



Summer 1995

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Recommended Citation

Diana Hurwitz, *Fishing for Compromises through NAFTA and Environmental Dispute-Settlement: The Tuna-Dolphin Controversy*, 35 Nat. Resources J. 501 (1995).

Available at: <https://digitalrepository.unm.edu/nrj/vol35/iss3/4>

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Fishing for Compromises through NAFTA and Environmental Dispute-Settlement: The Tuna-Dolphin Controversy

ABSTRACT

The conflict between tuna fishing practices and dolphin protection epitomizes the antagonism between environmentalists and free trade advocates. The history of the tuna-dolphin conflict and the different perspectives of the parties show that traditional dispute-settlement procedures, particularly those of the General Agreement on Tariffs and Trade (GATT), are unacceptable for solving complex international disputes. This article examines the potential of the North American Free Trade Agreement (NAFTA) and its Supplemental Agreements to resolve the tuna-dolphin conflict. The conclusion is that the NAFTA Supplemental Agreements create a framework for solution by bringing all of the international actors together through a mutually agreed-upon commitment to environmental cooperation. Thus, NAFTA can institutionalize procedures for the resolution of trade and environmental disputes and be a model for structuring multilateral trade agreements.

INTRODUCTION

A quick trip to the tuna aisle of any supermarket in the United States will leave consumers face to face with an array of brand-name labels that share one characteristic: stamped on each is a dolphin wearing a huge grin and sporting a brightly-colored life preserver on which the words "dolphin-safe" are inscribed. And yet, these simple labels mask the complexity of an underlying controversy. They reflect the "tuna-dolphin conflict" that has become a salient issue in the ongoing debate between environmental protection and international trade.¹

This type of debate has become commonplace in recent years. Free trade advocates feel that allowing the market to set prices through the opening of national economies and unhindered trade will help strengthen the economies of developing countries. They argue that

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1. Peter Behr, *Environmentalists Find NAFTA Is No Easy Call: National Groups Remain Sharply Divided*, WASH. POST, Aug. 24, 1993, at C1.

environmental degradation is linked to poverty; thus, as developing countries get richer through free trade, the world environment will improve. On the other side of the debate, environmentalists advocate the use of trade restrictions to induce enforcement of environmental protection laws.

Market liberalization has been pursued by free traders primarily through the General Agreement on Tariffs and Trade (GATT),² which attempts to diminish protectionist trade barriers throughout the world.³ The tuna-dolphin conflict peaked in the GATT international trade dispute-resolution panel in 1991. However, despite a formal panel ruling on this issue, the distinction between environmental protection laws and protectionist trade barriers is still blurred:

Throughout the industrialized world, the environment is no longer perceived as merely a scientific and technical issue but as one that is intertwined with other central issues in world politics: the future of North-South relations, the international system of resource production and use, the liberalization of world trade, and even East-West relations and the meaning of national and international security issues.⁴

Thus, understanding the tuna-dolphin conflict and finally resolving this ongoing controversy could facilitate the creation of a framework for the eventual harmonization of trade and environment issues. However, the tuna-dolphin conflict is a complicated matter with a long history of disagreement.

On September 7, 1990, the U.S. government implemented an import embargo on tuna caught by the Mexican tuna-fishing fleet. According to this court order, the Mexican vessels were not meeting the dolphin-mortality quotas established by the U.S. Marine Mammal Protection Act of 1972, as amended.⁵ Imports of tuna from Panama, Ecuador, Venezuela, and Vanuatu were also terminated.⁶ Sixty days after the original embargoes, the U.S. government followed with a secondary ban on imports of tuna from 20 nations that import Mexican tuna as a raw material, package it, and export it to the United States.⁷ As a result

2. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

3. ROBERT H. GIRLING, *MULTINATIONAL INSTITUTIONS AND THE THIRD WORLD: MANAGEMENT, DEBT, AND TRADE CONFLICTS IN THE INTERNATIONAL ECONOMIC ORDER* 62-69 (1985).

4. GARETH PORTER & JANET W. BROWN, *GLOBAL ENVIRONMENTAL POLITICS* 1 (1991).

5. Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. §§ 1361-1407 (1988 & Supp. 1995)).

6. This article concentrates on U.S. embargoes on imports of Mexican tuna.

7. David C. Scott, *U.S. Tuna Ban May Snag Trade Talks With Mexico: Mexico Says U.S. Environmental Rules Violate Principle of Open Markets*, CHRISTIAN SCIENCE MONITOR, Nov. 7,

of these embargoes, Mexico has been effectively shut out of one of the largest tuna markets in the world.⁸

The United States and Mexico share a 2,000-mile border over which thousands of people and products flow daily. This stretch of land is the only area of the world in which an advanced industrial country shares an extensive border with a less developed country. Given the cultural and historical differences between these two countries, not to mention clear asymmetries of power, the possibilities for conflict are great. However, the United States and Mexico also share strong and increasing environmental, social, and political ties. Most notably, the economies of these two nations and Canada have recently been cemented together by the North American Free Trade Agreement (NAFTA),⁹ which took effect on January 1, 1994. This agreement created the largest trading block in the world—with a \$6 trillion market.¹⁰

Thus, the tuna-dolphin controversy has created animosity between the United States and Mexico at a time when the increasing interdependence of these bordering nations necessitates multilateral collaboration on mutually important policy issues. Beyond its bilateral importance:

rooted in the tuna-dolphin controversy are the major philosophical and environmental questions of the day. Preservation versus management; the rights of human beings versus the rights of other creatures; the needs of many versus the demands of the few; feeding the hungry versus conserving natural resources; and one nation's power position versus another's attempts to rise from poverty.¹¹

A review of the history of this conflict and the different perspectives on this issue reveals that traditional dispute-settlement procedures have been inadequate in resolving this disagreement and therefore must be improved. In particular, the GATT conflict-resolution panel has failed to provide an adequate solution. The embargoes and the animosity among the various parties in this conflict act as a thorn in the side of policy makers seeking collaboration today. We must look elsewhere for a remedy.

1990, at 6.

8. In 1989, Mexico exported 17.1% of its tuna catch to the United States; one year after the embargo was implemented, this figure fell to zero. *Id.*

9. North American Free Trade Agreement, U.S.-Canada-Mexico, Dec. 17, 1992 (*entered into force* Jan. 1, 1994).

10. Juanita Darling et al., *Can Mexico Clean Up Its Act?*, L. A. TIMES, Nov. 17, 1991, at A1.

11. Saúl Alvarez-Borrego, *The Tuna and Dolphin Controversy*, 31 UC MEXUS NEWS 8, 13 (1993).

NAFTA provides two potential avenues for solving this dilemma: a framework for dispute-settlement and a trilateral Commission on Environmental Cooperation (CEC). However, the wording of the Supplemental Agreements to NAFTA creates substantial obstacles to bringing the tuna-dolphin issue to the dispute-resolution panel. Thus, by bringing together the various players in international disputes under the cloak of a mutually agreed-upon commitment to environmental cooperation, the CEC could provide the better means for resolution of the tuna-dolphin conflict.

Economic integration among countries at divergent levels of economic and political development inevitably produces the potential for conflict on a variety of issues. However, a solution that can effectively bring an end to the unilateral U.S. embargoes against Mexico while also diminishing Mexican dolphin-mortality rates to zero is both vitally necessary and within our reach. If properly utilized, NAFTA can act as a major stepping-stone in institutionalizing procedures for the resolution of current trade and environmental disputes. Moreover, in addition to ending the bilateral tuna-dolphin conflict, NAFTA can also act as a model for structuring future multilateral trade agreements in an environmentally sustainable manner.

A RECENT HISTORY OF THE TUNA-DOLPHIN CONTROVERSY

The Marine Mammal Protection Act of 1972: Congressional Amendments and Judicial Battles

The eastern tropical Pacific (ETP) is an important tuna-fishing sector ranging from Baja California to Peru and from the coast to 150 degrees west in latitude. In the past, the ETP has been one of the most productive tuna-fishing bodies in the world.¹² Fishermen have traditionally used a technique called "purse seining" to catch yellowfin tuna in this area. The tuna is then canned and sold as light tuna in supermarkets.

Purse seine nets are approximately one mile long and 600 feet deep. The most effective means of catching sexually mature yellowfin tuna with a purse seine net is through the "dolphin-fishing" technique, which capitalizes on the fact that herds of dolphins in this region tend to swim above schools of yellowfin tuna. Thus, in order to maximize the tuna catch, fishermen spot the dolphins as they come to the surface to breathe and set the purse seine nets around the dolphin herds. In the

12. *Id.* at 8.

process of gathering tuna in this fashion, the nets snare dolphins by their snouts or flippers and they drown.¹³ The dead dolphins are not sold or eaten by humans; they are thrown over the side of the fishing vessels as waste.¹⁴

Years of domestic legislation, judicial battle, and international confrontation have contributed to the drastic decline in the incidental killing of dolphins from tuna-fishing. The Marine Mammal Protection Act (MMPA) of 1972 was created to protect "certain species and population stocks of marine mammals [that] are, or may be, in danger of extinction or depletion as a result of man's activities."¹⁵ This law specifically aims for a zero mortality rate of dolphins, which have been targeted as a mammal in need of protection.¹⁶ Early on, MMPA proponents responded to U.S. government inaction in enforcing this law by lobbying for legislative amendments creating stricter regulations. When legislative amendments failed to produce enforcement, environmentalists took the matter to the courts. In recent years, implementation of the MMPA has played a major role in lowering domestic and international dolphin-mortality. While tuna-fishing killed more than 500,000 dolphins in the ETP 1960,¹⁷ the estimated dolphin-mortality for 1993 is less than 10,000, representing a decrease of 98 percent.¹⁸

While the MMPA was amended several times during the 1980s, two fundamental changes in this law were passed in 1984 and 1988. Congress drafted the 1984 amendment in response to the recognition that foreign tuna-fishing by Mexico, Venezuela, Vanuatu, Ecuador, and Panama was causing the majority of dolphin deaths. In particular, Congress noted that these nations did not implement any national or international regulation programs to protect dolphins, and that their boats contained fewer "observers" than did U.S. vessels.¹⁹ The 1984 amendment inserted "comparability provisions" in the MMPA, stating that nations desiring to export tuna to the United States had to implement

13. *Review of the Administration's Dolphin Protection Proposal and Discussion of Options Available to Help Reduce Dolphin Mortality: Hearing Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the Committee on Merchant Marine and Fisheries, House of Representatives, H.R. REP. 5417, 102d Cong., 2d Sess. 113 (1992), reprinted in 1992 U.S.C.C.A.N. 2919 [hereinafter Hearing].*

14. WHERE HAVE ALL THE DOLPHINS GONE? (The Video Project 1990).

15. 16 U.S.C. § 1361 (1972).

16. *Id.*

17. NANCY BOCKSTAEEL & IVAR STRAND, FREE TRADE AND GLOBAL RESOURCES: THE CASE OF PROTECTED MARINE SPECIES 8 (Inter-American Development Bank and United Nations Economic Commission for Latin America and the Caribbean Working Paper No. 49, 1993).

18. Jan Gilbreath, *Fish or Foul?*, 4.6 HEMISFILE 11 (1993).

19. Observers are typically biologists who monitor the techniques used to catch tuna and count the number of dolphins killed per shoal of tuna netted.

dolphin-conservation procedures and maintain low dolphin-mortality rates comparable to the United States. The Commerce Department of the United States would decide which nations met these criteria.²⁰

By 1988, little progress had been made in the implementation of the MMPA-mandated embargoes. Congress reacted by stripping the Commerce Department of its authority to decide whether nations were meeting the comparability provisions and establishing specific dolphin-mortality quotas for foreign fleets. The U.S. dolphin-mortality quota remained 20,500 per year as it had been since 1980,²¹ but in 1989, the U.S. government stipulated that nations wishing to export tuna to the United States could kill no more than twice as many dolphins as the U.S. tuna fleet. As of 1990, the quota was set at 1.25 times the number of dolphins killed by U.S. vessels for the same year.²² In addition, foreign boats were required to abide by four restrictions: the discontinuance of "sundown sets," which typically kill many dolphins; the termination of encircling dolphins; the assurance that an Inter-American Tropical Tuna Commission (IATTC) inspector would be present on all tuna vessels in order to monitor the number of dolphins killed; and the termination of the use of explosives to herd dolphins during sets.²³

Yet, despite the existence of such formal legislation, no penalties were imposed on nations violating the maximum dolphin-mortality limits set by the MMPA. Since the government was clearly not going to enforce its own legislation, a San Francisco-based environmental group decided that it would. In 1990, the Earth Island Institute, which had been advocating zero mortality rates for dolphins for years, sued the U.S. government for failing to enforce the MMPA.²⁴ The Earth Island Institute won the case, and on September 7, 1990, tuna-import embargoes were first imposed against Mexico, Panama, Venezuela, Ecuador, and Vanuatu. Within a week of imposing sanctions, however, the Commerce Department lifted the bans on all of these countries except Panama, based on estimated dolphin-mortality statistics for the first six months of the year. San Francisco District Court Judge Thelton Henderson then ruled that figures for the full year must be utilized to establish whether a nation was in violation of legislated quotas.²⁵ He reinstated the embargoes to be retroactive to October 12, 1990.²⁶

20. David Phillips, *Dolphins and GATT*, in *THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER* 134 (Ralph Nader ed., 1993).

21. *Id.*

22. *Congress Passes Historic Dolphin-Protection Law*, 8.1 *EARTH ISLAND J.* 8 (1993).

23. Hearing, *supra* note 13, at 137.

24. *Earth Island Institute v. Mosbacher*, 746 F. Supp. 964 (N.D. Cal. 1990).

25. 746 F. Supp. at 974.

26. Scott, *supra* note 7, at 6.

The U.S. government, displeased with Judge Henderson's ruling, appealed the case to the Ninth Circuit Court of Appeals, which ruled unanimously that the tuna-import embargoes were required by law.²⁷ Then, sixty days after the original embargoes were reinstated, a secondary ban on tuna imports from countries buying Mexican or any "dolphin unsafe" tuna and re-exporting it to the United States barred the import of tuna from more than twenty additional countries.²⁸ If there had been any doubt, it was now clear that Mexican tuna would not reach the U.S. market by any means.

The GATT Panel Decision

On January 25, 1991, the Mexican government challenged the legality of the MMPA through the GATT dispute-resolution panel.²⁹ GATT serves as the primary international trade agreement in existence today, in which both the United States (1948) and Mexico (1986) are members. While its primary focus is on facilitating trade liberalization among nations, the GATT also contains a dispute-settlement panel to resolve international trade disagreements.³⁰

On August 16, 1991, the GATT panel ruled in favor of Mexico, while specifically allowing the United States to use voluntary labeling for "dolphin-friendly" tuna, as long as it was applied evenly to imports and American-caught tuna.³¹ "Dolphin-safe" or "dolphin-friendly" tuna, as defined by the U.S. Dolphin Protection Consumer Information Act,³² includes any tuna not harvested by using purse seine nets and tuna not caught with high-seas drift nets.³³

The GATT panel's decision rested on many criteria, but the two most controversial and fundamental principles invoked were: Imported products must be treated in a manner that is no less favorable than that of domestic products, and the method of production or "production process" cannot be taken into account in determining equal treatment

27. *Earth Island Institute v. Mosbacher*, 929 F.2d 1449 (9th Cir. 1991); see also Phillips, *supra* note 20, at 134.

28. Scott, *supra* note 7, at 6.

29. General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (Aug. 16, 1991) [hereinafter Panel Report]; see also Phillips, *supra* note 20, at 135.

30. Barbara Stallings, *International Influence on Economic Policy: Debt, Stabilization, and Structural Reform*, in *THE POLITICS OF ECONOMIC ADJUSTMENT* 80 (Stephan Haggard & Robert R. Kaufman eds., 1992).

31. Panel Report, *supra* note 29, at 1622; see also Phillips, *supra* note 20, at 136.

32. 16 U.S.C. § 1385 (Supp. 1995).

33. BOCKSTAEEL & STRAND, *supra* note 17, at 35.

under GATT regulations.³⁴ In addition, subsections (b) and (g) of Article XX of GATT were ruled not to apply to this situation, which effectively meant that the protection of animal life or the conservation of natural resources are justifiable trade barriers only when they occur within a state's own borders.³⁵

Despite this favorable outcome, former President Salinas de Gortari of Mexico did not pursue the implementation of the GATT ruling and, to date, no further GATT action has been taken on this decision.³⁶ It appears that Salinas did not want environmental issues, such as the tuna-dolphin panel ruling, obstructing the prospect of a \$6 trillion North American market through NAFTA. As Juanita Darling, a reporter for the *Los Angeles Times*, wrote at the time, "Salinas sees a trade pact as his best weapon for fighting Mexico's nagging inflation rate, widespread unemployment, poverty, and mounting trade imbalance."³⁷ Given the amount of political collateral invested in NAFTA by the Mexicans, failure to secure this agreement would have significantly damaged Salinas' personal reputation, not to mention the harsh repercussions that a "no-NAFTA" outcome would have had for the Institutional Revolutionary Party (PRI) presidential candidate in the 1994 election. Thus, while Salinas might have preferred U.S. markets to be opened to Mexican tuna, the adverse consequences of forcing the United States to retract the embargoes might not have been worth the fight.

To lessen tension after the GATT ruling, Salinas unveiled a ten-point program on September 24, 1991, specifically designed to protect dolphins. This program represented an advance in two respects. First, international inspectors would be present on every tuna vessel of the Mexican fleet, as contrasted with previous regulations allowing them on only one-third of the boats. In addition, Salinas set aside \$1 million for research into dolphin-safe fishing practices.³⁸ While there have been no high technology breakthroughs in stopping dolphin deaths from

34. Panel Report, *supra* note 29, at 1617.

35. *Id.* at 1620, 1621; see also Matthew H. Hurlock, Note, *The GATT, U.S. Law and the Environment: A Proposal to Amend the GATT in Light of the Tuna/Dolphin Decision*, 92 COLUMBIA L. REV. 2098, 2125 (1992).

36. There was, however, a GATT panel ruling in May, 1994, on the secondary tuna embargoes that the United States imposed on nations that import "dolphin-unsafe tuna" and re-export it to the United States. General Agreement on Tariffs and Trade: Dispute Panel Settlement Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839 (June 1994). In this decision, the GATT ruled in favor of the European Economic Community by stating that the U.S. secondary embargoes are a violation of GATT. Donald M. Goldberg, *GATT Tuna-Dolphin II: Environmental Protection Continues to Clash with Free Trade*, 2 CENTER FOR INT'L ENVTL. L. BRIEF 1 (1994).

37. Darling et al., *supra* note 10, at A1.

38. *Id.* at D6.

tuna-fishing since the drafting of this proposal, the mere presence of inspectors has undoubtedly contributed to the decreasing Mexican dolphin-mortality rates by encouraging Mexican fisherman to be more careful about killing dolphins.

The U.S. Congress followed these Mexican efforts by wielding a major blow to any hopes that the tuna embargoes might soon be lifted. To further protect the dolphins, on October 8, 1992, Congress passed the International Dolphin Conservation Act,³⁹ which amended the MMPA. This unilateral law strengthened regulations on both domestic and foreign tuna fleets that want to sell tuna in the United States. Under this law, dolphin kills by U.S. fleets were not to exceed 800 total for the period January 1, 1993 to March 1, 1994, while the quota thereafter was to be zero. Regarding foreign fleets, this legislation authorized the Secretary of State to negotiate a global moratorium on the setting of tuna nets on dolphins:

[The law] imposes strict non-discretionary embargoes and sanctions against countries failing to abide by the global moratorium. These will include fish product sanctions that, for example, could reach \$100 million per year if Mexico pledges to enact a moratorium, but then fails to abide by its pledge.⁴⁰

As of May 1994, Mexico had not pledged to participate in this global moratorium.⁴¹

Given the sharp drop in the number of dolphin deaths caused by Mexican tuna harvesters over the last decade, it is likely that the quota-based embargoes on Mexican tuna would have been lifted. However, the International Dolphin Conservation Act squelches the possibility of ending the bans. On March 1, 1994, the moratorium-based embargoes of Mexican tuna went into effect. Thus, it appears that the conflict and animosity surrounding the tuna-dolphin controversy will continue until an adequate dispute-resolution apparatus is established and implemented.

DIVERGENT PERSPECTIVES

The perspectives of the primary actors involved in this dispute are quite disparate, and can be broadly categorized under the rubric of

39. International Dolphin Conservation Act of 1992, Pub. L. No. 102-523, 106 Stat. 3425 (codified at 16 U.S.C. §§ 1411-17 (Supp. 1995)).

40. *Congress Passes Historic Dolphin-Protection Law*, *supra* note 22, at 8.

41. Carlos R. Martinez, *Mexico's Tuna Fishing Policy Defended*, L.A. TIMES, Nov. 22, 1992, at D5.

two distinct—and polarized—groups. On one side of the fence, "staunch" U.S. environmental groups, the U.S. Congress, and U.S. cannery corporations have supported continued embargoes. In the opposing corner, the Bush Administration, moderate U.S. environmental activists, and the Mexican government and tuna fishermen have opposed the embargoes.⁴² While the views regarding the embargoes are diametrically opposed, one major area of agreement exists: all of the various players in this conflict find the GATT panel decision to be an inadequate resolution of the dispute.

Group A: Save the Dolphins at Any Cost

Pro-Embargo Environmentalists

Staunch environmental groups, such as the Earth Island Institute, believe that bans on Mexican tuna should continue until Mexico meets the requirements of the International Dolphin Conservation Act. They defend embargoes as a right of the United States "to preserve and conserve wildlife wherever it is located, with respect to any item, product or resource that enters into the United States."⁴³ David Phillips, director of Earth Island Institute, explains this perspective by stating that "it is the responsibility of the United States to make sure that our markets do not dictate the destruction of the planet."⁴⁴

Curiously, however, despite this activism among U.S. environmental groups, their analogue across the border—the Mexican environmental non-governmental organizations (ENGOS)—have remained conspicuously silent during the tuna-dolphin debate. There are three main reasons for this inaction and lack of transnational alliance. First, the 1988 presidential elections left Mexican environmental organizations extremely fragmented, with some supporting the opposition Party of the Democratic Revolution (PRD) candidate, while others favored the

42. As with several other environmental issues, the Clinton-Gore Administration has taken a low profile approach to the tuna-dolphin controversy. No public statements worthy of note have been made by Vice President Albert Gore on the tuna-dolphin conflict. Many predicted that Gore would take an active pro-environment stand on issues of trade and environmental conflicts once elected, but, surprisingly, Gore has chosen to pursue other issues with more vehemence. Interview with William Reilly, 1994 Payne Lecturer, Stanford University, in Palo Alto, CA (May 10, 1994).

43. Judge R. Kenton Musgrave, Address at the *North America Forum Lecture Series, NAFTA and the Environment: The Tuna-Dolphin Conflict* at Stanford University (Apr. 5, 1994). See also Judge R. Kenton Musgrave, *The Gatt-Tuna Dolphin Dispute: An Update*, 33 NAT. RESOURCES J. 957 (1993).

44. David Phillips, Address at the *North America Forum Lecture Series, NAFTA and the Environment: The Tuna-Dolphin Conflict* at Stanford University (Apr. 5, 1994).

government's PRI candidate.⁴⁵ Moreover, after Salinas was elected, some authors suggested that "critical ENGOs were intentionally weakened by the PRI government through the use of a number of strategies of control."⁴⁶ Thus, even those groups that supported the embargoes did not have the power to fight the opposition of the Salinas government and side with U.S. ENGOs.

Second, some believe that U.S. and Mexican ENGOs have experienced a "fall out" in recent years. According to Alberto Székely, Mexican representative to the International Law Commission, Mexican ENGOs have declined to side with their U.S. counterparts because of the "incredible discrepancy of interests" between the two, especially throughout the NAFTA negotiations. In his view, the U.S. ENGOs are more concerned with U.S. environmental protection and border issues than with environmental problems within Mexico. Mexican ENGOs, on the other hand, are worried about the environmental future of Mexico as a whole, and the possibility of their nation becoming one huge maquiladora.⁴⁷

The third, and perhaps most compelling, explanation for inaction is that Mexican ENGOs do not want to appear to be siding with U.S. organizations on this question, which touches upon sensitive issues of sovereignty. Historically, Mexicans have been concerned about the United States overstepping its territorial boundaries, and infringing on the rights of Mexicans to govern themselves and protect their own interests. Thus, to paraphrase Székely, if there is any issue in which public sentiment will be aroused in support of the Mexican government, it is one such as the tuna-dolphin conflict, which Mexicans perceive as a threat to their

45. Maria-Pilar Garcia-Guadilla, *Identity, Strategy and Symbolic Effectiveness: The Venezuelan Environmental Movement*, 12:4-7 INT'L J. SOC. & SOC. POL'Y 53 (1992).

46. JOLLE DEMMERS & BARBARA HOGENBOOM, POPULAR ORGANIZATION AND PARTY DOMINANCE: THE POLITICAL ROLE OF ENVIRONMENTAL NGOS IN MEXICO 69 (1992).

47. Alberto Székely, Address at the *North America Forum Lecture Series, NAFTA and the Environment: The Tuna-Dolphin Conflict* at Stanford University (Apr. 5, 1994). Maquiladoras are industrial plants located in Mexico that can import components into Mexico duty-free, assemble these components, and re-export the final product to the United States where duties are levied only on the value added by operations performed in Mexico. Székely's view is obviously very rigid. Today, many U.S. ENGOs, such as Greenpeace, have established bases in Mexico and throughout Latin America. In addition, local ENGOs in Mexico have allied with larger international organizations in an attempt to promote environmental conservation. While Mexican ENGOs do not always agree with the platforms espoused by all U.S. ENGOs (particularly since the U.S. ENGOs do not share the same opinions on all environmental issues themselves), there are areas of mutual concern and cooperation. The tuna-dolphin controversy does not seem to be one of those areas, although undoubtedly there are some environmental activists in Mexico who wish to see dolphin-protection improved.

sovereignty because of U.S. attempts to unilaterally "police" Mexican fishing.

The U.S. Congress

Even without the support of Mexican ENGOs, however, U.S. ENGOs have been successful in inciting public outrage on behalf of dolphins. For example, U.S. citizens reacted strongly to a videotape that aired on CBS, ABC, and CNN in spring of 1988, which captured the details of a dolphin slaughter by a Panamanian tuna vessel. Floods of letters were sent to both Congress and to the director of Heinz Corporation (producer of StarKist tuna), demanding the termination of this killing.⁴⁸ With public sentiment aroused regarding the protection of dolphins, members of Congress supported the zero-mortality goal by passing numerous dolphin-protection amendments to the MMPA. In this way, U.S. environmental groups have received substantial congressional support for their cause.

The U.S. Tuna Canneries

In addition to members of Congress, tuna canneries striving to cater to consumer preferences also reacted to public alarm over dolphin deaths. Even prior to the official U.S. embargoes, StarKist, Chicken of the Sea, and Bumble Bee all commenced a boycott of Mexican tuna to reassure the public that the United States could continue to buy tuna without fear of condoning the killing of dolphins. As Kathleen Bates, consumer affairs representative of San Diego, California's Van Camp Seafood Company wrote:

Our 100 percent "dolphin-safe" policy was announced and implemented on April 12, 1990. On that date, Van Camp Seafood (Chicken of the Sea brand) announced that effective immediately, it and all its affiliates would not purchase tuna from vessels that netted fish associated with dolphins. Van Camp Seafood's purchasing policy requires that suppliers of tuna provide certification that the vessel did not *at any time* during its trip fish for tuna by setting its nets around dolphins.⁴⁹

These seemingly "environmentally pure" goals of U.S. tuna harvesters are questionable. Only after considerable interest group

48. Patrick Conner, *The Conversion of StarKist*, S.F. CHRON., June 17, 1990, at *This World*.

49. Letter from Kathleen Bates, Consumer Affairs Representative, Van Camp Seafood Company, Inc. (Chicken of the Sea) (Nov. 12, 1993) (on file with author).

pressure did the largest canneries yield to public demands to can dolphin-safe tuna. The videotape of the Panamanian fishermen killing dolphins played a large part in forcing the canneries to implement a boycott. Adding to the pressure were the full-page advertisements that Earth Island Institute placed in major newspapers, including *The New York Times*, attacking Heinz's tuna-fishing policies.⁵⁰ The final blow to Heinz's policies was a public boycott of StarKist and other Heinz products such as WeightWatchers. On April 12, 1990, Heinz publicly announced its boycott of dolphin-unsafe tuna. The Heinz announcement not only capitalized on environmental awareness but also dramatically advanced the campaign to save the dolphins, by compelling rival tuna canneries to go along. Thus, Heinz must be given credit for "creating a new measure of corporate accountability against which all companies may now be judged" and having the moral integrity and the environmental consciousness to be the first cannery to implement a dolphin-safe policy proposal.⁵¹

The unusual "coalition of convenience" among U.S. ENGOs, the U.S. Congress, and tuna-cannery corporations argues that, just as U.S. fleets made substantial efforts in dolphin conservation, Mexico should be forced to do the same, despite being a less developed country with fewer resources available. The evidence (see Figure 1) indicates that U.S. dolphin kills have diminished tremendously in the recent past, from 20,000 in 1979⁵² to 1,004 in 1991.⁵³ These numbers represent a decrease of nearly 95 percent during the 12-year period. In addition, the number of U.S. tuna-fishing boats in the ETP has dropped from 34 in 1986⁵⁴ to four in 1993,⁵⁵ with this number still in decline. The fleet has primarily moved to the western tropical Pacific (WTP), where tuna are not believed to swim with dolphins.⁵⁶

Embargo advocates believe that these concrete measures are not being reciprocated by Mexico. They feel that the 10-point Salinas proposal to protect the dolphins was "only cosmetic, a face-saving measure."⁵⁷

50. Conner, *supra* note 48.

51. *Id.*

52. Hearing, *supra* note 13, at 115.

53. Phillips, *supra* note 20, at 135.

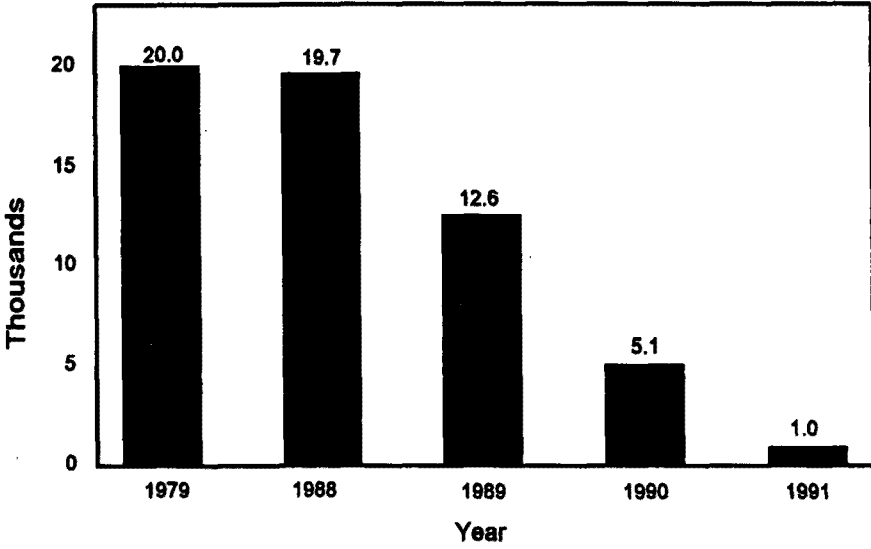
54. Hearing, *supra* note 13, at 115.

55. Gilbreath, *supra* note 18, at 10.

56. There is currently a debate as to whether dolphins swim with tuna only in the ETP. Recent evidence suggests that the earlier consensus that such behavior was limited to the ETP might be incorrect. If this evidence is accurate, it suggests that the U.S. Congress is discriminating against Mexican fleets by banning imports of Mexican tuna while dolphins continue to be killed by tuna fishermen in other areas of the world. Greenpeace, *Dolphins, Tuna and Free Trade: A Greenpeace Perspective 3* (1992).

57. Darling et al., *supra* note 10, at D6.

Figure 1
U.S. Dolphin Kills



Source: Committee on Merchant Marine and Fisheries (1992), p. 115; Phillips (1993), p. 135

Placing observers on every ship is important, they argue, but it is only a superficial measure, as is increasing spending on finding dolphin-safe fishing practices. They feel that these changes will not immediately impact the number of dolphins killed, and are ineffective attempts to avoid further confrontation. In addition, groups favoring continued embargoes feel that the recent decline in world dolphin-mortality rates, from 130,000 in 1986 to an estimate of less than 10,000 in 1993, was achieved without expensive alterations in fishing practices.⁵⁸ It is not a question of acquiring some expensive, advanced technology in order to diminish dolphin mortality, they argue; rather, it is a matter of employing more careful methods. Being more cautious is not very expensive. According to these critics, then, Mexico has no viable reason for not meeting U.S. dolphin kill quotas.⁵⁹

Finally, organizations supporting the tuna embargoes argue that the GATT dispute-resolution panel decision set a dangerous precedent for declaring several U.S. environmental laws "illegal" under GATT. Because of its allegation that the United States was unfairly blocking trade, future attempts to preserve the global commons—whether through laws protecting oceans, forests, or elephants—may be disallowed.⁶⁰ Pro-embargo groups feel that this sort of unilateral U.S. action is essential in forging international action to protect the environment and is necessary to propel forward multilateral action.⁶¹

Further, embargo supporters believe that the dispute-resolution procedures established under GATT were fundamentally flawed and ill suited for resolving complex environmental issues. Above all, they object to the fact that three judges in Geneva largely removed from the tuna-dolphin conflict came to a decision after holding secret proceedings without the advice of experts on the environment.⁶² Thus, they argue, the fact that GATT did not allow environmental groups to voice their views and provide their expertise to the dispute-resolution panel means that environmental concerns were not adequately considered, and trade-restrictive environmental protection measures were disallowed.

58. Gilbreath, *supra* note 18, at 11.

59. Hearing, *supra* note 13, at 114. While it is true that the initial cost of being more careful is not terribly high, the cost of moving from low dolphin kill rates to zero dolphin deaths is considerably higher. In order to do this effectively, Mexican fleets would have to convert the machinery of their boats in the ETP to that used for fishing on schools of tuna, or other floating objects that tuna swim beneath (such as logs), rather than dolphins. Several of these boats would also be forced to move to the WTP, a costly transfer.

60. Hilary F. French, *GATT: Menace or Ally?*, 6.5 *WORLDWATCH* 14 (1993).

61. Hilary F. French & Thomas Heller, Address at the *North America Forum Lecture Series, NAFTA and the Environment: The Tuna-Dolphin Conflict* at Stanford University (Apr. 5, 1994).

62. Phillips, *supra* note 20, at 135.

Group B: Save the Dolphins, But Weigh Other Issues Too

Clearly, staunch environmental groups, the U.S. Congress, and major canneries for U.S. tuna feel that the embargoes should continue until Mexico has met all the requirements of U.S. legislation. Meanwhile, the Bush Administration, other environmentalists, and the Mexican government and tuna fisheries have held a very different perspective. One common link between these two otherwise irreconcilable views is discontent with the GATT ruling.⁶³

The Bush Administration

The Bush Administration actively opposed the embargoes on imports of Mexican tuna because the bans on imports ignored the political intricacies of the situation. The tuna-dolphin conflict became salient just as the NAFTA negotiations began. Offending the Mexican government and harming the Mexican economy at a time when the United States sought Mexico's cooperation and support was not considered to be a wise strategy by policy makers. Thus, the Administration actively opposed the embargoes by fighting the Earth Island Institute in court.⁶⁴ When the government lost, it appealed the case.⁶⁵ When the appeal failed, Bush Administration officials told the Mexicans that "the U.S. government will get the dolphin protection law weakened."⁶⁶ As these events suggest, the growing interdependence between Mexico and the United States prompted the Administration to search for a more cooperative approach toward solving regional environmental issues.

While the stance of the Bush Administration with respect to the embargoes was thus relatively straightforward, its attitude toward the GATT ruling was more ambivalent. One would assume that those who opposed embargoes of Mexican tuna would have supported an international ruling declaring embargoes to be an unfair barrier to trade that had to be removed. However, the U.S. government was also publicly committed to strengthening GATT. Thus, after the GATT decision was announced, the Bush Administration was faced with a difficult choice: vetoing the GATT ruling, accepting the GATT penalties and sanctions, or trying to weaken the MMPA.⁶⁷ Luckily for the Administration, it did not have to make this choice. Instead, a fourth alternative was created: Mexico did not pursue enforcement.

63. See *supra* note 42 for an explanation of the Clinton Administration position.

64. *Earth Island Institute v. Mosbacher*, 746 F. Supp. 964 (N.D. Cal. 1990).

65. *Earth Island Institute v. Mosbacher*, 929 F.2d 1449 (9th Cir. 1991).

66. Jessica Mathews, *Dolphins, Tuna and Free Trade*, WASH. POST, Oct. 18, 1991, at A21.

67. Phillips, *supra* note 20, at 137.

Anti-Embargo Environmentalists

For reasons that differ from those of the Bush Administration, many environmentalists also opposed continued embargoes. For example, Greenpeace opposed the arbitrariness implied in the comparability provisions of the MMPA and the quota-based embargoes, stating:

This is a double standard staggering in hypocrisy. The MMPA limits the U.S. fleet to a blanket mortality "quota" of 20,500 dolphin kills per year, but bases "acceptable" mortality for foreign fleets on the U.S. fleet's actual kill rate. That kill rate changes from year to year because the dates used to make the comparison as well as the number of sets made on dolphins change. So, non-U.S. fleets have no constant standard to abide by. In addition, there is nothing in the MMPA that prevents the U.S. fleet from landing tuna caught on dolphin in the U.S. market from any source.⁶⁸

In addition, Greenpeace argued that discrimination against ETP tuna was unjust, as setting on dolphins also occurs in the WTP, noting that:

. . . the marketing strategies of the big canners have centered on high-priced "dolphin-safe" advertising campaigns such as those of the Heinz Company and the Italian canners, or on bragging about a blanket boycott on ETP tuna—and pushing the lie that other fisheries are "dolphin-safe." What began as a tool to help solve the problem has instead turned into a classic "greenwashing" cover-up that actually perpetuates the problem.⁶⁹

In a nutshell, Greenpeace and similar organizations saw the discrimination inherent in certain aspects of the MMPA and refused to take part in it. While they may object to continued dolphin kills, they also object to those rules which did not mandate uniform standards to legislate against dolphin kills.

In addition, authors such as Jan Gilbreath, usually a pro-environmentalist, join Mexicans in arguing that the embargoes have been excessive. As evidence, authors note that dolphin kills have diminished tremendously in recent years, and the number of each dolphin species has been stable or increasing since 1983.⁷⁰ Gilbreath contends that Mexican efforts have been extensive in this regard, and that the embar-

68. Greenpeace, *supra* note 56.

69. *Id.*

70. Hearing, *supra* note 13, at 118.

goes should now be lifted.⁷¹ Moreover, as noted at a recent environmentalist conference, many scientists consider the care of an entire ecosystem to be more critical than the hyper-protection of one species.⁷²

The Mexican Government and Mexican Tuna Fishermen

Most Mexicans agree with the sentiment of anti-embargo environmentalists in the United States who feel the embargoes are excessive. Mexicans were confused by the outcry over this non-endangered animal. Certainly, they have both conservationist and economic reasons for wanting to reduce dolphin-mortality in their tuna-fishing industry. On the one hand, an increasing population of environmentally conscious individuals in Mexico undoubtedly believes that dolphin species should not be eliminated. More pointedly, exclusion from the lucrative American market, whether directly through primary embargoes or indirectly through secondary embargoes, has also spurred Mexico's efforts to redress this issue.

However, as a general principle, Mexicans oppose continued bans on tuna imports to the United States for a variety of reasons. To begin with, they argue that the tuna-dolphin conflict ultimately comes down to a "humans versus dolphins" trade-off. Second, they feel that economic asymmetries between the United States and Mexico have not been considered in increasingly stringent U.S. legislation. Third, they contend that the United States is using embargoes to create a non-tariff barrier to trade that is fundamentally protectionist and damaging to Mexico's national sovereignty. Moreover, losses to the Mexican industry have been substantial. Finally, Mexicans are dissatisfied with the GATT panel decision.

MEXICAN EFFORTS TO DIMINISH DOLPHIN KILLS

The Mexican tuna-fishing industry has been decreasing dolphin-mortality rates since before the tuna embargoes began. Mexican dolphin kill rates declined more than 85 percent from 1986 to 1992.⁷³ Mexican fleets now kill fewer than one dolphin per shoal of tuna netted.⁷⁴ Estimated world dolphin-mortality statistics attest to this decline (see Figure 2). In 1989, between 97,000 and 102,000 dolphins died. By 1991, the figure was

71. Gilbreath, *supra* note 18, at 11.

72. Alvarez-Borrego, *supra* note 11, at 13.

73. Gilbreath, *supra* note 18, at 10.

74. *Must Try Harder*, *ECONOMIST*, Aug. 21, 1993, at A22.

down to 25,000.⁷⁵ The estimated figures for 1993 suggest that fewer than 10,000 dolphins died from tuna fishing around the world.⁷⁶

Mexican fishermen are now more careful about freeing dolphins. They use "backing down" techniques to let dolphins out of the nets, and speed boats and deep-sea divers to help spot and lead dolphins to safety. In turn, their methods of tuna-fishing are also approved by the National Academy of Sciences, and Mexico has been working with the Inter-American Tropical Tuna Commission to improve fishing practices.⁷⁷ Today, international monitors who observe fishing techniques and count dolphin deaths are aboard every ship of the Mexican tuna-fishing fleet in the ETP.⁷⁸ Moreover, while the United States has moved most of its fleet to the WTP or re-registered it internationally over a period of time, the U.S. government has forced comparable standards on Mexico's tuna industry within a short period.

Humans Versus Dolphins

At the same time that Mexicans have worked to diminish dolphin kill rates, they have also worked to help feed their population. Tuna plays a major role in the government's attempts to provide healthful food to those with fewer financial resources. Mexicans feel that U.S. environmental legislation protecting dolphins does not take these circumstances into account.

In other words, Mexican officials feel that while dolphin safety is important, other priorities should take precedence. In 1991, 17 million Mexicans lived in extreme poverty. They could not afford fresh fish or meat. In response to these resource deficiencies, Mexico has developed an extensive domestic market for tuna in the last decade. Indeed, while Mexico exports a great deal of tuna, about sixty percent of the harvest remains in the country for domestic consumption.⁷⁹ This inexpensive form of nutrition is vital to the survival of many in poverty. As one author noted:

Mexico does not have the dolphin-safe labels. Besides, consumers here don't care about the precise contents. What they see is a can of food that costs less than 80 cents. Few Mexicans are aware that dolphins suffer when yellowfin tuna are captured.⁸⁰

75. Hearing, *supra* note 13, at 115.

76. Gilbreath, *supra* note 18, at 10.

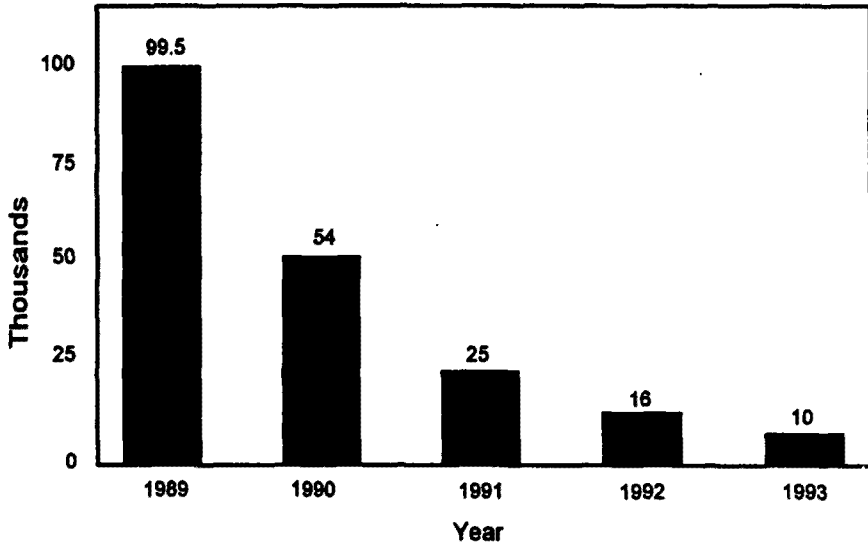
77. *Must Try Harder*, *supra* note 74.

78. Martinez, *supra* note 41.

79. BOCKSTAEEL & STRAND, *supra* note 17, at 12.

80. Cecilia Rodriguez, *Save the Dolphins, but Remember Mexican Needs, Too*, L. A. TIMES, Jan. 13, 1991, at M2.

Figure 2
Estimated World Dolphin Kills



Source: Committee on Merchant Marine and Fisheries (1992), p. 115; Gilbreath(1993), p. 10-11

Thus, by threatening the economic status of the Mexican tuna industry, tuna embargoes also endanger domestic supplies of this vital product. In this way, U.S. standards are arguably not applicable to the realities of life in a less developed country.⁸¹

In addition to the nutritional needs of poorer sectors, jobs also depend on the tuna industry. By 1990, Mexico had the largest and most modern tuna fleet in the world. Tuna-fishing is a valuable source of jobs and foreign currency. In an underemployed workforce, tuna-fishing sustains about 400,000 people, including workers and their dependents. By threatening the financial stability of the Mexican tuna industry, continued U.S. embargoes have the potential to cause job loss. In addition, were Mexico to move the entire fishing industry to the WTP, it could cause hardship for workers and upset the balance of regionally located industry in Mexico.⁸²

Asymmetries Are Ignored

The anger that Mexicans feel over these U.S. threats to Mexican jobs and the economy as a whole is enhanced by the feeling that the U.S. laws are unjust. In a nutshell, many Mexicans feel that U.S. congresspersons appear to have forgotten that Mexico does not share the same financial resources as the United States.

The U.S. tuna industry has the excess capital available to update its fleet and pay to move it to the WTP. The cost is then passed on to the U.S. tuna consumer through price increases. In contrast, the Mexican fleet does not have such resources immediately on hand. As David Clark Scott, journalist for *The Christian Science Monitor*, writes, "What bothers Mexican officials is that the U.S., by virtue of its market size, can single-handedly force a poor nation to comply with costly ecological standards set by the U.S. Congress."⁸³

United States legislation also ignores the fact that the United States contributed to tremendous dolphin-death rates in previous years, which caused the initial concern about dolphin-population conservation. In 1972, the United States killed 368,000 dolphins while all other non-U.S. vessels killed 55,000 in total. As a result of these statistics, many Mexicans feel that "The U.S. is one of the world's greatest environmental predators—from creating acid rain to fouling the Colorado River—with what moral authority can it pretend to the throne of ecological protection?"⁸⁴ Therefore, it is argued, like so many of the environmental issues of today,

81. *Id.*

82. Gilbreath, *supra* note 18, at 11.

83. Scott, *supra* note 7, at 6.

84. Rodriguez, *supra* note 80, at M3.

the less developed nations are called upon to solve a problem originally caused by the advanced industrial nations. Nonetheless, the notion of providing developing countries with some leeway on early environmental legislation to account for vastly unequal contribution to the problem is entirely absent from related U.S. legislation.⁸⁵

U.S. Protectionism

For many Mexicans, U.S. policies appear to be spurred more by economics than by environmental concerns. Primary and secondary embargoes blocked Mexico from the market just as the Mexican industry began to flourish. Many Mexican fishermen therefore feel that the United States is trying to create a virtual monopoly for its tuna: "Now that Mexico's fleet is big enough to take market share from the U.S. industry, protectionist barriers suddenly go up."⁸⁶ The strong degree of animosity felt by many Mexicans over this issue is reflected in the words of a Mexican columnist: "The defense of economic interests is disguised by the flag of environmentalism just as U.S. military interventionism is disguised as a democratic crusade."⁸⁷

There is some validity to these statements; the embargoes clearly create advantageous market conditions for U.S. harvesters. However, the United States currently imports more than 66 percent of its tuna, hardly a monopoly for domestic harvesters.⁸⁸ Most likely, the embargoes are a result of both economic and environmental concerns.

An Issue of Sovereignty

Another debate that is not clear-cut is the disagreement over the fundamental rights of citizens and nations to demand and implement laws that directly affect the practices of other nations. Staunch environmentalists within the United States have argued that U.S. citizens have a right to "consumer sovereignty," defined as the right of consumers to decide what they want to consume. This includes the decision not to eat "dolphin-unfriendly tuna" and the right to impose embargoes on consumer imports. On the other hand, Mexicans see the sovereignty issue from a different angle.⁸⁹ Over the course of history, Mexico has lost more than half of its land to the United States. Mexicans are understand-

85. Eduardo Viola, Class Lecture at Stanford University (Feb. 7, 1994).

86. Scott, *supra* note 7, at 6.

87. Rodriguez, *supra* note 80, at M2.

88. BOCKSTAEEL & STRAND, *supra* note 17, at 5.

89. Hilary French, Address at the North America Forum Lecture Series, NAFTA and the Environment: The Tuna-Dolphin Conflict at Stanford University (Apr. 5, 1994).

ably sensitive to further infringement on their sovereignty by the United States.⁹⁰

Székely argues that Mexico's only defense against sovereignty violations is the law. He believes that a principle of international equality permits one country to impose its sovereignty on another only by mutual agreement. In other words, there must be "consent to be bound" by international law. "The United States and Mexico have not, through any instrument, made any agreement on the dolphin issue." Székely also emphasizes that making something legal in the U.S. system does not make it legal in the system of international law. Rather, he calls for defined mutual rights and obligations, instead of forcing Mexico to "shut up on its legal arguments." Thus, many Mexicans such as Székely regret the abandonment of a legal defense to support the GATT decision against the United States.⁹¹ A statement by Javier Rosado, a Mexican citizen, best sums up the feelings of Mexicans: "Mexico believes in the force of law and the United States believes in the law of force."⁹²

The Cost to Mexico

Economic costs to Mexico add to the tension. The embargoes have created obstacles to the continued financial success of Mexican tuna harvesters. While in 1990 Mexico was able to sell the "U.S. share" of its tuna to Japan for the same price it received from U.S. canneries, financial losses occurred in subsequent years. In 1991, a spokesperson for the Mexican Fisheries Ministry announced that the U.S. embargo on Mexican tuna exports caused a total US \$7.77 million in lost revenue.⁹³ Continued embargoes have the potential to wreak havoc on the Mexican tuna-fishing industry.

GATT FAILED

Clearly, the perspective of the Mexican government and tuna industry is vastly different from the views of those who support continued embargoes. However, those sharing the Mexican perspective agree that the GATT dispute-settlement panel failed to adequately resolve this debate. The GATT ruling ignores the asymmetries of the political relationship between the United States and Mexico. Mexico is not in a

90. Rodriguez, *supra* note 80, at M2.

91. Székely, *supra* note 47.

92. Javier Rosado, Address at the North America Forum Lecture Series, NAFTA and the Environment: The Tuna-Dolphin Conflict at Stanford University (Apr. 5, 1994).

93. Update on U.S. Embargo on Mexican Tuna Exports & Related Developments, SOURCEMEX, Mar. 4, 1992, available in WESTLAW, SMXECON Database, File No. 1992 WL 2396904.

place to antagonize the United States when the costs of doing so could have repercussions for the rest of their economic dealings. GATT ruled in favor of Mexico in an effort to destroy unnecessary barriers to trade, but Mexico cannot possibly pursue the ruling without tremendous costs. President Salinas effectively defused this explosive issue by ignoring the GATT ruling. Thus, Mexicans undoubtedly believe that the GATT panel decision is an unacceptable resolution to the tuna-dolphin dispute.

Why GATT Failed

The GATT conflict-resolution panel has left all of the various actors in the tuna-dolphin conflict dissatisfied. One of the reasons for the failure of this traditional form of conflict-resolution is obvious after examining the polar perspectives of the parties involved. The GATT panel deliberations on the tuna-dolphin dispute did not incorporate a full understanding of the differences between Mexico and the United States.

The second major cause for the failure of the GATT dispute-settlement process was that it did not include new policy actors in its deliberation process. The recent globalization of policy issues has created new alliances that cut across national boundaries. As a result, governments of nation-states are no longer the only important parties to policy disputes. Non-governmental organizations (NGOs) must also play a part in any dispute-resolution process.

The number of NGOs worldwide has increased steadily in recent years. By the early 1980s there were approximately 13,000 environmental non-governmental organizations (ENGOs) in developed countries and an estimated 2,230 in developing countries, with numbers significantly increasing ever since.⁹⁴ These actors represent a large portion of the world population, and their political influence is great:

A distinctive characteristic of environmental politics is the importance of public opinion and nonprofit NGOs, especially environmental NGOs, that are both national and international in scope. Environmental issues, like human-rights issues before them, have mobilized the active political interest of large numbers of citizens in key countries, including shifts in policy that helped turn the tide in a number of environmental issues. Public opinion, channeled through electoral politics and NGOs, has had a substantial, if not decisive influence on the outcomes of global bargaining⁹⁵

94. PORTER & BROWN, *supra* note 4, at 56.

95. *Id.* at 19.

Total membership in U.S. national environmental organizations is now 13 million.⁹⁶ These groups are obviously a force with which to contend. GATT, however, does not formally recognize this "new actor" on the political scene:

Because NGOs are not permitted to participate in GATT meetings, no environmentalists or environmental specialists have ever been involved, even as observers, in the various rounds of GATT negotiations, nor have delegations to the negotiations included environmental specialists.⁹⁷

Given the failure of GATT to accept input from all of the various parties to the tuna-dolphin conflict, its dispute-settlement mechanism is incapable of adequately resolving international trade and environmental disputes.

Solutions

Several possible strategies exist to correct the failure of the GATT dispute-settlement panel. The most obvious is to amend the GATT so as to allow it to encompass a broader set of actors. Although some of these changes are already in motion, redefining the rules of a major international organization is a complicated and time-consuming process, as demonstrated through the lengthy negotiation process that has characterized the GATT in recent years.⁹⁸ As Hilary French of WorldWatch Institute suggests:

There have been calls for the negotiation of a GATT environmental code, perhaps through a "green round" of GATT to clarify what to do in cases where trade and the environment collide. If the length of the interminable Uruguay Round is any guide, however, revised rules could be quite some time in coming.⁹⁹

Porter and Brown concur with this statement and add that "changes in the GATT will come with difficulty, since they must be negotiated and

96. *Id.* at 57.

97. *Id.* at 135.

98. The Uruguay Round of GATT negotiations ended on December 15, 1993. Historically, much time has elapsed between GATT rounds. The Uruguay Round began in 1986 and took seven years to complete, and the previous negotiations ended in 1979. *GATT Comes Right*, *ECONOMIST*, Dec. 18, 1993, at 13.

99. Hilary F. French, *Reconciling Trade and the Environment*, in *STATE OF THE WORLD 1993: A WORLDWATCH INSTITUTE REPORT ON PROGRESS TOWARD A SUSTAINABLE SOCIETY* 158, 176 (Linda Starke ed., 1993).

approved by more than 110 nations, most of which are far more interested in opening markets than in reconciling trade with environmental protection."¹⁰⁰

A second option for resolving the present impasse would be to attempt to form a regional multilateral convention on the tuna-dolphin issue. However, at this stage of the conflict, when Mexican dolphin kills have already diminished substantially, an independent international agreement likely would take far too much time and effort to implement, especially when endangered species could stand to benefit even more from such efforts.

Amending an already existing international agreement is another possibility that has been investigated. However, after analyzing the Proposed Convention on the Law of the Sea (LOS),¹⁰¹ the International Whaling Commission (IWC),¹⁰² the Convention on International Trade in Endangered Species (CITES),¹⁰³ and the Inter-American Tropical Tuna Commission (IATTC),¹⁰⁴ Stephen Boreman found that only the IATTC is a viable candidate for amendment to remedy the tuna-dolphin controversy. All of the others exclude or are not applicable to the tuna-dolphin controversy. Although LOS provides a "broad constitutional framework for developing a regional option," it does not provide for the specific protection of species.¹⁰⁵ In principle, IWC could regulate dolphin kills, but has chosen to limit its focus to whale protection, while CITES is inappropriate to this debate because dolphins are not an endangered species.

Boreman's analysis of the first three agreements listed is accurate, but his conclusion that the IATTC can solve this conflict may be flawed. His suggestions for amendments to the IATTC are laudable, including a call for a termination of all purse seining, mandatory observers on all tuna-fishing fleets, and enforcement through the threat of sanctions in the form of the denial of the right to fish in certain Exclusive Economic

100. World Wildlife Foundation, *Questions and Answers on NAFTA 10* (1993).

101. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/Conf. 62/122, U.N. Sales No. E.83 V.5 (1983).

102. The IWC was created by treaty. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72.

103. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Convention done Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

104. The IATTC was created by treaty to make recommendations to member governments concerning the exploitation of tuna in the eastern Pacific. Convention for the Establishment of an Inter-American Tropical Tuna Commission, May 31, 1949, U.S.-Costa Rica, 1 U.S.T. 231, 80 U.N.T.S. 3.

105. Stephen M. Boreman, *Dolphin-Safe Tuna: What's in a Label?*, 32 NAT. RESOURCES J. 425, 439 (1992).

Zones (the waters 200 miles off shore of each nation).¹⁰⁶ However, there are three problems with his solution. First, while several of his suggestions have been implemented since he first proposed them, none has proven sufficient and the conflict continues. For example, the United States has unilaterally called for a global moratorium on purse seining nets and there are currently observers on every boat of the Mexican fleet in the ETP. Neither of these realities has solved the problem of dolphin kills. Second, his recommendations do not suggest a cooperative, give-and-take solution among the relevant actors. Rather, his solutions tend to imply that embargoed nations should yield to those policies that staunch U.S. environmentalists favor. This one-sided approach seems unlikely to produce consensus on amendments to the IATTC. Finally, as even Boreman himself notes, while the IATTC was originally signed in 1949 by the United States, Costa Rica, Ecuador, France, Japan, Mexico, Panama, Vanuatu, and Venezuela, in subsequent years Costa Rica, Ecuador, Mexico, Vanuatu, and Venezuela have opted out. Thus, the main parties to the tuna-dolphin dispute are not currently parties to the IATTC.¹⁰⁷

A third possibility is simply to ignore the tuna-dolphin conflict and hope that it goes away. Currently, the tuna-dolphin debate is not a particularly hot issue in the press. Although the embargoes continue and Mexico has made a concerted effort to decrease its dolphin kill rate, other debates have grabbed the attention of environmentalists, government officials, and individuals in both nations. Conceivably, this debate could be left as it stands and slowly "fade off" of the policy agenda. Over time, however, it is likely to resurface as it is indicative of the type of problem that will arise as the number of international trade agreements escalates. Eventually, a reasonable means of solving trade and environmental conflicts must be institutionalized.

In addition, this debate may make its way back into the public eye through one of several additional channels. First, it could serve as a useful issue for Ernesto Zedillo, the President of Mexico, to show the public that he is not merely an unfeeling technocrat, but rather a nationalist who will defend his country when it is threatened by unilateral U.S. action. Now that NAFTA has passed, Mexican officials could return to the GATT to ask that the tuna-dolphin panel decision be implemented.¹⁰⁸ Alternatively, the European Economic Community (EEC) raised the secondary tuna embargoes before the GATT dispute-resolution panel, calling them an unfair barrier to market liberalization, and

106. *Id.* at 442-47.

107. *Id.* at 440-41.

108. Interview with John Wirth, Professor of History, Stanford University, in Palo Alto, CA (Apr. 7, 1994).

a panel report was issued on May 20, 1994. The decision in favor of the EEC on "dolphin-unsafe" tuna exported from Mexico and other nations to Europe, packaged, and re-exported to the United States further angered environmentalists. The ruling was based on a somewhat different analysis of the relevant GATT text; however, it is equally or more offensive to environmentalists thus ensuring that the tuna-dolphin issue will not be forgotten in future debates.¹⁰⁹ Finally, as a result of concern over the GATT ruling stating that process standards may not be used to impede trade, these standards are slated for discussion by the NAFTA Free Trade Council.¹¹⁰ This formal review process will ensure that the tuna-dolphin issue is eventually brought back into the limelight.

NAFTA is an institution already in place and it can meet the challenge of resolving this conflict without extensive delay. The next section examines the weaknesses in the NAFTA instrument that hinder resolution of the tuna-dolphin dispute and then explains how these hurdles can be overcome. We will see that NAFTA is not the "lost opportunity" to reconcile environmental protection and free trade that many have suggested.¹¹¹

IS NAFTA THE ANSWER?

With the huge debate raging between advocates of free trade and proponents of environmental issues, it is hard to believe that NAFTA is actually the first international trade agreement to specifically incorporate provisions for environmental protection.¹¹² The signing of NAFTA in 1993 is clearly a precedent-setting accomplishment in this regard. A memo of the World Wildlife Foundation, an environmental organization that supported the passage of NAFTA, explains that:

Trade has an enormous impact on the planet's ecological health yet trade agreements have always been actively hostile to environmental protection . . . NAFTA's passage will ensure that future trade negotiations, including those on the General Agreement on Tariffs and Trade (GATT), follow suit [in incorporating environmental interests].¹¹³

With other developing countries in Latin America lining up to discuss the possibility of creating trade-liberalizing agreements with the United States

109. Phillips, *supra* note 44.

110. *Id.*

111. *Id.*

112. World Wildlife Foundation, *supra* note 100, at 3.

113. World Wildlife Foundation, *Why WWF Supports NAFTA: Talking Points 1* (1993).

and of signing onto NAFTA, the precedent-setting powers of NAFTA only grow.

The tuna-dolphin issue is not specifically addressed in NAFTA, "but it can be argued that the prospect of NAFTA has encouraged the Mexicans to make real progress in dolphin protection and that the Commission on Environmental Cooperation (CEC) holds out a real possibility of doing something important to further such protection in the medium term."¹¹⁴ This section analyzes the potential of the North American Agreement on Environmental Cooperation, more commonly known as the environmental side agreement to NAFTA,¹¹⁵ to adequately resolve the tuna-dolphin controversy. It outlines the obstacles to settlement of the tuna-dolphin conflict created by the environmental dispute-settlement apparatus, suggests a means to avoid these barriers, and proposes a plan for ultimately resolving this conflict through utilization of the Council established within the CEC.

Obstacles to Solving the Tuna-Dolphin Controversy within NAFTA

The preamble of the side agreement stresses that the parties to the agreement (the governments of the United States, Mexico, and Canada) are to be dedicated to environmental protection and sustainability.¹¹⁶ To further this objective, the side agreement creates the CEC which is comprised of a Council, a Secretariat, and a Joint Public Advisory.¹¹⁷ Within the CEC apparatus, Part Five of the side agreement creates a structure for the "consultation and resolution of disputes." While the dispute-settlement apparatus created in Part Five has many notable improvements over the GATT dispute panel, the NAFTA environmental dispute-resolution procedures alone cannot solve the tuna-dolphin dilemma.

Article 22, which covers the implementation of dispute-settlement procedures, explains that "Any Party may request, in writing, consultations with any other Party regarding whether there has been a persistent pattern of failure by that other Party to effectively enforce *its environmental law*."¹¹⁸ In analyzing this statement, the italicized words take on primary importance. The word "its" dictates that the dispute-settlement apparatus is to involve only issues relating to one party's enforcement of its own domestic legislation within its territory. The tuna-dolphin issue

114. *Id.* at 9.

115. North American Agreement on Environmental Cooperation, Sept. 13, 1993, 32 I.L.N. 1480 [hereinafter Side Agreement].

116. *Id.* at pmb1.

117. *Id.* pt. III, §§ A, B, & C.

118. *Id.* art. 22.1 (emphasis added).

is immediately excluded from this process because it involves a controversy over U.S. laws and Mexican fishing practices. Thus, those cases where one country is trying to impose its unilateral laws on another are beyond the scope of the NAFTA dispute-settlement structure.

Further, any loophole that might be found to let the tuna-dolphin issue slip into the dispute-resolution structure is closed by the second and third words italicized above. Article 45 of the side agreement indicates that the definition of "environmental law" "does not include any statute or regulation, or provision thereof, the primary purpose of which is *managing the commercial harvest* or exploitation, or subsistence or aboriginal harvesting, of natural resources."¹¹⁹ This means that no management laws, such as fishery-management legislation, can be considered by the environmental dispute-settlement apparatus of NAFTA. The tuna-dolphin issue falls within the periphery of tuna-management laws, and is thereby inappropriate for NAFTA environmental dispute-resolution procedures under the side agreement.

Finally, NAFTA shares the same process-standards regulations as GATT. Although these standards as currently stated are a topic listed for future discussion by the parties, their present status suggests that if the tuna-dolphin conflict were brought to the dispute-settlement panel, the subsequent ruling might be the same as the extant GATT ruling.¹²⁰

For all of these reasons, the dispute-settlement apparatus is clearly not the place for solution of this issue. It simply does not have the authority to make a binding ruling.

NAFTA as a Solution to the Tuna-Dolphin Conflict

Fortunately, there is much more to the North American Agreement on Environmental Cooperation than dispute-settlement. As illustrated in this section, the CEC established within the side agreement provides the necessary framework for a resolution of the tuna-dolphin conflict by overcoming the problems of the GATT apparatus. This section of NAFTA does not limit the range of issues that can be discussed to the extent that the NAFTA environmental dispute-resolution provisions do. Rather, NAFTA and the CEC include commitments to increased environmental protection and cooperation on environmental issues, an opening of procedures to the public, and the incorporation of NGOs and non-governmental persons into the discussion process, all of which are conducive to providing a framework for solving this dispute.

119. *Id.* art. 45.2(b) (emphasis added).

120. French, *supra* note 89.

First, it must be established that the tuna-dolphin conflict is not excluded from all structures of the side agreement. The Council created within the CEC serves as "a forum for the discussion of environmental matters within the scope of the Agreement," and it is this structure that holds the potential for possible negotiations to end the tuna-dolphin conflict.¹²¹ The broad nature of the term "environmental matters" suggests that any issue regarding the environment is acceptable for discussion in this format. The more limiting term "environmental law," which excluded matters of fishery management in the above discussion, is not used here.

Moreover, the phrase "scope of this Agreement" suggests that there may be a certain established range of issues that can be discussed in the Council. As this phrase is not defined later in the side agreement, this term can be interpreted by returning to the preamble in which the premises of the overall agreement are outlined. Here, the text explains that, in this agreement, the parties are "Recalling their tradition of environmental cooperation and expressing their desire to support and build on international agreements and existing policies and laws, in order to promote cooperation between them; . . ."¹²² This clause suggests that virtually any concern or conflict that involves the environment (either shared by the three countries and the world or within one of the nations) is within the scope of this agreement. The tuna-dolphin conflict meets these broad guidelines and therefore may be brought to the Council for discussion.

NAFTA as a whole, and the side agreement specifically, establishes a commitment to environmental protection and cooperation that will provide an atmosphere beneficial to resolving the tuna-dolphin controversy. The fact that a separate side agreement was drafted to deal with environmental concerns is an indication of the priority environmental interests were given by the parties. This commitment is laid out in the first lines of the preamble to the side agreement which states that the parties are:

. . . CONVINCED of the importance of the conservation, protection and enhancement of the environment in their territories and the essential role of cooperation in these areas in achieving sustainable development for the well-being of present and future generations.¹²³

121. Side Agreement, *supra* note 115, at art. 10.1(a).

122. *Id.* at pmb1.

123. *Id.* at pmb1.

The "Objectives" further elaborate on the agreement of the parties to "promote economically efficient and effective environmental measures"¹²⁴ and to "promote sustainable development."¹²⁵ Shortly thereafter, the "Obligations" indicate that the parties must use "economic instruments for the efficient achievement of environmental goals."¹²⁶ This recurring confirmation of commitment to environmental protection runs throughout the agreement, establishing a common goal for all discussions and a basis from which all negotiations can begin: environmental protection and sustainable development. Also, NAFTA commits the parties to upward harmonization of their environmental laws:

Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations.¹²⁷

Under this ruling, environmental protection laws may only be changed to become more stringent. Thus, unlike GATT, which makes no reference to the environment, NAFTA establishes environmental protection as the common denominator of all arguments. With this priority established, the parties have at least this one common standard from which to build agreement.

Another factor that works in favor of NAFTA as a means of helping to resolve this dispute is the shared desire on the part of various international policy players in the tuna-dolphin conflict to reach agreement. For example, Székely speaks of the need to have agreement on this issue rather than imposition of U.S. law on Mexico. He argues that unilateral action that violates the sovereignty of one nation is never legitimate. Indeed, he maintains that "Illegal unilateral U.S. embargoes have kept us away. Since the embargoes began there have been no United States-Mexico discussions on this matter."¹²⁸ In addition, while Hilary French of WorldWatch Institute and David Phillips of the Earth Island Institute have disagreed with Székely on many issues, they have both concurred on the need for agreement.¹²⁹ Thus, while the parties have "officially" stopped discussing the tuna-dolphin conflict, NAFTA

124. *Id.* pt. I, art. 1(i).

125. *Id.* pt. I, art. 1(b).

126. *Id.* pt. II, art. 2(f).

127. *Id.* art. 3.

128. Székely, *supra* note 47.

129. French, *supra* note 89; Phillips, *supra* note 44.

provides an overarching goal of cooperation that mandates an end to this silence.

This emphasis on cooperation is apparent throughout the NAFTA text. Article 2003 is specifically dedicated to this subject. Here the parties promise to "at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultation to arrive at a mutually satisfactory resolution to any matter that might affect its operation."¹³⁰

The side agreement also contains repeated references to the need for cooperation. The preamble provides the most explicit example by stating that the parties are "CONVINCED of the benefits to be derived from a framework, including a Commission, to facilitate effective cooperation on the conservation, protection and enhancement of the environment in their territories."¹³¹ Detailing the Council functions, the text states that the Council must "promote and facilitate cooperation between the Parties with respect to environmental matters."¹³² In addition, "[t]he Council shall strengthen cooperation on the development and continuing improvement of environmental laws and regulations."¹³³ This commitment to cooperation was strong enough to convince several ENGOs in the United States that NAFTA would provide the cooperation necessary to allow the parties to work together and resolve disagreements in a manner that benefits the environment as a whole. A portion of the outline circulated by the World Wildlife Foundation detailing the reasons for that organization's support of NAFTA reads as follows:

. . . . Fostering general cooperation between the parties. Such cooperation is essential if the environmental community wants to have a meaningful input into continent-wide environmental problems. In particular the CEC, by legitimizing a continent-wide approach to environmental issues, and the creation of the Joint Public Advisory Committee, which should permit direct access into continent-wide environmental planning, should insure that such input and direct involvement occur.¹³⁴

Thus, as all of these examples demonstrate, a framework of cooperation has been established that will benefit attempts to resolve the tuna-dolphin conflict.

130. NAFTA at 20-3.

131. Side Agreement, *supra* note 115, at pmb1.

132. *Id.* art. 10.1(f).

133. *Id.* art. 10.3.

134. World Wildlife Foundation, *The NAFTA Environmental Agreements 8* (1993) (memorandum by Kenneth Berlin & Jeffrey M. Lang).

Another advantage of NAFTA over older trade agreements such as GATT is that it opens the procedures of the environmental commission to the public. The GATT dispute-resolution panel is made up of officials unrelated to the conflicts, and it deliberates disputes in private. The CEC Council positions are filled by nationals of Mexico, Canada, or the United States—the parties directly involved in the matters for discussion.¹³⁵ Also, and "perhaps most important, the side agreement commits the three countries to open, transparent deliberations and to making information publicly available in line with the community right-to-know principle, heretofore unique to the United States."¹³⁶ According to this principle, the meetings of the Council are open to the public,¹³⁷ the Secretariat may gather information for its annual reports through "public consultations such as conferences, seminars and symposia,"¹³⁸ and information regarding the Council's activities is publicly available. ENGOs in the United States, such as World Wildlife Foundation (WWF), have found these provisions that encourage citizen comment, participation, and information dissemination to be a vast improvement over GATT. Also, as one WWF report states, the environmental law enforcement provisions of the side agreement,

... when combined with the obligations of the nations to open access to environmental decision documents and procedures, to ensure private access to environmental remedies, and to ensure that their administrative, quasi-judicial or judicial procedures are fair, open and equitable . . . would ensure a sea-change in how Mexico (and improvements in the way the U.S. and Canada) develops, implements and enforces, its environmental law.¹³⁹

This opening of virtually all processes related to environmental law removes any element of suspicion from negotiations and decisions and creates an atmosphere conducive to trust and compromise.

Finally, the most glaring weakness in the GATT apparatus with respect to the tuna-dolphin dispute is also remedied in the NAFTA structure. By not allowing ENGOs to be a part of any of its processes, GATT is simply out of date. The international political arena of today is different from the world system of 1947 when GATT was drafted. There are a variety of powerful and diverse political players now that do not always share the interests or priorities of the governments of their

135. Side Agreement, *supra* note 115, art. 9.1.

136. World Wildlife Foundation, *supra* note 100, at 8.

137. Side Agreement, *supra* note 115, at art. 9.4.

138. *Id.* art. 13.2(e).

139. World Wildlife Foundation, *supra* note 100, at 7.

countries. Given that government officials do not necessarily adequately represent the interests of these groups in international agreements, the groups themselves must be made a part of any negotiation process. The NAFTA environmental side agreement allows for the incorporation of non-governmental persons or groups in its procedures. With all of the interested parties participating in a discussion of the tuna-dolphin dispute, the atmosphere is ripe for agreement. Without all of the related players actively involved in negotiations, an agreement that is satisfactory to all is virtually impossible.

NGOs and non-governmental persons are incorporated into many facets of the CEC. The Council has the right to assign responsibilities to "ad hoc or standing committees, working groups or expert groups," and to seek the advice of NGOs, persons, or independent experts who can provide information or technical advice.¹⁴⁰ As well as seeking the assistance of NGOs, the Council must try "to achieve the environmental goals of NAFTA by acting as a point of inquiry and receipt for comments from non-governmental organizations and persons concerning those goals and objectives."¹⁴¹ In addition, annual reports of the Secretariat of the Council may be written with the expertise and information "submitted by interested non-governmental organizations and persons."¹⁴² Now that the ENGOs involved in the tuna-dolphin conflict are allowed to participate and even instigate discussions of the Council, a mutually agreeable solution can be reached through consideration of all of the facts and perspectives on this case. Public participation will play a vital role in this process.

By displaying repeated dedication to environmental protection and cooperation, opening discussions and procedures to the public, and incorporating all of the various policy actors in the debate over environmental concerns, NAFTA as a whole and the CEC in particular create a framework optimal for the resolution of the tuna-dolphin conflict.

Policy Recommendations

The actual resolution to the tuna-dolphin conflict will take extensive negotiation. This section offers suggestions as to possible policy changes that could produce one acceptable solution and explains why it is in the interest of the parties to follow these recommendations. All recommendations are based on the assumption that they will be

140. Side Agreement, *supra* note 115, at arts. 9.5(a), (b).

141. *Id.* art. 9.6.

142. *Id.* art. 13.2(b).

negotiated within the Council of the CEC and the discussion structure it encompasses.¹⁴³

First, the United States should amend the International Dolphin Conservation Act (IDCA) to allow for a two-year deferment of moratorium-based embargoes. In other words, embargoes should be lifted immediately with the agreement that within two years of enacting the deferment, Mexican vessels will have completely stopped encircling dolphins and consequently will have a zero dolphin kill rate.

Second, Mexican boats should move to other waters in order to catch tuna. We know that the Mexican tuna fleet has now met the quota-based embargoes by diminishing its dolphin kill rates. It has not, however, completely stopped encircling dolphins with purse-seine nets to become "dolphin-safe." Some of the Mexican boats are now 100 percent dolphin-safe, while others set on dolphins approximately half of the time. The Mexican ETP tuna fleet recently contained about 50 boats. Twelve of these boats were sold to Ecuador, which is now dolphin-safe by law. That leaves approximately 38 boats in the ETP, about 18 more than can profitably fish on schools of tuna, rather than dolphins. These 18 boats should move to other waters, such as the WTP.¹⁴⁴

While it seems unlikely that Mexican fishermen would want to agree to this proposal, there are two large incentives for cooperation. First, the added costs accruing from longer fishing trips and the possibility of catching fewer fish would be overcome by the benefits of access to the lucrative U.S. market as well as broader international markets. Second, if the tuna-dolphin controversy continues in its present form and U.S. legislation becomes more stringent, problems would arise that would increasingly hinder the Mexican fleet from operating profitably while fishing on dolphins. A current example is the provision of the IDCA that makes it a criminal offense for any U.S. citizen to partake in encircling dolphins, regardless of where this action takes place. Numerous Mexican tuna vessels have U.S. captains, while a great number of the helicopters used to spot dolphins trapped in the purse-seine nets during encircling are piloted by U.S. citizens. These expertly trained pilots would be difficult to replace. While one case has already been filed in a U.S. court to argue against the legality of these provisions,¹⁴⁵ legal battles tend to be long, and the Mexican vessels still encircling dolphins

143. I am grateful to David Phillips, Executive Director of Earth Island Institute, for providing a great deal of the information in this section. However, none of the suggestions made here should be considered to necessarily represent his views.

144. Interview with David Phillips, Executive Director of Earth Island Institute, in Palo Alto, CA (Apr. 22, 1994).

145. *Sabella v. United States*, 863 F. Supp. 1 (D.D.C. 1994) (case dismissed for lack of jurisdiction).

would suffer in the meantime, regardless of the ultimate outcome of any court cases.¹⁴⁶ This is just one example of the increasing barriers the Mexican fleets will encounter as U.S. laws become stricter, and Mexican boats continue to encircle dolphins. An agreement would avoid the need to fight this battle to the bitter end.

The second prong of this policy recommendation involves compensation to the Mexican fleet for the costs of converting boats to be equipped for fishing on schools of tuna (or floating objects), rather than dolphins. There are two options here, and the optimal one can only be selected through intensive negotiations. First, the United States could offer a technology-assistance grant to the Mexican fleet equal to the cost of converting the boat equipment. Costs of relocating the 18 boats to the WTP would also be included in this grant.¹⁴⁷ Justification for such a grant from the U.S. government would be offered on the grounds of "historical equity," or the idea that the U.S. government should pay a greater price for remedying the problem, particularly when it is partially responsible for the problem to begin with, and is demanding that a developing country meet U.S.-imposed restrictions.

A second possibility would be a loan to the Mexican tuna fleet from the World Bank to cover the costs of changing equipment and moving boats to the WTP. As the World Bank is usually interested in encouraging developing countries to privatize their industries, the Mexican government could agree to sell off any tuna boats they still own in return for a loan.¹⁴⁸ The U.S. government has great influence on World Bank policy, and U.S. officials could surely help to arrange this loan. Thus, with either of these options, Mexican fleets would not be forced to produce capital they do not have to pay for modifications mandated by the United States.

The incentives for the compromise explained above are numerous. Zedillo, the current president of Mexico, could benefit from a compromise. Domestically, the Mexican president would look better if he were portrayed as a strong nationalist who stood up to the United States and won, than by ignoring the issue or returning to the GATT to ask for enforcement of the panel ruling. In particular, Zedillo's reputation as a technocrat would benefit from his involvement in this emotionally charged issue.

Moreover, by ending dolphin kills, the Mexicans would appear to be upholding their commitment to environmental improvement, which has been questioned by U.S. ENGOs and the international community as

146. See *supra* note 144.

147. *Id.*

148. Personal Discussion with Clint Smith, Executive Director of the North America Forum, in Palo Alto, CA (Dec. 7, 1994).

a whole. Many worry that now that NAFTA has been passed, Mexican dedication to environmental improvement will wane. An agreement on the tuna-dolphin conflict could prove this conjecture unfounded. In addition, the number of environmentally aware Mexicans has been growing recently and, while they have not sided with the U.S. ENGOs on this issue, they will undoubtedly be pleased to see the killing of dolphins stopped. Finally, Mexican tuna suppliers would gain access to the lucrative U.S. tuna market and become more competitive tuna suppliers throughout the international arena. Market expansion could strengthen the Mexican tuna industry and the economy as a whole with added foreign exchange.

There are also many incentives for agreement for the various U.S. parties to the dispute. Just as the Bush Administration did not want to antagonize the Mexicans at a time when the United States and Mexico were becoming increasingly interdependent, the Clinton Administration would undoubtedly be pleased to see the conclusion of this conflict as well. In turn, environmentalists within the United States who feel that the embargoes are excessive at this point also would be pleased to see an agreement reached ending dolphin kills and the embargoes. For those U.S. ENGOs that supported the embargoes, their goal of zero dolphin kills would be achieved in a guaranteed two years, resulting in fewer than 20,000 more dolphin kills.¹⁴⁹ With this issue settled, the money presently spent on efforts to force Mexico to become dolphin-safe could be spent on protecting other species in more immediate danger of extinction.

Cooperation will benefit all. Dolphins, of course, will be the greatest benefactors of this agreement, for they are most directly impacted by this change in policy.

CONCLUSION

Today, dolphin-safe labels on tuna cans in the United States are so common as to go virtually unnoticed. But they represent a conflict that cannot and should not be overlooked. Trade and environmental issues must be harmonized, and the tuna-dolphin conflict is the ideal place to begin this process.

As is common with environmental and trade disputes, the tuna-dolphin conflict involves a vast array of policy actors who bring divergent perspectives to the bargaining table. They all, however, agree on one thing: the ineptitude of the GATT mechanism for dispute-settle-

149. This is based on estimated world dolphin kill rates for 1993. Mexico's rate is only a portion of this total. Gilbreath, *supra* note 18, at 10.

ent in effectively ending this disagreement. By not considering the different histories, priorities, and sensitivities of two nations at very different levels of economic development, the GATT ruling has failed to adequately reconcile the various views. More importantly, by ignoring the potent political force of environmental non-governmental organizations (ENGOS) that have grown in power and number during the globalization of policy issues in recent years, the GATT dispute-resolution mechanism is out of date. ENGOS must be made a part of any effective dispute-settlement mechanism or discussion process.

The tuna-dolphin conflict is no longer the most salient issue in the news, but it will not remain long on the periphery of international policy debate. It will return to center stage in the international arena by one or more of the following means: if the newly elected president of Mexico selects it as an issue for his new administration; when related disputes reference this conflict; and/or when process standards are reviewed as one of the issues targeted for discussion within the NAFTA structures. A solution to the tuna-dolphin dilemma must be sought, for neither this specific conflict nor environmental versus trade disputes as a whole is likely to disappear.

From shared border problems to issues of international immigration, the United States and Mexico are becoming increasingly interlinked. NAFTA is clearly the most tangible evidence of this growing interdependence, but trade liberalization does not happen alone. It is tied to issues of environmental degradation and the need to preserve the global commons. By creating the CEC, the parties to NAFTA have recognized that a continent-wide approach to environmental protection is mandatory and that no contemporary trade agreement should ignore this need.

NAFTA represents the first "green" international trade agreement in the world's history and provides an excellent structure for solving the tuna-dolphin conflict. Though the tuna-dolphin conflict is effectively excluded from the NAFTA environmental dispute-settlement mechanism, the structure for discussion of environmental issues established within the CEC provides an optimal atmosphere for compromise and agreement. If utilized to its fullest extent, the CEC can serve as a precedent for greening future trade liberalizing agreements. The CEC establishes a Council where environmental issues are to be discussed. Discussion, cooperation, and agreement are more appropriate to this multifaceted debate than a panel ruling.

In addition, the problems inherent to the GATT structure are remedied in the Council procedures. NAFTA as a whole, and the CEC specifically, include commitments to increased environmental protection and cooperation on environmental issues; an opening of procedures to the public; and the incorporation of NGOs and any non-governmental

person or group in the discussion process. These features create an atmosphere conducive to agreement.

A solution will take extensive negotiation and compromise. First, there should be an amendment creating a two-year deferment of moratorium-based embargoes mandated by the International Dolphin Conservation Act. By the end of the two-year period, Mexican fleets would completely stop setting nets on dolphins. In return for this concession, Mexican tuna harvesters would be provided with the capital necessary to change their equipment to promote fishing on tuna schools instead of dolphins, and for the cost of moving boats to the WTP. The funds should come in the form of a grant from the U.S. government or as a loan from the World Bank.

To date, unilateral action alone has not saved dolphins from incidental death caused by drowning in purse seine nets. It is time that a multilateral approach be institutionalized to solve trade and environmental disputes like the tuna-dolphin conflict. With the commitment to international cooperation and environmental protection it outlines, NAFTA provides a framework for multilateral negotiations and a multisectoral solution to the tuna-dolphin controversy.