MIGHT A FUTURE TUNA EMBARGO WITHSTAND A WTO CHALLENGE IN LIGHT OF THE RECENT SHRIMP-TURTLE RULING?

I. INTRODUCTION

Since the inception of the General Agreement on Tariffs and Trade ("GATT") and the establishment of the World Trade Organization ("WTO"), few environmental trade measures have withstood challenges from countries under embargo.[1] Under GATT, trade restrictions that discriminate between like products of different countries[2] or employ quantitative restrictions besides tariffs,[3] and are not necessary to protect humans or animals or related to the conservation of exhaustible natural resources,[4] are barred as impermissible barriers to trade.[5] Recent disputes over embargoes on tuna from countries that use methods harmful to dolphins have highlighted this problem and critics have decried the seeming sacrifice of the environment in favor of free trade.[6]

However, a recent WTO ruling on a U.S. embargo against nations that catch shrimp with methods that harm sea turtles seems to offer a step in the direction of environmental protection. In that case, the WTO ruled that unilateral requirements for nations under embargo to adopt certain conservation policies and practices could fall within GATT's environmental exceptions to trade restrictions.[7] Although the Appellate Body ultimately ruled against the United States, its opinion offers a possible roadmap by which a future tuna embargo might survive WTO scrutiny.[8]

In Section II, this comment presents a background history of the enactment of GATT and the establishment of the WTO. Section III offers a legislative history of Section 609 of the Endangered Species Act and a discussion of the WTO panel and Appellate Body rulings on the shrimp-turtle

---

1 *See* Carol J. Miller & Jennifer L. Croston, *WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act*, 37 AM. BUS. L.J. 73, 76 (1999).

2 *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A–11, T.I.A.S. 1700, 55 U.N.T.S. 194, 196–98 [hereinafter GATT].

3 *See id.* at 224–26.

4 *See id.* at 262.

5 *See supra* notes 2–4 and accompanying text.

6 *See* Patricia Forkan, *Do Not Sacrifice Dolphins on the Altar of Free Trade*, PANTAGRAPH (Bloomington, Ill.), Apr. 28, 1997, at A9.

7 *See* WTO Appellate Body, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998), *reprinted in* 38 I.L.M. 118, 152–53 (1999) (hereinafter WTO Appellate Report).

8 *See generally id.*

dispute. Section IV introduces the Pelly Amendment, which provides the basis for the United States use of environmental trade restrictions to give effect to its conservation goals. An example of how such a trade restriction might survive a WTO challenge in the context of driftnet fishing is presented in Section V. Section VI provides background on the United States' efforts to protect dolphins from tuna nets and offers a legislative history of the Marine Mammal Protection Act ("MMPA") and its amendments. Section VI also covers the two recent GATT challenges to American tuna embargoes. Finally, Section VII offers an analysis of how a future tuna embargo under the MMPA might withstand WTO scrutiny in light of the WTO's recent decision on the shrimp-turtle dispute.

II. GENERAL AGREEMENT ON TARIFFS AND TRADE & THE WORLD TRADE ORGANIZATION

A. The Establishment of GATT

GATT serves to reduce and eliminate international trade barriers and strives to provide equal access to foreign markets.[9] Although such efforts result in free trade, GATT signatory countries also aim to "rais[e] standards of living, ensur[e] full employment and a large and steadily growing volume of real income and effective demand, [develop] the full use of the resources of the world and [expand] the production and exchange of goods. . . ."[10]

In 1947, GATT was negotiated in Geneva as an inter-governmental treaty to reduce tariffs and create a stable multilateral trading system.[11] It originally began as an interim agreement during negotiations to create an International Trade Organization ("ITO").[12] When the U.S. Congress refused to ratify the ITO, GATT, being the interim agreement, remained in place.[13]

---

9 *See* BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO 13 (1995); *see also* Miller & Croston, *supra* note 1, at 77.

10 GATT, *supra* note 2, preamble; *see also* HOEKMAN & KOSTECKI, *supra* note 9, at 12–13.

11 *See* HOEKMAN & KOSTECKI, *supra* note 9, at 13; *see also* Brett Grosko, Note, *Just When is it That a Unilateral Trade Ban Satisfies the GATT?: The WTO Shrimp Products Case*, 5 ENVTL. LAW. 817, 818 (1999).

12 *See* HOEKMAN & KOSTECKI, *supra* note 9, at 13.

13 *See id.*

GATT was not conceived as an international organization and had "contracting parties" instead of member states.[14] Because the contracting parties to GATT considered it only as a temporary trade agreement, it had no institutional structure, enforcement mechanisms, or codified rules.[15] However, GATT gradually acquired an organizational structure by necessity, and by 1960 it had a Council of Representatives to conduct its daily management.[16] Over the years the agreement has transformed itself from an inter-governmental treaty to a de facto organization that regulates international trade.[17]

GATT's purpose is to reduce tariffs, eliminate barriers to trade, and prevent discrimination between international trading partners.[18] Three articles of GATT give effect to these purposes. Article I established the most-favored nation treatment provision, which prohibits contracting parties from discriminating between like products based on national origin.[19] In other words, countries must apply tariffs equally to similar products of all other contracting parties.[20] Article III contains the national treatment provision, requiring countries to tax internally and regulate domestic and imported products so as to prevent protection of domestic production.[21] Article XI, with its quantitative restriction

---

14 *Id.* at 12.

15 DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 245 (1994); *see also* HOEKMAN & KOSTECKI, *supra* note 9, at 13.

16 HOEKMAN & KOSTECKI, *supra* note 9, at 13.

17 *See* ESTY, *supra* note 15, at 245.

18 *See* GATT preamble.

19 *See* GATT art. I.

20 *See id.* Art. I:1 states

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, . . . any advantage, favour (sic), privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Id. at 196–98.

21 *See* GATT art. III. Art. III:1 states

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be exempt from internal taxes and other internal charges of any kind in excess of those applied directly or indirectly to like products of national origin. Moreover, in cases in which there

provision, only permits countries to impose tariffs as trade restrictions and prohibits the use of such non-tariff restrictions as quotas and import or export licenses.[22]

Several multi-year negotiating sessions, known as rounds, have modified and enlarged GATT since 1947.[23] Most rounds have primarily focused on lowering tariffs and eliminating non-tariff barriers to trade.[24] Most recently, the Uruguay Round (1986-94), extended GATT to include services trade, trade-related investment, intellectual property, and limitations on agricultural subsidies.[25]

B. The Establishment of the WTO

The Uruguay Round also established the WTO.[26] The WTO serves to implement the policies of GATT[27] and enforce the Uruguay Round Agreements.[28] Unlike GATT, the WTO is an international entity with enforcement responsibilities.[29] Its descending organizational ladder includes the General

---

> is no substantial domestic production of like products of national origin, no contracting party shall apply new or increased internal taxes on the products of the territories of other contracting parties for the purpose of affording protection to the production of directly competitive or substitutable products which are not similarly taxed; and existing internal taxes of this kind shall be subject to negotiation for their reduction or elimination.

Id. at 204–06.

22 *See* GATT art. XI. Art. XI:1 states

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Id. at 224–26.

23 *See* Miller & Croston, *supra* note 1, at 77; *see also* HOEKMAN & KOSTECKI, *supra* note 9, at 15.

24 *See* Miller & Croston, *supra* note 1, at 77–78.

25 *See generally* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter Final Act].

26 *Id.* art. I.

27 *See* HOEKMAN & KOSTECKI, *supra* note 9, at 19.

28 *See* Benjamin Simmons, Note, *In Search of Balance: An Analysis of the WTO Shrimp/Turtle Appellate Body Report*, 24 COLUM. J. ENVTL. L. 413, 415–16 (1999).

29 *See* HOEKMAN & KOSTECKI, *supra* note 9, at 12.

Council; the Goods, Services, and Intellectual Property Councils; and many other specialized committees and working groups.[30] The Secretariat, headquartered in Geneva, provides technical support to the various councils and committees, analyzes world trade, and provides technical assistance to developing countries.[31] As of September 2000, the WTO has 138 member nations.[32]

30 *See id.* at 38.

31 World Trade Organization, WTO: Secretariat and Budget, *at* http://www.wto.org/english/thewto_e/secre_e/secre_e.htm (last visited Sept. 13, 2000).

32 World Trade Organization, The WTO, *at* http://www.wto.org/english/thewto_e/thewto_e.htm (last visited Sept. 13, 2000).

Recognizing the weaknesses of GATT enforcement procedures, the contracting parties gave the WTO a more effective and standardized dispute resolution system to settle disagreements among member states and eliminate unfair trade practices and policies.[33] Members involved in a trade dispute first attempt to solve their differences through bilateral negotiations.[34] If negotiations fail, the members have the right to submit their case to the Dispute Settlement Body ("DSB"), which operates under the WTO General Council.[35] The DSB appoints a panel of three to five trade experts to hear oral testimony, accept written submissions and consider expert opinions.[36] The panel then determines the facts, interprets and applies GATT principles, and issues a written report to the DSB within six months.[37]

The Uruguay Round affected this procedure in two significant ways.[38] First, under the old GATT procedure, a party faced with an unfavorable panel ruling could block or veto the adoption of that ruling.[39] Today, however, panel reports are automatically binding, and no member can unilaterally block a ruling.[40] Second, the Uruguay Round

---

33 *See* Miller & Croston, *supra* note 1, at 79–82; *see also* HOEKMAN & KOSTECKI, *supra* note 9, at 44–50 (discussing in–depth the dispute resolution process).

34 *See* GATT, supra note 2, art. XXIII:1. The aggrieved party must show that GATT benefits have been nullified, or GATT objectives have been impeded, as a result of "(a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation. . . ." *Id.* at 268.

35 *See* Miller & Croston, *supra* note 1, at 80; *see also* GATT art. XXIII:2, which states in part

> If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, . . . the matter may be referred to the Contracting Parties. The Contracting Parties shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties that they consider to be concerned, or give a ruling on the matter, as appropriate.

Id. at 268. The term "Contracting Parties" in article XXIII:2 refers to the body of GATT parties as a whole. The creation of the WTO, which has member nations, supersedes that term. *See* HOEKMAN & KOSTECKI, *supra* note 9, at 12, 13 n.1.

36 Miller & Croston, *supra* note 1, at 80.

37 *Id.*

38 *See* Grosko, *supra* note 11, at 821.

39 Miller & Croston, *supra* note 1, at 80.

40 *See id.*

established an appeals process:[41] a member can request the DSB to appoint an Appellate Body of seven experts who may affirm, reverse, or modify the lower panel's ruling.[42] If the DSB does not unanimously reject the Appellate Body's report in thirty days, the report becomes final and binding.[43]

C. The Dangers of Disregarding WTO Decisions

Under the original GATT, as well as the WTO, dispute panels cannot strike down the offending law of a defendant country.[44] If the law in question is inconsistent with GATT principles, the panel can inform the General Council, who can recommend that the defendant country change its law.[45] If the defendant member refuses to do so, at the plaintiff country's request, the General Council can authorize retaliatory trade sanctions.[46]

III. SECTION 609 AND THE SHRIMP-TURTLE DISPUTE

Human activities directly and indirectly threaten the survival of sea turtles.[47] Not only have they been harvested for their meat, shells, and eggs, they have been adversely affected by ocean pollution and habitat destruction.[48] The seven species surviving worldwide are currently listed as endangered under the Convention on the International Trade in Endangered Species of Wild Fauna and Flora ("CITES"),[49] and the United States has listed all sea turtles that inhabit its waters as threatened or endangered under the Endangered Species Act ("ESA").[50]

---

41 Grosko, *supra* note 11, at 821–22.

42 Miller & Croston, *supra* note 1, at 80.

43 *Id.*

44 *See* Steve Charnovitz, *Dolphins and Tuna: An Analysis of the Second GATT Panel Report*, 10 ENVTL. L. REP. 10567, 10568 (1994).

45 *Id.*

46 *Id.*

47 *See* World Trade Organization, Report of the Panel: United States—Import Prohibition of Certain Shrimp and Shrimp Products (May 15, 1998), *reprinted in* 37 I.L.M. 832, 837 [hereinafter WTO Panel Report].

48 *Id*; *see also* Kathleen Doyle Yaninek, *Turtle Excluder Device Regulations: Laws Sea Turtles Can Live With*, 21 N.C. CENT. L.J. 256, 263–64 (1995) (stating that beachfront development, oil and gas drilling, dredge and fill operations, ocean dumping, and powerboats also endanger sea turtles).

49 *See* WTO Panel Report, *supra* note 47, 37 I.L.M. at 837.

50 *Id.*

One of the greatest dangers sea turtles face, however, is incidental capture by shrimp boats, or trawlers.[51] Almost 125,000 turtles die each year when "they are hauled in (and drowned) as unwanted bycatch for target catch such as shrimp and tuna."[52] A 1990 study by the National Academy of Sciences ("NAS") confirmed that shrimp trawling accounted for the vast majority of sea turtle deaths.[53]

In 1987, shrimp trawling accounted for more than 10,000 sea turtle deaths in U.S. waters alone.[54] This prompted the U.S. Secretary of Commerce to require all shrimp trawlers to either use turtle excluder devices ("TEDs") or limit their trawling times in American waters where sea turtles suffered high mortality rates.[55] TEDs are metal trap doors installed in trawling nets that allow turtles to escape while retaining the shrimp catch.[56]

---

51 *See* Susan L. Sakmar, *Free Trade and Sea Turtles: The International and Domestic Implications of the Shrimp-Turtles Case*, 10 COLO. J. INT'L ENVTL. L. & POL'Y 345, 347 (1999).

52 Paul Stanton Kibel, *Justice for the Sea Turtle: Marine Conservation and the Court of International Trade*, 15 UCLA J. ENVTL. L. & POL'Y 57, 59 (1999).

53 *See* NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, DECLINE OF THE SEA TURTLES: CAUSES AND PREVENTION 5 (1990); *see also* Yaninek, *supra* note 48, at 256.

54 *See* Tyrrell A. Henwood & Warren E. Stuntz, *Analysis of Sea Turtle Captures and Mortalities During Commercial Shrimp Trawling*, 85 FISHERY BULL. 813, 815 (1987).

55 *See* 50 C.F.R. § 223.206 (c)(2)–(3) (2000).

56 *See* Sakmar, *supra* note 53, at 348.

TEDs have proven effective in reducing sea turtle mortality[57] and are particularly important because other programs, such as protection of nesting beaches, do not increase the survival rate of living turtles.[58] The 1990 NAS study affirmed that TEDs were the most effective means of preventing incidental sea turtle deaths.[59]

In an effort to prevent the worldwide destruction of sea turtles by unregulated foreign shrimping fleets, the U.S. Congress amended ESA by enacting section 609 in 1989.[60] Known as the "Sea Turtle Act," this provision created a certification program to force other countries to improve their sea turtle protection programs.[61] This legislation authorizes embargoes on shrimp from a foreign country which uses fishing methods harmful to sea turtles, unless the President certifies that country by May 1 each year.[62] Under this law, certification is granted to an exporting nation whose shrimping program affords sea turtles protection comparable to that required by the United States, and that also has a rate of incidental sea turtle deaths comparable to that of the United States.[63]

The U.S. State Department limited the scope of section 609's application to the nations of the Caribbean/western Atlantic region.[64] However, in a suit brought by American environmentalists, the U.S. Court of International Trade ("CIT") ruled in 1995 that section 609 required a worldwide application of the shrimp embargo no later than May 1,

---

57 *See* Julie B. Master, *International Trade Trumps Domestic Environmental Protection: Dolphins and Sea Turtles are "Sacrificed on the Altar of Free Trade"*, 12 TEMP. INT'L & COMP. L.J. 423, 444 (1998). Use of TEDs have been "noted for freeing ninety-seven percent of sea turtles caught in shrimp trawls." *Id.*

58 *See* Sakmar, *supra* note 51, at 348 (explaining that because of the extremely high mortality rate of sea turtles before they reach breeding age, and because large juvenile and adult sea turtles are needed to increase the sea turtle populations, devices that protect living turtles are far more important to the growth of those populations than programs designed to protect sea turtle eggs or hatchlings).

59 *See* NATIONAL RESEARCH COUNCIL, *supra* note 53, at 14.

60 *See* Endangered Species Act, 16 U.S.C. § 1537 (1989).

61 *See id.* § 609(b).

62 *See id.*

63 *See id.*

64 Turtles in Shrimp Trawl Fishing Operations Protection; Guidelines, 56 Fed. Reg. 1051 (Jan. 10, 1991) (explaining that U.S. conservation measures under section 609 would be of limited effectiveness unless a similar level of protection was also afforded throughout the turtles' migratory range across the Gulf of Mexico, Caribbean, and western central Atlantic).

1996.[65] The State Department requested a one-year extension of that deadline because it would give affected countries only four months notice of the embargo.[66] Nonetheless, the CIT refused to extend the deadline based on the theory that those countries should have been on notice that section 609 would eventually be applied worldwide.[67]

In October 1996, India, Malaysia, Pakistan, and Thailand challenged the United States and the WTO after embargoes were applied.[68] These countries maintained that the embargoes violated GATT Articles I:1 (most-favored nation provision),[69] XI:1 (quantitative restriction provision),[70] and XIII:1 (like treatment provision, which requires that an embargo of one contracting party's products must be applied to all other countries).[71] The United States argued that its embargoes against these countries met the exceptions provided in article XX.[72] Article XX provides general exceptions for certain trade measures, the application of which do not arbitrarily or unjustifiably discriminate between countries where the same conditions prevail, and are not disguised restrictions on international trade.[73] Subject to those conditions, article XX(b) allows measures "necessary to protect human, animal, or plant life or health,"[74] and article XX(g) allows measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. . . ."[75]

In 1998, a WTO Dispute Settlement Panel ruled against the United States, finding that the embargoes violated article XI:1, and that the United States did not meet article XX exceptions.[76] The WTO Dispute Settlement panel found that

---

65 *See* Earth Island Inst. v. Christopher, 913 F. Supp. 559, 580 (Ct. Int'l Trade 1995).

66 Earth Island Inst. v. Christopher, 922 F. Supp. 616, 618–19 (Ct. Int'l Trade 1996).

67 *See id.* at 624.

68 *See* WTO Panel Report, *supra* note 47, 37 I.L.M. at 835.

69 *See* Esty, *supra* note 15, at 245 and accompanying text; *see also* HOEKMAN & KOSTECKI, *supra* note 9, at 12–13 and accompanying text.

70 *See* GATT, *supra* note 2, art. XI:1.

71 *See id.* art. XIII:1.

72 WTO Panel Report, *supra* note 47, 37 I.L.M. at 843.

73 *See* GATT, *supra* note 2, art. XX.

74 *Id.* at 262.

75 *Id.*

76 *See* WTO Panel Report, *supra* note 47, 37 I.L.M. at 839–41, 843–56.

the U.S. embargoes on shrimp from non-certified countries under section 609 was a trade restriction not allowed under article XI:1.[77] This article prohibits any restrictions on imported goods other than "duties, taxes or other charges."[78] The panel also determined that the embargoes did not fit the exceptions in article XX.[79] Looking only to the *chapeau* or introductory clause of article XX and without examining subsections (b) or (g), the panel ruled that the embargoes discriminated between countries where similar conditions prevailed: some nations were certified and allowed to import shrimp to the United States while others were not certified and therefore not allowed to import into the United States.[80] Considering article XX within the context of GATT and the WTO Agreement, the panel also ruled that this discrimination was not justified.[81] The panel felt that allowing a member country to condition access to its market on the adoption of conservation policies by other members would constitute a serious threat to the multilateral trading system.[82]

The United States appealed the WTO Dispute Settlement panel's section 609 ruling.[83] The United States urged the Appellate Body to address article XX(g) before considering an exception under article XX(b).[84] The United States argued that section 609 fit within article XX(g) because turtles are an exhaustible natural resource, the statute related to the conservation of sea turtles and there was a substantial relationship between the statute and the conservation of sea turtles.[85] The WTO Appellate Body overturned the lower panel's report, finding that section 609 did fall within article XX(g) but it violated the *chapeau* of article XX.[86] Instead of focusing on the design of section 609 as did the lower panel, the Appellate Body examined the application of the law and implicitly accepted its design:

> In the present case, the Panel found that the United States measure at stake fell within that class of

77 *Id.* at 841.

78 GATT, *supra* note 2, art. XI:1.

79 WTO Panel Report, *supra* note 47, 37 I.L.M. at 856.

80 *See id.* at 851, 856.

81 *Id.* at 851.

82 *See id.* at 849.

83 *See* WTO Appellate Report, *supra* note 7, 38 I.L.M. at 118, 129.

84 *See id.* at 129.

85 *See id.* at 129–30.

86 *See id.* at 175.

> excluded measures because Section 609 conditions access to the domestic shrimp market of the United States on the adoption by exporting countries of certain conservation policies prescribed by the United States. It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX.[87]

Although it held that article XX(g) applied to section 609 because the law was intended to conserve exhaustible natural resources,[88] the Appellate Body found fundamental flaws in its implementation that violated the *chapeau* of article XX.[89]

First, the 1996 State Department guidelines governing certifications eliminated any flexibility that Congress might have intended in the implementation of section 609.[90] The law did not expressly mandate that foreign nations adopt a comprehensive regulatory program, but as implemented under the 1996 guidelines the law had a coercive effect on

---

87 *Id.* at 152.

88 *See id.* at 159–60. To support this finding, the Appellate Body decided that section 609 was not too broad in scope and reach to give effect to the policy objective. It also recognized the existence of parallel domestic regulations in the United States, as required by article XX(g). *See id.*

89 *See id.* at 166–74; *see also* Miller & Croston, *supra* note 1, at 92–93; Joseph Robert Berger, Note, *Unilateral Trade Measures to Conserve the World's Living Resources: An Environmental Breakthrough for the GATT in the WTO Sea Turtle Case*, 24 COLUM. J. ENVTL. L. 355, 373–79 (1999). The Appellate Body issued a specific, narrow ruling on the case:

> What we *have* decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX. . . . WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the *WTO Agreement*.

WTO Appellate Report, *supra* note 7, 38 I.L.M. at 174–75.

90 WTO Appellate Report, *supra* note 7, 38 I.L.M. at 166.

foreign policy decisions by requiring such an adoption "without taking into consideration different conditions which may occur in the territories of those other Members."[91]

Second, the shrimp embargo was too broad because it applied to a member country's entire shrimp shipment.[92] Because the embargo banned the importation of shrimp from a country that did not meet certification under section 609, it also banned any shrimp that country might have caught using TEDs.[93] Thus, it banned all of a non-certified country's shrimp catch, including turtle-safe catches.[94]

Third, the Appellate Body affirmed the lower panel's finding that the United States did not attempt multilateral negotiations before enforcing its embargo, even though section 609 required the Secretary of State to attempt such negotiations.[95]

Fourth, the Appellate Body found discrimination between countries in the application of section 609 for three reasons: 1) the United States negotiated with only some of the countries affected by the law; 2) the countries of the Caribbean/western Atlantic region were given three years to comply with section 609, while all other affected nations had only four months to comply with the law; and 3) the United States was more aggressive with the Caribbean/western Atlantic countries in its technology transfer efforts.[96] The Appellate Body determined that this disparate treatment of affected countries constituted unjustifiable discrimination under the chapeau of article XX.[97]

Finally, the Appellate Body concluded that a lack of due process in application for certification constituted arbitrary discrimination under the article XX *chapeau*.[98] Countries applying for certification had no formal opportunity to be heard or respond to allegations made against it.[99] The United States did not give any reasons for accepting or rejecting certifications, and countries denied certification never

91 *Id.* at 167.

92 *See id.*

93 *See id.*

94 *See id.*

95 *See id.* at 124, 167–71.

96 *See id.* at 171–72.

97 *Id.* at 172.

98 *See id.* at 173–74.

99 *Id.* at 173.

received notice of the denial.[100] Also, section 609 did not provide an appeals process for countries denied certification.[101]

Despite ruling against the U.S. shrimp embargo, the Appellate Body's report offers hope that future unilateral actions under environmental trade measures will pass WTO scrutiny.[102] The WTO acknowledged that the unilateral requirement of a foreign country's adoption of environmental policies and practices could fall within the article XX exceptions against trade restrictions[103] if implemented on a more flexible basis than the shrimp embargo under section 609.[104] The Appellate Body also concluded that all WTO agreements should be interpreted within the context of the WTO Agreement preamble,[105] which acknowledges the need for conserving natural resources and supporting sustainable development in its quest for the liberalization of trade.[106] The above five aspects of implementation seem dispositive to future WTO rulings on unilateral environmental trade measures.[107]

IV. PELLY AMENDMENT

Several U.S. laws authorize the use of environmental trade restrictions to give effect to worldwide conservation efforts deemed important by the United States.[108] These environmental trade restrictions include import prohibitions and trade sanctions.[109] An import prohibition bans the importation of a targeted product that is directly linked to an environmental harm.[110] On the other hand, a trade sanction

100 *Id.*

101 *Id.*

102 *See* Berger, *supra* note 89, at 356–57.

103 *See* WTO Appellate Report, *supra* note 7, 38 I.L.M. at 118; *see also supra* notes 92–93 and accompanying text.

104 *See* Berger, *supra* note 89, at 357.

105 *See* WTO Appellate Report, *supra* note 7, 38 I.L.M. at 154–55.

106 *See* Final Act, *supra* note 25, preamble.

107 *See* Berger, *supra* note 89, at 367, 373–79.

108 *See generally* Pelly Amendment to the Fisherman's Protective Act of 1967, 22 U.S.C. § 1978 (1994) [hereinafter Pelly Amendment]; Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1421(h) (1994 & Supp. II & III 1997); Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq. (1998).

109 Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 AM. U. J. INT'L L. & POL'Y 751, 756 (1994).

110 *Id.*

is a ban on products unrelated to an environmental harm used to influence other countries' policies or actions.[111] The trade restrictions can be applied by treaty to both parties and non-parties of a treaty or they can be applied unilaterally in the absence of a treaty, to prevent adverse environmental effects.[112] The Pelly Amendment of 1971 is one such unilateral trade sanction.[113] Because other U.S. laws trigger the Pelly Amendment, it is considered the most important of these types of laws.[114]

Congress passed the Pelly Amendment to the Fishermen's Protective Act of 1967 because of the United States' failure to persuade Denmark, Norway, and West Germany to comply with a prohibition on high seas salmon fishing enacted by the International Commission for the Northwest Atlantic Fisheries ("ICNAF").[115] The law authorizes a discretionary ban on the importation of fish products from another country when the Secretary of Commerce certifies that nationals of that country have directly or indirectly conducted fishing operations which "diminish the effectiveness" of an international fishery conservation program or wildlife conservation program for threatened or endangered species.[116] However, the Pelly Amendment requires that such a ban be consistent with GATT.[117] Because Pelly authorizes a ban on all fish products, not just the salmon targeted for protection by the ICNAF, it is a trade sanction rather than an importation ban.[118] Note also that a

111 *Id.*

112 *See id.* at 757.

113 *See* Pelly Amendment, *supra* note 108, § 1978; *see also* Charnovitz, *supra* note 109, at 757.

114 *See* Charnovitz, *supra* note 109, at 751, 758.

115 *Id.* at 758.

116 Pelly Amendment § 1978(a)(1)–(2). The "diminishing the effectiveness" test is vague, and could be triggered by several factors, including non-ratification of a treaty, non-observance of a treaty, or even actions unrelated to a treaty such as domestic sales of endangered species. Charnovitz, *supra* note 109, at 760.

117 *See* Pelly Amendment § 1978(a)(4); *see also* Ted L. McDorman, *The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles*, 24 GEO. WASH. J. INT'L L. & ECON. 477, 483 n.39 (1991).

118 *See supra* note 108 and accompanying text.

treaty violation is not necessary to trigger a Pelly certification.[119]

Congress amended Pelly in 1978 to prevent countries from "engaging in trade or taking which diminishes the effectiveness of *any* international program for endangered or threatened species whether or not such conduct is legal under the laws of the offending country."[120] Should a Pelly certification be made under this provision, the President has the discretionary power to order an embargo against any or all wildlife products of the offending country.[121] This created a dual track system which sanctions activities that diminish the effectiveness of either an international fishery program or an international program for endangered or threatened species.[122]

In 1992, Congress amended Pelly once more with the High Seas Driftnet Fisheries Enforcement Act ("HSDFEA") in order to expand the range of products on which the United States can place trade sanctions.[123] The President may now place an embargo on any product of an offending country and thus devise trade sanctions that will have the maximum impact.[124]

Several U.S. environmental laws are linked to the Pelly Amendment, including: the Fishery Conservation and Management Act of 1976;[125] the Driftnet Impact Monitoring, Assessment, and Control Act of 1987;[126] the African Elephant Conservation Act of 1988;[127] the Marine Mammal Protection Act amendments of 1988;[128] the Fishery Conservation

---

119 *See* Charnovitz, *supra* note 109, at 760. Member nations may legally avoid being bound by a quota under the Whaling Convention, but they may still trigger a Pelly certification. *Id.*

120 *Id.* at 759 (emphasis added).

121 *See id.* at 759–60.

122 *Id.*

123 *See* High Seas Driftnet Fisheries Enforcement Act, 16 U.S.C. § 1826a (1992) [hereinafter HSDFEA]; *see also* Charnovitz, *supra* note 109, at 760.

124 *See* Charnovitz, *supra* note 109, at 761.

125 *See* Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1822 (1976).

126 *See* Driftnet Impact, Monitoring, Assessment, and Control Act, Pub. L. No. 100–220, §§ 4001–4009, 101 Stat. 1477 (1987)[hereinafter DIMACA].

127 *See* African Elephant Conservation Act, 16 U.S.C. §§ 4201–4245 (1988).

128 *See* Marine Mammal Protection Act of 1988, 16 U.S.C. § 1383(a),(b) (1994).

Amendments of 1990;[129] the Driftnet Act Amendments of 1990;[130] and the High Seas Driftnet Fisheries Enforcement Act of 1992.[131] Under these laws, official determinations on the activities of foreign nations are "deemed" Pelly certifications, authorizing sanctions.[132] Although there have been at least twenty episodes of Pelly certifications since the amendment's enaction in 1971,[133] there has been only one instance of actual trade restrictions being placed on products of an offending country.[134] Usually, the possibility of a Pelly certification or the consideration of trade restrictions after certification has been made, has been adequate to give effect to U.S. conservation policies.[135]

V. HOW A HIGH SEAS DRIFTNET FISHERIES ENFORCEMENT ACT EMBARGO MIGHT PASS A WTO CHALLENGE

Although most environmental trade measures have failed WTO scrutiny,[136] there are favorable scenarios which suggest that those measures which implement a targeted embargo to influence other countries might survive a WTO challenge. The recent driftnetting controversy shows how such an action could pass WTO muster in light of the Appellate Body's report in the shrimp-turtle dispute.[137]

Driftnetting is one of the most destructive methods of fishing in the world today.[138] Long monofilament plastic nets trail many kilometers behind ships, catching and

---

129 *See* 16 U.S.C. §1822 (1990), amended by 16 U.S.C. §1822(b)–(c) (Supp. 1994).

130 *See* 16 U.S.C. §1826 (1990), amended by 16 U.S.C. 1826(a) (Supp. 1994).

131 *See generally* HSDFEA, *supra* note 123.

132 *See* Charnovitz, *supra* note 109, at 761.

133 *See id.* at 763–72 (describing some of these episodes).

134 *See* Letter to Congressional Leaders on Rhinoceros and Tiger Trade by China and Taiwan, 30 WEEKLY COMP. PRES. DOC. 781 (Apr. 11, 1994) (explaining that in 1994 President Clinton imposed sanctions on fish and wildlife products from Taiwan in an attempt to end its trade in the horns and bones of endangered rhinoceroses and tigers); *see also* Tom Kenworthy, *President Imposes Sanctions on Taiwan*, WASH. POST, Apr. 12, 1994, at C1.

135 *See* John Alton Duff, *Recent Applications of United States Laws to Conserve Marine Species Worldwide: Should Trade Sanctions be Mandatory?*, 2 OCEAN & COASTAL L.J. 1, 5–6 (1996).

136 *See* Miller & Croston, *supra* note 1, at 76.

137 *See generally* Berger, *supra* note 89, at 403–10.

138 *See* Amy Blackwell, *The Humane Society and Italian Driftnetters: Environmental Activists and Unilateral Action in International Environmental Law*, 23 N.C. J. INT'L L. & COM. REG. 313, 313 (1998).

indiscriminately drowning almost every type of marine life in the area regardless of the intended catch, including whales, dolphins, sea turtles, and birds.[139] Studies have shown that this practice contributes to the exploitation of seventy percent of the world's marine stock and perpetuates unsustainable catches of fish stock.[140] Scientists have estimated that there will be a shortage of about thirty million tons of fish in 2000 due to driftnetting.[141]

The United Nations and the United States have led the effort to reduce or ban the practice of large-scale driftnetting around the world.[142] The United Nations adopted its Resolution on Large-Scale Pelagic Driftnet Fishing in 1989, hoping to implement a moratorium on driftnetting on the high seas, reduce driftnet fishing in the Pacific, and halt expansion of driftnetting in other areas.[143] In 1991, the United Nations passed another resolution on driftnetting which called for a more general moratorium that included enclosed and semi-enclosed seas.[144] Beginning on January 1, 1992, the resolution required members to reduce large-scale driftnetting by lowering the number of driftnetting vessels, shortening the length of nets used (no greater than 2.5 kilometers in length), and limiting the areas open to driftnet fishing.[145] These resolutions called for regulatory measures, but by themselves they were unenforceable;[146] individual nations would have to pass their own laws in order to enforce the moratorium against their own citizens.[147]

In 1990, the United States and several other countries signed the Wellington Convention, which banned driftnetting

---

139 *See id.* at 313–14; *see also* Duff, *supra* note 135, at 21.

140 *See* Dick Russell, *Vacuuming the Seas: Unprecedented Factory Fishing Operations Have Created a Global Crisis as Species Dwindle and Species Decline*, ENVTL. MAG., July–Aug. 1996, at 28–30.

141 *Id.* at 30.

142 Berger, *supra* note 89, at 407–10.

143 *See* Large-Scale Pelagic Driftnet Fishing and its Impact on the Living Marine Resources of the World's Oceans and Seas, U.N. GAOR 2nd Comm., 44th Sess., Annex, Agenda Item 82(f), U.N. Doc. A/RES/44/225 (1989), *reprinted in* 29 I.L.M. 1555, 1558 (1990); *see also* Blackwell, *supra* note 138, at 317–18.

144 *See* Large–Scale Pelagic Driftnet Fishing and its Impact on the Living Marine Resources of the World's Oceans and Seas, U.N. GAOR, 44th Sess. U.N. Doc. A/RES/46/215 (1992), *reprinted in* 31 I.L.M. 241 (1992).

145 *See id.* at 242.

146 *See* Blackwell, *supra* note 138, at 318.

147 *Id.*

in the South Pacific.[148] The ban covers a geographic area that includes Australia, New Zealand, Hawaii, most of the South Pacific Islands, and most of Southeast Asia.[149] The Convention signatories agree to prohibit their citizens from driftnet fishing in that area.[150] The Convention also limits the length of driftnets to 2.5 kilometers for fishing outside that area.[151] Two protocols supplement the Wellington Convention.[152] Protocol I, which any nation fishing in the area prescribed by the Convention may sign, requires its parties to prohibit their nationals from using driftnets, give the South Pacific Forum Fisheries Agency information on the measures they have adopted, cooperate with other parties on managing albacore tuna in the South Pacific, and use appropriate enforcement procedures.[153] The United States is also a party to Protocol I.[154] Protocol II may be signed only by Pacific Rim nations and requires signatory countries to ban driftnetting in their jurisdictional waters and to close their ports and facilities to driftnetting vessels.[155]

148 *See* Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, Nov. 24, 1989, *reprinted in* 29 I.L.M. 1449 (1990) [hereinafter Wellington Convention]; *see also* Blackwell, *supra* note 138, at 320–22; W. M. von Zharen, *Ocean Ecosystem Stewardship*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 1, 51–52 (1998).

149 *See* Wellington Convention, *supra* note 148, at 1453, 1455.

150 *Id.* at 1456.

151 *See id.* at 1455.

152 *See id.* at 1462–63.

153 *See id.* at 1462.

154 Blackwell, *supra* note 138, at 321.

155 *See* Wellington Convention, *supra* note 148, at 1449, 1463.

The United States has enacted its own tough laws against driftnet fishing.[156] In 1987, responding to an increase in driftnetting in the North Pacific,[157] and desiring to learn more about the driftnetting activities of Japan, Korea, and Taiwan in the Pacific,[158] the United States enacted the Driftnet Impact, Monitoring, Assessment, and Control Act ("DIMACA").[159] Because most driftnetting occurs outside U.S. waters,[160] the Act requires the Secretary of Commerce to initiate negotiations for monitoring agreements with foreign countries that conduct large-scale driftnetting operations in the North Pacific and the Bering Sea.[161] In 1990, Congress expanded the coverage of DIMACA with the Driftnet Act Amendments in order to enforce the U. N. moratorium on driftnetting, to support the Wellington Convention, and to secure a ban on large-scale driftnetting on the high seas.[162] The objective of DIMACA is to ensure foreign countries' compliance with U.S. law[163] and is an extension of the Pelly Amendment.[164] DIMACA authorizes the Secretary of Commerce to certify any country that either fails to enter a driftnet monitoring agreement with the United States or to implement the agreement within eighteen months of enactment.[165] A Pelly certification gives the President the discretion to impose trade sanctions on the offending country.[166] Certification and the threat of certification under DIMACA has led to agreements with Japan, Korea, and Taiwan.[167]

In response to the United Nations resolutions of 1990 and 1991, the United States enacted the HSDFEA.[168] This act

---

156 *See* notes 125–31 and accompanying text.

157 *See* Duff, *supra* note 135, at 21.

158 *See* McDorman, *supra* note 117, at 497.

159 *See generally* DIMACA, *supra* note 126.

160 Duff, *supra* note 135, at 21.

161 *See* DIMACA, *supra* note 126, § 4006.

162 *See* Driftnet Act Amendments, *supra* note 126, § 1826(c).

163 McDorman, *supra* note 117, at 497–98.

164 *See generally* DIMACA, *supra* note 126 (authorizing sanctions for failing to agree to U.S. monitoring); *see also* Pelly Amendment, *supra* note 108 (authorizing sanctions for countries that diminish effectiveness of wildlife conservation programs).

165 *See* DIMACA, *supra* note 126, § 4006(b).

166 *See* William Carroll Muffett, Note, *Regulating the Trade in Bear Parts for Use in Asian Traditional Medicine*, 80 MINN. L. REV. 1283, 1301 (1996).

167 *See* Duff, *supra* note 135, at 22.

168 *See generally* HSDFEA, *supra* note 123.

required the Secretary of Commerce to identify by 1993 all nations still conducting large-scale driftnet operations on the high seas.[169] This triggers a thirty-day period during which the President must try to get the identified country to immediately halt its large-scale driftnet operations.[170] Failure to reach an agreement will lead to import prohibitions on fish, fish products, and sport fishing equipment from the identified country.[171] If these sanctions are insufficient, the Act authorizes a Pelly certification of that country.[172]

Until 1998, the European Union ("EU") had difficulty enacting a ban on driftnet fishing, though it no longer allowed the use of driftnets longer than 2.5 kilometers.[173] Over the years, Denmark, Finland, France, Germany, Ireland, Italy, Sweden, and the United Kingdom consistently blocked proposed bans.[174] Prior to 1998, Italy, in particular, frequently flouted the international moratorium on driftnetting, and consistently used five to twenty kilometer nets.[175] But in 1998, members of the EU finally agreed to phase out the use of driftnets.[176]

The United States never sanctioned Italy under American driftnetting laws before 1998, but those laws, with their threat of action against offending countries, played a significant role in bringing about the European ban.[177] In 1996, the Humane Society sued the Commerce and State Departments in the CIT to force the United States to impose sanctions against Italy.[178] The CIT found that the United States must identify Italy as violating the HSDFEA for conducting large-scale driftnet fishing operations on the high seas.[179] The identification triggered the ninety-day

---

169 *Id.* § 1826a(b)(1)(A).

170 *See id.* § 1826a(b)(2).

171 *Id.* § 1826a(b)(3)(A)(ii).

172 *See id.* § 1826a.

173 *See* Blackwell, *supra* note 138, at 326–27 (attributing the difficulty to "historic disagreement" regarding the necessity of a total ban).

174 *Fisheries: Euro-MPS Probe Plans to Phase Out Italian Driftnets*, EUR. REP., Apr. 5, 1997, *available at* LEXIS, News Library, Eurrpt File.

175 *See Fisheries: Bonino Urges Italians to End Use of Driftnets*, EUR. REP., July 6, 1996, *available at* LEXIS, News Library, Eurrpt File.

176 *Fisheries Council: Driftnets Finally Voted Out*, EUR. REP., June 10, 1998, *available at* LEXIS, News Library, Eurrpt File.

177 *See* Berger, *supra* note 89, at 408–09.

178 *See* Humane Soc'y v. Brown, 920 F. Supp. 178 (Ct. Int'l. Trade 1996).

179 *See id.* at 195.

countdown to sanctions.[180] Faced with the threat of an embargo, Italy agreed to improve enforcement of its own driftnet laws.[181] In 1999, the Humane Society again sued for sanctions against Italy, but the court upheld the President's decision not to impose such sanctions.[182] However, because of the uncertainty of Italy's compliance with its agreement arising from the 1996 lawsuit, the CIT again ordered the United States to identify Italy as a large-scale driftnetter, leading once more to negotiations and potential sanctions.[183]

Had the Italians not succumbed to U.S. pressure and continued to fish with driftnets in defiance of international agreements, they would have been faced with a Pelly embargo.[184] For such an embargo to survive WTO scrutiny, the implementation of the HSDFEA would have to cure the five problems identified in the WTO Appellate Body's report on the shrimp-turtle dispute.[185] That report's first major criticism noted that while a measure designed to influence a member country's conservation policies was permissible, it could not be implemented in such an inflexible manner so as to require the offending country to adopt a comprehensive regulatory program.[186] Second, an embargo cannot be so broad as to ban an entire shipment of product when part of that shipment was procured in compliance with the environmental regulations in question.[187] Third, the United States must make a serious effort to solve the problem through multilateral negotiations.[188] Fourth, there must be no unjustifiable, disparate treatment among certified nations.[189] And finally, the certification process leading to sanctions must afford due process protection to those nations.[190]

---

180 Berger, *supra* note 89, at 409.

181 *See Fisheries*, *supra* note 175*; see also* Berger, *supra* note 89, at 408–09.

182 Humane Soc'y v. Clinton, 44 F. Supp. 2d 260, 268–69 (Ct. Int'l Trade 1999) (determining that the President is vested with the sole discretion to impose sanctions).

183 *See id.* at 279.

184 Berger, *supra* note 89, at 409.

185 *See supra* Part III.

186 *See supra* notes 90–91 and accompanying text.

187 *See supra* notes 92–94 and accompanying text.

188 *See supra* note 95 and accompanying text.

189 *See supra* notes 94–95 and accompanying text.

190 *See supra* notes 98–101 and accompanying text.

However, a Pelly embargo against Italy under the HSDFEA might not have these problems.[191] If the United States certified Italy under the statute and imposed sanctions against it, Italy would not have to adopt a comprehensive, uniform regulatory program; it would only have to cease violating the international agreements by appropriate means as negotiated with the United States.[192] Also, under the HSDFEA, the President cannot place an embargo on Italy without first negotiating to reach a solution; thus, as long as the United States followed the law, it could not be accused of enforcing an embargo without attempting serious negotiations.[193] In addition, dealing with only one offending country does not invite disparate treatment of nations.[194] Finally, "a targeted embargo could impact the Italian fishing fleet, so that an effective U.S. action need not fall into uncharted territory before the WTO."[195]

VI. THE MARINE MAMMAL PROTECTION ACT AND THE TUNA-DOLPHIN DISPUTES

The driftnetting controversy described above shows how a unilateral environmental trade measure, improved by the lessons learned from the WTO Appellate Body report on the U.S. shrimp embargo, might be upheld by the WTO. However, previous U.S. trade measures, such as embargoes on tuna caught by fishing methods that incidentally kill dolphins, have not survived such scrutiny.[196] This section will examine these attempted embargoes, and how such embargoes might gain WTO approval in light of the shrimp-turtle dispute.

A. The Fight to Save the Dolphins

Since the 1950s, millions of dolphins have died as a result of tuna fishing in the Eastern Tropical Pacific Ocean.[197]

---

191 *See* Berger, *supra* note 89, at 409.

192 *See* HSDFEA, *supra* note 123, § 1826a(b)(2)–(3)(A); *see also supra* notes 90–91, 163–67 and accompanying text.

193 *See* HSDFEA, *supra* note 123, § 1826a(b)(2)–(3)(A); *see also supra* notes 95, 163–67 and accompanying text.

194 *See supra* notes 96–97 and accompanying text.

195 Berger, *supra* note 89, at 409.

196 *See* Julie B. Master, *International Trade Trumps Domestic Environmental Protection: Dolphins and Sea Turtles are "Sacrificed on the Altar of Free Trade,"* 12 TEMP. INT'L & COMP. L.J. 423, 430 (1998).

197 *See* Miller & Croston, *supra* note 1, at 74–75; *see also* Deidre McGrath, Note, *Writing Different Lyrics to the Same Old Tune: The New (and Improved)*

For reasons not yet known, yellowfin tuna tend to congregate under pods of dolphins in that area.[198] Dolphins need to surface to breathe, and therefore, provide fishermen a means of locating the schools of tuna below.[199] Historically, a popular way to catch tuna has been the "purse seine" method.[200] In purse seine fishing, vessels trail nets up to a mile behind them.[201] The nets have floats at the top and extend as deep as 800 feet to create an open-bottomed, sack-like trap.[202] Motorboats and explosives are then used to herd the dolphins into the top of the nets, and winches pull the bottom together like a purse to trap the tuna below.[203] This is known as "setting on" the dolphins.[204] Most of the dolphins caught in the nets die by drowning, while others are mutilated trying to escape or are run over by speedboats.[205] Because dolphins travel in family groups, members of the family not caught in the nets will often stay below with their captured relatives and drown rather than abandon them.[206]

Purse seining endangers dolphins in other ways as well. The method often separates mothers from calves, who are then threatened with starvation and predator attacks.[207] In "backdown" procedures, the winches are slightly reversed to lower one side of the net in an attempt to release the dolphins, but sharks often await to attack the disoriented or

---

1997 Amendments to the Marine Mammal Protection Act, 7 MINN. J. GLOBAL TRADE 431, 431.

198 *See* GATT Dispute Panel Report on United States—Restrictions on Imports of Tuna (Sept. 3, 1991) *reprinted in* 30 I.L.M. 1594, 1598 (1991) [hereinafter Tuna-Dolphin I].

199 Rachel C. Hampton, Note, *Of Dolphins and Tuna: The Evolution to an International Agreement*, 10 FORDHAM ENVTL. L.J. 99, 99 (1998).

200 *See generally* Tuna-Dolphin I, *supra* note 198, at 1598 (detailing the deployment of purse-seine technology); ALESSANDRO BONANNO & DOUGLAS CONSTANCE, CAUGHT IN THE NET 123–25 (1996).

201 *See* Eugene H. Buck, Congressional Research Service Issue Brief of Comm. for Nat'l Inst. for the Env't. 96011: Dolphin Protection and Tuna Seining, *at* http://www.cnie.org/nle/mar–14.html (last visited Aug. 25, 2000).

202 *See id.* (describing the herding that often lasts twenty minutes).

203 *See id.*; *see also* Mary Ellen O'Connell, *Using Trade to Enforce International Environmental Law: Implications for United States Law*, 1 IND. J. GLOBAL LEGAL STUD. 273, 283 (1994).

204 *See* Nancy Kubasek, et al., *Protecting Marine Mammals: Time for a New Approach*, 13 UCLA J. ENVTL. L. & POL'Y 1, 4 (1995).

205 *See* O'Connell, *supra* note 203, at 283.

206 Miller & Croston, *supra* note 1, at 95.

207 Hampton, *supra* note 199, at 103.

injured dolphins.[208] There is also concern that even if they escape the nets and survive, dolphins will experience reproductive problems or even die later from the stress of being chased and netted.[209]

B. Legislative History of the MMPA

Since 1959, it is estimated that over six million dolphins have died from purse seine fishing methods.[210] Before protective legislation was passed, up to 300,000 dolphins were killed each year.[211] According to some estimates, this number had increased to nearly 500,000 by the early 1970's.[212] The American public was outraged at these deaths and pressure increased steadily to save dolphins from the tuna nets.[213]

The United States responded to this pressure by enacting the Marine Mammal Protection Act of 1972 ("MMPA"), which aimed to prevent the "taking" of dolphins in the Eastern Tropical Pacific Ocean.[214] "Taking" as defined in the Marine Mammal Protection Act means "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal."[215] Furthermore, "harassment" is defined as the potential to injure or disturb mammals and covers mammal activities such as migration, breeding, sheltering, and feeding.[216] Generally, the Act forbids the taking and importation of marine mammals.[217] The MMPA states, "it shall be the immediate goal that the incidental kill or

---

208 Kubasek et al., *supra* note 204, at 5.

209 Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn From the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1, 55 (1999).

210 *See Provisions of the International Dolphin Conservation Act, How It Is Affecting Dolphin Mortality, and What Measures Can Be Effected to Keep the Mortality to a Minimum: Hearings Before the Subcomm. on Fisheries, Wildlife and Oceans of the House Comm. on Resources*, 104th Congress, 1st & 2nd Sess. 60 (1996) (statement of Suzanne Iudicello, Vice President for Programs, Center for Marine Conservation).

211 O'Connell, *supra* note 203, at 283.

212 *See* Jennifer Ramach, *Dolphin Safe Tuna Labeling: Are the Dolphins Finally Safe?*, 15 VA. ENVTL. L.J. 743, 748 (1996).

213 *See* O'Connell, *supra* note 203, at 283.

214 *See* Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361 (1994 & Supp. II & III 1997).

215 *Id.* § 1362(12).

216 *Id.* § 1362(18)(A).

217 *Id.* § 1371.

incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate. . . ."[218]

However, intensive lobbying by the U.S. tuna fleet led to an exception for dolphins.[219] The MMPA allows the National Marine Fisheries Service ("NMFS") to issue permits for increased incidental dolphin kills for U.S. tuna fishermen operating in the Eastern Tropical Pacific Ocean.[220] The NMFS has only issued one of these permits, to the American Tunaboat Association ("ATA"), but the original permit allowed a limitless number of incidental dolphin deaths.[221] American environmentalists sued in 1976 claiming the NMFS failed to uphold the MMPA.[222] The court agreed and the NMFS reduced the number of allowable kills under the ATA permit from 78,000 in 1976 to 20,500 in 1980.[223] In 1980, the Reagan administration ordered the quota to be kept at 20,500 indefinitely.[224]

1. 1984 Amendments to the MMPA

Despite the permit system allowing incidental takings, the MMPA helped reduce dolphin deaths from purse seine tuna fishing by American fleets to about 25,000 per year by 1977.[225] Congress amended the Act in 1984 to require other countries to use fishing standards comparable to U.S. standards under the MMPA for tuna exported to this country.[226] The original Act sought to reduce the incidental deaths of dolphins at the hands of foreign fishermen, but only required those nations to avoid incidental takings in excess of U.S. standards in order to avoid an embargo.[227]

---

218 *Id.* § 1371(a)(2).

219 O'Connell, *supra* note 203, at 283–84.

220 *See* Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371(a).

221 *See* Comm. for Humane Legislation v. Richardson, 540 F.2d 1141, 1146–47 (D.C. Cir. 1976).

222 *Id.* at 1141.

223 *See* Susan C. Alker, Comment, *The Marine Mammal Protection Act: Refocusing the Approach to Conservation*, 44 UCLA L. REV. 527, 537 n.46 (1996); Hampton, *supra* note 199, at 111.

224 *Hampton, supra* note 199, at 111.

225 *See* Buck, *supra* note 201.

226 *See* Marine Mammal Protection Act of 1984, 16 U.S.C. § 1371(a)(2)(B)(ii)(I) (1994 & Supp. II 1997).

227 *See* Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1371(a)(2) (1994 & Supp. II & III 1997); *see also* O'Connell, *supra* note 203, at 284.

This was not a quantitative restriction and only required the country to prove it was using equipment and procedures that met U.S. standards.[228]

The amendments attempted to strengthen this requirement.[229] They particularly targeted yellowfin tuna and these standards became harder to meet.[230] Congress declared that yellowfin tuna caught with purse seine nets in the Eastern Tropical Pacific Ocean could only be imported if the exporting countries could prove that its regulatory program for preventing incidental takings of marine mammals was comparable to the U.S. government's program and that the average incidental taking rate per vessel was comparable to the U.S. rate.[231] Without "reasonable proof" that the exporting countries met these requirements, the United States would impose an importation prohibition on fish and fish products from those countries, regardless of whether the incidental takings occurred in that nation's waters and were in compliance with its domestic laws and obligations under international agreements.[232]

Since 1980, the United States has banned the importation of any yellowfin tuna from countries not in compliance with both the MMPA and U.S. standards on incidental takings of dolphins.[233] The United States placed an embargo on Mexican yellowfin tuna in 1981,[234] but lifted that embargo in 1986.[235] The United States also banned yellowfin tuna from the Congo,[236] Peru,[237] and Senegal[238] in the early

---

228 *See* Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371(a)(2).

229 *See* H.R. REP. NO. 98–758, at 6 (1984), *reprinted in* 1984 U.S.C.C.A.N. 635, 639. Congress wanted to "strengthen the requirements of the Act with respect to documentation of compliance by foreign nations with the essential features of the MMPA." *Id.*

230 *See id.* at 640–41.

231 *Id.*

232 Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371(a)(2)(A).

233 *See* McDorman, *supra* note 117, at 492.

234 Taking of Marine Mammals Incidental to Commercial Fishing Operations, 46 Fed. Reg. 10,974 (Feb. 2, 1981) (determination).

235 Taking of Marine Mammals Incidental to Commercial Fishing Operations, 51 Fed. Reg. 18,644 (May 21, 1986) (determination).

236 Taking of Marine Mammals Incidental to Commercial Fishing Operations, 45 Fed. Reg. 13,094 (Feb. 28, 1980) (determination).

237 Taking of Marine Mammals Incidental to Commercial Fishing Operations, 47 Fed. Reg. 11,307 (Mar. 16, 1982) (determination).

238 Taking of Marine Mammals Incidental to Commercial Fishing Operations, 45 Fed. Reg. 9,284 (Feb. 12, 1980) (determination).

1980s, but lifted those embargoes by 1983 when each country had not fished for tuna in the Eastern Tropical Pacific Ocean for at least one year.[239] By 1987, Congress exempted eight countries from the yellowfin tuna ban: the Cayman Islands, Costa Rica, Ecuador, Mexico, Panama, Spain, Vanuatu, and Venezuela.[240]

2. 1988 Amendments to the MMPA

Congress amended the MMPA a second time in 1988, again attempting to reduce the incidental taking of dolphins by foreign tuna fleets in the Eastern Tropical Pacific Ocean.[241] These amendments offered guidelines on how foreign fishing operations would be found "comparable" under the statute.[242] These guidelines required that: 1) the average rate of incidental takings of dolphins by foreign fleets be compared to the average rate of takings by U.S. ships; and 2) the per vessel annual dolphin mortality rate be less than 1.25 times that of the U.S. fleet by 1990.[243] Furthermore, foreign nations had to show that their tuna fishing operations were monitored to the same extent as the United States by qualified observers such as the Inter-American Tropical Tuna Commission ("IATTC").[244] If these comparable standards were not met, the amendments authorized a primary embargo on at least forty percent of the offending country's fish and fish products exports to the United States in a base year.[245] The amendments also authorized a secondary embargo on intermediary nations that could not show by reasonable proof that they had acted to ban the importation of tuna and tuna products from any country under a primary embargo.[246]

---

239 Taking of Marine Mammals Incidental to Commercial Fishing Operations, 47 Fed. Reg. 11,307 (Mar. 16, 1982) (determination) (rescinding import bans on the Congo and Senegal); Taking of Marine Mammals Incidental to Commercial Fishing Operations, 48 Fed. Reg. 30,422 (July 1, 1983) (determination) (rescinding import ban on Peru).

240 H.R. Rep. No. 100–970, at 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 6154, 6156.

241 *See* Marine Mammal Protection Act of 1988, 16 U.S.C. §§ 1361, 1371(a) (1994).

242 *See id.* § 1371(a)(2)(B) (providing five categories under which foreign operations will be found comparable).

243 *Id.*

244 *Id.*

245 *See id.* § 1415(b)(2)(B).

246 *Id.* § 1371(a)(2)(C).

The 1988 amendments also required the Secretary of Commerce to provide certification to the President six months after a U.S. embargo had been placed on any yellowfin tuna or yellowfin tuna products from another country.[247] This certification is deemed to be a Pelly certification, which could lead to a broader import ban on any or all fish and fish products from that country.[248]

Further, the 1988 amendments included a "skipper performance system," which was a training program for tuna captains with poor records of incidental dolphin deaths.[249] Also, "setting on" dolphins to catch tuna was prohibited after sundown, and only weak explosives were allowed to herd dolphins and tuna for capture.[250]

3. The Dolphin Protection Consumer Information Act

The public outrage that grew in the 1960s over dolphin deaths led to boycotts of canned tuna in the 1970s.[251] The growth in publicity increased public pressure on American companies that marketed tuna.[252] After years of public protest, the Star Kist, Bumblebee, and Van Kamp companies, which accounted for eighty percent of the market for canned tuna in the United States,[253] announced they would not buy tuna caught by methods that harmed dolphins.[254] They began labeling their cans as "dolphin-safe."[255]

In 1990, Congress responded to the seafood company efforts with the Dolphin Protection Consumer Information Act (DPCIA), which codified tuna labeling and precisely defined "dolphin-safe."[256] "Dolphin-safe tuna" is defined as tuna 1) caught by small boats in the Eastern Tropical Pacific Ocean without "setting on" dolphins; 2) caught by purse seine method outside the Eastern Tropical Pacific Ocean, but

---

247 *Id.* § 1371(a)(2)(D).

248 *See* H.R. Rep. No. 100–970, at 30, (1988), *reprinted in* 1988 U.S.C.C.A.N. 6154, 6171.

249 Miller & Croston, *supra* note 1, at 99.

250 *Id.*

251 Michael Parrish, *Film Turns Tide for Dolphins at StarKist Tuna*, L.A. TIMES, Apr. 14, 1990, at D1.

252 *See* Buck, *supra* note 201.

253 BONANNO, *supra* note 200, at 172.

254 Buck, *supra* note 201.

255 Miller & Croston, *supra* note 1, at 99.

256 Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385 (1994) [hereinafter DPCIA].

without "setting on" dolphins; or 3) not caught by driftnetting.[257]

C. *The First WTO Challenge to a U.S. Tuna Embargo ("Tuna-Dolphin I")*

Under court order from the Ninth Circuit,[258] the United States imposed an embargo on tuna from Mexico and several other countries in 1990 for violating the MMPA.[259] Mexico brought a complaint before the GATT council, claiming that the MMPA was inconsistent with GATT principles.[260] The United States argued that Article 65 of the United Nations Law of the Sea Conventions ("UNCLOS") allowed countries to forbid or regulate the exploitation of dolphins more stringently than the Convention.[261] The GATT dispute panel ignored this argument, and decided the case strictly on GATT principles.[262]

The GATT panel ruled that the MMPA violated articles III and XI, and did not qualify as an exception under article XX.[263] In its analysis under article III, the GATT panel distinguished between product and process.[264] Article III allows for internal regulations that treat domestic and foreign products alike.[265] Although American tuna was subject to the same regulations as Mexican tuna, the panel said these regulations can relate only to the product itself, not the process by which it was caught.[266] Since the U.S. regulations and embargo were aimed at saving dolphins from tuna nets, and not restricting the importation of unhealthy tuna, the MMPA did not survive GATT scrutiny under Article III.[267]

The panel also found that the embargo violated article XI, which prohibits quantitative restrictions other than tariffs on imports.[268] By "arbitrarily" setting the foreign rates and limits

---

257 *Id.* § 1417(d).

258 *See* Earth Island Inst. v. Mosbacher, 929 F.2d 1449, 1452 (9th Cir. 1991) (affirming subsequent preliminary injunction).

259 Charnovitz, *supra* note 44, at 10570.

260 Miller & Croston, *supra* note 1, at 101.

261 *Id.*

262 *See generally* Tuna–Dolphin I, *supra* note 198, at 1598.

263 *Id.* at 1618, 1623.

264 *See id.* at 1617–18.

265 *See supra* note 21 and accompanying text.

266 Tuna–Dolphin I, *supra* note 198, at 1618.

267 *See id.* at 1617–18.

268 *See id.* at 1618.

on the incidental taking of dolphins at U.S. standards, the MMPA violated the quantitative restriction provision.[269] The United States argued that requiring Mexican standards to meet American standards was an internal regulation and a permissible "point of importation" restriction, but the GATT panel ruled that because it was aimed at the process by which the tuna were caught, and not the tuna itself, it was a prohibited indirect tax or regulation.[270]

Finally, the panel determined that the MMPA did not meet the exceptions listed in article XX(b) and (g),[271] which allow trade restrictions "necessary to protect human, animal or plant life or health" or "relating to the conservation of exhaustible natural resources."[272] The panel ruled that the article XX exceptions could not be applied for purposes outside the jurisdiction of the United States.[273]

Mexico won its GATT challenge, but chose not to have the General Council formally adopt the panel's findings, largely because of the upcoming North American Free Trade Agreement ("NAFTA") negotiations with the United States.[274] Unadopted reports have no legal status in the WTO, but they can be used for guidance in similar disputes in the future.[275] While Mexico and the United States decided to work out a bilateral solution to the tuna-dolphin issue,[276] other nations were waiting their turn to challenge the MMPA.

D. The Second WTO Challenge to a U.S. Tuna Embargo ("Tuna-Dolphin II")

In 1992, the European Economic Community ("EEC") and the Netherlands filed a complaint before the GATT, charging that the MMPA's authorization to place embargoes on intermediary nations violated GATT principles.[277] Specifically, they argued that these embargoes violated article XI's prohibition against quantitative restrictions other than tariffs, the embargoes were not an internal regulation within

---

269 *See id.*

270 *See id.* at 1602.

271 *Id.* at 1620–21.

272 *Supra* notes 73–75 and accompanying text.

273 *See* Tuna–Dolphin I, *supra* note 198, at 1619–21.

274 McGrath, *supra* note 197, at 441.

275 Berger, *supra* note 89, at 368.

276 McGrath, *supra* note 197, at 441.

277 Tuna–Dolphin II, *supra* note 198, at 839, 850.

article III, and that the embargoes did not qualify as exceptions under article XX.[278]

As in Tuna-Dolphin I, the GATT dispute panel ruled against the United States, determining that the embargoes against intermediary countries were inconsistent with articles III and XI.[279] Tuna-Dolphin II contradicted the panel's finding in the first dispute ruling that the United States can protect natural resources under article XX outside its jurisdiction.[280]

Despite the different analysis the MMPA was still found to be outside the article XX exceptions.[281] The Tuna-Dolphin II panel decided that the statute's objectives were to conserve an exhaustible natural resource, as required by article XX(g).[282] It also found, as noted above, that those resources could be located outside U.S. jurisdiction.[283] However, in considering whether the embargo was "related to" conservation, the panel concluded that this meant it must be "primarily aimed" at conservation, and that the embargo must be necessary to give the domestic regulations their intended effect.[284] The Tuna-Dolphin II panel wrote that

> both the primary and intermediary nation embargoes on tuna implemented by the United States were taken so as to force other countries to change their policies with respect to persons and things within their own jurisdiction, since the embargoes required such changes in order to have any effect on the conservation of dolphins. . . . The Panel concluded that measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be primarily aimed either at the conservation of an exhaustible natural resource, or at rendering effective restrictions on domestic production or consumption, in the meaning of Article XX(g).[285]

---

278 *See id.* at 850, 889.

279 *See id.* at 890.

280 *See id.* at 891–93.

281 *See id.* at 894, 898.

282 *See id.* at 891–93.

283 *See supra* note 280 and accompanying text.

284 *See* GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna (June 16, 1994), *reprinted in* 33 I.L.M. 839, 893 (1994) [hereinafter Tuna-Dolphin II].

285 *Id.* at 894.

Essentially, the intermediary embargoes failed scrutiny because in the WTO's estimation they were not directly aimed at conservation.[286] Although the Netherlands and the EEC cannot force a primary exporting country to meet U.S. fishing standards, intermediary nations will still be subject to the embargo if they cannot prove that the tuna was caught with dolphin-safe methods.[287] This time the panel's ruling went unadopted because the United States vetoed it under the old settlement dispute procedure that was in place before the establishment of the WTO.[288]

E. The International Dolphin Conservation Program Act

After the WTO's rejection of United States tuna embargoes, Congress amended the MMPA once again with the International Dolphin Conservation Program Act ("IDCPA").[289] The IDCPA is based on the La Jolla Agreement and the Declaration of Panama.[290]

After the Tuna-Dolphin I decision, representatives from the United States, Columbia, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Spain, Vanuatu, and Venezuela met in La Jolla, California in 1992 to negotiate a multilateral agreement to reduce dolphin deaths in the Eastern Tropical Pacific Ocean.[291] Those ten countries adopted the La Jolla Agreement,[292] which set dolphin mortality limits in purse seine fishing and pledged to reduce mortality levels below 5,000 dolphins per year by 1999.[293] Each vessel was required to have an on-board observer to verify those mortality limits.[294] After the established limits were reached, a vessel

---

286 *See id.*

287 *See id.*

288 H.R. Rep. No. 104–665, pt. 2, at 2 (1996).

289 International Dolphin Conservation Program Act, Pub. L. No. 105–42, 111 Stat. 1122 (1997) (codified at and amending scattered sections of 16 U.S.C.(Supp. IV 1998)) [hereinafter IDCPA].

290 *See* H.R. REP. NO. 104–665 at 1–3.

291 Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean (EPO), June 1992, 33 I.L.M. 936, 938, 940 (1994) [hereinafter La Jolla Agreement].

292 *Id.*

293 *Id.* at 938. The La Jolla Agreement seems to have helped reduce dolphin mortality in the Eastern Tropical Pacific Ocean. Mortality estimates for U.S. vessels dropped from 1,002 in 1991 to 115 in 1993, and kills by foreign ships fell from 26,290 to 3,486 during the same period. Buck, *supra* note 201, at Table 1.

294 La Jolla Agreement, *supra* note 291, at 939.

was prohibited from "setting on" dolphins for the rest of the year.[295] The potential for economic loss was a motive for fishermen to bribe observers or conceal dolphin deaths to extend their fishing season.[296]

After the La Jolla Agreement, Congress adopted the International Dolphin Conservation Act of 1992 ("IDCA")[297] to set dolphin mortality limits[298] and prohibit the importation of any tuna that was not dolphin-safe after June 1, 1994.[299] The IDCA also established a five-year moratorium from "setting on" dolphins,[300] participation in which would grant exporting countries an exemption from U.S. embargoes under the MMPA.[301] During the moratorium, exporting countries had to agree to on-board observers on their fishing vessels as well as reduce dolphin mortality in both 1992 and 1993.[302] Non-compliance with the moratorium would lead to a tuna embargo on the offending nation,[303] and failure to comply within sixty days would trigger a ban on forty percent of that country's tuna exports to the United States.[304] Because no country agreed to the moratorium, the embargoes remained in place.[305]

The United States and eleven other countries signed the Declaration of Panama in 1995, affirming the goals of the La Jolla Agreement.[306] Through this declaration, these twelve nations stated an intention to formalize the La Jolla Agreement, if the United States made certain changes in its laws, including: 1) lifting the primary and secondary embargoes against countries in compliance with the La Jolla Agreement and the Declaration of Panama; 2) allowing IATTC members access to the U.S. tuna market; and 3) amending

---

295 *Id.*

296 Miller & Croston, *supra* note 1, at 108–09.

297 International Dolphin Conservation Act, Pub. L. No. 102–523, 106 Stat. 3425 (1992) (codified in and amending scattered sections of 16 U.S.C.).

298 16 U.S.C. § 1416(a)(1) (Supp. IV 1998).

299 *Id.* § 1417(a).

300 *Id.* § 1412(a).

301 *See id.* § 1415(a)(1).

302 *Id.* § 1415(a)(2)(4).

303 *See id.* § 1415(b)(1).

304 *See id.* § 1415(b)(2)(A)(B).

305 Hampton, *supra* note 199, at 129.

306 Declaration of Panama, Oct. 4, 1995, *reprinted in* 143 CONG. REC. S397 (daily ed. Jan. 21, 1997).

the dolphin-safe tuna label to include all tuna caught without observed dolphin mortality.[307]

Congress' enactment of the IDCPA formally adopted the Declaration of Panama into U.S. law.[308] The act is aimed at reducing marine mammal deaths through international research and cooperation,[309] conserving and managing marine mammals in the Eastern Tropical Pacific Ocean,[310] prohibiting embargoes on countries in compliance with the IDCPA and the Declaration of Panama,[311] and opening the U.S. tuna market to all fish caught in compliance with the IDCPA.[312]

The IDCPA also amended the Dolphin Protection Consumer Information Act of 1990, redefining what made tuna "dolphin-safe."[313] Outraged environmentalists have dubbed the Declaration of Panama and the IDCPA the "Dolphin Death Bill[s]."[314] Under the IDCPA, "dolphin-safe" tuna now applies to tuna caught in the Eastern Tropical Pacific Ocean with purse seining methods if the vessel is too small to "set on" or encircle dolphins with the nets.[315] Tuna is also "dolphin-safe" if both the captain and an observer are able to verify that no dolphins were killed or seriously injured by nets during the entire fishing trip.[316]

VII. WOULD A FUTURE MMPA EMBARGO SURVIVE A WTO CHALLENGE?

As noted above, the Appellate Body report in the shrimp-turtle dispute reversed the reasoning relied on in both the Tuna-Dolphin I and Tuna-Dolphin II panel reports, namely, that a unilateral requirement of a foreign nation's adoption of environmental policies and practices could fall within the article XX exceptions against trade restrictions, if implemented on a more flexible basis than the shrimp

307 *See id.* at S398, Annex I; Hampton, *supra* note 199, at 139.

308 International Dolphin Conservation Program Act, 16 U.S.C. §1361 (Supp. IV 1998) [hereinafter IDCPA].

309 *See id.* § 1413.

310 *See id.* § 1361.

311 *See id.* § 1415(a).

312 *See id.*

313 *See id.* § 1385(d)(1).

314 Miller & Croston, *supra* note 1, at 110.

315 *See* IDCPA, *supra* note 308, § 1385(d)(2)(A).

316 *See id.* § 1385(d)(2)(B)(i), (h)(1).

embargo under section 609 of the Endangered Species Act.[317] This acknowledgement of the U.S. position in recent trade disputes over natural resources is a "milestone breakthrough"[318] and "represents a crucial move towards reconciling the conflict between free trade and environmental protection."[319]

For a future environmental trade embargo to survive a WTO challenge, it would at least have to be free of the five problems identified by the WTO Appellate Body's report on the shrimp-turtle dispute. First, although a measure designed to influence a nation's conservation policies can be permissible under GATT, that measure must not be so inflexible in implementation as to require the nation to enact a comprehensive regulatory program.[320] The WTO Appellate Body's report on the shrimp-turtle controversy faulted the implementation of section 609 under the 1996 Department of State guidelines for its inflexibility in requiring adoption of a comprehensive regulatory program without considering the different conditions in member countries.[321] However, in its revised 1999 guidelines, the State Department will now consider information submitted by any shrimp-exporting member country that demonstrates that the technology it uses does not adversely affect sea turtles.[322] As a member of the State Department has said, "Any information a country can offer to say its approach, not using TEDs, is comparable, we will consider. There is nothing that we know of now that is comparable. But we will look carefully at any such information."[323] If the Department of Commerce adopts a similarly flexible approach to Pelly certification under the MMPA and its 1997 amendments, that might satisfy the WTO's concerns that the United States would unilaterally require the adoption of a rigid, comprehensive conservation program aimed at saving dolphins from tuna nets.

---

317 *See supra* notes 258–62 and accompanying text.

318 Berger, *supra* note 89, at 369–70.

319 *Id.* at 367.

320 *See supra* notes 88–89, 160 and accompanying text.

321 *See supra* Part III.

322 Notice of Proposed Revisions to Guidelines for the Implementation of Section 609 of Public Law 101–162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 14,481 (Mar. 25, 1999).

323 Berger, *supra* note 89, at 373–74 (quoting David Balton, Director, Office of Marine Conservation, U.S. Department of State).

Also, the IDCPA offers more of a "multilateral approach to dolphin protection" than did the MMPA as enacted in 1972.[324] Although the Secretary of Commerce still has the power to unilaterally reinstate an embargo on any country not in compliance with the Declaration of Panama and the IDCPA, the current statute calls for multilateral bargaining between the United States and an offending country encouraging such negotiations to acknowledge the environmental objectives of the MMPA.[325] Additionally, the fact that the IDCPA is founded on the Declaration of Panama,[326] itself a multilateral agreement, might assuage the WTO of its concerns over any seemingly unilateral action on the part of the United States.[327]

The second hurdle to WTO acceptance of another tuna embargo would be limiting the breadth of the embargo.[328] The WTO Appellate Body criticized the United States approach to the embargo, even though the United States had originally wanted to enforce the ban on a shipment-by-shipment basis.[329] Again, however, a multilateral approach to solving the problem of dolphin conservation might save the United States in a WTO dispute hearing.[330] The WTO Appellate Body did not clearly hold a nationwide embargo to be inconsistent with GATT.[331] Instead, the WTO focused a combination of the nationwide approach with the imposition of an inflexible, comprehensive regulatory program on all targeted nations, without taking into account the different conditions that

---

324 McGrath, *supra* note 197, at 454.

325 International Dolphin Conservation Program Act, 16 U.S.C. §1412 (Supp. IV 1998) [hereinafter IDCPA].

326 *See supra* note 306 and accompanying text.

327 *See supra* note 95 and accompanying text.

328 Berger, *supra* note 89, at 367, 373–77.

329 *See* Earth Island Inst. v. Albright, 147 F.3d 1352, 1355 (Fed. Cir. 1998). The State Department's shipment-by-shipment approach was challenged before the CIT, which ruled that the U.S. must adopt a nationwide approach for the embargo. *Id.* at 1354. That ruling was vacated for procedural reasons. *Id.* at 1358. The State Department reaffirmed its shipment-by-shipment focus before the WTO Appellate Body released its report. Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 63 Fed. Reg. 46,094 (Aug. 28, 1998). A subsequent suit in the CIT gained a ruling declaring that the embargoes must be nationwide. Earth Island Inst. v. Daley, 48 F. Supp. 2d 1064 (Ct. Int'l Trade 1999).

330 *See* WTO Appellate Report, *supra* note 7, at 166–67.

331 *See* Berger, *supra* note 89, at 376.

might exist in those countries.[332] If the United States fully utilizes the multilateral bargaining provisions in the IDCPA, and the Department of Commerce adopts flexible certification guidelines like the model provided in the 1999 State Department guidelines, a WTO panel might approve a nationwide tuna embargo.[333]

A third problem in the eyes of the WTO would be a failure to attempt serious multilateral negotiations to address an offending country's non-compliance with the Declaration of Panama and the IDCPA.[334] The problem in the shrimp-turtle dispute was that section 609 required other Member nations to adopt "essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within [the United States] *without* taking into account different conditions which may occur in the territories of those other Members." [335] There, the State Department failed to meet a deadline for negotiations imposed by the CIT.[336] The serious approach to multilateral bargaining taken by the United States under the IDCPA and the MMPA might help a future tuna embargo clear any WTO hurdles.

The fourth problem any tuna embargo would have to avoid is disparate treatment of offending countries.[337] Such a problem occurred in the shrimp-turtle dispute because of the United States failure to negotiate with all countries affected by the shrimp ban, the differing deadlines given to affected countries to come into compliance with the law, and the varying levels of technology transfer efforts directed at different countries.[338] However, those differing deadlines were a direct result of CIT imposed court orders that were challenged by the United States.[339] To avoid unjustifiable discrimination between offending nations, as well as the three problems outlined above, the United States will have to negotiate with all countries that are not in compliance with the Declaration of Panama and the IDCPA. However, dealing

---

332 *See* WTO Appellate Report, *supra* note 7, at 166–67; *see also* Berger, *supra* note 89, at 376.

333 *See* Berger, *supra* note 89, at 410–11.

334 *Supra* note 95 and accompanying text.

335 WTO Appellate Report, *supra* note 7, at 166–67.

336 *See* WTO Panel Report, *supra* note 47, at 854.

337 *Supra* notes 96–97 and accompanying text.

338 *Supra* notes 47–80 and accompanying text.

339 *Supra* notes 65–67 and accompanying text.

with only one offending country (Mexico, for example) does not invite disparate treatment among nations.[340]

The final problem that concerned the WTO Appellate Body was the lack of due process offered by the U.S. certification program under section 609.[341] The new 1999 State Department guidelines on certification under section 609 solved this problem by formalizing the certification process, with:

> specific deadlines, notice to foreign countries and full opportunity for those nations to be heard. There will be interim decisions and countries not happy with those decisions can seek review. . . . The intention is to create a more transparent and predictable process for reviewing foreign programs and for making decisions on certification and other related matters.[342]

If the Department of Commerce adopts these due process procedures for its own Pelly certifications, it can sidestep this problem in a future WTO challenge.

VIII. CONCLUSION

The GATT and WTO have often ruled against environmental trade measures, determining they are impermissible barriers to trade.[343] These decisions have highlighted the conflict between trade and the environment, and they have drawn much criticism from scholars and environmental groups for "prefer[ring] free trade to an individual country's right to protect the global environment."[344] The WTO rulings in Tuna-Dolphin I and Tuna-Dolphin II signaled that unilateral trade restrictions based on environmental conservation statutes or agreements are inconsistent with the principles of GATT, and would not survive scrutiny.[345]

However, the WTO Appellate Body report on the United States' shrimp ban seems to have opened the door regarding the viability of such measures. There, the body ruled that a

---

340 *Supra* note 194 and accompanying text.

341 *Supra* notes 98–101 and accompanying text.

342 Berger, *supra* note 89, at 379 (quoting David Balton, Director, Office of Marine Conservation, U.S. Department of State).

343 *See* Miller & Croston, *supra* note 1, at 76.

344 McGrath, *supra* note 197, at 458.

345 *See generally* Tuna–Dolphin I, *supra* note 198; *see also* Tuna-Dolphin II, *supra* note 284.

country's unilateral attempts to conserve exhaustible natural resources and influence the conservation policies of foreign nations might fall within the exceptions in article XX. But it noted five serious concerns regarding the implementation of trade embargoes for such purposes: 1) an inflexible requirement for offending countries to adopt a comprehensive regulatory program; 2) the breadth of the embargo; 3) failure to attempt serious multilateral negotiations; 4) unjustifiable discrimination between countries under embargoes; and 5) lack of due process in the Pelly certification procedures.

A future embargo on tuna from countries using purse seine nets in the Eastern Tropical Pacific Ocean in violation of the Declaration of Panama and the IDCPA will almost definitely draw another WTO challenge, but attention paid to the lessons learned from the shrimp-turtle dispute might gain WTO approval of the ban. The key to solving the first four problems will be multilateral negotiations with the offending nations. The MMPA, as amended in 1997 by the IDCPA, allows for bargaining with countries not in compliance with the statute. In conjunction with the adoption of more flexible Pelly certification guidelines, like those enacted by the State Department in 1999, serious negotiations could induce the WTO to overlook requirements that force foreign nations to adopt dolphin-conservation standards comparable to U.S. standards. It might also help gain WTO approval of a nationwide embargo, rather than a ban on a shipment-by-shipment basis. An evenhanded approach to negotiating between countries, along with attention paid to any applicable deadlines, might also help avoid charges of unjustifiable discrimination in the implementation of an embargo.

Scott C. Owen[*]

∗ This Comment received the Clark Thomas Writing Award.