Dolphins or Free Trade?

by Michael Berg and Susan Wainwright

As global trends push the United States further into a position of maintaining increased international trade practices, developments of international versus domestic trade policy discrepancies will begin to multiply. One of the first such conflicts occurred between the Earth Island Institute v. Mosbacher decision[1] and Mexico's 1991 GATT lawsuit against the United States. These two cases present opposing conclusions regarding the conservation of wildlife in this case dolphins and the pursuit of an efficient and rewarding international trade program. The most pertinent question surrounding these cases is whether it is possible to harmonize trade practices, while managing to protect environmental sovereignty.

INTRODUCTION TO GATT

Soon after the conclusion of World War II, a conventional law was established to regulate international trade. The General Agreement on Tariffs and Trade (GATT) currently consists of 103 nations from around the world: Australia, Canada, the European Communities, Mexico, Japan, the Philippines and the United States to name a few.[2] This assembly of nations agreed to follow a predetermined set of regulations which set out to protect and maintain fair levels of international trade. Members of GATT hope to prosper through this treaty by stabilizing international trade, thus contributing to economic growth and development of the world's nations. This powerful agreement currently regulates 90 percent of world trade, and continues to make economic reform in the abiding nations.[3] GATT has been structured so that there are international conventions, called rounds, in which the member nations discuss any relevant trade issues. Currently, in the Uruguay Rounds, GATT is just starting to negotiate with trace amounts of consideration for the environment. Since GATT's signing in 1947, it has been an integral part of the United Nations family of organizations, and has helped solve many international trade disputes.

Members of GATT hope to prosper through this treaty by stabilizing international trade.

On November 5, 1990, Mexico raised several questions concerning the restrictions placed upon the importation of Yellowfin Tuna into the United States. After consulting with the United States and being unsatisfied with the results, on January 25, 1991, Mexico requested that there be a panel formed under Article XXIII:2 of the GATT agreement. This panel was organized to determine whether any injustice had occurred through the United States' ban on the tuna imports.

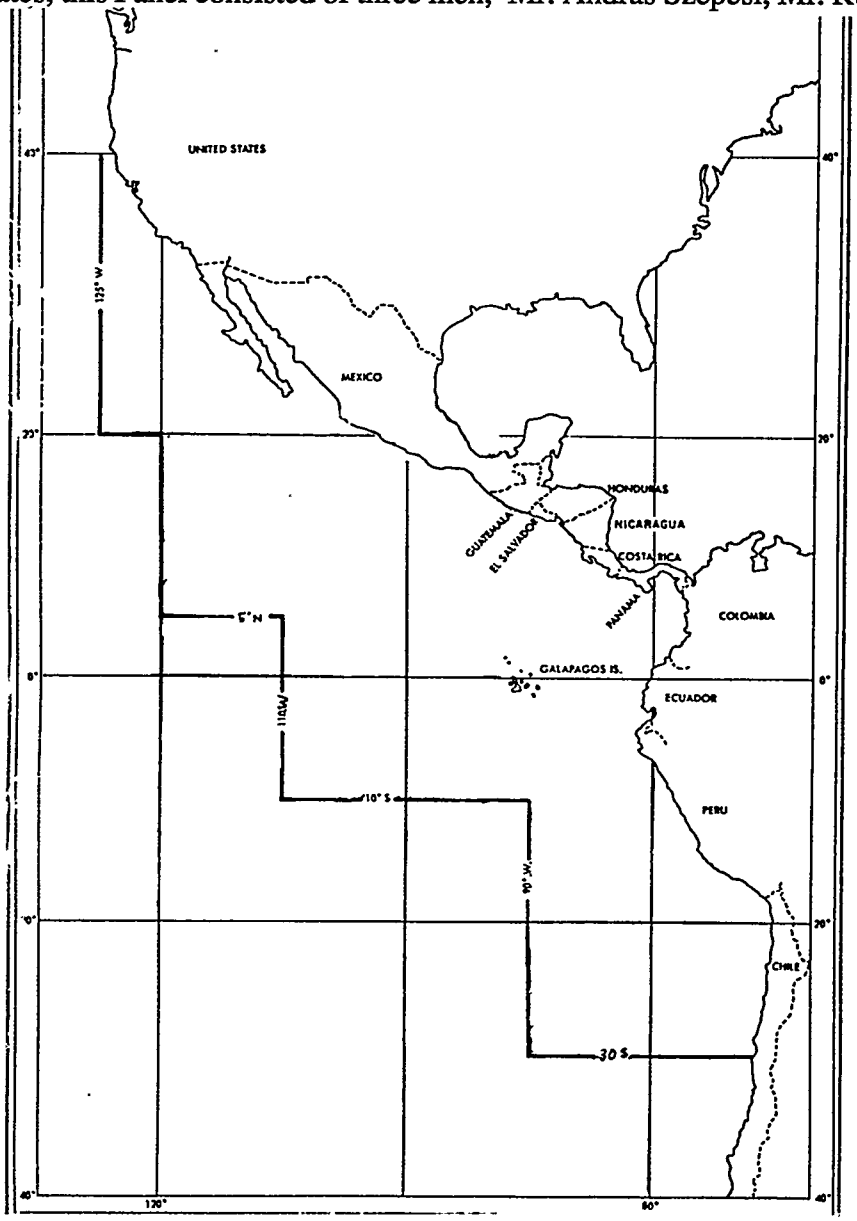
In order to understand how this dispute arose, it is important to understand many aspects of the dilemma leading up to this case. Historically, when economics have been a key issue in trade policy, mankind has always strived to maximize profits and limit costs. About thirty years ago the development of the "purse-seine" net enabled fisheries to increase their maximum draw of tuna from around the world. This technique of harvesting tuna consists of first sending a motorboat vessel to locate a school of fish, and next, while holding one end of this net, another vessel is detached to encircle the school of fish. Once both ends of the net are again attached to the original fishing vessel, it draws in the bottom edge of the net, weighted down by brass rings through which purse lines pass, at the same time as the top, which is supported by floats, in order to gather all of the net's contents.[4]

An examination of the relationship between tuna and dolphins demonstrates that in many sections of the world these two species are found together. This fact often leads to the "incidental" taking of dolphins during fishing expeditions. In the Eastern Tropical Pacific

Ocean (ETP), the five to seven million square miles of the Pacific Ocean that stretches from Southern California to Chile and extends westward for about three thousand miles,[5] a particular fishing technique using dolphins to trap tuna has developed. Fishing vessels locate dolphins, and then intentionally encircle them with the purse-seine nets in order to catch the large amounts of tuna underneath. Once the net has been deployed, dolphins often become entangled within the mesh, eventually suffocating. However, it is possible to limit the number of dolphins killed through the use of certain time consuming methods. The Nations fishing for Yellowfin tuna in the ETP include, but are not limited to Ecuador, Mexico, Panama, the United States, Vanuatu and Venezuela.

Interwoven into the proceedings of the conflict between United States policy and international law were questions regarding several sections of the Marine Mammal Protection Act (MMPA),[6] as well as numerous articles of GATT. The structure of the GATT hearing is fairly similar to that of most court sessions, with one main difference. In GATT trials, a panel representing non biased parties acts in replace of a Judge. In Mexico's 1991 suit against the United States, this Panel consisted of three men; Mr. Andras Szepesi, Mr. Rudolf Ramsauer

In the Eastern Tropical Pacific Ocean, a particular fishing technique using dolphins to trap tuna has developed: purse seining.



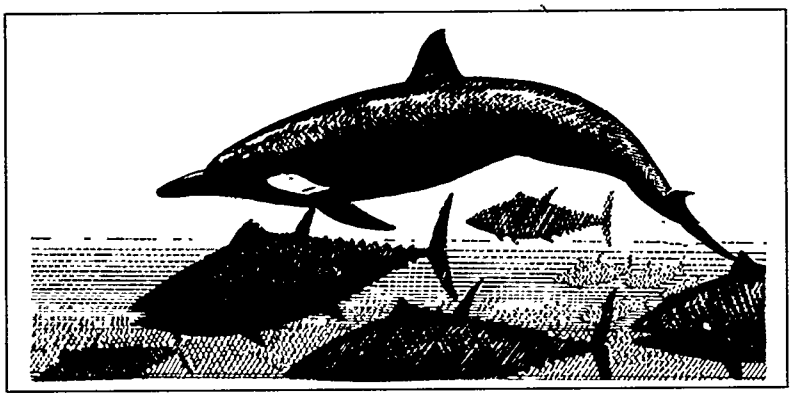
The Eastern Tropical Pacific Ocean

and Mr. Elbio Rosselli. These three men were responsible for determining, with respect to GATT, whether the United States had committed a breach of contract. In order to clarify the grievances of each Nation, a closer look at the MMPA is necessary. After reviewing this statute and describing the Mosbacher case, we will then proceed to take a closer look at the GATT incident.

Fishing vessels locate dolphins, and intentionally encircle them with purse-seine nets.

AN INTRODUCTION TO THE MMPA

In the late 1960's it was estimated that as many as 400,000 porpoises world-wide were killed each year as a result of drowning in the previously described purse-seine nets used by the tuna fishing industry.[7] Responding to the public outcry concerning the porpoise problem, as well as other instances such as the universal decline of numerous whale species and the clubbing deaths of Alaskan Pribiloff and Canadian harp seals,[8] Congress enacted the Marine Mammal Protection Act (MMPA) in 1972. The purpose of this act is to prohibit any person in U.S. waters from "killing, harassing, or importing marine mammals," unless it fulfills the protective measures intended by the act.[9]



With the advent of the MMPA, Congress took definite steps to, among other things, curb the mass killing of dolphins species living in the Eastern Tropical Pacific. The United States' own tuna fleet was given two years under the act to make advances in their fishing techniques that would reduce the number of dolphins killed to "insignificant levels approaching zero."[10] However, it soon became obvious that this goal was an unrealistic one and the practice was begun of issuing the U.S. fleet a permit to take a certain number of dolphins during it's operations each year.[11] By 1980, the limit on the number of dolphins that could be taken during one year statutorily was 20,500. The next year's amendment to the MMPA codified this limit into the act and established that Congress' goal of zero mortality of marine mammals during purse seining operations would have to be satisfied by the "use of the best marine mammal safety techniques and equipment that are technologically practicable."[12]

The issue of the contribution of foreign fishing fleets to the large-scale killing of marine mammals was also addressed by Congress in the MMPA. Originally the act directed authoritative agencies to ban the importation of fish or fish products caught by way of "technology resulting in the incidental kill or incidental serious injury of ocean mammals in excess of U.S. standards."[13] However, in 1984 Congress amended the Act to strengthen the requirements put upon tuna importation, since it felt that the regulations made by the National Marine Fisheries Service (NMFS) to enforce the MMPA were not "holding foreign vessels to United States dolphin protection standards."[14] The amendment indicated that the U.S. was only to allow the importation of yellowfin harvested by purse seining if the government of the foreign nation 1) had in place a regulatory program for protecting dolphins "comparable" to that of the U.S.; and 2) has an average incidental marine mammal takings rate "comparable" to that of the U.S. fleet.[15]

In 1988, Congress again amended the MMPA because it found that the regulations created by the NMFS to carry out the 1984 amendments were lax.[16] The 1988 additions were

to three segments of the statute. The first is to section 1371(a)(2)(B)(ii), where parts I-V outline a specific program regulating incidental dolphin takings that a country must incorporate in order to have their tuna catch imported by the United States. Second, Congress requires "the government of any intermediary nation from which yellowfin tuna or tuna products will be exported to the United States" to provide proof that it has also banned tuna coming from a nation that the U.S. has banned within sixty days of the original banning by the U.S.[17] This provision ensures that a nation cannot circumvent an embargo by selling yellowfin tuna to the U.S. through an intermediary nation. Finally, the Secretary of Commerce must certify to the President that a tuna import ban has been implemented against a nation six months after the fact.[18] The possibility for a further embargo of all fish and fish products from that nation then exists.[19]

With this knowledge of the MMPA and the amendments of 1981, 1984, and 1988, it is possible to examine the controversy between conservation groups and government regulatory agencies, as well as the international controversy that Earth Island Institute v. Mosbacher has stirred.

EARTH ISLAND V. MOSBACHER:
Exporting American Values?

This case concerns a difference of opinions about how much leeway government agencies have in interpreting the MMPA. Specifically, the issue to be decided is whether or not regulations made by the National Marine Fisheries Service, which allowed reconsideration of a tuna import ban on Mexico to be based on only six months of data about eastern spinner dolphins killed during purse seining activities for yellowfin tuna, were in keeping with the MMPA.

The appellants in the Mosbacher represented three government agencies, the Department of Commerce, National Marine Fisheries Service (NMFS), and National Oceanic and Atmospheric Administration (NOAA), all of which are mandated by Congress to enforce the MMPA through regulatory actions. The Secretary of the Department of Commerce (Mosbacher) is responsible for "enforcing all aspects of the MMPA" and thus is accountable for the actions of both the NMFS and the NOAA.[20]

Appellants argued that their right to interpret and administer the Act was being unjustly challenged. The agencies insisted that Congress has given them the right to interpret the MMPA in the manner under scrutiny because it had delegated them the task of implementing the Act. Further, they pointed "to the deference the courts owe to the agencies in matters of statutory interpretation" to support their case.[21]

The interests of Earth Island Institute, the Marine Mammal Protection Fund, and David Brower (all plaintiffs, who are collectively known as Earth Island Institute) are, in this case, to protect the eastern spinner dolphin (*Stenella longirostris*) from harm as an incident of purse seining. Both Earth Island Institute and The Marine Mammal Protection Fund are non-profit corporations which are committed to ensuring survival of marine mammal species.[22] Therefore, these groups have a vested interest in making sure that government agencies are interpreting the MMPA so that its concern with the conservation of marine mammals is upheld. The provision within the MMPA that is central to this dispute is found in the 1988 amendments described above. §1371(a)(2)(B)(ii)(III) states "the total number of eastern spinner dolphins .... incidentally taken by vessels of the harvesting nation during the 1989 and subsequent fishing seasons does not exceed 15 percent of the total number of all marine mammals incidentally taken by such vessels *in such year*." (emphasis added) The key word at the heart of this dispute

is "year." To fully understand this case at the appellate court level it is necessary to distinguish it from earlier proceedings in the lower court by tracing the dispute from the time it entered the district court under a slightly different context.

In 1990 when Earth Island Institute brought suit in the U.S. District Court, Northern District California, against these three government agencies, the nature of the controversy was nearly the same. In this district court dispute, the plaintiffs sought a preliminary injunction to ban the importation of yellowfin tuna from the tuna fleets of foreign nations based on the government's non-compliance with sections 1371(a)(2)(B)(ii)(II) and 1371(a)(2)(B)(ii)(III). The district court agreed with plaintiffs' motion over section 1371(a)(2)(B)(ii)(II), another 1988 amendment which requires that the NMFS use information from the 1989 season to determine whether a foreign nation had exceeded the set taking limit of 2.0 times the number of marine mammals taken by the U.S. during the same time period in 1989. This question must be satisfied before tuna imports from that country could be accepted. The court held that the NMFS misinterpreted the provision, assuming an implication that a ban would be initiated based on data from the entire year of 1989, not just on data from "the same time period" as that collected by the U.S. In fact, the NMFS had failed to even collect and analyze the data on marine mammal takings in 1989 from other nations by the time Earth Island Institute filed suit in July of 1990. On this count the court granted a preliminary injunction to restrain the agencies "from certifying any foreign nation or extending the certification of any foreign nation" to import yellowfin tuna from the Eastern Tropical Pacific "unless and until" the Secretary of Commerce finds that the nation hasn't violated section 1371(a)(2)(B)(ii)(II) of the Act.[23]

Section 1371(a)(2)(B)(ii)(III) (quoted above), on the other hand, requires that a decision to ban a nation's tuna because the country was found to have taken numbers of the eastern spinner dolphin that exceeded the U.S. limit of fifteen percent of all marine mammals taken, must be grounded on a year's worth of data. The deadline for the collection of this information is July 31 of the following year; therefore, since the trial occurred in August 1990, the court stated that "the defendant should make a prompt decision" as to whether all foreign nations met the criteria in 1989,[24] but mandated no further action.

On September 6, 1990 the government did impose an embargo on tuna importation from foreign nations as a result of the district court's decision, but the next day lifted the ban on Mexico. The decision to lift the ban was not based on a finding that Mexico was in compliance with section 1371(a)(2)(B)(ii)(II), as the district court stipulated it must be, but rather on the agency's own "reconsideration" regulation. NMFS stated that even though it had found that Mexico had both taken more that 2.0 times the marine mammals as the U.S. fleet in any comparable period in 1989, as well as violated the eastern spinner dolphin quota for the entire year of 1989, the country would not be banned for the rest of 1990 because it was within the limits set for eastern spinner dolphins for the first six months of 1990.[25]

Earth Island Institute saw this as a violation of the MMPA, charging that "under the plain language of the statute, the comparability [to industry-wide mammal takings] finding for the eastern spinner dolphin must be based on an entire year of data" and applied for a temporary restraining order from the district court.[26] The court granted the order in October of 1990, and required the embargo on Mexico to remain in effect until an entire year's worth of data on Mexico's taking of this dolphin species could be analyzed. This is the action that led to the appeal by the collective government agencies to Ninth Circuit Court of Appeals on the grounds that their actions were a legitimate interpretation of the MMPA and that the instatement of a temporary restraining order was unfounded.

The appellate court decided in favor of The Earth Island Institute, stating "Because the government's position is at odds with both the language and the purpose of MMPA, and the agency's intended role under it, we affirm the district court's order of October 4."[27]

The government's first argument was that the NMFS's reconsideration provision is within the "discretion delegated by Congress to the agency" and that the courts must defer to agencies "in matters of statutory interpretation."[28] This is an invalid argument in the eyes of the court, which rationalized that, while agencies' schemes for statutory implementation should be given considerable weight, they do not have the power to "issue regulations which conflict with statutory language and congressional purpose."[29] The agencies did not present any textual support from the Act to back their point, however they did contend that there was an absence of text forbidding it. Again the court disagreed, insisting that the specific language of section 1371(a)(2)(B)(ii)(III), requiring that a ban resulting from the incidence of eastern spinner dolphin mortalities must be based on a year's data, clearly directed the NMFS actions.

There have been other court decisions over the jurisdiction of the government regarding the interpretation of the MMPA which shed light on the Mosbacher decision. For example, in the 1984 case of Balelo v. Baldrige[30], a group of tuna fishing vessel owners brought suit against the same agencies implicated in Earth Island Institute v. Mosbacher (The Secretary of Commerce, NOAA, and NMFS). The vessel owners asserted that the Secretary did not have the authority to implement regulations creating a "statutory observer program" requiring the periodic placement of observers on U.S. vessels using purse seining methods. In this case the Ninth Circuit Court of Appeals stated that the regulation was valid and that Baldrige was utilizing "the broad rule-making authority expressly delegated to the Secretary" to correctly enforce the Act. This decision seems to contradict the Earth Island Institute v. Mosbacher findings in which the court disagreed with the agencies' interpretation of the Act. The court's fickleness appears to indicate that the intentions of Congress in the MMPA are closely examined in order to determine if the agencies broad interpretation is in keeping with the Act.

The government imposed an embargo on tuna importation from foreign nations but lifted the ban the next day.

Besides the government's proclamation in Earth Island Institute v. Mosbacher about its interpretive authorities, it also suggests that even if the language of the Act did not imply that the six month reconsideration period was valid, this provision should become policy since it "offers incentive to foreign countries to speed up their efforts to meet the statutory standards."[31] The court quickly denied that such a benefit would be derived from this policy, rationalizing that this case is an example of how regulations to this effect could be abused. Mexico surpassed the takings limit of the MMPA for the entire year of 1989, however, under the NMFS's policy, the nation was able to withhold these negative findings until data from the first six months of 1990 showed that the nation was presently under the limit for that year. In this way, Mexico was able to circumvent the embargo. Thus the reconsideration regulation creates what the judges call "a potential for abuse," and the court rejects the government's argument.

The Ninth Circuit further rationalized its holding by citing the NMFS's history of "non-enforcement of congressional directives" pertaining to the standards placed on importation of tuna from foreign fleets. The case enumerated specific criticisms directed toward the agency by members of Congress about it's interpretation of the MMPA. This evidence led the court to state "There is no basis in the history of the enforcement of the Act for us to conclude that the agency's policies are aimed at more stringent enforcement of Congressional policy."

The court's assertion can easily be verified by looking at the holdings of the United States District Court against the three government agencies (as discussed above). The lower Court's rationalization in its August 28, 1990 decision included statements such as "Again, the defendant ignores the plain language of the statute" and the "policy is in clear contravention of a Congressional statute."[32] Furthermore, in the recent case of Earth Island Institute v. Mosbacher[33] from February 3, 1992, the court held that the defendants were not "in compliance with the mandates of the MMPA" because they did not investigate foreign nations for the purpose imposing secondary embargoes on these nations if they were found to be importing

tuna from nations under primary embargoes, to the U.S. Again the Court's finding were that "the terms of the MMPA do not lend themselves to such simple circumvention," implying that the defendants are still not enforcing the statute. In review, the controversy thus far introduced was handled by a U.S. court of law, while the holding of the court implicated all parties concerned.

The appellate court decided in favor of The Earth Island Institute.

MEXICO BALKS: THE GATT DECISION

When reviewing this dispute on an international level, it is important to remember that the final decision of the GATT Panel is also considered binding to all GATT members. In the 1991 Mexico - United States case, there were several main points of disagreement. Mexico believed that many sections of the Marine Mammal Protection Act, as described in the previous section of this paper, were either inconsistent or in direct violation with the General Agreement on Tariffs and Trade. Both the MMPA and GATT strongly affect all parties involved, and unfortunately, in this situation they soundly conflict. Mexico stated that when a situation of contesting laws occurs, GATT, being an international agreement, must override or "trump" the Marine Mammal Protection Act. Mexico further stated that the Marine Mammal Protection Act creates prejudicial trade policies, and thus is completely inconsistent with Articles XI and XIII of GATT.

Considering that the main focus of GATT is the liberalization of international trade, it would be expected that written into GATT's agreement are Articles prohibiting individual nations from placing unfair barriers on other nations' exports. Article XI plainly states that no prohibitions or restrictions other than monetary charges, such as taxes or duties, shall be instituted by one contracting member of GATT, upon another, regarding the importation of any product. This article further entails a brief list of exceptions to the previously stated regulation. Article XIII was created so that all contracting parties were treated with equal constraints if a regulation were ever to be imposed upon a member nation. This article basically asserts that if any particular good is banned by a member nation, that nation must also ban all similar goods from all third countries. Mexico believed that these two Articles were inconsistent with the MMPA, causing the United States' ban on their Yellowfin Tuna to be in violation of the treaty.

Contrary to Mexico's reasoning, the United States requested the Panel to focus their attention primarily upon Article III. The United States believed that the restriction of Yellowfin Tuna under the Marine Mammal Protection Act was consistent with the General Agreement under Article III:4 which states: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to the like products of national origin in respect of all laws, regulations and requirements..."

Under MMPA Section 101(a)(2)(B), there is a specific clause condemning the harvesting of Yellowfin Tuna with purse-seine fishing nets in the ETP, unless the government had provided the necessary documents. The United States argued that Mexico had not provided this necessary documentation, and therefore under this section, the U.S. could not legally import their tuna.

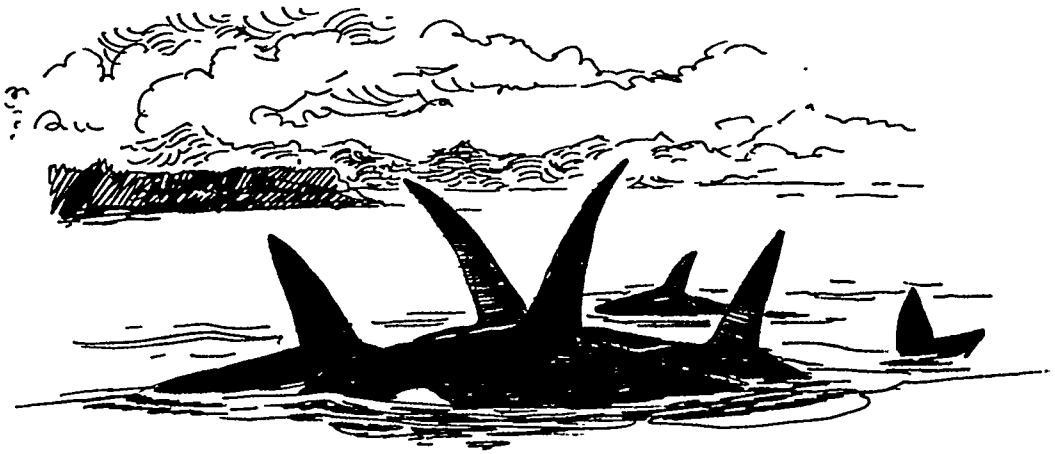
The United States further argued that even if the Marine Mammal Protection Act violated GATT's Article III, as Mexico believed, the Yellowfin Tuna restrictions were legitimate under GATT's general exceptions explained in Article XX(b) and XX(g). Article XX states: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries ... nothing in this agreement shall be constructed to prevent the adoption or enforcement by any

contracting party of measures: (b) necessary to protect human, animal or plant life; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restriction on domestic production or consumption." The two subsets of Article XX were placed into the language of GATT for the purpose of protecting the natural environment. The United States argued that the taking of dolphins is in direct conflict with this Article.

The final conclusion of the panel will have a significant effect on both the United States as well as Mexico. If Mexico were to win, it provides a base where fewer restrictions may be placed upon imported goods. In general, the market may open up to greater trading, producing a larger realm of economic mobility. However, there may be a corresponding loss of individual nations' ability to control import standards. If the United States were to win, it would be a great gain for environmentalists. Individual nations would be able to create environmental restrictions according to their own standards. This may lessen possible future environmental damage, though it would greatly dampen GATT's authority to create an equal trading status between member nations.

The most prominent problem in this case is the lack of similarity of goals between the General Agreement on Tariffs and Trade and the Marine Mammal Protection Act. The ideology behind both of these laws stems from extremely different rationales. Reflecting upon the Mosbacher case, the intent of the MMPA is to maintain an "optimum sustainable population" of marine mammals.[34] The MMPA places a ban on the "taking", possession, sale or interstate/international transportation of any marine mammal. The taking clause is similar to that of the Endangered Species Act. The MMPA also attempts to persuade other countries to limit the killing of marine mammals through the ban of their imports. The GATT agreement is a strictly economic piece of legislation. It is designed to help nations enter an equally advantageous trading center aimed toward the reduction of tariffs and other trade barriers, as well as the elimination of any noted discriminatory trade practices.

The GATT Panel decided that they would first examine each of the issues presented with respect to the General Agreement which Mexico claims the U.S. violated. Then, if there were to be an inconsistency with Mexico's provisions, the Panel would view the arguments in light of the General Agreement presented by the United States. The Panel broke down the case by examining each Article one at a time.



The Panel first discussed GATT's Article III. They needed to determine whether the United States' Yellowfin Tuna trade restriction, brought forth by the MMPA, could be applied to Article III. Within Article III, paragraph four, there are statements which suggest that this section applies "solely to laws, regulations and requirements affecting the international sale... of products." A past Panel decreed that this segment calls for an equally advantageous situation for imports to compete with domestic products.[35] Article III was basically created to regulate the sale of a product, in this case tuna. The regulations of the Marine Mammal Protection Act concerning dolphins could not possibly affect tuna as a product. The Panel also found that when the United States places yearly ceilings on the amount of tolerated dolphin kills in the ETP, they are establishing unfair trade barriers which are in conflict with Article III.

The Panel then chose to investigate Article XI and XIII. As stated earlier, Article XI basically prohibits any trade restrictions applied upon any other member nation. The Panel found that the actions called for by the MMPA are completely inconsistent with Article XI. The United States presented no countering opinion to the Panel's. Article XIII was not discussed further. Because of the previous decision that the United States had acted contrary to Article III, this caused no question to whether the actions were also inconsistent with Article XIII.

The Panel then examined the United States' arguments that the Marine Mammal Protection Act is justified in restricting the tuna imports under Article XX(b) or XX(g) of GATT. The Panel recalled then a previous interpretation of this article in "Canada - Administration of the Foreign Investment Renew Act", adopted February 7, 1984, where it was established that Article XX is a limited and conditional exception to the rules and regulations of GATT. This Article apparently had never been proposed to establish an obligative rule itself. This requires Article XX to be interpreted lightly. The burden of proof must lie upon the nation evoking Article XX to justify its requirement.

The actions called for by the MMPA are completely inconsistent with Article XI of GATT.

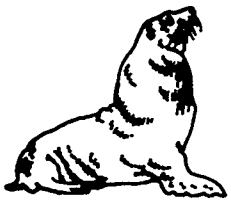
The United States believed that the restrictions of Yellowfin Tuna were justified under Article XX(b), for there was no other reasonable alternative to save and protect the life and health of the dolphins. Mexico argued that this stipulation does not apply in this case due to the fact that Article XX(b) is not applicable to animals outside the jurisdiction of the contracting party. In order to formulate their final opinion, the Panel referred to the drafting history of Article XX(b). They concluded that Article XX(b) focused primarily upon animals and plants within the jurisdiction of the importing country. The Panel also considered the ramifications if they ruled in favor of the United States. This occurrence would create a condition where each contracting parties could unilaterally determine the protection policies from which other contracting parties could not deviate with out breaking the general rules of GATT. Considering the prior facts, the Panel found that the prohibition imposed by the United States was not justified under the exception in Article XX(b).

Article XX(g) asserts that when restrictions are to be applied in domestic production or consumption, measures ensuring the conservation of exhaustible resources, including life, must be taken into account. The United States maintained that their restrictions of Mexico's tuna under the MMPA were primarily aimed at the conservation of dolphins. The constraint on Mexico's tuna imports were aimed at creating "..effective restrictions on domestic production or consumption.." of dolphins.[36] Mexico argued that the United States's guidelines were in violation of GATT for they were being applied outside the jurisdiction of the United States. The Panel reviewed an old case, Canada-Measures Affecting Exports of Unprocessed Herring and Salmon, which interpreted this clause as intending to permit contracting members to evoke restrictions on production or consumption only within their restricted jurisdiction. Similar to Article XX(b), if the United States had emerged victorious in this dispute, there would have been large, negative trade ramifications. Again, member nations would be able to

The Panel decided that the United States was in violation of GATT Article XX(g) by prohibiting the importation of Yellowfin Tuna.

unilaterally dictate the conservation policies from which other contracting nations would not be able to deviate from. The Panel decided, on the basis of the above considerations, that the United States was in violation of GATT Article XX(g) by prohibiting the importation of Yellowfin Tuna.

The final conclusions of the Panel were revealed after long hours of deliberation, and in the end, Mexico ended victorious on all counts. The judgments brought down in this case did very little to ease the environmental concerns which GATT presents. The United States' loss, according to Congressman James H. Scheuler, provides just reasoning for our world's nations to be worried.[37]



NOW WHAT? Dolphins or Trade in the 1990's

The significance of the case of Earth Island Institute v. Mosbacher, as decided in the U.S. Court of Appeals, may effect the interpretation of the MMPA in that it establishes that the agencies involved in regulating the Act (specifically the NMFS) cannot create regulations which contradict the intentions of Congress. No matter what gain the agency expects to occur as a result of their regulations, for example the assertion that the "reconsideration policy" might encourage foreign countries to speed up their efforts to comply with the statute, the holding in Mosbacher makes it clear that an agency may not implement such a regulation if it goes against the Act's immediate provisions. However, it is dubious that this holding will have much of an effect on the actions of the government given it's history of non-compliance and the Court's recent February 3rd finding.

At the present time, despite the findings of the GATT Panel, a U.S. District Court ordered that secondary embargoes be placed on appropriate countries engaged in "tuna laundering" in its February 3rd, 1992 decision.[38] Luckily for the dolphins of the Eastern Tropical Pacific the Court's action demonstrates that for now GATT does not have enough clout to determine U.S. policy. However, it is within the best interest of the U.S. to uphold its trade agreements under GATT to ensure the continuation of free trade with a large variety of countries. What then can the U.S. do to remain within the auspices of GATT without compromising its conservational concerns for marine mammals?

The 1991 Mexico GATT case, and future similar cases, could have unbounded world wide consequences. In the case of Mexico versus the United States, it was determined that in the eyes of GATT, an international treaty held more power than an individual federal statute. If this trend continues, and political and economic pressures force Nations to abide by GATT's rules the environmental consequences will be drastic. The General Agreement on Tariffs and Trade was formed when environmental considerations were not taken into account. Governmental negotiations, both past and present, have solicited and received input almost solely from large corporations and trade associations, ignoring most environmental inputs. Basically, our quest for free trade has not created a cost free situation, but one which we may pay dearly for in years to come.

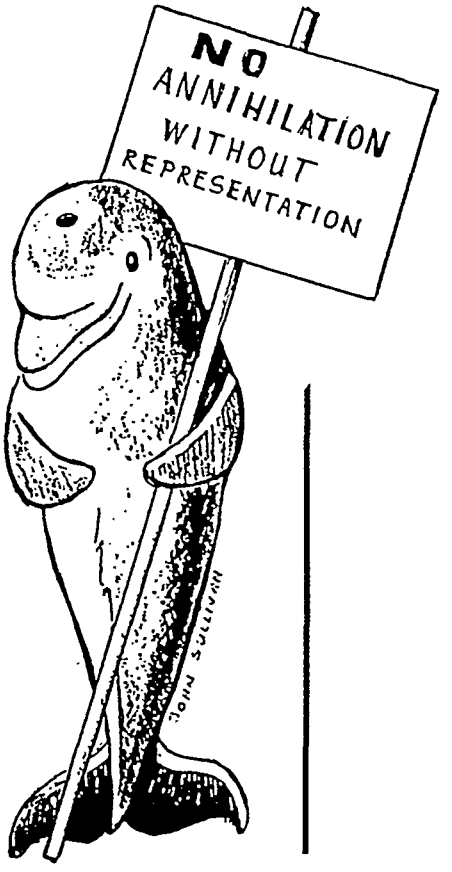
Unfortunately, free trade practices play a large role in determining the scale of resource exploitation. In a sense, we are trading away our environment. If GATT's power continues to rise, as the Bush administration wishes it to, it could limit member nations' rights to implement many kinds of national or state legislation, as was well documented in the 1991 Mexico case. Another example of the role which GATT may play in our future may be seen when looking at farm programs. These programs which impact production, consumption or prices may be drastically hampered. Furthermore, import as well as export controls on such

commodities as food and other natural resources would be under the guidance of GATT, not the individual nations. This would lead to the elimination of a countries right to set import and export standards. Lastly, environmental health standards may be lowered due to the proposal of harmonization. This is a particularly dangerous problem for it creates international standards, set by international bodies, which are often lower than national or state standards. Using pesticides as an example, here is a partial list of the standards set by the Rome-based Codex Alimentarius for the maximum residue levels on foods which are weaker than FDA action thresholds:[39]

In the eyes of GATT, an international treaty held more power than an individual federal statute.

CROPS	PESTICIDE	INCREASE
Apples	DDT	10X
Broccoli	DDT	33X
Lettuce	Aldrin	3.3X
Grapes	DDT	20X
Carrots	Heptachlor	20X
Peaches	Dieldrin	1.7X
Bananas	DDT	20X

GATT and "free trade" could also have further impacts on our world's environment. The power of GATT will undoubtedly lower the world's commodity prices. This cutting of prices may place unwanted pressures on the environment in several ways. There would be an overall decline in farmer revenues of 13% in the United States with a net loss of billion dollars.[40] Farmers would be forced to intensify production in order to make up for the lost money due to the lower prices. This increase could enhance soil leaching and erosion, as well as increase amounts of hazardous pesticides and fertilizers cycling through our environment. Secondly, GATT's ability to lower commodity prices may result in a determinant to less developed or poorer countries. These countries would be compelled to increase the amount of imported food and other goods at the expense of their own self reliance. In addition to these problems, it has been noted that when economic growth occurs, which is the purpose of GATT, that following the expected increase in industry is a fairly large increase in the transport and demands for energy.[41] These demands may result in the escalated burning of several forms of fuels, increasing their depletion rate as well as the environmental damage they cause.



Environmentally concerned groups, such as the Sierra Club, have made attempts to regulate the power of GATT. In the case of Public Citizen, Sierra Club, Friends of the Earth v. Office of the United States Trade Representative, plaintiffs challenged the Office of the United States Trade Representative's failure to prepare an Environmental Impact Statement (EIS) in accordance with NEPA on trade agreements that significantly affect the quality of the human environment. This attempt failed, but if an amendment such as our National Environmental Policy Act was added to GATT, it would protect many nations from being forced to accept the negative environmental implications of GATT. However, at the same time, it may possibly dissolve the power of GATT, lessening its power to create a balanced trade situation.

GATT is an extremely powerful international treaty, and one which could cause irreversible environmental damage unless it is somehow tempered. Trade agreements such as GATT should not interfere with the authority of Nations to create regulations, environmental or otherwise, as long as they apply reasonably to domestic and foreign trade. Nations must also have the power to create environmental regulations dealing with imported products to protect their land, wildlife, critical habitats and citizens. The right to restrict the export of a nation's products is also stripped by GATT, which does not sufficiently allow a nation to protect their domestic environment. Facing the future degeneration of our environment, the General Agreement on Tariffs and Trade must change. As the World Commission on the Environment and Development put it, the mandate and activities of GATT will have to, "reflect concern for the impacts of trading patterns on the environment."[42] Following these words of wisdom, the 1992 United Nations conference on Environment and Development will draw up the "Earth Charter" and "Agenda 21," which commits members of the U.N. to protect the environment and promote a sustainable development for years to come.[43]

While unrestricted trade in the world market may have many economic benefits, the overall cost on the environment is too high to pay. Along with the increased economic activity will be a growing drain on the world's natural resource stocks, causing increases in pollution and environmental stress. The ideology behind the General Agreement on Tariffs and Trade is a good one, but without some form of a strong environmental protection clause, GATT could find itself destroying the world it is attempting to make richer.

Stepping back somewhat to the protection of dolphins, one possibility would be to encourage the implementation of an international treaty concerned solely with the welfare of marine mammals, much like the International Whaling Convention. A goal of this treaty might be to establish an "eastern spinner conservation zone" where an international quota or prohibition could be set to prevent dolphin deaths. Much research has already been done to identify the distribution of subspecies populations of this dolphin in the Eastern Tropical Pacific so that such a zone could easily be identified.[44] Another viable alternative is to intensify research efforts to develop fishing technology that prevents the capture and death of dolphins. Research has already begun on a method of aerial tracking of tuna schools as well as on the use of hormone attractants to separate schools of tuna from dolphin social groups.[45] Another alternative, though more revisionist in its implications upon GATT, would use the European Economic Community (EEC) as a model. Within the EEC, trade barriers have been negotiated simultaneously with environmental, labor, and other provisions. To its advantage, this approach acknowledges the interconnectedness of seemingly diverse concerns. However, this approach greatly complicates deliberations. Also, this way may be wholly inappropriate given the diversity of GATT's member nations compared with the relative homogeneity of the EEC group.

For now GATT does not have enough clout to determine U.S. policy.

Whatever course the U.S. chooses to pursue to solve the problem, it must be an economically viable one for all countries expected to participate in the solution. The disparate levels of development amongst those nations make this task more difficult.

Although the proceedings of Earth Island Institute v. Mosbacher seem at first glance to be just one more effort to get government agencies to comply with the MMPA, it is obvious that this case has important global implications as well; this may be seen by the MMPA's involvement in GATT. The more quickly the U.S. addresses these concerns and finds an internationally acceptable way to achieve its conservation objectives, the faster both the nation and the free-swimming dolphin will benefit.

ENDNOTES

[1]929 F.2d 1449 (9th Cir. 1991).
[2] *Focus*, GATT Newsletter 1991.
[3] GATT Activities 1990.
[4] Au, David, *Polyspecific Nature of Tuna Schools: Shark, Dolphin, and Seabird Associates*, U.S. Fishery Bulletin (25 February 1991).
[5]*See* 746 F.Supp. at 964.
[6]16 U.S.C. Section 1361 *et seq.*
[7] Norman, Colin, *Dolphin Dissonance*, 264 Nature (16 December 1976).
[8] Manning, Laura L., *Marine Mammals and the Fisheries Conflicts: A Philosophical Dispute*, in Ocean and Shoreline Management, Elsevier Science Publishers (1989).
[9] McDorman, Ted, *The GATT Consistency of the U.S. Fish Import Embargoes to Stop Driftnet Fishing to Save Whales, Dolphins, and Turtles*, 24 George Washington Journal of International Law (1991).
[10] 16 U.S.C. §1371(a)2).
[11] *See* Norman, *supra* note 7.
[12] 16 U.S.C. §1371.
[13] 16 U.S.C. §1371(a)2).
[14] 746 F.Supp. 964.
[15] 16 U.S.C. §1371(a)(2B)(i) and (ii).
[16] 746 F.Supp. 964, 968.
[17] 16 U.S.C. §1371(a)(2C).
[18] 16 U.S.C. §1371(a)(2D).
[19] *See* McDorman, *supra* note 9.
[20] 16 U.S.C. §1361.
[21] 929 F.2d 1449.
[22] 746 F.Supp. 964.
[23] 746 F.Supp 964, 976.
[24] 746 F.Supp. 964.
[25] 929 F.2d 1449.
[26] 929 F.2d 1449.
[27] 929 F.2d 1449.
[28] *Id.*
[29] *Id.*
[30] 724 F.2d 753 (1984).
[31]929 F.2d 1449, at 1452.
[32]746 F.Supp 964.
[33] 1992 WL 29984 (N.D.Cal.).
[34] 16 U.S.C. §1361(2).
[35] *See* §337 of the United States Tariff Act of 1930 (adopted November 7, 1989).
[36] GATT Article XX(g).
[37] Congressman Scheuler, *Newsletter.*
[38] Earth Island Journal, Spring 1992, at 7.
[39] Complied by Bill Barclay, Greenpeace USA.
[40] Community Farm Alliance Fact Sheet.
[41]N.Y. Times, 3/1/92.
[42] WCED 1987, *Our Common Future.*
[43] *See* GATT: A World Wildlife Fund Discussion Paper.
[44] Perrin, W.F. et al., *Geographic Variation in External Morphology of the Spinner Dolphin in the Eastern Tropical Pacific and Implications for Conservation*, 89 U.S. Fisheries Bulletin (15 March 1991).
[45] Holt, Rennie S., *Research Vessel Survey Design for Monitoring Dolphin Abundance in the Eastern Tropical Pacific*, 85 U.S. Fisheries Bulletin (1987).

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