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Citation: 7 Minn. J. Global Trade 431 1998



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Writing Different Lyrics to the Same Old Tune: The New (and Improved) 1997 Amendments to the Marine Mammal Protection Act

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For the past quarter-century, the world has watched intently the activities of tuna fishermen in the Eastern Tropical Pacific (ETP), an oceanic area extending from the coasts of California to Chile to Hawaii. This interest stems from the history of purse seine fishing (also called "setting") in the ETP and the United States embargo imposed under the Marine Mammal Protection Act of 1972 (MMPA),¹ which forbids such fishing methods in order to protect the dolphins that swim with schools of tuna. Purse seine fishing entails setting out huge nets, up to a mile in circumference, which can be drawn up like a purse, trapping tuna and dolphins inside the net.² ETP purse seine fishing practices have resulted in the deaths of over six million dolphins since 1959.³ Mutilation and drowning are the most common causes of death.

1. Pub. L. No. 95-522, 86 Stat. 1027 (codified as amended at 16 U.S.C.A. §§ 1361-1421h (West 1985 & Supp. 1998)).

2. See ALESSANDRO BONANNO & DOUGLAS CONSTANCE, *CAUGHT IN THE NET: THE GLOBAL TUNA INDUSTRY, ENVIRONMENTALISM, AND THE STATE* 123 (1996). The practice was invented by the United States fishing fleet, specifically by fishermen in the San Diego area. See *id.* at 124. It is generally regarded as an economical and efficient manner of catching fish. See Elise Miller, Comment, *The Fox Guarding the Henhouse: Conflicting Duties Under the Marine Mammal Protection Act*, 31 SANTA CLARA L. REV. 1063, 1065 (1991).

3. See *The Provisions of the International Dolphin Conservation Act, How It Is Affecting Dolphin Mortality, and What Measures Can Be Effected to Keep the Mortality to a Minimum: Hearings Before the Subcomm. on Fisheries, Wildlife and Oceans of the House Comm. on Resources*, 104th Cong., 1st & 2d Sess. 60 (1996) [hereinafter Subcommittee Hearings I] (statement of Suzanne Iudicello, Vice-President for Programs, Center for Marine Conservation). Some think this is a low estimate because it does not account for the dolphins killed by sharks while entangled in the net or deaths that occur after dolphins escape the net and are still disoriented. See Nancy Kubasek et al., *Protecting Marine Mammals: Time for a New Approach*, 13 UCLA J. ENVTL. L. & POL'Y 1, 5 (1994-95).

The passage of the MMPA represented an implicit decision that the lives of dolphins were more valuable than trade relations with ETP countries such as Mexico, Venezuela, and Vanuatu. Although environmentalists hailed the statute as proof of the "growing strength of the ecology movement in the United States,"⁴ the embargoed countries complained bitterly.⁵ Perhaps all the complaining paid off. On August 15, 1997, Congress amended the MMPA with the passage of the International Dolphin Conservation Program Act (IDCPA), which at least temporarily lifts the tuna embargo against the ETP countries.⁶ Under the amended Act, the Secretary of Commerce is called upon to evaluate both the success of ETP countries in adopting alternative fishing practices and the effects of setting on today's dolphin population, in order to determine whether the embargo should be lifted indefinitely.⁷ The IDCPA also redefines the term "dolphin-safe" to mean that no dolphins were observed "killed or seriously injured in the sets or other gear deployments in which the tuna were caught."⁸

The original MMPA represented "a collective decision that when the price of tuna is too many dead dolphins, the price is too high—we won't buy."⁹ Environmentally conscious legislators considered the death of a single dolphin to be an exorbitant price to pay for tuna. With the passage of the IDCPA, Congress has struck a balance between the demands of international trade and concern for marine mammal life.

This Note analyzes whether the new legislation addresses traditional concerns regarding the MMPA and its amendments. Part I surveys the history of the MMPA leading up to the introduction and passage of the IDCPA. Part II outlines the terms of the IDCPA as they differ from the original legislation. Part III discusses traditional criticisms of the MMPA, as well as the arguments against amending the MMPA, and questions whether

4. Laurence Iliff, *Conservation or Conspiracy?: Mexican Tuna Embargo Theories Ignore Environmental Concerns*, BUS. MEX., Apr. 1991, at 27, 27.

5. The Mexican government, for example, set up an office in Washington D.C. with the sole purpose of lobbying Congress to lift the tuna embargo. See *Mexico Scores Senate's Failure to Lift Embargo on Yellowfin Tuna*, 13 INT'L TRADE REP. (BNA) No. 40, at 1576 (Oct. 9, 1996).

6. See International Dolphin Conservation Program Act, Pub. L. No. 105-42, 111 Stat. 1122 (1997).

7. See 16 U.S.C.A. § 1385(g) (West Supp. 1998).

8. *Id.* § 1385(d)(1)(D).

9. Christopher B. Stone, *The Environment & the Law: Panel III—International Law, Global Environmentalism, and the Future of American Environmental Policy*, 21 ECOLOGY L.Q. 495, 502 (1994).

the IDCPA responds appropriately to those issues. This Note concludes that, through the IDCPA, U.S. legislators have attempted to cater to both sides of the trade-environment debate in an equitable and novel manner. The IDCPA makes a bona fide attempt to deal with most of the current and historical concerns about the tuna/dolphin debate. Of all the amendments to the MMPA,¹⁰ this one has the greatest potential for success.

I. BACKGROUND OF THE MMPA

A. THE EMBARGO AND ITS TERMS

The numerous amendments to the MMPA¹¹ and the difficulties inherent in balancing the needs of the environment with the goals of international trade, have made it clear that legislating on such matters is no easy task. There are a variety of divergent interests involved in any environmental debate, and the MMPA is no exception.¹² "Animal rights groups, consumers, members of the U.S. tuna industry, and those involved in international trade" are examples of groups affected by the MMPA.¹³ Nonetheless, Congress took a definitive stance almost entirely on the side of the environmental interests with the passage of the MMPA.

The stated goal of the MMPA is to eradicate all dolphin kills taking place at the hands of commercial fishermen.¹⁴ To achieve that goal, legislators passed an embargo on tuna fish imports from any country using "commercial fishing technology which results in the incidental kill or incidental serious injury of ocean

10. The MMPA has been amended by, *inter alia*, the Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100-711, 102 Stat. 4755; the Dolphin Protection Consumer Information Act, Pub. L. No. 101-627, 104 Stat. 4467 (1990); the International Dolphin Conservation Act of 1992, Pub. L. No. 102-523, 106 Stat. 3425; the Marine Mammal Health and Stranding Response Act, Pub. L. No. 102-587, 106 Stat. 5059 (1992); and the Marine Mammal Protection Act Amendments of 1994, Pub. L. No. 103-238, 108 Stat. 532. For general background on the amendments, see Don Mayer & David Hoch, *International Environmental Protection and the GATT: The Tuna-Dolphin Controversy*, 30 Am. Bus. L.J. 187 (1993).

11. See *supra* note 10.

12. See Jennifer Ramach, Note, *Dolphin-Safe Tuna Labeling: Are the Dolphins Finally Safe?*, 15 VA. ENVTL. L.J. 743, 745 (1996).

13. *Id.*

14. See 16 U.S.C.A. § 1371(a)(2) (West 1985 & Supp. 1998). The clause reads: "In any event 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 . . ." *Id.*

mammals in excess of United States standards.”¹⁵ In order to export tuna to the United States, ETP countries needed to prove that they had adopted a regulatory program “comparable to that of the United States” for the prevention of dolphin kills and that the average level of dolphin deaths at the hands of commercial fishermen was “comparable to the average rate of incidental taking of marine mammals by United States vessels.”¹⁶ Under no circumstances, other than for scientific, educational, or replenishment purposes, could a marine mammal designated as “depleted” be taken in the course of business.¹⁷

In 1992, Congress passed the International Dolphin Conservation Act (IDCA), which offered tuna exporters exemption from the MMPA embargo in return for their participation in a five-year moratorium on the setting on and encircling of dolphins.¹⁸ The terms of the moratorium included the establishment of an international research program on alternative methods of har-

15. *Id.* This embargo is also known as a “countermeasure.” See Mary Ellen O’Connell, *Using Trade to Enforce International Environmental Law: Implications for United States Law*, 1 *IND. J. GLOBAL LEGAL STUD.* 273, 281 (1994). The United States is one of the world’s primary users of countermeasures. See *id.* According to the Restatement (Third) of Foreign Relations Law of the United States, the decision to impose a countermeasure is a purely political one. See *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 905 cmt. h (1986). The judiciary is in no way involved. See *id.* Hence, U.S. courts will never participate in the decision about how to deal with an infraction of an international duty. See *id.*

Through the MMPA, Congress declared it illegal to import “[a]ny fish, whether fresh, frozen, or otherwise prepared, if such fish was caught in a manner which the Secretary [of Commerce] has proscribed for persons subject to the jurisdiction of the United States,” regardless of whether any dolphins were incidentally killed in the course of the practice. 16 U.S.C.A. § 1372(c)(3) (West 1985 & Supp. 1998).

16. 16 U.S.C.A. § 1371(a)(2)(B)(i)-(ii). “Comparable regulatory program” is defined as one having prohibitions against encirclement by nets and sundown setting of dolphins. See *id.* § 1371(a)(2)(B)(ii)(I). “Comparable average rate of incidental taking” means an incidental taking rate not greater than two times that of domestic vessels up to the end of 1989, and not greater than 1.25 times the U.S. rate of 1990 and thereafter. See *id.* § 1371(a)(2)(B)(ii)(II).

17. See *id.* § 1371(a)(3)(B). The Secretary of Commerce determines which marine mammals are “depleted.” See *id.*

18. See International Dolphin Conservation Act, Pub. L. No. 102-523, 106 Stat. 3425 (1992) (codified at 16 U.S.C.A. § 1411-1418 (West 1985 & Supp. 1998)); see also Paul J. Yechout, Note, *In the Wake of Tuna II: New Possibilities for GATT-Compliant Environmental Standards*, 5 *MINN. J. GLOBAL TRADE* 247, 259 (1996). The IDCA provides for re-implementation of the ban should the Secretary determine that a country is not abiding by its commitments. See 16 U.S.C.A. § 1415(b)(1). It should be noted that under the Bush administration, none of the targeted countries subscribed to the moratorium. See Subcommittee Hearings I, *supra* note 3, at 63 (statement of Suzanne Iudicello).

vesting tuna and Secretarial reports to Congress on the results of the research, along with the assurance by each concerned country that research on dolphin-safe fishing methods would continue.¹⁹

The MMPA contained two exceptions to the general ban against setting on dolphins. The first was the "Good Samaritan" exemption, which excused the taking of a dolphin when "imminently necessary to avoid serious injury, additional injury, or death to a marine mammal entangled in fishing gear or debris."²⁰ The second exception was that general permits could be issued for taking marine mammals in particular circumstances.²¹ Exceptional circumstances justifying general permits included takings for "scientific research, public display, photography for educational or commercial purposes, or enhancing the survival or recovery of a species or stock."²² Marine mammals could also be taken by certificate holders in the process of testing suggested improvements in tuna fishing methods and equipment.²³ Finally, the Secretary of Commerce could issue permits for takings occurring during commercial fishing expeditions.²⁴

The special permit awarded to the American Tunaboat Association is a prime example of a controversial application of the commercial fishing exemption. Scholars have criticized the per-

19. See 16 U.S.C.A. §§ 1412(b)(2)-(3), 1413(a). The annual reports by the Secretary on the progress of the moratorium were also to include, among other things, "a description of the status of stocks of yellowfin tuna," and assessments of the moratorium regarding its "economic impacts on the tuna industry and consumers" and its "effectiveness . . . in protecting dolphin populations in the eastern tropical Pacific Ocean." *Id.* § 1414(1)(2)-(4).

20. See *id.* § 1371(d)(1). Reasonable care must be taken to protect the marine mammal from further injury, and the taking must be reported to the Secretary of Commerce within forty-eight hours of its occurrence. See *id.* §§ 1371(d)(3)-(4).

21. See *id.* § 1374(a). The permit system is generally headed by the National Oceanic and Atmospheric Administration (NOAA) and the National Marine Fisheries Service (NMFS), under the supervision of the Secretary of Commerce. See Miller, *supra* note 2, at 1071.

22. *Id.* § 1371(a)(1). However, permits for the furtherance of scientific research will provide for the "lethal taking" of dolphins or other marine mammals only if no other research method exists which will spare the life of a marine mammal. See *id.* § 1374(c)(3)(B).

23. See *id.* § 1374(h)(2)(B)(v).

24. See 16 U.S.C. §§ 1371(a)(2), 1374. Congress authorized the American Tunaboat Association (ATA) to take marine mammals, provided that the fleet used "the best marine mammal safety techniques and equipment that are economically and technologically practicable." *Id.* § 1374(h)(2)(B)(ii). It should be noted that the ATA is the only domestic entity to have received a permit from the Secretary, suggesting that they are not freely given to any commercial fishing entity applying for one. See Yechout, *supra* note 18, at 250.

mit exception for directly conflicting with the purpose behind the MMPA, as it allows incidental takings by commercial fishermen in some instances.²⁵ These permits are troublesome to many because they create a double standard: the restrictions are enforced more stringently on foreign fleets than on some fishermen within the United States' exclusive economic zone.²⁶ Basically, the permits make legal the very action which the MMPA purported to prohibit.²⁷ It is unfair to expect foreign colleagues to respect U.S. laws that contain exceptions for domestic entities.

The original MMPA was not intended to apply to foreign fishing fleets; instead, the law was meant to regulate domestic fishing practices.²⁸ Therefore, in order to avoid the statute's application, domestic vessels often sailed under foreign flags.²⁹ They accomplished this by flying "flags of convenience," meaning that they temporarily exhibited the flags of foreign countries, with which the ships had no formal association, in an attempt to foil authorities.³⁰ Essentially unrestricted, foreign ships had relatively fewer observers on board, and were not bound to use only dolphin-safe fishing techniques.³¹ Congress passed the embargo to circumvent this activity and protect the over 100,000 dolphins being killed every year by foreign fleets and domestic fishermen sailing under foreign flags.³² It took a suit by a determined environmental group, the Earth Island Institute (EII), to bring the MMPA to the level of enforcement that Congress had intended.³³

25. See Susan C. Alker, *The Marine Mammal Protection Act: Refocusing the Approach to Conservation*, 44 UCLA L. REV. 527, 536 (1996).

26. See James Joseph, *Tuna-Dolphin Controversy in the Eastern Pacific Ocean: Biological, Economic, and Political Impacts*, 25 OCEAN DEV. & INT'L L. 1, 25-26 (1994).

27. See Alker, *supra* note 25, at 536.

28. See Yechout, *supra* note 18, at 251.

29. See *id.* This also raised a question of liability under the Restatement (Third) of Foreign Relations Law of the United States. According to the Restatement, a state may be responsible for the consequences of failing to apply its own environmental laws against domestic entities. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 601 cmt. d (1986).

30. See Mayer & Hoch, *supra* note 10, at 204 n.124.

31. See *id.* at 204.

32. See *id.* Fleets from Ecuador, Mexico, Panama, Vanuatu, and Venezuela were responsible for the majority of these incidental deaths. See *id.*

33. At the outset the Commerce Department was extremely hesitant to impose the embargo against any country, even when credible evidence of illegal setting on dolphin existed. See *id.* at 205. The Department felt pressure from the newly regulated fishing industry to relax enforcement of the MMPA, so the regulations were largely ignored for the first five years of the statute's existence. See *id.* However, in *Earth Island Institute v. Mosbacher*, District Judge

Before the 1997 amendments, the Act banned the importation into the U.S. of tuna from Colombia, Costa Rica, Italy, Japan, Mexico, Panama, Vanuatu, and Venezuela.³⁴ This embargo proved to be very expensive for those countries that continued to set on dolphin, with the Mexican tuna industry estimating its losses between \$30 and \$40 million each year.³⁵ The embargo had a serious effect on Venezuela, too, given that country's traditional reliance on the United States as the market for over half of its ETP tuna catch.³⁶

The MMPA also implemented a secondary embargo against any country attempting to export fish products originally imported from an embargoed state.³⁷ The exporting country was required to provide the United States with reasonable proof that it had not imported any banned tuna or tuna products within the past six months.³⁸ A secondary embargo can devastate both the secondary nation and the original target of the embargo.³⁹

Henderson of the Northern District of California granted EII's motion for a preliminary injunction requiring stronger implementation of the ban against countries practicing purse seine fishing. *See* 746 F. Supp. 964, 969 (N.D. Cal. 1990). The court agreed with EII's contention that the importation of tuna from countries like Mexico should be enjoined until the Secretary of Commerce determined that foreign death rates did not exceed two times that of the United States. *See id.* at 976. By failing to uphold the terms of the embargo, the Secretary had interfered with the statutory scheme of the MMPA, "assur[ing] the continued slaughter of dolphins." *Id.* at 975. The decision was praised as a major step for the U.S. environmental movement.

There was some concern about the jurisdictional reach of the *Mosbacher* decision, however, because it originated from a U.S. District Court and not the Court of International Trade, which has exclusive jurisdiction over civil cases dealing with embargoes in the United States. *See* Hon. R. Kenton Musgrave & Garland Stephens, *The GATT-Tuna Dolphin Dispute: An Update*, 33 NAT. RES. J. 957, 960-61 (1993). Nonetheless, this issue has not discredited the holding of the case.

34. *See Administration Official Urges Rapid Passage of Tuna/Dolphin Bill*, 13 Int'l Trade Rep. (BNA) No. 19, at 764 (May 8, 1996).

35. *See Mexico Scores Senate's Failure to Lift Embargo on Yellowfin Tuna*, *supra* note 5, at 1576.

36. *See 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, 113 (1993).

37. *See* U.S.C.A. § 1371(a)(2)(C) (West 1985 & Supp. 1998).

38. *See id.*

39. This is especially true for Mexico and Venezuela, the two biggest tuna exporters in the ETP. *See* BONANNO & CONSTANCE, *supra* note 2, at 203-04. Mexico, for example, exports only about twelve percent of its tuna catch to the United States. *See* Iliff, *supra* note 4, at 28. Hence, with the application of the secondary embargo to the rest of Mexico's market, non-ETP countries will be less enthusiastic about buying excess tuna from Mexico for export to the United States, which will seriously impair Mexico's ability to sell tuna other than for domestic consumption. Mexican losses arising out of the secondary embargo

The secondary embargo extended the effect of the primary embargo to about twenty other countries, totalling approximately \$266 million in U.S. tuna imports.⁴⁰

B. DEFINING "DOLPHIN-SAFE"

The MMPA was amended in 1992 to ban the sale, purchase, offer of shipment, or transport of any tuna not considered dolphin-safe.⁴¹ Congress codified the definition of "dolphin-safe" and the responsibilities inherent in selling such tuna in the Dolphin Protection Consumer Information Act (DPCIA).⁴² Under the DPCIA, tuna harvested in the ETP is considered dolphin safe if 1) the Secretary has determined that the vessel which caught the fish is incapable of using its purse seine nets for setting on dolphin, or 2) the product contains written confirmation by the captain of the ship, the Secretary or Secretary's designee, or a representative of the Inter-American Tropical Tuna Commission (IATTC) that no tuna were caught using a purse seine net.⁴³ Therefore, tuna caught on the high seas through driftnet fishing or tuna caught in the ETP with purse seine nets could not be sold legally as "dolphin-safe."⁴⁴

Dolphin safe labeling began as a voluntary, "single attribute" scheme, since it was originally used to share "'positive' environmental information," namely that no dolphins were killed in catching the tuna.⁴⁵ However, upon passage of the International Dolphin Conservation Act of 1992, the offering of dolphin-safe tuna became a prerequisite to entrance into the U.S. tuna market, effectively turning the voluntary scheme into a mandatory one.⁴⁶ Unfortunately, despite the "dolphin-safe"

have been estimated at approximately \$57 million per year, assuming total compliance with the MMPA on the part of the intermediary nations. See Pedrozo, *supra* note 36, at 114.

40. See BONANNO & CONSTANCE, *supra* note 2, at 201.

41. See 16 U.S.C.A. § 1417(a)(1); see also Elliot B. Staffin, *Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labeling and Its Role in the "Greening" of World Trade*, 21 COLUM. J. ENVTL. L. 205, 251 (1996).

42. Pub. L. No. 101-627, § 901, 104 Stat. 4467 (1990) (codified as amended at 16 U.S.C.A. § 1385 (West Supp. 1998)).

43. See *id.* §§ 1385(d)(2)(A) & (B)(i)-(iii). Tuna that is labeled as dolphin-safe, but, in fact, is not, violates section 5 of the Federal Trade Commission Act. See *id.* § 1385(d)(1).

44. See *id.* § 1385(d)(1)(A)-(B).

45. Staffin, *supra* note 41, at 215.

46. See Musgrave & Stephens, *supra* note 33, at 971.

tuna requirement, dolphin-unsafe practices did not entirely cease in reportedly "dolphin-safe" hauls.⁴⁷

C. THE GATT INCIDENT

*EII v. Mosbacher*⁴⁸ became a source of contention for most of the ETP countries, as it was the first legal proceeding to impose the embargo to the letter. Shortly after *Mosbacher* was decided, Mexican officials protested the MMPA and DPCIA before a GATT dispute resolution panel (*Tuna I*).⁴⁹ They requested that the Panel find the primary and secondary embargoes under the MMPA to violate GATT Article XI, which prohibits quantitative restrictions generally.⁵⁰ Additionally, the Mexican delegation asserted that the Panel should find the DPCIA inconsistent with Article XI and unjustified under GATT.⁵¹ The United States defended the MMPA by arguing that it was consistent with the exceptions in Article XX(b) and (g),⁵² which allow for discriminatory measures "necessary to protect human, animal or plant life or health" or "relating to the conservation of exhaustible natural resources," respectively.⁵³ Although the GATT Panel could not unilaterally overrule United States law,⁵⁴ such controversial press coverage would not bode particularly well for the reputation of the MMPA in the eyes of the international trade community.

The Panel found that the Article XX(b) exception of the GATT did not cover actions outside the jurisdictional borders of the United States, and, even if it had, "[t]he United States had not demonstrated to the Panel . . . that it had exhausted all op-

47. See Ramach, *supra* note 12, at 775 (reporting that Greenpeace has claimed that dolphin encirclement still occurs in some "dolphin-safe" hauls).

48. 746 F. Supp. 964 (N.D. Cal. 1990).

49. United States—Restrictions on Imports of Tuna, Aug. 16, 1991, GATT B.I.S.D. (39th Supp.) at 155 (1993) (unadopted) [hereinafter *Tuna I*]. For an in-depth discussion of the findings of the dispute resolution panel, see Mayer & Hoch, *supra* note 10.

50. See *Tuna I*, *supra* note 49, ¶ 3.1, at 161. Article XI states that "[n]o 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." General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, Art. XI:I [hereinafter GATT].

51. See *Tuna I*, *supra* note 49, ¶ 3.3, at 161.

52. See *id.* ¶ 3.6, at 162.

53. GATT, arts. XX(b) and XX(g). The dispute panel rejected both these arguments. See *Tuna I*, *supra* note 49, ¶ 5.32, at 200-01.

54. See Iliff, *supra* note 4, at 28.

tions reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement.⁵⁵ Similarly, with regard to the Article XX(g) exception, the Panel held that “[a] country can effectively control the production or consumption of an exhaustible natural resource only to the extent that the production or consumption is under its jurisdiction.”⁵⁶

The final blow for the MMPA came from the Panel’s interpretation of GATT Article III:4, which calls for equal treatment and opportunities for imported products in the domestic market.⁵⁷ The Panel understood this to mean that regulations of imports must deal with their qualities as a product, and the standards espoused by the MMPA dealing with “the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product.”⁵⁸ This has come to be known as the process-product distinction.⁵⁹ Under GATT, a country may regulate a product only as a product, yet the process by which the product comes to be falls outside the purview of any regulation.⁶⁰

The Mexican challenge to the DPCIA, on the other hand, did not succeed. The GATT Panel upheld the “dolphin-safe” provisions as consistent with the General Agreement since, at that time, the labeling requirements were still voluntary.⁶¹ This meant the legislation did not hamper import access to the U.S. market.⁶² Hence, the subsequent passage of the IDCA seems to

55. *Tuna I*, *supra* note 49, ¶ 5.28, at 199.

56. *Id.* ¶ 5.31, at 200. This limited jurisdiction argument regarding Article XX has recently been extended to the U.S. Endangered Species Act, which bans imports of shrimp harvested in a manner dangerous to the well-being of sea turtles. See Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 AM. J. INT’L L. 231, 242 (1997).

57. See *Tuna I*, *supra* note 49, ¶ 5.12, at 194.

58. *Id.* ¶ 5.15, at 195.

59. This is not the first time the process-product distinction has been applied to a trade dispute between GATT members. A resolution panel found in the early 1950s that a Belgian law requiring a tax levy on all publicly made products imported from countries with substandard family allowance systems was a violation of GATT. See Alan Isaac Zreczny, *The Process/Product Distinction and the Tuna/Dolphin Controversy: Greening the GATT Through International Agreement*, 1 BUFF. J. INT’L L. 79, 93 (1994). Because the United States did not clearly differentiate between the product at issue and the process of harvesting it, the Panel found no choice but to condemn the embargo. See *id.* at 87.

60. See Yechout, *supra* note 18, at 255.

61. See *Tuna I*, *supra* note 49, ¶ 5.42, at 203.

62. See *id.*

have put the MMPA in further violation of GATT principles, since it mandated dolphin-safe labeling.

Despite Mexico's victory before the GATT Panel, Mexican government officials chose not to pursue the formal adoption of the panel findings, largely because of the difficulties such an action would introduce to NAFTA negotiations.⁶³ Instead, Mexican and U.S. negotiators decided to pursue a bilateral and mutually acceptable solution to this particular trade-environment dilemma.⁶⁴ However, the EU and the Netherlands brought their own challenge before another GATT dispute resolution panel two years later (*Tuna II*).⁶⁵ Again, the Panel found that the MMPA violated GATT.⁶⁶ This time the violation stemmed from the fact that GATT prevents measures "taken so as to force other countries to change their policies with respect to persons and things within their own jurisdiction."⁶⁷ Although the reasoning behind the rejection of the MMPA differed in this instance, criticism from academics and environmentalists alike mounted against the GATT's seemingly anti-environmental stance.⁶⁸

D. THE MOVE TO ABOLISH THE EMBARGO

The International Dolphin Conservation Program Act of 1997 arose out of the decision between Mexican trade officials and Congress to negotiate an alternative to a complete tuna embargo. The International Dolphin Conservation Program, also known as the La Jolla Agreement, was formulated and signed

63. See Richard J. McLaughlin, *UNCLOS and the Demise of the United States' Use of Trade Sanctions to Protect Dolphins, Sea Turtles, Whales, and Other International Marine Living Resources*, 21 *ECOLOGY L.Q.* 1, 12 (1994). For such a panel finding to be binding on each country, it must be officially adopted by the full GATT council. See Mayer & Hoch, *supra* note 10, at 218.

64. See McLaughlin, *supra* note 63, at 12-13.

65. United States—Restrictions on Imports of Tuna, 33 *I.L.M.* 839 (1994) [hereinafter *Tuna II*].

66. See *id.*

67. *Id.* ¶ 5.24, at 894.

68. See, e.g., Sean T. Fox, *Responding to Climate Change: The Case for Unilateral Trade Measures to Protect the Global Atmosphere*, 84 *GEO. L.J.* 2499, 2532 (1996) ("The panel's statement implied that states, by joining the GATT, had elevated the right to market access above other competing rights, including a country's sovereign right to protect the environment. . . . [That] conclusion . . . deserves serious scrutiny"); Mayer & Hoch, *supra* note 10, at 192 ("We conclude that the GATT should be amended to allow for some extra-territorial applications of domestic environmental law").

shortly after *Tuna I* was resolved.⁶⁹ The International Dolphin Conservation Act, which arose out of the agreement in 1992, created the five-year moratorium measure under the MMPA.⁷⁰

Despite the terms of the accord and the attempt to amend the MMPA once again, the MMPA remained in place for another five years, largely due to Congress' inability to find an acceptable compromise.⁷¹ The United States and the purse seining countries in the ETP met at the bargaining table again in 1995, leading to the drafting of the Panama Declaration.⁷² This agreement sets out the relative obligations of all twelve signatories in their collective attempt to protect dolphins in the ETP.⁷³ In return for international recognition of these obligations, the United States agreed to revise its definition of "dolphin-safe" in the MMPA.⁷⁴ This became the impetus for the IDCPA.

The first draft of amendments (known as the Stevens/Breaux bill) was largely rejected by both environmental groups and members of Congress.⁷⁵ Complaints surfaced regarding the provisions allowing for the immediate redefinition of "dolphin-

69. Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean (EPO), June 1992, 1 U.S.T. 230, 33 I.L.M. 936 [hereinafter IDCP]. The Program purported to set dolphin mortality limits for all participating countries "equivalent to 19,500 divided by the total number of qualified vessels. *Id.* at 938. A "qualified vessel" was one identified by its government as having a carrying capacity of more than 400 short tons and being likely to engage in purse seine fishing within the eastern Pacific. *See id.*

70. *See* 16 U.S.C.A. § 1412. (West 1985 & Supp. 1998). Keep in mind that the IDCA is not the same as the IDCPA. This paper deals only with the latter. The IDCA arose out of the 1992 amendments to the MMPA and the La Jolla Agreement, while the IDCPA arose out of the La Jolla Agreement and the Panama Declaration, which was a direct result of the La Jolla Agreement.

71. *See Mexico Scores Senate's Failure to Lift Embargo on Yellowfin Tuna*, *supra* note 5, at 1576.

72. *See* International Dolphin Conservation Program Act, Pub. L. No 105-42, § 2(a)(1), 111 Stat. 1122, 1122 (giving effect to the Panama Declaration, which was signed Oct. 4, 1995, in Panama City). The text of the Panama Declaration is available at <<http://www.greenpeaceusa.org/campaigns/biodiversity/panama.html>>.

73. *See House Subcommittee Sends Tuna-Dolphin Bill to Full Panel*, 14 Int'l Trade Rep. (BNA) No. 16, at 697 (Apr. 16, 1997). Signatories of the Panama Declaration include Belize, Colombia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, the United States, Vanuatu, and Venezuela. *See* International Dolphin Conservation Program Act § 2(a)(1), 111 Stat. at 1122.

74. *See House Subcommittee Sends Tuna-Dolphin Bill to Full Panel*, *supra* note 73, at 697. The definition was to be changed so that "any given haul of tuna that had no associated dolphin mortality (as certified by an observer) could bear the dolphin-safe label." *Id.*

75. *See New Bill Would Allow Cheap Tuna to Flood U.S., Earth Island Says*, 12 Int'l Trade Rep. (BNA) No. 47, at 1976 (Nov. 29, 1995).

safe.”⁷⁶ The current version of the amendments passed largely because the change in the definition of dolphin-safe is postponed until the Secretary of Commerce determines that purse seine practices do not have an adverse effect on dolphin populations in the ETP.⁷⁷ If no adverse effects are determined to exist as of December 2002, the dolphin-safe label will simply provide that no dolphins were “observed killed or seriously injured” in that particular tuna haul.⁷⁸

Thus, out of a law dedicated to the unwavering protection of all dolphins from the nets of purse seiners comes an amendment allowing for purse seine fishing, but only if no dolphins are injured in the process. The change in policy seems to honor the widespread interest in protecting dolphins, while recognizing that international trade is too valuable to compromise unilaterally. The Agreement represents significant progress in resolving the trade-environment debate, but the compromise has yet to prove itself as a completely satisfactory one.

II. THE INTERNATIONAL DOLPHIN CONSERVATION PROGRAM ACT OF 1997

A. CONGRESSIONAL FINDINGS AND THE PURPOSE BEHIND THE ACT

Congress enumerated three major purposes for enacting the IDCPA, each of which gives rise to substantial changes in the terms of the MMPA.⁷⁹ The first stated purpose is “to give effect to the Declaration of Panama . . . including the establishment of the International Dolphin Conservation Program, relating to the protection of dolphins and other species, and the conservation and management of tuna in the eastern tropical Pacific Ocean.”⁸⁰ The Panama Declaration delineates specific “dolphin and ecosystem protection commitments.”⁸¹ The crux of the Declaration is the understanding that each signatory nation will have a maximum dolphin mortality rate of 5,000 per year, and

76. See *Mexico Scores Senate's Failure to Lift Embargo on Yellowfin Tuna*, *supra* note 5, at 1576.

77. See *Compromise on Tuna/Dolphin Bill Approved Unanimously by Senate*, 14 Int'l Trade Rep. (BNA) No. 32, at 1354 (Aug. 6, 1997).

78. See 16 U.S.C.A. § 1385(d) (West 1985 & Supp. 1998).

79. See International Dolphin Conservation Program Act, Pub. L. No. 105-42, § 2(a), 111 Stat. 1122, 1122 (1997).

80. See *id.* § 2(a)(1).

81. *Tuna/Dolphin Measure Sent to Full Resources Committee*, 13 Int'l Trade Rep. (BNA) No. 17, at 682 (Apr. 24, 1996).

each will work to steadily decrease its relative dolphin mortality rate to zero.⁸²

In order to successfully implement the International Dolphin Conservation Program, the Panama Declaration signatories set out three objectives:⁸³ 1) the embargo on yellowfin tuna must be lifted; 2) the American tuna market must be opened to those nations that comply with the terms of the IDCP and seek and/or secure membership in the Inter-American Tropical Tuna Commission (IATTC);⁸⁴ and 3) the definition of dolphin safe must be changed to an observed mortality standard.⁸⁵ Besides providing for a 5,000 annual dolphin mortality cap, the IDCP also strives to establish a "per-stock per-year dolphin mortality limit . . . through calendar year 2000, at a level between 0.2 percent and 0.1 percent of the minimum population estimate" for that particular species of dolphin.⁸⁶ After the year 2000, the per-stock per-year limit must be at 0.1 percent or lower.⁸⁷ If any of these requirements are not met, setting on dolphin of the particular stocks affected is prohibited for the remainder of the year.⁸⁸ Finally, the IDCP calls for assessments by the Secretary of Commerce of the relative success of signatory countries in meeting these goals in the years 1998 and 2000.⁸⁹ The Secretaries of State and Commerce are charged with developing and securing promises from foreign countries to implement the IDCP.⁹⁰

82. See International Dolphin Conservation Program Act § 2(b)(4).

83. See Sen. Ted Stevens, *Senate Approves Tuna-Dolphin Measure*, Congressional Press Release, July 30, 1997, available in 1997 WL 12101757.

84. The IATTC is made up of the United States, France, Japan, Venezuela, Panama, Costa Rica, Nicaragua, and Vanuatu. See Subcommittee Hearings I, *supra* note 3, at 61 (statement of Suzanne Iudicello). It is headquartered at the Scripps Institute of Oceanography in La Jolla, California, and is largely financed by the United States. See Yechout, *supra* note 18, at 261 n.101. The Commission was established in 1950 pursuant to a fishing agreement between the United States and Costa Rica. See Pedrozo, *supra* note 36, at 95. The IATTC was relatively quiet until the 1970s, when it began taking a more active role in the regulation of incidental dolphin killings in the ETP. See *id.*

85. See Stevens, *supra* note 83.

86. International Dolphin Conservation Program Act, sec. 302(2), § 6(c) (codified at 16 U.S.C.A. § 1412(2) (West Supp. 1998)). "Per-stock per-year dolphin mortality limit" means that every year until the year 2000, for every type (stock) of dolphin swimming in the ETP, the mortality rate cannot exceed 0.2 percent of the minimum population estimate for that particular stock.

87. See *id.* sec. 302(3), § 6(c) (codified at 16 U.S.C.A. § 1412 (3)).

88. See *id.* sec. 302(4), § 6(c) (codified at 16 U.S.C.A. § 1412(4)).

89. See *id.* sec. 302(5)-(6), § 6(c) (codified at 16 U.S.C.A. § 1412(5)-(6)).

90. See *id.* sec. 302, § 6(c) (codified at 16 U.S.C.A. § 1412).

The Secretary of Commerce plays a key role in implementing both the International Dolphin Conservation Program and the IDCPA. The Secretary is charged with conducting research to determine whether marine mammal populations will be adversely affected (which occurs when mortality rates exceed reproduction rates) under the terms of the IDCPA.⁹¹ Should an adverse effect become apparent, the Secretary is to notify the IATTC at once and “prescribe emergency regulations to reduce incidental mortality and serious injury and mitigate such adverse impact.”⁹² The content of these “emergency regulations” is not clearly defined in the text of the amendment. However, the content of the research is prescribed.⁹³ The research, which commenced on October 1, 1997, should consist of “population abundance surveys,”⁹⁴ “stress studies,”⁹⁵ and other issues concerning the economic and bycatch effects (i.e. the effects on animals other than dolphins) of purse seine fishing.⁹⁶ For the most

91. *See id.* secs. 303(c)(1), 304(a)(1), § 6(c) (codified at 16 U.S.C.A. §§ 1413(c)(1), 1414(a)).

92. *Id.* sec. 303(c)(1), § 6(c) (codified at 16 U.S.C.A. § 1413(c)(1)).

93. *See id.* sec. 304(a)-(b), § 6(c) (codified at 16 U.S.C.A. § 1414a (a)-(b)).

94. *Id.* sec. 304(a)(2), § 6(c) (codified at 16 U.S.C.A. § 1414a (a)(2)). These surveys will determine the relative abundance of any stocks previously found to be depleted, and they will be conducted three times in the next three years. *See id.*

95. *Id.* sec. 304(a)(3), § 6(c) (codified at 16 U.S.C.A. § 1414a (a)(3)). These studies determine the biological and psychological effect of intentional encirclement on dolphin stocks. *See id.*

96. *See id.* sec. 304(b)(2), § 6(c) (codified at 16 U.S.C.A. § 1414a (b)(2)). Namely, the Secretary should adduce:

(A) projects to devise cost-effective fishing methods and gear so as to reduce, with the goal of eliminating, the incidental mortality and serious injury of marine mammals in connection with commercial purse seine fishing in the eastern tropical Pacific Ocean;

(B) projects to develop cost-effective methods of fishing for mature yellowfin tuna without setting nets on dolphins or other marine mammals;

(C) projects to carry out stock assessments for those marine mammal species and marine mammal stocks taken in the purse seine fishery for yellowfin tuna in the eastern tropical Pacific Ocean, including species or stocks not within waters under the jurisdiction of the United States; and

(D) projects to determine the extent to which the incidental take of nontarget species, including juvenile tuna, occurs in the course of purse seine fishing for yellowfin tuna in the eastern tropical Pacific Ocean, the geographic location of the incidental take, and the impact of that incidental take on tuna stocks and nontarget species.

Id.

part, environmentalists support the agenda set out under the IDCPA.⁹⁷

The Secretary is generally in charge of issuing regulations with the intention of effecting the provisions of the IDCP.⁹⁸ The content of the regulations is diverse. There are observer requirements for each vessel,⁹⁹ rules setting out various dolphin-safe procedures, and a ban on intentional dolphin-setting in accordance with the IDCP.¹⁰⁰

97. See *Mexican Fishermen Hail Senate Vote on Tuna Ban*, N.Y. TIMES, July 31, 1997, at A5 (reporting that the World Wildlife Fund, the Environmental Defense Fund, and Greenpeace all expressed support for the Senate bill version of the IDCPA); *Hearings Before the Subcomm. on Fisheries, Wildlife, and Oceans of the House Comm. on Resources*, 105th Cong. — (1997) [hereinafter *Subcommittee Hearings II*] (statement of Nina M. Young, Marine Mammalogist, Center for Marine Conservation, reiterating support of the above groups and adding that the National Wildlife Federation is also a proponent).

98. See International Dolphin Conservation Program Act sec. 303(a)(1), § 6(c) (codified at 16 U.S.C.A. § 1413 (a)(1)).

99. The observer requirement is not new. The National Marine Fisheries Service (NMFS) implemented an observer requirement intended to police tuna fishing practices and provide an accurate measure of dolphin mortality levels shortly after the passage of the MMPA. See Joseph, *supra* note 26, at 3. The authority of the NMFS to require observers on all domestic vessels was challenged as a violation of the Fourth Amendment in *Balelo v. Baldrige*, 724 F.2d 753 (9th Cir. 1984). The Ninth Circuit rejected the constitutional challenge and held that the NMFS has the authority to place the observers on board. See *id.* at 759. The observer requirement was deemed to be an "adequate substitute for a warrant" under the Fourth Amendment. *Id.* at 765-66.

100. See International Dolphin Conservation Program Act sec. 303(a)(2)(B)(i)-(iii), § 6(c) (codified at 16 U.S.C.A. § 1413(a)(2)(B)(i)-(iii)). Other terms include:

- (iv) requiring the use of special equipment, including dolphin safety panels in nets, monitoring devices as identified by the International Dolphin Conservation Program to detect unsafe fishing conditions that may cause high incidental dolphin mortality before nets are deployed by a tuna vessel, operable rafts, speedboats with towing bridles, floodlights in operable condition, and diving masks and snorkels;
- (v) ensuring that the backdown procedure during sets of purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later than 30 minutes before sundown;
- (vi) banning the use of explosive devices in all purse seine operations;
- (vii) establishing per vessel maximum annual dolphin mortality limits, total dolphin mortality limits and per-stock per-year mortality limits in accordance with the International Dolphin Conservation Program;
- (viii) preventing the making of intentional sets on dolphins after reaching either the vessel maximum annual dolphin mortality limits, total dolphin mortality limits, or per-stock per-year mortality limits;
- (ix) preventing the fishing on dolphins by a vessel without an assigned vessel dolphin mortality limit;

The second purpose of the IDCPA is to eliminate the tuna embargo against all nations in compliance with the IDCP and, consequently, the Panama Declaration.¹⁰¹ The amendment specifically repeals the language in the MMPA requiring that “[t]he Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards.”¹⁰² This, of course, also lifts the secondary embargo provisions.

The final purpose underlying the IDCPA is U.S. recognition of the “significant reductions” achieved by ETP nations “in dolphin mortality associated with that fishery.”¹⁰³ Congress specifically found that dolphin mortality in the ETP has decreased markedly since the initial passage of the MMPA, “from hundreds of thousands annually to fewer than 5,000 annually.”¹⁰⁴ This decrease is largely due to increased recognition of the importance of environmental protection by lesser-developed countries in the ETP and positive action on the part of ETP countries to strengthen adherence to environmental protection policies.¹⁰⁵

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- (x) allowing for the authorization and conduct of experimental fishing operations, under such terms and conditions as the Secretary may prescribe, for the purpose of testing proposed improvements in fishing techniques and equipment that may reduce or eliminate dolphin mortality or serious injury . . . ;
 - (xi) authorizing fishing within the area covered by the International Dolphin Conservation Program by vessels of the United States without the use of special equipment or nets if the vessel takes an observer and does not intentionally deploy nets on, or encircle, dolphins, under such terms and conditions as the Secretary may prescribe; and
 - (xii) containing such other restrictions and requirements as the Secretary determines are necessary to implement the International Dolphin Conservation Program with respect to vessels of the United States.

Id. sec. 303(a)(2)(B)(iv)-(xii), § 6(c) (codified at 16 U.S.C.A. § 1413(a)(2)(B)(iv)-(xii)).

101. *See id.* § 2(a)(3).

102. *See id.* § 4(a)(2). The quoted language was deleted from 16 U.S.C. 1371(a)(2) (1994).

103. *Id.* § 2(a)(2).

104. *Id.* § 2(b)(1).

105. Mexico, for example, has developed and passed five major environmental statutes, along with 87 sets of regulations setting various quality standards for everything from fuel to water to noise. *See Steinberg, supra* note 56, at 251. Also, with the creation of Mexico's Office of the Attorney General for Environmental Protection has come the hiring of over 500 environmental inspectors. *See id.*

Specifically, as of 1993, Mexican dolphin mortality rates matched those of the United States.¹⁰⁶ Mexican authorities accomplished this largely through mandating that tuna fleets employ special equipment and techniques, providing and requiring "extensive training" for everyone on board, and intensifying penalties for the violation of set regulations.¹⁰⁷ The IDCPA also establishes a mandatory observer requirement for all fishing vessels in order to ensure full compliance with the law.¹⁰⁸ According to some estimates, Mexican fishing fleets kill less than one dolphin in every tuna shoal netted.¹⁰⁹

B. A CHANGED MEANING BEHIND THE WORDS "DOLPHIN-SAFE"

Section 5 of the IDCPA amends the Dolphin Protection Consumer Information Act. It applies to purse seine fishing both within and outside the confines of the Eastern Tropical Pacific.¹¹⁰ As for purse seine practices within the ETP, a fishing boat employing purse seine technology will be considered dolphin-safe if "the vessel is of a type and size that the Secretary has determined . . . is not capable of deploying its purse seine nets on or to encircle dolphins," or, alternately, "the product is accompanied by a written statement executed by the captain providing the certification required under subsection (h)."¹¹¹ Subsection (h) states that the requisite certification must aver "that no dolphins were killed or seriously injured during the sets in which the tuna were caught."¹¹² Also, the captain must certify that an authorized observer accompanied the captain and crew for the duration of the harvest and that the observer did not see any dolphins killed or seriously injured.¹¹³

106. See *Fact Sheet: Mexico's Marine Conservation Efforts*, U.S. DEP'T OF STATE DISPATCH, May 1, 1994, at 18.

107. See *id.*

108. See *id.*

109. See *Must Try Harder*, THE ECONOMIST, Aug. 21, 1993, at 22. One of the preeminent technologies now used in purse seining is the installation of "safety panels" which protect the dolphins from becoming entangled in the tuna net. See Kurt Kleiner, *Mexico Fishes For End to Tuna Ban*, NEW SCIENTIST, May 25, 1996, at 10. After the tuna have been encircled, part of the net is lowered, and scuba divers are dispatched to help lead the dolphins out of the net, free of any injury. See *id.*

110. See International Dolphin Conservation Program Act § 5(a) (codified at 16 U.S.C.A. § 1385(d)(1) (West Supp. 1998)).

111. *Id.* § 5(a) (codified at 16 U.S.C.A. § 1385(d)(2)(A)-(B)).

112. *Id.* § 5(c) (codified at 16 U.S.C.A. § 1385(h)(1)).

113. See *id.* § 5(a) (codified at 16 U.S.C.A. § 1385(d)(2)(B)(ii)).

It is still a violation of Section 5 of the Federal Trade Commission Act to falsely label a tuna product as "dolphin-safe."¹¹⁴ Tuna will be considered dolphin-safe only if no dolphins suffered death or serious injury in the haul.¹¹⁵ Fishing fleets seeking to implement dolphin safety labels also need an effective "tracking and verification program" to support the claim of dolphin safety, and the label must be in total compliance with all Federal Trade Commission requirements.¹¹⁶

The definition of "dolphin-safe" could be amended to reflect these new terms as early as March of 1999 or as late as July of 2001.¹¹⁷ Whether the definition is amended depends on the outcome of the Secretary's dolphin impact studies.¹¹⁸ If the Secretary determines through sound evidence in the preliminary stage that no depleted dolphin stocks have suffered a significant adverse effect from revised purse seining practices, the definition will change immediately in 1999.¹¹⁹ If that determination cannot be sufficiently proven until the final outcome of the studies in 2001, the definition will change at that point.¹²⁰ If it appears that depleted stocks continue to be threatened, a new compromise may have to be reached.¹²¹

C. BYCATCH REDUCTION ISSUES

Besides reducing dolphin mortality to negligible levels, the Panama Declaration seeks to minimize the number of nontarget species, or bycatch, inadvertently killed by purse seine nets and other, more "dolphin-friendly" fishing techniques.¹²² Victims of bycatch include young fish, birds, turtles, and whales.¹²³ Very often, juvenile tuna are bycatch victims, which impairs the tuna

114. See *id.* § 5(a) (codified at 16 U.S.C.A. § 1385(d)(3)(C)).

115. See *id.* § 5(a) (codified at 16 U.S.C.A. § 1385(d)(3)(C)(i)).

116. See *id.* § 5(a) (codified at 16 U.S.C.A. § 1385(d)(3)(C)(ii)-(iii)).

117. See Allan Freedman, *After Compromise, Dolphin Deal Sails Through Senate*, *House*, CONG. Q. WKLY. REP., Aug. 2, 1997, at 1862, 1863.

118. See *id.* The Secretary is expected to review the stock levels and assess progress and any recommendations to further the objectives of the statute. See International Dolphin Conservation Program Act sec. 302 (4)-(5), § 6(c), (codified at 16 U.S.C.A. § 1412(4)-(5)).

119. See Freedman, *supra* note 117, at 1863.

120. See *id.*

121. See generally International Dolphin Conservation Program Act sec. 303(c)(1), § 6(c) (codified at 16 U.S.C.A. § 1413(c)(1)).

122. See Phillippe Cullet & Annie Patricia Kameri-Mbote, *Dolphin Bycatches in Tuna Fisheries: A Smokescreen Hiding the Real Issues?*, 27 OCEAN DEV. & INT'L L. 333, 337 (1996).

123. See *id.* at 339.

population's ability to sustain itself.¹²⁴ In most circumstances, the bycatch population is not utilized in any way and is simply left to die.¹²⁵ This raises economic concerns as well, since the tuna business is one of the most important commercial fishing operations in the world.¹²⁶ Therefore, it is unsurprising that the drafters of the IDCPA would choose to address the issue of bycatch reduction.¹²⁷

The bycatch reduction provisions require the Secretaries of State and Commerce to "establish standards and measures for a bycatch reduction program for vessels fishing for yellowfin tuna in the eastern tropical Pacific Ocean."¹²⁸ The agreed-upon program should include four measures:

- (1) to require, to the maximum extent practicable, that sea turtles and other threatened species and endangered species are released alive;
- (2) to reduce, to the maximum extent practicable, the harvest of nontarget species;
- (3) to reduce, to the maximum extent practicable, the mortality of nontarget species; and
- (4) to reduce, to the maximum extent practicable, the mortality of juveniles of the target species.¹²⁹

These are the primary terms of the International Dolphin Conservation Program Act as it amends the MMPA and the Tuna Conventions Act. The IDCPA represents not only a compromise between the House of Representatives and the Senate, but a bargain between international interests as well.¹³⁰ The unilateral embargo will be lifted only if the formerly embargoed states are in full compliance and agreement with the terms of the Panama Declaration as presented in the IDCPA.¹³¹ Additionally, the State Department must certify that, along with adopting the International Dolphin Conservation Program under the Panama Declaration, the foreign states have dolphin protecting legislation in place.¹³²

124. *See id.*

125. *See id.*

126. *See id.* at 340.

127. The amendments regulating bycatch levels actually apply to the Tuna Conventions Act (16 U.S.C. §§ 951-962 (1994) and not the MMPA. However, the terms of the amendments are contained in Pub. L. No. 105-42, along with the rest of the terms of the IDCPA.

128. International Dolphin Conservation Program Act, sec. 15, § 7(c) (codified at 16 U.S.C.A. § 962 (West 1985 & Supp. 1998)).

129. *Id.*

130. *See Compromise on Tuna/Dolphin Bill Approved Unanimously by Senate*, *supra* note 77, at 1354.

131. *See id.*

132. *See id.*

III. A SURVEY OF NEW AND TRADITIONAL CRITICISMS OF U.S. DOLPHIN PROTECTION AND AN ASSESSMENT OF THE IDCPA'S RESPONSES

Two schools of criticism have developed concerning the MMPA. The first stems from foreign interests in economics and international standards of conduct. The second arises out of internal concerns about the viability of the MMPA and the need for environmental protection in the Eastern Tropical Pacific. An examination of these criticisms both illuminates the deficiencies of the MMPA and highlights the improvements implemented by the 1997 amendments.

A. UNILATERAL VS. MULTILATERAL ENFORCEMENT & THE RECOGNITION OF LDC NEEDS

Unilateral enforcement of laws and regulations involves the policymakers of one country, usually a powerful and wealthy one, imposing its own laws, will, and developmental requirements on less-powerful, less-developed countries (LDCs). The original MMPA was largely unilateral, in that Congress alone decided to ban tuna from countries engaging in purse seine methods. Multilateralism, on the other hand, involves informed decisions and policymaking from sources in all countries involved in the issue at hand. Compromise and the recognition of the needs of countries at various levels of development are usually the norm.

Critics of the MMPA claim that the United States used the statute to wrongly impose its economic will outside its own jurisdiction.¹³³ Under the Restatement (Third) of Foreign Relations Law of the United States, a nation is forbidden from "exercis[ing] jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."¹³⁴ The Restatement enumerates eight factors to consider in determining the reasonableness of an extrajurisdictional regulation.¹³⁵ These include the strength of the link between the activity and the regulating states and the character of the activity being regulated.¹³⁶ The argument follows that the MMPA does not satisfy these requirements because its negative effects on the international commu-

133. See Pedrozo, *supra* note 36, at 102.

134. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1987).

135. See *id.* § 402(2)(a)-(h).

136. See *id.* The text lists the other factors as follows:

nity outweigh the United States' interest in regulating the dolphin mortality rate, and purse seine fishing bears no "direct and substantial effect 'upon' the United States."¹³⁷

Traditionally, unilateral trade measures have been largely disfavored within the trade community and by GATT, especially when the purpose is to force change in another country's domestic policy.¹³⁸ The fundamental principles underlying the *Tuna II* decision show that unilateral environmental trade measures will rarely survive GATT scrutiny.¹³⁹ Since the United States, like any other player in the international arena, has an interest in maintaining international order, the viability of the "might makes right" approach is truly questionable.¹⁴⁰

LDCs have argued that they were cheated under the MMPA because they were expected to place economic development projects on hiatus in favor of costly environmental projects which produce little, if any, revenue.¹⁴¹ Developed countries have traditionally pressured LDCs to forego steps in their industrialization processes and implement environmental standards

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) . . . the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

Id.

137. Pedrozo, *supra* note 36, at 102-03.

138. See Fox, *supra* note 68, at 2518; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 cmt. a (1987) ("In general, international law encourages the settlement of legal disputes by negotiation or third-party resolution, and discourages self-help unless it becomes necessary").

139. See Fox, *supra* note 68, at 2523.

140. See LouAnna C. Perkins, *International Dolphin Conservation Under U.S. Law: Does Might Make Right?*, 1 OCEAN & COASTAL DEV. 213, 250 (1995).

141. Mexico, Colombia and Vanuatu have all complained that the IDCA represented nothing more than a costly, unilateral infringement on their sovereignty and their fishing industries. See Pedrozo, *supra* note 36, at 106.

before they became economically feasible.¹⁴² Developing countries generally favor multilateral approaches to dolphin conservation, as multilateralism calls for a team approach and shifts some of the cost and burden to the developed countries, which can better afford it.¹⁴³

International commentators have found merit in the LDC position, recognizing that the original MMPA and IDCA "completely ignore[d] the social and economic impact that the elimination of purse seine fishing [would] have on lesser developed countries."¹⁴⁴ Others point to the fact that developing countries are more dependent on the sea for sustenance and revenue than are industrial countries.¹⁴⁵ Thus, the development of a thriving tuna industry gives LDCs a better chance of surviving in an increasingly trade-dependent world.¹⁴⁶

Proponents of unilateral environmental trade actions tout the MMPA and similar legislation as an acceptable alternative when global coordination is not possible.¹⁴⁷ Precisely because of the common international interest in protecting the global commons, unilateralism can be attractive.¹⁴⁸ In addition, these

142. See Sheila C. Lahey, *Trade & the Environment*, 16 N.Y. SCH. J. INT'L & COMP. L. 181, 182 (1996).

143. See Pedrozo, *supra* note 36, at 107.

144. *Id.* at 106; see also Lahey, *supra* note 142, at 191 ("According to one observer, those in the comfort of the North [developed countries] have never considered the needs of the people in the Southern nations [LDCs] that they seem to want to govern").

Some commentators have suggested that the North develop "aid packages" to ease the financial burden on the South of adopting environmental protection measures like eco-labeling. See Staffin, *supra* note 41, at 280. In fact, the developing nations themselves have asked for financial and technological aid "in exchange for a consensus on trade-environment topics of interest to the North." Steinberg, *supra* note 56, at 244.

145. See Cullet & Kameri-Mbote, *supra* note 122, at 338. Citizens of developing countries depend more on fish to supplement their daily diet, and the artisanal fishing industry is much more prominent in LDCs than in industrialized nations. See *id.* at 340.

146. See Pedrozo, *supra* note 36, at 124-25.

147. See Fox, *supra* note 68, at 2519-20.

148. See *id.* at 2518. Put another way,

A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control . . . conform to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction. . . .

types of actions are often the least controversial in dealing with international issues.¹⁴⁹

The IDCPA strikes a middle ground between these two viewpoints, but shows an obvious affinity for a new multilateral approach to dolphin protection.¹⁵⁰ The amendments recognize the necessity of scientific input and the need for compromise between industrial and developing countries.¹⁵¹ According to the legal director for Defenders of Wildlife, "the compromise recognizes that scientists rather than trade bureaucrats or politicians should set the standards."¹⁵² This is apparent in the detailed studies to be undertaken by the Secretary and the newfound concentration on bycatch issues.¹⁵³ Congress made a real attempt to recognize strides made by LDCs in dolphin protection, thereby addressing the argument that the MMPA has traditionally ignored LDC needs and preferences.¹⁵⁴ Lesser-developed participating countries had some control over the terms of the Act because it was based on the Panama Declaration, which was negotiated multilaterally in the first place.¹⁵⁵ LDCs had a voice in adopting the impetus for the IDCPA, and nothing in the Act suggests that the collective "voices" of ETP countries are any less valid than that of the United States.

Nonetheless, hints of unilateral action still exist, most notably in the provisions allowing the Secretary of Commerce to reintroduce the embargo should a country exceed its 5,000-dolphin mortality cap or should ETP practices adversely affect dolphin populations.¹⁵⁶ There are also unilateral undertones to the provisions granting the Secretary the authority to make determinations regarding the effectiveness of the IDCPA. Still, because

149. See Stone, *supra* note 9, at 503. Unilateral trade enforcement measures have been used in the Montreal Protocol and the Convention on International Trade of Endangered Species, as well as the MMPA. See Fox, *supra* note 68, at 2520. However, "[t]he principle of necessity ordinarily precludes measures designed only as retribution for a violation and not as an incentive to terminate a violation or to remedy it." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 cmt. f (1987).

150. Given that the IDCP is based on a bargain (acceptance of terms for discontinuance of embargo), multilateralism is readily apparent.

151. See Freedman, *supra* note 117, at 1863.

152. *Id.*

153. See International Dolphin Conservation Program Act sec. 304, § 6(c) (codified at 16 U.S.C.A. § 1414a (West 1985 & Supp 1998)(studies); *id.* sec. 15, § 7(c) (codified at 16 U.S.C.A § 962).

154. See *id.* § 2(a)(2), (b)(1).

155. See *id.* § 2(a)(1).

156. See *id.* sec. 302(4), § 6(c) (codified at 16 U.S.C.A. § 1412(4)); see also *id.* sec. 303(c), § 6(c) (codified at 16 U.S.C.A. § 1413(c)).

the IATTC plays a prominent role in the process, the unilateral flavor of the IDCPA is tempered somewhat.¹⁵⁷

The drafters of the IDCPA were wise to retain a soft unilateral undertone in the statute while adopting a much more multilateral viewpoint in the actual terms of the Act. Strictly unilateral measures reappear only if a country is lacking in its compliance requirements. This creates an incentive for ETP countries to comply and may help to ensure that foreign governments will take the statute seriously.

The *Tuna I* and *Tuna II* panels made it clear that multilateral action was essential to the continued viability of the MMPA. Countries are much more likely to willingly comply with the terms of an agreement when teamwork and voluntary action are the mode. Nonetheless, it is important to remember that the developed countries are the ones with greater experience in implementing successful environmental regulation, as well as the ones with the money necessary to make the program work on a large scale. Although the United States' environmental successes are generally domestic measures, the multilateral provisions of the Act will allow the United States to work with countries like Vanuatu in determining the best alternatives given specific foreign conditions. Domestic experience paired with assertive foreign environmental goals should bring positive results. The drafters of the IDCPA recognized the competing interests within the international marketplace. Because legislators remained open to the desires of global trade advocates, the IDCPA should enjoy greater compliance without forcing the United States to completely forego its traditional leadership role in the area. Trade in tuna products is restored between the United States and countries with purse seine fleets in the ETP, and U.S. dolphin protection standards are not entirely compromised in the process.

B. THE MMPA AS AN EXCUSE TO INTERFERE WITH FOREIGN TUNA INDUSTRIES

In *Tuna I*, one of Mexico's arguments against the MMPA was that it represented nothing more than a blanket attempt to

157. The IATTC assists the Secretary in his studies of the effects on dolphin species stock (*see id.* § 4(b)(3)(C) (codified at 16 U.S.C.A. § 1371(a)(2)(C)(ii))), is immediately notified of any adverse effects found by the Secretary (*see id.* sec. 303(c)(1)(A), § 6(c) (codified at 16 U.S.C.A. § 1413(c)(1)(A))), and "address[es] the actions necessary to reduce incidental mortality and serious injury and mitigate the adverse impact which resulted in the determination" by the Secretary (*id.* sec. 303(c)(5), § 6(c) (codified at 16 U.S.C.A. § 1413(c)(5))).

interfere with the potentially prosperous Mexican fishing industry.¹⁵⁸ According to the United States, the law's only objective was to protect dolphins from death at the hands of foreign and domestic fleets.¹⁵⁹ It is an unavoidable truth that the embargo did have some adverse effects on the ETP states; hence, one ulterior motive for the legislation may well have been economic protectionism. For instance, Mexico and Venezuela have historically run the largest purse seine fleets in the ETP.¹⁶⁰ Had they accepted the terms of the International Dolphin Conservation Act moratorium, their fleets probably would have gone bankrupt, given their lack of financial resources at the time.¹⁶¹ Heavy decreases in employment levels and Mexican tuna consumption levels inevitably would have followed.¹⁶²

The legislative history of the MMPA also suggests that the statute was not motivated solely by a desire to save dolphins.¹⁶³ Dolphin protection may have been the *primary* motivation, but it was not the only one. "Legislative history reveals that in strengthening the import prohibition provisions of the MMPA, Congress was motivated in part by a concern that, faced with weaker regulations, the foreign fleet was enjoying an unfair competitive advantage relative to the U.S. fleet."¹⁶⁴ Certain United States officials have even privately agreed that protectionism was a cognizable interest underlying the MMPA.¹⁶⁵

These facts take on even more importance when one realizes that, prior to the decision in *EII v. Mosbacher*, the U.S. purse seine fleet dominated the ETP.¹⁶⁶ After that decision, the U.S. fleet suffered a sharp decline in status and productivity.¹⁶⁷ Authorities assert that the noticeable decrease in the size and strength of the domestic fleet was due to various economic impediments, including the practice of domestic ships "reflagging" under foreign sails.¹⁶⁸

158. See *Tuna I*, *supra* note 49, ¶ 3.57 at 1610.

159. See *id.*

160. See Pedrozo, *supra* note 36, at 114-15.

161. See *id.* at 115.

162. See *id.*

163. See Stephen Fleischer, *The Mexico-US Tuna/Dolphin Dispute in GATT: Exploring the Use of Trade Restrictions to Enforce Environmental Standards*, 3 *TRANSNAT'L L. & CONTEMP. PROBS.* 515, 536 (1993).

164. *Id.*

165. See *Must Try Harder*, *supra* note 109, at 22.

166. See Pedrozo, *supra* note 36, at 104.

167. See *id.*

168. See Caroline E. Coulston, *Flipper Caught in the Net of Commerce: Reauthorization of the Marine Mammal Protection Act and Its Effect on Dolphin*, 11 *J. ENERGY NAT. RESOURCES & ENV'T'L L.* 97, 120-21 (1990).

It would have been very expensive for the U.S. fishing industry to move its operations out of the ETP to areas where dolphins and tuna do not associate.¹⁶⁹ Hence, the fact that Mexican ships could continue to fish in the ETP, while the Americans could not, gave Mexico an unacceptable advantage in tuna harvesting.¹⁷⁰ By leveling the playing field and imposing the embargo without exception, Congress could have been attempting to rescue a once-lucrative domestic industry on the edge of economic ruin.¹⁷¹

The IDCPA directly confronts the core of this argument by abolishing the tuna embargo. The changing definition of "dolphin-safe" also addresses protectionism concerns, since the definition is essentially relaxed under the new legislation.¹⁷² The Act retains its original purpose, however, by continuing to place a higher priority on the protection of dolphins than on the interests of the fishing industry.¹⁷³ ETP nations are unlikely to comply with an environmental statute like the MMPA if they think it is a front for less respectable goals on the part of the United States. Thus, the lifting of the tuna embargo does well to ease LDC concerns about U.S. protectionism.

C. NONCONFORMITY WITH GATT POLICIES

The expansive scope of both GATT panel decisions strongly suggests that the General Agreement disfavors environmental trade measures.¹⁷⁴ After all, the panel in *Tuna I* explicitly stated that Article XX did not apply outside a country's own borders,¹⁷⁵ which "effectively prohibit[ed] the United States and other environmentally conscious countries from influencing the policies of other nations."¹⁷⁶ This has led many scholars and en-

169. *See id.*

170. *See id.*

171. *See* Fleischer, *supra* note 163, at 536-37.

172. *See* International Dolphin Conservation Act § 5(a) (codified at 16 U.S.C.

§ 1385(d)(2) (West 1985 & Supp. 1998)).

173. *See id.* § 2(a)(1).

174. *See* Fox, *supra* note 68, at 2523 ("The trade community's general animosity toward environmental trade measures has manifested itself in the form of broadly worded GATT panel rulings that leave little room for future legitimate state action").

175. *See Tuna I*, *supra* note 49, ¶ 5.27, at 1620.

176. Kubasek et al., *supra* note 3, at 17.

vironmentalists to criticize GATT for being less than “environment-friendly.”¹⁷⁷

Some GATT critics have argued forcefully for an amendment to GATT allowing for environmental trade measures in specialized situations.¹⁷⁸ Others find inconsistency in the fact that GATT frowns upon such measures, since the Agreement allows for the use of “force” and the occasional imposition of unilateral trade measures.¹⁷⁹ Still others point to the irreconcilable disparity between the objectives of GATT, which are to establish extremely liberal trade policies, and those of the MMPA, which strive to improve dolphin stock sustainability throughout the ETP.¹⁸⁰

Critics of the IDCPA argue that the main reason it was enacted was to avoid the embarrassment of another GATT-based challenge, this time in front of the WTO.¹⁸¹ This is quite possible, as there was a general awareness around the international trade community that Mexico had threatened just such a challenge in 1995.¹⁸² This has never been officially confirmed, however, as a primary motivation for dropping the embargo.

At any rate, some scholars have the impression that GATT prefers free trade to an individual country’s right to protect the global environment.¹⁸³ The IDCPA espouses this view to the ex-

177. See generally Steinberg, *supra* note 56, at 264; Mayer & Hoch, *supra* note 10, at 192.

178. Mayer & Hoch, propound as follows:

We conclude that the GATT should be amended to allow for some extra-territorial applications of domestic environmental law, especially where resources being protected are part of the international commons. We also conclude that for free trade to be consistent with sustainable development, some domestic trade measures—including some forms of subsidy, tariff, or embargo—based on methods of production must be provided for in the GATT to assure that global development is also sustainable development.

Mayer & Hoch, *supra* note 10, at 192.

179. See Fox, *supra* note 68, at 2540. GATT permits “the imposition of countervailing duties in response to subsidies granted by foreign governments” and “permissible product standards ‘force’ other states to take certain steps, presumably with the objective of changing the producers’ behavior and policies.” *Id.*

180. See Kubasek et al., *supra* note 3, at 19.

181. See *Administration Official Urges Rapid Passage of Tuna/Dolphin Bill*, *supra* note 34, at 764.

182. See *id.*

183. See Fox, *supra* note 68, at 2532 (contending that such a premise “deserves serious scrutiny”). See also Mayer & Hoch, *supra* note 10, at 192 (“for free trade to be consistent with sustainable development, some domestic trade measures . . . must be provided for in the GATT to assure that global development is also sustainable development”).

tent that it permits *immediate* trade, with the *possibility* of another embargo addressing only environmental interests.¹⁸⁴ Loosening the definition of dolphin-safe is also a step toward better trade relations. However, under the more liberal definition, the interests of dolphins are still being recognized, since no tuna haul in which dolphins were "killed or seriously injured" will be labeled "dolphin-safe."¹⁸⁵ The bycatch provisions also give credence to environmental interests heretofore unasserted.¹⁸⁶ The IDCPA may not conform with GATT in that unilateral environmental trade measures may be reinstated if the 1997 amendments fail.¹⁸⁷ Nonetheless, the current policy, which allows for bargaining and encourages trade negotiations to acknowledge the environmental goals of the MMPA, is an unmistakable improvement upon the previous enforcement policy, which required environmental compliance on the United States' terms.

Some may say the lives of dolphins are being compromised for an increase in trade revenues. This is a shortsighted argument, however, because if the embargo were re-implemented and the MMPA were challenged again before the WTO, the statute would face dispute resolution panel rejection. If that occurred, even though the statute would still *exist*, compliance would be minimal, and dolphins could be threatened to the point of extinction, absent the voluntary good will of ETP nations. As such, the compromise struck for the sake of GATT compliance is certainly a step in the right direction.

184. This goes to the heart of the legislative debate over the bill. Some critics considered the sudden emphasis on trade over continued compliance with traditional environmental standards as the selling out of U.S. sovereignty for the mere purpose of gaining new trade partners and improving relations with old ones. See *Bill Permitting Tuna Imports Passes House of Representatives*, 14 Int'l Trade Rep. (BNA) No. 22, at 955 (May 28, 1997). Hence, the country abandons an important environmental law because its dominant political and economic interests do not want to jeopardize relations with Mexico for the sake of a few dolphins. See Iliff, *supra* note 4, at 27 (quoting Earth Island Institute executive director David Phillips). On the other hand, proponents of the bill, such as Sen. John Kerry of Massachusetts, stated that the slightly revised agenda was favorable because it protected dolphins on a sound scientific basis and respected the rights of other countries at the same time. See *Compromise on Tuna/Dolphin Bill Approved Unanimously by Senate*, 14 Int'l Trade Rep. (BNA) No. 32, at 1354 (Aug. 6, 1997).

185. See International Dolphin Conservation Program Act § 5(a) (codified at 16 U.S.C.A. § 1385(d)(2) (West 1985 & Supp. 1998)).

186. See *id.* sec. 15, § 7(c) (codified at 16 U.S.C.A. § 962).

187. See *id.* sec. 303(c)(1), § 6(c) (codified at 16 U.S.C.A. § 1413(c)(1)).

Noncompliance with GATT, and a probable third complaint in front of a dispute resolution panel, are likely if the embargo is implemented again in 1999 or 2001. Unilateralism, violative of the spirit of cooperation underlying GATT, would again form the basis of the Act. Again, the Panel would invoke its limited interpretation of Articles XX(b) and XX(g), concluding that the United States violated the Agreement by attempting to "control the production or consumption of an exhaustible natural resource" outside its jurisdictional reach.¹⁸⁸ The United States and ETP dolphins would be in the same positions they were in 1991. Even if the statute survived such a challenge, the re-implemented embargo would still represent a *process*-based ban, and not one centered on the *product* itself. The process-product distinction would become an issue again. As such, trade proponents looking to the future of the IDCPA may not be entirely satisfied with the terms of the amendments.

At least some reliance on the voluntary compliance of ETP countries is necessary if the Act's objectives are to be fulfilled. Although such reliance may weaken slightly the trade proponents' positioning relative to environmentalists, the situation is certainly preferable to foregoing trade altogether. At worst, under the new Act the international tuna market will experience no more than a short-term gain. At best, the market will experience continuous long-term growth. Either way, trade interests win to some extent. Although it is not stated in the Act (for obvious reasons), one goal of amending the MMPA should be to quiet any controversy surrounding it in an attempt to further international trade and compliance with dolphin protection measures. In order to reach that goal, short-term risk may be necessary.

D. DOLPHIN-SAFE TUNA IS NOT REALLY *THAT* DOLPHIN-SAFE

Critics of eco-labeling and the dolphin-safe label in general have suggested that the average consumer is defrauded when buying tuna marked with the dolphin safe label.¹⁸⁹

Consumers are unaware of the real truth behind the label. Since the time the dolphin-safe tuna label was implemented, consumers have been under the false impression that dolphins were no longer being encircled or drowned in tuna nets in the ETP. Nothing is further from

188. See *Tuna II*, *supra* note 65, ¶ 5.28, at 1620.

189. See Damien Lewis, *Doubt Cast on Claims For 'Dolphin-Friendly' Tuna*, *NEW SCIENTIST*, May 9, 1992, at 10 (reporting that the Whale and Dolphin Conservation Society of Great Britain determined that there is no way to be completely confident that tuna or cannery practices are entirely "dolphin-friendly").

the truth—dolphins were and are still dying in tuna nets. The dolphin safe label [under the MMPA] does not guarantee that no dolphins died because . . . fishing methods deemed “dolphin safe” . . . can still result in dolphin deaths and be labeled as “dolphin safe.”¹⁹⁰

Although dolphin mortality levels have decreased significantly, the relative number of sets undertaken by ETP countries really has not changed much since the 1980s.¹⁹¹ What has changed, rather, is the method of setting, which has become much more dolphin-friendly.

The confusion over the meaning of “dolphin-safe” is certainly valid. If consumers feel puzzled or misled by dolphin-safe labeling, they probably will be less likely to spend the extra money on dolphin-safe tuna, thereby compromising the effectiveness of the Dolphin Protection Consumer Information Act, the IDCPA, and trade profits in general.¹⁹² The IDCPA handles this controversy well by specifically stating that no dolphins will have died in any dolphin-safe tuna haul should the new definition be adopted in 1999 or 2001.¹⁹³ This is by far the most compelling reason for striving to make the IDCPA work. It assures clarity, and, thus, support, for the fundamental purposes underlying a dolphin-safe label.

Some argue that changing the definition of dolphin-safe will have exactly the opposite effect because consumers will become confused between the old and new standards.¹⁹⁴ This argument underestimates the intelligence of the average consumer and ignores the purpose behind changing the standards in the first place. The perception of consumers is what legislators and lobbyists are trying to protect by changing the labeling. If the labels are clear and conform with FTC standards, potential confusion will not be an obstacle to adopting the new definition. The drafters of the IDCPA succeeded in addressing a major complaint about the MMPA in the straightforward and carefully crafted language defining “dolphin-safe.”

Unfortunately, the IDCPA still allows the Secretary to grant specialized permits. The IDCPA only changed the terms

190. Subcommittee Hearings II, *supra* note 97, at 3 (statement of Nina Young).

191. *See id.*

192. *See* Subcommittee Hearings I, *supra* note 3, at 11 (statement of Suzanne Iudicello) (“As a practical matter, maintaining consumer confidence is essential to promoting the stable political and commercial climate that is a requisite for a workable and lasting solution to the tuna/dolphin problem”).

193. *See* International Dolphin Conservation Program Act § 5(a) (codified at 16 U.S.C.A. § 1385(d)(1)(D) (West 1985 & Supp. 1998)).

194. *See* Ramach, *supra* note 12, at 774.

of the permits. Previously, the Secretary had the power to authorize "general permits for the taking of. . . marine mammals" which were of unspecified duration.¹⁹⁵ The IDCPA restricts these permits to a duration of one year.¹⁹⁶ The value of this difference is unclear, however, as the harmful takings still occur either way. This is a weakness shared by the MMPA and the IDCPA. It seems counterproductive to take such care in defining "dolphin-safe" and then allow special interests to ignore the specifically drafted terms. One goal of the IDCPA should be to eradicate blatant inconsistencies such as these. Exceptions to the rule only weaken it.

E. CAN WE TRUST THE OBSERVERS?

The observer requirement has always been a part of the MMPA, and it has also been one of the statute's most questioned provisions.¹⁹⁷ Fishing captains and government officials in ETP countries have pressured observers to alter their reports, causing legitimate questions about the validity of reported dolphin kill rates.¹⁹⁸ Likewise, observers have reported harassment by crew members and frequent attempts to bribe them into lowering their report statistics.¹⁹⁹ Some tuna fleet employees have even threatened observers on board with seal bombs.²⁰⁰ One cannot assume that all those threatened reported the harassment and continued to perform their job in a legal and proper manner. As such, it is somewhat disheartening to think about the number of dolphin deaths which may have gone unreported and unpunished.

The IDCPA retains the observer requirement,²⁰¹ so its drafters must have faith in the dolphin observers and their ability to carry out their duties in spite of intimidation. However, Congress has not spoken officially on the realistic ability of one observer to effectively monitor an entire purse seine net.²⁰² The nets can be up to one mile in circumference, and injured or dis-

195. 16 U.S.C. § 1374(h)(1) (1994).

196. See International Dolphin Conservation Program Act § 4(d) (codified at 16 U.S.C.A. § 1374(h)(1) (West 1985 & Supp. 1998)).

197. See Kubasek et al., *supra* note 3, at 5.

198. See Shannon Brownlee, *A Political Casserole of Tuna and Greens*, U.S. NEWS & WORLD REP., Aug. 11, 1997, at 53.

199. See Kubasek et al., *supra* note 3, at 5-6.

200. See *id.*

201. See International Dolphin Conservation Program Act sec. 303(a)(2)(B)(i), § 6(c) (codified at 16 U.S.C.A. § 1413(a)(2)(B)(i)).

202. See Ramach, *supra* note 12, at 767.

oriented dolphins can die from entanglement in the net *after* they have escaped its clutches, making them easy targets for sharks and other predators.²⁰³ Because the dolphin-safe standard could be changed to an "actual death or injury" standard²⁰⁴ in the near future, it is critical that observers be able to guarantee that no dolphins died in the haul. At the very least, each vessel should have multiple observers so that the great expanse of ocean covered by the net can be more effectively monitored.

F. A CONFLICT OF INTEREST FOR THE SECRETARY OF COMMERCE?

Under the terms of the MMPA, as well as the IDCPA, the Secretary of Commerce is trusted with assuring compliance with the statute through the continuous protection of marine mammals in the ETP.²⁰⁵ However, in the general scheme of government, the Secretary is also responsible for increasing trade levels through "promoting and protecting the interests" of various industries, including tuna harvesting.²⁰⁶ Some critics have argued that this presents an inherent conflict of interest for the Secretary.²⁰⁷ To some, the whole regime suggests that the secretary will exercise considerable discretion in protecting both industry and dolphins by selectively choosing which information to use when engaging in regulatory activities.²⁰⁸

Critics feel it is contrary to the purpose of the MMPA for the Secretary to do anything besides ensure the continued protection of dolphins, as "[t]he statutory duty of the Secretary is . . . mandatory, not discretionary."²⁰⁹ Industrial interests should be served, according to some, only after the recognition and fulfillment of marine mammals' needs.²¹⁰ The dolphins are entitled

203. See Kubasek et al., *supra* note 3, at 5.

204. See International Dolphin Conservation Program Act § 5(a) (codified at 16 U.S.C.A. § 1385(d)).

205. See Miller, *supra* note 2, at 1064; International Dolphin Conservation Program Act sec. 303(a), § 6(c) (codified at 16 U.S.C.A. § 1413(a)).

206. See Miller, *supra* note 2, at 1064.

207. See Kubasek et al., *supra* note 3, at 10 (stating that the attempt to balance the protection of marine mammals and the interests of big business usually leads to the marine mammals losing out); Miller, *supra* note 2, at 1079 ("Inevitably, the Secretary will also consider the interests of the commercial fishing industry when promulgating regulations and permitting incidental takings").

208. See Miller, *supra* note 2, at 1081.

209. *Id.* at 1084 (citing *Japan Salmon Fisheries v. Baldrige*, 679 F. Supp. 37, 47 (D.D.C. 1987)).

210. See Coulston, *supra* note 168, at 109.

to more protection than that which conveniently furthers commercial fisheries' interests.²¹¹ Of course, if the Secretary adopted this viewpoint to its fullest extent, the commercial sectors of the economy would have a legitimate complaint about their interests being unjustifiably compromised.

Although the IATTC has an influential role in the IDCPA, it is the Secretary who heads all regulation and research.²¹² Hence, despite the recent debates, members of Congress must still be confident in the Secretary's ability to effectively execute the conflicting duties without needlessly compromising either one. The mammals would be better protected, however, if separate agencies were appointed to handle the conflicting interests of industry and marine life.

Some critics suggest that the Marine Mammal Commission (MMC) should be left to handle all regulatory and management matters for the dolphins, since it is not subject to as much pressure from powerful fishing interests as some other agencies and administrative bodies.²¹³ This is the most feasible alternative. Compromise between industry and environmentalism can only go so far. After that, a definite delineation becomes necessary. Either the MMC should be given this responsibility or special commissions representing the potentially opposing interests should be created, with the Secretary overseeing the internal processes of the regulatory body or bodies. That way, the Secretary can retain a leadership role without being directly subjected to the lobbying pressures of environmental and fishing groups. Such an option centralizes management in that the Secretary can act as an advisor or administrator of sorts, with commission members directly applying the amendment. Another possibility is to transfer dolphin protection duties to the Environmental Protection Agency or a separately created agency unrelated to the Commerce Department. At any rate, some division of responsibilities would decrease the conflict of interest that the Secretary faces.

211. *See id.*

212. *See* International Dolphin Conservation Program Act secs. 303, 304, § 6(c) (codified at 16 U.S.C.A. § 1413, 1414a (West 1985 & Supp. 1998)).

213. *See* Kubasek et al., *supra* note 3, at 22. The MMC was established by the Marine Mammal Protection Act. *See* 16 U.S.C. §§ 1401-1407 (1994). It advises the President on how government policies and programs can help in the conservation of marine mammals. *See id.* § 1402.

G. BYCATCH REDUCTION ISSUES

It has become painfully clear that “dolphin-safe” does not necessarily mean “whale-safe,” “sea turtle-safe,” or “baby tuna-safe.”²¹⁴ Unfortunately, statistics suggest that bycatch levels are lowest when traditional, dolphin-unsafe purse seine methods are used, and highest when dolphin-safe log sets are used.²¹⁵ Often, the bycatch species’ populations are more endangered than that of the dolphins.²¹⁶ In the case of younger tuna, overfishing seriously threatens the ability of yellowfin tuna stocks to replenish and survive.²¹⁷ Thus, bycatch issues have forced dolphin activists to recognize that, at some point, it becomes unjustified to kill other animals for the purpose of saving a dolphin.²¹⁸

Some critics blamed the original MMPA’s avoidance of bycatch issues on its overly narrow focus.²¹⁹ Critics called for an

214. See Subcommittee Hearings II, *supra* note 97, at 2 (statement of Nina Young) (“more needs to be done to protect dolphins and other marine wildlife, including sharks, billfish, sea turtles, and tuna in the ETP ecosystem”).

215. See Joseph, *supra* note 26, at 20. Some stocks threatened by dolphin safe practices include small tunas, mahi mahi, sharks, wahoo, rainbow runners, billfish, sea turtles, and triggerfish. See *id.* at 21. For example, the estimated number of juvenile tuna killed in 10,000 sets by dolphin-unsafe fishing methods is around 70,000, and the estimated number killed with log sets is over 130 million. See *id.* Similarly, approximately 100 sea turtles are killed in every 10,000 dolphin fishing sets, but over 1000 are killed with log fishing. See *id.*

216. See Betsy Carpenter, *What Price Dolphin?*, 116 U.S. NEWS & WORLD REP. 71, June 13, 1994, at 71, 71.

217. See Pedrozo, *supra* note 36, at 111. Tuna often swim under logs floating on the surface of the water when dolphins are not available. Log setting refers to the practice of placing purse seine nets over logs in the water in order to catch the tuna below. Pedrozo estimates that tuna stocks in the ETP could be cut in half by the year 2000 should the level of bycatch remain as it was under the original MMPA. See *id.* The IATTC has estimated that if only log sets were used, fishermen would discard between 10 and 25 million juvenile yellowfin tuna, which would decrease the total recruitment of the species by 13 to 32 percent and potentially cause a 25 to 60 percent drop in tuna hauls. See Subcommittee Hearings II, *supra* note 97, at 8 (statement of Nina Young).

218. See Cullet & Kameri-Mbote, *supra* note 122, at 339 (“the ecological value of saving one dolphin must be ascertained. Another question to be answered is whether or not such a value justifies the taking of a number of individuals of other species living in the same environment”). It has been estimated that the cost of saving a single dolphin statistically translates to killing “15,620 small tunas, 382 mahi-mahi, 190 wahoo, 8 rainbow runners, 11 blacktip sharks, 4 silky sharks, 2 whitetip sharks, 2 other sharks and rays, 1 rainlin, 428 triggerfishes, 800 other small fish, and approximately 1 sea turtle.” Subcommittee Hearings II, *supra* note 97, at 8 (statement of Nina Young) (citing statistics from a presentation by Dr. Martin Hall at the 57th meeting of the IATTC (Oct. 21-23, 1996)).

219. See Alker, *supra* note 25, at 531.

ecosystem-based approach rather than a species-by-species approach to marine mammal conservation.²²⁰ The MMPA never included specific measures recognizing that the marine life population needed comprehensive support.²²¹ After all, the accidental killing of sea turtles and sharks could lead to their accidental extinction, just as was feared for dolphins.²²²

Both domestic and foreign entities introduced measures to save "forgotten" sea life prior to the IDCPA. For instance, in 1993, Mexican government officials mandated the use of "turtle excluder devices" on all commercial shrimp boats sailing in the Gulf of Mexico and the Caribbean Sea.²²³ Mexico has also banned the harvesting of specific turtles altogether and refuses to trade turtle shells and skins with Japan.²²⁴ Unfortunately, efforts in the United States have not been quite as effective.²²⁵ The 1988 and 1994 amendments to the MMPA required the National Marine Fisheries Service to cooperate with industries in adopting methods for bycatch reduction.²²⁶ Although these initially received a warm response from U.S. fishing fleets, the research was never diligently performed.²²⁷ This suggests that one or both parties were not dedicated to the idea. Measures allowing for ongoing supervision are necessary in order to assure long-term compliance.

The bycatch protection measures gain more validity under the IDCPA, especially since proponents of the amendments offered bycatch considerations as a primary reason for adopting the amendments in the first place.²²⁸ Two problems arise, however. First, bycatch reduction is not mandatory. The IDCPA requires that the Secretaries of State and Commerce merely "seek, in cooperation with other nations whose vessels fish for tuna in the eastern tropical Pacific Ocean, to establish standards and measures for a bycatch reduction program for vessels fishing for yellowfin tuna in the eastern tropical Pacific Ocean."²²⁹ There is

220. See Cullet & Kameri-Mbote, *supra* note 122, at 339.

221. See Alker, *supra* note 25, at 532.

222. See Kubasek et al., *supra* note 3, at 14.

223. See *Fact Sheet: Mexico's Marine Conservation Efforts*, *supra* note 106, at 18.

224. See *id.*

225. See Alker, *supra* note 25, at 554.

226. See *id.* at 553-54.

227. See *id.* at 554.

228. See Subcommittee Hearings II, *supra* note 97, at 7-9 (statement of Nina M. Young).

229. International Dolphin Conservation Program Act sec. 15, § 7(c) (codified at 16 U.S.C.A. § 962 (West 1985 & Supp. 1998)) (emphasis added).

no guarantee that the United States government will take this provision any more seriously than it took the ones enacted in 1988 and 1994.

Second, nothing ensures that countries will abide by the standards even if they are adopted, given the absence of enforcement mechanisms. Although ongoing supervision seems necessary, the terms of the IDCPA do not provide for it. Countries are required only to seek to establish an agreement which will hold them to a promise to reduce various bycatch "to the maximum extent practicable."²³⁰ This is a very malleable and evasive standard, to say the least. In order to ensure compliance, the IDCPA should contain definite terms for reduction similar to the "comparable measures" language of the pre-amendment MMPA.²³¹

Another problem with the bycatch provision lies in the fact that there is no guarantee that bycatch levels will fall just because purse seine fishing is no longer banned.²³² Fishermen often engage in dolphin setting and log setting at the same time.²³³ The effect will be a negligible decrease in bycatch levels, unless all countries develop marine life safeguards like those applied towards sea turtles in Mexico. However, because no specific terms exist regarding how bycatch reduction is to be achieved, these successful safeguards remain *options* for ETP countries. They are not mandated. Hopefully, countries interacting with the Secretaries of State and Commerce in this matter will voluntarily follow Mexico's lead. Self-motivated action of this sort would certainly help, since required measures for reducing bycatch levels in the ETP nations could be regarded as a unilateral imposition on LDCs in violation of GATT.²³⁴

IV. CONCLUSION

What does all this mean for international trade in general? Is the MMPA experience a model for global compromise? It certainly shows compromise is possible, but it has taken a great deal of time, tapped legislative energy, and many dolphins have died in the meantime. Furthermore, although it is an improve-

230. *Id.*

231. *See supra* notes 15-16 and accompanying text (describing the "comparable measures" standard).

232. *See* Brownlee, *supra* note 198, at 53.

233. *See id.*

234. *See supra* notes 138-40 and accompanying text (discussing the GATT's distaste for unilateralism in general).

ment from a trade advocate's point of view, it is not ideal for international commercial interests. The possibility of strictly short-term gain, a somewhat disheartening scenario from a GATT standpoint, depends largely on the voluntary good will of LDCs. Yet, trust is a key component to any successful agreement, and gaining the trust of the United States could give ETP countries the confidence necessary to ensure compliance. More importantly, trade has been restored, albeit possibly only temporarily. Something is better than nothing in most cases, including this one.

Alternatively, perhaps the MMPA provides a lesson to international policymakers and lawmakers about the value of patience and willingness to respect each side of an argument. Either way, the IDCPA promises to show that virtually dichotomous objectives can be melded into a coherent agreement. Parties must be willing to work hard and commit themselves to the issue in order to achieve long-term success.

In general, the future looks good for dolphins and other marine life under the International Dolphin Conservation Program Act. The law responds, at least to some extent, to all the primary criticisms and concerns that have haunted the MMPA and its amendments. The only areas in which the IDCPA seems less in tune with common criticism are in assessing the viability of observer action and in the conflict of interest facing the Secretary of Commerce. As amendments to the MMPA go, this set seems to have more potential than the rest. Despite these concerns, it will be refreshing to see at least temporary closure to a debate that has persisted for so long. The lessons to be learned from these amendments are yet to be told, but at least it is clear that compromise is possible when international trade and environmental interests go head to head.