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INTERNATIONAL DOLPHIN CONSERVATION UNDER U.S. LAW: DOES MIGHT MAKE RIGHT?

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I. INTRODUCTION

Finding adequate solutions to wildlife conservation problems is rarely simple or straightforward. In developing acceptable domestic conservation policies, a nation must balance competing economic, political, biological and social concerns. When a wildlife problem is of international relevance, the range of competing interests is even broader. A nation's wildlife policies must then take into account not only various concerns of the nation's own citizenry, but also potential impacts on foreign policy. In addition, economic, political and cultural needs and values of the other nations whose interests are implicated must be recognized and weighed in the balance.

The problem of dolphin mortality incidental to tuna fishing in the eastern Pacific Ocean is a case in point. For reasons still not understood by scientists, large schools of mature yellowfin tuna are often found in association with herds of dolphins.[1] Fishermen take advantage of this

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1. Most frequently found in association with yellowfin tuna are the spotted dolphin, *Stenella attenuata*, and the spinner dolphin, *Stenella longirostris*. Less frequently found are the common dolphin, *Delphinus delphis*, and occasionally, the striped dolphin, *Stenella coeruleoalba*, the roughtoothed dolphin, *Steno bredanensis*, the bottlenose dolphin, *Tursiops truncatus*, and Fraser's dolphin, *Lagenodelphis hosei*. COMMITTEE ON PORPOISE MORTALITY FROM TUNA FISHING, NATIONAL RESEARCH COUNCIL, REDUCING DOLPHIN MORTALITY FROM TUNA FISHING 6 (1992), *reprinted in Review of the Administration's Dolphin Protection Proposal and Discussion of Options Available to Help Reduce Dolphin Mortality, 1992: Hearing Before the Subcomm. of Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 102d Cong., 2d Sess. 1, 117 (1992) [hereinafter NRC REPORT].

association by encircling the dolphins with nets, trapping both the dolphins and the tuna underneath. Initially, such "fishing on dolphins" caused hundreds of thousands of dolphins to drown after becoming entangled.

Although special nets and fishing techniques have been adopted over the last decade to substantially reduce incidental mortality, thousands of dolphins are still killed each year in the eastern Pacific Ocean tuna fishery. The problem is of grave concern to fishermen, scientists and the global citizenry. However, because tuna fishing in this area occurs on the high seas, no one nation has jurisdiction to establish universal dolphin-protective rules. Instead, under customary international law each nation regulates the activity of its own fishermen, except where the nations involved have agreed to adopt regulations established by an international organization.

The United States first addressed the dolphin by-catch problem with the enactment of the Marine Mammal Protection Act of 1972 (MMPA),[2] which attempted to balance the need for dolphin protection with the economic interests of U.S. tuna fishermen. Over the succeeding years, various provisions in the MMPA were strengthened and new provisions were adopted in an attempt to reduce to insignificant levels the number of dolphins incidentally killed during tuna fishing. Among these were provisions for trade embargoes to enforce U.S. dolphin protection standards in non-U.S. tuna fisheries.

The United States has also tried to develop an international solution to the problem through its participation in the Inter-American Tropical Tuna Commission (IATTC).[3] For example, in an agreement entered into in 1992 with eight other member nations, the United States affirmed its commitment to reducing dolphin mortality in the eastern Pacific Ocean through a "multilateral program with the objectives of (1) ... reducing

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2. Pub. L. No. 92-522, 86 Stat. 1027 (1972) (codified as amended at 16 U.S.C.S. §§ 1361-1421 (1994)).

3. The Commission was established for the purpose of studying tuna stocks of the eastern Pacific and to develop recommendations for responsible exploitation of tuna resources. Convention for the Establishment of an Inter-American Tropical Tuna Commission, May 31, 1949-Mar. 3, 1950 U.S.-Costa Rica, 1 U.S.T. 230 [hereinafter Tuna Commission Convention].

[such] mortality ... to levels approaching zero ... and, (2) ... seeking ecologically sound means of capturing tunas."[4]

Despite the success of the MMPA and IATTC programs in reducing the dolphin mortality levels, dolphins were still being killed in the eastern Pacific tuna fishery. For this reason, the U.S. Congress responded to pressures to step up the pace of dolphin protection and enacted the International Dolphin Conservation Act (IDCA) in 1992.[5] The IDCA imposes a five-year moratorium on fishing on dolphins and allows the lifting of trade sanctions from those nations which were embargoed under the MMPA if such nations agree to the moratorium.[6] In addition, the Act requires the posting of observers on all vessels fishing for tuna in areas where there is a regular and significant association between marine mammals and tuna; bans purse-seine fishing on eastern spinner and coastal spotted dolphins; and forbids U.S. citizens from selling, purchasing, transporting or shipping to the United States, tuna caught in association with dolphins.[7]

The passage of the IDCA was not without controversy, however. A strong faction of interested parties supported enforcement of the progressive approach to reducing dolphin mortality that the IATTC adopted.[8] The moratorium approach for dealing with the dolphin mortality problem had previously been presented to and rejected by Congress because of opposition from both the fishing industry and environmentalists.[9] After environmental groups reversed their positions and with strong endorsement of the IDCA by the Administration,

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4. Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean (EPO), (La Jolla, Cal., June 1992), 33 I.L.M. 936 (1994) [hereinafter La Jolla Agreement].

5. Pub. L. No. 102-523, 106 Stat. 3425 (1992) (current version as codified at 16 U.S.C. §§ 1411-1418 (Supp. IV 1992 & Supp. V 1993)).

6. 16 U.S.C. §§ 1412(a), 1415(a) (Supp. V 1993).

7. 16 U.S.C. § 1417(d) (Supp. V 1993). *See generally* James Joseph, *The Tuna-Dolphin Controversy in the Eastern Pacific Ocean: Biological, Economic, and Political Impacts*, 25 OCEAN DEV. & INT'L L. 1 (1994). *See* discussion at notes 104-114 *infra*.

8. The agreement called for a progressive decrease in dolphin mortality levels (DML) from 19,500 to fewer than 5000 over a period of seven years. The agreement also established an International Review Panel which was charged with the responsibility to monitor compliance with the provisions of the agreement, and a Scientific Advisory Board to assist in research to modify current purse-seine technology and to seek alternative means for harvesting yellowfin tuna. La Jolla Agreement, *supra* note 4. *See* Joseph, *supra* note 7, at 13.

9. Joseph, *supra* note 7, at 12.

Congress ultimately chose the moratorium approach.[10] This decision may have satisfied the desire for more urgent action but may be counterproductive in terms of development of international legal norms and perhaps ecologically as well.

The choice Congress made in 1992 raises several important questions regarding international law. First, how should a state attempt to solve an international wildlife conservation problem? Second, is a state's use of its economic power to impose its point of view on more dependent states valid under international law? Third, is such validity affected when that point of view is shared by a majority of the states involved in the problem? Finally, what approach to addressing conservation of common resources best serves the purposes of the international legal order?

Part II of this Comment will describe the political and economic background of the dolphin by-catch controversy including an analysis of U.S. attempts to reduce dolphin mortality by threat of trade sanctions under domestic legislation. It will also examine the efforts of the multilateral organization, IATTC, to reduce dolphin by-catch in the Pacific tuna fishery. Part III sets forth the significant provisions of the International Dolphin Conservation Act and discusses its legislative history, in which Congress had a choice between a multilateral approach and a unilateral trade sanctions approach. Part IV then analyzes these approaches in light of applicable international law. This Comment will conclude by asserting that of the two approaches presented to Congress in 1992, IATTC's multilateral agreement ultimately would better serve the interests of both the United States and the international legal order.

II. U.S. AND INTERNATIONAL APPROACHES TO REDUCING DOLPHIN BY-CATCH MORTALITY

The United States has long been a major world market for tuna.[11] Even though U.S. consumption of purse-seined tuna has declined from over 80% of the total catch in 1975 to just over 45% in 1987, the U.S. market remains very important to all fleets in the eastern Pacific Ocean.[12] Historically, U.S. tuna canning corporations had two major sources of raw tuna: they contracted with "independent" U.S. tuna fishermen to

10. *Id.*
11. NRC REPORT, *supra* note 1, at 114.
12. *Id.*

supply the tuna, or they owned and operated their own tuna fleets. This pattern changed in the period from the late 1970s to the early 1980s. Increasingly, U.S. corporations obtained their raw tuna on the international market from the lowest bidder.[13]

The change was due to a variety of factors. During this period, the size of the international tuna purse-seine fleet and the number of nations involved in tuna purse-seine fishing increased dramatically.[14] This put U.S. tuna companies in a strong buyers' position. The companies no longer needed to maintain corporate fleets or to lock themselves into contracts with independent fishermen. The corporate vessels were sold, often to nations with lower fuel and labor costs and more advantageous tax climates.[15]

These changes in the U.S. tuna market placed independent operators of domestic tuna boats at a competitive disadvantage. Operating costs of these fishermen were higher than those of non-U.S. fishermen, and they no longer could rely on long-term contracts to provide economic stability in the uncertain world of fishing. In addition, the growing global tuna harvest was holding down raw tuna prices and U.S. fishermen were for the first time, competing with many new supply sources.[16]

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13. *Id.*

14. *Id.* at 88. The increase in effort in the eastern Pacific Ocean might be explained in part by the increase in coastal nations' jurisdiction over highly migratory species within their EEZs. JOSEPH J. KALO, COASTAL AND OCEAN LAW 417 (1990). Fishermen whose access to tuna in EEZs became restricted may have turned to the high seas. However, a major factor in the increase, both within EEZs and on the high seas, was economic incentive. Writing in 1976, Joseph and Greenough commented:

> [M]ost tuna are caught because there exists a strong demand by people willing to pay a high price. Fishermen of nations with developed fleets fish for profit, not for food. They go after tuna because in the past it has provided an opportunity to make a better return on investment than any alternative undertaking. Developing nations also see in tuna fishing an opportunity for good returns to investment. In addition, to them it is a means for earning foreign exchange, creating jobs, and building industry.

JAMES JOSEPH & JOSEPH W. GREENOUGH, INTERNATIONAL MANAGEMENT OF TUNA, PORPOISE, AND BILLFISH: BIOLOGICAL, LEGAL, AND POLITICAL ASPECTS 26 (1976).

15. NRC REPORT, *supra* note 1, at 139.

16. *Id.* Other factors were also at work. According to one commentator:

> During the 'tuna boom' of the late 1970s, the United States industry overinvested in large purse seiners and overcommitted itself with debt repayments. The tuna market promptly collapsed in the early 1980s; prices fell, exchange rates moved against the industry, fuel prices rose and imports from Asia (especially Thailand) became cheaper. Ship owners were faced

The negative effects of these changes in market forces were exacerbated by restrictions placed on U.S. fishermen by the MMPA. The MMPA required fishermen to invest in the latest gear designed to reduce dolphin entanglement and to institute new, more labor- and fuel-intensive fishing techniques. In addition, the Act limited fishing in the eastern Pacific Ocean by establishing annual quotas on incidental dolphin take. The enforcement of these quotas resulted in the closure of the U.S. yellowfin purse-seine fishery for part of the years 1976, 1977, and 1986.

Finally, political and economic pressure was put on the U.S. tuna industry to end dolphin mortality associated with tuna fishing through the efforts of interest groups who widely publicized the plight of the dolphins.[17] One by one, U.S.-based tuna canning corporations acceded to the pressure of a consumer boycott of tuna, and made it their policy to process only "dolphin-safe" tuna.[18]

The overall effect of these factors was that many U.S. tuna boats were sold or reflagged to nations imposing fewer restrictions on their flagships.[19] Other fishermen simply moved their operations from the

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> with high trans-shipment costs to foreign ports, higher than expected debt servicing payments and fuel bills and a 30[%] fall in tuna prices. To cap it all, El Niño weather conditions [a unique ecological phenomenon in Latin America that causes a temporary break in the food chain] resulted in poor fishing conditions in the eastern tropical Pacific from 1982 to 1984 and correspondingly improved fishing in the tropical Western Pacific.

B. Martin Tsamenyi, *The Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America: The Final Chapter in United States Tuna Policy*, 15 BROOK. J. INT'L L. 183 n.1 (1989) (quoting Waugh, *Tuna Wars*, PACIFIC ISLANDS MONTHLY 46 (June 1988)).

17. Kathleen Merryman, *Cash-Registering Your Opinions: Consumer Boycotts Have Opened Vast New Opportunities for People to Apply Social, Economic and Political Pressure Via Their Pocketbooks*, NEWS TRIB., Mar. 2, 1994, at F3.

18. *Id. See generally*, H.R. REP. NO. 746, 102d Cong., 2d Sess., pt. I (1992), *reprinted in* 1992 U.S.C.C.A.N. 2919-2934. This political pressure ultimately resulted in the passage of the Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385 (Supp. IV 1993).

19. *See* NRC REPORT, *supra* note 1, at 78 (statement of James Joseph). "Reflagging," also known as "adopting a flag of convenience" is the practice of registering and operating a vessel under the flag of another nation. Nations to which U.S. vessels have reflagged include Panama, Ecuador, Venezuela, Korea, Mexico, and Vanuatu. Laura L. Lones, Note, *The Marine Mammal Protection Act and International Protection of Cetaceans: A Unilateral Attempt to Effectuate Transnational Conservation*, 22 VAND. J. TRANSNAT'L L. 997, 1017 n.179 (1989) (quoting Transcript, *West 57th: Pacific Dolphins: Slaughter at Sea*, at 10 (CBS television broadcast, Apr. 1, 1989).

eastern Pacific to the South Pacific,[20] where tuna fishing is carried out without fishing on dolphins.[21] Consequently, the percentage of the total yellowfin tuna harvest caught by U.S. vessels in the eastern Pacific diminished from 86% in 1970 to 9% in 1991.[22]

The United States has not worked in isolation to solve the dolphin by-catch problem. In addition to enacting the MMPA, the United States has cooperated through the IATTC with a number of nations whose fishermen harvest yellowfin tuna in the eastern Pacific Ocean. As will be seen, however, the original policy of the United States which integrated two paths of attack—domestic legislation under the MMPA

Under international law, every nation, whether coastal or not, has the right to sail ships under its flag on the high seas. Law of the Sea: Convention on the High Seas, April 29, 1958, arts. 4-6, 13 U.S.T. 2312, 2315; 1982 United Nations Convention on the Law of the Sea, *infra* note 133, at arts. 90, 92, 94.

20. Tuna fishing in the South Pacific was not initially without its problems for fishermen, however. Most South Pacific tuna fishing occurs within the EEZs of the South Pacific states. Because the United States (until 1992) did not recognize coastal states' jurisdiction over highly migratory species, U.S. fishermen were legally free to ignore the South Pacific states' licensing requirements. Furthermore, the Fishermen's Protective Act of 1954, 22 U.S.C. §§ 1971-76 (1988) provided for compensation for U.S. tuna fishermen whose vessels were seized by coastal states for illegal fishing, and for expenses incurred as a result of such seizures. Time and profits lost, however, were not compensated. Tsamenyi, *supra* note 16, at 193-4.

The situation was relieved in 1987 with the negotiation of two agreements. The Treaty on Fisheries (Certain Pacific Island States - United States: Treaty on Fisheries, Apr. 2, 1987, 26 I.L.M. 1048 (1987)) gave access to U.S. fishing vessels to certain areas within the various states' EEZs upon certain conditions and payment by the U.S. government of annual license applications, originally $1.75 million for the first thirty-five vessels, $50,000 per vessel for the next five, and $60,000 per vessel after that. *Id.* at 1082-1089, Annex II. The concomitant economic assistance agreement (Agreement Between United States (AID) and South Pacific Forum Fisheries Agency (FAA) on Economic Development Assistance, Apr. 2, 1987, 26 I.L.M. 1091 (1987)) provided that the United States would make annual cash payments of $10 million for five years, as part an overall foreign aid program to the South Pacific states. See the South Pacific Tuna Act of 1988, 16 U.S.C. § 973 (1988) and the Foreign Assistance Act of 1961, 22 U.S.C. § 151 (1988) for the U.S. implementation of these agreements. As a result of these agreements and their subsequent renewals, U.S. fishermen have access to the abundant tuna resources of the South Pacific, provided they observe the fisheries laws and regulations of the South Pacific states. H.R. REP. NO. 746, pt. I, *supra* note 18, at 2923.

21. *Id.*

22. NRC REPORT, *supra* note 1, at 87. (Computations of U.S. yellowfin tuna catch are derived from Table III of Joseph's remarks.)

and international efforts through the IATTC—has changed to a policy which puts domestic legislation at odds with other U.S. efforts in the international arena.

A. The Marine Mammal Protection Act

Congress enacted the Marine Mammal Protection Act of 1972 at least in part as a response to tremendous public concern over the dolphin slaughter associated with tuna fishing.[23] Although there was a general consensus that dolphins needed "optimum protection," the Act was clearly the result of compromises.[24] The House Report accompanying the Act noted that "[t]he Committee took pains in its consideration of this bill to see that the legitimate needs of the tuna industry were not ignored, while accepting the clear requirement that porpoises be given every reasonable protection."[25]

As originally enacted, the MMPA had two central strands. The first, a "domestic" component aimed at activities over which the U.S. government had jurisdiction, imposed a moratorium on the taking of

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23. For the view that dolphin protection was a primary impetus for the MMPA, *see, e.g.*, American Tunaboat Assn. v. Baldridge, 738 F.2d 1013, 1014 (9th Cir. 1984) and Comm. for Humane Legislation, Inc. v. Richardson, 540 F.2d 1141, 1144 (D.C. Cir. 1976).

24. In describing the original MMPA, one commentator noted:

> This law is a carefully evolved compromise. Under the skilled and highly professional leadership of Congressman Dingell in the House and Senator Hollings in the Senate, the Act became a balancing of conflicting political pressures. It is not a preservationist/protectionist act on the one hand or a maximum sustainable yield fishery type of management act on the other. The interests of these factions and the traditional professional resource managers in the middle are all reflected in the Act. This compromise, painfully hammered out over a two year period left no one completely happy except perhaps the marine mammals who were afforded a level of conservation concern never before provided.

Marine Mammal Protection Act Improvement: Hearing on H.R. 4084 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 97th Cong., 1st Sess. 1, 270 (1981) (statement of Milton M. Kaufmann, Director, Fund for Animals International Program for Marine Mammals and Endangered Species).

25. H.R. REP. NO. 707, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 4144, 4148.

marine mammals.[26] The second, an "international" component intended to address marine mammal protection in the global arena, directed the Secretary of State to pursue renegotiation of existing international treaties and to initiate new treaties to reflect the marine mammal management principles of the Act.[27]

1. The Moratorium and the Domestic Tuna Industry

The moratorium applied to all activities in U.S. waters as well as to the activities of all U.S. nationals on the high seas.[28] One important exception, however, was a provision for the incidental taking of marine mammals in the course of commercial fishing operations. This exemption was designed to allow the tuna industry to continue operations while working to eliminate dolphin mortality.[29] It also granted fishermen a special two-year waiver of the moratorium, during which time taking of mammals was allowed, although subject to regulations requiring fishing techniques which produced "the least practicable hazard to marine mammals."[30] At the end of the two years, incidental take of marine mammals could still continue, but would be subject to issuance of permits and even more stringent regulation.[31] Notwithstanding this commercial fisheries exemption, the goal to protect the dolphins was emphasized: "[i]n any event it shall be the immediate goal that the

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26. 16 U.S.C. § 1371(a) (1982) (current version as amended at 16 U.S.C.S. § 1371(a) (1994)). "Taking" is defined as harassing, hunting, capturing, killing, or attempting to harass, hunt, capture or kill any marine mammal. 16 U.S.C. § 1362 (12) (1982) (current version as amended at 16 U.S.C. § 1362(13) (Supp. V 1993)).

27. 16 U.S.C. § 1378(a) (1982) (current version as amended at 16 U.S.C. § 1378(a) (1988)).

28. 16 U.S.C. § 1371 (1982) (current version as amended at 16 U.S.C.S. § 1371 (1994)); 16 U.S.C. § 1372(a) (1982) (current version as amended at 16 U.S.C. § 1372(a) (1994).

29. 16 U.S.C. § 1371(a)(2) (1982) (current version as amended at 16 U.S.C.S. § 1371(a)(2) (1994)). The legislative history of the commercial fishing exemption reveals great concern over dolphin mortality among environmental groups, the congressional delegation, and among fishermen themselves. Testimony by commercial fishermen, however, apparently convinced the legislators that recently developed fishing techniques and gear modifications indicated that a solution to the mortality problem was imminent. *See* H.R. REP. No. 707, *supra* note 25, at 4148.

30. Pub. L. No. 92-522, tit. I, § 101(a)(2), 86 Stat. 1029 (1972) (current version as codified and amended at 16 U.S.C.S. § 1371(a)(2) (1994)).

31. Pub. L. No. 92-522, tit. I, § 101(a)(3)(A), 86 Stat. 1029 (1972) (current version as codified and amended at 16 U.S.C.S. § 1371(a)(2) (1994)).

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."[32] Congress did not, however, define "insignificant levels," nor did it indicate over what time period the goal was to be attained.

The meaning of the MMPA in the context of commercial fishing was the subject of significant disagreement in the 1970s. The Secretary of Commerce, through the National Marine Fisheries Service (NMFS) interpreted the exemption broadly, reading the statute to mean that fishing was to continue, even where there was a lack of adequate information concerning the factors to be considered in issuing general permits.[33]

Litigation, lobbying of Congress, and active participation in administrative proceedings ensued, as various interest groups—the fishing industry and environmental and protectionist organizations—attempted to influence the course of MMPA interpretation.[34] Some of these groups

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32. Pub. L. No. 92-522, tit. I, § 101(a)(2), 86 Stat. 1029 (1972) (current version as codified and amended at 16 U.S.C.S. § 1371(a)(2) (1994)).

33. *See* 16 U.S.C. §§ 1373(a)-(b) (1982) (current versions as amended at 16 U.S.C. § 1373(a)-(b) (1988 & Supp. V 1993)), for the factors to be considered in issuing general permits.

34. NMFS issued the required general permits to the tuna industry, to be in effect after expiration of the two-year exemption period, which initially set no quota for incidental dolphin take. In Committee for Humane Legislation v. Richardson, a number of interest groups successfully challenged this action. The court held that the MMPA had been violated, finding: 1) that the regulations had been promulgated without the requisite underlying scientific findings; 2) that the permit did not include the requisite specificity regarding number and kind of animals authorized to be taken; and 3) that the permit application failed to make the requisite showing that the permit's issuance would be consistent with the purposes of the Act. Comm. for Humane Legislation v. Richardson, 414 F. Supp. 297, 309-315 (D.D.C. 1976). The challenge was upheld on appeal, although to protect the fishing industry, the court stayed the order until the end of the year. Comm. for Humane Legislation v. Richardson, 540 F.2d at 1151.

Once regulations establishing a quota were promulgated, members of the tuna industry swiftly challenged their enforcement. *See* Motor Vessel Theresa Ann v. Richardson, 7 Envtl. L. Rep. (Envtl. L. Inst.) 20065 (S.D. Cal. 1976). The quota was again the subject of litigation in Fund for Animals v. Kreps, 7 Envtl. L. Rep. (Envtl. L. Inst.) 20456 (D.C. Cir. 1977).

Meanwhile, the industry attempted, by remaining in port, to protest these regulatory actions and to pressure Congress to amend the MMPA to legislatively fix the quota. MICHAEL J. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 310 (1983). This would eliminate the discretion of the Secretary and the avenues of legal challenge for the protectionist groups. The House of Representatives responded by passing a bill to fix

contended that the Act required the industry to halt its practice of setting nets on dolphins until more adequate scientific data were available. The tuna industry was concerned that the MMPA's ambiguous language about "insignificant levels approaching a zero mortality and serious injury rate" might one day be strictly interpreted to mean actual elimination of incidental take regardless of technological feasibility or economic impact.[35]

Congress addressed the problem by clarifying the zero mortality goal in a 1981 amendment to the Act:

> [P]rovided, that this goal shall be satisfied in the case of the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable.[36]

It does not appear that this clarification was intended to soften the intent of the MMPA to provide protection for dolphins. The 1981 amendment did not alter the Secretary's directive to finance and undertake research into new methods of locating and catching yellowfin tuna without the incidental taking of marine mammals.[37] Also, the Secretary retained the authority to establish quotas.[38]

The MMPA was again amended in 1984, providing even more detailed mandates to be followed by the Secretary of Commerce in issuing the general permits, and setting by statute the allowable quota of the most threatened dolphin species.[39] The amendment specifically directed the Secretary to undertake certain scientific studies, and to modify quotas and gear requirements as necessary "to ensure that the marine mammal population stock is not significantly adversely affected

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the quota. 123 CONG. REC. 17141-68 (1977). However, the Senate did not go along, and the fishermen's boycott ended in mid-1977. BEAN at 310.

35. BEAN, *supra* note 34, at 310.

36. 16 U.S.C. § 1371(a)(2) (1982) (current version as amended at 16 U.S.C.S. § 1371(a)(2) (1994)).

37. 16 U.S.C. § 1381(a) (1988).

38. 16 U.S.C. § 1373(c) (1988 & Supp. V 1993).

39. 16 U.S.C. §§ 1371 (1982 & Supp. III 1985) (current version as amended at 16 U.S.C.S. § 1371 (1994)); 16 U.S.C. § 1374 (1982 & Supp. III 1985) (current version as amended at 16 U.S.C.S. § 1374 (1994)).

by the incidental taking."[40] Despite these protections, high rates of dolphin by-catch in the eastern Pacific Ocean continued. Between 1979 and 1988, the U.S. tuna fleet's take of dolphins generally ranged between 8,000—20,000 per year.[41] Congress recognized that the fishing industry generally had made great strides in attempting to solve the problem. However, there was a strong feeling that at least some U.S. tuna vessels were not adequately reducing dolphin by-catch. Congress reacted by further amending the Act in 1988. Congress took the unusual step of detailing the specific regulations which were to be promulgated by the Secretary.[42] These included performance standards,[43] observer requirements,[44] and a ban on "sundown sets."[45] In addition, the Secretary was directed to undertake a scientific research project and was required to submit a comprehensive report to Congress by 1992. This report was to discuss the results of the regulations required by the amendment and recommend legislation to accomplish the goals of the Act.[46] Before 1988, such specifics had been left to the discretion of the agencies.

The latest amendments to the MMPA, the International Dolphin Conservation Act of 1992 (IDCA),[47] are evidence of Congress' continuing frustration with the domestic tuna fishing industry, notwithstanding the finding by the National Research Council that "no methods of catching tuna without killing dolphins—currently available or capable of rapid development—are as efficient as current methods of catching large yellowfin tuna in the [Eastern Pacific]."[48] The IDCA flatly imposes a moratorium on all fishing on dolphins beginning in 1994, unless no other major tuna fishing nation agrees to such a moratorium. If no other nations agree, the American Tunaboat Association (ATA) permit will be

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40. 16 U.S.C. § 1374(h)(3)(B) (Supp. III 1985 & 1988).
41. NRC REPORT, *supra* note 1, at 176.
42. 16 U.S.C. § 1374(h)(2)(B) (1988).
43. 16 U.S.C. § 1374(h)(2)(B)(vi) (1988).
44. 16 U.S.C. § 1374(h)(2)(B)(iv) (1988).
45. 16 U.S.C. § 1374(h)(2)(B)(iv) (1988).
46. 16 U.S.C. § 1374(h)(2)(B)(ix) (1988). The study was undertaken by the National Research Council, whose report was not publicly released until February 27, 1992. *See* NRC REPORT, *supra* note 1.
47. 16 U.S.C. §§ 1361, 1411-1418 (current version as amended at 16 U.S.C.S. § 1361 (1994)).
48. NRC REPORT, *supra* note 1, at 114.

limited by an annual quota, beginning at 1000 in 1994.[49] This quota will be significantly reduced each year until 1999, after which the permit will expire.[50]

2. The MMPA's International Program

Congress recognized in 1972 that although dolphin mortality in the eastern Pacific was attributable primarily to U.S. vessels, fishing by non-U.S. vessels was increasing, and an international solution was called for. Hence, the MMPA directed the Secretary of State to:

> initiate negotiations with other nations, and particularly with all foreign governments whose nationals engaged in commercial fishing operations which were found to be harmful to any species of marine mammal, for the purpose of entering into bilateral or multilateral treaties in order to protect marine mammals;
>
> encourage the development of international agreements protecting specific regions significant to marine mammals;
>
> initiate amendments to existing international treaties to which the U.S. was a party, in order to make such treaties consistent with the purposes of the MMPA; and
>
> seek the convening of an international ministerial meeting to negotiate a binding international convention for the protection and conservation of marine mammals.[51]

In addition, perhaps as an effort to "put some teeth" into the negotiating position of the United States, the Act also provided for a ban on the importation of fish or fish products caught with commercial fishing methods that resulted in incidental kill or serious injury of marine mammals in excess of U.S. standards.[52] The government of any nation exporting fish or fish products to the United States was required under

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49. 16 U.S.C. §§ 1412, 1416 (Supp. IV 1992).

50. 16 U.S.C. § 1416(a)(4) (Supp. IV 1992).

51. 16 U.S.C. § 1378(a)(2) (1982) (current version as amended at 16 U.S.C. § 1378(a)(2) (1988)).

52. 16 U.S.C. § 1371 (a)(2) (1982) (current version as amended at 16 U.S.C. § 1371(a)(2) (1994)).

this provision to provide "reasonable proof" of the effects on ocean mammals of the commercial fishing technology used to catch the exported product.[53]

The import ban provision was strengthened by the 1984 amendments with the addition of a provision strictly aimed at yellowfin tuna caught by purse-seine in the eastern Pacific Ocean. The new provision required that in order to have access to U.S. markets, the exporting nation needed to provide "documentary evidence" that:

1) the exporting nation had adopted a regulatory program concerning incidental take of marine mammals that was comparable to the U.S. program; and

2) the average rate of incidental take was comparable to the average rate for U.S. vessels.[54]

This strengthened provision responded to a recognition that much of the dolphin mortality in the eastern Pacific was now attributable to non-U.S. fishing vessels.[55] The Secretary of Commerce had promulgated regulations for implementing the embargoes,[56] however, under these regulations the Secretary had a significant amount of discretion.[57] The 1984 amendment was intended to address this problem by specifying the documentation required of nations exporting tuna to the United States to avoid a ban, and therefore placing pressure on foreign governments to adopt tuna fishing regulations more protective of dolphins.[58]

This congressional mandate, however, was largely ignored. No NMFS regulations pursuant to the 1984 import ban provision were promulgated until March 1988. Consequently, at a hearing on reauthorization of the MMPA in April 1988, legislators expressed even greater impatience, both with the administration's delay in implementing the strengthened import ban, and with continued dolphin mortality figures attributable to non-U.S. fleets.[59]

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53. 16 U.S.C. § 1371(a)(2)(B) (1988).

54. 16 U.S.C. § 1371(a)(2)(B) (1988).

55. H.R. REP. No. 758, 98th Cong., 2d. Sess. 1 (1984) *reprinted in* 1984 U.S.C.C.A.N. 635, 639 [hereinafter *1984 Amendments*].

56. 50 C.F.R. § 216.24(e) (1993).

57. *Id.*

58. *1984 Amendments*, *supra* note 55, at 640-641.

59. *Id.* at 639.

Not surprisingly, the 1988 amendments to the MMPA added a number of measures targeted specifically at the non-U.S. purse-seine tuna fishery in the eastern Pacific Ocean. First, the import ban was further strengthened. Rather than giving the Secretary discretion to decide whether the regulatory program of an eastern Pacific tuna harvesting nation was comparable to that of the United States, the amendment explicitly specified five elements of the program that must be present in order for such nations to avoid embargo of their tuna products from U.S. markets.[60] Second, when an embargo against a country's importation of yellowfin tuna or tuna products into the United States has been in effect for six months, the Secretary must certify this fact to the President.[61] Such certification brings the embargoed nation under the Pelly Amendment, and initiates further sanctions.[62] Third, intermediary nations are now required to provide reasonable proof to the Secretary that they have not imported, "within the preceding six months, any yellowfin tuna or tuna products that are subject to a direct ban on importation to the United States."[63] Finally, the Secretary of State is specifically directed to work through the IATTC or other appropriate institutions in order to conclude international arrangements for the conservation of marine mammals incidentally taken in tuna purse-seines.[64]

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60. 16 U.S.C. § 1371(a)(2)(B)(I-V) (1988).

61. 16 U.S.C. § 1371(a)(2)(D) (1988 & Supp. V 1993).

62. This amendment to the Fishermen's Protective Act of 1967 provides that whenever non-U.S. fishermen conduct "fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program," the Secretary of Commerce is authorized to certify this fact to the President, who may then direct that importation of fish products from the offending nation be prohibited "for such duration as he determines appropriate." 22 U.S.C § 1978(a) (1988).

63. 16 U.S.C. § 1371 (a)(2)(C) (1988 & Supp. V 1993). "Intermediary nation" is defined as "a nation that exports yellowfin tuna or yellowfin tuna products to the United States and that imports yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation into the United States pursuant to section 16 U.S.C. 1371(a)(2)(B)." 16 U.S.C. § 1362(17) (Supp. IV 1992).

The purpose of this provision was to prevent the selling by embargoed nations of tuna to an intermediary nation which, in turn, sells the otherwise banned tuna to the United States. Earth Island Institute v. Mosbacher, 785 F. Supp. 826, 832 (N.D. Cal. 1992).

64. 16 U.S.C. § 1378(a)(2)(B) (1988).

3. Earth Island Institute Cases

After the adoption of the 1988 amendments, the Secretary of Commerce and the administrative agencies still did not exercise their authority to impose embargoes. In fact, the National Marine Fisheries Service (NMFS) promulgated regulations which appeared to allow circumvention of the strict provisions in the statute.[65] In addition, the Department of Commerce, through NMFS, was exercising its own discretion in some areas, rather than strictly adhering to the new mandates. As a result of these actions, a coalition of marine mammal protection groups brought two actions against the government in the "Earth Island Institute" cases.

In the first of these cases, *Earth Island Institute v. Mosbacher (Earth Island I)*,[66] plaintiffs sought a court order to enforce the primary embargo provisions of the MMPA. Plaintiffs alleged that the Secretary of Commerce had not made requisite findings that the average rate of incidental taking of dolphins by Mexican vessels was comparable to the average rate of U.S. vessels. Therefore, the Secretary of the Treasury was required to ban importation of yellowfin tuna and tuna products from Mexico. The government maintained that although the data had been received, making the requisite findings would take several months. The government argued that the MMPA did not require action until findings had been made. The district court disagreed and ordered that the embargo be imposed immediately, holding that the plain language of the statute required an embargo until the NMFS had made the requisite comparability finding.

In response, the government imposed the embargo. However, the very next day, NMFS completed the findings and lifted it. NMFS found that even though Mexico had exceeded the limits for both total dolphin take and percentage of eastern spinner dolphins killed in 1989, the embargo could be lifted because Mexico was within the limits on killing eastern spinner dolphins for the first six months of 1990. This action was based on NMFS' "reconsideration regulation," under which the Secretary could reconsider an embargo and certify compliance with the

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65. 50 C.F.R. § 216.24(e)(5) (1993).

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

statute's provisions based upon data for only the first six months following the year the limits were exceeded.[67]

Earth Island Institute then challenged the "reconsideration regulation," arguing that under the statute, the comparability finding must be based on an entire year of data. Again, the district court agreed and invalidated the "reconsideration regulation."[68] The court also issued a temporary restraining order banning the import of yellowfin tuna from Mexico. This order was upheld by the 9th Circuit Court of Appeals, with sharp criticism of the government's position:

> Because the reconsideration regulation creates such a potential for abuse, and has in fact already been used to circumvent the intent of Congress, we reject the government's argument that the reconsideration regulation offers a more effective incentive to foreign countries to reduce dolphin kill rates.
>
> The agency's contention that it seeks only to provide additional incentives consistent with Congress' intent is further belied by the agency's own record of non-enforcement of congressional directives during the years which preceded the 1988 amendments.[69]

In the second case brought to compel enforcement of the embargo provisions, *Earth Island v. Mosbacher (Earth Island II)*,[70] three aspects of the intermediary nation embargo provisions were at issue. First, which intermediary nations are required to submit proof of their import policies to the Secretary of the Treasury? Second, what must be proved in order to overcome the embargo? Finally, for intermediary nations whose policies bring them under the embargo, what products are banned

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67. 50 C.F.R. § 216.24(e)(5)(vii) (1993).

68. *Earth Island I*, 929 F.2d at 1451-1452. The regulation was subsequently changed to establish more specific dates. 50 C.F.R. § 216.24(e)(5)(vii) (1993).

69. *Earth Island I*, 929 F.2d at 1453. This action resulted in Mexico challenging whether the MMPA was consistent with provisions of the General Agreement on Tariffs and Trade (GATT) in an appeal to a GATT Dispute Settlement Panel. Joseph, *supra* note 7, at 9 (citing 'United States- Restrictions on Imports of Tuna, Request for the Establishment of a Panel under Article XXIII-2 by Mexico' (Memorandum from the Council of GATT, Jan. 25, 1991)). *See* discussion *infra* notes 79-84.

70. 785 F. Supp. 826 (N.D. Cal. 1992) [hereinafter *Earth Island II*].

from importation into the United States? The district court found the answer to all three questions "by simple reference to the statute."[71]

As to which nations must submit proof, the government argued that the agency had discretion not to require formal government certifications where there was no reason to suspect that a nation was importing tuna from embargoed nations. The court found such discretion unwarranted, however, because the language of the statute was clear and unambiguous: "[t]he Secretary ... shall require the government of *any intermediary nation* from which yellowfin tuna or tuna products will be exported to the United States to certify and provide reasonable proof."[72]

Regarding the nature of proof, the government contended that an intermediary nation would not be subject to the embargo if:

1) evidence had been received that the nation did not import yellowfin tuna from the embargoed harvesting nations, or

2) evidence were received that once the embargo was in effect the nation no longer imported such tuna.[73]

Again relying on the plain wording of the statute, the court found the government's interpretation faulty in two ways. First, the statute requires an intermediary nation's *prohibition* of importation of certain products, not merely a declaration that the nation does not or no longer continues to import such products.[74] Second, the statute does not require intermediary nations to prohibit the importation of *all* tuna products from embargoed nations, but rather only those products that would be banned from importation into the United States.[75] In other words, the Congress intended only to induce intermediary nations to adopt the same prohibition the U.S. had adopted with regard to tuna and tuna products.

Finally, the court addressed the scope of the secondary embargo, which the government had interpreted to be the same as that of the primary embargo. Again finding the answer "by simple reference to the statute," the court held that the secondary embargo encompasses a

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71. *Id.* at 832. This phrase was repeated throughout the opinion, underscoring the court's impatience with the government's apparent attempts to circumvent the embargo provisions.

72. *Id.* (citing 16 U.S.C. § 1371(a)(2)(C) (1988)).

73. *Id.* at 834.

74. *Id.* at 833.

75. *Id.*

broader range of products.[76] That is, while the primary embargo only prohibits importation of yellowfin tuna and tuna products caught in purse seines in the Eastern Pacific, the secondary embargo prohibits importation of *all* yellowfin tuna or tuna products, regardless of origin or method of harvest.[77]

The evolution of MMPA mandates aimed at non-U.S. fishing on dolphins in the eastern Pacific demonstrates a retreat from Congress's initial focus on searching for an international, or multinational attempt to solve the tuna-dolphin problem. In 1972, the focus of the international program was on negotiation with other nations, with only a weakly-worded provision for economic sanctions against nations whose marine mammal conservation programs did not parallel that of the United States.[78] By 1988, the focus had shifted to embargoes against both primary and intermediary nations, in an effort to use economic sanctions to force nations to aggressively attack the problem. While the 1988 amendments to the MMPA did provide for negotiations with other tuna fishing nations through the IATTC, these negotiations were clearly intended to be influenced by the threat of embargo.

During the years over which this shift took place, there is no evidence in the legislative history that Congress questioned either the propriety of the United States exercising its economic power to impose the goals of the MMPA on other nations, or the effect such action would have on multilateral efforts to reduce dolphin by-catch. The lack of analysis of these issues is disconcerting, particularly in light of basic principles of international law.

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76. *Id.* at 833-834.

77. *Id.* at 833-835. The state of the law remains unclear, however. On appeal, *Earth Island II* was reversed and the injunction vacated. The 9th Circuit Court of Appeals held that the District Court improperly exercised jurisdiction, stating that under 28 U.S.C. § 1581 the Court of International Trade has exclusive jurisdiction over this matter. Earth Island Institute v. Brown, 28 F.3d 76, 78 (9th Cir. 1994). In any event, primary and secondary embargoes have been imposed at least temporarily on more than 20 nations since August 1990. Joseph, *supra* note 7, at 7 (citing a letter from Dr. William Fox, Jr., U.S. National Marine Fisheries Service, dated Jan. 20, 1992 to Mr. Bill Broward, Director, Office of Trade Operations, Dept. of Treasury, Wash., D.C.).

78. *See* 16 U.S.C. § 1371(a)(2)(A) (1988).

B. The GATT Controversy

Shortly after *Earth Island I* was decided, Mexico registered a protest that embargoes imposed pursuant to the MMPA by the United States violated provisions of the General Agreement on Tariffs and Trade (GATT).[79] In an appeal to a GATT Dispute Settlement Panel, Mexico alleged, among other things, that the embargoes were contrary to Article XI of GATT because they were a "prohibition or restriction other than duties, taxes or other charges...."[80] The United States argued that its actions were consistent with GATT principles because the MMPA applies to both domestic and imported products, and thus the measures were "internal regulations" exempted under Article III.[81]

The GATT Panel dismissed this argument finding that the Article III provisions covered only products as such, and that regulations governing the incidental take of dolphins could not be considered products for these purposes.[82] The Panel decided in favor of Mexico and ruled that the U.S. embargoes were contrary to GATT principles.[83] Further, the Panel ruled that the United States had not considered all options for resolving the controversy under GATT, because it had not attempted to negotiate international cooperative agreements.[84]

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79. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 55 U.N.T.S. 188 [hereinafter GATT]. The United States became a contracting party to GATT by executive agreement. The Senate has never formally approved the GATT or acted to implement it but it is widely regarded as a binding treaty obligation of the United States. *See* Don Mayer & David Hoch, *International Environmental Protection and the GATT: The Tuna/Dolphin Controversy*, 31 AM. BUS. L.J. 187, 188 n.7 (1993).

80. GATT, *supra* note 79, art. XI:1, at 224-225. For a more comprehensive discussion of the Mexico—United States GATT dispute, *see* Hon. R. Kenton Musgrave & Garland Stephens, *The GATT-Tuna Dispute: An Update*, 33 NAT. RESOURCES J. 957 (1993); Mayer & Hoch, *supra* note 77; John P. Manard, Jr., *GATT and the Environment: The Friction Between International Trade and the World's Environment--The Dolphin and Tuna Dispute*, 5 TUL. ENVTL. L.J. 373 (1992).

81. GATT, *supra* note 79, art. III, at 204-208. Article III:2 requires that "[t]he products of the territory of any ... party [to GATT] shall be accorded treatment no less favorable than that accorded to like products of national origin...." GATT, *supra* note 79, at 206.

82. General Agreement on Tariffs and Trade: Dispute Settlement Panel Report On United States Restrictions on Imports of Tuna, 30 I.L.M. 1594, 1618 (1991).

83. *Id.* at 1623.

84. *Id.* at 1620.

C. The Inter-American Tropical Tuna Commission

The IATTC commission was established in 1949 in a convention originally entered into by the United States and Costa Rica.[85] The convention was left open to adherence by other eastern Pacific fishing nations, and by 1993, seven nations were members.[86] Originally the IATTC was charged with studying tuna and other species impacted by tuna fishing vessels within its geographical area of responsibility, and with recommending management measures designed to maintain stocks at levels capable of producing maximum sustainable yields.[87]

As other nations began to expand their fishing efforts in the eastern Pacific Ocean in the early 1970s, the United States worked to have the duties of the IATTC broadened to include dolphin conservation. In 1976, IATTC member nations resolved that "the Commission should strive [1] to maintain a high level of tuna production and also [2] to maintain [dolphin] stocks at or above levels that assure their survival in perpetuity, [3] with every reasonable effort being made to avoid needless or careless killing of [dolphins]."[88]

In carrying out these objectives, the IATTC initiated an "observer program," to monitor fishing trips on non-U.S. vessels.[89] Additionally,

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85. Tuna Commission Convention, *supra* note 3. The Convention is implemented by the Tuna Convention Act of 1950, 16 U.S.C. §§ 951-961 (1988 & Supp. V 1993).

86. Current members of the IATTC are Costa Rica, Panama, Japan, France, Nicaragua, Vanuatu, and the United States. Former members were Ecuador (1961-68), Mexico (1964-78), and Canada (1968-84). In 1991 the IATTC passed a resolution requesting that the United States initiate procedures to amend the Convention to make it easier for eligible nations to join. IATTC, ANNUAL REPORT OF THE INTER-AMERICAN TROPICAL TUNA COMM'N 8 (1991) [hereinafter 1991 IATTC REPORT].

87. The initial impetus for establishing the IATTC was U.S. concern over bait-fish and yellowfin tuna resources in the high seas of the Eastern Pacific Ocean. As the major tuna harvesting nation in the Eastern Pacific at the end of World War II, the United States had a strong interest in managing both tuna and the bait with which they were caught. JOSEPH & GREENOUGH, *supra* note 14, at 13.

88. 1991 IATTC REPORT, *supra* note 86, at 7. The specific areas of involvement of the Commission were to be "(1) monitoring population sizes and mortality incidental to fishing through the collection of data aboard tuna purse seiners, (2)aerial surveys and dolphin tagging, (3) analyses of indices of abundance of dolphins and computer simulation studies, and (4) gear and behavioral research and education." *Id.*

89. Initially, the IATTC lacked adequate funding to implement the program. In 1979-1980, limited funding became available, and 66 trips were accompanied by observers. Combined with trips observed by national programs (primarily the NMFS observer program authorized by the MMPA at 16 U.S.C. § 1381(d) (1988)), 20.9% of

the IATTC has collected, analyzed and reported biological data, conducted extensive studies to develop improved fishing techniques and gear, presented seminars for fishermen to provide training and technical advice concerning procedures designed to minimize dolphin mortality, and carried out routine inspections of fishing equipment.[90] Finally, the IATTC has worked closely with a number of groups including national fisheries and fisheries-related organizations of member and non-member nations; intergovernmental working groups consisting of both member and non-member representatives; and international organizations, in its effort to share information, encourage the adoption of dolphin-protective regulations by participating nations, and develop effective internationally cooperative mechanisms for enforcement of IATTC regulations.[91]

In 1990, members of the IATTC agreed "in principle" to work toward reducing incidental dolphin mortality to levels approaching zero.[92] For a number of members, however, this goal was somewhat in conflict with another primary goal of the IATTC which was to manage yellowfin tuna stocks for maximum yield consistent with conservation of the ecosystem as a whole.[93] According to one commentator, there was concern that:

> [c]hanging from fishing in international waters for the large, sexually mature yellowfin usually found associated with dolphins to fishing on logs and schools for predominantly smaller,

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the fishing trips in 1979-80 were observed. Although hampered by funding problems, the IATTC observer program grew. In 1991-92, IATTC observers accompanied 65% of the eastern Pacific fishing trips. Combined with national observer programs, this provided 98.1% observer coverage. Joseph, *supra* note 7 at 5.

90. Joseph, *supra* note 7, at 5-6.

91. For a detailed summary of IATTC activities, see *id.* at 4-6. For more specific information, see CLIFFORD L. PETERSON & WILLIAM H. BAYLIFF, IATTC SPECIAL REPORT NO. 5: ORGANIZATION, FUNCTIONS, AND ACHIEVEMENTS OF THE INTER-AMERICAN TROPICAL TUNA COMMISSION (1985) [hereinafter IATTC ANNUAL REPORTS].

92. Joseph, *supra* note 7, at 10.

93. Only large mature tuna associate with dolphins. A prohibition on killing of dolphins would require that the fishing effort concentrate on "dolphin-free" schools—mostly small, sexually immature tuna. This shift would result in a large decrease in efficiency and in overall production of yellowfin tuna. In addition, the increased harvest of immature yellowfin could have a negative impact on future recruitment. Finally, wasteful by-catch (mostly yellowfin tuna too small to have commercial value) would be greatly increased, probably resulting in significant negative effects on yellowfin tuna recruitment and on large pelagic predator and dolphin populations. *Id.* at 18-22.

> sexually immature yellowfin and skipjack tunas closer to shore would, at current levels of effort, lead to overexploitation of the resource and also give rise to political problems over access to areas under national jurisdiction.[94]

Nevertheless, negotiations continued, and at a meeting held in La Jolla, California in June 1992, the IATTC agreed to establish a multilateral dolphin conservation program (La Jolla Agreement).[95] The program set a schedule for progressively decreasing total limits on dolphin mortality to less than 5,000 per year in 1999, with a goal of "eliminating dolphin mortality in the [eastern Pacific Ocean] fishery."[96] The annual quota was to be divided among individual fishermen of all participating nations. Addressing the economic and ecological concerns mentioned above, this unique quota allocation system provides a great incentive to reduce dolphin take without requiring a moratorium on fishing on dolphins.[97]

The La Jolla Agreement also called for multilateral cooperation in enforcement and research. An International Review Panel, made up of representatives from participating governments, environmental groups, and the fishing industry is charged with overseeing the quota program. The panel monitors compliance and recommends measures to be taken against individual vessels and nations violating the terms of the agreement.[98] Similarly, the agreement establishes a Scientific Advisory Board to assist the IATTC Director in research designed to reduce dolphin mortality and to develop alternative means of harvesting large yellowfin tuna.[99]

The provisions of the La Jolla Agreement concerning the development of a multilateral program for reducing dolphin mortality, and the establishment of the Review Panel and the Scientific Advisory Board are consistent with actions mandated by the MMPA. Section 1378 of the MMPA requires the Secretary to pursue international arrangements, through the Inter-American Tropical Tuna Commission; which provide

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94. *Id.* at 10.

95. La Jolla Agreement, *supra* note 4, at 938.

96. *Id.*

97. A quota holder who for the most part successfully frees dolphins unharmed may continue to harvest the large tuna, unless and until his dolphin quota is reached. Joseph, *supra* note 7, at 11.

98. La Jolla Agreement, *supra* note 4, at 941.

99. *Id.* at 942.

for cooperative research into methods of catching yellowfin tuna which do not involve the taking of marine mammals, with a goal toward approaching a zero dolphin mortality rate, as well as reliable monitoring of the number, rate, and species of marine mammals taken by vessels of harvesting nations.[100]

III. THE INTERNATIONAL DOLPHIN CONSERVATION ACT OF 1992

It was against the backdrop of the successful negotiation of the 1992 La Jolla Agreement, court-ordered embargoes against primary and intermediary nations exporting tuna to the United States, and the recently issued GATT Panel's report concerning Mexico's appeal that Congress considered two measures proposing a Dolphin Conservation Act as an amendment to the MMPA. Both were aimed at reducing, and ultimately eliminating, dolphin mortality associated with purse seining for yellowfin tuna in the eastern Pacific Ocean. Both measures acknowledged that non-U.S. fishing vessels were responsible for an overwhelming majority of these dolphin deaths, and provided for international research programs to develop methods of fishing for large yellowfin tuna. However, the two proposals had distinctly different approaches to dealing with dolphin mortality while the research was underway.

A. The Breaux Bill

The first of these measures was sponsored by Senator Breaux of Louisiana (the Breaux bill),[101] and proposed to build on the considerable cooperative efforts and negotiations of the IATTC.[102] This bill would have declared the policy of the United States to be the implementation and enforcement of IATTC's La Jolla Agreement.[103] That Agreement, as noted above, established quotas on dolphin take for the entire fleet in the eastern Pacific Ocean, starting at 19,500 in 1993 and being progressively reduced to less than 5000 per year by 1999, with the ultimate goal being to "eliminat[e] dolphin mortality in this fishery."[104] The bill proposed to direct the Secretary of State to seek and enter into

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100. 16 U.S.C. §§ 1378(a)(2)(B)(i)-(iii), (v) (1988). *See also* Joseph, *supra* note 7, at 12.

101. S. 2995, 102d Cong., 2d Sess. (1992).

102. *See supra* notes 85-100 and accompanying text.

103. S. 2995, *supra* note 101, at § 301(b)(3).

104. La Jolla Agreement, *supra* note 4, at 938.

multilateral, international agreements to establish a program to protect dolphins. These agreements would, among other things, reduce dolphin mortality in the eastern Pacific Ocean tuna fishery; eliminate such mortality as soon as practicable; be consistent with the policies in the MMPA;[105] recognize the need for multilateral agreement and cooperation in achieving the objectives of dolphin conservation in the eastern Pacific Ocean; encourage parties to the agreement to seek, through bilateral and multilateral negotiations, to encourage other nations that participate in fisheries to which the agreement applies, to become parties to the agreement; and support the research program established under the IATTC Agreement.[106]

Under the Breaux bill, a moratorium on fishing on dolphins would be considered if a "competent regional organization" (i.e., IATTC or some counterpart) made a recommendation to that effect.[107] Finally, the bill would have provided for embargoes, similar to those ultimately adopted in the International Dolphin Conservation Act, upon a finding that a nation which was a party to the international agreement was not fully implementing such nation's commitments under the agreement.[108]

B. The Studds Bill

The other bill, sponsored by Congressman Studds of Massachusetts (the Studds bill), called for a five year moratorium on fishing on dolphins.[109] Under this bill, the Secretary of State can negotiate bilateral agreements with other tuna fishing nations.[110] Such agreements would allow the lifting of trade sanctions from those nations which agreed to continue to reduce dolphin mortality.[111] These nations would also be required to suspend fishing on dolphin for at least five years beginning March 1, 1994.[112] In the event that a nation failed to so agree, or failed

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105. See *supra* note 100 and accompanying text demonstrating that the provisions of the La Jolla Agreement were consistent with MMPA mandates.

106. S. 2995, *supra* note 101, at § 302.

107. *Id.* § 304(b).

108. *Id.* § 305(a).

109. H.R. 5419, 102d Cong., 2d Sess. (version: 2) (1992). A companion bill was introduced in the Senate by Senator Kerry of Massachusetts. S. 3003, 102d Cong., 2d Sess. (1992).

110. H.R. 5419, *supra* note 109 at § 302(a).

111. *Id.* § 304(b).

112. Id. § 305 (a)(1).

to live up to its commitment after a treaty to this effect was signed, the United States would impose sanctions on that nation.[113] These sanctions included a ban on the importation of all tuna, tuna products, and with the exception of shrimp and shrimp products, all other other fish products from the offending nation.[114]

The Studds bill was ultimately adopted by Congress as the International Dolphin Conservation Act of 1992 (IDCA).[115] In its final version, the IDCA called for the negotiation of bilateral agreements with major purse-seine tuna fishing countries to establish the global moratorium. The moratorium was to last at least five years[116] and prohibited the harvest of tuna through the use of purse-seine nets deployed on or used to encircle dolphins or other marine mammals. Any country that transmits to the Secretary of State a formal communication committing to implement a moratorium, require observers on all large vessels purse-seining for tuna in the eastern Pacific Ocean, and reduce dolphin mortality resulting from purse-seining by statistically significant margins in 1992 and 1993, will be exempted from the MMPA's import ban.[117]

The Secretary is directed to periodically determine whether each country transmitting such a formal communication is implementing the commitments. If the Secretary finds that the country is not, then an import ban is to be put in place within 15 days. If the country does not provide reasonable proof that it has fully implemented its commitments

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113. *Id.* § 305 (b)(1).

114. *Id.* § 305 (b)(2).

115. *See supra* note 5.

116. The IDCA does provide an avenue of early escape: the moratorium may be terminated prior to December 31, 1999, with respect to the United States for the harvesting of tuna in the eastern Pacific, only if (1) a recommendation for termination is submitted to the Secretary of Commerce by "a competent regional organization under the auspices of which research is conducted" concerning the development of methods of fishing for large yellowfin tuna, 16 U.S.C. § 1414(b) (Supp. IV 1992 & Supp. V 1993) (2) the Secretary reviews the information on which the recommendation is based, in consultation with relevant Federal agencies and other interested persons, 16 U.S.C. §§ 1414(b)(1), (b)(2) (Supp. IV 1992 & Supp. V 1993) (3) the Secretary submits to Congress a recommendation regarding the termination of the moratorium, 16 U.S.C. § 1412(c) (Supp. IV 1992 & Supp. V 1993) and (4) the recommendation is approved by enactment of a joint resolution of approval. *Id.*

117. 16 U.S.C. § 1415(a) (Supp. IV 1992 & Supp. V 1993).

within 60 days of the beginning of the ban, an even harsher embargo will be imposed.[118]

For U.S. fishermen, the IDCA limits the American Tunaboat Association's (ATA) general permit to a quota of incidental dolphin take (including those taken for research) to 1000 for 1992, and 800 for a 15 month period beginning January 1, 1993.[119] On March 1, 1994, the ATA's general permit would expire, unless no major purse-seine tuna fishing country had entered into the above-described agreement by that date.[120] In that case, the permit will not expire until 1999, but dolphin mortalities for each year may not exceed the prior year's mortality figure, and that number must be reduced by statistically significant amounts each year, to levels approaching zero by 1999.[121]

Thus, two different outcomes are possible under the IDCA. First, if at least one "major purse-seine tuna fishing country"[122] agrees to implement a moratorium on fishing on dolphins, then U.S. fishermen will also be subject to a moratorium, and yellowfin tuna and tuna products from all major fishing countries not instituting a moratorium will be embargoed.[123] On the other hand, if no major tuna purse-seining country enters into the agreement with the United States, imports from all such countries will be subject to embargoes of yellowfin tuna or tuna products unless their tuna purse-seiners' average rate of incidental taking is comparable to the new rates set for U.S. fishermen under the IDCA.[124] Either way, the United States is using its power to impose economic sanctions to coerce adoption of the dolphin protection goals that it has unilaterally determined to be appropriate.

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118. 16 U.S.C. § 1415(b)(2) (Supp. IV 1992 & Supp. V 1993). In such case, the President is directed to impose a ban on importation of all fish and fish products that the President considers "appropriate," according to certain criteria. *Id.*

119. 16 U.S.C. § 1416(a)(1) (Supp. IV 1992 & Supp. V 1993).

120. 16 U.S.C. § 1416(a)(3) (Supp. IV 1992 & Supp. V 1993).

121. 16 U.S.C. § 1416(a)(4) (Supp. IV 1992 & Supp. V 1993).

122. A "major purse seine tuna fishing country" is defined as "a country which on October 26, 1992, has an active purse seine tuna fishing fleet of 20 or more vessels." 16 U.S.C. § 1416(c) (Supp. IV 1992 & Supp. V 1993).

123. As noted above, a country that continues to refuse to implement a moratorium will ultimately be subject to a ban of all fish and fish products. 16 U.S.C. § 1415(b)(2) (Supp. IV 1992 & Supp. V 1993).

124. *See* 16 U.S.C. § 1371(a)(2)(B)(ii)(I)-(V) (1988). Intermediary nations, of course, will still be subject to embargoes if they do not prohibit the importation of any tuna product that is prohibited from importation into the United States.

It appears that the lifting of tuna import bans was intended to meet U.S. responsibilities under GATT.[125] The legislative history of the IDCA demonstrates that Congress was very concerned about resolving the issues raised by Mexico and saw the unilateral provisions of the IDCA as a method of quickly dealing with those concerns.[126] Although the history also includes a discussion of the merits of the La Jolla Agreement[127] and a strong dissent to the adoption of the committee report by Representative Cunningham,[128] no other explanation is offered in the report as to why the Studds IDCA approach was deemed preferable to the multilateral approach reflected in the Breaux bill. It does not appear that the broader international law obligations the United States has under either the law of the sea or other international treaties were considered prior to the passage of the IDCA.

IV. TUNA EMBARGOES AND THE NEW LAW OF THE SEA

At first glance, the two approaches to resolving the tuna-dolphin controversy presented by the Breaux bill and the IDCA as finally enacted seem similar. The objective of both measures was to eliminate dolphin mortality associated with yellowfin tuna fishing. Both would have required the United States to impose economic sanctions on countries unwilling to cooperate toward this end. However, one significant difference distinguished the two. The Breaux bill would have had the United States enforce the La Jolla Agreement, a multinationally-agreed upon program designed to solve the dolphin mortality problem. In contrast, the IDCA, a unilateral attempt by the United States to enforce dolphin protection through embargoes imposed pursuant to the MMPA, works to enforce a stark protectionist measure.

As previously noted, analysis of the approaches requires consideration of questions concerning how a nation should work toward solving an international problem. The answers to these questions can be found by first evaluating the two approaches in terms of the principles of the new law of the sea, and then by examining the effect of MMPA embargoes on the international legal order.

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125. *See* discussion *supra* notes 79-84 and accompanying text.

126. 138 CONG. REC. H9064, 9069 (daily ed. Sept. 22, 1992) (statement of Rep. Crane).

127. H.R. REP. NO. 746 (pt. I), *supra* note 18, at 2924-2925; H.R. REP. NO. 746 (pt. II), 102d Cong., 2d Sess. 4-5 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2941-2942.

128. H.R. REP. NO. 746 (pt. I), *supra* note 18, at 2938-2939.

The two approaches reflect the diverging paths the United States has been travelling when considering an issue of international importance. By selecting the IDCA rather than the Breaux bill, the United States has endorsed a unilateral approach that does not incorporate considerations of the rest of the world community. This approach is not consistent with principles adopted by either the United Nations Convention on the Law of the Sea or the United Nations Conference on Environment and Development, and because it was not the result of international cooperation, but rather a unilateral action, the IDCA has been criticized by both the European Community, and the Latin America tuna fishing states.

An underlying tenet of international law is the desirability of negotiation, cooperation, and consent in matters of common interest beyond state borders. International norms emerge from the interaction of nations participating as politically equal sovereigns: negotiation of treaties and conventions, customary practice engaged in or condoned by many nations, and the decisions of the International Court of Justice in disputes submitted for resolution are all sources of international law based on the basic principle of consent.

There are neither specific international treaties,[129] nor decisional law regarding the protection of dolphins. State practice on the issue varies widely—while some nations actively attempt to protect dolphins, many do not; and there is no generally recognized custom of doing so. Therefore, the most relevant international law concerning dolphin protection must be found under the rubric of high seas fishing, and through conservation of ocean resources under the Law of the Sea Convention and UNCED.

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129. Earth Island Institute has suggested that the International Whaling Commission (IWC), established by the International Convention for the Regulation of Whaling of 1946, (161 U.N.T.S. 72 Dec. 2, 1946), has broad powers to designate certain species of whales, and therefore could appropriately regulate the killing of dolphins. Stephen Boreman, *Dolphin-Safe Tuna: What's in a Label? The Killing of Dolphins in the Eastern Tropical Pacific and the Case for an International Legal Solution*, 32 NAT. RESOURCES J. 425, 439 (1992) (citing Steiner, *et. al.*, *The Tragedy Continues: Killing of Dolphins by the Tuna Industry, Earth Island Institute* 11 (1988)). The IWC, however, has made the conscious choice not to "dilute its basic mission" with added concerns about the international tuna industry and the killing of eastern Pacific Ocean dolphins. *Id.*

A. High Seas Fishing

Freedom of fishing on the high seas is a long-standing principle of international law. From far back in history, fish stocks in the waters beyond the territorial seas of coastal states have been considered a common resource, to be freely harvested. Historically, all harvesting of fish in the ocean has been subject only to those controls flag states have chosen to impose on their fishing vessels, and to those few measures necessary to respect the equal rights of other harvesters.

Not until fairly recently did nations begin to recognize that the oceans' bountiful living resources were not without limit.[130] Technological advances made it possible for nations to profitably fish in distant fishing grounds. Development of fisheries offered promise of economic growth. Moreover, as the unprecedented population boom of the 20th century created an equally unprecedented demand for food, people turned to the sea. As a result, new, larger, and more efficient fishing vessels and techniques were developed, such as large ocean-going fishing trawlers and seiners tended by huge factory freezer ships that could stay at sea for months. Such increased pressure on ocean fish stocks raised concerns for their management.[131] These concerns led to a dramatic change in the scope of high seas fishing freedoms,[132] now articulated in

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130. For an analysis of the transition from the open ocean system to relative scarcity of many ocean resources, *see* THE NEW ORDER OF THE OCEANS: THE ADVENT OF A MANAGED ENVIRONMENT 6-7 (Giulio Pontecorvo ed., 1986).

131. WILLIAM T. BURKE, INTERNATIONAL LAW OF THE SEA 3-1 (1992).

132. Until the 1970s, coastal nations had exercised control over the resources only in their territorial seas. Generally, in the early 1970s, the accepted limit on the territorial sea was 12 miles; a few states recognized only 3- or 6-mile territorial seas, which had been the norm for preceding centuries. *Id.*

This concept of limited coastal control was abandoned in the 1970s and early 1980s with the widespread adoption of the Exclusive Economic Zone (EEZ) regime, under which coastal nations have sovereign authority to manage the ocean resources out to 200 miles from their shores. Increased fishing pressure beyond the territorial sea had taken its toll on fish stocks, prompting coastal nations to take control of resource management beyond the traditional limit, in order to conserve the resources within its borders. *See id.* at 3-1—3-27. (For various reasons, international agreements establishing multinational regulatory bodies had proved to be ineffective in regulating and enforcing meaningful management of these resources. See *id.* at 3-6, for a discussion of the difficulties of multinational regulatory institutions.) *See also* BEAN, *supra* note 34, at 386-387.

the Law of the Sea Convention (LOS).[133]

The LOS sets forth accepted international law regarding management of resources including: straddling stocks,[134] anadromous stocks,[135] highly migratory (fish) species,[136] marine mammals,[137] and other living ocean resources.[138] The articles of the LOS applicable to the tuna/dolphin problem show a clear preference for conservation and management programs developed through international effort and cooperation, calling for nations to work through "appropriate" regional or international organizations.[139]

B. Principles Embodied in the High Seas Provisions of the Law of the Sea Convention

Under LOS Article 116, the nationals of all states have the right to engage in fishing for tuna in the eastern Pacific Ocean outside the EEZs of coastal states. These fishing rights are limited by 1) the respective

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133. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/Conf.62/122, *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter LOS].

134. LOS, *supra* note 133, art. 63, at 1282.

135. LOS, *supra* note 133, art. 66, at 1282.

136. LOS, *supra* note 133, art. 64, at 1282.

137. LOS, *supra* note 133, arts. 65, 120, at 1282, 1291.

138. LOS, *supra* note 133, arts. 117-119, at 1291. The LOS represents an "overhaul" and rewriting of international law regarding coastal state control, distant water fishing states' rights, and obligations for conservation of living marine resources. The LOS is the result of intense negotiations culminating in the Third United Nations Conference on the Law of the Sea. For a general discussion of the progress made on various law of the sea issues during the Third United Nations Conference on the Law of the Sea, see John R. Stevenson & Bernard H. Oxman, *The Preparations for the Law of the Sea Conference*, 68 AM. J. INT'L L. 1 (1974); *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AM. J. INT'L L. 1 (1975); and Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The 1976 New York Session*, 71 AM. J. INT'L L. 247 (1977); *The 1977 New York Sessions*, 72 AM. J. INT'L L. 57 (1978); *The Seventh Session (1978)*, 73 AM. J. INT'L L. 1 (1979); *The Eighth Session (1979)*, 74 AM. J. INT'L L. 1 (1980); *Ninth Session (1980)*, 75 AM. J. INT'L L. 211 (1981); *The Tenth Session (1981)*, 76 AM. J. INT'L L. 1 (1982).

A good source on developments in the law of the sea can be found in annual SAN DIEGO L. REV. issues starting with Volume 6 in 1968-1969. The articles detail emerging issues, chart the progress of UNCLOS III negotiations and parallel law of the sea issues, and offer insights as to the makeup of the law of the sea, post-UNCLOS III.

139. LOS, *supra* note 133, arts. 64, 65, 118 and 119, at 1282, 1291.

flag state's treaty obligations; 2) any rights, duties and interests of the coastal states; and 3) other provisions of the Convention regarding conservation and management of high seas fishery resources.[140]

1. Interests of Coastal States

The "rights, duties and interests of coastal states" are those which states have by virtue of the fact that both yellowfin tuna and the dolphins with which they associate may be found within their Exclusive Economic Zones. Under the LOS Part V, the provisions on the Exclusive Economic Zone, coastal states have both the right and the duty to provide adequate management of all living resources within their EEZs.[141] This is true whether or not a coastal state participates in the harvest of such resources. Under the LOS Article 64, coastal states also have a duty to cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species throughout the region, both within and beyond the EEZ.[142] Again, coastal states have this obligation *whether or not* their nationals harvest the species. Thus, under the LOS, the coastal states bordering the eastern Pacific Ocean have both duties and interests in reducing dolphin by-catch in the tuna fisheries. Fishing regulations or management plans must be adopted in cooperation with, and subject to the interests of, the coastal states.[143]

The IDCA calls for negotiation of either bilateral or multilateral treaties to effect dolphin protection in the eastern Pacific Ocean. However, because the Act also calls for the imposition of strict embargoes against states that refuse to adopt the moratorium desired by the United States, the Act cannot be considered to propose cooperation with other coastal states or distant fishing states having an interest in the tuna and the dolphins.

The Breaux bill, on the other hand, would have implemented an agreement reached between coastal states and other states involved in the eastern Pacific Ocean tuna fishery. Although the willingness of some states to reach agreement may have been influenced by U.S. embargoes

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140. The provisions include Articles 117 through 120. *See* discussion *infra* notes 144-155.

141. LOS, *supra* note 133, arts. 56-75, at 1280-1284.

142. LOS, *supra* note 133, art. 64, at 1282.

143. LOS, *supra* note 133, art. 58, at 1280.

or the threat thereof, the La Jolla Agreement was nonetheless the result of negotiations during which the interests and needs of all the participating states were considered. Furthermore, in contrast to those of the IDCA, the Breaux bill's proposed economic sanctions would be used against states that refused to adopt a management plan comparable to one cooperatively developed by a multinational organization, a plan in which all interested states had an opportunity to put forth their interests and concerns and to negotiate compromises.

2. *Duty of All States to Cooperate*

LOS Article 117 provides that: "[a]ll States have the duty to adopt, or to co-operate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas."[144] Under this Article, it is clear that the United States has both the right and the duty to adopt such regulations as it deems appropriate for U.S. fishermen, to ensure that dolphin populations are properly protected from harmful activities by U.S. nationals.

The duty of cooperation is expanded in Article 118 which states that:

> States shall co-operate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, co-operate to establish subregional or regional fisheries organizations to this end.[145]

Under Article 118, then, the United States has the duty to cooperate with other states engaged in purse-seine fishing in the eastern Pacific Ocean to develop conservation measures for dolphins. In working to establish the IATTC, and in working through the IATTC, supporting research and developing management goals, the United States has attempted to carry out this duty. By including an international program in the MMPA, whereby the Secretary was directed to negotiate agreements with other

144. LOS, *supra* note 133, art. 117, at 1291.
145. LOS, *supra* note 133, art. 118, at 1291.

countries for the protection and conservation of marine mammals,[146] the United States was further responding to international obligations, actively putting its concerns and interests on the negotiating table.

However, the gradual shift in emphasis of the MMPA to a position mandating a moratorium approach to the dolphin by-catch problem, and the use of powerful economic sanctions to force international acceptance of that approach, is in contravention of Article 118. States that may have been willing to negotiate and compromise, as is the case with the nine countries that agreed to the La Jolla Agreement, are cut off from discussion. Their only options are to accept the "American compromise" (hammered out between competing U.S. interests), or to protect their own interests but be deprived of the U.S. market. Under international law, cooperation does not mean that the economically strongest state may determine all the rules, even if that state purports to be acting in the overall best interests of all.

Supporters of the IDCA may argue that an economic sanctions approach is necessary in order to save species of dolphin that are threatened with irreparable harm. While considerable disagreement may exist as to exact population counts, optimum sustainable population levels and other scientific data, no scientific report claims that zero dolphin mortality is required for the healthy maintenance of the species.

3. Factors to be Considered in Management Programs

In addition to the duties of consideration and cooperation articulated in Articles 117 and 118, Article 119 provides specific factors which must be considered when developing conservation measures for living resources in the high seas. Paragraph 1(a) of that Article states that management of harvested species should take into account relevant economic factors, including the special requirements of developing states. This is consistent with the overall approach of LOS, which reflects a balancing of conservation requirements with economic needs, particularly those of developing states. Although the IDCA was enacted to protect dolphins and was not designed with the intent to manage any "harvested species," factors relating to other countries' economic needs are still relevant in dolphin management decisions. Such factors may not be ignored by the United States.

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146. *See supra* Part I(1).

Article 119 paragraph 1(b) provides a norm that is particularly relevant to the dolphin by-catch problem. Under this provision, states are required to maintain or restore species "associated with" the harvested species to populations "above levels at which their reproduction may become seriously threatened."[147] The IDCA's requirement that dolphin mortality be reduced to zero in 1994 goes beyond this norm unless any dolphin mortality level above zero would "seriously threaten" reproductive rates. Over the past 5 years, with a mortality figure averaging around 100,000 per year,[148] indicators of dolphin stock size have shown no statistically significant trend in populations.[149] The La Jolla Agreement sets an initial mortality limit of 19,500 in 1993, and in subsequent years, quotas would be gradually reduced from that figure.[150] There is no scientific indication that these quotas would seriously threaten dolphin reproductive rates. Therefore, international law does not support the particular goal that the IDCA mandates.

4. Special Considerations Regarding Marine Mammals

Articles 65 and 120[151] of the LOS give special recognition to the desire of some nations to manage marine mammals. However, this does not mean that one nation may unilaterally demand a stricter standard of

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147. LOS, *supra* note 133, art. 119(1)(b), at 1291.

148. NRC REPORT, *supra* note 1, at 176 (author's estimate derived from Table 6.1).

149. *Id.* at 118.

150. *See* La Jolla Agreement, *supra* note 4, at 938. The IATTC has already revised these quotas downward. Noting the significant progress toward reaching the Dolphin Mortality Limits prescribed in the La Jolla Agreement, the IATTC adopted a Resolution on October 27, 1993, to set the 1994 quota at 9300, and will continue to review the original schedule "with the objective of determining whether reductions in that schedule can be achieved." *Id.* at 936.

151. Article 65 provides:

> Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall co-operate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.

LOS, *supra* note 133, art. 65, at 1282. Article 120 provides, "Article 65 also applies to the conservation and management of marine mammals in the high seas." LOS, *supra* note 133, art. 120, at 1291.

regulation. In the LOS, the entire High Seas section,[152] as well as the articles concerning straddling stocks,[153] highly migratory species[154] and marine mammals[155] all point to nations' duties to cooperate in establishing management plans, and, where appropriate, to establish and work through regional fisheries organizations to this end. Thus, under Article 120, it would be permissible to require zero incidental dolphin mortality in the eastern Pacific tuna fishery. For such a requirement to be consistent with the LOS, however, it must have been agreed upon through good faith negotiation and agreement within a regional or international organization.

Both the IDCA and the Breaux bill had "zero mortality" as an ultimate goal. In pursuing this goal, the IDCA fails to conform to principles of international law; it unilaterally imposes a dolphin management scheme. In contrast, the Breaux bill's approach would have relied on the IATTC's multilaterally agreed-upon plan for achievement of the goal, therefore conforming to international law principles.

C. UNCED Principles

The IDCA may also fall short of emerging principles of international environmental law beyond the LOS. At the United Nations Conference on Environment and Development in Rio de Janeiro, Brazil in June, 1992 (UNCED), two documents were adopted. The *Agreement on Environment and Development*[156] is a charter of environmental principles which had been negotiated in pre-summit conferences. *Agenda 21*[157] is a detailed blueprint for the next century, laying out internationally accepted guidelines for dealing with global environmental problems. It had been jointly created by representatives from over 100 nations.

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152. LOS, *supra* note 133, pt. VII, at 1286-1291.

153. LOS, *supra* note 133, art. 63, at 1282.

154. LOS, *supra* note 133, art. 64, at 1282.

155. LOS, *supra* note 133, arts. 65, 120, at 1282, 1291.

156. UNCED Doc. A/Conf.151/5/Rev.1 (1992), *reprinted in* 31 I.L.M. 874, 876 (1992) [hereinafter UNCED DOC.].

157. U.N. Conference on Environment and Development, U.N. Dept. of Public Information, *Protection of the Oceans, All Kinds of Seas, Including Enclosed and Semi-Enclosed Seas, and Coastal Areas and the Protection, Rational Use and Development of Their Living Resources* (ch. 17, advance copy 1993) (available from U.N. Department of Public Information, 160 Route de Fiorissant, P.O. Box 80 CH-1231, Conches, Switzerland) [hereinafter *Agenda 21*].

Principle 12 of the *Declaration of Principles* states: "[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing ... global environment[al] concerns should, as far as possible, be based on an international consensus."[158] The IDCA is inconsistent with this principle. Despite its language calling for bilateral and multilateral treaties, the IDCA's imposition of sanctions on those nations that do not agree to unilaterally determined terms is, in effect, a unilateral action. The Breaux bill, in contrast, proposed action based on international, or at least multinational, consensus, and hence was consistent with Principle 12.

Agenda 21's chapter 17 deals with protection, rational use and development of living resources of the oceans. This chapter, like the LOS, calls for nations to commit themselves to the conservation and sustainable use of living resources of the high seas,[159] and to take "effective action, including bilateral and multilateral cooperation ... to ensure that high seas fisheries are managed in accordance with the provisions of the [LOS]."[160]

Section 17.47 of Chapter 17 specifically refers to the conservation of marine mammals.[161] Like the LOS Articles 65 and 120, this section provides that nothing in the chapter restricts the rights of nations to "prohibit, limit or regulate the exploitation of marine mammals" more strictly than other ocean resources.[162] However, the section continues, "States shall *cooperate* with a view to the conservation of marine mammals, and in the case of cetaceans, shall in particular work through the appropriate international organizations."[163] Section 17.62 recognizes the work of the IATTC in this regard.[164]

Thus, the principles set forth in the LOS were re-endorsed as international policy objectives in *Agenda 21*. Again, because it would have served to implement and strengthen a multinational agreement, the Breaux bill was consistent with these objectives. In contrast, the IDCA ignores the duty to cooperate.

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158. UNCED DOC., *supra* note 156, at 878.
159. *Agenda 21*, *supra* note 157, at 18.
160. *Id.* § 17.49, at 18-19. *See also id.* §§ 17.58 and 17.60, at 20.
161. *Id.* at 18.
162. *Id.*
163. *Id.* *See also id.* § 17.63, at 21.
164. *Id.* at 20-21.

D. The International Legal Order

In amending the MMPA with the International Dolphin Conservation Act of 1992, Congress exercised its duty to define policy and legislate in the interests of the United States. Clearly, it is in the United States' interest, from the standpoints of ethics, economics, and science, to solve the problem of wasteful dolphin mortality in the eastern Pacific tuna fishery. However, dolphin conservation is not the only interest to be considered in adopting legislation that has implications beyond U.S. borders. The United States has a broader interest in a stable, predictable international legal order.

Over the centuries, sovereign states have come to acknowledge the value of a principle recognizing legal equality among states in the international community.[165] As much as possible, decisions with international implications are made by states negotiating and consenting as political equals. Though sometimes more an aspiration than a reality, this principle serves to provide stability in international affairs, particularly in economic relations.

Unfortunately, by adopting the moratorium-embargo approach rather than promoting implementation of IATTC's La Jolla Agreement, the United States has chosen to follow a "might makes right" approach to solving an international problem, ignoring the interests of other sovereign states. Apart from its failure to acknowledge the demands of international law, this approach may not even work. Over the last five years, some of the Latin American nations have begun to develop alternative markets for their tuna.[166] These nations may decide they can do without the U.S. market. On the other hand, they may bow to the economic pressure of the U.S. approach. In the long run, however, the unilateral sanctions approach is likely to be counterproductive in the broader scope of international relations.

The embargoes against Mexico and Venezuela, required under the MMPA because those states did not prove the existence of a "comparable" dolphin protection scheme, stirred international resentment. Not only were the embargoes found to be in contravention of the General Agreement on Trade and Tariffs (GATT), of which the United States is

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165. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 123 (1988) (citing Lachs, *The Development and General Trends of International Law in our Time*, 169 HAGUE RECUEIL 9, 77-84 (1980)).

166. Joseph, *supra* note 7, at 15.

a signatory,[167] but they have also further inflamed the sentiment of Mexico and of developing countries in Central and South America. These countries are now claiming that the United States is engaged in economic protectionism masked by "ecological arguments."[168] The embargo provisions of the MMPA, including the strict provisions of the IDCA, have increased friction over trade, and complicated NAFTA negotiations.

These complications and frictions could have been avoided had Congress adopted the Breaux bill, promoting the implementation of the La Jolla Agreement. That approach was supported not just by Mexico and Venezuela, but by all the major countries involved in the fishery. Indeed, in June 1993 six supporters of the IATTC issued a joint declaration exhorting the United States to recognize the successful achievement of an international agreement for the conservation of dolphins, and to lift the tuna embargoes imposed under the MMPA.[169]

Generally concerned about unilateral actions used to force the adoption of certain policies, the European Community (EC) has expressed its disapproval of the U.S. embargo approach to the dolphin by-catch problem in the Pacific tuna fisheries. Joining other entities in calling for the GATT council to rule on the actions of the United States, spokespersons for the EC noted, "Not only are the U.S. measures unilateral and extraterritorial in nature; they also actually require third countries to act in breach of their GATT obligations."[170]

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167. Mexico had requested that the Council of the GATT convene a Dispute Settlement Panel, contending that the MMPA embargo provisions violated GATT provisions. The Panel held in favor of Mexico. *See* Eric Christiansen & Samantha Gaffin, *GATT Sets its Net on Environmental Regulation: The GATT Panel Ruling on Mexican Yellowfin Tuna Imports and the Need for Reform of the International Trading System*, 23 U. MIAMI INTER-AM L. REV. 569, 575 (1992).

168. *Point of Agreement on the Tuna Embargo of the Permanent Commission of the Mexican Congress*, COMISION DE PESCA, 2,6 (Sept. 14, 1992) (on file with *Ocean and Coastal Law Journal*).

169. Colombia, Costa Rica, Mexico, Panama, Vanuatu and Venezuela adopted the declaration during an intergovernmental meeting on June 9, 1993. IATTC, QUARTERLY REPORT: Apr.-June 1993, 14 (1993).

170. Statement released by 1992 Commission of the European Communities, Community Request for a GATT panel on the U.S. Unilateral Tuna Embargo, RAPID, June 19, 1992 available in LEXIS, Eurcom Library, RAPID File. In May 1994, a GATT dispute resolution panel ruled that the U.S. tuna embargoes were inconsistent with U.S. GATT obligations. General Agreement on Tariffs and Trade: Panel Report - United States Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994). The United States is

The EC stressed that it was the unilateral nature of the position of the United States, and not the U.S. concern for incidental dolphin mortality, that gave rise to its criticism. Indeed, the EC supports international efforts to provide protection to cetaceans and to establish responsible fishing practices. The EC specifically expressed full support for current efforts by the IATTC to protect dolphins.[171] Hence, the passage of the Breaux bill would have satisfied the concerns of the EC, and may have helped to alleviate U.S.-EC economic tensions.

The United States has a broad range of interests in international affairs from trade, to humanitarian concerns, to environmental protection. It cannot afford to be seen as the "bully on the block," more interested in promoting its own agenda than in building multinational support for its concerns. Moreover, it must be remembered that concerns about the dolphin by-catch problem are the result of years of internal political battles over environmental policies. The world community cannot be expected to come to share the same perspective without a similar opportunity for dialogue. To be a credible player in negotiation and consensus-building over these issues, the United States must patiently cooperate with other interested nations and avoid unilateral actions that have no support in the world community.

V. CONCLUSION

In enacting the International Dolphin Conservation Act rather than the Breaux bill, Congress has missed two opportunities. First, the chance to provide real protection for dolphins in the eastern Pacific Ocean may have been lost. Some nations may agree at first to observe the moratorium, simply to preserve access to the U.S. market. However, if alternative markets open up, those nations may abandon the moratorium because they have no stake in its continued observance. In contrast, the nations that worked to hammer out the compromise represented by IATTC's La Jolla Agreement do have a stake in its success as it is their agreement. That agreement may fall apart if, despite concessions made by other nations in negotiations leading up to

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seeking reconsideration of the panel's decision by the GATT Council. *EU, Japan, Call on U.S. to Implement Ruling Against U.S. Tuna Embargo* Int'l Trade Rptr. (BNA), 1179, July 27, 1994 available in LEXIS, News Library, CURNWS File.

171. *EU, Japan, Call on U.S. to Implement Ruling Against U.S. Tuna Embargo, supra* note 170.

the agreement, the United States closes its markets to their fish products. Avoidance of the moratorium due to the availability of alternative markets, coupled with the collapse of the La Jolla Agreement would be a step backward in dolphin protection.

Even more important, though, is the second opportunity missed—that of promoting a stable international world order by setting an example of international cooperation in dealing with a complex conservation issue. Customary international law, the LOS and *Agenda 21* all call for the cooperation of interested nations in conserving global resources. This ideal has become increasingly difficult to achieve as the pressure on these resources mount. The United States cannot afford to set a precedent of economic coercion as the basis for problem solving, especially where there is no emergency and a solution based on negotiation and cooperation is so close at hand.