

THE INTERNATIONAL DOLPHIN CONSERVATION ACT OF 1992: UNREASONABLE EXTENSION OF U.S. JURISDICTION IN THE EASTERN TROPICAL PACIFIC OCEAN FISHERY\*

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I. INTRODUCTION: DOLPHIN MORTALITY IN THE EASTERN TROPICAL PACIFIC

Since the early 1960s, the dispute over incidental dolphin mortality<sup>1</sup> in the Eastern Tropical Pacific (ETP)<sup>2</sup> tuna fishery has been one of the most controversial and emotional wildlife issues addressed by Congress.<sup>3</sup> For reasons that are not entirely clear, dolphins and schools of yellowfin tuna frequently associate in the

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<sup>1</sup>. Incidental dolphin mortality is caused primarily by the use of purse seine nets to fish for yellowfin tuna in the ETP and the use of driftnets to fish for tuna in other fisheries. U.S. INT'L TRADE COMM'N, PUB. NO. 2547, TUNA: CURRENT ISSUES AFFECTING THE U.S. INDUSTRY, REPORT TO THE SENATE COMMITTEE OF FINANCE 3-1 (1992) [hereinafter U.S. INT'L TRADE COMM'N]. This Article will discuss only dolphin mortality associated with purse seine fishing in the ETP.

<sup>2</sup>. The Eastern Tropical Pacific (ETP) is a 7 million square mile area of the Pacific Ocean "bounded by 40° N. latitude, 40° S. latitude, 160° W. longitude and the coastlines of North, Central and South America." 50 C.F.R. § 216.3 (1992).

<sup>3</sup>. See *id.*; 138 CONG. REC. H9067 (daily ed. Sept. 22, 1992) (statement of Rep. Studds).

ETP.<sup>4</sup> Because dolphins are easy to spot as they swim along the ocean's surface, tuna fishermen have traditionally relied on the tuna-dolphin bond to locate large schools of yellowfin tuna.<sup>5</sup> During the 1950s, this technique of locating tuna did not pose a serious threat to dolphins because the primary commercial method used to harvest yellowfin tuna was the "line-and-pole."<sup>6</sup> The threat to dolphins increased dramatically in the 1960s, however, with the introduction of purse seine nets to the ETP tuna fishery.<sup>7</sup> This new technology proved to be far more efficient for harvesting tuna than the "line-and-pole" method.<sup>8</sup> However, it also brought with it an unwelcome and serious rise in incidental dolphin mortality.<sup>9</sup> The U.S. International Trade Commission has estimated that, since 1959, approximately 7.5

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<sup>4</sup>. Because yellowfin tuna and certain species of dolphins share a similar diet, one theory suggests that the bond is related to feeding. See U.S. INT'L TRADE COMM'N, *supra* note 1, at 3-1 to 3-2.

<sup>5</sup>. See 56 Fed. Reg. 4981 (1991).

<sup>6</sup>. This method of fishing relies primarily on the use of hooks to catch tuna. After locating a school of fish, ground bait is thrown over the side to attract the tuna towards the vessel. As the tuna begin to feed on the baitfish, unbaited hooks are thrown into the water. Lacking the intelligence and built-in sonar of the dolphin, the tuna bite anything in the water, including the unbaited hooks. The dolphins, on the other hand, eat only the baitfish. See 45 Fed. Reg. 72,178 (1980); K. Patrick Conner, *The Conversion of Starkist*, S.F. CHRON., June 17, 1990, at 7/Z; Kerry L. Holland, Note, *Exploitation on Porpoise: The Use of Purse Seine Nets by Commercial Tuna Fishermen in the Eastern Tropical Pacific Ocean*, 17 SYRACUSE J. INT'L L. & COM. 267, 268-69 (1991).

<sup>7</sup>. 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 are then winched closed by steel cables to prevent the tuna from escaping to deeper water. As a result, a number of dolphins are also 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. See Holland, *supra* note 6, at 269-70; James Brooke, *10 Nations Reach Accord on Saving Dolphins*, N.Y. TIMES, May 12, 1992, at C4; U.S. INT'L TRADE COMM'N, *supra* note 2, at 3-2.

<sup>8</sup>. See Conner, *supra* note 6, at 7/2.

<sup>9</sup>. See *id.*; Holland, *supra* note 6, at 269-70; U.S. INT'L TRADE COMM'N, *supra* note 1, at 3-2.

million dolphins have died in purse seine-related deaths in the ETP.<sup>10</sup> The majority of those deaths, approximately 6.8 million, occurred during the 1960s and 1970s.<sup>11</sup>

Public outrage in the U.S. over the high level of dolphin mortality in the ETP prompted a massive legislative effort to reduce the number of dolphin deaths caused by both the domestic and foreign tuna fleets. The result of this outcry was the Marine Mammal Protection Act (MMPA) of 1972.<sup>12</sup> The immediate goal of the Act 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 . . . .”<sup>13</sup> Congress’ continued concern over U.S. and foreign commercial fishing practices resulted in amendments to the MMPA in 1981,<sup>14</sup> 1984<sup>15</sup> and 1988.<sup>16</sup> These amendments provide marine mammals further protections under the Act.<sup>17</sup>

Despite the progress made under the MMPA, continued public dissatisfaction in the U.S. has resulted in consumer boycotts against canned tuna products.<sup>18</sup> In response to these boycotts, the three major U.S. tuna processors—Starkist, Van Camp/Chicken of the Sea, and Bumblebee—announced in April 1990 that they would sell only

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<sup>10</sup>. U.S. INT’L TRADE COMM’N, *supra* note 1, at 3-3 Tbl. 3-1.

<sup>11</sup>. *Id.*

<sup>12</sup>. Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. §§ 1361-1421h (West 1985 & Supp. 1993) [hereinafter 1972 MMPA]. Note that the MMPA is not limited to the protection of dolphins, but rather protects all species of marine mammals. *Id.*

<sup>13</sup>. *Id.* at § 101(a)(2) (codified as amended at 16 U.S.C. § 1371(a)(2) (1988 & Supp. III 1991)). The 1972 MMPA and its amendments will be discussed in more detail in section III, A, *infra*. See *infra* notes 58-75 and accompanying text.

<sup>14</sup>. Act of Oct. 9, 1981, Pub. L. No. 97-58, 95 Stat. 979.

<sup>15</sup>. Act of July 17, 1984, Pub. L. No. 98-364, 98 Stat. 440.

<sup>16</sup>. Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100-74, 102 Stat. 4755 [hereinafter MMPA Amendments].

<sup>17</sup>. Some of the new protection measures include: an annual kill quota of 20,500 dolphins for the U.S. tuna fleet (1981); potential tuna embargoes against nations that do not have a comparable dolphin conservation program (1984); performance standards for tuna boat captains to reduce dolphin mortality and a 100 percent observer program on U.S. tuna boats (1988). See *infra* notes 63-75 and accompanying text.

<sup>18</sup>. See U.S. INT’L TRADE COMM’N, *supra* note 1, at 3-1 to 3-10.

dolphin-safe tuna in the U.S.<sup>19</sup> Congress supplemented this voluntary “dolphin-safe” policy by passing the Dolphin Protection Consumer Information Act (DPCIA) of 1990.<sup>20</sup> The DPCIA established national labeling standards for dolphin-safe tuna.<sup>21</sup> In addition, between 1990 and 1992, U.S. courts imposed tuna embargoes against harvesting and intermediary nations that had failed to comply with the comparability standards of the MMPA.<sup>22</sup> The net effect of the MMPA, the processors’ dolphin-safe policy, the DPCIA labeling scheme and the court-ordered embargoes has been a significant reduction in dolphin mortality, as well as the elimination of almost all dolphin-unsafe tuna from the U.S. market.<sup>23</sup>

Unfortunately, the MMPA embargoes and DPCIA labeling scheme have caused friction with some of our closest allies and trading partners. Mexico, Venezuela and the European Community (EC) have each challenged the embargoes and labeling scheme as unfair trade practices under the General Agreement on Tariffs and Trade (GATT).<sup>24</sup> Notwithstanding these disputes, a significant breakthrough occurred at the international level in April 1992. At a special meeting of the Inter-American Tropical Tuna Commission (IATTC), the ETP harvesting nations joined in a multilateral

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<sup>19</sup>. See 138 CONG. REC. S17,841 (daily ed. Oct. 8, 1992) (statement of Sen. Kerry).

<sup>20</sup>. Dolphin Protection Consumer Information Act, Pub. L. No. 101-627, § 901, 104 Stat. 4465 (codified at 16 U.S.C. §§ 1371, 1385 (Supp. III 1991)) [hereinafter 1990 DPCIA].

<sup>21</sup>. *Id.*

<sup>22</sup>. *Earth Island Institute v. Mosbacher*, 746 F. Supp. 964 (N.D. Cal. 1990), *aff’d*, 929 F.2d 1449 (9th Cir. 1991), *reh’g granted*, 785 F. Supp. 826 (N.D. Cal. 1992). Comparability standards are set out in detail in 16 U.S.C. § 1371(a)(2) (1988 & Supp. III 1991); see also 50 C.F.R. § 216.24 (1992).

<sup>23</sup>. Pre-MMPA dolphin mortality in the ETP peaked at 534,000 deaths in 1961. See 57 Fed. Reg. 27,010, 27,014 Tbl. 2 (1992). By 1991, dolphin mortality in the ETP had been reduced to approximately 25,000 deaths, only 1005 of which were caused by U.S. tuna boats. See 138 CONG. REC. H9070 (daily ed. Sept. 22, 1992) (background text of H.R. 5419, 102d Cong., 2nd Sess. (1992)).

<sup>24</sup>. In August 1991, a dispute panel reviewing the Mexican complaint found that the U.S. embargoes (but not the labeling scheme) were illegal under the General Agreement on Tariffs and Trade (GATT). United States Restrictions on Imports of Tuna, GATT Panel Report (*In re Matter D521/1*) submitted to parties Aug. 16, 1991, *reprinted in* 30 I.L.M. 1594 (1991) (not yet adopted) [hereinafter GATT Panel Report]. The European Community and Venezuelan complaints are pending review. See 138 CONG. REC. H9069 (daily ed. Sept. 22, 1992) (statement of Rep. Crane).

agreement that will reduce dolphin mortality from 19,500 in 1993 to less than 5,000 per year by 1999.<sup>25</sup>

Despite this noteworthy achievement by the IATTC, Congress elected to amend the MMPA and, in October 1992, the President signed into law the International Dolphin Conservation Act (IDCA) of 1992.<sup>26</sup> The IDCA establishes new standards for dolphin protection including, *inter alia*, authorization of agreements which may impose at least a five-year global moratorium on the use of purse seine nets to intentionally encircle dolphins in order to harvest tuna.<sup>27</sup> To encourage compliance with these new measures, the IDCA allows the Secretary of the Treasury to lift existing tuna embargoes for any nation agreeing to abide by the moratorium.<sup>28</sup> However, if such a nation subsequently fails to comply with its commitments under the IDCA, the Secretary can impose a more onerous embargo, not only against yellowfin tuna harvested in the ETP, but also against any fish and fish products produced by the noncomplying state.<sup>29</sup>

This new legislative attempt to further extend U.S. dolphin conservation efforts in the ETP raises three interesting jurisdictional questions. First, does international law provide a basis for such unilateral regulation of domestic and foreign fishing activities? Second, if such a basis exists, will the exercise of extraterritorial jurisdiction to regulate foreign fishing practices in the ETP nevertheless be inconsistent with the international legal system? Finally, even if the United States is not precluded from applying its laws extraterritorially, are U.S. conservation interests outweighed by

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<sup>25</sup>. Inter-American Tropical Tuna Commission Agreement, June 1992 (La Jolla, California) at 1 [hereinafter IATTC Agreement]. The parties to the agreement are: Colombia, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Spain, the United States, Vanuatu, and Venezuela. IATTC Agreement, app. I; see U.S. INT'L TRADE COMM'N, *supra* note 2, at 3-9, 4-3.

<sup>26</sup>. International Dolphin Conservation Act of 1992, Pub. L. No. 102-523, 106 Stat. 3425 (codified at 16 U.S.C.A. §§ 1411-18 (West Supp. 1993)) [hereinafter 1992 IDCA].

<sup>27</sup>. 16 U.S.C.A. § 1412(a) (West Supp. 1993). Other dolphin protection provisions of the IDCA include: an international research program to develop new fishing equipment and techniques that are dolphin-safe and a mandatory dolphin-safe tuna market for the United States by June 1994. *Id.* at §§ 1413, 1417.

<sup>28</sup>. *Id.* at § 1415(b)(3).

<sup>29</sup>. *Id.* at § 1415.

the political, economic, social and sovereignty concerns of the other ETP harvesting states?

This paper will answer these questions by examining the practical and legal implications of extending the IDCA extraterritorially. Section II will provide a brief historical overview of U.S. fishery management and ocean policy regarding highly migratory species as background information. Sections III and IV will review domestic and international efforts to manage tuna stocks and protect dolphins in the ETP. Sections V and VI will examine the extraterritorial extension of U.S. jurisdiction under the IDCA by applying the reasonableness test of the *Restatement (Third) of the Foreign Relations Law of the United States* Section 403. The paper will demonstrate that a balancing of the interests involved weighs heavily against unilaterally extending the IDCA beyond the U.S. exclusive economic zone (EEZ). The paper will also offer a reasonable alternative to the IDCA.

## II. U.S. FISHERY MANAGEMENT: AN HISTORICAL OVERVIEW

### A. *The Truman Proclamation of 1945*

On September 28, 1945, President Truman took the unprecedented step of unilaterally establishing fishery conservation zones over high seas areas contiguous to the U.S. coast.<sup>30</sup> In these zones, the U.S. was to exercise exclusive regulatory control over areas that had been traditionally fished by U.S. nationals alone.<sup>31</sup> Areas traditionally used by both U.S. and foreign fishermen would be regulated by bilateral agreements.<sup>32</sup> Additionally, the Truman Proclamation recognized the right of other coastal nations to establish similar conservation zones provided they were consistent with the U.S. claims.<sup>33</sup>

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<sup>30</sup>. Proclamation No. 2668, 3 C.F.R. 68 (1943-1948). The proclamation was issued primarily for three reasons: (1) concern over "the inadequacy of present arrangements for the protection and perpetuation of the fishery resources contiguous" to the U.S. coast; (2) the special importance of fishery resources to coastal communities; and (3) the "urgent need to protect coastal fishery resources from destructive exploitation . . . ." Another proclamation issued on the same day extended jurisdiction over the natural resources of the U.S. continental shelf. Proclamation No. 2667, 3 C.F.R. 67 (1943-1948).

<sup>31</sup>. Proclamation No. 2668, 3 C.F.R. 68, 69 (1943-1948).

<sup>32</sup>. *Id.*

<sup>33</sup>. *Id.*

Although the proclamations indicated that freedom of navigation would not be affected in the zones, the unintended result of this unilateral extension of jurisdiction was a new era of expansive maritime claims by the international community. Citing the Truman Proclamations as authority, Chile, Ecuador and Peru signed the Declaration of Santiago in 1952.<sup>34</sup> This declaration established 200 nautical mile maritime zones in which each nation claimed exclusive sovereign jurisdiction, not only over the resources in the zone, but also over the water column.<sup>35</sup> Other nations soon followed suit with similar declarations.<sup>36</sup> These claims raised a potential threat to freedom of navigation and overflight in areas that had traditionally been considered part of the high seas.<sup>37</sup>

*B. Magnuson Fishery Conservation and Management Act of 1976*

Continued concern over depletion of coastal fish stocks prompted Congress to take further unilateral action to protect U.S. fishing interests beyond the territorial sea. When it enacted the Magnuson Fishery Conservation and Management Act (MFCMA) of 1976, Congress established a broad 200-mile Fisheries Conservation Zone (FCZ) in which the U.S. claimed exclusive management authority.<sup>38</sup> This claim covered all fish stocks found in the zone,

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<sup>34</sup>. Declaration of Santiago, Aug. 18, 1952, *in* 1 *NEW DIRECTIONS OF THE LAW OF THE SEA*, at 231 (S. Houston Lay et al. eds., 1973).

<sup>35</sup>. The "water column" includes the waters superjacent to the continental shelf. *See* Thomas A. Clingan, Jr., *Emerging Law of the Sea: The Economic Zone Dilemma*, 14 *SAN DIEGO L. REV.* 530, 540 (1977); Elliot L. Richardson, *Power, Mobility and the Law of the Sea*, 58 *FOREIGN AFFAIRS* 902, 903-04 (1980).

<sup>36</sup>. *See* DOUGLAS M. JOHNSTON, *THE INTERNATIONAL LAW OF FISHERIES* 334-36 (1965).

<sup>37</sup>. In effect, what these states were claiming was a 200-mile territorial sea. Such claims are significant because foreign vessels only enjoy a right of innocent passage through the territorial sea of another state. If all coastal states were to claim 200-mile territorial seas, freedom of navigation critical for U.S. military and commercial needs would be adversely affected.

<sup>38</sup>. Magnuson Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 tit. I § 101 (codified as amended at 16 U.S.C.A. §§ 1801-1882, 1811 (West 1985 & Supp. 1993)) [hereinafter 1976 MFCMA].



except for highly migratory species such as tuna.<sup>39</sup> With regard to highly migratory species, the MFCMA authorized the Secretary of State to initiate negotiations with other nations “for the purpose of entering into international fishery agreements . . . which provide for the conservation and management” of such species throughout their range.<sup>40</sup>

Although well-intended, the MFCMA had an adverse impact on U.S. ocean policy goals. In the short-term, the timing of the Act preempted the conclusion of a promising agreement with several Latin American states to multilaterally regulate tuna stocks in the ETP.<sup>41</sup> Moreover, the Act undercut U.S. efforts at the U.N. Conference on the Law of the Sea to obtain consensus on international standards for the conservation and management of highly migratory species.<sup>42</sup> As a result, several countries immediately extended their fishery jurisdictions to 200 miles.<sup>43</sup> Unlike the United States, however, many of these countries asserted jurisdiction over highly migratory species.<sup>44</sup> A less immediate consequence was that many nations relied upon the MFCMA to make more expansive maritime claims.<sup>45</sup> By 1990, thirteen countries claimed 200-mile territorial seas, twenty-one countries claimed 200-

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<sup>39</sup>. *Id.* at § 103 (repealed 1990). Highly migratory species, such as tuna, do not live in any defined area of water. Therefore, until 1990, the United States maintained that no state had a paramount interest in managing such stocks, even when found within a state’s exclusive economic zone (EEZ) (formerly FCZ). The United States amended the MFCMA in 1990 to place tuna found within the U.S. EEZ under exclusive U.S. management jurisdiction. *See infra* notes 54-57 and accompanying text.

<sup>40</sup>. 16 U.S.C. § 1822 (a)(4) (1982).

<sup>41</sup>. *See* John M. Moore, *Foreign Policy and Fidelity to Law: The Anatomy of a Treaty Violation*, 70 AM. J. INT’L. L. 802, 806 (1976).

<sup>42</sup>. JOHN WARREN KINDT, *Overall Goals for Protecting the Marine Environment*, 2 MARINE POLLUTION AND THE LAW OF THE SEA 673, 675-708 (1986).

<sup>43</sup>. These states included: Norway, Mexico, Canada, and the European Economic Community. Clingan, *supra* note 35, at 536.

<sup>44</sup>. U.S. INT’L TRADE COMM’N, *supra* note 2, at 1-3.

<sup>45</sup>. KINDT, *supra* note 42. These claims were made despite language in the MFCMA which indicated that the traditional high seas freedoms of navigation and overflight would not be impeded in the FCZ. *See* 16 U.S.C. § 1801(c) (1988).

mile fishery zones, and another eighty countries claimed 200-mile exclusive economic zones (EEZ).<sup>46</sup>

The MFCMA also demonstrated U.S. willingness (repeated in the IDCA) to enact fishery legislation inconsistent with its existing international treaty obligations. The MFCMA arguably violated U.S. commitments under Articles 1, 7, and 9-12 of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, Articles 2, 6 and 22 of the 1958 Geneva Convention on the High Seas, and several bilateral and multilateral fishery agreements.<sup>47</sup>

### C. *U.S. Exclusive Economic Zone Proclamation of 1983*

In July 1982, the U.S. eliminated any further hope of reaching international consensus on the issue of fishery management by declaring that it would not sign the 1982 U.N. Convention on the Law of the Sea (LOSC).<sup>48</sup> Less than a year later, however, President Reagan announced that the non-seabed portions of the LOSC reflected customary international law and that the United States would accordingly exercise its maritime rights and duties consistent with those provisions.<sup>49</sup> Moreover, the President concurrently declared that the United States was establishing a 200-mile EEZ consistent with international law.<sup>50</sup>

For the most part, the U.S. EEZ Proclamation paralleled the EEZ concept established in Part V of the LOSC. Within this new zone, the U.S. claimed to exercise "sovereign rights for the purpose of . . . exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent

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<sup>46</sup>. *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, Naval Warfare Publication (NWP) 9 (Rev. A)/Fleet Marine Force Manual (FMFM) 1-10, of 5 October 1989, Tbl. ST1-5 [hereinafter NWP-9].

<sup>47</sup>. See Convention on Fishing and Conservation of the Living Resources on the High Seas, April 29, 1958, arts. 1, 7, 9-12, 17 U.S.T. 138, 559 U.N.T.S. 285 [hereinafter Fisheries Convention]; Convention on the High Seas, April 29, 1958, arts. 2, 6, 22, 13 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter High Seas Convention]; Moore, *supra* note 41, at 805.

<sup>48</sup>. See statement on United States Oceans Policy, 1 PUB. PAPERS 378, 378-79 (Mar. 10, 1983). The primary justification given for this decision was that the deep seabed mining provisions of the Convention were contrary to U.S. interests. *Id.*

<sup>49</sup>. *Id.* at 378-79.

<sup>50</sup>. Proclamation No. 5030, 3 C.F.R. 22 (1984).

waters . . . .”<sup>51</sup> In 1986, Congress amended the MFCMA accordingly to reflect the fact that the United States would exercise “sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources,” within the EEZ.<sup>52</sup> Specifically excluded from both the EEZ Proclamation and the 1986 MFCMA amendments, however, was jurisdiction over highly migratory species.<sup>53</sup>

*D. Fishery Conservation Amendments Act of 1990*

The Fishery Conservation Amendments (FCA) of 1990 reversed U.S. fishery policy regarding highly migratory species.<sup>54</sup> Effective January 1, 1992, the FCA amended the MFCMA to claim jurisdiction over tuna stocks found within the U.S. EEZ.<sup>55</sup> More importantly, the FCA recognized for the first time the right of other coastal states to claim jurisdiction over tuna stocks found within their 200-mile EEZs or fishery zones (FZ).<sup>56</sup> Arguably, this includes the right to regulate how, and to what extent, tuna stocks will be harvested within these zones.<sup>57</sup>

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<sup>51</sup>. *Id.* at 23. Nothing in the Proclamation, however, was intended to interfere with the traditional high seas freedoms of navigation and overflight within the zone. *See id.*

<sup>52</sup>. Act of Nov. 14, 1986, Pub. L. No. 99-659, § 101(a), 100 Stat. 3706 (codified as amended at 16 U.S.C.A. § 1811(a) (West Supp. 1993) [hereinafter 1986 MFCMA amendments].

<sup>53</sup>. The EEZ Proclamation explicitly rejected U.S. jurisdiction over marine mammals and tuna and recognized the need for international agreements to effectively manage these stocks. Proclamation No. 5030, *supra* note 50, at 23; *see also* 1986 MFCMA amendments, § 102 (repealed 1990).

<sup>54</sup>. Fishery Conservation Amendments of 1990, Pub. L. No. 101-627, 104 Stat. 4436 (codified as amended in scattered sections of 16 U.S.C.A., 15 U.S.C.A. § 713(c)(3), 22 U.S.C.A. § 1977 (West 1985 & Supp. 1993) [hereinafter 1990 FCA].

<sup>55</sup>. *Id.* at § 103 (codified at 16 U.S.C. § 1812 (Supp. III 1991)).

<sup>56</sup>. *Id.* 16 U.S.C. § 1822 (Supp. III 1991).

<sup>57</sup>. *See infra* notes 132-145 and accompanying text. The IDCA imposes a moratorium on the use of purse seine nets to intentionally encircle dolphins. It therefore attempts to regulate how a foreign state may harvest tuna within its own EEZ. Such extraterritorial regulation is clearly inconsistent with the FCAA’s recognition of a coastal nation’s sovereign rights over tuna found within its EEZ.

## III. EARLY U.S. EFFORTS TO PROTECT MARINE MAMMALS

A. *Marine Mammal Protection Act of 1972*

Throughout much of the 1970s and 1980s, Congress, in addition to extending U.S. fishery jurisdiction, was also actively involved in extraterritorial efforts to reduce incidental marine mammal mortality caused by domestic and foreign commercial fishermen. Concern that certain species of marine mammals were being depleted “below their optimum sustainable population” prompted Congress to enact the Marine Mammal Protection Act (MMPA) of 1972.<sup>58</sup> The primary feature of the MMPA was “a moratorium on the taking and importation of marine mammals and marine mammal products . . . .”<sup>59</sup> There were, of course, exceptions to the moratorium. In 1981, Congress included an exception for the incidental taking of marine mammals during commercial fishing operations.<sup>60</sup> Under this exception, “the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna . . .” was permissible as long as commercial fishermen were using “the best marine mammal safety techniques and equipment . . .” economically and technologically practicable.<sup>61</sup>

Notwithstanding the enactment of the MMPA, more than 1.3 million dolphins died in the ETP tuna fishery between 1972 and 1980 as a direct result of intentional encirclement by purse seine nets.<sup>62</sup> Dissatisfied with these and other marine mammal mortality figures, Congress amended the MMPA in 1981. Subsequently, the U.S. tuna fleet was allotted an annual kill quota of 20,500 dolphins.<sup>63</sup> As a

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<sup>58</sup>. See 1972 MMPA, *supra* note 12, at § 2 (codified as amended at 16 U.S.C.A. § 1361 (West 1985 & Supp. 1993)). “Optimum sustainable population” is defined as “the number of animals which will result in the maximum productivity of the population or the species keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.” 16 U.S.C.A. § 1362 (West Supp. 1993).

<sup>59</sup>. *Id.* at § 101 (codified as amended at 16 U.S.C. § 1371 (1988)). The immediate goal of the Act 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 . . . .” *Id.* at § 1371(a)(2) (1988).

<sup>60</sup>. *Id.*

<sup>61</sup>. *Id.*

<sup>62</sup>. See U.S. Int’l Trade Comm’n, *supra* note 1, at Tbl. 3-1.

<sup>63</sup>. See Caroline E. Coulston, Comment, *Flipper Caught in the Net of Commerce: Reauthorization of the Marine Mammal Protection Act and Its Effect on Dolphins*, 11 J.

result of the quota and other factors, U.S.-caused dolphin mortality dropped dramatically throughout the 1980s, reaching a record low of 1005 animals in 1991.<sup>64</sup> During this same time period, however, dolphin mortality caused by foreign tuna fleets increased.<sup>65</sup>

Concern in Congress over lax foreign fishing practices resulted in additional amendments to the MMPA in 1984<sup>66</sup> and 1988.<sup>67</sup> These amendments included an import ban on yellowfin tuna harvested in the ETP by nations not having a dolphin conservation program comparable to that of the U.S. purse seine fleet.<sup>68</sup> Moreover, the amendments also empowered the Secretary of the Treasury to ban imports from such nations if their average dolphin mortality rates exceeded U.S. standards.<sup>69</sup> In addition to the possibility of a primary embargo, the MMPA amendments also prevented “tuna laundering” by requiring intermediary nations exporting yellowfin tuna to the U.S. “to certify and provide reasonable proof . . .” that they had taken measures “to prohibit the importation of such tuna” from harvesting nations subject to a primary embargo.<sup>70</sup> Failure to provide the required proof would result in a secondary embargo against the noncomplying intermediary nation.<sup>71</sup> If the primary and secondary embargoes failed to achieve

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ENERGY NAT. RESOURCES & ENVTL. L. 97, 110-12 (1990). *See also* 50 C.F.R. § 216.24(d)(2)(i) (1992).

<sup>64</sup>. 138 CONG. REC. H9064, at H9070 (1992). *See also* 57 Fed. Reg. 47,620, 47,623 (1992).

<sup>65</sup>. *See* 130 CONG. REC. H9071 (daily ed. Sept. 22, 1992) (statement of Rep. Hughes). *But see* 57 Fed. Reg. 47,620, 47,623 (1992) (arguing that foreign fleet dolphin mortality decreased dramatically).

<sup>66</sup>. Act of July 17, 1984, *supra* note 15.

<sup>67</sup>. Marine Mammal Protection Act Amendments of 1988, *supra* note 16.

<sup>68</sup>. Act of July 17, 1984, *supra* note 15 at § 101(b) (codified as amended at 16 U.S.C.A. § 1371(a)(2)(B) (West 1985 & Supp. 1993)).

<sup>69</sup>. Act of July 17, 1984, Pub. L. No. 98-364, § 101, 98 Stat. 440 (codified as amended 16 U.S.C.A. § 1371(a)(2)(B) (West 1985 & Supp. 1993)) [hereinafter 1984 MMPA amendments].

<sup>70</sup>. Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100-711, § 4(a)(3), 102 Stat. 4755 (codified as amended 16 U.S.C.A. § 1371(a)(2)(C) (West 1985 & Supp. 1993)) [hereinafter 1988 MMPA amendments]. An intermediary nation is defined as “a nation that exports yellowfin tuna or yellowfin tuna products to the United States and that imports yellowfin tuna or tuna products.” 50 C.F.R. § 216.3 (1992).

<sup>71</sup>. 1988 MMPA amendments, *supra* note 67, at 16 U.S.C.A. § 1371(a)(2)(C) (West Supp. 1993).

their intended results, a further ban on any other fish or fish product was authorized pursuant to the Pelly Amendment to the Fisherman's Protective Act of 1967.<sup>72</sup>

The 1988 Amendments to the MMPA additionally established performance standards for tuna boat captains and required the use of dolphin-friendly fishing technology.<sup>73</sup> To monitor compliance with these added safeguards, the amendments instituted a 100 percent observer program for the U.S. tuna fleet.<sup>74</sup> Similarly, foreign nations wishing to export yellowfin tuna harvested in the ETP to the United States had to implement an observer program to meet the MMPA comparability standards.<sup>75</sup>

*B. Dolphin-Safe Policy and the Dolphin Protection Consumer Information Act*

Dissatisfied with the results of the MMPA, environmental groups in the U.S. protested dolphin-unsafe fishing practices by organizing consumer boycotts against canned tuna.<sup>76</sup> In response to the growing public relations problem created by these boycotts, the three principal U.S. tuna processors announced in April 1990 that

<sup>72</sup>. See 22 U.S.C. §§ 1978(a), (h) (1988).

<sup>73</sup>. See 1988 MMPA amendments, *supra* note 67, at §§ 5(d), 4(d) (codified at 16 U.S.C. § 1374 (1988)). Performance standards and vessel gear requirements are contained in 50 C.F.R. § 216.24 (1992). Some of the more important performance standards include: a ban on sundown sets; a requirement to engage in a "backdown" procedure to release dolphins trapped in the net; and a prohibition on the use of Class C explosives to herd dolphins into the net. See 50 C.F.R. § 216.24(d) (1992). Gear requirements include: porpoise safety panel (*i.e.*, Medina Panel); porpoise apron; porpoise safety panel markers; hand holds; and corkline hangings; bunchlines; speedboats; rubber raft; facemasks and snorkels; and spotlights. *Id.*

<sup>74</sup>. See 1988 MMPA Amendments, *supra* note 16, at §§ 4(d), 114 (codified at 16 U.S.C. §§ 1374(h)(2)(B)(viii), 1383(a) (1988)). Observers for this program are provided by the National Marine Fisheries Service (NMFS) and the IATTC. The observers monitor the fishing practices and performance of the U.S. tuna fleet to ensure compliance with the MMPA. *Id.*; see also 134 CONG. REC. S12,946 (daily ed. Sept. 20, 1988) (statement of Sen. Kerry); 50 C.F.R. § 216.24(d)(2)(iii), (f) (1992).

<sup>75</sup>. A foreign nation had to demonstrate that its tuna fleet was being "monitor[ed] by observers from the IATTC or an equivalent international program" in which the United States participated, and that the level of observer coverage was equal to that imposed on U.S. vessels "unless an alternative observer program [was] . . . determined to provide sufficiently reliable documentary evidence of the nation's incidental take rate." 54 Fed. Reg. 20,171 (1989); 16 U.S.C. § 1374 (1992).

<sup>76</sup>. See U.S. INT'L TRADE COMM'N, *supra* note 1, at 3-1 to 3-10.

they would purchase only dolphin-safe tuna for the U.S. market.<sup>77</sup> This unexpected announcement had an immediate and substantial effect on both the domestic and foreign tuna industries. To avoid losing their share of the largest canned tuna market in the world, a number of foreign tuna processors, including Mitsubishi Foods,<sup>78</sup> adopted a similar policy.<sup>79</sup> Domestically, the announcement forced the U.S. purse seine fleet to restructure and to transfer most of its fishing operations to the Western Tropical Pacific (WTP) where the tuna-dolphin bond does not occur.<sup>80</sup> Whereas the U.S. fleet had once dominated the ETP tuna fishery during the 1970s and 1980s (reaching a high of 112 vessels in 1976), by 1991 the number of U.S.-flagged purse seiners in the ETP had dropped to fourteen.<sup>81</sup>

In addition, Congress responded to the canners' announcement by enacting the Dolphin Protection Consumer Information Act (DPCIA) of 1991.<sup>82</sup> The Act defines "dolphin safe" and makes it unlawful for a tuna producer offering to sell tuna products in the U.S. to misuse a label by falsely suggesting that a product is "dolphin safe."<sup>83</sup> The net effect of the DPCIA and the dolphin-safe policy is a U.S. canned tuna market that is virtually dolphin-safe.<sup>84</sup>

### C. *Reaction to Tuna Embargoes and DPCIA Under the GATT*

Beginning in 1990, U.S. courts ordered embargoes against various harvesting nations not having dolphin conservation programs comparable to those of the United States, or which had exceeded U.S.

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<sup>77</sup>. See 56 Fed. Reg. 47,418, 47,419 (1991). The three principal U.S. tuna processors are Starkist, Van Camp/Chicken of the Sea and Bumblebee. *Id.*

<sup>78</sup>. Mitsubishi packages Three Diamonds brand and A&Ps' and Safeways' store brands. Anita Manning, *The Net Effect on Dolphins*, USA TODAY, Aug. 6, 1990, at Life 1.

<sup>79</sup>. U.S. INT'L TRADE COMM'N, *supra* note 1, at 3-10.

<sup>80</sup>. *Id.* at 3-18.

<sup>81</sup>. See 57 Fed. Reg. 27,010, 27,013 Tbl. 1 (1992).

<sup>82</sup>. See 1990 DPCIA, *supra* note 20.

<sup>83</sup>. 16 U.S.C. § 1385(d) (Supp. III 1991). Specifically, it is a violation of Section 5 of the Federal Trade Commission Act to affix a dolphin-safe label to any tuna product harvested anywhere on the high seas by a vessel that uses driftnets, or in the ETP, if there is no accompanying documentation signed by the vessel captain, an observer, all exporters, all importers, and all processors, certifying that no purse seine nets were intentionally deployed on dolphins during the fishing trip on which the tuna were harvested. *Id.*

<sup>84</sup>. See generally 56 Fed. Reg. 47,418 (1991) (explaining requirements for dolphin-safe tuna).

standards regarding average dolphin mortality rates.<sup>85</sup> Courts also ordered embargoes against various intermediary nations that failed to demonstrate that they had banned yellowfin tuna products from nations subject to the primary embargoes.<sup>86</sup>

In response, Mexico requested the GATT Council to establish a panel to consider whether the primary and secondary embargo provisions of the MMPA and the labeling provisions of the DPCIA were illegal under the GATT.<sup>87</sup> Mexican officials argued that the embargoes violated:

(1) the prohibition on quantitative restrictions under GATT Article XI; (2) . . . the prohibitions on discriminatory administration of quantitative restrictions under GATT Article XIII . . .; and (3) . . . the requirement to accord national treatment to imported goods under GATT Article III.<sup>88</sup>

Additionally, Mexico challenged the application of the DPCIA labeling provisions to Mexican tuna.<sup>89</sup> U.S. officials responded that the embargo provisions were “internal regulations permitted under GATT Article III(4)” and under the Note Ad Article III.<sup>90</sup>

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<sup>85</sup>. See *Earth Island Institute v. Mosbacher*, 746 F. Supp. 964 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991), *reh'g granted*, 785 F. Supp. 826 (N.D. Cal. 1992).

<sup>86</sup>. See *id.* Thirteen nations remain subject to these embargoes. U.S. Policy on Tuna-Dolphin Issues, Aug. 24, 1992, U.S. DEPT. ST. DISP. 667, 668 (statement by David A. Colson, Deputy Assistant Secretary for Oceans and Fisheries Affairs) [hereinafter DEP'T ST. DISP.].

<sup>87</sup>. See U.S. INT'L TRADE COMM'N, *supra* note 1, at 3-13.

<sup>88</sup>. Joel P. Trachtman, *GATT Dispute Settlement Panel*, 86 AM. J. INT'L L. 142 (1992).

<sup>89</sup>. *Id.* at n.1. Mexico also challenged the potential application of a Pelly Amendment embargo against other fish products from Mexico. GATT Panel Report, *supra* note 24, at 1601-02.

<sup>90</sup>. Trachtman, *supra* note 88, at 142-43. Under Article III(1) national regulations may not be applied “to imported or domestic products so as to afford protection to domestic production.” General Agreement on Tariffs and Trade, October 30, 1947, art. III(1), *reprinted as amended in* KENNETH R. SIMMONDS & BRIAN H.W. HILL, *LAW AND PRACTICE UNDER THE GATT I.A.* (1988) [hereinafter GATT]. Under Article III(4), foreign products must be accorded “treatment no less favorable than that accorded to like products of national origin in respect of all laws . . . affecting their internal sale . . ., distribution or use.” *Id.* at art. III(4). The Note Ad article III provides that “any law . . . which applies to an imported product and the like domestic product and is . . . enforced in the case of the imported product



Specifically, U.S. officials claimed that the Mexican embargo “constituted an enforcement at the time or point of importation of the requirements of the MMPA that yellowfin tuna in the ETP be harvested with fishing techniques designed to reduce the incidental taking of dolphins.”<sup>91</sup> The U.S. therefore contended that the embargo provisions were “not subject to Article XI and XIII.”<sup>92</sup> In the alternative, U.S. authorities argued that the embargoes were permitted under exceptions to Article XI, allowing for the protection of animal life and the conservation of exhaustible natural resources under Article XX(b) and XX(g).<sup>93</sup>

The dispute panel found that Article III and the Note Ad Article III were limited to the regulation of products as such (*i.e.*, the tuna).<sup>94</sup> Therefore, since the MMPA attempted to regulate the production process of the product (*i.e.*, the harvesting of tuna) and not the product itself, the panel concluded that the MMPA embargoes could not be justified as internal regulations applied at the point of importation under Article III.<sup>95</sup> The dispute panel further found, with regard to Article XX(b), that the embargoes were not necessary because the U.S. had failed to exhaust “all options consistent with the GATT . . . , such as international negotiation and cooperation . . . ,

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at the time or point of importation, is . . . subject to the provisions of Article III.” *Id.* at Note Ad art. III.

<sup>91</sup>. GATT Panel Report, *supra* note 24, at 1617. The United States further claimed that “the MMPA did not regulate tuna products as such, and in particular did not regulate the sale of tuna or tuna products.” *Id.* Additionally, the United States argued that the MMPA did not “prescribe fishing techniques that could have an effect on tuna as a product.” *Id.*

<sup>92</sup>. Trachtman, *supra* note 88, at 143. GATT Article XI(1) provides that “no prohibitions . . . shall be instituted . . . by any . . . party on the importation of any product of the territory of any other . . . party . . . .” GATT, *supra* note 90, at art. XI.

<sup>93</sup>. See Trachtman, *supra* note 88, at 143. Article XX of the GATT provides that “subject to the requirement that such measures are not applied in a manner which would constitute 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.” GATT, *supra* note 90, at art. XX.

<sup>94</sup>. GATT Panel Report, *supra* note 24, at 1617.

<sup>95</sup>. *Id.* at 1617-18.

before using GATT-inconsistent measures . . . .”<sup>96</sup> More importantly, the panel limited the use of Article XX(b) to domestic animal protection. The panel specifically found that Article XX(b) did not “except measures from the restriction of the GATT that are intended . . . to protect foreign animals . . . .”<sup>97</sup>

The panel similarly restricted the application of Article XX(g) by finding that conservation measures adopted pursuant to Article XX(g) were permissible only to the extent that they primarily restricted production or consumption within a nation’s jurisdiction.<sup>98</sup> Therefore, having determined that the Article XX exceptions did not apply, the panel found that the primary and secondary embargoes imposed by the United States were inconsistent with Article XI(1).<sup>99</sup> However, the panel did find that the DPCIA labeling provisions were consistent with GATT Article I(1). The panel held that, because tuna products could be sold with or without the “Dolphin Safe” label, the labeling provision did not restrict the sale of tuna.<sup>100</sup>

Following this hearing, the dispute panel recommended that the GATT Council request the United States to bring the MMPA and its application into compliance with the GATT.<sup>101</sup> Final action on the panel report was withheld, however, after the United States and Mexico reached a tentative compromise whereby Mexico agreed not to request the GATT Council to adopt the report until after the two nations had attempted to work out a settlement.<sup>102</sup> Despite Mexico’s reluctance to enforce the panel’s report, two additional complaints have been filed challenging the MMPA embargo provisions under the GATT. On July 14, 1992, the EC requested that a second dispute panel be established to review the secondary import bans currently in force against Spain, France, Italy, and the United Kingdom.<sup>103</sup>

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<sup>96</sup>. Trachtman, *supra* note 88, at 148.

<sup>97</sup>. *Id.* at 149.

<sup>98</sup>. GATT Panel Report, *supra* note 24, at 1620-21.

<sup>99</sup>. *Id.* at 1618. In light of this ruling, the complaint was not reviewed under Article XIII. *Id.*

<sup>100</sup>. *Id.* at 1622. The challenge to the Pelly Amendment was also denied on the grounds that the U.S. law allows for the discretionary, not the mandatory, imposition of an embargo. *Id.* at 1618-19, 1621.

<sup>101</sup>. *Id.* at 1623.

<sup>102</sup>. See U.S. INT’L TRADE COMM’N, *supra* note 1, at 3-15.

<sup>103</sup>. See DEP’T ST. DISP., *supra* note 86, at 668-69.

Venezuela has also threatened to pursue its complaint if the MMPA embargo is not lifted.<sup>104</sup>

#### IV. MULTILATERAL EFFORTS TO PROTECT DOLPHINS IN THE ETP

##### A. *Inter-American Tropical Tuna Commission (IATTC)*

The Inter-American Tropical Tuna Commission (IATTC) was established in 1950 by the United States and Costa Rica pursuant to a bilateral fishing agreement.<sup>105</sup> Since its inception, the IATTC has been concerned primarily with the conservation and management of marine resources in the ETP.<sup>106</sup> Although little was accomplished during its first twenty years of existence, since the mid-1970s the IATTC has taken a leading role in evaluating and reducing dolphin mortality in the ETP tuna fishery.

In 1976, the IATTC established the following goals to balance the competing interests of the tuna industry and dolphin conservationists:

- (1) . . . strive to maintain a high level of tuna production and
- (2) also to maintain porpoise stocks at or above levels that assure their survival in perpetuity,
- (3) with every reasonable effort being made to avoid needless or careless killing of porpoise.<sup>107</sup>

In furtherance of these goals, the IATTC implemented a voluntary observer program in 1979 to monitor the fishing practices and performance of the foreign fleets.<sup>108</sup> Dolphin mortality data collected by these observers is used by the ETP harvesting nations to show compliance with the comparability standards of the MMPA.<sup>109</sup> The data is also used to calculate annual dolphin mortality rates for each

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<sup>104</sup>. See U.S. INT'L TRADE COMM'N, *supra* note 1, at 3-6 n.35.

<sup>105</sup>. 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 now include: Panama, Ecuador, Canada, Japan, France and Nicaragua. Mexico and Costa Rica have withdrawn from the organization. See Holland, *supra* note 6, at 274-75 & nn. 72-73.

<sup>106</sup>. *Id.* at 274-75.

<sup>107</sup>. U.S. INT'L TRADE COMM'N, *supra* note 1, at 3-2 (quoting IATTC, 1979 Annual Report of the Inter-American Tuna Commission (1981)).

<sup>108</sup>. See 54 Fed. Reg. 20,171 (1989).

<sup>109</sup>. See 56 Fed. Reg. 47,418 (1991); 53 Fed. Reg. 8910, 8913-16 (1988).

major species and stock of dolphin.<sup>110</sup> Since 1988, all the ETP harvesting nations with sizeable purse seine fleets have voluntarily participated in the program.<sup>111</sup> Although observer coverage was initially set at 33 percent, in January 1991 the ETP harvesting nations committed to 100 percent coverage.<sup>112</sup>

To complement the observer program, the IATTC issued regulations in 1987 to manage purse seine fishing in the ETP.<sup>113</sup> These regulations were refined in 1991 to implement a new goal of reducing dolphin mortality to levels approaching zero.<sup>114</sup> To achieve this new goal, the regulations implemented an aggressive research program to identify "alternative fishing methods that would not involve the encirclement of dolphins . . . ."<sup>115</sup> The member states also agreed to implement a dolphin conservation plan beginning in 1992.<sup>116</sup> The combined effect of these initiatives has been an 80 percent reduction in dolphin mortality.<sup>117</sup>

#### *B. IATTC Agreement of June 1992*

The most significant contribution by the IATTC occurred in April 1992. At a special meeting held in La Jolla, California, the IATTC successfully negotiated the first ever multilateral agreement to protect dolphins in the ETP.<sup>118</sup> The agreement, formally ratified in June, provides for a further 80 percent reduction in dolphin mortality between 1993 and 1999.<sup>119</sup> These reductions will be implemented through a system of individual vessel quotas based on the total

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<sup>110</sup>. See 54 Fed. Reg. 20,171, 20,171 (1989).

<sup>111</sup>. These states included: Spain, Ecuador, El Salvador, Mexico, Panama, the United States, Vanuatu and Venezuela. *Id.* at 20, 171-72.

<sup>112</sup>. See 57 Fed. Reg. 47,620, 47,624 (1992).

<sup>113</sup>. See U.S. INT'L TRADE COMM'N, *supra* note 1, at 3-2.

<sup>114</sup>. See 57 Fed. Reg. 47,620, 47,625 (1992).

<sup>115</sup>. *Id.*

<sup>116</sup>. See *id.*

<sup>117</sup>. Dolphin mortality dropped from 133,000 animals in 1986 to 25,000 in 1991. See Brooke, *supra* note 7; 57 Fed. Reg. 27,010, 27,013-14 (1992).

<sup>118</sup>. See Brooke, *supra* note 7, at C4.

<sup>119</sup>. See *id.* The parties to the agreement are: Colombia, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Spain, the United States, Vanuatu, and Venezuela. See *supra* note 25, IATTC Agreement, at app. I.

number of purse seiners in the fishery and the following annual limits on total dolphin mortality:<sup>120</sup>

| 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   |

Additional protections are afforded for individual species and stocks of dolphins in Appendix III of the agreement.<sup>121</sup>

A Review Panel established by the agreement will be responsible for assigning individual vessel dolphin mortality limits (DML).<sup>122</sup> The Panel will additionally review and report annually “on the compliance of the international fleet with the mortality limits” set out in the agreement.<sup>123</sup> Compliance will also be monitored by 100 percent observer coverage, 50 percent of which must be provided by the IATTC.<sup>124</sup> The other 50 percent may be provided by the flag-state.<sup>125</sup>

The agreement also establishes a full-time Scientific Advisory Board that will be responsible for coordinating an international

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<sup>120</sup>. For example, if there are 100 purse seine vessels fishing in the ETP in 1994, each vessel would be assigned a “dolphin mortality limit” (DML) of 195 animals. An onboard IATTC observer will be responsible for informing the captain when his vessel has reached its DML. If a captain deliberately exceeds his quota, he is subject to a fine and/or license suspension. Additionally, the vessel’s quota for subsequent years would be lowered accordingly. IATTC Agreement, *supra* note 25, at app. II; *see* Brooke, *supra* note 7, at C4.

<sup>121</sup>. *Id.* at C4.

<sup>122</sup>. *Id.* at C4.

<sup>123</sup>. IATTC Agreement, *supra* note 25, at 3.

<sup>124</sup>. *Id.* at 2.

<sup>125</sup>. *See id.*

research program.<sup>126</sup> The research program will initially focus on improving current purse-seine technology in order to make this method of tuna harvesting more safe to dolphins.<sup>127</sup> The program will also seek alternative methods of harvesting tuna that do not involve the encirclement of dolphins.<sup>128</sup> Although the United States, Mexico, Venezuela, and the Italian Cannery Association have already pledged contributions of \$1.4, \$1.0, \$.5, and \$.4 million respectively, to initiate research in 1993, funding will be the major obstacle to this program.<sup>129</sup>

#### V. INCREASED PROTECTION FOR DOLPHINS UNDER THE IDCA

In 1992, Congress revived its efforts to resolve the issue of incidental dolphin mortality in the ETP. While the Administration was negotiating the IATTC Agreement, Congress developed an alternative plan to “eliminate,” as opposed to “reduce,” dolphin mortality.<sup>130</sup> The plan that emerged consisted of a moratorium on the use of purse seine nets to encircle dolphins intentionally.<sup>131</sup> The tension between the congressional plan and the administration’s negotiation surfaced in July 1992 when legislation was introduced in the Senate to implement the IATTC Agreement.<sup>132</sup> Opponents of the bill simultaneously introduced the IDCA as an alternative solution arguing that the IATTC Agreement was unacceptable to the American people because it allowed for the deaths of an additional 75,000

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<sup>126</sup>. *Id.* at 5, app. IV.

<sup>127</sup>. *Id.*

<sup>128</sup>. *Id.* Some proposals in this regard include: “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. . . . Initiat[ing] tracking and other behavioral studies of tunas and dolphins. . . . Locating large yellowfin tuna with [Fish Aggregation Devices] FADs, 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).

<sup>129</sup>. *See id.*

<sup>130</sup>. *See* 1992 IDCA, *supra* note 26, at § 301(b) (codified at 16 U.S.C.A. § 1411 (West Supp. 1993)).

<sup>131</sup>. *See id.* at § 302 (codified at 16 U.S.C.A. § 1412 (West Supp. 1993)).

<sup>132</sup>. *See* S. 2995, 102d Cong., 2d Sess. (1992).

dolphins by the year 2000.<sup>133</sup> The opponents further argued that the continued use of purse seine nets was inimical to the original MMPA goal of reducing dolphin mortality to levels approaching zero.<sup>134</sup> The result was an overwhelming rejection of the IATTC Agreement in favor of the more rigid moratorium scheme of the IDCA.<sup>135</sup>

On October 26, 1992, the IDCA became the latest in a long line of unilateral U.S. efforts to protect dolphins in the ETP. It differs, however, from previous efforts in that it changes U.S. policy from one of “reducing” incidental dolphin mortality to one of “eliminating” such mortality.<sup>136</sup> To facilitate this change in policy, the Act amends the MMPA by adding Subchapter IV. Subchapter IV authorizes the Secretary of State to enter into agreements to establish a 5-year moratorium on the use of purse seine nets to encircle dolphins intentionally in the tuna fisheries.<sup>137</sup> As an incentive for compliance, the IDCA provides that the United States will immediately lift any tuna embargo currently in effect for any nation agreeing to observe the moratorium.<sup>138</sup> To take advantage of this provision, however, a foreign state must commit in writing to comply with section 1415(a). This provision requires that the foreign state: (1) implement the moratorium by March 1, 1994; (2) allow observers onboard its purse seiners (50% of which must be from a competent regional organization like the IATTC); (3) reduce its 1992 level of

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<sup>133</sup>. See S. 3003, 102d Cong. 2d Sess. (1992); H.R. 5419, 102d Cong., 2nd Sess. (1992); 138 CONG. REC. S10,135 (daily ed. July 22, 1992) (statement of Sen. Kerry); 138 CONG. REC. H9067 (daily ed. Sept. 22, 1992) (statement of Rep. Studds).

<sup>134</sup>. See *id.*

<sup>135</sup>. The IDCA passed by a vote of 389 to 15 in the House of Representatives. 138 CONG. REC. H9365 (daily ed. Sept. 24, 1992).

<sup>136</sup>. See 1992 IDCA, *supra* note 26, at § 301(b) (codified at 16 U.S.C.A. § 1411(b) (West Supp. 1993)).

<sup>137</sup>. 16 U.S.C.A. § 1412(a) (West Supp. 1993). A limited exception to the moratorium is permitted for research purposes. *Id.* at § 1413. The required terms for any agreement entered into pursuant to § 1412(a) are set out in § 1412(b)(1)-(5) [general terms]; § 1413(a) [research program]; § 1413(b) [limits on dolphin mortality under research program]; and § 1413(c) [funding for research program]. In addition to the moratorium, the Act also establishes a dolphin-safe tuna market in the United States by June 1994, provides for a research program, and reauthorizes the South Pacific Tuna Act which implements “the treaty which assures access for U.S. vessels to productive” tuna fisheries in the WTP through the year 2002. See *id.* at §§ 1413, 1417; 1992 IDCA, *supra* note 26, at § 3 (not codified).

<sup>138</sup>. 16 U.S.C.A. § 1415(a) (West Supp. 1993).

dolphin mortality “to a level that is lower than such mortality in 1991 by a statistically significant margin;” and (4) reduce its January 1993 to February 1994 level of dolphin mortality “to a level that is lower than such mortality in 1992 by a statistically significant margin.”<sup>139</sup> If a state agrees to abide by the moratorium but subsequently fails to comply with its commitments under § 1415(a), the IDCA requires the Secretary of the Treasury to re-impose a tuna embargo against that nation.<sup>140</sup> The noncomplying state then has 60 days to certify and provide reasonable proof that it has fully implemented its prior commitment to comply with § 1415(a).<sup>141</sup> If the required evidence is not provided within 60 days, an additional embargo against other fish and fish products will be imposed.<sup>142</sup>

If an agreement to abide by the moratorium cannot be reached with any of the major purse seine fishing nations by March 1, 1994, U.S. purse seiners are permitted to continue fishing in the ETP until the end of 1999.<sup>143</sup> However, the total number of dolphin mortalities caused by the U.S. fleet during this period must “continue to be reduced by statistically significant amounts each year to levels approaching zero.”<sup>144</sup> This provision is significant because the embargoes under the MMPA are based, in part, on a foreign nations failure to achieve dolphin mortality rates comparable to U.S. standards.<sup>145</sup> As a result, it will become increasingly difficult for the foreign fleet to meet these comparability standards as U.S. dolphin mortality rates are phased down to zero by the end of 1999.

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<sup>139</sup>. *Id.*

<sup>140</sup>. *Id.* at § 1415(b)(1).

<sup>141</sup>. *Id.* at § 1415(b)(2).

<sup>142</sup>. *Id.* This embargo is limited to fish and fish products which have “an aggregate customs valuation equal to 40 percent of the aggregate customs valuation . . .” of all fish and fish products imported from that country during the base year. *Id.*

<sup>143</sup>. *Id.* at § 1416(a)(4).

<sup>144</sup>. *Id.*

<sup>145</sup>. *See supra* notes 66-69 and accompanying text.



## VI. UNWARRANTED EXTENSION OF U.S. JURISDICTION

A. *Reasonableness Under the Restatement (Third) of the Foreign Relations Law of the United States*

The assertion of extraterritorial jurisdiction under the IDCA is based on the effects principle reflected in § 402(1)(c) of the *Restatement (Third) of the Foreign Relations Law of the United States* (hereinafter *Restatement*).<sup>146</sup> This commonly recognized principle of international law allows a nation to exercise jurisdiction over conduct occurring outside its territory when the effect or intended effect of such conduct within the state is substantial.<sup>147</sup> However, even though a basis for jurisdiction may exist under § 402, a state is precluded from exercising jurisdiction over “a person or activity having connections with another state . . .” if it would be unreasonable to do so.<sup>148</sup> Whether an exercise of extraterritorial jurisdiction is reasonable is determined by evaluating all relevant factors, including the factors listed in § 403(2) of the *Restatement*.<sup>149</sup> These factors include:

- (a) the extent to which the activity takes place within the regulating state, or has substantial, direct, and foreseeable effect upon or in the regulating state;

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<sup>146</sup>. Jurisdiction under the IDCA is derived from the MMPA which provides that:

- (5) marine mammals and marine mammal products either—
  - (A) move in interstate commerce, or
  - (B) affect the balance of marine ecosystems in a manner which is important to other animals and animal products which move in interstate commerce, and that the protection and conservation of marine mammals is therefore necessary to insure the continuing availability of those products which move in interstate commerce; and
- (6) marine mammals have proven themselves to be resources of great international significance, esthetics and recreational as well as economic, and it is the sense of Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem . . . .

16 U.S.C. § 1361 (1988).

<sup>147</sup>. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 402(1)(c) (1986).

<sup>148</sup>. *Id.* at § 403(1).

<sup>149</sup>. *Id.* at § 403.

- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectation that might be protected or hurt by the regulation in question;
- (e) the importance of the regulation in question to the international political, legal or economic system;
- (f) the extent to which such regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by other states.<sup>150</sup>

This paper evaluates these factors and concludes that the IDCA is an unreasonable extension of U.S. jurisdiction. Any interest the United States may have in regulating dolphin mortality outside the U.S. EEZ is clearly outweighed by the adverse effects such regulations will have on the international community.

#### 1. Link Between Purse Seine Fishing and the United States

The first factor to consider is “the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory.”<sup>151</sup> Reasonableness under the *Restatement* initially turns on the extent to which the activity to be regulated occurs “within,” or has a direct and substantial effect “upon,” the regulating state.<sup>152</sup> Since the great majority of purse

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<sup>150</sup>. *Id.*

<sup>151</sup>. *Id.* at § 403(2)(a).

<sup>152</sup>. *Id.*

seine fishing occurs “outside” the U.S. EEZ, the extraterritorial application of the IDCA will only be reasonable under § 403(2)(a) if purse seining has a direct and substantial effect “upon” the United States.<sup>153</sup> There are arguably two bases under which the United States can claim that purse seine fishing has an effect “upon” the United States. Neither of these bases, however, satisfy the “substantial and direct effect” requirement of § 402 or § 403 of the *Restatement*.

First, as the largest canned tuna market in the world,<sup>154</sup> the United States may argue that it has a substantial interest in maintaining a dolphin-safe tuna market for American consumers.<sup>155</sup> Thus the IDCA is necessary to achieve this goal because more than one-third of all canned tuna consumed in the United States is imported.<sup>156</sup> The trouble with such an argument is that this interest can be achieved without implementing the IDCA. Dolphin-unsafe tuna is already effectively precluded from sale in the United States by the dolphin-safe policy and the DPCIA labeling provisions.<sup>157</sup> Therefore, the IDCA is unnecessary and cannot be justified on this basis.

Second, Congress has indicated that “marine mammals play an important role in marine ecosystems and that they are significant recreational and esthetic resources” for the United States.<sup>158</sup> Since dolphins are highly migratory species that move freely between the various EEZs encompassed by the ETP, this interest could be affected if substantial depletions of dolphin stocks occur outside the U.S. EEZ. Therefore, the United States arguably has an interest in maintaining an “optimum sustainable population” of dolphins in the ETP.<sup>159</sup> The difficulty with this argument, however, is that current scientific evidence does not support the conclusion that dolphin stocks or species are currently endangered or threatened in the ETP. On the contrary, scientific studies indicate that dolphin stocks and species in

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<sup>153</sup>. See RESTATEMENT (THIRD), *supra* note 147, at § 403(2)(a).

<sup>154</sup>. See U.S. Int’l Trade Comm’n, *supra* note 1, at 1-1.

<sup>155</sup>. See *id.*, at 3-1.

<sup>156</sup>. *Id.*

<sup>157</sup>. See *supra* note 84 and accompanying text.

<sup>158</sup>. 134 CONG. REC. S16,342 (daily ed. Oct. 14, 1988) (statement of Sen. Hollings); see also 16 U.S.C. § 1361(6) (1988).

<sup>159</sup>. See 50 C.F.R. § 216.3 (1992) (defining “optimum sustainable population”).

the ETP are healthy and can sustain the current level of incidental mortality in perpetuity.<sup>160</sup> These scientific findings become even more significant when one considers the reductions in dolphin mortality required by the IATTC Agreement.<sup>161</sup> Hence, the IDCA cannot be supported on this basis.

It appears, therefore, that the continued use of purse seine nets proscribed by the IDCA does not have a “substantial and direct” effect “upon” the United States. Consequently, it would be unreasonable to extend the IDCA extraterritorially based on this factor alone. Moreover, since the United States cannot demonstrate that purse seine fishing will have a “substantial effect” within its territory, the United States fails to satisfy the basic requirement for jurisdiction under the effects doctrine. As a result, any extraterritorial extension of the IDCA would not only be unreasonable, but would also have no basis under customary international law. However, even if the IDCA can overcome this initial obstacle, an evaluation of the remaining seven factors clearly demonstrates the unreasonableness of extending the law beyond the U.S. EEZ.

## 2. The Connection Between the Purse Seine Fleet and the United States

An additional factor to consider is “the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect.”<sup>162</sup> Although the U.S. purse seine fleet was once dominant in the ETP, it has declined significantly since the enactment of the 1981 amendments to the MMPA.<sup>163</sup> The stringent performance standards and vessel gear requirements imposed by the MMPA have made it financially unattractive for U.S. purse seiners to fish in the ETP.<sup>164</sup> The dolphin-safe policy and the DPCIA have

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<sup>160</sup>. See U.S. INT’L TRADE COMM’N, *supra* note 1, at 3-2; 55 Fed. Reg. 11,921, 11,922 (1990). These studies will be discussed in more detail in the § 403(2)(c) analysis, *infra*, notes 143-158 and accompanying text.

<sup>161</sup>. See IATTC Agreement, *supra* note 25, at 1.

<sup>162</sup>. RESTATEMENT (THIRD), *supra* note 147, at § 403(2)(b).

<sup>163</sup>. See 57 Fed. Reg. 47,620, 47,623 (1992).

<sup>164</sup>. 138 CONG. REC. H9091 (1992).

likewise had an impact on further reducing U.S. participation in the ETP tuna fishery.<sup>165</sup> And under the IDCA, even if the proposed moratorium does not take effect, the remaining U.S. purse seiners will be forced out of the ETP by 1999.<sup>166</sup>

Foreign presence, on the other hand, has grown appreciably since the 1980s. Whereas in 1971, there were only thirteen foreign-flagged purse seiners operating in the ETP, by 1991 there were ninety such vessels.<sup>167</sup> Over 80 percent of these vessels fly the Mexican or Venezuelan flag.<sup>168</sup>

Based on the level of participation alone, it is obvious that it is the foreign nations with a significant presence in the ETP, and not the United States that have a greater interest in regulating fishing activities in the tuna fishery. Thus the continued assertion of U.S. jurisdiction over foreign fishing practices in the ETP, despite a conscious decision by the U.S. Congress to abandon the region, is clearly unreasonable and seriously infringes on the sovereignty of the ETP harvesting nations to regulate their respective tuna fleets.

### 3. Importance and Acceptability of the IDCA

The third factor to consider is “the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted.”<sup>169</sup> The next question that must be addressed under the *Restatement’s* test is whether the international community will accept the level of importance that the United States has placed on the elimination of dolphin mortality in the ETP.<sup>170</sup>

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<sup>165</sup>. See 57 Fed. Reg. 27,010, 27,013 Tbl. 1 (1992).

<sup>166</sup>. Regardless of whether the IDCA moratorium takes effect or not, all purse seine fishing operations by U.S. tuna boats must cease in 1999. See 16 U.S.C. § 1416(a)(4) (West Supp. 1993).

<sup>167</sup>. See 57 Fed. Reg. 27,010, 27,013 Tbl. 1 (1992).

<sup>168</sup>. Countries currently fishing in the ETP include: Ecuador, Costa Rica, France, Japan, Nicaragua, Mexico, Panama, Spain, the United States, Venezuela, and Vanuatu. Only the United States, Panama, Mexico and Venezuela continue to use purse seine nets to intentionally encircle dolphins. Mexico maintains over 50 purse seine boats; Venezuela maintains over 25. See U.S. INT’L TRADE COMM’N, *supra* note 1.

<sup>169</sup>. RESTATEMENT (THIRD), *supra* note 147, at § 403(2)(c).

<sup>170</sup>. See *id.*

Since 1972, one of the primary goals of the MMPA has been to reduce dolphin mortality in the purse seine fisheries to levels approaching zero in order to maintain the overall viability of the dolphin populations.<sup>171</sup> The proponents of the IDCA argue that this goal cannot be achieved unless a moratorium on the use of purse seine nets to encircle dolphins intentionally is implemented.<sup>172</sup> Proponents additionally argue that the continued killing of dolphins in the ETP is unacceptable to the American people.<sup>173</sup> Thus, in the opinion of Congress, the IDCA is necessary to ensure the viability of dolphin stocks in the ETP and to allay the concerns of the American people that dolphins are being slaughtered in the ETP.<sup>174</sup> However, based on available scientific evidence and National Marine Fishery Service (NMFS)/IATTC observer data, the importance placed by the United States on the elimination of dolphin mortality is simply untenable.<sup>175</sup> Moreover, the U.S. position completely ignores the social and economic impact that the elimination of purse seine fishing will have on lesser developed countries like Mexico and Venezuela.<sup>176</sup> It is not surprising, then, that the U.S. position is not supported by most of the ETP harvesting nations.

Although there is growing international support for enhanced dolphin protection, much of the international community disagrees with the manner in which the United States has attempted to impose its dolphin conservation standards on the rest of the world.<sup>177</sup>

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<sup>171</sup>. See, e.g., *supra* notes 12-17 and accompanying text.

<sup>172</sup>. See 138 CONG. REC. S10,135 (daily ed. July 22, 1992) (statement of Sen. Kerry); 138 CONG. REC. H9067 (daily ed. Sept. 22, 1992) (statement of Rep. Studds).

<sup>173</sup>. See *id.*; see also 16 U.S.C.A. § 1411(b)(1) (West Supp. 1993).

<sup>174</sup>. The proponents of the IDCA additionally argued that, even if dolphin stocks are not endangered, the intentional encirclement of dolphins with purse seine nets should still be prohibited because such activities place the animals under stress. This argument was justified on the ground that dolphins are entitled to special protection because "human beings have always felt a special sense of kinship and wonder toward the dolphin, because of its beauty, its grace, and its proven intelligence." 138 CONG. REC. S10,136 (daily ed. July 22, 1992) (statement of Sen. Kerry). While laudable, there is no scientific evidence to support this view. Cf. 138 CONG. REC. H9068 (daily ed. Sept. 22, 1992) (statement of Rep. Cunningham).

<sup>175</sup>. See *infra* notes 180-185 and accompanying text.

<sup>176</sup>. See *infra* notes 209-231 and accompanying text.

<sup>177</sup>. However, in support of the U.S. position, the French Tuna Cannery Association and two Italian tuna processors have indicated that they will not buy dolphin-unsafe tuna from the ETP. See Conner, *supra* note 6, at 72. Additionally, the Fisheries Committee of the

Mexico and Venezuela, in particular, have expressed their strong opposition to the IDCA. Government officials in both nations have publicly denounced the IDCA, calling it U.S. unilateral measures to save dolphins, and claiming that the measures infringe on their sovereignty and could have devastating effects on their tuna industry and economy.<sup>178</sup> Columbia and Vanuatu have also indicated that they will not support the IDCA for many of the same reasons.<sup>179</sup> In light of these statements and the recently concluded IATTC Agreement, it would appear that the ETP harvesting nations believe that the best way to guarantee the long-term sustainability of dolphin stocks is “not by the imposition of unilateral measures or embargoes” by the United States, but rather through multilateral efforts at the IATTC.<sup>180</sup>

Opposition to the IDCA and U.S. dolphin policies is not only based on sovereignty and economic/social concerns, but also on scientific evidence which concluded that a moratorium on purse seine fishing in the ETP would be unwise.<sup>181</sup> The evidence suggests that dolphin mortality can be reduced “to acceptable levels through a careful conservation program and the gradual development of new [fishing] methods . . . .”<sup>182</sup> The study further recommends that the best way to protect dolphins in the ETP is through better training of tuna boat captains and crews regarding dolphin-friendly fishing

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European Parliament passed a resolution in September 1991 recommending a ban on the importation of dolphin-unsafe tuna to the 12 member EC. Edward Epstein, *Conservationists Bash Salinas' Dolphin Plan*, S.F. CHRON., Sept. 27, 1991, at A14. Nonetheless, the EC has filed a GATT complaint to challenge the secondary embargo provisions of the MMPA. See *supra* note 103.

<sup>178</sup>. See Alejandro Kirk, *Venezuela: Offensive on All Fronts Against U.S. Tuna Embargo*, Inter Press Service, Jan. 29, 1992, available in LEXIS, Nexis Library, Omni File; Carlos M. Martinez, *Mexico Tuna Fishing Policy Defended*, L.A. TIMES, Nov. 22, 1992, at D5 (letter to the editor).

<sup>179</sup>. See 138 CONG. REC. H9068 (daily ed. Sept. 22, 1992) (statement of Rep. Cunningham). The fact that Vanuatu has not endorsed the IDCA is significant since it is the only nation subject to a primary MMPA embargo that has taken the steps necessary to have the import ban lifted.

<sup>180</sup>. Martinez, *supra* note 178, at D5.

<sup>181</sup>. See *id.* Evidence was obtained from a study conducted by the National Academy of Sciences, 138 CONG. REC. H9068 (daily ed. Sept. 22, 1992) (statement of Rep. Cunningham).

<sup>182</sup>. See Martinez, *supra* note 178, at D5.

techniques.<sup>183</sup> Moreover, a four-year study released by the National Research Council in February 1992 indicated that “no practical alternative” to purse seine fishing exists to protect dolphins in the ETP.<sup>184</sup> The director of the study stated that purse seine fishing was “the only commercially viable way of harvesting” large yellowfin tuna in the ETP.<sup>185</sup> The Council’s report further supported the ETP harvesting nations’ position that international cooperation is necessary if dolphin conservation efforts are to succeed and specifically recommended that the United States bring its goals in line with the objectives of other nations, *i.e.*, a reduction strategy as opposed to an elimination strategy.<sup>186</sup>

It appears therefore that the importance of eliminating dolphin mortality in the ETP is neither shared by most of the ETP harvesting nations, nor is it supported by the overwhelming weight of scientific evidence. Rather, this evidence suggests that the best way to protect dolphins in the ETP is through multilateral efforts. The unilateral extension of U.S. jurisdiction is therefore clearly unnecessary and unreasonable.

#### 4. Justified Expectations Protected or Hurt by the IDCA

The fourth factor to consider is “the existence of justified expectations that might be protected or hurt by the regulation.”<sup>187</sup> The IDCA restates the United States’ previously articulated expectations under the DPCIA and MMPA of achieving a dolphin-safe tuna market in the United States, and of maintaining an optimum sustainable dolphin population in the ETP.<sup>188</sup> The legislative history also makes clear that proponents of the IDCA expect that the new law will provide a solution to the current tuna ban disputes before the GATT.<sup>189</sup> The first two expectations have already been achieved

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<sup>183</sup>. See 138 CONG. REC. H9068 (daily ed. Sept. 22, 1992).

<sup>184</sup>. Michael Parrish, *Study Says Ban on Nets Can't Save Dolphins*, L.A. TIMES, Feb. 28, 1992, at A1.

<sup>185</sup>. *Id.*

<sup>186</sup>. See *id.* Similar recommendations have been made by the NMFS and IATTC. See generally 57 Fed. Reg. 21,081 (1992); IATTC Agreement, *supra* note 25, at 1.

<sup>187</sup>. RESTATEMENT (THIRD), *supra* note 147, at § 403(2)(d).

<sup>188</sup>. See generally 1992 IDCA, *supra* note 26.

<sup>189</sup>. See 138 CONG. REC. H9071 (daily ed. Sept. 22, 1992) (statements of Reps. Facell, Hughes, and Morella).



under preexisting legislation.<sup>190</sup> The latter cannot be achieved by imposing a moratorium on the use of purse seine nets.<sup>191</sup> Consequently, further extraterritorial regulation in the ETP by the United States is unnecessary.

The distinct preference for dolphin-safe tuna by American consumers can be guaranteed by continued application of the dolphin-safe policy and the DPCIA labeling requirements. Further unilateral regulations which force the U.S. standard onto foreign consumers go well beyond the expectation of achieving a dolphin-safe tuna market in the United States and are clearly unreasonable.

Similarly, the IDCA is not necessary to ensure the viability of dolphin stocks in the ETP. Based on the current number of dolphins in the ETP, scientists have concluded that the current levels of incidental mortality caused by the use of purse seine nets are sustainable by the ETP dolphin populations.<sup>192</sup> IATTC data collected in 1991 showed that incidental dolphin mortalities in the ETP were as

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<sup>190</sup>. See generally 1990 DPCIA, *supra* note 20; 1972 MMPA, *supra* note 12.

<sup>191</sup>. See *infra* notes 212-35 and accompanying text (outlining other countries' objections to the purse seine ban).

<sup>192</sup>. The National Academy of Sciences estimates the number of dolphins to be at eight million. See 138 CONG. REC. H9068 (Sept. 22, 1992) (statement of Rep. Cunningham). The IATTC puts the number at over 9.5 million. IATTC Agreement, *supra* note 25, at 5, app. III; see U.S. INT'L TRADE COMM'N, *supra* note 2, at 3-2.

follows:

| Stock                           | Population abundance | Incidental mortality | Percent mortality |
|---------------------------------|----------------------|----------------------|-------------------|
| Northeastern spotted            | 738,100              |                      |                   |
| Western and/or southern spotted | 1,299,300            |                      |                   |
| All spotted (except coastal)    | 2,037,400            | 13,991               | .69               |
| Eastern spinner                 | 632,700              | 5,879                | .93               |
| Whitebelly spinner              | 1,020,100            | 2,974                | .29               |
| Northern common                 | 477,000              | 161                  | .03               |
| Central common                  | 415,600              | 3,182                | .77               |
| Southern common                 | 2,211,500            | 115                  | .01               |
| Other dolphins                  | 2,729,100            | 990                  | .04               |
| All                             | 9,523,400            | 27,292               | .29               |

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These numbers are significant because scientific analysis has shown that incidental mortality rates below two percent do not jeopardize the recovery of dolphin stocks.<sup>194</sup> This data demonstrates that dolphin populations in the ETP are not endangered by current purse seine fishing practices.<sup>195</sup> Additionally, since incidental dolphin mortalities will decline under the IATTC Agreement, dolphin stocks in the ETP will increase thereby further ensuring the population's viability in perpetuity.<sup>196</sup>

<sup>193</sup>. IATTC Agreement, *supra* note 25, at 5, app. III.

<sup>194</sup>. *See id.*

<sup>195</sup>. It should be noted that the NMFS determined in 1992 that the eastern spinner dolphin and northern offshore spotted dolphin were "depleted" as that term is defined in 16 U.S.C. §1362. 57 Fed. Reg. 27,010 (1992). However, neither stock was designated as a "threatened" species under the Endangered Species Act [16 U.S.C. § 1532(2)]. *See* 57 Fed. Reg. 47,620, 47,624 (1992). Moreover, scientific studies indicate that the population size of both stocks has been progressively increasing or has remained stable for the past 15 years. *Id.* at 47,621.

<sup>196</sup>. *Id.* at 47,625.

Application of the moratorium could, on the other hand, increase dolphin mortality in the short-term.<sup>197</sup> It could also affect the sustainability of tuna stocks worldwide. The U.S. tuna fleet has the best fishing practices and the lowest dolphin mortality rate of any fleet currently operating in the ETP. The IDCA will, however, essentially force the remaining U.S. purse seiners out of business. As U.S. vessels withdraw from the fishery, foreign-flagged vessels with higher dolphin mortality rates will take their place. The result will be the incidental death of more dolphins over the short term until the IATTC Agreement takes full effect in 1999.<sup>198</sup> Therefore, rather than eliminating dolphin mortality, the IDCA will have the opposite effect of frustrating the MMPA's goal of reducing dolphin mortality in the ETP.

Of equal concern is the increasing number of tuna boats harvesting younger yellowfin tuna to avoid killing dolphins.<sup>199</sup> Because younger tuna rarely associate with dolphins, they may be harvested without intentionally setting nets on dolphins.<sup>200</sup> The problem is that the younger tuna are essential for replenishment of the stocks. If the immature tunas are over-fished, yellowfin tuna stocks in the ETP could be cut in half by the year 2000.<sup>201</sup> Similarly, tuna stocks in the WTP, where the tuna-dolphin bond does not occur, could also be threatened by over-fishing as ETP tuna boats are forced to migrate to the western Pacific to remain in business.<sup>202</sup> The increased U.S. presence in the WTP is directly attributable to dolphin conservation legislation like the MMPA, DPCIA and IDCA, which make it financially unattractive for U.S. vessels to remain in the ETP. Thus, the IDCA could have the opposite effect of increasing dolphin

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<sup>197</sup>. *Study: No Practical Way to Ensure "Dolphin Safe" Tuna Fishing*, J. COM., Mar. 2, 1992, at A5.

<sup>198</sup>. The same argument has been made with regard to the DPCIA and dolphin-safe policy. See Seth Mydans, *Drive to Save Dolphins Jolts American Tuna Fleet*, N.Y. TIMES, May 10, 1990, at A1.

<sup>199</sup>. See Brooke, *supra* note 7, at C4.

<sup>200</sup>. See Mydans, *supra* note 198, at A1.

<sup>201</sup>. See Brooke, *supra* note 7, at C4.

<sup>202</sup>. See 138 CONG. REC. E2783 (daily ed. Sept. 24, 1992) (statement of Rep. Anderson). Since 1990, the number of U.S. tuna boats alone has increased in the WTP from 35 to 44. U.S. INT'L TRADE COMM'N, *supra* note 1, at D-5 Tbl. D-3.

mortality, as well as potentially endangering the sustainability of tuna stocks.

The IDCA will likewise fail to achieve U.S. expectations to resolve the current tuna ban disputes before the GATT. The IDCA can only resolve these disputes by lifting the MMPA embargoes. However, before the import bans can be lifted, the embargoed nations must agree to abide by the moratorium.<sup>203</sup> Yet both nations that have filed GATT complaints against the United States have indicated that they are unable and unwilling to abide by the moratorium.<sup>204</sup> As a result, the MMPA embargoes and the GATT disputes will persist.<sup>205</sup>

It is clear, therefore, that the IDCA is unnecessary and will fail to achieve its desired results. Moreover, the Act completely ignores the needs and expectations of the foreign tuna fleets to continue fishing in the ETP. Since the 1980s, both the U.S. and foreign tuna fleets have adopted new fishing techniques and equipment, at great expense, to substantially reduce dolphin mortality in the ETP.<sup>206</sup> Dolphin kills have been reduced from over 700,000 in 1960 to 27,000 in 1991.<sup>207</sup> Under the IATTC Agreement, incidental dolphin mortalities will be further reduced to less than 5,000 per year by 1999.<sup>208</sup> These accomplishments were not achieved by unilateral U.S. efforts, but rather by the combined efforts and cooperation of the U.S. and foreign tuna fleets. The United States rewards this outstanding record of achievement and cooperation by putting the purse seine fleets out of business. Such a result is neither just nor reasonable.

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<sup>203</sup>. See 16 U.S.C.A. § 1415(a) (West Supp. 1993).

<sup>204</sup>. See Larry B. Stammer, *White House Urges End to Ban on Mexican Tuna*, L.A. TIMES, MAR. 5, 1992, at A3.

<sup>205</sup>. U.S. obligations under the GATT will be addressed further in the § 403(2)(e) discussion, *infra* notes 232-235 and accompanying text.

<sup>206</sup>. See DEPT. ST. DISP., *supra* note 86, at 667-68.

<sup>207</sup>. See U.S. INT'L TRADE COMM'N, *supra* note 1, at 3-3, Tbl. 3-1.

<sup>208</sup>. See *supra* note 25 and accompanying text.

5. Importance of IDCA to the International Political, Legal, or Economic System

The next factor to consider is “the importance of the regulation to the international political, legal, or economic system.”<sup>209</sup> Imposing the proposed moratorium on the use of purse seine nets could also have a number of adverse economic, legal and political consequences for both the United States and the international community. For example, the moratorium could cause significant social and economic disruption for states like Mexico and Venezuela that rely heavily on the ETP as a food source and for jobs. Continued embargoes under the MMPA could derail U.S. and international efforts to renew the stalled GATT talks. Finally, the unprecedented progress made by the IATTC to reduce dolphin mortality at the multilateral level could be impeded if U.S. unilateralism continues in the ETP. In short, what appears to be an isolated problem to the supporters of the IDCA, is, in fact, an issue that could potentially affect a broad range of international interests far removed from the ETP and far more important than the death of 75,000 dolphins over the next six years.

Furthermore, continued unilateral dolphin conservation efforts by the United States could have a devastating economic effect on several Latin American countries. The current embargoes under the MMPA have already had an adverse economic impact on several nations, including Mexico and Venezuela.<sup>210</sup> Venezuela has suffered the most due to its historic reliance on the United States to purchase over 50 percent of its ETP yellowfin tuna catch.<sup>211</sup> This harvest has an estimated annual value of about \$14 million.<sup>212</sup> Mexico has also been affected, but not as severely. Because Mexico has a strong European market, it is less dependent on the United States to purchase its ETP tuna harvest.<sup>213</sup> Before the tuna embargo was imposed,

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<sup>209</sup>. RESTATEMENT (THIRD), *supra* note 147, at § 403(2)(e).

<sup>210</sup>. *See generally* 53 Fed. Reg. 8910 (1988). Other nations affected by the MMPA embargoes include: Ecuador, Cayman Islands, Panama, Spain and Vanuatu. *See id.* at 8911-12. Prior to the embargoes these nations were exporting over 60 percent of their combined ETP tuna harvest to the United States. *See id.* Ecuador alone was exporting over 25 percent of its total ETP yellowfin tuna catch to the United States. *See id.*

<sup>211</sup>. *See id.*

<sup>212</sup>. *See id.*

<sup>213</sup>. *See id.*

Mexico was exporting about \$10 million worth of yellowfin tuna to the United States annually.<sup>214</sup> However, if those nations subject to secondary embargoes decide to comply with the MMPA and ban Mexican tuna, Mexico could lose an additional \$57 million in tuna exports per year.<sup>215</sup>

In addition to the possibility of continued embargoes under the MMPA, the added import ban provisions of the IDCA could have a devastating effect on the economies of the ETP harvesting nations. As discussed in section V, *supra*, if a nation fails to comply with its agreement to implement the moratorium, the IDCA provides for the imposition of additional sanctions including a ban on the importation of all tuna products and a ban on 40 percent of all fish products.<sup>216</sup>

Such a total ban on all fish products is of particular concern to Mexico because fishing is one of Mexico's top industries, employing 269,000 people and constituting one of the country's top five foreign exchange earners.<sup>217</sup> In 1992, Mexico exported an estimated \$520 million in fish products.<sup>218</sup> The majority of these products, with the exception of tuna, were exported to the United States.<sup>219</sup> If an all-fish product embargo was imposed under the IDCA, Mexico could lose over \$360 million annually in foreign exchange.<sup>220</sup>

The threat of embargo is not, however, the only economic concern Mexico and Venezuela have with the IDCA. There are other economic and social reasons that make compliance with the moratorium impossible for both nations. For instance, historically Mexico and Venezuela have operated the two largest purse seine

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<sup>214</sup>. DEPT. ST. DISP., *supra* note 86, at 670.

<sup>215</sup>. Venezuela would also be affected by such a decision since it is currently exporting about 50 percent of its ETP tuna harvest to Europe.

<sup>216</sup>. 16 U.S.C.A. § 1415(b) (West Supp. 1993).

<sup>217</sup>. *See Mexico Takes a Lead in Fish Exports: Fishing Helps Exports, Nutrition & Jobs Creation*, LATIN AMERICAN COMMODITIES REPORT (Latin American Newsletters, Ltd.) June 2, 1988, at 4.

<sup>218</sup>. *See* Tod Robberson, *In Mexico, A Tempest Over Tuna*, WASH. POST, Jan. 8, 1993, at A12.

<sup>219</sup>. LATIN AMERICAN COMMODITIES REPORT (Latin American Newsletters, Ltd.) July 15, 1988, at 15.

<sup>220</sup>. *See* DEPT. ST. DISP., *supra* note 86, at 670. Venezuela would lose about \$50 million annually under an all-fish ban. *See id.*

fishing fleets in the ETP.<sup>221</sup> Implementation of a moratorium would effectively put these fleets out of business. The result would be heavy job losses and a severe reduction in the availability of much needed fish products for domestic consumption.<sup>222</sup>

Proponents of the IDCA suggest that Mexico and Venezuela can avoid these job and food source losses by transferring their purse seine fishing operations to the WTP where the tuna-dolphin bond is not a problem.<sup>223</sup> This suggestion presumes, however, that boat captains can afford to make the extensive and costly modifications necessary to fish in the WTP.<sup>224</sup> Such a transfer can require a vessel to refit “with a new mile-long net, a larger hydraulic system and power block assembly, and new sonars to detect the tuna.”<sup>225</sup> In addition to these refitting costs, vessels operating in the WTP incur significantly greater expenses for fuel, repairs and transshipment fees.<sup>226</sup> Moreover, even if a vessel can afford to refit, it will not have guaranteed access to most of the abundant WTP tuna fisheries. Because the WTP is already overcrowded, many of the rich tuna fisheries are managed by the member nations of the South Pacific Forum Fisheries Agency pursuant to the South Pacific Tuna Treaty of 1987.<sup>227</sup>

A second alternative proposed for those vessels that cannot afford to refit is to fish for skipjack tuna and immature yellowfin tuna in the ETP. This alternative, however, is also not a viable solution. First, because these fish are smaller, they are more expensive to process.<sup>228</sup> Abroad, this added expense places Latin American fishermen at a competitive disadvantage in the international tuna

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<sup>221</sup>. 54 Fed. Reg. 20,171, Tbl. 1 (1989).

<sup>222</sup>. Arguably, the embargoes under the MMPA are the lesser of the two evils. See Michael Parrish & Juanita Darling, *Mexico Backs Away From Pact on Tuna*, L.A. TIMES, Nov. 4, 1992, at D2.

<sup>223</sup>. Cf. 138 CONG. REC. H9069 (daily ed. Sept. 22, 1992) (statement of Mr. Goss).

<sup>224</sup>. See U.S. INT’L TRADE COMM’N, *supra* note 1, at 3-17 n.62. In Mexico, very high interest rates (180% in 1991) have restricted the ability of most fishermen to obtain loans to pay for these modifications. See *Mexico—Fishing Equipment/Supplies*, National Trade Data Bank, Market Research Reports, July 28, 1993.

<sup>225</sup>. See Mydans, *supra* note 198, at A1.

<sup>226</sup>. See U.S. INT’L TRADE COMM’N, *supra* note 1, at 2-5.

<sup>227</sup>. See *id.* at 4-7. U.S. participation is capped at 50 vessels. *Id.*

<sup>228</sup>. See *id.*

market. At home, these costs are ultimately passed on to domestic consumers in the form of higher prices. Second, as previously discussed, harvesting immature tuna could adversely affect the ability of the stocks to replenish themselves.<sup>229</sup> For these reasons, compliance with the IDCA is simply not a viable economic option for states like Mexico and Venezuela operating large purse seine fleets in the ETP.

Extraterritorial application of U.S. dolphin conservation laws could also weaken the U.S. position at any subsequent GATT negotiations. At a time when the international community appears ready to renew the stalled talks, the United States finds itself in the awkward position of having been found in violation of its GATT obligations. Although Mexico has decided not to submit the dispute panel ruling to the GATT Council for enforcement, Mexico's continued adherence to its position is contingent on a successful resolution of the underlying dispute with the United States.<sup>230</sup> Additionally, the EC and Venezuela have indicated that they are prepared to go forward with their own complaints against the MMPA import bans if either the United States does not cancel the embargoes or Mexico fails to have the GATT panel's ruling adopted.<sup>231</sup> If these complaints go forward, it is almost certain that the GATT panel will rule against the U.S.<sup>232</sup> Such a result could further weaken U.S. efforts at subsequent negotiations to reduce trade barriers under the

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<sup>229</sup>. See Brooke, *supra* note 7 and accompanying text.

<sup>230</sup>. U.S. INT'L TRADE COMM'N, *supra* note 1, at 3-15. It has also been suggested that Mexico failed to have the GATT panel decision enforced so as not to jeopardize its chances of winning congressional approval of the NAFTA. Stammer, *supra* note 204, at A3.

<sup>231</sup>. See *generally* DEP'T ST. DISP., *supra* note 86, at 668-70. Twelve other GATT member states have joined in the move to have the GATT Council adopt the U.S.-Mexico dispute panel ruling. These members include: Argentina, Canada, India, Peru, Japan, Colombia, Senegal, South Korea, New Zealand, Pakistan, Brazil and Hong Kong. See David Ross, *Making GATT Dolphin-Safe: Trade and the Environment*, 2 DUKE J. COMP. & INT'L L. 345, 354 n.93 (1992). In addition, a number of states submitted third-party statements in support of the Mexican position during the hearings of the U.S.-Mexico dispute including: Senegal, the Philippines, Thailand, Norway, Australia, Venezuela, Canada, the EC, Indonesia, Japan, and South Korea. See *id.* at n.104.

<sup>232</sup>. See DEP'T ST. DISP., *supra* note 86, at 668-69.



GATT.<sup>233</sup> A resolution to this controversy must, therefore, be achieved if the U.S. is to improve its negotiating position.

The solution proposed by Congress is lifting the current tuna embargoes pursuant to § 1415 of the IDCA. Although it is true that a cancellation of the embargoes would resolve the GATT issue, the import bans can only be lifted under § 1415 if a foreign state agrees to observe the moratorium.<sup>234</sup> However, both Mexico and Venezuela have indicated their opposition to a ban on the use of purse seine nets.<sup>235</sup> Accordingly, the dispute will continue since, under the circumstances the embargoes cannot be lifted.

Moreover, the IDCA provides that, if no major purse seine fishing nation (*i.e.*, Mexico and Venezuela) agrees to the moratorium, U.S. purse seiners can continue to operate in the ETP as long as the total dolphin mortality rates each year are “reduced by statistically significant amounts . . . .”<sup>236</sup> Under this provision, U.S. tuna boats will continue purse seining in the ETP until 1999 under a more ambiguous “comparability standard” than the one denounced by the U.S.-Mexico dispute panel.<sup>237</sup> Failure to establish a clear “comparability standard” for the foreign tuna fleets to observe is not, however, the only problem with the IDCA. The Act also ignores the dispute panel’s finding that U.S. jurisdiction to restrict products brought into the United States cannot be applied extraterritorially to regulate production processes abroad.<sup>238</sup> The Act likewise ignores the panel’s findings that the Article XX(b) and (g) exceptions can

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<sup>233</sup>. It has also been reported that the tuna-dolphin issue could complicate the acceptance of the NAFTA in both Mexico and the United States. *See* Stammer, *supra* note 233. A satisfactory solution to the tuna-dolphin issue is, therefore, important in both a domestic and an international context.

<sup>234</sup>. *See* 1992 IDCA, *supra* note 26, at § 302 (codified at 16 U.S.C.A. § 1415 (West Supp. 1993)).

<sup>235</sup>. *See* Stammer, *supra* note 204, at A3.

<sup>236</sup>. 16 U.S.C.A. § 1416(a)(4)(B) (West Supp. 1993).

<sup>237</sup>. Under the MMPA, the maximum incidental dolphin mortality rate that a foreign nation must meet during any given period in order to export tuna to the United States is linked to actual U.S. mortality figures for the same period. 16 U.S.C.A. § 1371(a)(2) (West Supp. 1993). The U.S.-Mexico dispute panel found this requirement to be too unpredictable, and hence inconsistent with GATT, Article XX(b) and (g), because the Mexicans would have no way of knowing whether they were in compliance with U.S. standards at any given point in time.

<sup>238</sup>. *See* Trachtman, *supra* note 88, at 150.

only be applied to protect domestic animals and resources within a state's jurisdiction.<sup>239</sup> The IDCA is simply another attempt by the United States to use the environmental exceptions of the GATT to protect dolphins beyond the U.S. EEZ.<sup>240</sup> Such an attempt will not survive a subsequent GATT challenge. The only sure solution to the tuna ban dispute is for the United States to immediately lift the MMPA embargoes and amend the IDCA to bring it into compliance with IATTC Agreement.

With regard to the international legal system, the United States has traditionally held itself out as a nation that observes the rule of law. One of the basic principles of international law is that nations have a duty to observe their treaty obligations.<sup>241</sup> The IDCA, however, violates this universally accepted tenet of customary international law. As enacted, the IDCA will violate preexisting U.S. treaty commitments under: (1) the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas (Fishery Convention); (2) the 1958 Geneva Convention on the High Seas; (3) the GATT; and (4) the IATTC Agreement.<sup>242</sup>

Under Article 1(1) of the Fishery Convention, all nations enjoy a high seas freedom of fishing subject to three limitations: (1) their treaty obligations; (2) the rights of coastal states provided in Articles 6 and 7; and (3) the provisions of the convention concerning conservation of resources.<sup>243</sup> With regard to coastal state rights and

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<sup>239</sup>. See GATT Panel Report, *supra* note 24, at 1620-21.

<sup>240</sup>. See *supra* notes 90-99 and accompanying text.

<sup>241</sup>. This principle is set out in the Vienna Convention on the Law of Treaties, May 23, 1969, *reprinted in* 63 AMER. J. INT'L L. 875 (1969). Article 26 provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." *Id.* at 884.

<sup>242</sup>. Thirty-eight states are parties to the Fishery Convention, including Mexico, Venezuela and the United States. Sixty-two states are parties to the High Seas Convention, including Mexico, Venezuela and the United States. NWP-9, *supra* note 46. U.S. violations of the GATT have been previously discussed. See *supra* notes 86-104 and accompanying text. Parties to the IATTC Agreement include Mexico, Venezuela and the United States. See *supra* note 25, at 3, app. I.

<sup>243</sup>. Fisheries Convention, *supra* note 47, at 286. Article 2 of the High Seas Convention contains a similar high seas freedom of fishing. The only limitation on this freedom is that it must be exercised with "reasonable regard to the interests of other States . . ." High Seas Convention, *supra* note 47, at 82, 84. Article 2 additionally prohibits any state from exercising sovereignty over any part of the high seas. *Id.* at 82. Articles 4, 5 and 6 of

the conservation of living resources of the high seas, Article 4(1) of the Fishery Convention imposes a duty to negotiate multilateral conservation agreements on all states “engaged in fishing the same . . . stocks of fish or other living marine resources in any area . . . of the high seas . . . .”<sup>244</sup> Under Article 6(1), however, coastal states are given a preferential status over other countries with regard to “the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea.”<sup>245</sup> Any other state fishing in such an area is required by Article 6(3) to “enter into negotiations with a view to prescribing by agreement the measures necessary for the conservation of the living resources of the high seas in that area.”<sup>246</sup> If an agreement has not been reached within six months, the coastal state may enact unilateral conservation measures consistent with Article 7(1) and 7(2).<sup>247</sup> Additionally, once the coastal state has enacted conservation measures for the area of the high seas adjacent to its territorial sea, Article 6(4) provides that other states are prohibited from enforcing their own conservation measures in that area if those regulations are inconsistent with “those which have been adopted by the coastal State . . . .”<sup>248</sup> Most countries with coastlines bordering the ETP have enacted domestic legislation to regulate and improve the fishing practices of their purse seine fleets.<sup>249</sup> The IDCA

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the High Seas Convention give the flag state jurisdiction over vessels that fly its flag. *See id.* at 84, 86. This implies that the flag state has jurisdiction to regulate fishing practices by its vessels on the high seas. The IDCA, to the extent that it attempts to regulate the fishing practices of the foreign tuna fleets, interferes with this high seas freedom and is therefore inconsistent with U.S. treaty obligations.

<sup>244</sup>. Fisheries Convention, *supra* note 47, at 288.

<sup>245</sup>. *Id.* at 290.

<sup>246</sup>. *Id.*

<sup>247</sup>. To be consistent with Article 7(2), the unilateral measures adopted must fulfill the following requirements:

- (a) That there is a need for urgent application of conservation measures in the light of the existing knowledge of the fishery;
- (b) That the measures adopted are based on appropriate scientific findings;
- (c) That such measures do not discriminate in form or in fact against foreign fishermen.

*Id.* at 290, 292.

<sup>248</sup>. *Id.* at art. 6(4).

<sup>249</sup>. These states include Ecuador, Mexico, Panama, Vanuatu, Venezuela, Costa Rica, France, Guatemala and the Netherlands Antilles. *Cf.* Holland, *supra* note 6, at 274.

moratorium is inconsistent with many of these regulations and is therefore in direct violation of Articles 6 and 7 of the Fishing Convention.

With regard to U.S. treaty obligations in the tuna fishery, twenty years ago Congress charged the Secretary of the Treasury through the Secretary of State to negotiate a multilateral agreement with the ETP harvesting nations to protect dolphins taken incidentally in the course of purse seine fishing operations.<sup>250</sup> In 1988, Congress required that any such agreement was to provide for:

(i) cooperative research into alternative methods of locating and catching yellowfin tuna which do not involve the taking of marine mammals, (ii) cooperative research on the status of affected marine mammal population stocks, (iii) reliable monitoring of the number, rate, and species of marine mammals taken by vessels of harvesting nations, (iv) limitations on incidental take levels based upon the best scientific information available, and (v) the use of the best marine mammal safety techniques and equipment that are economically and technologically practicable to reduce the incidental kill and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate . . . .<sup>251</sup>

This was achieved in June 1992 when the ETP harvesting nations agreed to sign the IATTC Agreement. Without question, this agreement is the most significant accomplishment regarding dolphin conservation that has occurred at the international level in the last fifty years.<sup>252</sup> Four months later, however, this noteworthy achievement was placed in jeopardy with the passage of the IDCA. When it enacted the IDCA, Congress ignored twenty years of negotiations that produced a solid conservation program that all ETP harvesting nations, except the United States, can accept. Moreover, to the extent that the IDCA moratorium interferes with a state's

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<sup>250</sup>. See 1972 MMPA, *supra* note 12, at § 108(a)(1) (codified as amended at 16 U.S.C. § 1378(a)(2) (1988)).

<sup>251</sup>. 1988 MMPA amendments, *supra* note 16, at § 4(b) (codified at 16 U.S.C. § 1378(a)(2)(B) (1988)).

<sup>252</sup>. See DEP'T ST. DISP., *supra* note 86, at 669-71.

fishing rights by prohibiting incidental takes, it is inconsistent with U.S. obligations under the IATTC Agreement. Such action on the part of the United States is clearly unreasonable and provides little incentive for the ETP harvesting nations to engage in further discussions with the United States over the tuna-dolphin issue.

From the foregoing, it is evident that implementation of the IDCA will have a number of adverse international economic, legal and political consequences. To the extent that these effects can be reduced or eliminated by adherence to the IATTC Agreement, the United States will be acting unreasonably in attempting to enforce its dolphin conservation laws unilaterally in the ETP.

#### 6. Consistency with the International System

The sixth factor to consider is “the extent to which the regulation is consistent with the traditions of the international systems.”<sup>253</sup> The extraterritorial application of the IDCA also conflicts with customary norms of international maritime law as reflected in the 1982 LOSC. Although the United States has not signed the LOSC, it has repeatedly recognized that the non-seabed portions of the Convention are reflective of customary international law.<sup>254</sup> Accordingly, President Reagan indicated in 1983 that the United States would act in accordance with the non-seabed portions of the Convention and would “recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as

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<sup>253</sup>. RESTATEMENT (THIRD), *supra* note 147, at § 403(2)(f).

<sup>254</sup>. The LOSC was not signed “because several major problems in the Convention’s deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries . . . .” Statement on United States Ocean Policy, *supra* note 48. With regard to the non-seabed portions of the agreement, the United States stated that “the Convention . . . contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states.” *Id.* The LOSC has been signed by 119 states and has been ratified by more than 50 states. In accordance with Article 307 of the Convention, it will enter into force “12 months after the date of deposit of the sixtieth instrument of ratification or accession.” Mexico has ratified the Convention. Panama is a signatory, but has not yet ratified. Venezuela joined the United States in not signing the Convention. NWP-9, *supra* note 46.

the rights and freedoms of the United States . . . under international law” were recognized by such coastal states.<sup>255</sup>

The IDCA initially conflicts with the customary norm of flag-state sovereignty over ships that fly its flag. With limited exceptions,<sup>256</sup> this principle grants the flag-state exclusive jurisdiction over all administrative, technical and social matters regarding ships that fly its flag.<sup>257</sup> The IDCA, however, interferes with a flag-state’s right to regulate the fishing practices of its tuna fleet. It is therefore inconsistent with this customary international law principle.

The IDCA also conflicts with the universally recognized high seas freedom of fishing.<sup>258</sup> By dictating how a foreign state can fish in the ETP (including parts of the high seas), the IDCA attempts to subject a part of the high seas to U.S. sovereignty. This is clearly in violation of customary international law as reflected in Articles 87 and 89 of the LOSC.<sup>259</sup>

Additionally, the IDCA conflicts with the customary law duty to cooperate in the management and conservation of marine resources in the high seas.<sup>260</sup> Such cooperation is particularly important when nationals from different states “exploit identical . . . or different living resources in the same area . . . .”<sup>261</sup> Under such circumstances,

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<sup>255</sup>. Statement on United States Ocean Policy, *supra* note 48.

<sup>256</sup>. All states may exercise jurisdiction over ships engaged in piracy and slave trade regardless of the flag they are flying. United Nations Convention on the Law of the Sea, Dec. 10, 1982, arts. 99, 105, 21 I.L.M. 1261 [hereinafter LOSC].

<sup>257</sup>. See LOSC, *supra* note 256, at arts. 91 and 94(1); see also RESTATEMENT (THIRD), *supra* note 147, at § 501.

<sup>258</sup>. Article 87 of the LOSC provides that “[t]he high seas are open to all States . . . . Freedom of the high seas . . . comprises, *inter alia*: . . . freedom of fishing . . . . These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas . . . .” LOSC, *supra* note 257, at art. 87. The United States clearly takes advantage of this freedom of fishing since more than 94 percent of the tuna harvested by the United States is caught outside the U.S. EEZ. U.S. INT’L TRADE COMM’N, *supra* note 1.

<sup>259</sup>. See *supra* note 259. Article 89 provides that “no State may validly purport to subject any part of the high seas to its sovereignty.” LOSC, *supra* note 257, at art. 89.

<sup>260</sup>. Article 117 of the LOSC provides that “all States have the duty . . . to co-operate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.” *Id.* at art. 117.

<sup>261</sup>. *Id.* at art. 118.

Article 118 of the LOSC imposes a duty on states “to establish subregional or regional fisheries organizations . . .” and to negotiate adequate conservation measures for the resources concerned.<sup>262</sup> There is a similar duty to work through appropriate international organizations in order to conserve and manage marine mammals in the high seas.<sup>263</sup> This requirement for multilateral cooperation in the management and conservation of marine resources in the high seas is not a new concept and has been historically recognized by the United States.<sup>264</sup> To the extent that the IDCA is a unilateral attempt by the United States to regulate dolphin conservation on the high seas, it is inconsistent with this customary duty to cooperate.

Finally, the IDCA conflicts with the well-recognized, albeit recently established, concept of the EEZ reflected in Part V of the LOSC.<sup>265</sup> In the EEZ, a coastal state has *inter alia*:

- (a) sovereign rights for the purpose of . . . exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed . . . ; [and]
- (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: . . . (iii)

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<sup>262</sup>. *Id.*

<sup>263</sup>. *Id.* at arts. 65, 120.

<sup>264</sup>. As discussed *supra*, this duty to cooperate has been recognized by the United States in the Truman Fishery Proclamation, the MFCMA, the 1958 Fishery Convention, the MMPA, and the IATTC Agreement. For a concurring Soviet view, see G. Tunkin, *The Geneva Conference on the Law of the Sea*, 7 INT’L AFFAIRS 47-52 (Moscow) (1958).

<sup>265</sup>. Today, more than 80 states, including Mexico, Venezuela and the United States, claim a 200-mile EEZ. Another 25 states claim fishery zones, 21 of which extend 200 nautical miles from shore. Thirteen other states, including Panama, Ecuador, El Salvador, Nicaragua and Peru, claim 200-mile territorial seas. Such claims, in combination with the effects of the long negotiating history of, and overwhelming support for (*i.e.*, 119 signatories), the LOSC, strongly support the position espoused by many commentators that the EEZ concept is reflective of customary international law as evidenced by state practice. NWP-9, *supra* note 46. The United States has officially taken the position that the EEZ concept “is widely regarded as lawful under customary international law” and that “there is already a considerable record of state practice supporting such a conclusion.” Oceans Policy and the Exclusive Economic Zone, Mar. 10, 1983, U.S. DEP’T ST., Bureau of Public Affairs (statement of Ambassador Malone). The EEZ concept has also been endorsed by the American Law Institute in § 511 of the RESTATEMENT (THIRD). See *supra* at note 147.

the protection and preservation of the marine environment; . . .<sup>266</sup>

The coastal state shall exercise these rights and duties with “due regard to the rights and duties of other States . . . .”<sup>267</sup>

With regard to fish stocks that “occur within the exclusive economic zones of two or more coastal States,” or “within the exclusive economic zone and in an area beyond and adjacent to the zone,” Article 63 of the LOSC requires that the states involved negotiate, “either directly or through . . . regional organizations,” appropriate conservation measures for these stocks.<sup>268</sup> This duty to negotiate is extended to states that fish for highly migratory species, such as tuna, to ensure the “optimum utilization of such species . . . both within and beyond the exclusive economic zone.”<sup>269</sup> Additionally, Article 65 imposes a duty on all states to cooperate through appropriate international organizations to conserve marine mammals.<sup>270</sup>

By attempting to regulate fishing practices in the EEZ of other states, the IDCA specifically violates the sovereign rights and duties of coastal states to exploit, manage and conserve the marine resources within their respective EEZs. Additionally, the unilateral nature of the IDCA clearly violates the duty to cooperate in the negotiation of conservation measures for the management and protection of highly migratory species (such as tuna and dolphin) under Article 64.

#### 7. Other States’ Interests in the ETP

The next factor to consider is “the extent to which another state may have an interest in regulating the activity.”<sup>271</sup> The most compelling justification for foreign state regulation in the ETP, apart from sovereignty concerns and the aforementioned conventional and customary international law principles, is economic development. Tuna is the second most important commercial fish product in the

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<sup>266</sup>. LOSC, *supra* note 257, at art. 56(1).

<sup>267</sup>. *Id.* at art. 56(2).

<sup>268</sup>. *Id.* at art. 63.

<sup>269</sup>. *Id.* at art. 64.

<sup>270</sup>. *Id.*

<sup>271</sup>. RESTATEMENT (THIRD), *supra* note 147, at § 403(2)(g).



world.<sup>272</sup> Since 1960, world tuna consumption has grown at a rate of seven percent per year, and in 1990, world tuna sales were estimated at over \$4.5 billion.<sup>273</sup> One quarter of this catch, primarily yellowfin tuna, was harvested in the ETP.<sup>274</sup> Therefore, the tuna industry presents an attractive opportunity to some of the developing countries of Latin America to improve their economic status. Both Mexico and Venezuela have taken advantage of this opportunity and are currently operating the two largest purse seine fleets in the ETP.<sup>275</sup> As a result, they both have a significant interest in regulating the fishing practices of their respective fleets. Moreover, for Mexico, compliance with the IDCA would mean a prohibition on tuna fishing throughout its entire EEZ, an area in which it is authorized by international law to exercise “sovereign rights for the purpose of . . . exploiting, conserving and managing the natural resources . . .” of the zone.<sup>276</sup> Mexico therefore obviously has a paramount interest in regulating its own fishing activities within the ETP.

In addition, the IDCA completely ignores the treaty obligations of other states under the IATTC Agreement.<sup>277</sup> These states have a duty under international law to adopt regulations to implement their obligations under the agreement. However, such regulations will undoubtedly conflict with the moratorium requirement of the IDCA. It is therefore unreasonable for the United States to expect foreign state compliance with the IDCA.

#### 8. Likelihood of Conflict

The final factor to consider is “the likelihood of conflict with regulation by another state.”<sup>278</sup> Although Congress apparently believes that the United States has authority under international law to unilaterally apply its dolphin conservation policies extraterritorially, it would appear from the foregoing discussion that many of the ETP

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<sup>272</sup>. U.S. INT’L TRADE COMM’N, *supra* note 1, at 1-1.

<sup>273</sup>. *Id.*

<sup>274</sup>. Parrish, *supra* note 222, at D5.

<sup>275</sup>. Mexico has 43 purse seine vessels operating in the ETP; Venezuela has 21 vessels. *See* Brooke, *supra* note 7, at C4.

<sup>276</sup>. LOSC, *supra* note 257, at art. 56(1).

<sup>277</sup>. *See* 138 CONG. REC. H9068 (daily ed. Sept. 22, 1992) (statement of Sen. Cunningham).

<sup>278</sup>. RESTATEMENT (THIRD), *supra* note 147, at § 403(2)(h).

harvesting nations disagree. Conflict over the tuna-dolphin issue is therefore inevitable, particularly since most ETP harvesting states have enacted domestic legislation to protect dolphins or regulate their purse seine fleets.<sup>279</sup>

This potential for conflict with other states' regulations can be illustrated by the current embargo against Columbia. In 1992, the NMFS reviewed Columbia's marine mammal regulatory program.<sup>280</sup> It found that the program was comparable to the U.S. program.<sup>281</sup> Additionally, IATTC observer reports indicated that there were no observed dolphin mortalities associated with the Colombian purse seine fleet during the 1991 fishing season.<sup>282</sup> Despite these findings, an import ban was still imposed against Colombian yellowfin tuna.<sup>283</sup> The justification given for the embargo was that "the level of observer coverage during the period was [only] 40 percent."<sup>284</sup> That figure was below the 75 percent required by NMFS regulations.<sup>285</sup>

The potential for conflict has become more apparent with the adoption of the IATTC Agreement. A recent incident involving Panama provides an example of how the potential for conflict has increased. In 1990, yellowfin tuna harvested by Panamanian purse seiners was subjected to an embargo under the MMPA.<sup>286</sup> In order to lift the embargo, Panama enacted a law which prohibited the

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<sup>279</sup>. Mexico announced its new 10-point dolphin conservation program in September 1991. See Stammer, *supra* note 233. The Mexican program focuses on improving current fishing practices as opposed to a total ban on purse seine fishing. Venezuela has also enacted tough dolphin conservation regulations that promise to reduce incidental mortality by 75 percent. Kirk, *supra* note 178. Panama has recently amended its laws to comply with its obligations under the IATTC Agreement. This new law allows for the intentional encirclement of dolphins with purse seine nets. See 58 Fed. Reg. 3013, 3014 (1993). Costa Rica, Columbia, Ecuador, France, Guatemala, and the Netherlands Antilles have also enacted conservation laws to protect dolphins in the purse seine fisheries. Cf. Holland, *supra* note 6, at 274 n.68; see generally 55 Fed. Reg. 11,921 (1990); 57 Fed. Reg. 17,857 (1992).

<sup>280</sup>. See 57 Fed. Reg. 17,857 (1992).

<sup>281</sup>. See *id.*

<sup>282</sup>. See *id.*

<sup>283</sup>. See *id.*

<sup>284</sup>. 57 Fed. Reg. 17,857 (1992). Secondary embargoes will also be imposed against intermediary nations that do not provide the required certification that they have banned yellowfin tuna imports from Columbia. *Id.*

<sup>285</sup>. See 57 Fed. Reg. 668, 668-69 (1992); 57 Fed. Reg. 17,857 (1992).

<sup>286</sup>. See 58 Fed. Reg. 3013, 3014 (1993).

intentional encirclement of dolphins with purse seine nets.<sup>287</sup> In January 1992, the embargo was lifted by the United States.<sup>288</sup> However, under the IATTC Agreement, Panama modified Presidential Decree No. 111 on October 20, 1992.<sup>289</sup> The new decree allows “Panamanian purse seine vessels operating under the . . . IATTC dolphin mortality program to intentionally deploy their nets on . . . marine mammals.”<sup>290</sup> As a result of this change in the law and reports by observers that Panamanian vessels had used purse seine nets to intentionally encircle dolphins on two successive trips, an embargo was re-imposed against Panamanian yellowfin tuna in January 1993.<sup>291</sup>

Both of these cases illustrate the reality of conflict between the IDCA and the dolphin conservation laws of other nations. With respect to Columbia, the United States imposed an import ban even though there was no evidence of dolphin mortality associated with the purse seine fleet. In regard to Panama, the United States has penalized a nation for complying with its international obligations. Unquestionably, such results are unreasonable. This is clearly one of those situations in which the United States should limit jurisdictional influence in order to minimize inter-state jurisdictional conflicts.<sup>292</sup>

#### 9. Who Has the Greater Interest?

Even if a U.S. court were to reach the untenable conclusion that the IDCA is a reasonable application of extraterritorial jurisdiction under § 403(2), the *Restatement* still requires the application of a balancing test to determine which state has the

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<sup>287</sup>. 58 Fed. Reg. 3013, 3014 (1993).

<sup>288</sup>. See 57 Fed. Reg. 883 (1992).

<sup>289</sup>. See 58 Fed. Reg. 3013, 3014 (1993).

<sup>290</sup>. *Id.*

<sup>291</sup>. *Id.* Secondary embargoes will also be imposed against intermediary nations that do not provide the required certification indicating that they have banned the import of yellowfin tuna from Panama. *Id.*

<sup>292</sup>. The *Restatement* provides that “[w]here regulation of transnational activity is based on its effects in the territory of the regulating state, the principle of reasonableness calls for limiting the exercise of jurisdiction so as to minimize conflict with the jurisdiction of other states, particularly with the state where the act takes place.” RESTATEMENT (THIRD), *supra* note 147, at § 403, n.3.

greatest interest in regulating fishing activities in the ETP.<sup>293</sup> On the one hand, the United States has an interest in saving 75,000 dolphins over the next six years and achieving a dolphin-safe tuna market in the United States. On the other hand, ETP harvesting states have an interest in improving their economic and social status (through the continued use of purse seine nets to harvest tuna) and complying with their treaty obligations under the IATTC Agreement. Upon weighing these interests, it is obvious that the commercial, legal and political needs of the ETP harvesting nations are clearly paramount. Accordingly, the United States should defer to the greater interests of the ETP harvesting states in this instance.

#### VII. SUMMARY: A PROPOSED SOLUTION

The IDCA has been justified on the ground that “the past strategy of trying to reduce dolphin mortality while continuing to fish for tuna in association with dolphin is no longer sufficient.”<sup>294</sup> In light of the overwhelming scientific evidence to the contrary and the economic and social needs of the ETP harvesting nations to continue purse seine fishing,<sup>295</sup> such a position is untenable. The moratorium, in particular, is not based on scientific fact and is, hence, an unreasonable burden to place on nations that rely heavily on the ETP tuna fishery to enhance their economic and social development.<sup>296</sup> Moreover, the unilateral nature of the IDCA violates virtually every conventional and customary norm of maritime law with respect to fishery management and conservation, as well as U.S. treaty obligations under the GATT. The IDCA, therefore, does not provide

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<sup>293</sup>. Section 403(3) of the RESTATEMENT (THIRD) provides:

When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state’s interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state’s interest is clearly greater . . . .

*Id.*

<sup>294</sup>. 138 CONG. REC. 17,841 (daily ed. Oct. 8, 1992) (statement of Sen. Kerry).

<sup>295</sup>. See *supra* notes 180-185 and accompanying text.

<sup>296</sup>. The proponents of the IDCA acknowledge that “the overall viability of dolphin populations are not endangered [sic]” by the use of purse seine nets and that safeguards “currently in place guarantee that this will continue to be the case.” 138 CONG. REC. S10,136 (daily ed. July 22, 1992) (statement of Sen. Kerry).

an appropriate nor reasonable solution to the tuna-dolphin problem in the ETP. A proper balance between the U.S. interest in protecting dolphins and the ETP harvesting nations' interest in maintaining a viable tuna industry by fishing in the ETP can only be achieved through implementation of the IATTC Agreement and the DPCIA dolphin-safe regime.

Implementation of the IATTC Agreement will immediately eliminate any potential conflicts with the other nine nations that have joined the agreement. Sovereignty concerns will be accommodated and claims of U.S. unilateralism will be precluded. In addition, implementation of the IATTC Agreement will bring the United States back into compliance with its obligations under the GATT. More importantly, compliance with the IATTC Agreement comports with the basic tenet of fishery management of highly migratory species—that is, multilateral cooperation throughout the range of the stock. Without such cooperation, any effort to manage and conserve highly migratory species will fail.<sup>297</sup>

Implementation of the DPCIA regime allows the American consumer to decide if the U.S. tuna market should be dolphin-safe.<sup>298</sup> It is a proven regime that has already resulted in a U.S. tuna market that is virtually dolphin-safe.<sup>299</sup> The DPCIA has additionally encouraged research into alternative means of harvesting tuna that do not involve the intentional killing of dolphins.<sup>300</sup> In the end, it will be the buying power of the American consumer, and not unilateral measures by Congress, that will have the greatest impact on the foreign purse seine fleets.<sup>301</sup> In the meantime, the IATTC Agreement

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<sup>297</sup>. This theme was also emphasized by a National Academy of Sciences study. The report found “that the best way for the United States to address the tuna/dolphin issue was to work cooperatively with the other fishing nations of the region to reduce the incidental take of dolphins.” Gerry Randy, *Congress Mulls Fishing Ban*, SAN DIEGO DAILY TRANSCRIPT, July 22, 1992, at A1.

<sup>298</sup>. The DPCIA labeling provisions were reviewed by the U.S.-Mexico dispute panel and were found to be consistent with the GATT. *See supra* note 100 and accompanying text.

<sup>299</sup>. Even Greenpeace has indicated that the processors' dolphin-safe policy is “without a doubt one of the biggest steps that could be taken in order to preserve dolphins in the Eastern Tropical Pacific in . . . the last 20 to 30 years.” *See 2 Tuna Cannery Shun Fishing That Snares Dolphins*, CHI. TRIB., Apr. 11, 1990, at C1.

<sup>300</sup>. *See* U.S. INT'L TRADE COMM'N, *supra* note 1, at Ch.5.

<sup>301</sup>. *See* 138 CONG. REC. S10,136 (daily ed. July 22, 1992) (statement of Sen. Kerry).

promises to significantly reduce dolphin mortality to levels approaching zero by the year 1999 and will guarantee the viability of dolphin populations in perpetuity.