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## ARTICLES

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### THE GATT AND THE UNMAKING OF INTERNATIONAL ENVIRONMENTAL LAW

ROBERT WEIR†

*This paper examines the uneasy relationship between the regulation of international trade and international environmental law. In particular, it focusses on two GATT panel decisions that struck down U.S.-imposed trade embargoes on tuna products imported from countries that the U.S. considered killed too many dolphins in their tuna fisheries. The implications of the decisions went far beyond the immediate environmental issue that faced the GATT panels, bringing into question the validity of trade sanctions as a means of enforcing and strengthening existing multilateral environmental agreements. At the same time, however, a critical examination of the American position reveals serious flaws in the environmental policy the trade embargoes were meant to support. The article, therefore, concludes that more effective international environmental regulations are best pursued through cooperative initiatives on the international stage.*

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*Cet article examine les relations troublées entre la réglementation du commerce extérieur et le droit internationale de l'environnement. En particulier, l'article examine deux décisions des tribunaux sous le GATT qui ont annulées deux embargos imposés par les États-Unis sur du thon importé qui venait des pays qui, selon les États-Unis, ont tué trop de dauphins pendant la pêche au thon. Les conséquences des décisions vont au-delà de la question précise devant les tribunaux sous le GATT. Ils mettent en doute la validité des sanctions pour renforcer et améliorer les accords internationaux sur l'environnement. Cependant, au même temps, une analyse critique de la position américaine soulève des graves problèmes dans la politique environnementale que le embargos devaient soutenir. L'article conclut donc que la réglementation internationale de l'environnement doit se faire à partir d'initiatives coopératives.*

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## I. INTRODUCTION

On October 30, 1947, the General Agreement on Tariffs and Trade (the GATT) was opened for signature.<sup>1</sup> The GATT was seen by its promoters as a means to achieve international economic stability through the liberalization of trade practices. The post-war economic order was to be built around free enterprise and access to markets, rather than the protectionism that had characterized the pre-war period; under the GATT trade disputes would be defused through independent arbitration and negotiation before they could lead to wider conflicts.<sup>2</sup>

At the same time, international concern for environmental law was incipient. Development of an international regime for the regulation of trade disputes took priority on the diplomatic stage. The logic of the elevation of international trade concerns over international environmental issues was clear: Nations had gone to war over trade but they had not done so over the environment. As well, there was little awareness of the potential environmental impact from the accelerated development of technology that occurred as part of the war effort and the diffusion of this technology throughout the world in the liberalized post-war economic order.<sup>3</sup> International peace and security would be achieved through harmonious trade practices. There is evidence that the imbalance between trade and the environment as issues of international importance remains today, despite the increased awareness that degradation of the global environment is as serious a threat to international health and security as economic instability.

Two recent GATT Dispute Settlement Panel decisions have highlighted this imbalance. Both decisions concerned U.S. trade embargoes on the importation of tuna products that had been harvested with unacceptably high levels of incidental dolphin mortality. The first panel decision challenged the primary nation

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<sup>1</sup> *General Agreement on Tariffs and Trade*, 61 Stat. pts. 5-6, T.I.A.S. No. 1700, reprinted in 55 U.N.T.S. 187.

<sup>2</sup> For a complete discussion of the history of GATT, see P. Hallström, *The GATT Panels and the Formation of International Trade Law* (Stockholm: Juristförlaget, 1994) at 22-47 [hereinafter *The GATT Panels*].

<sup>3</sup> For a discussion of the effects of this rapid technological growth on fisheries resources, see G.D. Taylor, "The Collapse of the Northern Cod Fishery: A Historical Perspective" (1995) 18 Dalhousie L.J. 5.

embargo [Tuna/Dolphin I].<sup>4</sup> The second challenge was brought when Mexico declined to press its victory before the GATT Council and concerned both the primary and secondary nation embargoes [Tuna/Dolphin II].<sup>5</sup> In both cases, the GATT panels found that the U.S. was in violation of international trade standards and that the environmental concern argued in defence of the embargoes—the protection of dolphins—did not justify the violations. The environmental ramifications of the decisions are far-reaching; the decisions bring into question the validity of using trade embargoes as a tool for environmental protection. These decisions may serve to undermine the effectiveness of such multi-lateral agreements as the Montreal Protocol, the Convention on International Trade in Endangered Species (CITES) and the South Pacific Driftnet Convention, all of which sanction the use of trade measures to enforce international environmental obligations.

At the same time, however, the imposition of the unilateral trade embargoes by the U.S. raises significant problems for the future development of international environmental law. South nations have decried the use of unilateral trade embargoes by developed countries as an intrusion into their sovereignty. Specifically, they find it particularly ironic (and inequitable) that they are being asked to bear costs to address global environmental problems that are the by-product of northern industrialization and the failure of the developed world to internalize environmental externalities.<sup>6</sup>

This viewpoint was only reinforced by regulations that allowed the U.S. to determine the acceptable level of dolphin kill. As well, intense competition for tuna resources in the Eastern Tropical Pacific (ETP) has led to suspicion that the U.S. was not so much motivated with concerns for dolphins as in conserving its share of the tuna stocks.<sup>7</sup> The U.S. action has, in general, raised the thorny

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<sup>4</sup> See *United States - Restrictions on the Import of Tuna (Mexico v. United States)* GATT Doc. D/S21/R (3 September 1991), reprinted in 30 I.L.M. 1564.

<sup>5</sup> See *United States - Restriction on Tuna Imports (Netherlands v. United States)* GATT Doc. D/S32/6 (20 May 1994), reprinted in 33 I.L.M. 844.

<sup>6</sup> D.C. Estey, *Greening the GATT* (Washington, D.C.: Institute for International Economics, 1994) at 182 [hereinafter *Greening the GATT*].

<sup>7</sup> The Eastern Tropical Pacific region runs from Chile to Southern California. The United Nations Food and Agricultural Organization has reported that stocks of yellowfin tuna in the Eastern Tropical Pacific, at which the embargo was aimed,

issue of whether or not one country can impose unilateral environmental policies on the international community.

While the U.S. has pursued a unilateralist approach, other nations have disavowed this methodology in favour of a multilateral approach to the creation of environmental regulation of living resources. The South Pacific states have effectively banned large-scale pelagic driftnet fishing in their waters. This ban has in turn been taken up on an international scale. The experiences of the U.S. and the South Pacific states merits comparison.

This paper will take a critical view of the GATT decisions and the unilateral action undertaken by the U.S.. First, the Tuna/Dolphin II decision will be analyzed and its implications for the future of international environmental law highlighted. Second, the effectiveness of unilateral trade sanctions will be considered. Finally, the paper will consider more effective ways of making and enforcing environmental laws on an international scale through an analysis of the experience of the South Pacific driftnet fishery.

## II. THE TUNA/DOLPHIN PROBLEM

In the ETP dolphins travel in the company of yellowfin tuna. Fishers, using a technique called "fishing on dolphins," spot herds of dolphins moving along the surface of the ocean. They then pursue and encircle the dolphins with large purse seine nets. The nets are wynched at the top and bottom, trapping both the dolphins at the surface and large schools of tuna travelling beneath the dolphins. Enmeshed, the dolphins either drown or injure themselves trying to escape. Dead dolphins are not weighed, processed, or sold; they are merely thrown overboard.

Estimates of the number of dolphins killed in purse seining vary widely. Environmental groups have estimated that 1,650,00 dolphins were killed in the 1980s—an average of 23 dolphins per hour.<sup>8</sup> More conservative estimates put the dolphin mortality for

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are fully exploited. One of the reasons for the state of the stocks is the failure of nations fishing in this region to agree on adequate conservation measures. See *World Review of Highly Migratory Species and Straddling Stocks: FAO Fisheries Technical Paper No. 337* (Rome: Food and Agricultural Organization of the United Nations, 1994).

<sup>8</sup> *Animal Rights: Heinz, Purina, and All Canned Tuna*, National Boycott News, Spring/Summer 1989, cited in K.L. Holland, "Exploitation on Porpoise: The Use

the same period at approximately 750,000.<sup>9</sup> Reasons for the discrepancies reflect both the politically charged nature of this issue—mortality rates can be used to sway or soothe public opinion—and the simple fact that there has been little accurate reporting of dolphin mortality.<sup>10</sup> However, both perspectives agree that the incidence of mortality has been in steady decline for the past two decades largely due to the corresponding decline in yellowfin tuna stocks. Recent studies estimate that dolphin stocks in the ETP are stable and some are increasing.<sup>11</sup>

## 1. Background to Tuna/Dolphin II

### (i) *The U.S. Legislation*

In 1972, the U.S. government enacted the *Marine Mammal Protection Act* (MMPA).<sup>12</sup> The MMPA seeks to reduce the incidental bycatch of marine mammals in the commercial fishery. Subsection 101(a) reads:

S. 101(a) There shall be a moratorium on the taking and importation of marine mammals and mammal products . . . during which time no permit may be issued for the taking of any marine mammal and no marine mammal product may be imported into the United States except in the following cases:

(2) Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued. . . .

The MMPA provides for a complicated regulatory scheme under which permits or exemptions to section 101 are issued. The regulations establish the ceiling for incidental dolphin kill in the

of Purse Seine Nets by Commercial Tuna Fisherman in the Eastern Tropical Pacific" (1991) 17 *Syracuse J. Int'l L. & Com.* 267 at note 32.

<sup>9</sup> *Tuna: Current Issues Affecting the U.S. Industry: Report to the Committee on Finance* (Washington, D.C.: United States International Trade Commission, 1992)(Chair: D.E. Newquist) at 3-3 [hereinafter USITC Report].

<sup>10</sup> It should be noted that in 1991 the Inter-American Tropical Tuna Commission (IATTC) implemented an observer plan to better determine and monitor annual mortality figures in the ETP fishery (*ibid.* at 3-9).

<sup>11</sup> National Research Council, *Dolphins and the Tuna Industry* (Washington D.C.: National Academy Press, 1992).

<sup>12</sup> 16 U.S.C. § 1371(a)(2)(1988 & Supp. II 1990).

yellowfin fishery for U.S. fishers.<sup>13</sup> The regulations also make it illegal to import into the U.S. any fish product where that product has involved an incidental kill of marine mammals above the U.S. standards.<sup>14</sup> Under section 101 of the MMPA the Secretary of the Treasury is mandated to impose trade embargoes on fishing nations who exceed the U.S. standards or do not have a "comparable" regulatory program.<sup>15</sup> This is referred to as the primary nation embargo. Paragraph 101(2)(C) extends the embargo to intermediary nations unless those nations can provide reasonable proof that they have not imported yellowfin tuna or yellowfin tuna products from nations subject to the primary nation embargo within the preceding six months.<sup>16</sup>

The underlying purpose of the embargoes reflects an uneasy alliance between environmental concerns and national economic self-interest. On the one hand, environmentalists argue that the sanctions are a "fundamental component of the international effort to . . . address the largest slaughter of marine mammals in the world."<sup>17</sup> On the other hand, the embargoes are justified by the need to protect U.S. fishers, who are subject to the environmental regulations, from foreign fishers who would otherwise have a competitive advantage in the U.S. market if they were not subject to

<sup>13</sup> *Operational Regulations for Tuna Fishermen*, 50 CFR Ch. II § 219.22 (1990). The regulations establish the total numbers of marine mammals that can be taken in a year. See §§. (d)(A)(2). They set up a sliding scale of penalties for fishers who exceed their permitted kill. This scale slides from participation in marine mammal safety training to revocation of the fishing permit. See §§. (d)(E)(F) &(G). An operator's permit will only be suspended if the total allowable kill on three consecutive trips is exceeded.

<sup>14</sup> *Ibid.* §§. (e).

<sup>15</sup> *MMPA*, 16 U.S.C. §. 101(2)(b)(i)&(ii) (1988 & Supp. II 1990).

<sup>16</sup> U.S. legislators have enacted several statutes aimed at conserving wildlife in areas outside its national jurisdiction. See *e.g.* *African Elephant Conservation Act of 1988*, 16 U.S.C. §§ 4201-4244 (1988); *The Endangered Species Act*, 7 U.S.C. § 136, 16 U.S.C. §§ 4601-9; & *Driftnet Act Amendments* 16 U.S.C. 1826 (1990). Together with 1990 amendments to the *MMPA*, the *Driftnet Act Amendments* mandate that trade embargoes are to be imposed on fish products from any nation using a large-scale pelagic driftnet. See *MMPA Amendments*, 16 U.S.C. § 1371(a)(2)(E)(1990).

<sup>17</sup> Earth Island Institute, *Statement on the Implications of the GATT Panel Ruling on Dolphin Protection and the Environment in GATT: Implications for Environmental Law*, Hearing before the Subcommittee on Health and Environment, 102 Cong., 1st Sess., (27 September 1991)(Washington, D.C.: U.S. Government Printing Office, 1991) at 55.

the same standards.<sup>18</sup> The GATT panels were clearly more concerned with the latter justification.

(ii) *Tuna/Dolphin I*

The implementation of the tuna embargoes revealed domestic tension within the U.S. itself. Environmentalists, frustrated by what they viewed as a lack of commitment to the goals of the MMPA on the part of the federal administration, brought an action in U.S. District Court.<sup>19</sup> The Court, noting that the relevant provisions of the MMPA were mandatory, granted an injunction forcing the administration to implement the embargoes.<sup>20</sup>

Following the implementation of the primary nation embargo, Mexico, arguing that its right to sell tuna on the U.S. market had been violated, requested a GATT dispute-settlement panel to adjudicate the conflict. The panel ruled in favour of the Mexican position. The Mexican government, however, declined to submit the decision to the GATT Council, choosing instead to enter bilateral consultation with the U.S. to resolve the matter. As a result of the Mexican response, the GATT decision in *Tuna/Dolphin I* had no precedential value and the embargo remained in effect.<sup>21</sup> Dissatisfied with the end result of *Tuna/Dolphin I*, the European Union (EU) and the Netherlands as co-complainants requested the

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<sup>18</sup> M.H. Hurlöck, "The GATT, U.S. Law and the Environment: A Proposal to Amend the GATT in Light of the Tuna/Dolphin Decision" (1992) 92 Columbia L.R. 2098 at 2112.

<sup>19</sup> *Earth Island Institute v. Mosbacher*, 929 F. 2d 1449 (1991). The imposition of the embargoes was opposed by Commerce Secretary Robert Mosbacher, U.S. Ambassador to Mexico John Negroponte, and Assistant Administrator for Fisheries William Fox Jr., leading to accusations that the administration was willing to use environmental bargaining chips in the NAFTA negotiations with Mexico. See Earth Island Institute, *supra* note 17 at 60.

<sup>20</sup> The nations initially listed under the primary nation embargo were Mexico, Ecuador, Panama and Vanuatu. Following an agreement to place international observers on board their purse seiners, Ecuador and Panama were taken off the list. On October 26, 1992, four nations were subject to the intermediary nation embargo: Costa Rica, Italy, Japan and Spain. This was down from a total of 21 the previous January. See *Tuna/Dolphin II*, *supra* note 5 at para. 2.14.

<sup>21</sup> See *Greening the GATT*, *supra* note 6 at 268. For a more complete discussion of GATT procedure and state practice under the GATT, including bilateral consultation, see *The GATT Panels*, *supra* note 2 at 11–21.

formation of a second dispute settlement panel to consider both the primary and intermediary nation embargoes.<sup>22</sup>

## 2. Tuna/Dolphin II

The U.S. presented two defences for the use of the embargoes before the GATT Dispute Settlement Panel. First, they argued that the embargoes were justified under Article III. Article III, the national treatment obligation, requires that products imported into a country cannot be treated differently from “like domestic products.”<sup>23</sup> Failing this, the U.S. argued that the embargoes were nonetheless justified under the general exemptions set out in Article XX. Specifically, the U.S. argued that the trade embargoes were either aimed primarily at the conservation of an exhaustible natural resource (Article XX(g)) or necessary to protect animal life (Article XX(b)). The panel ruled against the U.S. on both arguments.

### (i) Article III

The interpretation given to Article III by the GATT panel turned on a very precise reading of the term “product.” The U.S. held that since the domestic tuna industry was subject to the same restrictions on dolphin mortality as the foreign industry, this did not constitute a discriminatory trade practice. In other words, they were applying the same regulatory standards to foreign products as they were to their own. The EU and the Netherlands maintained that the U.S. regulations were aimed not at tuna as a product but at the production methods employed in harvesting tuna, namely

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<sup>22</sup> Australia, Canada, Japan, New Zealand, Thailand and Venezuela supported the EU position as interested third parties. The U.S. found no international support for its position.

<sup>23</sup> Article III:2 reads:

The *products* of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like *products* of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, transportation, distribution or use . . . See GATT, *supra* note 1, reprinted in Tuna/Dolphin II at 889 [emphasis added in panel decision].

incidental dolphin kill. Hence, the U.S. measures were excluded by the wording of Article III, which only applied to products and not to production methods.<sup>24</sup> Essentially, this was the same argument that had succeeded in Tuna/Dolphin I, and the second panel applied the reasoning of the first.

The panel ruled that the U.S. measures were taken in relation to production and had nothing to do with product. As a result, the panel held that Article III “could not apply to the enforcement at the time or point of importation of laws, regulations or requirements that *related to policies or practices that could not affect the product as such.*” [emphasis added]<sup>25</sup> By separating products from their methods of production, the panel was then able to determine that the U.S. embargo was a quantitative restriction. As such, it was inconsistent with Article XI, which generally prohibits such trade restrictions.<sup>26</sup>

(ii) *Article XX*

The U.S. argument centred around the GATT exceptions in Article XX.<sup>27</sup> Article XX allows contracting parties to impose quantitative

<sup>24</sup> See Tuna/Dolphin II, *supra* note 5 at para. 5.8.

<sup>25</sup> See *ibid.*

<sup>26</sup> Article XI:1 reads:

No prohibitions of restrictions other than duties, taxes or other charges . . . shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party.

See GATT, *supra* note 1, reprinted in Tuna/Dolphin II at para. 5.10.

<sup>27</sup> Article XX(b) and Article XX(g) read:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

....

(b) necessary to protect human, animal, or plant life or health:

....

trade restrictions in certain circumstances. Because the drafters of the GATT were cautious about allowing parties to impose such restrictions (for fear that these restrictions may be abused to create disguised trade barriers), GATT panels have consistently given Article XX a narrow interpretation.<sup>28</sup> The Tuna/Dolphin II panel affirmed this interpretative strategy: “The long-standing practice of panels has accordingly been to interpret [Article XX] narrowly, in a manner that preserves the basic objectives and principles of the General Agreement.”<sup>29</sup> Thus, the trade interests protected under the GATT are raised above environmental concerns in interpreting Article XX.<sup>30</sup>

The narrow interpretation of Article XX led to two key determinations by the panel. The first determination concerned the “extra-jurisdictional” impact of the U.S. regulations. The U.S. argued that there was no territorial limitation on measures that a contracting party could take outside its jurisdiction to protect “exhaustible natural resources.” In support of its position, the U.S. pointed to several bilateral and multilateral environmental treaties that “provided for [trade] measures outside of the territorial jurisdiction of the country taking the measures.”<sup>31</sup> In disposing of

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(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic products.

See GATT, *supra* note 1, reprinted in Tuna/Dolphin II at 5.29 & 5.12.

<sup>28</sup> Future panels may narrow the interpretation further. The recently completed Uruguay Round Agreement, stipulates that any quantitative trade restrictions must be subject to a “least trade-restrictive” test. See *Greening the GATT*, *supra* note 6 at 50.

<sup>29</sup> See Tuna/Dolphin II, *supra* note 5 at para. 5.26.

<sup>30</sup> It has been noted that Article XX does not include specific reference to the environment. See *Greening the GATT*, *supra* note 6 at 49; M.H. Hurlock, *supra* note 18 at 2107. While Article XX(b) permits restrictions necessary to protect human life it is unclear whether this exception would cover such diffuse areas as ozone protection. As well, evidentiary problems in connecting trade actions taken in response to ozone depletion to the protection of human life would be enormous.

<sup>31</sup> See Tuna/Dolphin II, *supra* note 5 at para. 3.23. The U.S. cited the enforcement provisions in the 1933 *Convention Relative to the Preservation of Fauna and Flora in Their Natural State*; the 1940 *Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere*; the 1950 *International Convention for the Protection of Migratory Birds*; the 1973 *Agreement of the Conservation of Polar Bears*; the 1976 *Convention on Conservation of North Pacific Fur Seals*; and the 1989 *Convention on the Prohibition of Fishing with Large-Scale Pelagic Driftnets in*

the relevance of these treaties for the purposes of the GATT the panel stated:

[T]he agreements cited by the parties to the dispute were bilateral or plurilateral agreements that were not concluded among the contracting parties to the General Agreement, and they did not apply to the interpretation of the General Agreement or the application of its provisions.<sup>32</sup>

At the same time that the panel dismissed the environmental agreements as an interpretative aid to the GATT, it held that nothing in the wording of Article XX precluded states from taking actions outside their national jurisdiction to conserve exhaustible natural resources. Some writers have suggested that this represents a substantive step in the interpretation of the GATT and its application to international environmental law.<sup>33</sup> However, a closer reading of the panel report suggests that what it had in mind are trade restrictions related to the activity of nationals in a foreign jurisdiction, such as vessels flying the flag of the restricting state, rather than restrictions placed on the activity of other contracting parties.<sup>34</sup>

The second determination focussed on the wording of Article XX(g). While the panel was willing to accept that dolphins were "an exhaustible natural resource" that fell within the wording of Article XX(g)<sup>35</sup> and a policy to conserve dolphins could be seen as a policy to conserve such a resource, the panel narrowed the ambit of Article XX(g). The panel held that the words "related to" the conservation of an exhaustible natural resource had to mean "primarily aimed at" conservation.<sup>36</sup> The panel then went on to find that the U.S. trade restrictions were not, in fact, primarily aimed at the conservation of an exhaustible natural resource but were "measures taken to force

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*the South Pacific*. See *ibid.* at para. 3.21. As well, the U.S. pointed to trade restriction provisions in *The Montreal Protocol on Substances that Deplete the Ozone Layer*, *The Convention on International Trade in Endangered Species* and *The Basel Convention on the Control of Transboundary Movement of Hazardous Waste and their Disposal*. See *ibid.* at para. 3.23.

<sup>32</sup> *Ibid.* at para 5.19.

<sup>33</sup> See *Greening the GATT*, *supra* note 6 at 269.

<sup>34</sup> See *Tuna/Dolphin II*, *supra* note 5 at para. 5.17.

<sup>35</sup> See *ibid.* at para. 5.13.

<sup>36</sup> See *ibid.* at para. 5.21.

other countries to change their policies.”<sup>37</sup> As such, they were not excepted from the general provision of the GATT.

The logical separation in the reasoning of measures aimed at conservation from those aimed at other states’ practices is perplexing. The trade embargo, in order to be effective in conserving the exhaustible natural resource, necessarily had to influence the policy and practice of foreign states. It was exactly those policies and practices, after all, that were contributing to high levels of dolphin mortality. However, any trade action taken to accomplish this end would automatically violate the GATT. The panel justifies this shift through GATT-specific principles:

If. . . Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, *in particular the right of access to markets*, would be seriously impaired. [emphasis added]<sup>38</sup>

The U.S. fared no better under the interpretation of Article XX(b). The GATT panel again narrowed the reading of “necessary” in the Article. The panel asserted that in order for a trade restriction to be necessary for the protection of animal life there had to be no less restrictive—or GATT-consistent—option available to the offending state. Recalling its reasoning under Article XX(g), the panel held that measures taken to force other nations to change their policies could not be necessary for the protection of animal life.<sup>39</sup> Unfortunately, the panel provides no discussion on what less restrictive measures could be considered necessary. It seems that any trade measure that has the effect of influencing policies or practices of other states cannot be “necessary,” within the meaning of Article XX(b), or “primarily aimed” at the conservation of a natural resources, within the meaning of Article XX(g).

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<sup>37</sup> See *ibid.* at para. 5.27.

<sup>38</sup> *Ibid.* at para. 5.26.

<sup>39</sup> See *ibid.* at para. 5.38.

*(iii) Implications of the Panel Decision for International Environmental Law*

The GATT ruling underscored a number of problems already extant in international environmental law. The decision further questioned the effectiveness and, indeed, the integrity of environmental agreements negotiated at multilateral fora. By refusing to recognize the spirit and validity of many of these agreements, the GATT panel effectively made soft law even softer. Without acknowledging the importance of non-trade issues, such as the environment, the panel ignored the international consensus embodied in these agreements. The applicability of the enforcement provisions in these agreements has been seriously undermined. It is doubtful that a trade embargo enacted pursuant to one of these agreements would be sanctioned under the GATT.

The interpretation of Article III further limits the breadth of international environmental agreements. For instance, Article 4(5) of the *Montreal Protocol on Substances that Deplete the Ozone Layer*, (the *Montreal Protocol*)<sup>40</sup> calls on parties to determine the feasibility of banning or restricting importation of products that, while in themselves are harmless to the ozone layer, have been produced with ozone depleting substances. Following the GATT decision, such trade restrictions would not meet the national treatment obligation in Article III. A party to the *Montreal Protocol* can impose trade embargoes on ozone-depleting products, provided similar domestic restrictions are in force, but not products manufactured with ozone-depleting production methods. The GATT decision in *Tuna/Dolphin II* leaves little room for acknowledging that pollution is a transboundary problem—pollution in one state has direct environmental consequences on neighbouring states. It also fails to recognize that the protection of such “environments” as the ozone layer is, by nature, a global problem requiring global remedies.<sup>41</sup> The international community

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<sup>40</sup> *Adjustments to the Montreal Protocol on Substances that Deplete the Ozone*, reprinted in 30 I.L.M. 539 (1991).

<sup>41</sup> The implications of the decision, of course, reach far beyond the *Montreal Protocol* and other international environmental agreements. German environmental lobbyists, for instance, have lobbied hard to get their government to impose restrictions on the importation of Canadian hardwood products because of the clearcutting technique used by the forestry industry. Following the reasoning in

has agreed that trade embargoes are an appropriate enforcement tool; the GATT ruling has now declared such measures to be invalid.

The protection of endangered species is also undermined by the GATT decision. While the GATT ruling is hostile towards import restrictions aimed at production methods, it is in some ways more hospitable to international agreements such as the *Convention on International Trade in Endangered Species* (CITES),<sup>42</sup> that target products such as leopard skin and ivory.<sup>43</sup> Unfortunately, CITES deals exclusively with international trade in endangered species. The fact that all cetaceans, including dolphins, are listed on Annex I and Annex II of CITES does nothing to prohibit incidental dolphin kill in the tuna fishery, as this is a non-trading issue.<sup>44</sup> In addition, destruction of species habitat through environmentally harmful production methods is not addressed in CITES. Trade measures designed to protect habitat would likely be in violation of the GATT.<sup>45</sup>

In closing its decision, the Tuna/Dolphin II panel delivered this telling summation:

The Panel noted that the objective of sustainable development, which includes the protection and preservation of the environment, has been widely recognized by the contracting parties to the General Agreement. The Panel observed that the issue in this dispute was not the validity of the environmental objectives of the United States to protect and conserve dolphins. The issue was whether, in the pursuit of its environmental objectives, the United States could impose

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Tuna/Dolphin II such trade restrictions would not fall within Article III because they would be targeting production and not product. As well, the restrictions would not be justified under Article XX(g) because they would be primarily aimed at forcing a foreign government to change its harvesting policies and practices and not at the conservation of an exhaustible natural resource.

<sup>42</sup> *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, amended 1979, 1983, 993 U.N.T.S. 243.

<sup>43</sup> See J.P. Trachtman, "GATT Dispute Settlement Panel" 86 *American J. of Int'l L.* 142 at 151.

<sup>44</sup> See E.A. Norse, ed., *Global Marine Biodiversity: A Strategy for Building Conservation into Decision Making* (Washington, D.C.: Island Press, 1993) at 94.

<sup>45</sup> Such conventions as the *Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention)*, which specifically call for the conservation of habitat, would also be vulnerable to a GATT challenge if trade measures were enacted to ban products associated with that habitat destruction.

trade embargos to secure changes in the policies which other contracting parties pursued within their own jurisdiction.<sup>46</sup>

Contracting parties are protected from the enforcement provisions of treaties and agreements, which are aimed at gaining compliance with international environmental standards, by virtue of having access to dispute settlement under the GATT. Progressive environmental principles, such as sustainable development, have no persuasive value in the GATT forum.

*(iv) Reaction and Responses to the GATT Decisions*

Domestic reaction to Tuna/Dolphin I in the United States was vitriolic. Ralph Nader called the GATT process “antidemocratic” and predicted that the decision would “turn the GATT into a weapon of mass destruction for the environment and environmental laws around the world.”<sup>47</sup> Steven Shrybman, counsel for the Canadian Environmental Law Association, spoke with a more reflective tone: “In many ways the objectives of liberalized or free trade represent an agenda for deregulation, and the consequences of such a policy for the environment are very problematic.”<sup>48</sup> The GATT panel in Tuna/Dolphin II may have had such criticism in mind when they washed their hands of the issue: “The Panel noted that the relationship between environment and trade would be considered in the context of preparations for the organization of the World Trade Organization.”<sup>49</sup> To date, little progress has been made on integrating environmental policy with trade issues within the GATT or the proposed World Trade Organization.<sup>50</sup>

More positive responses to Tuna/Dolphin I were reflected in the ground swell of public and congressional support for building environmental protection into the North American Free Trade Agreement (NAFTA). Pressure on the Bush administration to push for a side agreement on the environment within the NAFTA

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<sup>46</sup> Tuna/Dolphin II, *supra* note 5 at para. 5.42.

<sup>47</sup> Testimony of Ralph Nader before the Subcommittee on Health and the Environment (27 September 1991), *supra* note 17 at 63.

<sup>48</sup> Testimony of Steven Shrybman before the Subcommittee on Health and the Environment (27 September 1991), *ibid.* at 77.

<sup>49</sup> Tuna/Dolphin II, *supra* note 5 at para. 5.43.

<sup>50</sup> See *Greening the GATT*, *supra* note 6 at 50.

negotiations has been attributed to the intensity of the national debate following Tuna/Dolphin I.<sup>51</sup> In response to the concern over the incompatibility of GATT with environmental protection, the GATT Council called for a meeting of its working group on trade and the environment. Created in 1972 as part of the general provisions of the *Stockholm Declaration*,<sup>52</sup> the working group had never met prior to 1991. Moreover, the report submitted by the group confirmed the panel decision in Tuna/Dolphin I. It cautioned that environmental protection could be used as a disguised trade barrier, emphasized the role of GATT as a trade panel, and suggested that any moves to incorporate environmental considerations into the interpretation of the GATT would necessitate amendments to the General Agreement.<sup>53</sup>

The call to reform the GATT along environmental lines has been widely taken up following the decisions. Much of the response has been creative. Proposals for an amended exception to the GATT, a hypothetical Article XX(k), have called for recognition that trade measures taken to enforce multilateral and bilateral environmental treaties and conventions should serve as a general exclusion to the trade obligations in the GATT.<sup>54</sup> As well, broadening Article III to include production methods would allow countries to target sources of pollution rather than just harmful products.<sup>55</sup> Daniel Estey has called upon environmentalists to use the GATT as a model for international dispute resolution. His proposed Global Environmental Organization would "serve as an honest broker in transnational environmental disputes, assessing risks and benefits from environmental threats and allocating costs and cleanup responsibilities."<sup>56</sup> While each of these proposals would serve the desired end of integrating environmental protection into the GATT,

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<sup>51</sup> P. Low, *Trading Free: The GATT and U.S. Trade Policy* (New York: The Twentieth Century Fund Press, 1993) at 31.

<sup>52</sup> *Stockholm Declaration of the United Nations Conference on the Human Environment*, 5 June 1972, UN Doc. A/CONF. 48/14 (1972), reprinted in 11 I.L.M. 1416.

<sup>53</sup> See *GATT Secretariat 1992 Study on Trade and Environment*, cited in *The GATT Panels*, *supra* note 2 at 95.

<sup>54</sup> See M.H. Hurlock, *supra* note 18 at 2148 & *Greening the GATT*, *supra* note 6 at 221.

<sup>55</sup> See M.H. Hurlock, *ibid.* at 2157.

<sup>56</sup> *Greening the GATT*, *supra* note 6 at 230.

actual moves to amend the GATT have been disappointing.<sup>57</sup> It is ironic that the same states responsible for such documents as the *Montreal Protocol* and CITES seem so reluctant to incorporate similar principles into the GATT.

The above-mentioned proposals all focus on multilateral solutions to the concerns raised in the Tuna/Dolphin decisions. Other proposals, such as amending Article XX(b) to include protection of the environment,<sup>58</sup> leave room for unilateral trade measures outside of existing international agreements. Underlying the Tuna/Dolphin II decision, however, is a reluctance to sanction unilateral trade measures. In this way, the GATT reflects many concerns existing in international law generally. Unilateral action is viewed by many states as a roadblock to the implementation of workable international laws. In the environmental regime, multilateral actions have been effective in developing general principles as well as effective agreements on conservation and environmental protection. While the GATT decisions raise serious questions as to the future enforcement of international environmental law, it may be equally true that the U.S. action impedes the progress of effective solutions to global environmental problems.

### III. UNILATERALISM AND INTERNATIONAL ENVIRONMENTAL LAW: THE ARGUMENT AGAINST THE U.S. POSITION

#### 1. Conservation Flaws in the U.S. Regulations

Proponents of the yellowfin tuna embargoes have proffered three justifications for their implementation: First, they protected dolphins; second, they were necessary to maintain the competitive

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<sup>57</sup> The recently completed Uruguay Round amendments to the GATT on countervailing measures and subsidies have again failed to include environmental protection on the list of GATT exceptions, although they were brought up in the negotiations. The Uruguay Round has confirmed that lower environmental standards in the exporting country are not a justification for countervailing measures. See *The GATT Panels*, *supra* note 2 at 91.

<sup>58</sup> See C. Arden-Clarke, "The General Agreement on Tariffs and Trade, Environmental Protection and Sustainable Development", World Wildlife Discussion Paper (June 1991), cited in M.H. Hurlock, *supra* note 18 at note 302.

equality of U.S. tuna fishers;<sup>59</sup> and third, they represented U.S. frustration with the failure of enforcement mechanisms in existing multilateral environmental agreements. Indeed, the GATT decisions, in many ways, underscore the failure of the international community to implement effective rules concerning environmental protection.<sup>60</sup> These proponents, however, have largely ignored the effect of these regulations on the conservation prospects for yellowfin tuna.

The first thing to recognize in addressing unilateral enforcement of conservation regulations is that those standards are not open to criticism or input from countries with a similar interest in the yellowfin resource. By placing itself on a higher moral plane than other nations in the ETP, the U.S. was asserting a preferential right in the reduction of dolphin mortality. However, the U.S. regulations do not seriously reduce the potential numbers of dolphins killed. Under the regulations the total allowable kill in 1993 for all dolphin species in the yellowfin fishery exceeds 50,000,<sup>61</sup> a number well higher than even conservative estimates of total annual kill in the ETP.<sup>62</sup> Further, the experience of U.S. tuna fishers in the ETP showed that the regulations were not working. The USITC reported that the U.S. fishers who remained in the ETP, like most foreign fishers, were forced to sell their yellowfin catches on foreign markets because "much of the harvest was dolphin unsafe."<sup>63</sup> As well, the stipulated kill per set of 3.89, when applied to smaller fishing nations, does not equitably address overall stock abundance. A country with a comparatively small purse seining fleet—such as Vanuatu, which was put under the primary nation embargo when its fishers exceeded U.S. prescribed levels in 1988<sup>64</sup>—is subject to the same restrictions as the more extensive fleet of the United States. While smaller fishing states do not contribute to overall depletion of dolphin stocks to the extent that the larger fleets of Mexico and the United States do, they are nonetheless

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<sup>59</sup> See discussion *supra* note 7.

<sup>60</sup> See J.P. Trachtman, *supra* note 43 at 151.

<sup>61</sup> *Operational Regulations for Tuna Fishermen*, *supra* note 13 at §§. d(A)(2).

<sup>62</sup> The total incidental kill of dolphins in the ETP for 1991 was 27,300. See USITC Report, *supra* note 9 at 3-2.

<sup>63</sup> *Ibid.* at 3-18.

<sup>64</sup> *Ibid.* at 3-7.

subject to the same regulatory burden.<sup>65</sup> The U.S. regulations have the effect of making each participant in the yellowfin fishery equally responsible for dolphin conservation without considering the relative impact each participating state has on overall dolphin mortality.

The second flaw in the regulations and the enforcement of the embargoes is that they may have had a negative impact on the conservation of the yellowfin stocks in the ETP. Herds of dolphins in the ETP associate with schools of moderate to large yellowfin.<sup>66</sup> One of the adverse effects of the embargoes was to force nations to target smaller yellowfin before they had reproduced. Venezuela argued that the U.S. regulations were short-sighted and threatened the long-term viability of the tuna stocks. The Venezuelans stated: "The embargos . . . were not only barriers to trade but [barriers] to responsible eco-system management."<sup>67</sup> The exclusive focus on dolphins may have blinded the U.S. to broader concerns of species bio-diversity and eco-system management.

A third flaw in the U.S. regulatory system is that it did not encourage or promote more sustainable fishing methods but preserved the purse seiner status quo. Bait fishing or long liners do not involve incidental dolphin mortality. As well, lower yields in the tuna harvest associated with these techniques assist the long-term sustainability of the resource. Because purse seining is economically more efficient in the short-term, the U.S. position has been to focus on modifications of current methods.<sup>68</sup> Unfortunately, the National Research Council reports that it was

unable to identify any currently available alternative to setting nets on dolphins that is as efficient as dolphin seining . . . [or] any experimental modifications to gear or techniques of catching dolphin-associated tuna that

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<sup>65</sup> For a description of the fleet sizes of the participants in the ETP yellowfin fishery, see *Ad Hoc Consultation on the Role of Regional Fishery Agencies in Relation to High Seas Fishery Statistics: FAO Fisheries Report No. 500* (Rome: Food and Agricultural Organization of the United Nations, 1994).

<sup>66</sup> A. Wild, "A Review of the Biology and Fisheries for Yellowfin Tuna, *Thunnus Albacares*, in the Eastern Pacific Ocean", in *Interactions of Pacific Tuna Fisheries: FAO Fisheries Technical Paper 336/2* (Rome: Food and Agricultural Organization of the United Nations, 1991) 52 at 73.

<sup>67</sup> See Tuna/Dolphin II, *supra* note 5 at para. 4.37.

<sup>68</sup> See National Research Council, *supra* note 11 at 3.

would reduce dolphin mortality to or near to zero and would be practical in the fishery in the immediate future.<sup>69</sup>

The embargoes ultimately may have an adverse effect on the tuna stocks of the central and western pacific. The USITC reported that efforts to minimize costs and improve efficiency in the U.S. tuna harvesting and processing industry have “mainly been driven by economic considerations such as the cost of energy and labour.”<sup>70</sup> The higher costs associated with compliance with the dolphin-safe policy have been partially blamed for the migration of the majority of the U.S. purse seiners from the ETP to the western and central pacific.<sup>71</sup> As well, the bulk of U.S. capital investment in tuna processing avoided adverse economic impacts altogether by being relocated to countries in the western pacific not subject to the embargoes—a fact which proves that global capital, like pollution and tuna fish, is highly migratory and difficult to regulate.<sup>72</sup> Increased pressure on the central and western pacific fisheries from the economic calculations of the U.S. industry may have long-term detrimental effects on tuna stocks in those regions.

Another plausible reason for the migration of U.S. industry to the western and central pacific is that, unlike their counterparts in the ETP, stocks of yellowfin tuna in these regions are relatively healthy.<sup>73</sup> In 1960, the U.S. caught and processed 90% of the ETP tuna. By 1991, due to the expansion in the fleet sizes of Mexico, Ecuador and Panama, the U.S. share of the resource had been reduced to 11%.<sup>74</sup> Throughout the 1970s and 1980s, members of the Inter-American Tropical Tuna Commission (IATTC) refused to

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<sup>69</sup> *Ibid.* at 8.

<sup>70</sup> USITC Report, *supra* note 9 at 5-1.

<sup>71</sup> In 1989, 29 U.S. vessels, accounting for 26% of the total yellowfin harvest, operated in the ETP. See National Research Council, *supra* note 11 at 29. By 1992, only nine purse seiners remained in the ETP, while the number operating in the western and central pacific had increased from 30 in 1988 to 43 in 1992. See USITC Report, *supra* note 9 at D-5.

<sup>72</sup> As of 1990, only one of the major U.S. tuna processors was operating within the U.S.. The others had sold their interests to Thai and Indonesian companies. See National Research Council, *ibid.* at 31.

<sup>73</sup> Yellowfin stocks in the central and western pacific are lightly exploited. See *FAO Fisheries Technical Paper No. 337*, *supra* note 7 at 27.

<sup>74</sup> See National Research Council, *supra* note 11 at 3.

adhere to the catch limits set by the regulatory body because countries such as Mexico, who did not participate in IATTC, were operating independent of international regulatory control.<sup>75</sup> As a result, IATTC lost all credibility as an effective regulatory body<sup>76</sup> and the yellowfin tuna stocks are now fully exploited.<sup>77</sup> The same misfortune may befall the stocks of the western and central pacific.

## 2. The U.S. Action Under International Law: Rio and UNCLOS

Intense competition for yellowfin tuna resources in the ETP led the Australians to suggest that the regulatory measures taken by the U.S. to limit dolphin mortality were, in fact, aimed at controlling the international trade in ETP yellowfin tuna.<sup>78</sup> Their statement reflects a general suspicion of the American policy. The U.S. holds 31% of the world's tuna market.<sup>79</sup> By closing that market to dolphin-unsafe tuna caught in the ETP, the U.S. could confer an economic advantage on their tuna fishers who had largely moved away from the ETP, while at the same time forcing nations fishing in the ETP to find other markets or catch less tuna. This theory, however, is insupportable for a number of reasons. One, it was environmentalists who forced the administration to impose the embargoes. Two, part of the reason the U.S. fishers left the ETP was due to the increased cost of meeting the regulatory standards.

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<sup>75</sup> See USITC Report, *supra* note 9 at 4-3.

<sup>76</sup> The current membership in IATTC includes only Costa Rica, France, Japan, Nicaragua, Panama, the U.S., Vanuatu and Venezuela. Mexico, Ecuador and Chile, with their large yellowfin fleets, are not members. IATTC's role in the regulation of the ETP tuna fishery is limited to gathering scientific information, conducting observer programs, and advising the member states on conservation and management of the stocks. See *FAO Fisheries Report No. 500*, *supra* note 65 at 43.

<sup>77</sup> See *FAO Fisheries Technical Paper No. 337*, *supra* note 7 at 27. In FAO parlance, "fully exploited" means the stock is fished at its maximum sustainable yield (MSY). MSY calculations are based on the best available science and have historically resulted in over-exploitation of stocks managed under this principle. For a more complete discussion of the flaws inherent in managing fisheries based on MSY, see R.L. Payne, "A Glance Into the Future of the World Canned Tuna Trade" (1994) 18 *Marine Policy* 407.

<sup>78</sup> See *Tuna/Dolphin II*, *supra* note 5 at para. 4.12.

<sup>79</sup> See National Research Council, *supra* note 11 at 6.

Finally, the effect of the embargoes proved to be damaging on the remainder of the domestic processing industry.<sup>80</sup>

The suspicion, however, reflects a growing divide in international environmental law between North and South countries. Principle 12 of the Rio Declaration states, in part:

Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.<sup>81</sup>

Principle 12 was drafted to protect the development interests of South nations, who feared that trade measures would be taken by North nations to “force acquiescence to northern environmental priorities over which legitimate disagreement remains regarding the resulting benefits.”<sup>82</sup> The U.S. trade action can be seen as a direct abrogation of Principle 12. The embargoes placed a heavier burden on the South nations, where tuna resources contribute more significantly to their narrower economic bases. In addition, serious and valid points of disagreement concerning the environmental soundness of the U.S. regulations were not opened for debate among the participating nations in the ETP fishery. Instead, the U.S. used its market strength to force unsound conservation and resource management strategies on South nations.

This dispute has long been a sore spot in international fisheries management. South nations, with less developed fisheries industries, are more dependent on stocks that occur within their 200 mile limit than North nations with their highly capitalized fleets. After stocks are depleted in one region, the North nations

<sup>80</sup> The processing industry complained of a number of adverse affects created by the embargoes: (1) increased public awareness of traditional dolphin-unsafe harvesting practices had decreased demand for tuna even after the canners moved to dolphin-safe labelling; (2) uncertainties in supplies created higher risks; (3) U.S. canners had to compete with the large and growing European market for dolphin-safe products. See USITC Report, *supra* note 9 at 3–18. The Report did, however, acknowledge that the increased demand for albacore was an “unambiguously positive” result of the embargoes for U.S. fishers. See *ibid.* at 3–21.

<sup>81</sup> *United Nations Conference on Environment and Development*, UN Doc. A/CONF. 151/5/Rev. 1, reprinted in 31 I.L.M. 874 at 878.

<sup>82</sup> *Greening the GATT*, *supra* note 6 at 187.

move on to less exploited areas, leaving the southern states to suffer the consequences of overfishing. This pattern, known as "pulse fishing," has not only contributed to the depletion of much of the world's high seas fisheries<sup>83</sup> but to open distrust of northern motives surrounding conservation measures.<sup>84</sup> The ease with which the U.S. fleet was able to relocate its activities may have contributed to the hostility among Southern nations toward the U.S. trade measures.

The 1982 United Nations Convention of the Law of the Sea (UNCLOS)<sup>85</sup> mirrors the cooperative approach to transboundary resource management expressed in Principle 12. UNCLOS recognized that individual states could not adequately manage transboundary stocks such as tuna fish. Article 64 mandates states whose nationals fish for highly migratory species within the same region to cooperate through international fisheries organizations in the management and conservation of the species. By taking the issue of dolphin conservation upon itself, the U.S. was indirectly regulating the yellowfin tuna resource. In principle, this unilateral action would amount to a violation of the provisions of UNCLOS.<sup>86</sup>

At the Tuna/Dolphin II panel hearing, Venezuela called upon the U.S. to respect the principle of cooperation enunciated in UNCLOS.<sup>87</sup> Venezuela considered the appropriate mechanism for regulation of dolphin mortality was through an international agreement, which would not only represent all interested parties but could also address the more pressing economic issue of conserving the yellowfin tuna stocks.<sup>88</sup> Unfortunately, the opposition to the U.S. dolphin-safe policy highlights the regional antipathies that exist

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<sup>83</sup> The FAO estimates that 70% of the world's high seas fisheries are either fully exploited or over exploited. See *Technical Consultation on High Seas Fishing: FAO Fisheries Report No. 484* (Rome: Food and Agricultural Organization of the United Nations, 1992).

<sup>84</sup> See J. Carr & M. Gianni, "High Seas Fisheries, Large-Scale Driftnets, and the Law of the Sea" in J.M. Van Dyke et al., eds., *Freedom for the Seas in the 21st Century* (Washington, D.C.: Island Press, 1993) 272.

<sup>85</sup> *United Nations Convention on the Law of the Sea*, UN Doc. A/CONF. 62/122, opened for signature 10 December 1982, reprinted in 21 I.L.M. 1291.

<sup>86</sup> It should be noted that the U.S. has not ratified UNCLOS.

<sup>87</sup> Tuna/Dolphin II, *supra* note 5 at para. 4.38.

<sup>88</sup> Indeed, when the GATT panel determined that the U.S. actions were too restrictive, or GATT inconsistent, they may have had in mind a cooperative management solution to the dolphin problem. Unfortunately, they failed to spell this out in the decision.

in the ETP. The refusal of many coastal states to join IATTC, distrust of American motives in imposing the trade embargoes (which was compounded by the feeling that the U.S. was largely responsible for the dismal state of the yellowfin stocks), and U.S. frustration with the failure of states in the region to adequately regulate their fishers all contributed to the intractable nature of the regulatory dilemma facing the ETP. The GATT challenges were simply the continuation of these antipathies played out on a different stage.

While the ETP has become a regulatory nightmare, which has frustrated efforts to protect dolphins and conserve tuna stocks, lessons can be learned from looking elsewhere. The South Pacific island states have had much greater success in resisting the economic muscle of large fishing nations and raising environmental conservation to an international plane. The experience of these states in working to ban large-scale pelagic driftnets from their waters is an instructive and hopeful lesson that states in the ETP would do well to observe.

#### IV. LESSONS FROM THE SOUTH PACIFIC

##### 1. Historical Background to the Pelagic Driftnet Convention

The history of the UN Pelagic Driftnet Resolution (the Driftnet Resolution)<sup>89</sup> is important for four reasons. First, it reveals the environmentally unfriendly side to American trade embargoes related to international fisheries. Second, it provides a contextual insight into the North-South dispute in international environmental law. Third, it shows how economic concerns can be integrated with environmental concerns in natural resource management. And finally, it provides a positive role model for environmental protection on the international stage. Many of the regulatory problems currently facing the ETP have been resolved in the South Pacific.

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<sup>89</sup> *Large-scale Pelagic Driftnet Fishing and Its Impact on the Living Marine Resources of the World's Oceans and Seas*, GA Res. 44/225, UN GAOR, UN DOC. A/45/663.

The South Pacific Forum Fisheries Agency (FFA)<sup>90</sup> is responsible for the management of the tuna resources that migrate through the combined exclusive economic zones (EEZ) of its member states.<sup>91</sup> The FFA was born and galvanized out of international conflict. In 1976, the U.S. enacted the *Magnuson Fishery Conservation and Management Act* (the *Magnuson Act*).<sup>92</sup> The legislation asserted U.S. jurisdiction over the living resources within the American EEZ, with the one notable exception of tuna. The *Magnuson Act* also refused to recognize the legitimacy of other states' claims over tuna that occurred inside their EEZs and allowed the U.S. government to impose punitive trade sanctions on any nation that took action against U.S. vessels. Many U.S. vessels continued to fish for tuna within the EEZs of FFA states under the protection of the *Magnuson Act* despite the fact that those states had claimed jurisdiction over the resources under Article 56 of UNCLOS. Article 56 gives coastal states exclusive authority to manage the living resources within their EEZs.<sup>93</sup> The motivation for the U.S. policy was fairly simple: The annual landed value of South Pacific tuna fishery in the 1980s has been estimated at two billion U.S. dollars.<sup>94</sup> Competition between technically advanced distant water fishing fleets, such as Taiwan, Japan, and the U.S., made free access to the resource a matter of economic importance.

Faced with threats to their sovereign rights, four South Pacific island states arrested American vessels.<sup>95</sup> In each case, the U.S. responded by imposing trade embargoes on tuna imported from

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<sup>90</sup> *Convention Establishing the South Pacific Forum Fisheries Agency*, 1978, reprinted in B. Herr, ed., *infra* note 101 at 422.

<sup>91</sup> The FFA consists of 17 member states: Australia, the Cook Islands, the Federated States of Micronesia, Fiji, Kiribati, the Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, the Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa.

<sup>92</sup> 16 U.S.C. §§ 1801–1882 (1988).

<sup>93</sup> See W.T. Burke, "Highly Migratory Species and the Law of the Sea" (1984) 14 *Ocean Dev. & Int'l. L.* 273.

<sup>94</sup> M.L. Lodge, "Minimum Terms and Conditions of Access: Responsible Fisheries Management in the South Pacific Regions" (1992) 16 *Marine Policy* 272 at 273.

<sup>95</sup> Papua New Guinea arrested the "Danica" in 1982, the Solomon Islands arrested the "Jeanette Diana" in 1984, the Federated States of Micronesia arrested the "Ocean Pearl" in 1986, and Kiribati took similar action against a U.S. vessel in 1987.

these countries. The events had two positive consequences for the South Pacific states. First, their responses, though limited, proved to be effective. The Solomon Islands, for instance, threatened to bar all U.S. vessels from its waters and open them instead to vessels from the Soviet Union.<sup>96</sup> Second, the conflict created regional cohesion. In 1987, the two sides negotiated a settlement of the dispute.<sup>97</sup> In exchange for allowing U.S. vessels into their waters, the member states of the FFA received recognition of their jurisdiction over their combined EEZ through licensing and access agreements. The regional unity that was forged from this conflict has in turn led to significant international environmental initiatives.

Arvid Pardo has asserted that small, developing states, such as those in the South Pacific, suffer from “inequitable consequences deriving from inequalities in technology and access to open seas.”<sup>98</sup> Prior to 1991, distant water fishing nations had exploited their technological advantage by fishing with large scale pelagic driftnets within the EEZ of the FFA. Driftnets, sometimes reaching 50 kms in length,<sup>99</sup> were used because the migratory patterns of tuna are poorly understood and the species can be widely dispersed.

The ecological impact of driftnets is extremely destructive. The report of the Secretary General identifies two environmental problems with this practice. First, the nets are indiscriminate. As well as targeting tuna fish, the nets are responsible for the significant bycatch of sea birds, marine mammals and non-target species. Second, the impact on the target species is equally devastating. In particular, the report identifies the adverse economic impact the overexploitation of living resources has on coastal states that are particularly reliant on sustaining those resources.<sup>100</sup> Large driftnets are frequently cut loose in adverse conditions and left to comb the

<sup>96</sup> B. M. Tsamenyi, “The Jeanette Diana Dispute” (1986) 16 *Ocean Dev. & Int’l. L.* 353.

<sup>97</sup> See *Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States*, reprinted in K.R. Simmonds, ed., *New Directions in the Law of the Sea [New Series]* (New York: Oceana, 1987) at 9.

<sup>98</sup> A. Pardo, “Perspectives on Ocean Governance”, in J.M. Van Dyke et al, eds., *Freedom for the High Seas in the 21st Century*, *supra* note 84 at 38.

<sup>99</sup> See *Large-Scale Pelagic Driftnet Fishing and Its Impact on the Living Resources of the World’s Oceans and Seas, Report of the Secretary General*, UN Doc. A/45/663 (1990).

<sup>100</sup> *Ibid.* at para. 2.

marine ecosystem. As well, the massive capital expenditure required to conduct driftnet activities means greater numbers of fish must be caught to meet expenses. The cycle is vicious and unsustainable.

In response to driftnetting, the FFA banded together and issued the Tarawa Declaration.<sup>101</sup> The Tarawa Declaration identifies the practice as "indiscriminate, irresponsible and destructive." The Tarawa Declaration also links the issue of environmental protection with the economic interests of the developing states of the FFA, noting the importance of a sustainable fishery for "this and future generations of Pacific people." The Declaration called on the international community to recognize the unsustainable nature of driftnet fishing and suggested that the ban on driftnet fishing in the South Pacific "might then be the first step to a comprehensive ban on such fishing" throughout the world. The Tarawa Declaration was ratified by all FFA member states in Wellington, New Zealand.<sup>102</sup>

Following adoption of the Wellington Convention driftnets have virtually disappeared from the waters of the South Pacific.<sup>103</sup> The success of the multilateral resolve has been applauded as "an important step toward international cooperation and the long-term health of the ecosystem on which we depended."<sup>104</sup>

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<sup>101</sup> *Tarawa Declaration*, July 1989, reprinted in B. Herr, ed., *The Forum Fisheries Agency: Achievements, Challenges and Prospects* (Institute of Pacific Studies: University of the Pacific, 1990) at 437.

<sup>102</sup> *Convention to Prohibit Driftnet Fishing in the South Pacific*, 1989, reprinted in K.R. Simmonds, ed., *New Directions in the Law of the Sea [New Series]* P. (New York: Oceana, 1989) 18 [hereinafter the Wellington Convention].

<sup>103</sup> See G.J. Hewison, "The Legally Binding Nature of the Moratorium on Large-Scale High Seas Pelagic Driftnet Fishing" (1994) 25 *J. of Maritime L. and Comm.* 557 at 566.

<sup>104</sup> J. Carr & M. Gianni, *supra* note 84 at 273. Judith Swan has written: "[Tarawa] Declaration, therefore, was a policy-political decision and strategy, generated by strong regional infrastructure and collectivism. It reflected South Pacific priorities of sound ecosystems and peoples' welfare over a debate about scientific evidence." See J. Swan, "International Regulation of Driftnet Fishing Activities" in M. Ross & J.O. Saunders, eds., *Growing Demand on a Shrinking Heritage: Managing Resource-Use Conflicts* (Calgary: Canadian Institute of Resources Law, 1992) 216 at 240.

## 2. International Acceptance of the Driftnet Resolution

The Driftnet Resolution adopted many of the initiatives expounded in the Wellington Convention. First, it noted both the destructive impact on non-target species and the economic impact on developing states who fished on a smaller scale. The Resolution called for immediate cessation of the activity in the North and South Pacific and a global moratorium on large-scale driftnet fishing by June 30, 1992.<sup>105</sup>

The concerted diplomatic effort to ban driftnet fishing in the South Pacific has been continued on an international scale. In 1990 the UN General Assembly adopted resolution 45/197.<sup>106</sup> The resolution reaffirmed the commitment to the global ban called for in Resolution 44/225. As of 1994, many nations, including some of the largest offenders, had enacted legislation prohibiting their nationals from engaging in driftnet fishing on the high seas.<sup>107</sup> As well, many international fisheries organizations have issued communiqués endorsing the moratorium.<sup>108</sup> The accumulation of support in the international community for the moratorium has led some scholars to argue that the content of Resolution 44/225 meets the criteria set out in Article 38 of the *Statute of the International Court of Justice*<sup>109</sup> for customary international law.<sup>110</sup>

The success of the South Pacific states in promoting regional conservation issues on an international scale provides a dramatic comparison to the present experience in the ETP. There are many reasons why this is so. First, the South Pacific approach has been

<sup>105</sup> Canada was a strong supporter of the Driftnet Resolution. In its submission, Canada called for the termination of the wasteful and destructive practice. Canada's main concern was for conserving salmon stocks which were fished on the high seas by Japan, South Korea and Taiwan. See *Submission to the United Nations Office of Ocean Affairs and the Law of the Sea, Large-Scale Pelagic Driftnets* (31 August 1990); Canada, Department of Fisheries and Oceans Press Release, HQ-B-90-14-3 (7 November 1990).

<sup>106</sup> *Large-Scale Pelagic Driftnet Fishing and its Impact on the Living Resources on the World's Oceans and Seas*, UN Doc. A/C-2/45 6.77 (10 December 1990).

<sup>107</sup> These nations include Japan, Taiwan, the former Soviet Union and the EU. See G.J. Hewison, *supra* note 103 at 576.

<sup>108</sup> G.J. Hewison, *ibid.* at 573.

<sup>109</sup> *Statute of the International Court of Justice*, reprinted in 11 I.L.M. 899 (1972).

<sup>110</sup> G.J. Hewison argues that accepting the moratorium is a general practice recognized as obligatory by a majority of states. See generally G.J. Hewison, *supra* note 103.

one of multilateral cooperation. The ETP has remained mired in regional distrust. Second, the South Pacific initiative took a comprehensive eco-system approach. The Wellington Convention recognized that the destruction caused by driftnet fishing could not be addressed through attempts to limit the kill of a particular species. The Wellington Convention addresses both the environmental issues of wasteful incidental bycatch and the economic issue of overexploitation of the tuna resources. The U.S. approach in attempting to regulate only dolphin kill without regard to the state of the yellowfin stocks has only deepened the divisions in the ETP. Until there is recognition by the countries in the ETP that the two species are inseparable in the eco-system, and that an effort to reduce dolphin kill must also consider the precarious state of the tuna, further cooperation in the region is unlikely. Third, the international community recognized the soundness of the South Pacific approach. The U.S. has reported that the driftnet moratoria in the South Pacific and the corresponding reduction in the albacore catch is expected to benefit U.S. fishers by an increase in prices because of the smaller harvests and a long-term sustainable fishery in which albacore populations are expected to rise.<sup>111</sup> Finally, the similarities between the regions should not be ignored. The South Pacific initiative came in response to an economic and environmental crisis. Stocks of albacore tuna, on which the region is highly dependent, were reported to be in threat of serious depletion.<sup>112</sup> It has been frequently observed that conservation only becomes part of fishery policy in response to crises.<sup>113</sup> The ETP is now faced with a similar crisis. Failure to regulate the resource through multilateral cooperation may well solve the dolphin problem at the expense of the tuna: there simply will be no more tuna left to fish.

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<sup>111</sup> See USITC Report, *supra* note 9 at xi.

<sup>112</sup> See J. Swan, *supra* note 104 at 221.

<sup>113</sup> See, for *e.g.*, H.D. Smith, "Theory of Ocean Management" in P. Fabbri, ed., *Ocean Management in Global Change* (London: Elsevier Applied Science Publishers, 1993) 19.

## V. CONCLUSION

The Wellington Convention may only survive by the grace of having avoided the GATT. Article 3(2)(c) of the Convention allows all parties to prohibit the importation of fish products caught with driftnets. Embargoes enacted under this provision would not withstand a challenge under the GATT. Nevertheless, many member states have implemented such legislation.<sup>114</sup> As well, nations outside the South Pacific, including the United States,<sup>115</sup> have followed the lead of the South Pacific states. The fact that the GATT exists as an available mechanism to undermine the Wellington Convention and yet has not been used is a further testimony to the strength of the international resolve to support the moratorium on driftnet fishing.

In the end, the experience of the driftnet moratorium is instructive for both the ETP fishery and the GATT itself. The contracting parties to the GATT and the interpreters of the GATT should recognize the international consensus embodied in Resolution 45/225. The GATT must be either amended or interpretative direction must be supplied to permit trade embargoes that are consistent with international environmental initiatives and multilateral agreements. By undermining these agreements rather than providing valuable support for them, the GATT will continue to impede the development of effective international environmental law, which, after all, embodies the same multilateral consensus that is the foundation of the GATT.

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<sup>114</sup> These states include Australia and the Cook Islands. New Zealand considered such measures unenforceable in light of the GATT decision in *Tuna/Dolphin I*, and Papua New Guinea declined to implement supporting legislation for fear that its processing industry would suffer economic harm. See G.J. Hewison, *supra* note 103 at 576.

<sup>115</sup> The U.S. implemented legislation banning importation of driftnet products into its territory in 1991. See *High Seas Driftnet Fisheries Enforcement Act*, amending 16 U.S.C. § 1801 (1991).