

DOLPHIN-SAFE TUNA: THE TIDE IS CHANGING

By
KRISTIN L. STEWART*

I. INTRODUCTION

The dolphin-tuna issue is once more a matter of public debate as Congress passed H.R. 408 in August 1997,¹ and President Clinton signed the International Dolphin Conservation Program Act into law.² The new measure amends the Marine Mammal Protection Act, thereby lifting embargoes against countries like Mexico, changing the definition of “dolphin-safe” tuna, and giving effect to the Declaration of Panama—a multinational dolphin conservation program designed to protect both dolphins and tuna stocks in the eastern tropical Pacific Ocean.³

Dubbed by some the “Dolphin Death Bill,” the introduction of H.R. 408 seemed to rend typically chummy environmental groups apart from one another.⁴ Those organizations that opposed the new U.S. law expressed concern that the provision was more about international trade issues than dolphin safety, and that instead of protecting dolphins, it would cause increased dolphin mortality during tuna harvesting.⁵

Many environmental organizations ardently support the new U.S. law and argue that the United States could not unilaterally influence dolphin safety in commercial fishing operations any longer, especially when the eastern tropical Pacific fishery was dominated by foreign fleets.⁶ Those that support the changes recognized that the international community had made great efforts to lower dolphin mortality—and that those efforts have

* Kristin Stewart is a practicing attorney in Pensacola, Florida with a keen interest in environmental advocacy and marine mammal welfare. The author wishes to thank her husband, Ben Clabaugh, for his helpful comments and tireless support.

¹ International Dolphin Conservation Program Act (IDCPA), Pub. L. No. 105-42, 111 Stat. 1122 (1997) (codified as amended in scattered sections of 16 U.S.C.).

² 143 Cong. Rec. H9862 (daily ed. Oct. 31, 1997).

³ International Dolphin Conservation Program Act, (IDCPA), Pub. L. No. 105-42, 111 Stat. 1122 (1997)) (codified as amended in scattered sections of 16 U.S.C.).

⁴ Danielle Knight, *Environment: Greens Split Over Dolphin Protection Agreement*, Int'l Press Serv. (Feb. 15, 1998), available at 1998 WL 5985850.

⁵ Bill Bryant, *Global Trade Needn't Come at Expense of Environment*, Seattle Post-Intelligencer, June 27, 1997, at A15.

⁶ *Id.*

paid off enormously—and that it was time for the United States to support, rather than stand in the way of, international progress.⁷

II. THE DOLPHIN-TUNA CONTROVERSY

A. *Dolphin Deaths in the Eastern Tropical Pacific Ocean*

Although the reasons are not fully understood, schools of large yellowfin tuna associate with dolphin schools in the eastern tropical Pacific Ocean (ETP),⁸ an area that covers more than five million square miles, stretching from the California coastline down to Chile and westward to Hawaii. Because dolphins are air breathing mammals, they are easily seen from a boat as they swim along the ocean surface. In the ETP, tuna fishermen know that where there are dolphins there are also swarms of prized yellowfin tuna swimming beneath them, so they seek out the dolphins in order to catch the tuna—a process called fishing “on dolphin.”⁹

Tuna fishermen had relied on the dolphin-tuna bond in the ETP for many years before using nets. At one time, fishing on dolphin to catch tuna was no real threat to dolphins, primarily because fishermen relied on the line-and-pole method to harvest yellowfin tuna.¹⁰ But technological advancement introduced a new fishing technique to the ETP in the late 1950s: purse seine nets.¹¹

⁷ *Id.*

⁸ MARINE MAMMAL COMM'N 1996 ANNUAL REPORT TO CONGRESS 97 (1997) [hereinafter 1996 MMCAR]. No one knows why the dolphins and tuna swim together—one theory suggests that because yellowfin tuna and certain species of dolphins share a similar diet and the bond is related to feeding. UNITED STATES INT'L TRADE COMM'N, TUNA: CURRENT ISSUES AFFECTING THE U.S. INDUSTRY 3-1 (1992) [hereinafter TRADE COMM'N TUNA REPORT].

⁹ 1996 MMCAR, *supra* note 8, at 97.

¹⁰ TRADE COMM'N TUNA REPORT, *supra* note 8, at 5-4. The line-and-pole method relies mostly on the use of hooks to catch the fish: after locating a school of tuna, bait is thrown overboard to attract the fish. As the tuna begin to feed on the bait, unbaited hooks are thrown into the water which the tuna also bite. The dolphins, though, eat only the bait fish and are, thus, at little risk of being caught or harmed. With the introduction of the purse seine nets in the 1960s, however, the threat to dolphins increased dramatically. Caroline E. Coulston, Comment, *Flipper Caught in the Net of Commerce: Reauthorization of the Marine Mammal Protection Act and its Effect on Dolphin*, 11 J. ENERGY NAT. RESOURCES & ENVTL. L. 97 (1990); Raul Pedrozo, *The International Dolphin Conservation Act of 1992: Unreasonable Extension of U.S. Jurisdiction in the Eastern Tropical Pacific Ocean Fishery*, 7 TUL. ENVTL. L.J. 77, 79 n.6 (1993).

¹¹ 1996 MMCAR, *supra* note 8, at 97. Raul Pedrozo explains the purse seine fishing method as follows:

Purse seine fishing involves the use of deep-walled, nylon webbed nets, some of which reach depths of over 500 fathoms. After the nets are placed in the ocean, dolphins are herded into the area using helicopters, speed boats and Class C explosives. The dolphins are then intentionally encircled with the nets. The bottom of the nets then are winched closed by steel cables to prevent the tuna from escaping to deeper water. As a result, a number of dolphins also are trapped within the net. The walls of the “purse” are then tightened and a second net is used to remove the tuna from the water. However, before hauling the tuna onboard, efforts are made to release any dolphins that remain within the “purse.” Notwithstanding these efforts, some animals inevitably become entangled in the nets and drown. Others are injured in the process and subsequently die from their injuries or are killed by sharks.

Purse seine nets allowed fishermen to meet increasing market demands by enabling them to catch more tuna in less time over a wider area of ocean.¹² Purse seiners position the net around a school of tuna and then pull it tight around the fish like a drawstring on a "purse," catching thousands of pounds of tuna at one time. When the technology was first employed in the ETP by U.S. fishing fleets in the late 1950s and 1960s, a great many dolphins were caught up in the nets with the tuna and drowned.¹³

B. Estimated Dolphin Mortality in the ETP

There is no question that dolphin mortalities in the ETP, particularly those of northeastern spotted and eastern spinner dolphins, increased measurably because of early purse seine fishing.¹⁴ The following tables provide information concerning dolphin mortality in the ETP due to purse seine fishing efforts:

TABLE 1
ESTIMATED INCIDENTAL KILL OF DOLPHINS IN THE
TUNA PURSE SEINE FISHERY IN THE EASTERN TROPICAL PACIFIC OCEAN
1972-1996¹⁵

Year	U.S. Vessels	Non-U.S. Vessel
1972	368,600	55,078
1973	206,697	58,276
1974	147,437	27,245
1975	166,645	27,812
1976	108,740	19,482
1977	25,452	25,901
1978	19,366	11,147
1979	17,938	3,488
1980	15,305	16,665
1981	18,780	17,199
1982	23,267	5,837
1983	8,513	4,980

Pedrozo, *supra* note 10, at 79 n.7.

¹² The United States' per capita tuna consumption more than doubled between 1950 and 1965, and by 1975, more than 25% of all fish consumed in the U.S. was tuna. Eugene Buck, *Dolphin Protection and Tuna Seining*, Cong. Res. Serv. Rep. 96-011 (1997).

¹³ *Id.* In fact, the U.S. International Trade Commission has estimated that since 1959 about seven and a half million dolphins have died in purse seine related deaths in the ETP. The majority of those deaths (over six million) occurred during the 1960s and 1970s. Pedrozo, *supra* note 10, at 79-80. However, technology in fishing with purse nets has advanced considerably over the last few decades. For example, in 1971, tuna seiner Harold Medina developed and introduced a special panel for purse seine nets that worked together with other new methods like backing-down vessels in order to release dolphins over the top and further reduced dolphin entanglement. These methods were improved further after the passage of the MMPA. Trade Comm'n Tuna Report, *supra* note 8, at 5-3 to 5-4.

¹⁴ 1996 MMCAR, *supra* note 8, at 97.

¹⁵ *Id.* at 98 tbl.10. "These estimates, based on kill per set and fishing effort date, are provided by the National Marine Fisheries Service and the Inter-American Tropical Tuna Commission. They include some, but not all, seriously injury animals released alive." *Id.* at 98 tbl.10 n.1.

1984	17,732	22,980
1985	19,205	39,642
1986	20,692	112,482
1987	13,992	85,185
1988	19,712	61,881
1989	12,643	84,403
1990	5,083	47,448
1991	1,002	26,290
1992	439	15,111
1993	115	3,601
1994	105	4,095
1995	0	3,274
1996	0	2,738 ¹⁶

TABLE 2
ESTIMATED U.S. AND FOREIGN DOLPHIN KILLS PER SET,
SETS ON DOLPHINS, OBSERVER COVERAGE AND NUMBER OF VESSELS¹⁷

	1988	1989	1990	1991	1992	1993	1994	1995	1996
<i>Kills per Set</i>									
U.S.	5.28	3.60	2.75	2.49	0.66	0.58	2.12	0.00	0.00
Foreign	9.17	9.34	5.41	2.90	1.56	0.52	0.51	0.45	0.34
<i>Sets on Dolphins</i>									
U.S.	3,766	3,435	1,801	430	654	201	50	0	0
Foreign	6,749	9,145	8,770	9,052	9,672	6,752	7,754	7,209	7,187
<i>Observer Coverage (in percent)</i>									
U.S.	53.2	99.0	100	100	100	97.3	100	100	100
Foreign	35.3	35.5	40.1	56.4	97.3	100	99.8	100	100
<i>Number of Vessels</i>									
U.S.	39	29	28	13	8	8	6	5	7
Foreign	93	93	95	91	88	89	93	99	103

III. UNITED STATES' DOMESTIC EFFORTS TO PROTECT DOLPHINS

A. *The Marine Mammal Protection Act*

In the 1970s, Congress responded to a growing public concern over the incidental killing of dolphins in the course of commercial fishing in the ETP and enacted the Marine Mammal Protection Act (MMPA)¹⁸ to protect marine mammals, including dolphins, from the adverse effects of human activities.¹⁹ The core of the MMPA was a "moratorium [that was placed]

¹⁶ This is a preliminary estimate. *Id.* at 98 tbl.10.

¹⁷ *Id.* at 99 tbl.11. Data was provided by the National Marine Fisheries Service and the IATTC. The 1996 figures are preliminary and observer coverage levels are given for the trips actually observed. Figures provided include observers placed under the U.S., the IATTC, and the Mexican national observer programs. Only vessels with a carrying capacity of 400 short tons or more were included. 1996 MMCA, *supra* note 8, at 99 tbl.11 nn.1-5.

¹⁸ 16 U.S.C. §§ 1361-1432 (1994).

¹⁹ See 16 U.S.C. § 1361(1) (1994). Tuna-related dolphin deaths in the ETP were among the factors driving the passage of the MMPA which prohibits the taking of any marine mammal in connection with the harvesting of fish. Coulston, *supra* note 10, at 105; 16 U.S.C. § 1371 (1994). For overviews of the Tuna-Dolphin controversy, see Jennifer Ramach, Note, *Dolphin-Safe Tuna Labeling: Are the Dolphins Finally Safe?*, 15 Va. Env'tl. L.J. 743, 746 (1996); Coulston, *supra* note 10; Stephen J. Porter, Note, *The Tuna/Dolphin Controversy:*

on the taking and importation of marine mammals and marine mammal products."²⁰ However, when it came to harvesting tuna, the statute carved out an exception to the moratorium: instead of an all-out ban, the statute provided a goal of reducing the incidental death of marine mammals by commercial fishing operations to "insignificant levels approaching a zero mortality."²¹ Moreover, the MMPA explicitly allows dolphin mortalities "in the course of purse seine fishing for yellowfin tuna," provided U.S. vessels use "the best marine mammal safety techniques and equipment that are economically and technologically practicable."²²

United States vessels continued to dominate the ETP tuna fishery until the late 1970s and 1980s, when the number of foreign vessels in the fishery grew.²³ Unfortunately, as the number of foreign vessels grew, so did the number of dolphin mortalities they caused, thereby off-setting the progress made by the U.S. fleet.²⁴ This, and perhaps a "desire to prevent U.S. vessels from skirting the stringent regulations by re-flagging as for-

Can the GATT Become Environment-Friendly?, 5 GEO. INT'L ENVTL. L. REV. 91, 93 (1992) (stating that Congress enacted the MMPA in part "to defuse the growing public outrage over the continuing slaughter of . . . [dolphins] in the course of commercial operations"). For related laws of other countries, see SADAT MARASHI, I COMPENDIUM OF NATIONAL LEGISLATION OF THE CONSERVATION OF MARINE MAMMALS pt. 1.3 (1986).

²⁰ 16 U.S.C. § 1371(a) (1994).

²¹ *Id.* The "immediate goal" of the MMPA was to reduce the "incidental kill or . . . serious injury of marine mammals permitted in the course of commercial fishing operations . . . to insignificant levels approaching . . . zero." 16 U.S.C. § 1371(a)(2) (1994).

²² *Id.* The MMPA authorized the Secretary of Commerce to issue permits allowing a defined number of dolphin mortalities per year. Marine Mammal Protection Act, 16 U.S.C. § 1371 (1994). The American Tunaboat Association is the only entity that has been issued a permit to date; the general permit allowed 20,500 incidental dolphin kills per year. American Tunaboat Association, Issuance of General Permit, 45 Fed. Reg. 80,855 (1980). The permit was issued by the National Marine Fisheries Administration on December 1, 1980. In 1984, Congress extended the permit indefinitely. 16 U.S.C. § 1374(h)(2)(a) (1994).

²³ 1996 MMCAR, *supra* note 8, at 97. Some suggest that it was the MMPA that prompted the decline of U.S. vessels. *Id.* However, the U.S. purse seiner fleet "was at its peak vessel number in 1979 when 140 vessels with a carrying capacity of 102,000 metric tons fished for [ETP] yellowfin tuna." Buck, *supra* note 12. Actually, changes in the 1980s that led to more efficient, larger vessels may have been the cause of the reduced U.S. fleet. *Id.* The late 1980s and early 1990s saw a dramatic decline in the number of U.S. vessels; in 1988, the number had dropped to 39, and by 1995, there were only 5 U.S. vessels fishing the ETP for yellowfin tuna. 1996 MMCAR, *supra* note 8, at 99 tbl.11.

²⁴ See *supra* notes 15-17 and accompanying tables. Foreign fleets in the ETP were responsible for an estimated 112,482 incidental dolphin deaths in 1986, where U.S. fleets made up for only 20,692 deaths in the same year. *Id.* According to the American Tunaboat Owners Coalition (ATOC), the increased foreign dolphin mortality rate is at least partly attributable to inexperienced captains on the newer foreign fleets. *Tuna/Dolphin Issues: Hearings on the Provisions of the International Dolphin Conservation Act, How It Is Affecting Dolphin Mortality, and What Measures Can Be Effected to Keep the Mortality To a Minimum, Before the Subcomm. on Fisheries, Wildlife and Oceans of the Comm. on Resources, 104th Cong. 78 (1995)* [hereinafter *IDCA Hearings*] (statement of James P. Walsh, American Tunaboat Owners Coalition); James P. Walsh, *With the Tuna-Dolphin Controversy Expected to Resurface, Congress Faces a Catch-22*, Nat'l L.J., June 12, 1995, at B6.

eign vessels,"²⁵ led Congress to amend the MMPA in 1984,²⁶ and again in 1988.²⁷

The MMPA amendments established actual performance standards for U.S. tuna boat captains and required improved fishing technology and vessel gear.²⁸ The amendments also instituted a one hundred percent observer program to monitor the fleet's new dolphin-safe measures.²⁹ Once these regulations were in place, the number of U.S. vessels harvesting tuna in the ETP declined further.³⁰ By 1995, the American Tunaboat Association reported that only five U.S. tuna vessels fished in the ETP, compared to ninety-two foreign tuna vessels.³¹

At the heart of the 1984 amendment to the MMPA was an import ban on yellowfin tuna harvested in the ETP by any nation that did not have a dolphin conservation program comparable to that of the U.S. purse seine fleet.³² The embargo provisions³³ also directed the Department of the

²⁵ Steve Charnovitz, *Dolphins and Tuna: An Analysis of the Second GATT Panel Report*, 24 *Env'tl. L. Rep.* [Env'tl. L. Inst.] 10,567, 10,569 (1994).

²⁶ Act of July 17, 1984, Pub. L. No. 98-364, 98 Stat. 440 (1984) (codified as amended in scattered sections of 16 U.S.C.).

²⁷ Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100-74, 102 Stat. 4755 (1988) (codified as amended in scattered sections of 16 U.S.C.). Congress amended the MMPA several times in the 1980s to afford even greater protection to dolphins in the ETP. In 1981, the annual dolphin mortality limit was set at 20,500 for the U.S. tuna fleet. Act of Oct. 9, 1981, Pub. L. No. 97-58, 95 Stat. 979 (1981).

²⁸ 50 C.F.R. § 216.24(d)(2)(iv)-(vii) (1997). For example, the amendment prohibited the use of purse seine nets after sunset, and required every vessel to engage in "backdown" procedures to release dolphins that were trapped in the net. Also, the amendment forbade the use of explosives to herd dolphins, and each boat was required to have the following equipment on board: a porpoise safety panel ("Madina Panel"), porpoise safety panel markers, porpoise apron, hand holds, corkline hangings, bunchlines, speedboats, rubber rafts, facemasks and snorkels, and spotlights. *Id.*

²⁹ 16 U.S.C. § 1374(h)(2)(B)(viii) (1994). Observers were certified by the National Marine Fisheries Service and the Inter-American Tropical Tuna Commission (IATTC). *Id.*

³⁰ See 1996 MMCAR, *supra* note 8, at 98 tbl.10. Due in part to a strong El Niño event and a growing Asian cannery industry, the early 1980s saw some U.S. fishermen relocate to the western Pacific Ocean fisheries to harvest skipjack tuna—less valuable than ETP yellowfin—which do not associate with dolphins. Trade Comm'n Tuna Report, *supra* note 8, at 3-18. Other U.S. fishermen sold their boats to foreign fleets. *IDCA Hearings*, *supra* note 24, at 126. One commentator suggested that most of the U.S. purse seine fleet was forced out of the ETP after three major U.S. tuna processors announced that they would purchase only "dolphin-safe" tuna. Pedrozo, *supra* note 10, at 91.

³¹ *IDCA Hearings*, *supra* note 24, at 125 (statement of Julius Zolezzi, President, American Tunaboat Association). In 1981, U.S. tuna fishermen caught more than 396,000 tons of tuna in the ETP. By 1994, the ATA reported that U.S. tuna vessels caught only 31,000 tons of yellowfin tuna in the ETP. *Id.*

³² Marine Mammal Protection Act 1994 Amendments, 16 U.S.C. § 1371(a)(2)(B) (1994).

³³ The U.S. imposed several import bans on tuna, including an embargo against Mexico in 1981. Taking of Marine Mammals Incidental to Commercial Fishing Operations, 46 *Fed. Reg.* 10,974 (1981). At the same time, however, Mexico was already under embargo in retaliation for having seized U.S. fishing vessels. This was not the first time the United States placed import restrictions on tuna, however. The United States imposed an embargo on Spain to promote healthy tuna stocks as well as for dolphin conservation in 1975 because overfishing by the Spanish fleet was undermining the effectiveness of the IATTC's conservation program. Buck, *supra* note 12.

Treasury, which oversees the Customs Service, to ban imports from those nations whose average dolphin mortality rates exceeded U.S. limits³⁴ and from those nations without an observer program that met the MMPA comparability standards.³⁵ As a result of the embargo provisions, the United States also imposed embargoes on tuna from the Congo, El Salvador, Peru, Senegal, the Union of Soviet Socialist Republics (now Russia), and Spain.³⁶

B. The "Dolphin-Safe" Tuna Movement

Consumer boycotts of canned tuna became widespread in the late 1980s as dolphin deaths in the ETP were increasingly publicized.³⁷ In 1988, an eleven-minute video, taken by a man working on board a Panamanian tuna vessel, publicly aired graphic footage of dolphins dying in fishing nets.³⁸ Consumers reacted with unprecedented outrage—environmental groups, local city governments, and school boards took action to support "dolphin-safe" tuna. School children banded together and wrote thousands of letters to their representatives in Congress.³⁹ The City Commission of St. Petersburg, Florida passed a resolution encouraging consumers to join the canned tuna boycott.⁴⁰ And across the country, school districts kept canned tuna out of their lunchrooms.⁴¹ Community groups also staged protests in front of tuna companies⁴² and promoted boycotts by running

³⁴ Marine Mammal Protection Act, 16 U.S.C. § 1371(a)(2)(B) (1994). The per vessel annual dolphin mortality rate of any foreign fleet could be no more than 1.25 times that of the American fleet by the end of 1990 and thereafter. *Id.* § 1415(b)(2)(B). Additionally, the MMPA amendments prevented "tuna laundering" by prohibiting intermediary nations from exporting yellowfin tuna to the U.S. unless they certified by "reasonable proof" that they had taken some action to prohibit the importation of tuna subject to the primary embargo. 16 U.S.C. § 1371(a)(2) (1994). An "intermediary nation" was defined as "a nation that exports yellowfin tuna or yellowfin tuna products to the United States and that imports yellowfin tuna or tuna products." 50 C.F.R. § 216.3 (1997).

³⁵ A foreign country was required to show that its fleet was being monitored by observers from the IATTC or an "equivalent" international program in which the United States participated, and that the level of observer coverage met or exceeded that imposed by the MMPA on U.S. vessels. Taking of Marine Mammals Incidental to Commercial Fishing Operations, 54 Fed. Reg. 20,171 (1989).

³⁶ 53 Fed. Reg. 8,911 (1988).

³⁷ Ramach, *supra* note 19, at 63 (citing Michael Parrish, *Film Turns Tide for Dolphins at StarKist Tuna*, L.A. Times, Apr. 14, 1990, at D1).

³⁸ The video was filmed by Samel F. LaBudde, who was working undercover on board a Panamanian tuna vessel and supported by Earth Island Institute. The original video was five hours long but was edited down to 11 minutes to be aired on television. *Id.*

³⁹ One commentator noted: "[N]ever before or since has Congress received so much mail from schoolchildren on any environmental issue." Faye Fiore, *Dolphin Protection Law Under Attack*, The Record, Sept. 10, 1995, at A25.

⁴⁰ Ramach, *supra* note 19, at n.68 (citing Patty Curtin, *Just Saying No to Nets*, St. Petersburg Times, July 20, 1989, at 8).

⁴¹ See generally *Id.* (citing cases in different areas around the U.S. where schools banned tuna).

⁴² Brenda Killian, *The Dolphin-Safe Tuna Anniversary: A Personal Perspective of Five Years of International Tuna Monitoring*, Ocean Alert, Fall 1995.

advertisements with emotionally appealing statements like, "all you need to kill a dolphin is a can opener."⁴³

Responding to the boycotts, as well as the growing public relations problem, the three principal U.S. tuna processors, StarKist, Van Camp/Chicken of the Sea, and Bumblebee, announced in April 1990 that they would no longer purchase tuna caught by a method that harmed dolphins.⁴⁴ The three companies—which at that time produced some eighty percent of the United States' canned tuna—began to affix labels on their products advertising that their tuna was "dolphin-safe."⁴⁵

Congress followed corporate America's lead: In response to the voluntary actions taken by the tuna canneries and pressure from environmental organizations, the legislature mandated criteria for labeling tuna products dolphin-safe by enacting the Dolphin Protection Consumer Information Act (DPCIA) in 1990.⁴⁶ To qualify as dolphin-safe, yellowfin tuna caught in the ETP must have (1) been caught by a vessel too small to use nets on dolphins, or (2) been certified by the captain of the vessel that no nets were intentionally set on dolphins during the entire voyage.⁴⁷ Thus, any nets used in harvesting tuna—whether a dolphin was killed or not—rendered the product unqualified as dolphin-safe.⁴⁸

IV. INTERNATIONAL EFFORTS TO PROTECT DOLPHINS

A. *History of Multinational Dolphin Conservation Efforts*

The United States first sought an international agreement for dolphin conservation in the early 1970s when the United States proposed a new protocol to the international Convention for the Regulation of Whaling.⁴⁹ For many years the U.S. government also urged the Inter-American Tropical Tuna Commission (IATTC) to develop programs addressing dolphin

⁴³ Ramach, *supra* note 19, at 752 n.68 (quoting Jon Wison, *Group Launches Ad Campaign to Protect Dolphins*, St. Petersburg Times, Nov. 26, 1989, at 13C).

⁴⁴ Whether the consumer boycotts had a negative economic effect is not too clear, even though StarKist cited consumer pressure as a reason for its decision to stop purchasing tuna caught by setting nets on dolphins. Trade Comm'n Tuna Report, *supra* note 8, at 3-10. According to at least one analyst, the company's revenue and profit actually increased over the two years that Earth Island Institute led the consumer boycott. Ramach, *supra* note 19, at 752 (citing Anthony Rameriz, *Epic Debate Led to Heinz Tuna Plan*, N.Y. TIMES, Apr. 16, 1990, at D1). The company's pre-tax income was \$160 million in 1990—up over 10% from 1989. *Id.*

⁴⁵ TRADE COMM'N TUNA REPORT, *supra* note 8, at 3-10. It was reported that the companies required observers on each vessel to testify that no dolphins were associated with the tuna catch before they attached the dolphin-safe label. Ramach, *supra* note 19, at 753 (citing *Tuna Companies Bar Dolphin Catch*, ST. PETERSBURG TIMES, Apr. 13, 1990, at A1).

⁴⁶ Dolphin Protection Consumer Information Act of 1990, 16 U.S.C. § 1385 (1994).

⁴⁷ 16 U.S.C. § 1385(d)(2) (1994). A written statement by the Secretary of Commerce or an IATTC representative was required stating that an approved observer was on board during the entire voyage and no nets were intentionally set on dolphins. 16 U.S.C. 1385(d)(2)(B)(ii) (1994).

⁴⁸ 16 U.S.C. § 1385(d)(2) (1994).

⁴⁹ Marine Mammal Protection Act, Report of the Secretary of Commerce, 38 Fed. Reg. 20,564 (1973). Unfortunately, those efforts ultimately failed.

protection in the ETP.⁵⁰ These programs ultimately proved very successful.⁵¹ Additionally, the United States has periodically provided technical assistance to other nations attempting dolphin-conscious fishing and has provided most of the financial support for the IATTC's dolphin-tuna program because the MMPA *requires* the United States to seek international cooperation⁵² by directing the U.S. government to pursue negotiations for bilateral and multilateral agreements with other nations engaged in commercial fishing unduly harmful to marine mammals.⁵³

B. *Early Challenges to the MMPA Under GATT*

In 1990, international conflict over the dolphin-tuna issue emerged. It began when Mexico challenged the embargo of its tuna under the MMPA as being inconsistent with U.S. obligations under the General Agreement on Tariffs and Trade (GATT).⁵⁴ The 1988 amendments to the MMPA⁵⁵ and a federal court order requiring Department of the Treasury to adhere to the provisions of the 1988 ban on certain tuna imports⁵⁶ led U.S. Customs to bar tuna imports from Mexico, Panama, and Ecuador in September of 1990.⁵⁷ The embargo had the greatest impact on Mexico, since Mexico had more vessels fishing the ETP than any other country.⁵⁸ Distraught by the state of events, Mexico petitioned the GATT Council in January 1991 to adjudicate whether the MMPA's import restrictions conformed with GATT.⁵⁹ Finding in Mexico's favor, the GATT panel ruled that the MMPA provisions violated GATT.⁶⁰

The MMPA was challenged a second time by the European Community and The Netherlands in 1992, claiming that the intermediary nation

⁵⁰ MMPA Report and Studies, 39 Fed. Reg. 12,051 (1974); Status of Marine Mammal Species and Population Stocks, 40 Fed. Reg. 30,678 (1975); Marine Mammals, Report of the Secretary of Commerce, 41 Fed. Reg. 30,152 (1976); Status of Marine Mammals, Report of the Secretary of Commerce, 42 Fed. Reg. 38,982 (1977).

⁵¹ See *supra* notes 10-12 and accompanying text.

⁵² 16 U.S.C. §§ 1378, 1381 (1994).

⁵³ 16 U.S.C. § 1378(a)(2) (1994).

⁵⁴ General Agreement of Tariffs and Trade, opened for signature Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187. For a background on the GATT adjudicatory Process, GATT rules as they applied to Mexico's challenge to the MMPA and the subsequent challenge by the European Union and The Netherlands, see generally Charnovitz, *supra* note 25; Joel P. Trachtman, *Decision: GATT Dispute Settlement Panel*, 86 Am. J. Int'l L. 142 (1992).

⁵⁵ See *supra* note 27 and accompanying text.

⁵⁶ Earth Island Institute v. Mosbacher, 746 F. Supp 964 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991) (affirming the preliminary injunction that the trial court imposed). Because the Department of Treasury was ignoring the mandates of the 1988 amendments to the MMPA, Earth Island Institute, an environmental organization, filed suit in federal court to require U.S. Customs to stop importing tuna from nations subject to the provisions of the MMPA. *Id.*

⁵⁷ Charnovitz, *supra* note 25, at 10,570.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* The GATT panel found that the import restrictions "(1) did not qualify as a GATT Article III internal regulation that applied equally to imports, (2) was a quantitative restriction violative of GATT Article XI, and (3) did not fit within any of the GATT Article XX general exceptions." *Id.*

embargoes were also inconsistent with GATT. As it did with regard to Mexico's challenge, the GATT panel found for the petitioning nations, holding that the U.S. embargo was inconsistent with GATT.⁶¹ However, the GATT panel decisions have not been formally adopted by the GATT Council and thus, are not binding on the United States.⁶² In fact, Mexico voluntarily withheld final action on the panel report after the United States and Mexico reached a tentative compromise.⁶³ If the panel report were to be adopted at a later date, it could mean costly sanctions against the United States.⁶⁴ However, GATT's dispute panel indicated that U.S. import proscriptions might be permissible if they were designed to ensure compliance with a multilateral agreement.⁶⁵

C. *The Inter-American Tropical Tuna Commission*

Notwithstanding trade conflicts under GATT, the early 1990s witnessed the birth of auspicious international cooperation to reduce dolphin mortality in the ETP. In 1992, a special meeting of the IATTC⁶⁶ was held where participants from all nations with an interest in the ETP fishery, whether members of the IATTC or not, met and agreed to implement an expanded international dolphin conservation program.⁶⁷

Since the United States and Costa Rica first established the organization in 1949, the IATTC's primary concern has been the conservation of marine resources in the ETP.⁶⁸ Although obviously concerned with maintaining healthy tuna stocks, since the mid-1970s, the IATTC has taken the lead in evaluating and reducing dolphin mortality in the ETP tuna fishery.⁶⁹ The IATTC has been working since 1976 towards balancing the interests of the tuna industry in the ETP and the dolphin conservationists, including (1) striving to maintain a high level of tuna production, (2) maintaining dolphin stocks at or above levels that assure their survival, and (3) making every reasonable effort to avoid needless or careless killing of dol-

⁶¹ *Id.* at 10,567.

⁶² *Id.*

⁶³ TRADE COMM'N TUNA REPORT, *supra* note 8, at 3-14 to 3-15. Even so, GATT rules require that the contracting parties must formally accept the panel report, in this case, both Mexico and the United States, before it will bind the U.S. However, Mexico does have the power to take the dispute before the World Trade Organization (WTO), GATT's successor, and keep the U.S. from blocking the adoption of the panel report. *See* Ramach, *supra* note 19, at 756.

⁶⁴ *Id.* Eugene Buck, *Tuna and the GATT*, Cong. Res. Serv. Rep. No. 91-666, at 2 (1991).

⁶⁵ Trachtman, *supra* note 56, at 150.

⁶⁶ The IATTC was established in 1949 by the United States and Costa Rica pursuant to a bilateral fishing agreement. Convention for the Establishment of Inter-American Tropical Tuna Commission, May 31, 1949, U.S.-Costa Rica, 1 U.S.T. 230. Other member states include Panama, Ecuador, Canada, Japan, France and Nicaragua. Mexico and Costa Rica withdrew from the organization. Pedrozo, *supra* note 10, at 95 n.105. Mexico's announced reason for leaving was a conflict over fishing rights. Charnovitz, *supra* note 25, at 10,571 n.44.

⁶⁷ 1996 MMCAR, *supra* note 8, at 98.

⁶⁸ Ramach, *supra* note 19, at 744. The IATTC "make[s] recommendations for the management and conservation of the tuna resources of the eastern Pacific Ocean." Jeffrey L. Dunoff, *Reconciling International Trade With Preservation of the Global Commons: Can We Prosper and Protect?*, 49 Wash. & Lee L. Rev. 1407 n.75 (1992).

⁶⁹ Pedrozo, *supra* note 10, at 95.

phins.⁷⁰ To further these goals, the IATTC instituted a volunteer observer program in 1979 to monitor the fishing practices and performance of the foreign fleets.⁷¹ Since 1988, each of the ETP harvesting states with purse seine fleets, including the United States, Mexico, Panama, Venezuela, the Island of Vanuatu, El Salvador, Ecuador, and Spain, have voluntarily participated in the program.⁷²

In 1991, the IATTC set as its goal a reduction in fishing related dolphin mortality to "levels approaching zero."⁷³ In furtherance of the new goal, the IATTC implemented regulations that required an aggressive research program to identify alternative fishing methods that avoided dolphin encirclement.⁷⁴ Member nations also agreed to implement a watershed dolphin conservation program beginning in 1992.⁷⁵ The combined initiatives seemed to yield fantastic results: between 1986 and 1991, dolphin mortality in the ETP dropped some eighty percent.⁷⁶

D. *The La Jolla Agreement: International Dolphin Conservation Program*

Named for the site of the negotiations in La Jolla, California, the La Jolla Agreement⁷⁷ was adopted in 1992 by ten governments⁷⁸—all nations participating in the ETP tuna fishery—and was the first ever multilateral agreement to protect dolphins.⁷⁹ The La Jolla Agreement, a voluntary program, sought an additional eighty percent reduction in dolphin mortality between 1993 and 1999,⁸⁰ calling for dolphin death rates to reach "insignif-

⁷⁰ TRADE COMM'N TUNA REPORT, *supra* note 8, at 3-1 (1992) (quoting IATTC, 1979 Annual Report to the Inter-American Tropical Tuna Commission (1981)).

⁷¹ Taking of Marine Mammals Incidental to Commercial Fishing Operations, *supra* note 33, at 20,172. The data is used to calculate annual dolphin mortality rates for each major species and stock of dolphin. *Id.* Also, dolphin mortality data collected by the observers was used by tuna harvesting nations to show compliance with the comparability standard of the MMPA. Taking and Importing of Marine Mammals; "Dolphin Safe" Tuna Labeling, 56 Fed. Reg. 47,418 (1991) (to be codified at 50 C.F.R. pts. 216, 247); Regulations Governing the Importation of Tuna Taken in Association With Marine Mammals, 53 Fed. Reg. 8910 (1988) (to be codified at 50 C.F.R. pt. 216).

⁷² Taking of Marine Mammals Incidental to Commercial Fishing Operations, *supra* note 33, at 20,172. Although observer coverage was originally set at 33%, in 1991 the ETP harvesting countries committed to 100% observer coverage. *See* Taking and Importing of Marine Mammals; Listing of Eastern Spinner Dolphin as a Threatened Species, 57 Fed. Reg. 47,620, 47,624 (1992).

⁷³ Taking and Importing of Marine Mammals; Listing of Eastern Spinner Dolphin as a Threatened Species, *supra* note 71, at 47,625.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Dolphin mortality from foreign vessels went from approximately 112,000 in 1986 to 26,000 in 1991. 1996 MMCAR, *supra* note 8, at 98 tbl.10.

⁷⁷ Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean (EPO), adopted June 1992, 33 LL.M. 936 (1994) [hereafter La Jolla Agreement].

⁷⁸ Venezuela, Vanuatu, the United States, Spain, Panama, Nicaragua, Mexico, Ecuador, Costa Rica, and Columbia. *Id.* at 938.

⁷⁹ Pedrozo, *supra* note 10, at 96.

⁸⁰ La Jolla Agreement, *supra* note 77, at 938.

icant levels" by the turn of the century.⁸¹ To reach these goals, a system of individual vessel quotas based on the total number of purse seiners in the fishery was established so that, by 1999, the dolphin mortality rate will be limited to less than 5,000—or less than 0.1 percent of the estimated dolphin population.⁸²

Actually, dolphin mortality declined with unprecedented speed after the La Jolla Agreement was in place.⁸³ The IATTC's goal of less than 5,000 was reached far ahead of schedule: In 1993, the estimated incidental kill of dolphins in the ETP caused by foreign vessels was approximately 3,600.⁸⁴

The La Jolla Agreement also included the continuation of the international observer program and added the requirement that at least fifty percent of the observers placed by a nation each year be deployed by the IATTC.⁸⁵ Beginning January 1, 1993, every vessel in the ETP⁸⁶ is accompanied by an internationally accredited observer⁸⁷ who collects scientific research and ensures compliance with the La Jolla Agreement.

The La Jolla Agreement also established an international review panel to monitor compliance with the dolphin mortality limits by the international fleet.⁸⁸ The panel is made up of representatives from the participat-

⁸¹ *Id.*; Ramach, *supra* note 19, at 756-57.

⁸² The following annual limits are suggested by the La Jolla Agreement:

Year	Limit	Percentage of best estimate of current populations of spotted, spinner and common dolphins
1993	19,500	0.30
1994	15,500	0.24
1995	12,000	0.19
1996	9,000	0.14
1997	7,500	0.11
1998	6,500	0.10
1999	<5,000	0.08

La Jolla Agreement, *supra* note 77, at 938. Additional protections are provided for individual species of dolphins in Appendix III of the agreement. *Id.* at 941.

⁸³ 1996 MMCAR, *supra* note 8, at 100. Because dolphin deaths dropped so quickly, the parties adopted further resolutions to reduce overall dolphin mortality limits for 1994 and 1995 to 9,300 for each year. The limit for 1996, previously set at 9,000 under the 1992 agreement, was not reduced. *Id.*

⁸⁴ If the annual kill for U.S. vessels is added to the number, the total is still only 3,716. 1996 MMCAR, *supra* note 8, at 98 tbl.10.

⁸⁵ La Jolla Agreement, *supra* note 77, at 939.

⁸⁶ *Id.* at 939. These regulations apply to every vessel that is greater than 400 short tons carrying capacity. *Id.* at 938.

⁸⁷ *Id.* Some of these observers are from accredited national programs, but most are international observers employed by the IATTC. *Id.*

⁸⁸ *Id.* at 940. This panel meets approximately three times annually and is responsible for reviewing and reporting on the compliance of the international fleet with the La Jolla Agreement. Some say this is a very strong incentive for vessel captains and one of the key elements that has impacted the dramatic reduction in dolphin mortality. *Dolphin Conservation: Hearing on H.R. 408 Before the Subcomm. on Fisheries, Wildlife and Oceans of the House Comm. on Resources*, 105th Cong. (1997), available at 1997 WL 168444 (statement of Mary Beth West, Deputy Ass. Secretary for Oceans, Bureau of Oceans and International Environmental and Scientific Affairs) [hereinafter West Testimony].

ing governments, the fishing industry, and non-governmental environmental organizations. It is responsible for reviewing issues arising in the implementation of the program established by the La Jolla Agreement, as well as verifying performance of individual vessels.⁸⁹ The data collected by the observers is reviewed and, when a violation of the standards is found, the flag state is notified and requested to report to the panel who will initiate enforcement action.⁹⁰ The existing research and educational programs set in place by the IATTC were also expanded by the international program.⁹¹

The program also included the establishment of a scientific advisory board to assist the IATTC in coordinating, facilitating, and guiding research directed at reducing dolphin mortality.⁹² The board consists of representatives from government agencies, environmental groups, the fishing industry, and the international scientific community.⁹³ Initially, the research program was established to focus on improving current purse seine technology to make that method of harvesting tuna even safer for dolphins.⁹⁴ The program also mandates that scientists seek alternative methods of harvesting tuna that do not involve the encirclement of dolphins.⁹⁵

The parties to the La Jolla Agreement also agreed to a system limiting each vessel in the ETP fishery to a strict individual Dolphin Mortality Limit (DML).⁹⁶ DMLs are only allocated to those vessels that meet certain criteria, including one hundred percent observer coverage, possession of the equipment required for releasing captured dolphins unharmed, commitment to adhere to IATTC standards regarding fishing practices, training of key crew members in dolphin safety techniques, and the payment of funds to support the observer program.⁹⁷ Vessels are only permitted to harvest tuna if they meet these requirements and can remain beneath their individ-

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 1996 MMCAR, *supra* note 8, at 100.

⁹² La Jolla Agreement, *supra* note 77, at 938.

⁹³ *Id.*

⁹⁴ *See* Pedroza, *supra* note 10, at 98.

⁹⁵ *Id.* Scientists are looking for techniques other than fishing "on school" or "on log". For example, scientists proposed "separating tunas and dolphins prior to encirclement using acoustic stimuli, prey, or other stimuli . . . , using paired-trawls to capture tunas associated with dolphin without encirclement . . . , initial[ing] tracking and other behavioral studies of tunas and dolphins . . . , locating large yellowfin tuna with FADs [Fish Aggregation Devices], light detecting and ranging devices (LIDAR) or other optical sensors, and aggregating tunas with bait[, and] . . . predicting the spatial distribution and catchability of large yellowfin tuna with oceanographic data." 57 Fed. Reg. 21,081 (1992).

⁹⁶ La Jolla Agreement, *supra* note 77, at 938-939. For 1996 the Dolphin Mortality Limit (DML) for individual vessels was set at 96; ninety-four vessels were originally issued a DML in 1996, including thirty-seven vessels from Mexico, twenty from Venezuela, fourteen from the Island of Vanuatu, eight from Columbia, seven from Ecuador, three from Panama, and five from the United States. *Id.*

⁹⁷ *Id.* at 938-40. Under that system, any vessel that does not use any of its DML quota by June 1 of the year forfeits its quota for the remainder of the year. *Id.* at 939. No United States vessel used its dolphin mortality limits in 1996. They had requested the DML "in anticipation that the . . . [MMPA] might be amended to allow the resumption of setting on dolphins [with purse seine nets] by U.S. vessels under the [IDCA]." 1996 MMCAR, *supra* note 8, at 100.

ual DML.⁹⁸ Any vessel that exceeds its DML will have the amount of the excess deducted from its DML for the following year.⁹⁹

V. THE UNITED STATES GETS CAUGHT IN THE NET

A. *International Dolphin Conservation Act*

As the U.S. Administration, along with the other nine signatories to the La Jolla Agreement, concluded the special meeting of the IATTC, Congress was at home devising its own domestic plan to promote dolphin protection—The International Dolphin Conservation Act (IDCA).¹⁰⁰ In part designed to address GATT concerns,¹⁰¹ the IDCA sought to eliminate, rather than merely reduce, incidental dolphin mortality in the ETP.¹⁰² The legislation established a framework for a global moratorium on the use of purse seine nets and the fishing technique of setting on dolphins to harvest tuna,¹⁰³ and, as incentive, provided for U.S. embargoes to be lifted from any nation that committed to implementing the moratorium.¹⁰⁴

No fishing nation agreed to the moratorium,¹⁰⁵ so certain provisions of the IDCA never became effective. Other parts of the Act were not contingent on the moratorium, however.¹⁰⁶ In 1992, the dolphin-safe definition established by the 1990 DPCIA¹⁰⁷ took on international meaning as it banned the sale, shipment, or importation in the United States of any tuna or tuna product that was not “dolphin-safe.”¹⁰⁸ Thus, nations which set on dolphins with purse seine nets were excluded from the U.S. market.¹⁰⁹

Three years after Congress enacted the IDCA, at the June 1995 meeting of the IATTC, six parties to the La Jolla Agreement issued a formal statement urging the United States to lift the embargoes that were in effect.¹¹⁰ In so doing, Colombia, Costa Rica, Ecuador, Mexico, Panama, and Venezuela reiterated their commitment to dolphin conservation in the ETP

Unused DML quotas may then be allocated to other vessels for the second half of the year. La Jolla Agreement, *supra* note 77, at 939.

⁹⁸ West Testimony, *supra* note 88.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ 1996 MMCAR, *supra* note 8, at 98.

¹⁰² 16 U.S.C. §§ 1411-1418 (1994). To make the change from reducing to eliminating mortality, the IDCA added a chapter to the MMPA (Subchapter IV) authorizing the Secretary of State to enter into agreements to establish a five-year moratorium on the use of purse seine nets to encircle dolphins while harvesting tuna. 16 U.S.C. § 1412(a) (1994).

¹⁰³ 1996 MMCAR, *supra* note 8, at 98.

¹⁰⁴ 16 U.S.C. §§ 1412(c), 1415(a) (1994).

¹⁰⁵ 1996 MMCAR, *supra* note 8, at 98.

¹⁰⁶ For example, changes included revising the quotas applicable to the U.S. fleet, and modifying the American Tunaboat Association's general permit to prohibit setting on eastern spinner or coastal spotted dolphins. *Id.*

¹⁰⁷ See *supra* note 46 and accompanying text.

¹⁰⁸ 16 U.S.C. § 1417(a)(1) (1994). Thus, regardless of whether a nation was meeting MMPA comparability standards, any vessel that used purse seine nets was banned from the U.S. market. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ 1996 MMCAR, *supra* note 8, at 101.

under the La Jolla Agreement.¹¹¹ They argued that compliance with the conservation programs initiated by the La Jolla Agreement were environmentally sound and, thus, their practices should not subject them to an embargo.¹¹² In fact, they argued that increased use of dolphin-safe fishing methods as contemplated by U.S. legislation would harm biodiversity by increasing the discard of juvenile tuna and the bycatch of other non-target species.¹¹³ The nations endorsed fishing for tuna by setting on dolphins as the most effective method for protecting the tuna stocks as well as the overall resources and ecosystem of the ETP.¹¹⁴

B. 1995 Congressional Oversight Hearing

The tuna-fishing nations expressed concern that the embargoes threatened the continued viability of the La Jolla Agreement and called on the United States to abandon the embargoes and redefine the term "dolphin-safe" and to include measures adopted pursuant to the La Jolla Agreement.¹¹⁵ As a result, the Subcommittee on Fisheries, Wildlife, and Oceans of the U.S. House of Representatives Committee on Resources convened an oversight hearing in June 1995.¹¹⁶ Representatives of the U.S. Administration, the IATTC, U.S. fishing interests, and environmental groups all attended the hearing.¹¹⁷

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* There are three principal methods of catching tuna today; the alternatives to fishing on dolphin are fishing "on log," and fishing "on school." See *supra* note 95 and accompanying text. In fishing for tuna on log, the fishermen encircle a floating object with a net, because tuna (and other sea life) tend to aggregate beneath floating logs or artificial logs (known as fish aggregating devices (FADs)). The fishermen then pull in the net with all of the contents. This is not only a second-choice method for fisherman because of higher per-set failure rates, the ecosystem seems to suffer high costs because the incidental bycatch of such species as turtles, sharks and billfish is significant. *Dolphin-Safe Tuna: Hearings on S. 39 Before the Subcomm. on Oceans and Fisheries of the Senate Comm. of Commerce, Science and Transportation*, 105th Cong. 45, 73 (1997) (statements of Suzanne Iudicello, Center for Marine Conservation, and D. James Baker, Under Secretary for Oceans & Atmosphere, U.S. Dep't of Comm.). Fishing on school uses a combination of spotters, sonar and other identification techniques. The per-set failure of this method is extremely high, as are the levels of incident bycatch of non-target marine life, including substantial numbers of juvenile tuna. *Id.* The average weight of a tuna caught by this method is less than ten pounds, well below the average weight of a reproductive mature tuna. *Id.*

¹¹⁴ 1996 MMCAR, *supra* note 8, at 101.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ 1996 MMCAR, *supra* note 8, at 101. The testimony of representatives of the National Fisheries Institute (NFI)—with a membership of approximately 1,000 fishery-related businesses—illuminated the broader ramifications of continued U.S. tuna embargoes on the seafood industry. Marine Mammal Comm'n 1995 Annual Report to Congress 105 (1996) [hereinafter 1995 MMCAR]. The NFI argued that imposition of unilateral trade sanctions and refusal of the United States to realize the importance of the international agreement undermined the cooperation needed to conserve all fishery resources (including those outside the ETP). *Id.* Of particular concern was the need for cooperation with Mexico, Venezuela, and other western hemisphere nations in managing fish stocks under the auspices of the International Commission for Conservation of Atlantic Tunas and in reducing the take of sea turtles incidental to shrimp fisheries. *Id.* They also argued that the nations subject to the U.S. em-

The State Department agreed with the tuna-fishing nations that the embargoes had outlived their usefulness and may have become counter-productive, because they were pushing some nations to consider abandoning the international program altogether.¹¹⁸ Witnesses representing the IATTC and the U.S. tuna industry echoed arguments made by the State Department.¹¹⁹ The IATTC noted, in support of its position, that (1) considerable progress had been made under the international program implemented by the La Jolla Agreement, (2) the threat by some nations to withdraw from the program was serious, (3) the number of sets on dolphins in the ETP had not declined appreciably despite the U.S. embargoes, and (4) aborting the practice of using purse seine nets to set on dolphins would have adverse effects on tuna stocks and other living marine resources.¹²⁰

Some environmental organizations disapproved completely.¹²¹ Reiterating their commitment to a complete elimination of dolphin mortality and to the establishment of a global moratorium on the practice of setting on dolphins,¹²² Earth Island Institute representatives argued that the embargo provisions were working and should be retained.¹²³ They further maintained that, even if no dolphins were killed in the nets themselves, the practice of herding the dolphins into the netted area likely causes considerable stress and numerous physiological difficulties.¹²⁴ In addition, concerns were raised about whether the IATTC was truly objective, whether IATTC observers might be influenced to misreport dolphin mortalities and dolphin school sizes, and whether there was sufficient objective scientific peer review of IATTC programs.¹²⁵

Not all environmental groups were in accord, however. The Center for Marine Conservation and other organizations it represented¹²⁶ questioned the durability of a unilateral approach to dolphin conservation such

bargoes had found alternative markets for their tuna and those suffering most were U.S. firms and customers that historically relied on banned products. *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* The IATTC presented data supporting the position that switching to log sets and school sets—the two principal alternative fishing methods—would result in greatly increased bycatch of immature tuna and other species, including billfish, sharks, mahimahi, and sea turtles. The IATTC estimated that if there were a wide scale shift to what the U.S. contemplated as “dolphin-safe” fishing practices, ten to twenty-five million undersized yellowfin tuna with no commercial value would be caught and discarded each year. *Id.* at 102.

¹²¹ *Id.* (primarily Earth Island Institute and the groups it represents: sixteen environmental organizations, including Defenders of Wildlife and Humane Society of the United States).

¹²² *Id.*

¹²³ 1995 MMCAR, *supra* note 117, at 106. Earth Island Institute also opposed allowing the IATTC control over dolphin conservation. They argued that the IATTC is a “fisheries organization whose primary mission is to ensure sustainable tuna production.” *Id.*

¹²⁴ 1996 MMCAR, *supra* note 8, at 102.

¹²⁵ Buck, *supra* note 12.

¹²⁶ The Center presented testimony on behalf of itself, the Environmental Defense Fund, Greenpeace, the National Audubon Society, the National Wildlife Federation, the Whale and Dolphin Conservation Society, and World Wildlife Fund. 1995 MMCAR, *supra* note 117, at 106.

as that embodied in the MMPA.¹²⁷ Although these groups did not immediately support amendments to the MMPA, they did suggest that relevant issues be addressed through a multilateral process that would result in a binding international agreement.¹²⁸ Furthermore, the Center for Marine Conservation recommended that any international agreement should address the conservation of the ecosystem and biological diversity of the ETP, establish international conservation and management of both dolphin and tuna stocks, and keep mindful of consumer confidence.¹²⁹

Congress did not take immediate action after the June 1995 congressional oversight hearing. As a result, representatives of the fishing-nations, Colombia, Costa Rica, Ecuador, Mexico, Panama, and Venezuela, although heartened by what had transpired at the hearing, met in July 1995 to express concern that there had been no call to amend the legislative definition of dolphin-safe tuna.¹³⁰ The nations issued a declaration that, without a provision redefining the term of dolphin-safe, merely lifting the tuna embargoes would be unacceptable.¹³¹ Again, they reiterated their position that the continued viability of the La Jolla Agreement would be jeopardized unless the United States enacted legislation lifting the primary and secondary embargoes, codifying the La Jolla Agreement, and redefining dolphin-safe to include tuna harvested in accordance with the regulatory practices adopted under the international program.¹³²

C. Declaration of Panama

Disgruntled by the pace at which the United States was pursuing international negotiations concerning the dolphin-tuna issue and concerned for the efficacy of the La Jolla Agreement, six environmental organizations¹³³ initiated a meeting in September 1995 with representatives of Mexico to discuss the idea of a multinational agreement among the tuna-fishing nations consistent with the international program.¹³⁴ The discussions proved successful and ultimately led to a compromise approach supported by the tuna-fishing nations, the attendant environmental community, and the U.S. Administration.¹³⁵ More importantly, the discus-

¹²⁷ *Id.* They also agreed that there was evidence to suggest a widespread shift to other fishing practices—on log or on school—would create other bycatch problems. Furthermore, the Center recognized that the 1992 amendments to the MMPA—the IDCA—calling for a moratorium on purse seine fishing had failed miserably. 1995 MMCAR, *supra* note 117, at 106.

¹²⁸ 1996 MMCAR, *supra* note 8, at 102.

¹²⁹ 1995 MMCAR, *supra* note 117, at 106.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 106-07.

¹³³ The environmental groups included the Center for Marine Conservation, the Environmental Defense Fund, Greenpeace, the National Wildlife Federation, and the World Wildlife Fund. *Id.*

¹³⁴ 1996 MMCAR, *supra* note 8, at 102.

¹³⁵ *Id.*

sions formed the basis for the latest international agreement—the Declaration of Panama (the Declaration).¹³⁶

In October 1995, twelve nations, including Belize, Colombia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, Vanuatu, Venezuela, and the United States, signed the Declaration.¹³⁷ The document begins with each nation reaffirming the objectives of the La Jolla Agreement, including commitments to “progressively [reduce] dolphin mortality in the [ETP] fishery to levels approaching zero” through setting annual limits that “eliminate dolphin mortality” in the ETP and to seek “ecologically sound means of capturing large yellowfin tunas not in association with dolphins.”¹³⁸

The Declaration was envisioned as having been built upon the strengths and achievements of the La Jolla Agreement, the organizations established by it, and the actions of the nations participating in that Agreement.¹³⁹ Once certain prerequisites were met, the tuna-fishing nations promised to: (1) adopt conservation and manageability of tuna stocks and other living marine resources in the ETP, (2) assess the catch and bycatch of juvenile tuna and other living marine resources of the ETP and adopt measures to reduce or eliminate such bycatch, (3) implement the international agreement through enactment of domestic legislation, (4) enhance existing programs for reviewing compliance with the international program, (5) establish annual stock-specific quotas on dolphin mortality based on minimum population estimates, (6) limit overall dolphin mortality to no more than five thousand per year, (7) enact a system that provides further incentives to vessel captains to continue to reduce dolphin mortality, and (8) to establish or bolster scientific advisory committees to advise their respective governments on research needs.¹⁴⁰

The adoption of the Declaration as a legally binding instrument was subject to a number of specific contingencies—namely, changes to U.S. law.¹⁴¹ The Declaration anticipated that the United States would effectively lift primary and secondary embargoes for tuna caught in compliance with the La Jolla Agreement and the Declaration, open the U.S. market to

¹³⁶ *Id.*; Declaration of Panama, signed Oct. 4, 1995, Belize, Columbia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, the United States, Vanuatu & Venezuela, reprinted in 143 Cong. Rec. S397 (daily ed. Jan. 21, 1997) [hereinafter Declaration of Panama].

¹³⁷ *Id.*

¹³⁸ Declaration of Panama, *supra* note 136.

¹³⁹ *Id.*

¹⁴⁰ 1996 MMCAR, *supra* note 8, at 103. The Declaration of Panama provides that, until the year 2001, an annual quota for each dolphin stock would be set between 0.1 and 0.2 percent of the minimum population estimate for that particular stock. In 2001 and thereafter, the “annual per-stock quota would be set at 0.1 percent of the stock’s minimum population estimate. If the annual quota for any stock were exceeded, all sets on that stock and any mixed schools containing individuals from that stock would cease for the remainder of the year. In addition, . . . [if] annual mortality for the eastern spinner or the northeastern spotted dolphin exceed[s] 0.1 percent of the minimum population estimate, the governments would conduct a scientific review to consider whether further action to reduce mortality is necessary.” *Id.*

¹⁴¹ Annex 1 of the Declaration of Panama contains the envisioned changes. *See* Declaration of Panama, *supra* note 136.

IATTC member states¹⁴² (provided their tuna is caught in compliance with the La Jolla Agreement and the Declaration), and revise the term "dolphin-safe" to include tuna caught by setting on dolphins with purse seine nets, as long observers certify that no dolphin mortality occurred during the set.¹⁴³

D. Legislative Approaches

Between 1995 and 1996, two alternative legislative approaches to the problem received the most attention in the 104th and 105th Congresses.¹⁴⁴ Although similar in many respects, the most recent bills considered, S. 39 and H.R. 408, provided more extensive changes to current law than the others did, in that they sought to change the definition of dolphin-safe to include tuna caught by encircling dolphins.¹⁴⁵ The obvious intent of the bills was to change U.S. policy so that it finally corresponded with the

¹⁴² *Id.* Also, that the U.S. will effectively open its market to those states that have taken particular steps to become members of the IATTC. *Id.* The La Jolla Agreement was always based on voluntary participation. See Declaration of Panama, *supra* note 136. The adoption of a legally binding device, however, is contingent on the U.S. changing its domestic laws including lifting MMPA embargoes and changing the definition of "dolphin-safe."

¹⁴³ Declaration of Panama, *supra* note 136.

¹⁴⁴ In 1995, four bills to amend the dolphin/tuna provisions of the MMPA were introduced in Congress. H.R. 2856, 104th Cong. (1996); H.R. 2823, 104th Cong. (1995); S. 1460, 104th Cong. (1995) (introduced by Senator Barbara Boxer and Joseph Biden on Dec. 7, 1995); S. 1420, 104th Cong. (1995) (introduced by Senator Ted Stevens on Nov. 17, 1995); H.R. 2179, 104th Cong. (1995) (introduced by Wayne Gilchrest on Dec. 21, 1995). 1996 MMCA, *supra* note 8, at 103-04.

S. 1420 and H.R. 2823 were designed to make the changes to U.S. law anticipated by the Panama Declaration. Under these bills, tuna caught with nets in the ETP could be labeled dolphin-safe if no dolphins were killed during the set in which the tuna was caught. Those bills also attempted to put U.S. and foreign fishermen operating in the ETP on equal footing. *Id.* On the other hand, S. 1460 and H.R. 2856, although similar to the other bills in many ways, proposed to retain the statutory definition of dolphin-safe and preserved the ban on tuna that is not "dolphin-safe" as currently defined. These bills also took a more aggressive approach to pursuing the zero mortality goal of the MMPA—a mortality cap of five thousand dolphins would have been established for 1996, but an accompanying requirement stated that the quota be reduced by a statistically significant amount each year. *Id.* at 104. Thus, those bills lacked the provisions anticipated by the tuna-fishing nations in the Declaration of Panama.

When H.R. 2823 reached the floor of the House of Representatives for consideration, debate was heating up over the dolphin-safe labeling standard. Although H.R. 2823 passed the House without amendment, the bill was blocked when it reached the Senate. As it was, the international community was somewhat displeased by the U.S. failure to enact legislation consistent with the Declaration of Panama. *Id.* ETP tuna-fishing nations expressed their displeasure with the failure by the United States to change its laws as called for by the Panama Declaration at an international meeting in October 1996. The Mexican Government expressed its indignation by announcing that it was immediately suspending its active participation in the La Jolla Agreement. *Id.* Although Mexican vessels would no longer seek DMLs or be restricted by the quotas established by the La Jolla Agreement, Mexico indicated that it would, at least for the time being, continue to carry IATTC observers on its vessels. *Id.*

¹⁴⁵ International Dolphin Conservation Program Act (IDCPA), Pub. L. No. 105-42, § 5, 111 Stat. 1122 (1997) (codified as amended in scattered sections of 16 U.S.C.).

Declaration.¹⁴⁶ During the summer session in 1997, a compromise was drafted: Import sanctions on dolphin-safe tuna would be immediately lifted, and a new definition of dolphin-safe would include tuna caught by encircling dolphins (provided observers document that no dolphins were killed or seriously injured during the set). The bill made these actions contingent on a three-year study to be conducted, showing no indications of long-term harm to dolphin populations as a result of encirclement by purse seiners.¹⁴⁷

On July 30, 1997, the Senate voted 99-0 to pass H.R. 408 as amended to include the compromise language. On July 31, 1997, the House unanimously agreed to accept the Senate-amended bill and H.R. 408 was sent to the President. Finally, on August 15, 1997, President Clinton signed the measure into law as Public Law number 105-42, to be called the International Dolphin Conservation Program Act (IDCPA).¹⁴⁸

E. 1997 International Dolphin Conservation Program Act

The stated purpose of the IDCPA is to give effect to the Declaration of Panama and the international program established by the La Jolla Agreement.¹⁴⁹ The IDCPA provides that the ETP tuna-fishing nations "have achieved significant reductions in dolphin mortality associated with the purse seine fishery from hundreds of thousands annually to fewer than 5,000 annually."¹⁵⁰ The IDCPA, as anticipated by the Panama Declaration, lifts the ban on imports of tuna from countries that are in compliance with the international program,¹⁵¹ and redefines the term dolphin-safe to include tuna caught by purse seine nets as long as a qualified observer and the captain of the vessel certify that "no dolphins were killed or seriously injured during the sets in which the tuna were caught."¹⁵² Of course, the compromise agreement was also included; specifically, the IDCPA mandates that between July 2001 and December 2002 Congress will review a completed scientific study along with other relevant information and determine whether the "intentional setting on dolphins with purse seine nets is having a significant adverse impact" on dolphins in the ETP.¹⁵³

VI. ANALYSIS

A. Was it the Right Thing To Do?

Passing legislation in Congress is difficult because of the diverse group of participants involved. In this case, Congress heard from animal rights groups, consumers, the tuna industry, various environmental coalitions, and the U.S. Administration. Although the legislation split a typically

¹⁴⁶ *Id.* § 1.

¹⁴⁷ See Buck, *supra* note 12.

¹⁴⁸ 143 Cong. Rec. H9862 (daily ed. Oct. 31, 1997).

¹⁴⁹ 16 U.S.C. § 1361(a)(1) (1994 & Supp. 1997).

¹⁵⁰ 16 U.S.C. § 1461(b)(1) (1994 & Supp. 1997).

¹⁵¹ 16 U.S.C. § 1361(b)(3) (1994 & Supp. 1997).

¹⁵² 16 U.S.C. § 1385(d)(1)(B)(i) (1994 & Supp. 1997).

¹⁵³ 16 U.S.C. § 1385(g)(2) (1994 & Supp. 1997).

cohesive environmental community, a huge, albeit unlikely, alliance supported the measure, including Greenpeace, the National Wildlife Federation, the World Wildlife Fund, the Environmental Defense Fund, the Center for Marine Conservation, the American Tunaboat Owners Coalition, the Seafarers' International Union, the Sportfishing Association of California, the National Fisheries Institute, and the Clinton Administration. Bringing domestic law in harmony with the Declaration of Panama was the only alternative if the United States expected to continue impacting international protection for dolphins and marine ecosystems. And this was accomplished not a moment too soon—the alternative would have been counter productive to international relations, contrary to international law and, more importantly, environmentally irresponsible and scientifically unsound.

In 1996, as a result of effective multinational fishing measures, there were fewer than three thousand dolphin mortalities in the ETP tuna fishery, from a population of nearly ten million—only about three one hundredths of one percent. This phenomenal success was achieved through considerable efforts by governments, environmental groups, fishermen, and international cooperation. International efforts that yielded fantastic results in lowering dolphin mortality were at risk without U.S. cooperation. Indeed, after the first legislative attempt to conform with the La Jolla Agreement (Declaration of Panama) failed in 1996, the tuna fishing nations were predictably displeased. Mexico expressed its indignation by immediately suspending active participation in the La Jolla Agreement.¹⁵⁴ More important, in the long run, it was not whether Mexico was reasonable when it walked away from the program and its restrictions but that the world was reminded that the international program provided for only voluntary involvement—there were no sanctions available to penalize Mexico's behavior, and there were no incentives to keep other nations from also abandoning the La Jolla Agreement. The Declaration of Panama calls for a binding agreement that will protect years of international progress, and recent U.S. action promises that advancement will continue.

Likewise, the question of whether Congress acquiesced to another nation's desire to enter the U.S. market should not be a primary consideration. If the goal is to protect dolphins and the marine environment, then the focus should remain on encouraging the best alternatives to meet that goal. Although some contend that the old "dolphin-safe" measures were working, the evidence is overwhelming that U.S. embargoes were simply ineffective. The embargoes were intended to stop foreign vessels from setting on dolphins with purse seine nets. In fact, the tonnage of tuna caught on dolphins and the number of sets on dolphins remained relatively steady for foreign vessels.¹⁵⁵ Since 1990, foreign fleets have reduced their total number of incidental dolphin deaths by ninety-seven percent despite continued use of purse seine nets.¹⁵⁶

¹⁵⁴ 1996 MMCAR, *supra* note 8, at 104.

¹⁵⁵ *Id.* at 99 tbl.11.

¹⁵⁶ *Id.* Dolphin mortality per set decreased from 5.4 in 1990 to 0.34 in 1996. *Id.*

The embargoes were based on the assumption that purse seine fishing caused the high dolphin mortality rates witnessed in the 1950s and 1960s, and that the only way to decrease those rates was by stopping fishing on dolphins with nets. Since the ETP is mostly in international waters, the United States hoped to influence the foreign fleet by imposing embargoes as a barrier to an important market. It is now clear that dolphin mortalities dramatically decreased with improved purse seine techniques and a cooperative commitment to dolphin conservation. Apparently, The dolphin stocks in the ETP are now recovering. The National Research Council has stated that:

[A] kill rate of 40,000 [dolphins in the ETP] per year would . . . represent a kill rate of 25% or less of recruitment, almost certainly low enough to permit current dolphin populations to be stable and perhaps to increase. An annual kill of 20,000 (12.5% or less of recruitment) would probably result in substantial increases in dolphin populations.¹⁵⁷

Mortality rates for all stocks of dolphins are today below 0.2% of the minimum population abundance—a level more than four times lower than what is recommended by the National Research Council to allow recovery.¹⁵⁸ At these levels, many scientists agree that the stocks will certainly increase and ultimately recover.¹⁵⁹

Furthermore, the embargoes were inconsistent with the United States having joined the La Jolla Agreement. On the one hand, the United States stood with the international community, as they continued to collect data and evaluate the most effective ways to protect dolphins, including development of purse seine methods that promoted dolphin survival.¹⁶⁰ On the other hand, the United States prohibited the very nations with which it collaborated at IATTC meetings from entering its markets,¹⁶¹ even in the

¹⁵⁷ *Dolphin-Safe Tuna: Hearings on S. 39 Before the Subcomm. On Oceans and Fisheries of the Senate Comm. of Commerce, Science and Transportation*, 105th Cong. 82 (1997) (statement of Suzanne Iudicello, Center for Marine Conservation) [hereinafter Iudicello Testimony] (citing National Research Council, *Dolphins and the Tuna Industry* (1992)).

¹⁵⁸ *Id.* According to the National Research Council, “a complete ban on dolphin fishing or the purchase of tuna caught on dolphins is not required to ensure the survival and even the increase of dolphin populations.” *Id.* (citing National Research Council, *Dolphins and the Tuna Industry* 71 (1992)).

¹⁵⁹ *Id.* (citing P. Wade, *Abundance and Population Dynamics of Eastern Spinner Dolphins, Stenella attenuata and Stenella longirostris orientalis* (1994) (Doctoral Dissertation, University of California, San Diego)).

¹⁶⁰ According to the U.S. Department of State, the La Jolla Agreement has been in effect for the United States since 1992. Interestingly, this is a sole executive agreement not approved by Congress or consented to by the Senate. It appears to be the only multilateral fishery agreement that the U.S. has entered into as an executive agreement rather than as a treaty approved by the Senate. As part of its efforts to secure the La Jolla Agreement, the Bush Administration promised to seek legislation lifting the import bans against Mexico and other nations (but was unsuccessful in convincing Congress). Charnovitz, *supra* note 25, at 10,571.

¹⁶¹ The embargoes also caused international tension during a time of growing multinational cooperation. When Mexico (and then the European community and the Netherlands) challenged the U.S. legislation as violative of GATT, the GATT panel agreed. Although the

wake of mounting evidence that purse seine fishing was the best fishing alternative available to protect dolphins and the marine environment.

If the embargoes acted as incentive for ETP fishing nations to improve fishing techniques and encouraged international cooperation, all the better. But it appears that the embargoes were only a set of impotent provisions that are better off deleted from the new MMPA. The IDCPA brings the United States wholly in line with international cooperative efforts towards eliminating dolphin mortalities in the ETP by the most environmentally responsible fishing practices. Whether the United States capitulated to Mexico's trade demands by enacting the new law can be made an issue fraught with complex implications for U.S./international trade relations, but the issue is ancillary. The focus must remain on the goal of dolphin protection and on the best interests of the marine ecosystem.

Although dolphin mortalities have declined while fishermen continue to use purse seine nets, there is still considerable concern that the practice of setting on dolphins causes harm to dolphins and to dolphin stocks. The IDCPA includes an important provision calling for a three year scientific study on the effect of encirclement on dolphin populations. According to supporters of the scientific study provision, three years is the minimum amount of time to conduct a scientifically reliable survey with acceptable confidence limits.¹⁶² If the study shows that dolphin stocks (particularly the two depleted stocks of northeastern spotted and eastern spinner dolphins) are recovering, then it can be "assumed that unobserved mortality or serious injury is not preventing the stocks from recovering and reaching optimum sustainable populations."¹⁶³ In 1992, the National Academy of Sciences found no direct evidence of harm associated with chase and encirclement of dolphins.¹⁶⁴ Scientific evidence suggests that, just like humans, dolphins have adapted to cope with stress in their environment. Dolphins have been chased and encircled for more than thirty-five years in the ETP, and the evidence indicates that these dolphins have displayed adaptive behaviors to compensate for the stress they encounter during fishing operations.¹⁶⁵ Some herds are believed to have developed strategies to avoid capture, and others seem to have habituated to encirclement and developed behavioral patterns that reduce the risk of injury once encircled by the net.¹⁶⁶

GATT council never adopted the provision, the World Trade Organization may have the final word on the matter. Charnovitz, *supra* note 25, at 10,522-74.

¹⁶² *Dolphin-Safe Tuna: Hearings on S. 39 Before the Subcomm. On Oceans and Fisheries of the Senate Comm. of Commerce, Science and Transportation*, 105th Cong. 106 (1997) (statement of Jeffrey R. Pike, Dolphin Safe/Fair Trade Campaign Coordinator). Mr. Pike's testimony also was supported by Earth Island Institute and other environmental groups. *Id.* at 104.

¹⁶³ *Id.* at 106.

¹⁶⁴ Buck, *supra* note 12.

¹⁶⁵ Iudicello Testimony, *supra* note 157, at 83 (citing 50 C.F.R. pt. 216.24(d)(2)(I)(A)(2) (1997); K. Pryor & L. K. Shallenberger, *Social Structure in Spotted Dolphins in the Tuna Purse Seine Fishery in the Eastern Tropical Pacific*, in *Dolphin Societies: Discoveries and Puzzles* 161-96 (K. Pryor & K. S. Norris eds., 1991)).

¹⁶⁶ *Id.*

The contention that chase and encirclement causes stress that results in reproductive difficulties or post-release dolphin deaths are not scientifically supported.¹⁶⁷ And there is no support from available peer-reviewed scientific data that mortality occurs after the dolphins are released from purse seine nets.¹⁶⁸ However, stress to dolphins from chase and encirclement and the impact it may have on recovery of dolphin population stocks has not been extensively studied, although the IDCFA anticipates that scientists will discover more about the impact of encirclement on dolphins.¹⁶⁹

What has been substantially documented, however, is the impact that alternative fishing techniques have on the ETP ecosystem as a whole. According to the IATTC, if all of the vessels fishing the ETP no longer fished on dolphin, it would create a conservation problem for tuna stocks and a bycatch problem for other species.¹⁷⁰ Recent data indicate that alternative fishing methods used by fishermen today such as fishing on log or on school have up to one hundred times greater bycatch of other marine life and juvenile tuna.¹⁷¹

The practice of discarding dead juvenile yellowfin tuna could drastically affect the fishery. Purse seiners throw away seven to fifteen tons of immature yellowfin tuna per set on logs and 1 to 1.2 tons of small tuna per set on school, versus 0.06 tons of juvenile yellowfin tuna per set on dolphins.¹⁷² The IATTC estimates that if fishermen replaced sets on dolphin with school and log sets, the fisherman would discard ten to twenty-five million juvenile yellowfin tuna every year.¹⁷³ This would remove between thirteen and thirty-two percent of the total recruitment of the species and potentially cause a twenty-five to sixty percent decline in the catch of yellowfin tuna in the ETP.¹⁷⁴ The impact on tuna stocks under these circumstances would be inevitable.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* Further, "no scientific evidence demonstrates a preponderance of stress-related diseases or injuries in ETP dolphin stocks." *Id.* Claims that reproductive complications or depressed reproductive capacity caused by stress related to chase and encirclement, and that fishing on dolphin results in spontaneous abortions, muscle degradation, or stress-related reproductive inhibition in the reproductive tracts examined from dolphins that have died in the ETP are likewise considered speculative, at best, as there is no scientific evidence to support the claims. *Id.* (citing T. D. Smith, *Changes in Size of Three Dolphin Populations in the Eastern Tropical Pacific*, 81 *Fish Bull.* 1 (1983); S. J. Chivers & D. P. DeMaster, *Evaluation of Biological Indices for Three Eastern Tropical Pacific Dolphin Species*, 58 *J. WILDLIFE MGMT.* 470 (1994)).

¹⁶⁹ The contention is that the repetitive chase, tiring, herding, and encirclement of dolphins is stressful to the animals and that adverse, stress-related physiological problems put dolphin populations at risk by increasing mortality and lowering birth rates. Buck, *supra* note 12.

¹⁷⁰ See *supra* 113 and accompanying text.

¹⁷¹ Iudicello Testimony, *supra* note 157, at 85.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* (citing *Hearing on H.R. 2823 International Dolphin Conservation Act, Subcomm. on Fisheries, Wildlife, and Oceans, Comm. on Resources*, 104th Cong. (1996) (statement of Dr. Elizabeth Edwards)).

Other than small, immature tuna, typical bycatch includes billfish, sharks, and endangered sea turtles.¹⁷⁵ Thus, pushing alternatives to purse seine fishing techniques was merely encouraging a shift in the mortality problem. A representative from the Center for Marine Conservation noted that "the cost of saving one dolphin statistically means the killing of 15,620 small tunas, 382 mahi-mahi, 190 wahoo, 8 rainbow runners, 11 blacktip sharks, 4 silky sharks, 2 whitetip sharks, 2 other sharks and rays, 1 marlin, 428 triggerfishes, 800 other small fish, and approximately 1 sea turtle."¹⁷⁶ The Panama Declaration addresses a reality that has been ignored by the U.S. Congress until now—that all things are inextricably linked to the ecosystem, including dolphins. It would be disingenuous at best to continue labeling U.S. tuna dolphin-safe and at the same time encourage the destruction of the ecosystem on which they depend.

The new definition of dolphin-safe not only opens the U.S. market to nations whose fishing practices are strictly regulated by international rules, it is a more sensible approach for the marketplace.¹⁷⁷ Under the old definition, consumers were misled to believe that the dolphin-tuna issue was resolved and that dolphins were no longer killed or hurt by tuna fishermen. In fact, the label never guaranteed that no dolphins died because, under old law, fishing methods deemed dolphin-safe—such as setting on log and on school—could have still resulted in dolphin deaths. Consumers were also likely unaware that, in the midst of all the regulations, much of the U.S. fleet moved to the western Pacific, major canneries stopped purchasing ETP tuna, and the United States thus lost most of its leverage to enforce changes in tuna fishing practices in the ETP.¹⁷⁸ Consumers certainly were not informed that the fishing techniques encouraged by the old dolphin-safe definition were resulting in the deaths of endangered sea turtles and other marine life. The new definition requires every vessel to have on board an internationally trained observer who monitors dolphin mortality; only if there are no dolphin deaths will the tuna qualify for the dolphin-safe label. This system better equates to the common perception of the consumer.¹⁷⁹

¹⁷⁵ See *supra* note 113 and accompanying text

¹⁷⁶ Iudicello Testimony, *supra* note 157, at 85.

¹⁷⁷ Some, including Senator Barbara Boxer, say "observed mortality" is a tricky issue because it leaves room for errors and judgment calls. *Dolphin Conservation: Hearings Before the Subcomm. on Oceans and Fisheries of the Senate Comm. on Commerce, Science and Transportation*, 104th Cong. (1996) (statement of Senator Barbara Boxer). However, IATTC scientists contend that dolphin mortality is actually easily noted and documented, arguing that very few go unseen, because dolphin carcasses float and are visible from a great distance. Buck, *supra* note 12.

¹⁷⁸ Iudicello Testimony, *supra* note 157, at 80.

¹⁷⁹ It may be that consumers don't even notice. One poll showed that most of the consuming public thinks "dolphin-safe" means that there is *no dolphin in the can*. James P. Walsh, *With the Tuna-Dolphin Controversy Expected to Resurface, Congress Faces a Catch-22: Compliance with GATT Provisions Could Infuriate the 'Green' Lobby*, Nat'l L.J., June 12, 1995, at B6. For example, during the hearings on the H.R. 408 one congressman received a letter opposing the Gilchrest legislation that concludes by saying "we naturally want to be fairly assured that with every can of tuna we purchase, that we're preparing our meals with only tuna!" *The International Dolphin Conservation Program Act: Hearing on H.R. 408*

VII. CONCLUSION

There is one way to be sure no dolphins die at the hands of commercial fishermen in the ETP: Stop harvesting yellowfin tuna. In a perfect world, that would be the obvious solution. However, growing market demand and increasing global interdependence preclude that from being a viable solution in today's world. The challenge, then, is to continue striving for the most effective and responsible alternatives through technological and scientific research, broad-based education, and international cooperation.¹⁸⁰ The unilateral approach that the United States has taken in the past has proven ineffective and detrimental to both international relations and the ETP marine environment. The Panama Declaration calls for an international team of scientists to discover new fishing technologies that avoid dolphin encirclement and are safe for the entire ecosystem. Until those discoveries are made, the focus must include protecting dolphin stocks, eliminating dolphin mortalities, preserving the entire ETP ecosystem, and encouraging international cooperation and accountability. The new U.S. legislation and the Panama Declaration, although not the ultimate solution, keep us moving in the right direction.

Before the Subcomm. On Fisheries Conservation, Wildlife and Oceans of the House Comm. on Resources, 105th Cong. (1997) (statement of Congressman Don Young, Chairman, Comm. on Resources).

¹⁸⁰ There can be no argument that every dolphin mortality is a tragedy—and that the objective is to eliminate *all* dolphin mortality. To reach that goal, though, it is critical to examine the success that the international programs have had along the way. Although the goal is not met, it is encouraging to note that a vast majority of independent and government marine mammal scientists consider mortality levels of less than 0.1% to have a “negligible impact” on the dolphin stocks and to meet the MMPA’s zero mortality rate goal. Iudicello Testimony, *supra* note 157, at 82 (citing National Marine Fisheries Service, Report of the Potential Biological Removal Workshop (1994)). Presently, the annual incidental mortality in the ETP fishery is less than 0.2% and—except in the case of the northeastern spotted and the eastern spinner dolphins—less than 0.1% of the minimum population estimate for all dolphin stocks. *Id.*