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Stephen M. Boreman*

Dolphin-Safe Tuna: What's in a Label? The Killing of Dolphins in the Eastern Tropical Pacific and the Case for an International Legal Solution

INTRODUCTION

Early recordings of human events reveal a unique relationship between humans and dolphins. Greek mythology credits dolphins with rescues at sea and other heroic acts.¹ Contemporarily, Americans portrayed the dolphin "Flipper" in a television series as a sort of sea-going "Lassie".² Both Flipper and Lassie were portrayed as intelligent protagonists.³ Today promoters market a "dolphin experience" at hotels where

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1. R. Bell, *Dictionary of Classical Mythology (Symbols, Attributes and Association)* 72-74 (1982).

2. *Flipper*, (NBC television broadcast, 1967-72) The *Flipper* theme, while marine in nature, was similar to the story of *Lassie*. See, *Lawrence v. Ylla*, 55 N.Y.S.2d 343 (Sup.Ct. 1945) (describing the popular film and television adventure program, *Lassie*, about a family dog). "Flipper" was the name given to the star of the 1960s television program in which a trained dolphin acted as a family pet. *Id.* See also telephone interview with R. O'Barry, now director, Dolphin Project, Coconut Grove, Florida, (Jan. 4, 1991) [hereinafter O'Barry] (interview notes on file with U.C. Davis L. Rev.) (stating that the program *Flipper* made dolphins popular in American culture, and that *Flipper* is currently re-run in five countries). See also D. Schrieberg, *U.S., Mexico Engage in Tuna War*, *The Sacramento Bee*, Aug. 29, 1990, at 1, [hereinafter Schrieberg] (quoting a Mexican official who said: "It wasn't until that stupid series [*Flipper*], that people suddenly cared about dolphins."); C. Dezern & C. Schreuder, *Fate of Captive Dolphins is Often a Short Life Span*, *The Sacramento Bee*, June 24, 1990, at 2, col.1 [hereinafter Dezern] (stating that dolphins are also known as "crowd charmers" in steel tanks and concrete pools, performing tricks for audiences at commercial attractions).

3. *Good Morning, America* (ABC television broadcast, Feb. 15, 1991) (tape on file at ABC Television, Inc., New York, N.Y.) (suggesting dolphins' intelligence may rival human beings' intelligence, and that dolphins have probable language capabilities). See Telephone interview with T. Steiner, marine biologist and Director, Earth Island Institute, San Francisco, Cal. (Sept. 16, 1989) (interview notes on file at U.C. Davis L. Rev.) (dolphins' development may parallel that of humans, but in a marine environmental context). Earth Island Institute (Earth Island) is a private, nonprofit organization in San Francisco, Calif., dedicated to world-wide environmental protection. One of Earth Island's programs is the *Dolphin Project*. This project directs public education and legal actions aimed at halting the slaughter of Eastern Tropical Pacific (ETP) dolphins. *Id.*

guests can swim with dolphins.⁴

On the surface, dolphin-human relations appear generally amicable, particularly in the United States.⁵ Dolphins, however, have benefited little from this ostensibly friendly relationship and have suffered because of their association with schools of tuna that are highly sought after by commercial fishermen.⁶ Purse-seine fishing is commonly practiced in the Eastern Tropical Pacific (ETP),⁷ where, for unknown reasons, tuna aggregate under dolphins.⁸ Specifically, modern tuna fishing practices have increasingly wreaked havoc on dolphin populations in the ETP.⁹

The new fishing technology, known as purse-seine fishing,¹⁰ involves the encirclement of fish with large nets, which can extend for a mile and sink 300 feet below the surface.¹¹ Speed boats and helicopters may be used to herd the dolphins into the nets, while the tuna, which are schooling beneath, are trapped. Large power winches pull the net in, closing it at the center like a drawstring purse, encircling the dolphin and tuna alike. Without means of escape, the air breathing dolphins slowly drown or are crushed in winches that pull in the net.¹² As a result of purse-seine

4. Dezern, *supra* note 2, at 1, (describing how participants proclaim that the experience is spiritual; however, marine biologists argue that these activities can be harmful to dolphins and may shorten their life-spans).

5. See O'Barry, *supra* note 2.

6. K. Brower, *The Destruction of Dolphins*, *The Atlantic Monthly*, July 1989, at 46, [hereinafter *Brower*] (describing how tuna fishermen sometimes eat dolphins); E. Wright, *Benjamin Franklin, His Life As He Wrote It* 70 (1989) (referring to Benjamin Franklin's description of the consumption of dolphin during a transatlantic voyage in 1726).

7. See L. Scheele and D. Wilkinson, *Background Paper on the Eastern Tropical Pacific Tuna/Dolphin Issue 4-7* (1988) [hereinafter *Scheele*]. From the late 1960s to the mid 1970s there was a rapid expansion of the ETP purse-seine fleet. *Id.* at 7. After a brief decline in the early 1980s due to over-fishing and the effects of the El Nino phenomena (a tropical storm causing interference with currents and fishing), the ETP fleet again expanded in 1985-86. *Id.* at 8. There are now approximately 100 "purse-seiners" fishing ETP waters. *Id.* at 9. The fleet was 99 percent American when purse-seine fishing in the ETP began in the 1960s, but today U.S. boats are in the minority. Mexico is now the largest register of ETP purse-seiners. *Id.*

8. Scheele, *supra* note 7, at 4 (stating that in the ETP, yellowfin tuna school directly under herds of dolphin).

9. T. Steiner, et. al., *The Tragedy Continues: Killing of Dolphins by the Tuna Industry* 13-15, 23, 30 (Earth Island Institute 1988) [hereinafter *Steiner*]. This briefing document, prepared by the staff of the *Dolphin Project*, reviews the problem of ETP tunaboat slaughter of dolphins, provides statistical data, an analysis of alternatives, and makes recommendations for actions to mitigate or end ETP dolphin destruction. *Id.* at 1-49.

10. Scheele, *supra* note 7.

11. *Id.* at 6.

12. *Id.* at 4. ETP tuna fishermen depend on the dolphins to lead the fleet to tuna. Traditional line fishing or purse seine fishing may be used to catch the fish. When traditional line fishing is used, the dolphins are not harmed because their sensitive sonar prevents them from striking at a baited hook. *Id.* In purse-seine fishing, by contrast, the fishermen sometimes use underwater explosives known as seal bombs to terrify and confuse the dolphin herd, causing the tuna to congregate while the nets are being set. Brower, *supra* note 6, at 47-48 (describing fisherman hurling seal bombs into the water, and stating that fishermen throw these bombs right on top of dolphins). Some dolphins could escape from the nets if the fishermen used a technique called "backing down". Despite the availability of this technique, more dolphins are still routinely killed by purse-seine nets than line fishing. Scheele, *supra* note 7, at 6-7. Even more dolphins are indiscriminately hauled in with tuna. Steiner, *supra* note 9, at 38. Sundown sets result in four times the day time kill, and can result in "disaster sets" wherein vast numbers of dolphin are killed. *Id.*

fishing, over six million dolphins have died since 1959.¹³ There is little economic justification for this killing, since over 90 percent of the tuna caught world-wide are taken with methods that are dolphin-safe.¹⁴

American environmentalists and lawmakers have attempted to address the ETP tuna-dolphin issue through domestic law, beginning with enactment of the Marine Mammal Protection Act of 1972 (MMPA).¹⁵ Domestic law, however, cannot be directly applied to foreign tuna fleet practices in the ETP region.¹⁶ Moreover, United States boats have simply reflagged with flags of foreign nations, effectively avoiding MMPA regulations.¹⁷ The domestic tuna industry has responded to criticism about its dolphin practices with a voluntary plan establishing *dolphin-safe* tuna.¹⁸ The three largest United States tuna companies have declared they will purchase only tuna caught without harm to dolphins, and so label their tuna cans.¹⁹ In November of 1990, however, news sources reported that one participant had already violated its own dolphin-safe program.²⁰

ETP tuna fishing and dolphin slaughter is international in character; thus domestic approaches such as the MMPA, domestic lawsuits, and

13. Scheele, *supra* note 7, at 1; Appendix tabl. 1 (referring to dolphin data obtained by Greenpeace International, a conservation organization, from the Annual Reports of the Inter-American Tropical Tuna Commission (IATTC), 1959-87).

14. See Steiner, *supra* note 9, at 10, 16 (citing the Earth Island Institute study). Earth Island states that even in the ETP, when U.S. quotas for dolphin kills forced the use of other methods in 1986, fishermen were able to catch tuna profitably. *Id.* at 16.

15. Marine Mammal Protection Act of 1972 (MMPA), Pub. L. No. 92-522, 86 Stat. 1027 (1972) (codified as amended at 16 U.S.C. §§ 1378-1407 (1988)). See Marine Mammal Commission, Annual Report Calendar Year 1988: A Report to Congress 148-57 (1989) [hereinafter *Marine Mammal Commission*] (discussing recent amendments to the MMPA and their effect on dolphin protection).

16. M. Janis, An Introduction to International Law 71 (1988) [hereinafter *Janis*] (stating that municipal, or domestic, law is thought incapable of imposing itself on the international legal system).

17. Scheele, *supra* note 7, at 9.

18. D. Cabrera, 3 *Canners Say They'll Sell Only 'Dolphin-Safe' Tuna* The Sacramento Bee, April 13, 1990, at 1, [hereinafter *Cabrera*]. (The Starkist, Chicken of the Sea and Bumble Bee tuna companies announced that henceforth their tuna cans would bear a dolphin-safe label, and that their companies would purchase only tuna caught with dolphin-safe methods).

19. *Id.*

20. *Good Morning, America* (ABC television broadcast, Dec. 6, 1990) (video cassette on file at Earth Island Institute Library, San Francisco, Cal.). In this network television interview, Brenda Killian, Associate Director, Dolphin Project, Earth Island Institute, San Francisco, accused the Bumble Bee tuna company of violating its agreement to purchase only dolphin-safe tuna for its cans bearing a dolphin-safe label. *Id.* Mark Coop, President, Bumble Bee Seafoods, Inc., responded by stating that any violation is due to the company's legal obligation to honor long-term tuna contracts entered into prior to implementation of the dolphin-safe program. *Id.* See also Telephone interview, Brenda Killian, Associate Director, Earth Island Institute, San Francisco (March 18, 1991) (hereinafter *Killian*) (interview notes on file at U.C. Davis L. Rev. Ms. Killian is responsible for efforts by Earth Island Institute to convince all commercial tuna interests to use only dolphin-safe methods. By March 1991, the Chicken of the Sea, Starkist and Bumble Bee tuna companies agreed to allow Earth Island Institute to act as the certifying agency. *Id.* Telephone interview with Sam LaBudde *supra* note 19. *Id.*

voluntary United States industry action have not resulted in completely effective dolphin protection.²¹ Purely domestic approaches are inadequate,²² because these programs reach only as far as domestic markets.²³ Assuming that saving the dolphins is desirable, even if some adverse economic impact on neighboring nations results,²⁴ only a program based on international agreement can produce truly effective dolphin protection.²⁵

Part I of the Comment describes the problem of dolphin slaughter in the ETP.²⁶ Part II analyzes the MMPA and its weaknesses in terms of ETP dolphin protection.²⁷ Part III considers international law as a means of providing an effective dolphin shield.²⁸ Part IV offers a proposal for a regional convention to address ETP dolphin protection as well as preservation of the tuna fishery.²⁹ This Comment concludes that only a regional, multilateral convention can provide the sort of enforceable international protection necessary to prevent the destruction of ETP dolphins.

I. SLAUGHTER IN THE EASTERN TROPICAL PACIFIC

The Eastern Tropical Pacific (ETP) includes seven million square miles, from San Diego, California, south to Chile, and extending westward for several hundred miles.³⁰ Within the boundaries of the ETP, schools of yellowfin tuna abound,³¹ and as discussed earlier, dolphins swim over the schools and are caught with the tuna.³²

21. Steiner, *supra* note 9, at 11; Telephone interview with Donna Woish, Staff, Dolphin, Earth Island Institute, San Francisco, Cal. (Jan. 4, 1991) [hereinafter *Woish*] (interview notes on file at U.C. Davis L. Rev.); See also Brower, *supra* note 6, at 37-58.

22. Telephone interview with Sam LaBudde, U.S. Filmmaker and Biologist, The Marine Mammal Fund, San Francisco, Cal. (Mar. 25, 1991) (interview notes on file at U.C. Davis L. Rev.) [hereinafter *LaBudde*]. See also D. Schrieberg, [hereinafter *Schrieberg*], *U.S., Mexico Engage in Tuna War*, *The Sacramento Bee*, Aug. 29, 1990 at 1, 12 (U.S. officials quoted as saying non-U.S. tuna fleets killed 84,336 dolphins last year, compared to 12,643 for U.S. boats). Mexican boats, outside the jurisdiction of U.S. law, are responsible for much of the killing. *Id.*

23. Telephone interview with Donna Woish, *supra* note 21. Ms. Woish advises that because of the U.S. embargo, Italy is now the largest purchaser of Mexican tuna. *Id.* Italy imposes no dolphin safety restrictions on its tuna imports.

24. See Schrieberg, *supra* note 22, at 1. Both Mexican and U.S. officials agree that an international agreement will be the best approach to resolving these conflicting interests. *Id.*

25. See e.g., LaBudde, *supra* note 22. (interview notes on file at U.S. Davis L. Rev.). LaBudde, who is primarily responsible for publicizing the dolphin-tuna issue, states that international agreement is necessary to assure that violating nations cannot simply seek other markets. *Id.*

26. See *infra* notes 30-45 and accompanying text.

27. See *infra* notes 46-111 and accompanying text.

28. See *infra* notes 112-164 and accompanying text.

29. See *infra* notes 165-194 and accompanying text.

30. See Steiner, *supra* note 9, at 12-13. This report provides a map of the Eastern Tropical Pacific (ETP), most of which is not under U.S. jurisdiction. *Id.* at 12.

31. *Id.*

32. See *infra* notes 7-14 and accompanying text. The association of dolphins with yellowfin tuna is most common in the ETP waters west of Mexico, Central America, Colombia, Ecuador, Peru and northern Chile. Brower, *supra* note 6, at 37.

Since the 1920s, there has been a significant tuna fishery in the ETP and the ETP tuna fishery has been a viable part of the economy of the United States and its neighbors.³³ Until the late 1950s, tuna were caught with bait and hook.³⁴ By creating disturbances over schools of tuna, ETP dolphins served as beacons for the fishermen.³⁵ The dolphins' sensitive sonar protected them from accidental hooking.³⁶ The fishermen coincidentally rewarded the dolphins with a meal of live bait fish, usually chum.³⁷

By 1960, the advance of American technology caught up with ETP tuna fishing.³⁸ By this time, United States vessels comprised 99 percent of the ETP.³⁹ These boats were equipped with powerful motor-driven winches and purse-seine nets a mile long and 300 feet deep.⁴⁰ Fishermen began to use speed boats and explosives came into use to terrify and drive the dolphin herd, and below them the tuna, into the nets.⁴¹ Although the tuna harvest was thereby increased, the destruction of dolphins began in earnest.⁴² Over the past 29 years, ETP tuna boats have killed an average of one dolphin every two and one-half minutes.⁴³ In recent years the average dolphin kill has risen 550 percent, from 63 dolphins per day to more than 350 per day.⁴⁴ The total ETP dolphin destroyed now exceeds six million killed, and is rising.⁴⁵

II. THE MARINE MAMMAL PROTECTION ACT

A. Domestic Law

In response to the increasing destruction of ETP dolphin by the tuna industry, United States environmentalists looked to Congress for

33. Scheele, *supra* note 7, at 3-4.

34. Brower, *supra* note 6, at 37.

35. Scheele, *supra* note 7, at 4.

36. *Id.*

37. *Id.*

38. *Id.*

39. Brower, *supra* note 6, at 37; Scheele, *supra* note 7 at 4-5.

40. Scheele, *supra* note 7, at 9.

41. Brower, *supra* note 6, at 37. The percentage of purse-seine net sets made on dolphins has increased to 94 percent in recent years. Steiner, *supra* note 9, at 23 and 30. The nets and winches that are now used to harvest tuna entangle the dolphins, breaking beaks and fins as the dolphins slowly drown. *Id.* at 13. Because dolphins are air-breathing mammals, dolphins that become entangled in nets suffocate. Scheele, *supra* note 7 at 6. Scientists have documented that during purse-seine net sets dolphin mothers try in vain to shield their young. Steiner, *supra* note 9, at 25. Of females killed, 82.5 percent were found to be pregnant or lactating. *Id.* Those dolphins that are not crushed, slowly drown when they are unable to move freely. Brower, *supra* note 6, at 44-46.

42. Steiner, *supra* note 9, at 13-15, 43. See also Scheele, *supra* note 7, at 5-6 (describing massive dolphin mortality as an unfortunate and costly by-catch of the more efficient use of nets).

43. Steiner, *supra* note 9, at 17.

44. *Id.*

45. *Id.*

help. These environmentalists focused their dolphin-saving efforts primarily on enforcement of the Marine Mammal Protection Act (MMPA).⁴⁶ Congress enacted the MMPA to protect all marine mammals, including dolphins,⁴⁷ and in particular, to reduce incidental killing or serious injury of marine mammals in the course of commercial fishing operations.⁴⁸ In the MMPA, Congress established the Marine Mammal Commission to develop programs to reduce the incidental taking of marine mammals to insignificant levels, that is, levels approaching zero mortality or serious injury.⁴⁹

Congress specifically enacted several MMPA provisions directed at dolphin safety⁵⁰ including: 1) reducing the allowable dolphin kill for United States tuna boats;⁵¹ 2) funding research to develop technology enhancing dolphin safety in tuna fishing;⁵² 3) establishing an observer program for collection of dolphin mortality data on tuna boats;⁵³ and 4) requiring the United States Department of Commerce to impose an embargo on imports of foreign tuna when United States standards are violated.⁵⁴ Congress included in the MMPA the threat of embargo to influence foreign boats to conform to United States standards.⁵⁵

The MMPA regulates United States and foreign boats only when they seek to sell tuna in the United States.⁵⁶ Thus, because the United States provides a major market for tuna, the MMPA provisions have had some effect.⁵⁷ Nonetheless, domestic law has serious limitations since the United States is not the only tuna market.⁵⁸

46. 16 U.S.C. §§ 1371-1407. See generally Scheele, *supra* note 7, at 9-35 (describing MMPA provisions and need for strict enforcement as means of reducing threat to dolphins). See also Steiner, *supra* note 9, at 7 (describing MMPA regulation and reauthorization as primary focus of U.S. environmentalists' actions to protect dolphins).

47. 16 U.S.C. § 1371.

48. *Id.* See also Marine Mammal Commission, *supra* note 15, at 148 (describing the intent of the MMPA and the role of the Marine Mammal Commission).

49. *Id.*

50. 16 U.S.C. § 1371.

51. *Id.* at §§1378-1380.

52. *Id.*

53. *Id.* at 6 §1371-1407.

54. *Id.*

55. See generally Marine Mammal Commission, *supra* note 15, at 148, 153. Under the heading, *Foreign Nation Compliance Program*, this report describes MMPA provisions and the mandates applicable to foreign tuna importers. The report describes the "alternative" tunaboat observer provisions applicable to foreign boats wishing to import tuna to U.S. markets. *Id.* The report also describes a proposed regulation that would allow foreign boats to kill dolphins at a rate "not more than 50 percent higher than the U.S. level". *Id.* at 154. Under MMPA rules, if a nation fails to meet these requirements, then the United States would ban imports of tuna and tuna products from that nation. *Id.*

56. 16 U.S.C. §§1371-72.

57. Steiner, *supra* note 9, at 48 (Appendix) (stating that a small decline in U.S. tuna consumption would seriously impact international tuna markets).

58. In general, markets outside the United States are not subject to domestic U.S. legal restrictions. Janis, *supra* note 16, at 71. For example, despite the U.S. ban on Mexican tuna imports, Schrieberg, *supra* note 2, at 1, Mexico, which continues to violate dolphin safety provisions, sells substantial amounts of tuna to Italy. Woish, *supra* note 21.

B. Tuna Industry Opposition

Until recently, the tuna industry, including United States companies, openly opposed dolphin protection regulations since these regulations affect profits.⁵⁹ For example, in the United States, the American Tunaboat Association (ATA), which represents United States tunaboat operators,⁶⁰ has opposed MMPA regulatory schemes on the grounds that the regulations burden United States tuna fishing operators.⁶¹ The ATA has also consistently opposed the efforts of conservation groups, such as Earth Island Institute, to promote dolphin safety.⁶²

In its attack on MMPA regulations, the ATA reportedly spent over \$1 million in 1980 to refute National Marine Fishery Service (NMFS) dolphin kill data.⁶³ The ATA⁶⁴ attempted to prevent NMFS observers from reporting MMPA violations on United States vessels,⁶⁵ and successfully in barred NMFS observers from United States vessels for a period of three years.⁶⁶ On Capitol Hill, the ATA attacked regulation of NMFS practices, and in 1986, the administration reduced federal dolphin-protection regulations to guidelines.⁶⁷ Today, the United States tuna industry is generally self-policing.⁶⁸

ATA lobbying efforts in Washington may have paid off in other ways as well. The United States Department of Commerce's Inspector General reported in 1987 that, since passage of the MMPA, United States enforcement of dolphin safety regulations has been lenient and ineffective.⁶⁹ Where the government has acted on MMPA violations, "[f]ines have been so low compared to incomes that skippers have knowingly violated the regulations and accepted the fines."⁷⁰ As a result of these ATA activities, dolphin mortality in the ETP rose in 1986 to its highest level in a decade.⁷¹

59. Steiner, *supra* note 9, at 28 (describing the tuna industry's pressure on Congress and the executive branch to limit or abandon MMPA requirements).

60. Scheele, *supra* note 7, at 15, 29. ATA receives federal permits authorizing dolphin kills within MMPA guidelines. *Id.*

61. Steiner, *supra* note 9, at 28.

62. Killian, *supra* note 20.

63. *Id.*

64. The American Tunaboat Association (ATA) is the industry organization of American tunaboat owners. It receives federally issued permits for authorized dolphin kills within MMPA limitations. Scheele, *supra* note 7, at 15, 29.

65. Steiner, *supra* note 9, at 28.

66. *Id.*

67. Steiner, *supra* note 9, at 28-29; Scheele, *supra* note 7, at 35-36.

68. Scheele, *supra* note 7, at 35-36.

69. Brower, *supra* note 6, at 52. For example, out of 11 recent cases of reported violations, no notices of violation were issued to the offenders. *Id.*

70. *Id.* (quoting NMFS staff familiar with tuna fishing operations). In one case, the penalty assessment for MMPA violations was reduced at hearing from \$305,024 to \$60,341. Brower also describes ETP tunaboat captains' attempts to avoid or falsify dolphin mortality observer records in order to avoid sanctions. *Id.*

71. Scheele, *supra* note 7, at 36.

At congressional hearings in 1988 to reauthorize the MMPA, environmentalists asked Congress to phase out the use of purse-seine nets over four years and to have observers on all United States boats to report dolphin mortality.⁷² As a result of ATA lobbying, Congress merely required tunaboat operators to reduce their kill to twice the United States allowable rate by 1989, and to 1.25 times the United States rate by 1990.⁷³

Congress, however, agreed with the environmentalists to require all United States boats to have observers who could report dolphin mortality.⁷⁴ Congress could not require observers on foreign boats.⁷⁵ Foreign tuna boats are allowed to meet alternative observer standards with less stringent observer coverage, if there exists "sufficiently reliable documentary evidence" of that nation's incidental dolphin take rate. Thus, under current MMPA regulations, foreign boats may kill more dolphins than may United States boats and still sell tuna to United States markets.⁷⁶ Otherwise, unless foreign tuna fishermen seek to import their tuna into the United States, they remain beyond the legal reach of the MMPA. Further, the observer requirement for United States boats is meaningless since there are now almost no United States registered tunaboats fishing the ETP.⁷⁷ Consequently, the 1988 MMPA reauthorization hearings were a greater victory for the tuna industry than for dolphins.⁷⁸

C. The Disappearing United States Tuna Fleet

The United States tuna fleet has avoided MMPA regulation in recent years by reflagging its boats with the colors of foreign nations.⁷⁹ Reflagging has rendered the MMPA ineffective by reducing the number of vessels subject to MMPA regulations.⁸⁰ Moreover, by reducing the number of vessels subject to MMPA regulation, reflagging has distorted statistics on the United States kill of dolphins.⁸¹

In 1978, United States boats accounted for 62 percent of the ETP tuna operators.⁸² In 1989 there were 35 United States boats left, out of a

72. Brower, *supra* note 6, at 58 (describing testimony of biologist Sam LaBudde, in which LaBudde called for four-year phase-out of ETP purse-seine fishing and a 100 percent observer requirement for all ETP tuna boats). See also LaBudde, *supra* note 22, (confirming Congressional testimony and calling for a total ban on ETP purse-seine tuna fishing by Dec. 31, 1992).

73. Brower, *supra*, note 6, at 58.

74. Marine Mammal Commission, *supra* note 15, at 151.

75. *Id.* See generally Janis, *supra* note 16. See also Marine Mammal Commission, *supra* note 15, at 153 (describing the provisions in the MMPA concerning foreign fleet).

76. Marine Mammal Commission, *supra* note 15, at 12.

77. LaBudde *supra* note 22, (stating that today in the ETP, there are only two tunaboats registered in the United States, down from 35 in 1989 and 98 in 1979). See also Steiner, *supra* note 9, at 20.

78. Brower, *supra* note 6, at 58 (quoting LaBudde, who stated that the owners of 35 tunaboats defeated 28 environmentalist organizations at the 1988 MMPA reauthorization hearings).

79. Scheele, *supra* note 7, at 10.

80. *Id.*; Brower, *supra* note 6, at 57.

81. *Id.* at 9.

82. Steiner, *supra* note 9, at 32 (Table 6).

total of about 100.⁸³ In 1990, there were only 10 United States tunaboats in the ETP, representing approximately a 66 percent decrease in domestic boats and a 20 percent increase in foreign boats in one year.⁸⁴ Foreign boats, operating under fewer constraints than United States boats, cause dolphin mortality at a rate several times the allowable United States rate.⁸⁵ Thus, with no change in practices, United States tuna industry reduced its dolphin kill rates overnight.⁸⁶

D. MMPA Litigation

In reliance on MMPA dolphin protection provisions, American environmentalists have turned to the federal courts to remedy the ETP dolphin slaughter. In 1989, Earth Island Institute⁸⁷ filed a lawsuit, seeking strict enforcement of the MMPA.⁸⁸ The United States District Court in San Francisco issued a preliminary injunction ordering the United States Department of Commerce to temporarily embargo imports of foreign tuna into the United States from nations, including Mexico, Panama, Ecuador, Venezuela and the Pacific island of Vanuatu, caught violating MMPA dolphin-safety regulations.⁸⁹

83. Brower, *supra* note 6, at 57 (stating that of 98 large, Class 6 tuna seiners registered to the United States in 1979, only 35 remained in 1989).

84. LaBudde, *supra* note 22. Records of ETP tunaboat registrations are maintained at The Mammal Fund and Earth Island Institute, San Francisco, Cal. Of the 10 remaining U.S. registered tunaboats in the ETP, only two are still fishing on dolphin, the "Pisces" and the "Nicole K". Today, 14 former U.S. boats are flagged under the nation of Vanuatu and registered under Panamanian corporations. These boats are presently setting purse-seine nets on dolphins to catch tuna. *Id.* See also Scheele, *supra* note 7, at 9 (stating that between 1972 when the MMPA was enacted and 1980, 27 U.S. vessels were transferred to foreign registry).

85. Brower, *supra* note 6, at 57.

86. See Scheele, *supra* note 7, at 10. Domestic regulation of the U.S. fleet has not been effective in reducing ETP dolphin mortality, because the fishing effort has shifted to the foreign fleet. *Id.*

87. See generally Steiner, *supra* note 9 (describing Earth Island's MMPA-oriented actions). While most of Earth Island Institute's activities are domestic, it has recognized the need for international action, sending representatives abroad to convince foreign governments and tuna processors to buy only dolphin-safe tuna. *Id.* See also Killian, *supra* note 20 (describing her international activities related to dolphins); Earth Island Institute, Spring 1991 Dolphin Alert 1, 3 (1991), [hereinafter Dolphin Alert] (describing Killian's recent international efforts as Associate Director of Earth Island's Dolphin Project to protect ETP dolphins by meeting with foreign tuna processors).

88. *Earth Island Inst. v. Mosbacher*, 746 F. Supp. 964 (N.D. Cal. 1990). Earth Island's suit names the NMFS, U.S. Department of Commerce and the ATA as defendants and accuses them of violating the MMPA and failing to comply with its mandates. Plaintiffs seek 1) 100 percent observation coverage on those foreign boats in the ETP importing tuna into the United States, and 2) an embargo against violators. In response, the United States claims that under the MMPA if the Secretary of Commerce finds that the nation in question has provided an alternative observer program of sufficient reliability, then the United States need not require 100 percent observation coverage. *Id.* See also Telephone interview with Josh Floum, Attorney, Heller, Ehrman, White & McAuliffe (Heller-Ehrman), San Francisco, Cal. (Sept. 26, 1989) (interview notes on file at U.C. Davis L. Rev.). Floum is representing Earth Island Institute in this lawsuit. *Id.* See also Schrieberg, *supra* note 2 (describing Earth Island's lawsuit and the federal government's reaction).

89. See *Earth Island Institute*, 746 F. Supp. at 976.

The Ninth Circuit Court of Appeals temporarily stayed the injunction when the United States Department of Commerce granted a variance to Mexico and Panama.⁹⁰ After reviewing arguments from both sides, however, the Ninth Circuit reinstated the District Court's preliminary injunction.⁹¹ News reports described Mexican officials as livid over these judicial actions.⁹²

Mexican compliance with United States dolphin safety standards is a sensitive point for the United States Administration.⁹³ Unlike the United States, Mexico is not generally able to assure adequate food and employment for its growing population. Economic development takes precedence over conservation and animal rights in impoverished Mexico.⁹⁴

For example, in 1978, Mexico withdrew from voluntary compliance with the Inter-American Tropical Tuna Commission regulatory programs for dolphin safety.⁹⁵ Now with 75 percent of ETP tuna fleet under Mexican registry,⁹⁶ Mexican diplomatic sources argue that the embargo is protectionist and counterproductive.⁹⁷ Mexican boat captains continue to resist United States efforts to achieve voluntary compliance with dolphin safety measures, while successfully pursuing markets in Italy, Japan and

90. Woish, *supra* note 21 (stating that the U.S. State department had pressured the U.S. Department of Commerce to exempt Mexico and Panama from MMPA provisions due to regional political concerns). In response to Mexican anger over an embargo, the Bush administration responded by seeking a special variance from MMPA tuna import regulations for Mexico and Panama. Mexico City Bureau, *U.S. Tuna Ban Strikes Nerve in Mexico*, The Sacramento Bee, Feb. 22, 1991, at A16.

91. *Id.* For a review of the comments made by Judge Henderson upon issuing the initial injunction on Aug. 28, 1990, see Schrieberg, *supra* note 2. Pending trial on the merits, Judge Henderson renewed the embargo order based on evidence of continuing violations of the MMPA dolphin-safety regulations. *U.S. Judge Renews Embargo on Tuna Imports*, The Sacramento Bee, Mar. 27, 1991, at B5.

92. See Mexico City Bureau, *supra* note 90.

93. President Bush has reportedly promised Mexico's President Salinas to do all he can to prevent the tuna embargo, including seeking judicial relief and a special MMPA exemption for Mexico from Congress. Dolphin Alert, *supra* note 87 at 3.

94. Schrieberg, *supra* note 2, at 12. Thus, angry at the economic impact of the U.S. embargo, Mexican officials charged that the United States is hypocritical for prohibiting practices that U.S. companies taught Mexican tuna fishermen. *Id.* at 1, 12. Mexican commentators suggested that American concern for dolphins is disproportionate to the developing nations' costs for complying with U.S. marine mammal protection policies. Mexican officials complain that their economic needs outweigh Americans' interest in dolphin protection, stating that U.S. environmental policies put fish and animal needs above those of humans. *Id.* at 12. For example, Mexico's Assistant Secretary of Fishing, Clara Jusidman, declared that the United States is self-righteous and accused the United States of engaging in fundamentalist environmentalism. Unlike Mexico, the United States is a rich country where people can eat what they want. *Id.* at 1, 12.

95. Scheele, *supra* note 7, at 54.

96. Steiner, *supra* note 9, at 21.

97. Schrieberg, *supra* note 2, at 12.

elsewhere.⁹⁸ Even before the current United States embargo, Mexico sold only 10 percent of its total ETP tuna harvest to the United States Market.⁹⁹ Most significantly, an international panel on the General Agreement on Tariffs and Trade (GATT) ruled that domestic environmental laws, such as the United States MMPA, cannot be used to ban imports from other nations, casting serious doubt on the current effectiveness of the embargo of Mexican tuna.¹⁰⁰

Both United States and Mexican officials state that the better means of resolving their differences is through international agreement, rather than domestic lawsuits.¹⁰¹ As the case of Mexican tuna fishermen illustrates, domestic law does not give the United States jurisdiction over other countries.¹⁰² The United States tuna processing industry, like many other commercial interests and the tuna boats, has moved largely offshore.¹⁰³

For example, since 1983, four of five American tuna canners have relocated to Samoa and Puerto Rico.¹⁰⁴ Moreover, the market for processed tuna is international. Major consumers of tuna in Europe, such as Italy, continue to freely accept unregulated tuna, harvested at the peril of dolphins.¹⁰⁵ As long as Mexican and other foreign tuna fishermen can sell their tuna outside the United States, they can ignore dolphin safety.¹⁰⁶

98. Woish, *supra* note 21 (stating that Mexico sells bulk of its tuna to non-U.S. markets, in particular, Italy, which refuses to agree to buy only dolphin-safe tuna). Panama, Vanuatu and Venezuela also continue to ignore dolphin safety requirements but like Mexico find markets in Italy, Japan, and other countries. *Id.*

99. Schrieberg, *supra* note 2, at 12.

100. K. Bradsher, *Panel Rules U.S. Ban Out of Bounds*, The Sacramento Bee, Aug. 23, 1991, at G1. Mexican officials have, however, indicated their willingness to engage in further U.S.-Mexico discussions on trade and environmental issues. The United States is bound by treaty to comply if a majority of the 108 member nations of GATT approve the decision. *Id.*

101. *Id.*

102. See generally Janis, *supra* note 16, at 35-38, 71 (stating that municipal law cannot be imposed on the international legal system since international law is based on the consent of nations, with the exception of generally recognized customs). Because the MMPA is only domestic or "municipal" law, absent recognition by the international community as law based on international custom, the United States cannot use the MMPA to force Mexico to comply with dolphin safety provisions. *Id.*

103. Steiner, *supra* note 9, at 37.

104. *Id.*

105. Earth Island Institute, *supra* note 87, at 5-41.

106. See *supra* note 97 and accompanying text. LaBudde states that Earth Island Institute and the Marine Mammal Fund have recently become engaged in international efforts to prevent the distribution of "dolphin-unsafe" tuna products from Mexico, Vanuatu, Panama and Venezuela. *Id.* See also Telephone interview with B. Killian, *supra* note 20. Killian advises that she has established Far East contacts, seeking agreement from Thai and Philippine canneries to purchase only dolphin-safe tuna. See also Dolphin Alert, *supra* note 87, at 1, 3 (describing Killian's efforts and Earth Island Institute's *Global Monitoring Program*).

Notwithstanding the domestic American effort, the dolphins' situation remains grave.¹⁰⁷ The estimate of ETP dolphin deaths remains at 100,000 annually.¹⁰⁸ Environmentalists believe this figure may be low due to industry underreporting.¹⁰⁹ Since dolphin reproductive potential is not high, these numbers represent a serious threat.¹¹⁰ While Earth Island Institute pursues its action in federal court, its staff and other environmentalists agree that United States domestic law and remedies are simply not enough.¹¹¹

III. INTERNATIONAL LAW

A. Overview

Because the remedies available to protect ETP dolphins through United States domestic law are jurisdictionally insufficient,¹¹² it is necessary to turn to international law.¹¹³ International law has been based on the consent of nations, so conventions or treaties serve as the primary

107. Brower, *supra* note 6, at 38 (stating that the dolphin kill by tuna fishermen in the ETP remains the greatest slaughter of marine mammals on earth). See e.g., Marine Mammal Commission, *supra* note 15, at 149. Since passage of the MMPA, the annual ETP dolphin kill rate has fluctuated from over 400,000 to a low of about 30,000. The total ETP dolphin kill rate currently averages over 100,000 deaths per year. Most of the dolphin kill is now attributable to foreign boats. *Id.* See also Dolphin Alert, *supra* note 87, at 2 (stating that more than 100,000 ETP dolphins have been killed annually by the tuna industry, or 100 times the number of whales slaughtered world-wide and that the stock of eastern spinner dolphin has been reduced by 80 percent since purse-seine tuna fishing began in the ETP in the 1960s); Steiner, *supra* note 9, at 18-25 (stating that over the past 29 years, one dolphin has been killed every two-and-one-half minutes). The real level of danger to dolphin survival is unknown, since the National Marine Fisheries Service (NMFS) guidelines provide that species are not in danger of depletion until a 50 percent population decrease is statistically detectable during a five-year study period. Steiner, *supra* note 9, at 26. But based on the NMFS definition of depletion, at least one variety of dolphin, the eastern spinner, is now depleted. Dolphin Alert, *supra* note 87, at 2 (stating that the stock of eastern spinner dolphin in the ETP has decline by 80 percent due primarily to tuna fishing practices).

108. Dolphin Alert, *supra* note 87, at 2; Marine Mammal Commission, *supra* note 15, at 149; Schrieberg, *supra* note 2.

109. Steiner, *supra* note 9, at 18-19,25.

110. Brower, *supra* note 6, at 56 (stating that dolphin reproductive potential is not high); Scheele, *supra* note 7, at 8 (stating that compared to tuna, dolphins have a much slower reproductive rate).

111. See e.g., Woish, *supra* note 21 (stating court action does not go far enough; international agreement needed to provide long term dolphin protection); LaBudde, *supra* note 22.

112. See *supra* notes 103-10 and accompanying text.

113. See generally Janis, *supra* note 16, at 1-90 (describing the nature and sources of international law); L. Henkin *et al.*, International Law (2d ed. 1987, discussing general principles of international law). Professor Janis' book provides an overview of the primary sources of international law. Janis, *supra* note 16, at 1-46. International law conflicts may be decided in the International Court of Justice at The Hague. *Id.* at 7. More commonly, disputes are adjudicated by domestic courts which may adopt international rules to resolve international disputes. *Id.* at 6-7. International rules for decisionmaking use the following sources of law in descending order of authority; 1) international conventions, whether general or particular,

source of law among international entities.¹¹⁴ Currently, there are no international conventions in force that directly address the ETP dolphin-tuna issue.¹¹⁵ International custom is a secondary source of law which, absent a relevant convention, may take precedence.¹¹⁶ This source of international law is not available either to protect dolphins. Dolphin protection practices are not yet customarily practiced by many states and international entities and have not been generally recognized as international law.¹¹⁷ Moreover, no general principles of law, *opinio juris*, or judicial opinions are yet available to support an international law of dolphin protection.¹¹⁸ Municipal law, like the MMPA, is not generally enforceable in the international legal system (unless recognized as customary international law).¹¹⁹ Finally, since the threshold for finding a *jus cogens*, or peremptory norm, to protect dolphins is higher than that for custom, *jus cogens* is also inapplicable.¹²⁰ International convention remains the better, as well as more legally potent, course of action.¹²¹

establishing rules expressly recognized by contesting states; 2) international custom, as evidence of general practice accepted as law; 3) general principles of law recognized by civilized nations (*opinio juris*); and 4) subject to Article 59, judicial decisions and teachings of the most highly qualified publicists of various nations, as subsidiary means for determination of rules of law. *Id.* at 10, n.2. International tribunals are also authorized to decide cases *ex aequo et bono*, that is, by what is fair and good, if the parties so stipulate. *Id.* at 56. More controversial is the notion that fundamental, preemptory norms, or *jus cogens*, exist, which most states have as so fundamental that conventions cannot violate these norms. *Id.* at 30–31, 54. The *jus cogens* theory is frequently referred to in international cases and parallels natural law in domestic analysis. *Id.* There is, however, little practical application of *jus cogens* in modern international law practice. The International Court of Justice is on record as not "Attempting to enter into, still less pronounce upon any question of *jus cogens*." *Id.* (citing the North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.S.J. 4, 42 (Feb. 20, 1969)). See also I. Sinclair, *The Vienna Convention on the Law of Treaties* 1–5 (2d ed. 1984) (stating that "It is striking that a concept so widely supported in doctrine and in the writings of jurists has found so little application in state practice") Janis, *supra* note 16, at 54 (stating that "[T]here seems to be no example in modern international practice of a treaty being voided by a peremptory norm.").

114. Janis, *supra* note 16, at 4. (describing treaties or conventions as the first and plainest source of international law). See also *id.* at 10 n.2. Under the Vienna Convention, "[E]very treaty in force is binding upon the parties to it and must be performed by them in good faith." *Id.* at 23.

115. See *infra* notes 109–44 and accompanying text.

116. See Janis, *supra* note 16, at 35–41.

117. A review of existing international customs to find a legal basis for dolphin protection is unproductive. While Western history reveals a tradition of sympathy and admiration for dolphins, Bell, *supra* note 1, at 72–74, it also reveals a pattern of human predation against dolphins, Brower, *supra* note 6, at 46. Mexicans resistance to ETP dolphin protections deflates any assertion of a universal dolphin protection ethic or custom. Schrieberg, *supra* note 2. Japanese use of gill nets further undercuts a protective dolphin custom. Marine Mammal Commission, *supra* note 15, at 158.

118. Janis, *supra* note 16, at 40–41.

119. *Id.* at 35–41, 71.

120. See brief overview of the principles of international law *infra* note 13. See also Janis, *supra* note 16, at 54.

121. Janis, *supra* note 16, at 4.

Even though there is no international law to protect dolphins, the following conventions establish agencies and regulations which appear to be at least facially relevant to the issue of ETP dolphin protection: the Proposed Convention on the Law of the Sea (LOS)¹²²; the Convention for the Regulation of Whaling¹²³; the Convention on International Trade in Endangered Species (CITES)¹²⁴; and the Convention for the Establishment of an Inter-American Tropical Tuna Commission (IATTC)¹²⁵. A brief analysis of these conventions follows:

B. Current Conventions as Alternatives for ETP Dolphin Protection

1. Convention on the Law of the Sea

The United Nations (U.N.) has proposed a convention which may be of some help in preventing the killing of ETP dolphins. The proposed Convention on the Law of the Sea (LOS) is a comprehensive treaty regulating international marine resources.¹²⁶ The Law of the Sea defines international law and policy for maritime shipping, military actions, coastal, off-shore and sea-bed resource rights, and marine resource management.¹²⁷ The Law of the Sea seeks to preserve marine resources generally, including marine mammals, but does not provide specific protections.¹²⁸

122. United Nations Convention on the Law of the Sea, Dec. 10, 1982. U.N. Doc. A/Conf. 62/122, 21 I.L.M. 1261 [hereinafter LOS]. This convention was signed on Dec. 10, 1982, but has not entered into force. Ratification by 60 states is required for the convention to enter into force, but only 44 have done so to date. Henkin, *supra* note 113, at 1231; Janis, *supra* note 16, at 153.

123. International Convention for the Regulation of Whaling of 1946, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72.

124. Convention on International Trade in Endangered Species of Wild Fauna and Flora, July 1, 1975, art. 1, 27 Stat. 1087, 993 U.N.T.S. 243 [hereinafter *CITES Convention*].

125. Convention Between the United States of America and the Republic of Costa Rica for the Establishment of an Inter-American Tropical Tuna Commission, May 31, 1949, art. 1, 1 U.S.T. 230, 80 U.N.T.S. 3, [hereinafter *IATTC Convention*].

126. The Law of the Sea is the broad international code of custom and conventions governing the control of the high seas, coastal areas, the sea-bed, and the contents thereof. The origins of the LOS are ancient, derived from such early maritime codes as the Rhodian Sea Law, the Rule of Oleron, and the Consolato del Mare. Janis, *supra* note 14, at 149. In 1608, the renowned international legal scholar, Grotius, advanced the concept that the high seas should be open to the ships of all states. This idea is the central principle of the Law of the Sea. *Id.* at 150. The contemporary Law of the Sea, as proposed, is the United Nations' compendium of relevant international maritime principles, and is based on an earlier, 1958 Convention on the Law of the Sea. Henkin, *et al.*, *supra* note 113, at 1231-32. Although the Law of the Sea is still several nations short of ratification, the United States and others have agreed to abide by most of the proposed provisions, including recognition of a 200-mile Exclusive Economic Zone (EEZ) extending outward from any coast of each signatory. *Id.* at 1233. The EEZ is an exclusive, off-shore economic zone in which each coastal nation signatory exercises sovereign rights in living and nonliving resources within 200 nautical miles of its coast. *Id.* at 1234.

127. Henkin, *et al.*, *supra* note 113, at 1231-1348.

128. *Id.* at 1343.

The Law of the Sea suggests only that nations should exercise their international fishing rights with reasonable care for preservation of marine resources.¹²⁹

The Law of the Sea, however, provides a broad constitutional framework for developing a regional option.¹³⁰ It urges coastal states and others to propose regional and other international agreements directed at the preservation of marine mammals.¹³¹ The regional approach suggested by the Law of the Sea Convention forms the core for the proposal in Part IV of this Comment.¹³²

2. Convention for the Regulation of Whaling

The International Convention for the Regulation of Whaling of 1946,¹³³ established the International Whaling Commission (IWC).¹³⁴ The IWC has broad powers to designate certain species of whales as protected, and is the international agency that regulates the taking of whales generally.¹³⁵

Earth Island Institute suggests that the IWC might appropriately regulate the killing of dolphins.¹³⁶ The IWC probably has more experience in regulating the protection of marine mammals than any other agency.¹³⁷ The IWC, however, made a conscious choice to limit its focus to whale protection.¹³⁸ The Commission has refused to dilute its basic mission with added concerns about the international tuna industry and the killing of ETP dolphins.¹³⁹

129. *Id.* at 1245-47 (discussing coastal states' authority to determine allowable catch of living resources in exclusive economic zone (EEZ)). Art. 61, §2, of the LOS provides that Coastal States shall, taking into account the best scientific evidence available, ensure that the maintenance of living resources in exclusive economic zones is not endangered through over-exploitation. Section 2 further states that Coastal States and relevant subregional, regional and global organizations shall cooperate to this end. Article 65 of the Convention provides that nothing in the LOS restricts the right of a coastal State or international organization to prohibit, regulate and limit exploitation of marine mammals. LOS, *supra* note 122.

130. LOS, note 122, at art. 61.

131. *Id.*

132. See *infra* notes 126-131 and accompanying text.

133. International Convention for the Regulation of Whaling of 1946, *supra* note 123.

134. *Id.*

135. *Id.*

136. Steiner, *supra* note 9, at 11.

137. D. Caron, *International Sanctions, Ocean Management, and the Law of the Sea: A Study of Denial of Access to Fisheries*, 16 Ecology L.Q. 311, 316 (1989) [hereinafter Caron] (discussing extensive experience of the IWC, using the EEZ concept, in the field of marine mammal protection and resource management).

138. See Steiner, *supra* note 9, at 5. Dr. William Perrin, National Marine Fisheries Service (NMFS), who pioneered research of the ETP dolphin slaughter in the 1960s, states that on the subject of dolphin protection the International Whaling Commission (IWC) has demurred. Dr. Perrin suggests that the situation is reminiscent of whaling before the advent of the IWC. *Id.*

139. *Id.* at 5-6.

3. Convention on International Trade in Endangered Species

Earth Island Institute also suggests the Convention on International Trade in Endangered Species (CITES)¹⁴⁰ be considered as a source of dolphin protection.¹⁴¹ CITES restricts commercial trade among its signatories in species of plants and wildlife that are in danger of extinction.¹⁴² It is a final line against extinction; it is not a conservation measure *per se*.

CITES, however, cannot protect ETP dolphins for two reasons. First, CITES only protects species that have become detectably endangered.¹⁴³ According to the National Marine Fisheries Service, regulations, for dolphins to be endangered, dolphin population would have to decrease by 50 percent or more over the next five years for a statistically valid population decrease to be demonstrated.¹⁴⁴ The populations of most species of dolphin in the ETP have not yet decreased at this rate. ETP tuna species are not endangered yet, either. Second, CITES applies directly only to trade in endangered species.¹⁴⁵ Without the requisite trading in an endangered species, CITES does not apply to dolphins.

4. Convention for the Establishment of an Inter-American Tropical Tuna Commission

A fourth convention, which established the ETP tuna industry's own Inter-American Tropical Tuna Commission (IATTC),¹⁴⁶ may present the best means for forging an international agreement on dolphin protection. In 1949, recognizing the need for an international approach to understanding and managing the ETP yellowfin tuna fishery more effectively, the United States, Costa Rica, Ecuador, France, Japan, Mexico, Panama, Vanuatu and Venezuela signed the convention establishing the IATTC.¹⁴⁷

140. CITES Convention, *supra* note 124. For a discussion of CITES Convention application to marine life, including marine mammals, see Marine Mammal Commission, *supra* note 15, at 117-18.

141. Steiner, *supra* note 9, at 11.

142. CITES Convention, *supra* note 124 at art. 1.

143. Marine Mammal Commission, *supra* note 15, at 117-18. The extent of trade control depends on the extent of endangerment. See *id.* at 118. Inclusion of species in endangered status is determined at international conferences of the signatories. *Id.*

144. See Steiner, *supra* note 9, at 26 and n. 21 (describing NMFS standards for endangered species and dolphin stock depletion).

145. CITES Convention, *supra* note 124; *supra* note 15, at 118.

146. IATTC Convention, *supra* note 125.

147. IATTC Convention, *supra* note 125 art II. Article II provides that the IATTC shall:

1) Make investigations concerning the abundance, biology, biometry, and ecology of yellowfin and skipjack tuna in ETP waters fished by nationals of High Contracting Parties, and of the kinds of fishes commonly used as bait in tuna fisheries, and of other kinds of fish taken by tuna fishing vessels; and the effects of natural factors and human activities on the abundance of populations of fishes supporting these fisheries. 2) Collect and analyze information relating to current and past conditions and trends of the populations of fishes covered by Con-

Costa Rica, Ecuador, Mexico, Vanuatu and Venezuela have since opted out. The only countries bound by the Convention are the United States, France, Japan and Panama.¹⁴⁸

Conservation of the fishery by the IATTC was more or less successful from 1966 to 1979. As demand for tuna grew, however, the less developed signatories argued over the right to exploit and manage tuna in their own areas. The IATTC and United States boats refused to recognize sovereign rights over yellowfin tuna. Chile and Peru successfully pressured Ecuador, Mexico and Costa Rica to withdraw from the Convention, thereby ending comprehensive IATTC management of the fishery.¹⁴⁹

The IATTC recognized dolphin mortality as an issue when the use of purse seine fishing expanded in the 1960s and 1970s.¹⁵⁰ In 1976 the IATTC formally agreed and stated, that while it should strive to maintain a high level of tuna production, it should act to assure the survival of dolphin stocks and make every reasonable effort to avoid the needless or careless killing of dolphins.¹⁵¹ This statement represents the official policy of the IATTC¹⁵² and it establishes the IATTC as an international entity with recognized responsibility and authority to appropriately address ETP dolphin safety.¹⁵³ Since then, IATTC has assumed a monitoring role and assisted non-United States nations in acquiring technology designed to reduce dolphin mortality during tuna fishing.¹⁵⁴ The IATTC has also been a source of information for foreign tuna fishers regarding United States laws affecting access to the United States tuna market.¹⁵⁵

Many environmentalists, however, view the IATTC as a commercial entity, functioning only to perpetuate the tuna industry.¹⁵⁶ IATTC crit-

vention. 3) Study and appraise information concerning methods and procedures for maintaining and increasing populations of fishes covered by the Convention. 4) Conduct such fishing and other activities, on the high seas and in waters which are under the jurisdiction of the High Contracting Parties. 5) Recommend, on basis of scientific investigations, proposals for joint action by the High Contracting Parties designed to keep the populations of fishes covered by Convention at levels of abundance which will permit maximum sustained catch. 6) Collect statistics and reports concerning the catches and operations of fishing boats, and other information concerning fishing for fishes covered by the Convention, from vessels or persons engaged in these fisheries. 7) Publish or otherwise disseminate reports relative to the results of findings and such other reports as fall within scope of the Convention, as well as scientific, statistical, and other data relating to the fisheries maintained by nationals of the High Contracting Parties for fishes covered by this Convention. *Id.* Article III provides that High Contracting Parties may agree to enact such legislation as may be necessary to carry out purposes of Convention. *Id.* art. III.

148. Scheele, *supra* note 7, at 42.

149. *Id.*

150. *Id.* at 55.

151. *Id.*

152. *Id.*

153. Scheele, *supra* note 7, at 55.

154. *Id.*

155. *Id.*

156. See, e.g., Steiner, *supra* note 9, at 34.

ics argue that the voluntary IATTC tunaboat observer program is not as effective as the mandatory United States observation program, notwithstanding the reflagging problem. Unlike the United States NMFS mandatory observers, IATTC observers do not have any enforcement powers and do not have a process for reporting violations of dolphin safety procedures on board ETP tunaboats.¹⁵⁷

Although environmentalists voice skepticism about the IATTC and its effectiveness, as an international agency the IATTC has already promoted positive, dolphin-saving efforts.¹⁵⁸ Unlike the American Tunaboat Association, the IATTC has not actively attempted to thwart dolphin protection regulations.¹⁵⁹ Instead, the IATTC monitors the ETP fleet's dolphin kill levels and ETP dolphin stock abundance and offers instruction in the use of gear and techniques to reduce dolphin mortality.¹⁶⁰ The IATTC has also conducted research on tuna aggregating devices as an alternative to setting purse-seine nets on dolphins.¹⁶¹

Research, education, and monitoring to protect dolphins along with conservation of the ETP tuna fishery, can and should continue.¹⁶² Dolphin protection and conservation of the fishery are not mutually exclusive.¹⁶³ The IATTC and its convention are capable of unifying both of these objectives.¹⁶⁴

IV. PROPOSAL FOR A REGIONAL CONVENTION ON CONSERVING THE ETP

A. Amendment of the IATTC Convention Enabling Tuna Fishery and Dolphin Protection

In response to the continuing slaughter of ETP dolphins by a largely foreign-based tuna fleet, this Comment proposes amending the Convention for the Establishment of an Inter-American Tropical Tuna Commission (IATTC Convention) to include regional measures that will protect ETP dolphins as well as conserve the tuna fishery.

Section 1371 of the Marine Mammal Protection Act (MMPA) directs the Secretary of Commerce to initiate the amendment of any international treaty in a manner consistent with the purposes and policies of the Act.¹⁶⁵ Section 1371 of the MMPA provides that the Director of the United States Department of Commerce should propose amendment of

157. Steiner, *id.* at 41.

158. See e.g., Scheele, *supra* note 7, at 55-56.

159. Steiner, *supra* note 9, at 28, 35.

160. *Id.* at 35. See also Scheele *supra* note 8, at 55-56.

161. Steiner, *supra* note 9, at 35.

162. *Id.* at 36, 43.

163. Scheele, *supra* note 7, at 55.

164. *Id.*

165. See S. Hankins, Comment, *The United States Abuse of the Aboriginal Whaling Exception: A Contradiction in United States Policy and a Dangerous Precedent for the Whale*, 24 U.C. Davis L. Rev. 489, 499 n. 77 (1991).

international conventions to which the United States is a party, in order to advance the policies of the MMPA, which includes protecting ETP dolphins.¹⁶⁶ Section 1371 of the MMPA supports amendment of the IATTC Convention to utilize this treaty-in-force as a foundation for a new, amended regional convention.¹⁶⁷

The IATTC Convention provides a ready-made vehicle for MMPA-based dolphin protection.¹⁶⁸ The Commission already exists and has adopted a public policy supporting dolphin protection among ETP tuna fishers.¹⁶⁹ Unlike the jurisdictionally limited MMPA, a regional, multilateral convention could provide both protection and conserve ETP marine resources, including dolphins, throughout the ETP region.¹⁷⁰ Simply expanding the Commission's enabling convention to include express dolphin protection measures could accomplish this dual objective.¹⁷¹

166. *Id.* MMPA, 16 U.S.C. §1371. See also Marine Mammal Commission, *supra* note 15, at 148. The Secretaries of Commerce and Interior are required to develop regulations governing the incidental taking of marine mammals. Although the Commission describes the dolphin-tuna issue as the "tuna-porpoise" issue, the Commission notes that the issue is a matter of intense concern, attention and controversy. *Id.*

167. See Hankins, *supra* note 165, at 499 n. 77.

168. See *supra* note 165 and accompanying text.

169. Scheele, *supra* note 7, at 55.

170. See Janis, *supra* note 16, at 4.

171. See IATTC Convention, *supra* notes 130-31 and accompanying text. For illustrative purposes, this Comment suggests that proposed language could replace the existing article III of the convention, thereby constituting a new article III. Article III currently reads:
Article III

The High Contracting Parties agree to enact such legislation as may be necessary to carry out the purposes of this Convention. *Id.* The existing art. III and art. IV would be renumbered articles IV and V accordingly. The new, proposed art. III would read:

Article III

The High Contracting Parties find and declare that it is the policy of the Commission to maintain dolphin stocks at or above levels that assure their survival in perpetuity, with every reasonable effort being made to avoid needless or careless killing of dolphins.

See Steiner, *supra* note 7, at 34 (quoting the revised dolphin-tuna policy of the IATTC as adopted in 1976).

To effectuate this policy, the High Contracting Parties agree to the following provisions:

1) The practice of encircling dolphins with purse-seine nets from vessels engaged in tuna fishing in the Eastern Tropical Pacific shall be discontinued immediately upon this convention, as amended, entering into force. 2) All tunaboats operating in Eastern Tropical Pacific waters shall carry onboard an observer, authorized by the Commission to take dolphin kill data. Such data shall be regularly reported to the Commission and shall be published by the Commission annually. 3) The High Contracting parties agree to promulgate legislation consistent with these provisions. The Parties further agree to deny to the nationals of any nation failing to comply with these provisions, the right to fish within all waters under the dominion or control of the High Contracting Parties. Such waters expressly include those coastal areas up to 200 miles from shore, over the resources of which coastal nations' powers are generally recognized.

This proposal is based conceptually on MMPA amendments proposed but rejected at the Congressional reauthorization hearings in 1988. See Brower, *supra* note 6, at 58 (describing rejected amendments to U.S. MMPA, proposed at 1988 Congressional Reauthorization Hearings). See also Annual Report of the Marine Mammal Commission, *supra* note 16, at 11-12 (describing 1988 amendments to MMPA affecting dolphins as actually adopted and subsequently carried out). The proposal's provisions are more expansive in scope, but narrower in time frame, in response to recent developments and discussions with environmental experts.

This Comment proposes a four part amendment to the IATTC convention to provide comprehensive ETP dolphin protection on a regional, multilateral basis. First, all purse-seine net setting on ETP dolphins should be discontinued immediately.¹⁷² Because establishing a new convention will no doubt require more than a year, this proposal allows ample time for the industry to adapt to a change that was intended 20 years ago with the enactment of the MMPA.¹⁷³

Second, dolphin-kill observers should be required on all purse-seine operators in the ETP.¹⁷⁴ The documented efforts of foreign tunaboat captains to avoid accurate reports of their dolphin kill rate suggest that only 100 percent coverage by observers will provide reliable enforcement data.¹⁷⁵ These observers should be employees of the IATTC to assure their independence. Their findings should be published annually by IATTC. This will provide a valid basis for enforcement through fishing restrictions. Since United States boats must already meet this requirement, imposing the same requirement on foreign tunaboats is not unfair.¹⁷⁶

Third, the practice of allowing alternative observers and observer variances¹⁷⁷ should be discontinued. This practice gave foreign tuna importers a more flexible standard for ETP tunaboat observer compliance under United States law, but because foreign boats are responsible for most of the ETP dolphin kill¹⁷⁸ exceptions such as these subvert the

See telephone interview with Sam LaBudde, *supra* note 19. Sam LaBudde, Biologist, the Marine Mammal Fund, advises that only two U.S. tunaboats still fish the ETP, and these two boats are not using nets to encircle dolphins. *Id.* LaBudde states, based on personal observation, that the U.S. boats are taking more skipjack tuna, which can be seen schooling from the surface without the aid of dolphins. *Id.* LaBudde now asserts that the four-year phase out he and other environmentalist suggested at the 1988 MMPA Congressional hearings is no longer necessary. See Brower, *supra* note 6, at 58. LaBudde today suggests an international ban on tunaboat encirclement of dolphins, effective as soon as December 31, 1992, is practicable. *Id.* For a ban to be meaningful, however, it is necessary that neutral observers be allowed onboard all ETP tunaboats to verify compliance. *Id.* A 100 percent observer requirement is already in effect for U.S. boats under domestic MMPA provisions. Annual Report of the Marine Mammal Commission, *supra* note 13, at 151. Brenda Killian, Associate Director for the *Dolphin Project*, Earth Island Institute, concurs generally with LaBudde's assessment. Telephone interview with Brenda Killian, *supra* note 18.

172. *Id.*

173. See Brower, *supra* note 6, at 58.

174. *Id.* at 58.

175. *Id.* *supra* note 6, at 48-52 (describing tunaboat captains' efforts to restrict observers' access to accurate onboard dolphin kill information in order to avoid sanctions). See also Steiner, *supra* note 9, at 8 (stating evidence suggests 100 percent observer coverage is the best way to ensure compliance with existing regulations and reduce dolphin mortality); LaBudde, *supra* note 22 (suggesting that only 100 percent tunaboat observer coverage for all ETP vessels can assure the integrity of a dolphin safety program).

176. Brower, *supra* note 6, at 58.

177. Marine Mammal Commission, *supra* note 15, at 12.

178. Brower, *supra* note 6, at 57.

purpose of the program.¹⁷⁹

Discontinuing the practice of encircling dolphins with purse-seine nets will permanently remove this threat to dolphins.¹⁸⁰ Even if the ETP nations agree to abandon the use of purse-seine nets, greed may prevent this provision from being effective.¹⁸¹ For this reason alone requiring observers on all ETP boats for onboard verification of tunaboat practices is essential.¹⁸² Nonetheless, without effective sanctions for violations, dolphin protection will remain an elusive goal even in the presence of neutral observers.¹⁸³

B. Convention Enforcement

To assure that the proposed international dolphin-safety provisions are respected by the entire ETP tuna fleet, an enforcement mechanism is needed. Enforcement, then, is the fourth program element of this proposal.

Ecuador, Mexico, Panama, Vanuatu and Venezuela still fail to recognize the need to conserve the tuna fishery and protect marine mammals.¹⁸⁴ The problem of freeriders, those who benefit from conservation efforts of others without similarly restraining themselves, must be firmly confronted in all treaty considerations.¹⁸⁵ The Exclusive Economic Zone (EEZ)¹⁸⁶ concept, contained in the proposed Law of the Sea Convention, provides the means to meet this challenge, and the legal authority necessary to enforce the measures that this Comment proposes.¹⁸⁷

The EEZ concept gives coastal nations an internationally recognized right to control marine resources, fishing and other commercial

179. See Scheele, *supra* note 8, at 34. Fear that strict U.S. regulation would cause foreign tunaboats to seek outside markets caused the National Marine Fisheries Service at one point to suggest an alternate dolphin kill rate for foreign boats 400 percent higher than U.S. kill rates. *Id.* Scheele suggests it is difficult to believe Congress intended a 400 percent upward kill margin to be considered comparable for U.S. rates under the MMPA. *Id.*

180. *Id.* at 1-8 (describing slaughter of ETP dolphins caused solely by tunaboats' purse-seine net dolphin encirclement).

181. See *supra* note 7, and accompanying text.

182. *Id.*

183. *Id.*

184. Steiner, *supra* note 9, at 32, 35 (stating that Mexico refused to allow IATTC's voluntary observers on its boats until 1986, when it allowed a limited number); Schrieberg, *supra* note 2 (describing Mexican hostility to U.S. embargo on Mexican, Panamanian and Vanuatian tuna imports due to MMPA violations).

185. See *Mexico Is Seeking More In Pact With U.S., Canada*, The Sacramento Bee, Feb. 7, 1991, at A15. This article describes current treaty discussions among the United States, Canada and Mexico, directed at new economic development and trade agreements among the participants. *Id.*

186. See Janis, *supra* note 146 at 154. The Exclusive Economic Zone is a 200-mile area extending from a nation's shore out to sea, recognized under the proposed Law of the Sea Convention as being under the control of the contiguous coastal nation. *Id.* See generally Caron, *supra* note 137, at 311 (analyzing use of the Exclusive Economic Zone as a means for promoting and enforcing policy and international management of marine resources).

187. See *supra* notes 143-63 and accompanying text.

activities in international waters out to 200 miles off their shorelines.¹⁸⁸ Although the Law of the Sea Convention has not been fully adopted yet, its EEZ provisions are generally accepted as international law.¹⁸⁹

Given international acceptance of the EEZ, this Comment proposes that the IATTC signatories enforce a dolphin encirclement prohibition and observer program through denial of EEZ fishing rights to violators.¹⁹⁰ EEZ fishing rights are a potent weapon.¹⁹¹ Under EEZ authority, coastal nations could deny fishing rights to nations that refuse to recognize the coastal nation's right to manage and control marine resources in territorial waters.¹⁹² By exercising EEZ rights contiguously, IATTC nations could effectively regulate significant portions of ETP waters. Commercial fishing without government interference would become nearly impossible for uncooperative, non-signatory nations.¹⁹³ This tactical use of EEZ fishing rights has worked well as a means of enforcing whale protection.¹⁹⁴ It should work equally well to enforce the dolphin protection measures proposed in this Comment.

V. CONCLUSION

More than 90 percent of tuna harvesting world-wide is dolphin-safe.¹⁹⁵ Alternatives to purse-seine encirclement of dolphins exist, and the IATTC has already made some progress in this regard.¹⁹⁶ A convention for international dolphin protection can be established through normal diplomacy and regional economic policy.¹⁹⁷

188. Janis, *supra* note 16, at 154 (describing Exclusive Economic Zone concept and relation to control of resources).

189. Caron, *supra* note 137, at 316-44 (describing use of EEZ as means of exercising management and control over marine activities of other nations). The EEZ is expressly recognized by many nations, including the United States. Henkin, *supra* note 113, at 1232-33. The EEZ is also recognized under international law derived from international custom having the force of law. The Restatement of International Law, stating that by express or tacit agreement accompanied by consistent practice, the United States, and states generally, have accepted EEZ and other LOS provisions as statements of customary law binding upon them apart from the LOS Convention. *Id.*

190. Caron, *supra* note 137, at 311-12.

191. *Id.* at 313.

192. *Id.*

193. *Id.*

194. *Id.* at 313-14. Professor Caron provides a detailed discussion of the use of Exclusive Economic Zones and the control of fishing rights therein as a means of enforcing international whale protection regulations. *Id.* Use of the EEZ, combined with other diplomatic and economic incentives, may be sufficient to encourage Mexico, Ecuador and others who left the IATTC, to once again become signatory-participants. For example, the economic treaty discussions underway with Mexico and Canada could provide the United States with a forum in which to encourage Mexican cooperation on a tuna-dolphin convention. Sacramento Bee, *supra* note 185.

195. See *supra* note 12 and accompanying text.

196. See generally *supra* notes 130-44 and accompanying text.

197. G. Garelik, *A New Item on the Agenda*, Time, Oct. 23, 1989, at 60-62.

Conventions can be slow in the making,¹⁹⁸ and are enforceable only to the extent that nations consent to be bound.¹⁹⁹ Nevertheless, for the 100,000 or more ETP dolphins that will die at the hands of tuna fishermen in the coming year, labels with smiling dolphins on United States tuna cans are simply not enough.²⁰⁰ A comprehensive, regional solution is therefore needed.²⁰¹

Domestic United States law is simply jurisdictionally insufficient to provide regional dolphin protection, particularly if GATT provisions prevent the United States from using its environmental regulations to affect international tuna practices.²⁰² A multilateral convention would have the force of law throughout the ETP region.²⁰³ Moreover, international law provides the only viable alternative.²⁰⁴ An amended IATTC convention for conservation of the ETP tuna fishery and the protection of ETP dolphins would provide the international authority and enforcement needed to bring an end to ETP dolphin slaughter.

198. See, e.g. Henkin *et al.*, *supra* note 113 at 1231-32 (noting that the Law of the Sea Convention has been pending adoption since 1982).

199. See Janis, *supra* note 146 at 18.

200. Cabrera, *supra* note 18.

201. LaBudde, *supra* note 22. LaBudde states that there is merit in the regional, multilateral approach of this proposal for two reasons. First, an international convention, with appropriate sanction provisions, could fill the gaps left by jurisdictionally limited domestic laws. Second, a proposal for a dolphin-tuna convention would allow ETP nations to be judged internationally by their willingness to discuss and become part of such a convention. LaBudde states that this would be important in Europe, where a nation's refusal to join a dolphin-tuna convention would brand the offending nation as an environmental outlaw. This would enable Earth Island Institute and others to press harder for exclusion of dolphin-unsafe tuna from European markets, where much of the unsafe tuna is now sold. *Id.* See also Dolphin Alert, *supra* note 87, at 5 (stating that Europe is still importing dolphin-unsafe tuna, with Italy importing over 50,000 tons from Mexican and Venezuelan vessels in 1990 alone).

202. See, e.g., Bradsher, *supra* note 100.

203. Janis, *supra* note 16, at 4.

204. *Id.*