

YELLOWFIN TUNA FISHERY AND DOLPHIN CONSERVATION: INTERNATIONAL FREE TRADE MEETS ENVIRONMENTALISM

By
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As nations develop economically, conflicts often occur between the ordinarily incompatible goals of environmental quality and prosperity. Almost inevitably, environmental quality suffers. Although these conflicts and their effects surface in many local and national settings, the arena of international trade has become one prominent area in which such conflicts arise.

International trade is an important point of conflict between the pursuit of economic prosperity and the maintenance of environmental quality for at least two reasons. First, most economic interests involve inputs of raw, natural materials. For example, interests as basic as energy generation, construction, and food production all require the use of natural materials. However, people also value the conservation of nature.

Second, the natural world and its resources are not defined by man-made political boundaries. Animal populations do not observe arbitrary political or national boundaries and may migrate from one nation to another. Ocean resources pose a particularly difficult problem because often these resources are located in international commons—regions for which there is no national ownership. Frequently, the incompatible policies of countries toward these commons generate conflict. Since international trade is one result of the capture, development and sharing of these resources, such trade becomes an inevitable source of environmental disagreements. In particular, one trading partner may try to use its bargaining power to influence the environmental policies of another.

This Article focuses on the continuing controversy over the incidental taking of dolphins by the yellowfin tuna fishery. Part I describes the dolphin con-

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ervation measures that led to the United States embargo of imported yellowfin tuna. Part II discusses the panel proceedings of the General Agreement on Tariffs and Trade (GATT) affecting the dolphin and tuna controversy. Finally, Part III examines the post-GATT results.

I. INTRODUCTION

A. *The Tuna Industry and Unintended Dolphin Mortalities*

The tuna fishing industry long ago discovered a unique method for catching yellowfin tuna. For unknown reasons, adult yellowfin tuna swim beneath pods of dolphins in the Eastern Pacific Ocean.¹ This behavior pattern of the mature tuna gives fishermen the opportunity to use dolphins to find schools of marketable tuna.² However, although commercial fisherman do not intentionally target dolphins, fishermen employing purse seine nets often capture these mammals along with the tuna. Using purse seine nets, fishermen encircle both the dolphins and tuna, close the bottoms of the nets, and then pull both tuna and dolphins back onto the ships. Although no present technological alternative exists which rivals the efficiency of purse seine nets in the capture of mature yellowfin tuna, improvements in fishing techniques have greatly decreased dolphin mortality.³

B. *The Marine Mammal Protection Act*

In the past thirty years, the fishing industry has "incidentally taken"⁴ an estimated six million dolphins.⁵ In response to public concern over this incidental taking of dolphins, in 1972 Congress enacted the Marine Mammal Pro-

¹ Immature yellowfin tuna, on the other hand, school independently of dolphins. However, fishermen prefer the mature tuna because the younger fish are of less economic value due to their smaller size. Furthermore, the fishing industry realized that catching immature tuna before they are able to reproduce could ultimately lead to declining numbers of tuna. See Betsy Carpenter, *What Price Dolphin?*, U.S. NEWS & WORLD REPORT, June 13, 1994, at 71.

² Alejandro Nadal Egea, *The Tuna-Dolphin Association in the Eastern Pacific Ocean Tuna Fishery: International Trade and Resource Management Issues*, in OCEAN YEARBOOK 11, 122 (University of Chicago Press, 1994).

³ *Id.* at 126.

⁴ With respect to the fishing industry, the term "incidental take" commonly refers to the unintended capture or killing of one species when fishing for another.

⁵ Paul J. Yechout, *In the Wake of Tuna II: New Possibilities for GATT-Compliant Environmental Standards*, 5 MINN. J. GLOBAL TRADE 247, 249 (1996).

tection Act (MMPA), which imposed a moratorium on the taking of marine mammals by United States fishing fleets.⁶ The MMPA's goal was to reduce the "incidental kill or incidental injury of marine mammals...to insignificant levels approaching a zero mortality and serious injury rate."⁷ However, the Act also allowed the Secretary of Commerce to issue fishing permits. Consequently, the tuna industry continued to operate as the MMPA tried to eliminate dolphin mortalities.

The Act also banned the importation of fish and fish products which non-U.S. fishing fleets caught using methods that resulted in the continued incidental taking or serious injury of marine mammals.⁸ In 1984, an amendment to the MMPA specifically targeted yellowfin tuna caught by purse seine nets. The amendment prohibited yellowfin tuna importation unless the exporting nation had a dolphin protection plan comparable to that of the United States and the rate of incidental take was similar to that of the United States.⁹ Further, a 1988 amendment to the MMPA restricted the importation of tuna products from intermediary nations that imported tuna for export to the United States. This amendment required countries that exported tuna to the United States to certify that they had stopped accepting tuna from nations which were subjects of primary United States embargoes. A failure to comply would result in the imposition of a secondary embargo on the tuna products of the intermediary country.¹⁰

C. The Dolphin Protection Consumer Information Act (DPCIA)

In addition to the MMPA, the United States enacted the Dolphin Protection Consumer Information Act, which mandated labeling regulations to inform consumers of the source of the tuna products.¹¹ This statute prohibited a producer, importer, exporter, distributor or seller from designating as "dolphin-safe" any tuna caught in one of two ways: (1) through the use of purse seine nets not designated as "dolphin-safe," or (2) through the use of drift nets on the high seas.¹²

⁶ See Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1362, 1371-1384, 1401-1407 (amended 1988 & Supp. III 1991).

⁷ *Id.* § 1371(a)(2) (amended 1994).

⁸ *Id.*

⁹ *Id.* § 1371(a)(2)(B)(1988).

¹⁰ 16 U.S.C. § 1371(a)(2)(C)(Supp. III 1991).

¹¹ 16 U.S.C. § 1385 (1994).

¹² Elliot B. Staffin, *Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labeling and its Role in the "Greening" of World Trade*, 21 COLUM. J. ENVTL. L. 205, 286 (1996).

D. Embargo of Non-U.S. Tuna

The MMPA allowed the United States to block importation of tuna caught by purse seine nets. As of 1990, however, by failing to evaluate the fishing methods of non-U.S. fishermen or their incidental take of dolphins, even the United States had not complied with the MMPA. Consequently, a coalition of marine mammal protection groups brought two suits against the United States government to enforce the primary embargo provisions of the MMPA.

In the first of these two suits, both named *Earth Island Institute v. Mosbacher*, the Earth Island Institute alleged that the Secretary of Commerce violated the MMPA by not determining the rate of incidental taking of dolphins by non-U.S. fishing vessels.¹³ The United States replied that several months would be required to develop the needed information and that the MMPA did not require the imposition of embargoes until the requisite findings were made. The United States District Court for the Northern District of California disagreed. The court ordered an immediate embargo of all tuna and tuna products from Mexico and several other countries.¹⁴

Interestingly, the day after the United States government imposed the embargo, it lifted the embargoes against Mexico, Venezuela and Vanuatu as they were within the limits of dolphin takings.¹⁵ The National Marine Fisheries Service's "reconsideration regulation" allowed the Secretary to determine the rate of dolphin kills by using data from the first six months *after* the year in which the incidental taking exceeded the regulated limits. Although dolphin takings by these countries in 1989 exceeded the limits imposed by the United States, their rates of dolphin kills in the first half of 1990 were still within the statutory limits. The Earth Island Institute challenged the "reconsideration regulation" by insisting that the government calculate the rate of dolphin kills from an entire year's data.¹⁶ The district court agreed. This time, the court imposed a preliminary injunction banning importation of tuna from Mexico. Although the Ninth

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

¹⁴ *Id.* at 1451.

¹⁵ Thomas E. Skilton, *GATT and the Environment in Conflict: The Tuna-Dolphin Dispute and the Quest for an International Conservation Strategy*, 26 CORNELL INT'L L. J. 455, 461 (1993). Embargoes against Panama and Ecuador ended when they stopped setting purse seine nets on dolphins. *Id.*

¹⁶ *Earth Island Institute*, 929 F.2d at 1451-52.

Circuit Court of Appeals temporarily stayed this primary embargo against Mexico, the embargo eventually came into effect on February 22, 1991.¹⁷

In the second case, the court upheld a secondary embargo against intermediary nations which imported yellowfin tuna from countries such as Mexico.¹⁸ The secondary embargo blocked importation from intermediary countries of all tuna products, regardless of origin or fishing techniques used. To overcome the secondary embargo, the Secretary of the Treasury required verification from intermediary nations that they did not import yellowfin tuna products that would otherwise be banned from direct importation into the United States. In comparison, the primary embargo only covered yellowfin tuna directly caught by purse seines in the Eastern Pacific Ocean.¹⁹ On May 24, 1991, the district court imposed secondary embargoes on Costa Rica, France, Italy, Japan and Panama.²⁰ These events set the stage for Mexico's complaint that the embargoes violated the General Agreement on Tariffs and Trade.

II. INTERVENTION BY THE GATT

A. Summary of the GATT Dispute Resolution Process

In 1947 in Geneva, organizers held a conference to develop an International Trade Organization (ITO) that would supervise the enforcement of trade agreements. Although the United States provisionally accepted GATT, the United States did not approve the charter for the ITO and the ITO was never formally created. Nevertheless, individual nations contracted with each other to use GATT procedures as a means of resolving international trade disputes.²¹

Briefly, GATT first required nations in dispute to discuss issues through bilateral consultations (direct negotiations) or through mediation involving a third party.²² If agreements did not result from these negotiations, then the complaining party could request a GATT panel to hear the written and oral argu-

¹⁷ United States-Restrictions on Imports of Tuna, Sept. 3, 1991, GATT Doc. DS21/R-39S/155 at 3.

¹⁸ Earth Island Institute v. Mosbacher, 785 F. Supp. 826, 833 (N.D. Cal. 1992), *vacated by* Earth Island Institute v. Brown, 17 F.3d 1241 (9th Cir. 1994), *opinion withdrawn and superseded by* Earth Island Institute v. Brown, 28 F.3d 76 (9th Cir. 1994).

¹⁹ *Id.* at 833-835.

²⁰ United States-Restrictions on Imports of Tuna, *supra* note 17, at 4.

²¹ John H. Jackson, *GATT and Recent International Trade Problems*, 11 MD. J. INT'L L. & TRADE 1, 7, 8 (1987).

²² Rosine Plank, *An Unofficial Description of How a GATT Panel Works and Does Not*, 4 J. INT'L ARB. 53, 60-61 (1987).

ments.²³ The Panel was an ad hoc group of three to five members from neutral contracting nations that were chosen by the GATT Council. The Council itself consisted of members of contracting nations who wished to be represented at the Council meetings.

After examining the arguments in the context of GATT, the Panel gave its conclusions and recommendations to the disputing parties.²⁴ Since the GATT panel could not enforce these recommendations, the dispute continued if the parties did not voluntarily abide by the Panel's holdings. In such a case, the Panel's report was brought before the Council for adoption.²⁵ The Council must unanimously agree to adopt the Panel's holdings. If the losing party was represented in the Council, it could vote against the Panel's conclusions and prevent adoption of the holdings. If the Council adopted the Panel's holdings, countries could decide to implement international sanctions against the recalcitrant party.

B. The First Tuna-Dolphin GATT Panel

Mexico requested consultations with the United States on November 5, 1990.²⁶ As a result of the failure to reach a resolution, Mexico requested the establishment of a GATT panel on January 25, 1991.²⁷ On three occasions during May and June, representatives from Mexico and the United States met with the three-member Panel. More than twenty interested countries, including Australia, Canada, Chile, Colombia, the European Community, Senegal, and Venezuela, presented their viewpoints to the Panel. In general, their comments were in opposition to the United States embargoes.

1. Summary of the Relevant GATT Articles

In contention were GATT Articles, I, III, IX, XI and XX. Articles I and III outline "most favored nation" treatment through the general rule that among contracting parties, imported trade products would be treated the same as simi-

²³ *Id.* at 62.

²⁴ *Id.* at 86.

²⁵ *Id.* at 88.

²⁶ Yechout, *supra* note 5, at 254.

²⁷ Skilton, *supra* note 15, at 467.

lar domestic products.²⁸ These Articles prohibit an importing country from imposing internal charges or taxes on foreign goods in excess of charges or taxes put on similar domestic products. Article IX provides that the label or mark would not unfairly discriminate against an imported product in relation to the similar domestic product.²⁹ Article XI further prohibits the imposition of quantitative restrictions on imports solely to protect domestic producers of similar products.³⁰ In this way, GATT encouraged the development of trading partnerships that were free of unfair protective quotas, tariffs or blockades. In addition, Article XX(b) provides for the protection of the health and welfare of the consuming nation that imports foreign goods while XX(g) provides for the protection of natural resources.³¹ Finally, Article XX(d) states that GATT would apply its provisions consistently and evenly to countries that violated its agreements.³²

Mexico claimed that: (1) the embargoes were inconsistent with the general prohibitions of quantitative restrictions under Article XI,³³ and (2) the Dolphin Protection Consumer Information Act violated Articles I and IX of the GATT.³⁴

²⁸ GATT Article I provides: "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

GATT Article III(4) provides: "The products of any territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect to all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

²⁹ Article IX provides: "Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country."

³⁰ GATT Article XI(1) provides: "No prohibitions or restrictions... whether made effective through quota, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory or any other contracting party."

³¹ GATT Article XX(b) and (g) provide: "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 where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures... (b) necessary to protect human, animal or plant life or health... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;..."

³² Article XX(d) provides: "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 where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures... (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement..."

³³ United States-Restrictions on Imports of Tuna, *supra* note 17, at 5.

³⁴ *Id.*

The United States replied that: (1) the embargoes were acceptable under Article III,³⁵ (2) if not consistent with Article III, Articles XX justified the embargoes,³⁶ and (3) the DPCIA was covered by Articles I and III.³⁷

On August 16, 1991, the Panel concluded that the United States' embargoes against Mexico were an impermissible quantitative restriction. The Panel further concluded that the embargoes were not covered by Article XX and the DPCIA was not violative of the GATT.³⁸

2. Articles III and XI

The main issue between the countries concerned the application of GATT Articles III and XI to the tuna imported into the United States. Mexico contended that the embargo was a violation of Article XI, which prohibited quantitative restrictions of imports.³⁹ Therefore, Mexico perceived this embargo as contrary to the law and spirit of GATT, which encouraged the development of trading partnerships free of unfair, protective quotas or blockades.

The United States responded that Article III(4), which allowed foreign products to receive equal treatment to similar domestic products, permitted the embargo.⁴⁰ The United States considered the restriction on Mexican tuna fair because similar bans were also in place for yellowfin tuna caught by United States fishermen. Therefore, the United States government did not impose the embargo on Mexican yellowfin tuna to protect the United States fishing industry.

The Panel focused on the sale and distribution of tuna as a "product." The Panel concluded that the MMPA simply "regulated the domestic harvesting of yellowfin tuna to reduce the incidental taking of dolphin."⁴¹ However, Article III(4) dealt with post-harvested tuna products as discreet commercial entities (for example, canned tuna). Because the MMPA did not directly regulate the sale of tuna as a product, and Article III(4) did not address relevant fishing techniques, the United States could not use Article III(4) to support the MMPA-

³⁵ *Id.* at 5, 6.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 1.

³⁹ See Article XI, *supra* note 30.

⁴⁰ See Article III, *supra* note 28.

⁴¹ United States-Restrictions on Imports of Tuna, *supra* note 17, at 36.

motivated embargo. The Panel concluded that the United States should treat all tuna products similarly without regard to how the fish were initially caught.⁴²

3. Article XX

The United States used Article XX(b) and Article XX(g) to justify its extrajurisdictional application of the MMPA.⁴³ The United States contended that pursuant to Article XX(b), the embargo was necessary to protect the life and health of dolphins.⁴⁴ Mexico contended that Article XX(b) did not apply outside the jurisdiction of the party taking the measure. The Panel's examination of the drafting history of Article XX(b) suggested that the drafters' major concern was safeguarding the life and health of humans, animals or plants within the importing country.⁴⁵ The Panel acknowledged that past examinations of Article XX(b) had concluded that broad interpretations of this provision would lead to restrictive trade measures which were contrary to the policy objectives of the GATT.⁴⁶

The United States also argued that the embargoes were valid under Article XX(g). This Article provided for the conservation of an exhaustible natural resource (here, dolphins) through restrictions on its production and consumption. However, the Panel once again stated that the United States' control over the production and consumption of tuna products under Article XX(g) was limited to activities within its jurisdiction.⁴⁷ An extrajurisdictional interpretation of this provision would allow a contracting party to unilaterally impose conservation policies on others. Since this interpretation contradicted the free-trade policy of the GATT, the Panel supported jurisdictional limitations. Therefore, the Panel decided that both Articles XX(b) and (g) did not permit the imposition of MMPA's goals outside the United States.

Mexico also disputed the necessity of the embargo for the protection of dolphins in the Eastern Pacific Ocean.⁴⁸ The Panel decided that the United States had not demonstrated that other options were not reasonably available for achieving the MMPA's goals. In particular, the Panel mentioned the absence of United

⁴² *Id.* at 37.

⁴³ See Article XX(d), *supra* note 32.

⁴⁴ United States-Restrictions on Imports of Tuna, *supra* note 17, at 39.

⁴⁵ *Id.*

⁴⁶ *Id.* at 40.

⁴⁷ United States-Restrictions on Imports of Tuna, *supra* note 17, at 41.

⁴⁸ *Id.*

States efforts to negotiate “international cooperative arrangements” consistent with GATT.⁴⁹ Such bilateral efforts would better harmonize with GATT’s preference for dispute settlements through direct negotiation rather than unilateral legislation.⁵⁰

In addition, the MMPA required that rates of Mexico’s dolphin takings be no higher than those of the United States. However, the transfer of rate information from the United States was not sufficient to allow the Mexican authorities to know what the current United States rate was at any particular time; these rates were calculated from an entire year’s data. Without information from the United States, the Mexican fishermen could not adjust their fishing practices in order to remain within the specified limits of dolphin takings imposed by the United States. Therefore, this matching of rates was not “necessary” for the “conservation” of dolphins. The Panel did not allow the use of Articles XX(b) or (g) to support the United States’ implementation of the MMPA to conserve dolphins.⁵¹

The United States also proffered Article XX(d) as an additional justification for the secondary embargo.⁵² The United States argued that compliance with the goals of the primary embargo required prohibitions on the importation of tuna and tuna products from intermediary nations. However, the Panel decided that since the primary embargoes were already inconsistent with GATT, Article XX(d) did not apply.⁵³

4. Dolphin Protection Consumer Information Act

Mexico considered the labeling provisions of the DPCIA to be subject to Article IX. Mexico believed that the “dolphin safe” labeling requirement acted to negatively discriminate against Mexican tuna products.⁵⁴ Mexico also argued that this labeling requirement discriminated against Mexico as a country that fished in the Eastern Pacific Ocean.⁵⁵

The United States responded that the title of Article IX was “Marks of Origin.” This referred to marking of the national origin of products, and not of

⁴⁹ United States-Restrictions on Imports of Tuna, *supra* note 17, at 40.

⁵⁰ Plank, *supra* note 22, at 60.

⁵¹ Skilton, *supra* note 15, at 469.

⁵² See Article XX(d), *supra* note 32.

⁵³ United States-Restrictions on Imports of Tuna, *supra* note 17, at 43.

⁵⁴ *Id.*

⁵⁵ See Article IX, *supra* note 29.

products generally. Therefore, the United States felt that Article IX was not relevant to the labeling of tuna as "dolphin-safe." The Panel dismissed Mexico's contention on this point since yellowfin tuna caught in the Eastern Pacific Ocean with purse seine nets were subject to the DPCIA regardless of national origin. Therefore, the provisions of the DPCIA met the requirements of Article I(1).⁵⁶

C. Responses to the Panel Report

The findings of the Panel were not binding on the United States because GATT rulings are only considered recommendations. As of early 1996, the Panel report was not adopted by members of the GATT.⁵⁷ Instead of seeking adoption, Mexico agreed to further negotiations with the United States to find other means of reducing dolphin takings in the Eastern Pacific Ocean. Mexico probably did not press for adoption of the Panel report in order to prevent negative repercussions on NAFTA.⁵⁸

Pressure from environmental groups and the general public resulted in opposition to the Panel findings by more than sixty members of Congress.⁵⁹ Environmental groups viewed the continued negotiations as confirmation of economic concerns taking precedence over environmental concerns.

D. The La Jolla Accord

An additional response to the tuna-dolphin controversy was the La Jolla Accord. In June of 1992, members of the Inter-American Tropical Tuna Commission (IATTC) agreed to multilateral efforts toward reducing dolphin mortality.⁶⁰ At this meeting in La Jolla, California, member nations agreed to a total takings rate of five thousand dolphins or less by 1999. Within the context of these events, Congress proposed the Dolphin Conservation Act as an amendment to the MMPA.

⁵⁶ United States-Restrictions on Imports of Tuna, *supra* note 17, at 44.

⁵⁷ See Yechout, *supra* note 5, at 258.

⁵⁸ *Id.* at 275.

⁵⁹ *Members of Congress Protest Recent GATT Ruling on U.S. Embargo of Mexican Tuna*, 8 INT'L TRADE REP. (BNA) at 1399 (Sept. 25, 1991).

⁶⁰ LouAnna C. Perkins, *International Dolphin Conservation Under U.S. Law: Does Might Make Right?*, 1 OCEAN & COASTAL L. J. 213, 235 (1995).

E. The International Dolphin Conservation Act

In 1992, Congress considered two measures aimed at furthering the goals of the MMPA. The bill by Senator Breaux of Louisiana would have harmonized United States policy with that of the IATTC's La Jolla Accord. Under the Breaux bill, findings of violations of the IATTC's dolphin protection agreements would trigger embargoes of tuna imports.⁶¹ Organizations such as the IATTC could also recommend a moratorium on the setting of purse seine nets on dolphins.

The second measure, proposed by Congressman Studds of Massachusetts, would have lifted trade sanctions on embargoed fishing nations if two requirements were met. First, these nations would have to agree to reduce dolphin deaths. Second, they would have to implement a five-year moratorium, from 1994 to 1999, on setting purse seine nets on dolphins. Presumably, using purse seines for other purposes would have been acceptable.

Although the goal of both bills was to reduce incidental dolphin takings, they contained major differences. The Breaux bill would have encouraged the IATTC's program for multinational negotiations in addressing the dolphin taking.⁶² Also, findings of violations of the La Jolla Accord would be grounds for implementing trade sanctions. On the other hand, the Studds bill allowed unilateral measures to be used by the US.⁶³

The Studds bill was adopted as an amendment to the MMPA as the International Dolphin Conservation Act (IDCA) of 1992. Any country that informed the Secretary of State of their commitment to implement the moratorium, allowed observers on all large vessels using purse seines in the Eastern Pacific Ocean, and took good faith efforts to reduce their levels of dolphin mortality, were exempt from the MMPA yellowfin tuna embargo.⁶⁴ Thus, this proposed legislation directly conflicted with GATT's Tuna-Dolphin Panel Report which condemned the unilateral imposition of trade sanctions as a means to promote environmental policies. This eventually resulted in a complaint against the United States by the European Union (EU) and the Netherlands, and the convening of a second panel.

⁶¹ *Id.* at 237.

⁶² *Id.* at 239.

⁶³ *Id.*

⁶⁴ *Id.* at 238.

F. The Second Tuna-Dolphin GATT Panel

The United States' embargo of yellowfin tuna continued to dissatisfy countries, such as those of the EU, burdened with the secondary embargo. The EU held consultations with the United States on April 10, 1992. The inability to achieve a satisfactory solution led to the EU's request to establish a second GATT panel. On July 13, the Netherlands, on behalf of the Netherlands Antilles, consulted with the United States on the import restrictions of tuna products. The lack of a resolution resulted in the Netherlands' joining as a co-complainant with the EU. On July 14, 1992, the Council agreed to establish a panel to hear this case.⁶⁵

As in the prior 1991 Tuna-Dolphin report, the 1994 panel report concluded that the embargoes violated Article XI.⁶⁶ The 1994 panel examined the secondary embargoes within the context of Article XX(b) and (g). In particular, the Panel studied embargoes and their underlying policies.

1. Article XX(g)

Concerning the underlying policies of the embargoes, the Panel agreed with the United States that dolphin were "exhaustible natural resources" whose populations could be endangered.⁶⁷ The Panel also agreed with the United States' contention that there was no explicit language in Article XX which limited a nation's efforts to conserve an exhaustible natural resource to areas within its jurisdiction. Nor were states generally barred from regulating the conduct of their citizens, animals, plants or natural resources when outside of their territories. The Panel concluded that the United States' policy to conserve dolphins could thus extend to its own citizens and vessels in the Eastern Pacific.⁶⁸

The Panel next examined whether the secondary embargoes were "related to" the conservation of an exhaustible natural resource, and whether they were made effective "in conjunction with" restrictions on domestic production or consumption. The secondary embargoes prohibited the importation of tuna and tuna products from intermediary nations, without regard to the harvesting

⁶⁵ *United States-Restrictions on Imports of Tuna*, June 16, 1994, GATT Doc. DS29/R at 1.

⁶⁶ *Id.* at 55.

⁶⁷ *Id.* at 56.

⁶⁸ *Id.* at 56 to 58.

method. The Panel thus reasoned that the secondary embargo's main purpose could not be the conservation of an identified natural resource.⁶⁹ In addition, the Panel found that the goals of the embargoes required forcing internal policy changes within the exporting countries. The Panel concluded that the secondary embargoes were therefore efforts by the United States to unilaterally influence the internal affairs of exporting countries rather than direct actions toward the conservation of dolphins.⁷⁰ Consequently, the embargoes violated Article XX(g).

2. Article XX(b)

Similar to its examination of Article XX(g), the Panel found that the United States' interest in protecting human, animal or plant life and health could extend to its own citizens and vessels in the Eastern Pacific Ocean.⁷¹ And as with the second part of the test of Article XX(g), the Panel could not find the embargoes to be indispensable or necessary components of dolphin conservation. The Panel considered secondary embargoes as either misdirected efforts to achieve the goals of the MMPA, or violations of free-trade policies as promulgated by the GATT.⁷²

G. Reactions to the Second Tuna-Dolphin Panel

Environmentalists' reactions to the findings of the 1994 Panel Report were similar to those which followed the 1991 Report: the GATT undermines the efforts of United States environmental policies and standards. As a result, environmental groups encouraged the United States government to denounce the implementation of other international agreements that included environmental provisions.⁷³

⁶⁹ *Id.* at 59.

⁷⁰ *Id.* at 60.

⁷¹ *Id.* at 62.

⁷² *Id.* at 63-64.

⁷³ Steve Charnovitz, *Dolphins and Tuna: An Analysis of the Second GATT Panel Report*, 24 ENVIRONMENTAL L. REP. 10,567, 10,582 (1994).

III. MEXICO'S WITHDRAWAL FROM THE LA JOLLA ACCORD AND THE LIFTING OF THE EMBARGO

In 1995, Mexico and other countries killed approximately 3500 dolphins, down from about 140,000 per year in the mid-1980s. This 1995 rate surpassed the La Jolla Accord's goal to reduce dolphin deaths to 5000 or less by 1999. Independent observers reported that Mexican vessels released ninety-nine percent of the dolphins surrounded by purse seine nets.⁷⁴ However, even if these fishing fleets did not kill any dolphins, tuna products could not be labeled as "dolphin-safe" if dolphins were temporarily captured in purse seine nets. By 1996, the Mexican tuna industry reportedly lost approximately 15,000 jobs.⁷⁵

That same year, the Clinton administration supported legislation to lift the embargo to acknowledge efforts of Latin American countries toward decreasing dolphin takings, and the hundreds of millions of dollars lost by these nations.⁷⁶ The scientific community supported this because the embargo, although safer for dolphins, encouraged fishing methods that killed sea turtles, very young tuna, sharks and other fish.⁷⁷ Greenpeace, the National Wildlife Federation, the Environmental Defense Fund and other environmental groups saw this as a measure to strengthen international cooperation in the conservation of marine life.⁷⁸ However, other organizations, including the Earth Island Institute, the Sierra Club and the Defenders of Wildlife, condemned the move.⁷⁹

By October of 1996, supporters of the embargo defeated efforts to lift the ban.⁸⁰ The United States argued that fishing by Colombia, Costa Rica, Mexico, Panama, Venezuela and Vanuatu was decimating the dolphin population of the Pacific.⁸¹ These nations affected by the embargo declared the defeat as nothing more than a protectionist measure.⁸² Interestingly, the Earth Island Institute claimed in a press release that a lifting of the embargo would result in the increased importation of less expensive foreign tuna and the loss of United States

⁷⁴ Joseph B. Frazier, *Mexico Fishermen Blame Tuna Troubles on 'Dolphin-Safe' Rules*, L.A. TIMES, July 21, 1996.

⁷⁵ *Id.*

⁷⁶ Sam Dillon, *Fate of Tuna Ban Fuels Feud*, THE ORANGE COUNTY REGISTER, July 2, 1996.

⁷⁷ *Id.*

⁷⁸ *White House Lobbying on Senate Tuna-Dolphin Measure*, Congress Daily/A.M. (July 22, 1997).

⁷⁹ See Dillon, *supra* note 76.

⁸⁰ Diego Cevallos, *Fisheries: U.S. Dispels Hopes of End to Tuna Ban*, INTER PRESS SERVICE (Oct. 4, 1996).

⁸¹ *Id.*

⁸² *Id.*

jobs.⁸³ This protectionist stance was contrary to Articles III and XI of the GATT.⁸⁴ A Mexican government official also alleged that the ban was being kept in place for political reasons, in particular, the United States presidential elections of 1996.⁸⁵

In response to the continuance of the embargo, Mexico withdrew from the IATTC's La Jolla Accord in October of 1996 and charged that "unilateralism has prevailed over a multilateral environmental policy based on science."⁸⁶ Mexico declared that it would maintain IATTC observers on its vessels and continue to "act in a manner consistent with international environmental standards."⁸⁷

The United States lifted the embargo on August 16, 1997.⁸⁸ The United States House of Representatives' legislation to lift the ban would have allowed the labeling of tuna as "dolphin safe" if the use of purse seines was not accompanied by any observable dolphin deaths.⁸⁹ The current version gives the Department of Commerce until March 1999 to study the fishing methods before deciding if Mexico can use the "dolphin-safe" label. A final ruling by the Secretary of Commerce is due by December 31, 2002.⁹⁰ In the meantime, yellowfin tuna caught by purse seines can be sold in the United States, but without the "dolphin-safe" designation.

IV. CONCLUSION

The conflict between Mexico and the United States is one that highlights the tension between the economic necessity of a relatively poor country and the environmental ideals of a richer one. It is also an interesting confrontation between an international agreement dedicated to the elimination of trade barriers and a United States policy to halt all dolphin deaths caused by yellowfin tuna fishing. Additionally, this dispute demonstrates how legal rights and political

⁸³ *New Bill Would Allow Cheap Tuna to Flood U.S.*, Int'l Trade Daily (BNA) (Nov. 29, 1995).

⁸⁴ See *supra* notes 28 and 30.

⁸⁵ See Cevallos, *supra* note 80.

⁸⁶ *Mexico Suspends Participation in Fishing Accord in Embargo Protest*, BNA INT'L TRADE DAILY (BNA) (Oct. 24, 1996).

⁸⁷ *Id.*

⁸⁸ Associated Press, *U.S. Tuna Embargo is Lifted After Seven Years*, THE SAN DIEGO UNION-TRIBUNE, Aug. 16, 1997.

⁸⁹ *Dolphin-Harmful Legislation Passes House; Defenders Says Congress Weakens Dolphin Protection in Name of Corporate Trade*, U.S. NEWSWIRE (May 21, 1997).

⁹⁰ Associated Press, *supra* note 88.

will become intertwined in the struggle over natural resources. This is only one example of the many issues over which nations disagree, and it highlights the need for international cooperation as the expanding human population places increasing demands on the world's natural resources.

It is interesting that the United States, which began its actions in a unitary legalistic manner through the MMPA, eventually used its relatively stronger economic and political position to disregard the GATT rulings. It is also striking that Mexico appears to have faithfully followed the various multilateral rules and agreements on dolphin protection. Organizations such as the IATTC presumably established these multilateral agreements through reasonable and scientific avenues. However, the relative strengths of the parties may ultimately determine which rules come to dominate.

The GATT decisions on the tuna-dolphin dispute did not bring an immediate resolution to the conflict. But this is not to say that the GATT process failed, or that GATT did not fulfill its purpose. Rulings by the GATT panels were not meant to be binding but were to be taken as recommendations. Indeed, the responses to the Panels highlighted a prominent characteristic of international agreements: there is no higher power or authority above the nations themselves to enforce these rulings. But in these tuna-dolphin controversies, GATT proceedings may have had indirect effects toward promoting freer trade. Perhaps the United States' continuous refusal to bend to the Panels' conclusions and the recognized rights of a poorer neighbor affected its image within the international community. During negotiations with the United States, other trading partners may have used the holdings of the Panels as representative of proper international cooperation. In any event, the United States eventually lifted the embargoes, and countries like Mexico may consider this outcome a victory for free trade advocates. For now, consumers are ultimately responsible for deciding which methods of tuna fishing are environmentally proper and socially acceptable.

