tuna II].

112. Charnovitz, *supra* note 83, at 10,572.

113. *Id.*

114. *Id.* GATT panels normally issue decisions within six months. *Id.* This decision may have been delayed for political reasons. *Id.* at 10,572 n.65.

115. Tuna II, *supra* note 111, at para. 5.8. Although the EU did not allege that Article III applied to the complaint nor did the United States attempt to defend the MMPA under Article III, the panel declined to merely agree with the EU that the Article did not apply. Instead, the panel reiterated the Tuna I panel's discussion that the Article related to the regulation of products as products, not the process by which they are produced. *Id.* Because the MMPA distinguished between harvesting practices and tuna importing policies of exporting countries, and because these practices and policies could not affect the tuna as a product, the panel declared that Article III did not apply. *Id.* at para. 5.9. The Tuna II panel also used the same line of reasoning as the first panel in its analysis of Article XI; the panel found that the import prohibitions were not "duties, taxes or other charges," and thus violated Article XI. *Id.* at para. 5.10.

an Article XX exception. The United States invoked three Article XX sections.

With respect to Article XX(g),<sup>116</sup> the panel applied a three-step analysis. First, it considered whether the policy was meant to conserve an exhaustible natural resource and was made effective in conjunction with domestic restrictions.<sup>117</sup> Second, the panel considered whether the trade measure was "related to" the conservation of exhaustible natural resources.<sup>118</sup> The third step involved an inquiry as to whether the measure was applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where similar conditions exist or in a manner which would constitute a disguised restriction on international trade.<sup>119</sup> The panel never reached the third step due to its dispositive finding with respect to the second step.

Noting that dolphin stocks could potentially be exhausted, the Tuna II panel accepted the U.S. argument that a policy to conserve dolphins was a policy to conserve an exhaustible natural resource.<sup>120</sup> Unlike the Tuna I panel, the Tuna II panel found that the rationale of a policy to conserve an exhaustible natural resource did not depend on the current depletion of that resource.<sup>121</sup> Thus, the fact that dolphin populations in the ETP were not presently endangered did not preclude their classification as an exhaustible natural resource.<sup>122</sup>

In analyzing what measures a country may take in attempting to conserve exhaustible natural resources, the panel's logic shifted dramatically from previous GATT analyses. For the first time, a GATT panel observed that Article XX (g) contains no limit on extraterritorial application. Contrary to the EU's assertion, the panel stated that Article XX(g) does not prohibit a country from applying resource conservation measures beyond

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116. Article XX (g) provides an exception for measures "relating to the conservation of exhaustible natural resources if such measure are made effective in conjunction with restrictions on domestic production or consumption." GATT, *supra* note 1, at art. XX (g).

117. Tuna II, *supra* note 111, at para. 5.12.

118. *Id.*

119. *Id.* Each Article XX exception must meet this standard, which is contained in the Article's headnote. GATT, *supra* note 1, at art. XX.

120. Tuna II, *supra* note 111, at para. 5.13.

121. *Id.* The first panel had not reached this issue due to its invalidation of the MMPA on the basis of its extrajurisdictional application. See *supra* text accompanying notes 60-62.

122. Tuna II, *supra* note 111, at para. 5.13.

its borders.<sup>123</sup> Thus, the Tuna II panel explicitly rejected the Tuna I panel's conclusion that extrajurisdictional measures were contrary to the GATT.<sup>124</sup>

In considering the second prong of its analysis, the panel noted that a previous GATT panel had defined the term "related to" as "primarily aimed at."<sup>125</sup> The panel then examined whether the U.S. measures were "primarily aimed at" their expressed goal of dolphin conservation. The panel noted that the United States prohibited the importation of any tuna from intermediary countries whether or not the *particular* tuna was harvested in a manner which was unsafe to dolphins and whether or not the country itself had tuna harvesting practices or policies which were of actual or potential harm to dolphins.<sup>126</sup> Imports would be banned as long as that country imported *some* of its tuna from another country which had unacceptable tuna harvesting policies.<sup>127</sup> The panel observed that both the primary and intermediary embargoes attempted to coerce other nations to change their policies with regard to persons and things within their own jurisdictions.<sup>128</sup> Conservation of dolphins could not be effected without such a change.<sup>129</sup> Thus, the statute was primarily aimed at bringing about changes in other countries' internal regulations rather than directly addressing issues of dolphin conservation. The panel concluded that measures taken to force other countries to change their policies, and that were effective only if such changes occurred, could not be primarily aimed at the conservation of an exhaustible natural resource in accordance with the meaning of Article XX (g).<sup>130</sup>

The panel also used three-step analysis in its consideration of whether the MMPA could be justified as an Article XX(b) exception. The first issue for consideration was whether the policy fell within the range of policies to protect the life of humans, animals or plants. The panel first noted that the parties did not disagree that the protection of dolphin life or health was a policy

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123. *Id.* at para. 5.15.

124. *Id.* at para. 5.20.

125. GATT Dispute Settlement Panel, *Canada — Measures affecting the Exports of Unprocessed Herring and Salmon*, BISD 35th Supp. 98 (1988) para. 4.6, cited in Tuna II, *supra* note 111, at para. 5.22. That panel noted that the basis for the "primarily aimed at" test was whether the restrictive trade measures would have been adopted for conservation reasons alone. *Id.*

126. Tuna II, *supra* note 111, at para. 5.23.

127. *Id.*

128. *Id.* at para. 5.24.

129. *Id.*

130. *Id.* at para. 5.27.

that could fall under Article XX(b).<sup>131</sup> The sole dispute in this respect was whether extrajurisdictional application of the policy was permissible. Referring to its reasoning under Article XX(g), the panel reiterated that the General Agreement's provisions could be given extra-territorial application.<sup>132</sup>

In step two, the panel addressed the question of whether the measure was "necessary" to protect human, animal or plant life or health. The panel utilized a definition of "necessary" which required a party to use "among the measures reasonably available to it, [the measure] which entails the least degree of inconsistency with other GATT provisions."<sup>133</sup> Consistent with its analysis under Article XX(g), the panel noted that both the primary and intermediate embargoes constituted an attempt to force other nations to conform their domestic policies to those advocated by the United States.<sup>134</sup> This proved particularly problematic in the case of the secondary embargo because the domestic policies which the United States sought to change were not those of the country upon which the embargo was imposed, but those of a third country from which the intermediary country had imported the tuna.<sup>135</sup> In the absence of such a change in a foreign producer's internal policies, the U.S. policies could not further U.S. environmental conservation objectives. The panel again declined to consider the third requirement of compliance with the Article XX headnote because an essential condition of Article XX(b) had not been met.<sup>136</sup>

Finally, the United States attempted to justify the secondary embargo under Article XX (d), which excepts measures necessary to secure compliance with another law or regulation which is not itself inconsistent with the GATT.<sup>137</sup> Since the primary embargo was not consistent with the GATT, the panel con-

131. *Id.* at para. 5.30.

132. *Id.* at para. 5.32. Recalling its observation that:

elsewhere in the General Agreement measures according different treatment to products of different origins could in principle be taken with respect to things located, or actions occurring, outside the territorial jurisdiction of the party taking the measure. [The panel noted that] [i]t could not therefore be said that the General Agreement prescribed in an absolute manner such measures.

*Id.*

133. GATT Dispute Settlement Panel, *Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37th Supp. 200 (1990), para. 74, cited in *Tuna II*, *supra* note 111, at para. 5.35.

134. *Tuna II*, *supra* note 111, at paras. 5.36-37.

135. *Id.* at para. 5.36.

136. *Id.* at para. 5.39.

137. *Id.* at paras. 5.40-41.

cluded that it could not serve as a basis by which to justify the secondary embargo under Article XX(d).<sup>138</sup>

Since the objective of sustainable development<sup>139</sup> has been widely accepted by the parties to the GATT, the validity of the U.S. objective of protecting dolphins was not questioned.<sup>140</sup> The issue was whether, in pursuance of this objective, the United States could impose trade sanctions to coerce other countries to change their internal policies which could in turn affect tuna fishing and dolphin safety.<sup>141</sup> The panel concluded that the MMPA's non-conformity with the GATT could not be justified under an Article XX exception.<sup>142</sup> Thus, the Tuna II panel reached the same ultimate result as its predecessor, although it followed a somewhat different path to that end. That path left a significant opening through which future environmental policies may be directed in order to be upheld under Article XX.

By singling out the MMPA's effect on national policies as its downfall, the Tuna II panel indicated that the Act could stand despite its extraterritorial application if the United States reformulated it to take a more direct approach. Under this rationale, a policy could survive GATT scrutiny if it were aimed directly at dolphin conservation, rather than coerced change in another nation's policy which could in turn affect dolphin conservation.

The second Tuna panel report eliminated a substantial barrier to reconciling the goals of trade and environmental groups by acknowledging dolphin conservation as a legitimate objective to conserve an exhaustible natural resource.<sup>143</sup> The panel merely found the measures taken by the United States to be insufficiently linked to that objective. Even more importantly, a policy can be applied outside of U.S. territory under Tuna II. This change in GATT reasoning is the most significant aspect of the Tuna II panel decision. It greatly enhances the efficacy of

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138. *Id.* at para. 5.41.

139. Although many alternative definitions for the term "sustainable development" have been advanced, the core concept is:

to direct global economic efforts toward increasing the present generation's quality of life while recognizing two essential principles: (1) the Earth's finite capacity to accommodate people and industrial development; and (2) a moral imperative not to deprive future generations of natural resources essential to well-being and quality of environment.

Susan L. Smith, *Ecologically Sustainable Development: Integrating Economics, Ecology, and Law*, 31 WILLAMETTE L. REV. 261, 262 (1995).

140. Tuna II, *supra* note 111, at para. 5.42.

141. *Id.*

142. *Id.*

143. See *supra* text accompanying notes 120-22.

both the MMPA's conservation provisions and conservation efforts generally. By recognizing the significance of dolphin conservation measures and allowing extrajurisdictional application of such measures, the Tuna II panel greatly increased the ability of the United States to bring the MMPA into conformity with the GATT.

#### IV. IN THE WAKE OF TUNA II

The Tuna I panel decision had little or no impact on U.S. environmental legislation. This inefficacy resulted largely because Mexico did not push to have the report adopted.<sup>144</sup> While some have argued that the United States should seek to bring its laws into compliance with the GATT, environmental groups have opposed any changes.<sup>145</sup> Despite the apparent willingness of the Tuna II panel to tolerate modified environmental laws regardless of their extrajurisdictional application, the second decision met with the same hostility as its predecessor.<sup>146</sup>

##### A. ENVIRONMENTALISTS' REACTIONS TO TUNA II

Although the Tuna II panel acknowledged the validity of efforts to ensure sustainable development, environmental concerns are secondary to economic growth under the GATT.<sup>147</sup> Many environmental groups pointed to the Tuna II decision as proof that the GATT can undermine U.S. environmental stan-

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144. As of the present date, the report has still not been adopted. *See supra* note 74 and accompanying text.

145. *See infra* part IV.A.

146. Bill Snape, trade counsel for Defenders of Wildlife, called the decision a "clear and lucid example" of why the environmental community is against GATT. *U.S. Seeks Review of Tuna-Dolphin Decision; Ruling Said to Undermine Environmental Laws*, Int'l Env'tl. Daily (BNA), May 25, 1994, available in LEXIS, News Library, BNAIED file. Lori Wallach, director of Public Citizen's trade program, said that "[t]his decision is proof positive that environmental laws are undermined by GATT." *Id.* David Schorr, a trade policy specialist for the World Wildlife Fund, called the ruling "wrong-headed and unacceptable," and added that the ruling was deeply troubling because it demonstrates the kind of pressure GATT imposes on U.S. environmental laws. *Id.*

147. *See generally* Mayer & Hoch, *supra* note 9. GATT panelists bring a narrow, trade-focused perspective to their task, and environmental matters are often beyond the scope of their interest and expertise. GATT panelists are typically trade attorneys, law professors, or current government officials drawn from the GATT community. Charnovitz, *supra* note 83, at 10,582. Members of these professions often lack the scientific knowledge to fully appreciate environmental issues. Of the three Tuna II panel members, only one had strong environmental credentials. *Id.* at 10,582 n.219.

dards.<sup>148</sup> Environmentalists encouraged Congress to reject the Uruguay Round and attempted to stall negotiations toward implementing the World Trade Organization.<sup>149</sup>

Members of Congress have felt additional pressure from their constituents to protect dolphins.<sup>150</sup> Public sentiment in this area is so strong that the tuna - dolphin case has been referred to as "the catalyst for the environmentalist onslaught" against the GATT and free trade.<sup>151</sup> Because decisions by GATT panels are not binding, such widespread public opinion is significant. Congress gives greater weight to the immediate concerns of its constituents than to the relatively distant obligations imposed by the GATT. Thus, the impact of well-organized environmental lobbying groups and the sheer volume of public opinion is likely to weigh heavily against any action by Congress to bring U.S. laws into compliance with the GATT.<sup>152</sup>

## B. CONFLICTING VIEWPOINTS

Not all groups agree that the MMPA's tuna fishing methods are the best option, economically or ecologically. Biologists and fishermen regard the available alternatives as poor substitutes

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148. Citizen Trade Campaign Executive Director Jane Danowitz called the ruling a "dress rehearsal" for what will happen under the new WTO. *Kantor Says United States Will Ask for Full Review in Tuna-Dolphin Ruling*, 11 Int'l Trade Rep. (BNA) 814 (May 25, 1994). U.S. laws banning dangerous pesticide residues, restrictions on the use of hormones, and restrictions on allowable levels of toxic chemicals would be at risk under the WTO. Charnovitz, *supra* note 83, at 10,582 n.219.

149. Charnovitz, *supra* note 83, at 10,582.

150. See, e.g., 138 Cong. Rec. H9064, 9067 (daily ed. Sept. 22, 1992) (statement of Rep. Gerry E. Studds):

No other single wildlife issue has caused more public outrage than this one. Hundreds of letters, telephone calls, and petitions with thousands of signatures begging Congress to put a stop to this practice pour into the office of my Subcommittee on Fisheries and Wildlife Conservation each year. They come from virtually every State in the Nation - from school children, retired steelworkers, and consumers who demand dolphin-safe tuna in the marketplace.

151. *The Greening of Protectionism*, ECONOMIST, Feb. 27, 1993, at 25. Despite dramatic decreases in dolphin mortality in recent years, many environmentalists remain adamantly opposed to any incidental dolphin deaths in the ETP. Brad Warren, *The Dowside of Dolphin-Safe: The Dolphin Will Survive, but Will the U.S. Tuna Fleet?*, AUDUBON, Nov. 1993, at 20.

152. Environmental lobbying efforts were bolstered by the fact that they were unopposed by conflicting business interests. In April, 1990, the world's three largest tuna canners (Bumble Bee, StarKist, and Chicken of the Sea) bowed to public pressure and agreed to stop buying and selling tuna caught with dolphins. See *Dolphin-Safe Tuna is Aim of Bumble Bee Study*, L.A. TIMES, May 2, 1991, at D1.



for purse-seining.<sup>153</sup> Fishermen argue that these "dolphin-safe" fishing methods require them to harvest immature tuna which not only threaten the tuna fishing industry,<sup>154</sup> but could threaten the long-term health of tuna populations.<sup>155</sup> Indeed, a growing number of critics charge that "dolphin-safe" methods may actually be environmentally unsound.<sup>156</sup> Marine biologists contend that while new fishing practices spare dolphins, they endanger a number of far more threatened species including sharks and sea turtles.<sup>157</sup> The Tuna II ruling has widened the rift between this environmental camp and that which promotes the well-being of the more appealing dolphin.<sup>158</sup>

153. Warren, *supra* note 151, at 20. The primary alternatives involve setting nets on free-swimming schools of tuna or on logs or other floating objects. *Id.*

154. According to IATTC Director James Joseph, "the population of tuna would soon be overfished, and catches would drop by between 30 and 50 per cent. . . . For every dolphin saved . . . 9,000 undersize tuna would be dumped overboard." *Id.* About two-thirds of U.S. tuna boats in the ETP ceased operations within one year of the advent of the dolphin-safe fishing requirements. *Id.* That number has continued to drop. Some have argued that this decrease in the number of U.S. vessels in the ETP has merely turned these waters over to foreign fishing vessels. *Id.* The United States presently has only three boats that still set on dolphins in the ETP compared with Mexico, which has roughly 40. Snape & Lefkovitz, *supra* note 110, at 784 n.45. There are some fishermen in the ETP, however, who set their nets on mature free-swimming tuna schools not in the interest of dolphin conservation, but because it is economically advantageous for them to do so. *Id.*

155. Betsy Carpenter, *What Price Dolphin?*, U.S. NEWS & WORLD REP., June 13, 1994, at 71. When fishermen set their nets around dolphins, the catch is almost entirely adult tuna; when they set on a free-swimming school, the harvest is primarily juvenile tuna, many of which are too small to bother keeping. *Id.* at 72. The small tuna are thrown back too late to avoid death. Thus, a significant number of tuna are removed from the ETP before they are able to reproduce. *Id.*

156. *Id.* at 71.

157. *Id.* Number of dolphins and other species caught per 1,000 tons of tuna:

Setting on:	tuna schools	logs	dolphins
Mortality of:			
Dolphins	less than 1	less than 1	29
Small tuna	38,599	432,935	8,773
Mahi-Mahi	12	2,273	2
Sharks	81	870	28
Wahoo	2	425	less than 1
Billfish	20	30	5
Sea Turtles	4	2	1

*Id.*

158. See, e.g., *Mass Deaths Stump Experts: the Dolphin Die-Off*, U.S. NEWS & WORLD REP., Aug. 24, 1987, at 12.

Few sea creatures enjoy a closer hold on the nation's affection than the . . . dolphin. Gregarious and highly intelligent, these sleek mammals are mainstay attractions at oceanariums, delighting visitors with spec-

Adherents to this new mode of thinking do not dispute that the ETP has historically been a killing field for dolphins.<sup>159</sup> In recent years, however, tuna fishermen in the ETP have been operating under a stringent, multinational agreement managed by the IATTC which has caused the dolphin mortality rate to drop significantly.<sup>160</sup> According to the IATTC, only 3,609 dolphins were killed in the ETP in 1993.<sup>161</sup> This dramatic reduction in mortality has been attributed to increased use of a procedure called "backing down," wherein one end of the net is allowed to dip under the surface before the net is hauled in, opening a channel through which most dolphins escape.<sup>162</sup> Moreover, each tuna fishing boat has been given a strict dolphin kill quota.<sup>163</sup> Once a boat reaches its limit, it must stop fishing for the remainder of the year.<sup>164</sup>

Marine mammal biologists have stated that this level of mortality poses no threat to the dolphin population in the ETP — a population which currently numbers approximately 9.5 million.<sup>165</sup> Thus, even though some dolphins are still killed as a result of setting on dolphin, the effects of such incidental kills are significantly less threatening to the ETP ecosystem than any

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tacular acrobatics. They balance beach balls on their noses, toss Frisbees, ring bells and 'walk' on water on their powerful tails. Dolphins have such high intelligence that several animal-rights groups campaign against their confinement in any conditions, likening it to jailing an innocent person.

*Id.*

159. See *supra* text accompanying notes 9-16.

160. Carpenter, *supra* note 155, at 71-72.

161. *Id.* at 72. This number demonstrates a significant drop in mortality from that of previous years. See *supra* note 103.

162. Over 99 per cent of entrapped dolphins escaped from purse seine nets through use of this procedure in 1993. Carpenter, *supra* note 155, at 72. The backing down procedure, however, may itself contribute to dolphin casualties. Sharks often wait outside of the net to attack injured or confused dolphins as they attempt to escape. Nancy Kubasek et al., *Protecting Marine Mammals: Time for a New Approach*, 13 UCLA J. ENVTL. L & POL'Y 1, 5 (1995). In addition, hundreds or perhaps thousands of dolphins die in "disaster sets," in which the dolphins remain trapped in the nets because of disorientation or errors in the backdown procedure. *Id.*

163. See *supra* note 106 and accompanying text.

164. Carpenter, *supra* note 155, at 72.

165. *Id.* IATTC data collected in 1991 showed that incidental dolphin mortalities in the ETP were as follows:

known alternative.<sup>166</sup> Although this result falls short of the zero-mortality rate sought by some environmentalists, a compromise of this nature may constitute the best way to reconcile opposing viewpoints.

### C. POSSIBLE RESOLUTION

Trade and environmental policies in the area of dolphin conservation can be reconciled. A resolution of the MMPA's incompatibility with the GATT may be reached by incorporating the boat-by-boat standard of the IATTC into the MMPA and eliminating the current provisions for imposition of unilateral sanctions. Such a change offers several advantages and could appease the conflicting factions. First, the focus of the MMPA would shift from national fishing policies to the dolphin conservation practices of individual fishing enterprises. The program would not require other nations to modify their regulations in any way. Rather, it would require *individuals* who wished to

Stock	Population	Incidental Mortality	Percent Mortality
Northeastern spotted	738,100		
Western and/or southern spotted	1,299,300		
All spotted (except coastal)	2,037,400	13,991	.69
Eastern spinner	632,700	5,879	.93
Whitebelly spinner	1,020,100	2,974	.29
Northern common	477,000	161	.03
Central common	415,600	3,182	.77
Southern common	2,211,500	115	.01
Other dolphins	2,729,100	990	.04
All	9,523,400	27,292	.29

Pedrozo, *supra* note 9, at 110. These numbers are significant because scientists believe that incidental mortality rates of less than two percent are sustainable by dolphin populations. *Id.*

166. Indeed, scientists have concluded that an outright ban on purse-seine fishing in the ETP would be unwise. *Id.* at 107-08. One study conducted by the National Academy of Sciences suggests that dolphin mortality can be reduced to non-threatening levels through implementing conservation programs and developing new, dolphin-friendly fishing techniques and training of tuna boat crews to use these fishing methods. *Id.* A study conducted by the National Research Council concluded that purse-seine fishing is "the only commercially viable way of harvesting tuna in the ETP," and that "no practical alternative" exists. *Id.* (citing Michael Parrish, *Study Says Ban on Nets Can't Save Dolphins*, L.A. TIMES, Feb. 28, 1992, at A1). Other commentators have argued that a better alternative is to harvest tuna in other areas of the ocean where tuna schools do not associate with dolphins. Snape & Lefkovitz, *supra* note 110, at 783 n.34 The Western Tropical Pacific, where "tremendously large numbers of fast reproducing skipjack tuna exist," is one such alternative. *Id.* But see Pedrozo, *supra* note 9, at 111 (noting that tuna stocks in the Western Tropical Pacific could also become threatened if a significant number of ETP fishing boats migrate there).

sell their catch to the United States to comply with U.S. importation standards.<sup>167</sup> Fishing boats which meet the U.S. standard would be unaffected by the import prohibition and those which do not sell tuna to the United States need not adhere to the U.S. policy.<sup>168</sup> The embargo provision would thus be unnecessary. If the standard is not met, the United States can simply refuse to transact with that party. This program would be facilitated by the existing enforcement mechanism; IATTC observers have already been placed on most ETP fishing boats to monitor compliance.<sup>169</sup>

This program also imposes concrete and ascertainable limits on dolphin mortality. The present MMPA standard is loosely based on U.S. kill rates over the same period for which foreign kill is calculated.<sup>170</sup> Thus, foreign fishing boats must comply with a quota which is unknown to them until after the fact. The IATTC program eliminates this uncertainty.

A benefit to both sides of the environmental debate is that the IATTC program has saved thousands of dolphin lives without imposing greater danger to other marine species.<sup>171</sup> Although the program cannot guarantee an immediate zero kill rate, dolphin mortality under the IATTC program has constantly declined due to improved fishing techniques.<sup>172</sup> These results have also been achieved without reducing tuna harvests.

Finally, many nations have already embraced the IATTC's policies.<sup>173</sup> Adoption of the IATTC program will immediately eliminate any potential conflict with the other member nations

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167. The same standard would apply to non-IATTC member countries. Because fishing vessels in those countries would most likely not be equipped with the required observers, the United States could refuse to import tuna from those boats. This refusal would be based on the boat's failure to comply and would not directly relate to the boat's country of origin.

168. The United States constitutes approximately 65% of the world market for tuna. Snape & Lefkowitz, *supra* note 110, at 785 n.48. The sheer size of the U.S. market provides an incentive to fishermen to adapt their fishing techniques in order to gain access to it. *Id.* The downside to this policy is that those fishing vessels that choose to sell their tuna elsewhere could continue to fish in a manner unsafe to dolphins and could thereby gain a comparative advantage over other, dolphin-safe fishing boats in non-U.S. markets. *Id.* at 785.

169. See *supra* note 106 and accompanying text.

170. See *supra* text accompanying note 26.

171. See *supra* text accompanying notes 160-66. Because the procedure of "backing down" is performed after setting the tuna nets on a school of dolphin, the incidental kill of other marine species associated with alternative fishing methods is avoided. See *supra* note 162 and accompanying text.

172. See *supra* text accompanying notes 160-64.

173. See Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean (EPO), July, 1994, 33 I.L.M. 936. The signatory nations included

and these nations may impose multilateral pressure on dissenting nations.<sup>174</sup> In addition to securing greater GATT conformity, such pressure can be more effective than unilateral sanctions and is less likely to incite retaliatory measures. Despite these advantages, the IATTC program has met with some criticism.

First, IATTC observers have occasionally been harassed by the crews of the vessels to which they were assigned. For example, some observers reported that the crews, in placing bombs used to herd the dolphins, set them to explode near the observers in order to "discourage them from reporting correct numbers."<sup>175</sup> Other observers were offered bribes to lower the number of dolphin casualties in their reports.<sup>176</sup> A more direct problem arises from the possibility that some nations will simply refuse to comply with the conservation measures,<sup>177</sup> which raises complaints from both environmentalists and free traders.

The environmental argument against allowing nations to opt out of compliance is that such nations will continue to deplete dolphin populations. This possibility of opting out decimates the very purpose of the MMPA and nullifies the efforts of environmental conservation groups and the general public who advocated this legislation. Although quite popular among the general population, dolphin conservation efforts must confront business and trade interests. A situation in which some nations are allowed to avoid compliance with the IATTC's standards would create a free rider problem which would harm complying tuna fishermen in two ways. First, tuna vessels of member nations would suffer inconveniences and cost increases as a result of the additional safeguards.<sup>178</sup> The free rider fishing enterprises would not incur any of the long-term costs of these reforms. Second, non-complying fishing boats would be able to pass along their lower production costs in the form of lower

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Colombia, Costa Rica, Ecuador, France, Japan, Mexico, Nicaragua, Panama, Spain, United States, Vanuatu, and Venezuela. *Id.*

174. *Id.* The July 1994 Agreement recommends that all parties to the Agreement take measures to insure that its terms are followed and that other tuna-fishing nations subscribe to the Agreement. *Id.* The GATT prefers agreements that may result from the use of such multilateral pressure as an alternative to trade sanctions. *See* GATT, *supra* note 1.

175. Kubasek, *supra* note 162, at 5-6.

176. *Id.* at 6.

177. A likely problem child is Mexico, which has consistently avoided rejoining the IATTC since 1978. *See supra* note 108 and accompanying text.

178. Kubasek, *supra* note 162, at 18.

prices, thereby gaining an unfair competitive advantage.<sup>179</sup> Despite these criticisms, the IATTC's boat-based standard is preferable to that of the present MMPA. In addition, this standard is more likely to be acceptable under the GATT and provides the best means by which to reconcile the competing interests of environmental and trade groups.

## V. CONCLUSION

As the Tuna-Dolphin cases illustrate, environmental conservation efforts have not fared well under GATT scrutiny. Such measures were particularly impeded by the Tuna I prohibition on extrajurisdictionality. As environmental issues have gained attention, however, resolution of this incompatibility has taken on greater urgency. The second Tuna-Dolphin decision represents a step toward conciliation between the rival pro-trade and pro-environment camps.

The Tuna II panel's indication that extrajurisdictional measures may be consistent with the GATT gives the United States significant leeway in imposing environmental policies on the global commons. The panel's primary rationale for invalidating the MMPA provisions was that they attempted to force foreign nations to change their domestic policies. The panel thus implied that if the United States amends the MMPA to avoid this coercion, it may pass GATT scrutiny. This modification could be attained by shifting the focus to a boat-by-boat, rather than a country-by-country standard. This showing of greater permissiveness on the part of GATT is especially significant in light of the intense pressure on the U.S. Congress to support dolphin conservation efforts.

Congress is unlikely to accommodate GATT requests to amend environmental legislation because it is not in their own best interests to defy strong constituent and interest group pressure to achieve GATT compliance. Given the opportunity to appease these domestic pressures while bringing U.S. laws into conformity with the GATT, however, Congress may be more inclined to act. The difference in analysis applied by the Tuna II panel compared to that of the previous panel may give Congress enough space to do so.

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179. *Id.* Although such lower prices would not apply in countries such as the United States, which would only import dolphin safe tuna, the existence of the competitive advantage in any market is sufficient to raise concern among tuna fishermen.

