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# Marine Mammal Protection Act: Working Toward an Effective International Solution to the Dolphin Problem, The

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**The Marine Mammal Protection Act:  
Working Toward an Effective  
International Solution to the Dolphin  
Problem**

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## I. INTRODUCTION

Dolphin, among the world's most intelligent mammals, are being decimated by tuna fishermen. Since the 1960s, the dolphin population has decreased by 80%.<sup>1</sup> Most dolphin are taken,<sup>2</sup> killed, or seriously injured, by the fishing nets of foreign tuna fishing fleets.<sup>3</sup> In 1987, the United States tuna fleet killed 13,992 dolphins, while the foreign fleets<sup>4</sup> killed over 100,000 dolphins<sup>5</sup> in the Eastern Tropical Pacific.<sup>6</sup> At least two subspecies have fallen below their optimum sustainable population thus threatening the species' existence.<sup>7</sup>

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1. *Implementation of the Marine Mammal Protection Act Amendments: Hearings on H.R. 2926 and H.R. 2948 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment, Comm. on Merchant Marine and Fisheries*, 100th Cong., 2d Sess. 20 (1989) [hereinafter *MMPA Hearings*] (statement of Rep. Schneider) ("It has been estimated that since the 1960s six million dolphins," or roughly 80% of the dolphin population, "have been killed by both foreign and domestic tuna fleets.").

2. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1362(12) (1982 & Supp. V 1987) [hereinafter *MMPA*] ("Take" means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill).

3. *MMPA Hearings*, *supra* note 1, at 201 (statement of Christopher Croft, Greenpeace representative). "From 1977 to 1988, the U.S. fleet dwindled from over 100 boats to 23 boats, as the foreign fleet ballooned to more than 70 boats from fewer than 10. Today, foreign vessels comprise 68% of the eastern Pacific fleet and account for 85% of the dolphin mortalities." *Id.*

4. "Foreign" and "international" both refer to the tuna fishing operations of Ecuador, Mexico, Panama, Vanuatu, and Venezuela. 54 Fed. Reg. 7933 (1989).

5. Marine Mammal Protection Act Amendments of 1988, S. REP. No. 592, 100th Cong. 2d. Sess. 6 [hereinafter *MMPA Amendments*]. In 1989, purse seine fishing killed 96,979 dolphins, a 23% increase from 1988. The American kill of dolphin in 1989 was 12,643, a 36% decrease. But in 1989, the foreign rate increased 42% to 84,364 dolphins killed. MacLean, *Environmentalists Seek Foreign Tuna Embargo to Halt Dolphin Kill*, U. Press Int'l, Aug. 20, 1990, § Regional News (BC cycle).

6. 53 Fed. Reg. 39,743 (1988) ("The [Eastern Tropical Pacific] is the Pacific Ocean area bounded by 40° north latitude, 40° south latitude, 160° west longitude, and the coasts of North, Central and South America.").

7. *MMPA*, *supra* note 2, § 1362(8). See Statement of: American Cetacean Society, American Humane Society, Animal Protection Institute of America, California Marine Mammal Center, Center for Environmental Education, Defenders of Wildlife, Earth Island Institute, Friends of the Earth, Greenpeace U.S.A., The Humane Society of the United States, International Wildlife Coalition, Marine Mammal Fund, National Audubon Society, Northwind Undersea Institute, The Oceanic Society, Society for Animal Protective Legislation, and The Whale Center before the National Ocean Policy Study of the Committee on Commerce, Science, and Transportation on the Reauthorization of the Marine Mammal Protection Act 10 (1988) [hereinafter *Greenpeace Statement*] (available from Greenpeace in San Francisco, California) (statement of Lesley Sheele, Greenpeace Spokesperson) ("A stock which has been reduced below its optimum sustainable population (OSP), interpreted at 60% of its original size, is considered 'depleted'. . . . Currently, two stocks, the eastern spinner and coastal

The dolphin and tuna have a symbiotic relationship.<sup>8</sup> Dolphin swim in the upper levels of the ocean where they are visible as they break the surface of the water to breathe. Tuna swim below the dolphins.<sup>9</sup> Fishing fleets follow the visible dolphin herds in order to locate schools of tuna swimming below. The fishing vessels then set their nets on the dolphins in order to catch the tuna. The nets often drown or seriously injure the dolphin.<sup>10</sup>

In response to this growing problem, the U.S. Congress enacted the Marine Mammal Protection Act of 1972 [hereinafter MMPA or the Act].<sup>11</sup> The U.S. Congress determined that dolphin are resources of great international significance.<sup>12</sup> Dolphins have aesthetic, recreational and economic value.<sup>13</sup> Because dolphin are a migratory species, they affect the balance of marine ecosystems in a manner which is important to other animals and animal products.<sup>14</sup> A major purpose of the Act is to protect dolphins and other marine mammals from the dangers of commercial tuna fishing operations.<sup>15</sup>

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spotted dolphin, have been so reduced by tuna fishing operations they have been designated as depleted.").

8. MMPA Amendments, *supra* note 5, at 6 (Although termed "symbiotic," the dolphin and tuna's close association is not necessarily for the benefit of each other). See Beyette, *Catch-22; Must a Thriving San Diego Fishing Community Die So More Pacific Dolphin May Live?*, L.A. Times, May 1, 1990, § View, at 1, col. 2 (discussing the dolphin's symbiotic relationship with tuna).

9. *Id.*

10. *Id.*

11. 16 U.S.C. §§ 1361-1407 (1982 & Supp. V 1987).

12. MMPA, *supra* note 2, § 1361(6). See Inter-American Tropical Tuna Commission, Summary Minutes of the 48th Meeting, September 17-20 1990, San José, Costa Rica, (statement of Dr. Joseph) ("Because the fleets of many nations fish for tunas in association with dolphin, and because more than twice as many dolphins are caught beyond the 200-mile limit as inside it, the problem was international.").

13. MMPA, *supra* note 2, § 1361(6).

14. *Id.* "[I]t is the sense of the Congress that [dolphin] should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem." *Id.*

15. MMPA Amendments, *supra* note 5, at 1-3 (The MMPA was enacted in 1972 for the purpose of ensuring that marine mammals are maintained at healthy levels. In order to minimize the impact of commercial fishing on populations of marine mammals, the Act directed the Secretary of Commerce to establish a permit system and issue regulations which would ensure that the techniques and equipment used by the fishermen would produce the least practicable hazard to marine mammals).

The MMPA significantly impacts the U.S. tuna fishing fleets [hereinafter domestic fleets] by reducing the number of dolphins taken by domestic fleets.<sup>16</sup> Environmental organizations<sup>17</sup> argue that, although U.S. fleets comply with the MMPA, too many dolphins are killed, and stricter provisions<sup>18</sup> are necessary to maintain optimum sustainable populations.<sup>19</sup> Despite this claim, the U.S. Congress is primarily concerned with the foreign fleets which continuously take large numbers of dolphins from the Eastern Tropical Pacific.<sup>20</sup> This concern is sufficiently supported by statistics. In 1989, the international fleet's total dolphin

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16. *Id.* The Committee Report discussed the success of the Act in the U.S. by reducing the dolphin mortality from 369,000 in 1972 to 18,573 in 1980. *Id.*

17. See Greenpeace Statement, *supra* note 7, at 5 (asserting that the dolphin mortality problem which was recognized a decade ago, still has not been resolved).

18. Telephone interview with Amy Hollerant, Director of Dolphin Project, Greenpeace Action, in San Francisco (January 14, 1991). Ms. Hollerant recommended that observers be placed on board 100% of the foreign tuna vessels and that a new enforcement agency replace the Fisheries Service. She claimed that the Fisheries Service does not effectively enforce the Act because, among many reasons, the Fisheries Service has strong ties with the tuna industry. That is, the Fisheries Service is unwilling to limit the amount of tuna imported to the U.S. because the decreased supply will raise prices. *Id.*

19. H.R. REP. No. 970, 100th Cong., 2d Sess. 15, reprinted in 1988 U.S. Code Cong. & Admin. News 6154, 6156. The Committee Report also discussed the issue of whether the goal of the Act was being fulfilled because the incidental kill of porpoise had not been reduced to insignificant levels approaching zero. The tuna industry contends that by using the best technology feasible to reduce incidental porpoise mortality, the industry was meeting the mandate of the Act. *Id.* See Greenpeace Statement, *supra* note 7, at 16-17 ("The bottom line remains the number of dolphins actually killed and the impact of the fishery on specific stocks. By this measure, conditions have not improved for over a decade. . . . The Congress has stated that the immediate goal of the Act is that commercial fishing operations reduce kill levels of marine mammals to levels approaching a zero mortality rate. It is our opinion that the intentional take of massive numbers of dolphins in the tuna fishery is inconsistent with such a goal. Sixteen years after the Act was passed it is time for the practice of setting on dolphins to be stopped."). The phrase "setting on dolphins" describes fishing vessels that encircle the dolphins with nets to catch tuna. *Earth Island*, *infra* note 20, 746 F. Supp. at 967.

20. MMPA Amendments, *supra* note 5, at 7 ("While the U.S. industry has made dramatic improvements since the enactment of the MMPA, unregulated tuna fleets of foreign nations now present a far more serious source of porpoise mortality."). See Reply to Opposition to Plaintiffs' Motion for Preliminary Injunction at 7, *Earth Island Institute v. Mosbacher*, 746 F. Supp. 964 (N.D. Cal. 1990) (No. C-88-1380-TEH), *aff'd*, 929 F.2d 1449 (9th Cir. 1991) [hereinafter *Earth Island*]. The Tuna Commission disseminated a report at its 1990 meeting stating that the total foreign kill of dolphin was 19.3% higher in 1989 than the previous year. The aggregate foreign kill of dolphin in 1989 exceeded the 2.0 times U.S. kill rate comparability requirement in 1989. *Id.*

mortality was 84,279.<sup>21</sup> This is a dramatic increase from 1988 levels.<sup>22</sup> Additionally, preliminary figures for 1990 show little change from 1989.<sup>23</sup>

Under the Act, excessive dolphin mortality rates result in excluding foreign fisheries from exporting tuna to the U.S. As a major consumer of canned tuna,<sup>24</sup> the U.S. greatly influences the methods of tuna fishing by banning tuna exports of foreign fleets with excessive dolphin mortality rates. International fisheries not conforming with the MMPA are prohibited from exporting tuna to the U.S. Theoretically, without access to a major tuna market the noncomplying foreign fisheries are forced to comply with the provisions of the Act in order to regain access to the U.S. market.<sup>25</sup> Unfortunately, due to ineffective enforcement of the Act the foreign fisheries are not denied access to the U.S. market despite their unreasonable dolphin mortality rate.

The purpose of this comment is to discuss the MMPA and analyze ways to resolve two of its weaknesses. These weaknesses are the inadequate observer coverage rate on the foreign fleet and the ineffective enforcement of the Act on the international level. Part II examines the MMPA and its effect on domestic and foreign tuna fishing operations. Part III explores the weaknesses of the Act.

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21. Declaration of David C. Phillips in Support of Plaintiffs' Motion for Preliminary Injunction at 2, *Earth Island*, *supra* note 20.

22. *Id.* "At the June 1990 conference, the Inter-American Tropical Tuna Commission released documents which indicated that mortality rose by 22.9% when calculated on a mortality per set ratio, and 19.3% when calculated on a mortality per ton ratio." *Id.*

23. Inter-American Tropical Tuna Commission, Considerations for an International Dolphin Conservation and/or Management Program for the Eastern Pacific Ocean, BP1-90B/2 (Sept. 12, 1990) (unpublished manuscript for the Tuna Commission meeting on September 17-18, 1990) [hereinafter Background Paper] ("So far in 1990 the patterns of fishing do not appear to have changed much, compared to 1989").

24. Manning, *The Net Effect on Dolphin, More Foreign Fishing Boats Pose a Risk*, USA Today, August 6, 1990, § Life, at 4, col. 1 (The U.S. consumes 40% of the world's canned tuna. This market could force foreign fisheries to stop excessive killing of dolphins). See Peckham, NOAA's TUNA NEWSLETTER, Feb. 1989, 8-9 (The U.S. consumed over 50% of all canned tuna produced in the world between 1986 and 1988).

25. Manning, *supra* note 24, at 4 (statement by Brenda Killian, head of the Dolphin Project for Earth Island Institute) (describing the international situation) ("The buying power of the U.S. market . . . is likely to force foreign fishers to stop killing dolphins."). "Two companies in Italy and the French canners' association have vowed to go dolphin-safe. . . . The Ecuadorian tuna fleet have vowed to go dolphin-safe. . . . We've got to keep the pressure on, to encourage other countries." *Id.*

Part IV proposes two amendments to the Act. If enacted, these amendments would increase observer coverage rates and create a new enforcement agency to better accomplish the original goal of the MMPA: reducing dolphin mortality.<sup>26</sup>

## II. THE MARINE MAMMAL PROTECTION ACT

The purpose of the Act is to reduce to insignificant levels<sup>27</sup> the number of marine mammals incidentally killed during commercial fishing operations.<sup>28</sup> To achieve this goal, the Act authorizes the Secretary of Commerce to regulate commercial tuna operations by limiting the number of dolphins taken while fishing.<sup>29</sup>

### A. *United States Standards*

To enforce the Act's provisions in the United States, a three-member Marine Mammal Commission (MMC) monitors the implementation of the Act through a permit system.<sup>30</sup> This permit system ensures that vessels use the safest equipment practicable and that dolphin mortality rates are within the provisions of the

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26. MMPA, *supra* note 2, § 1371(a)(2) ("In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.").

27. *Id.* (The Act also notes that "this goal shall be satisfied in the case of the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable.").

28. "Incidental" is generally defined as "occurring merely by chance or without intention or calculation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1142 (unabr. ed. 1981). However, Greenpeace disagrees: "Unlike other fisheries with marine mammal kills, these dolphins are not passively taken when they encounter fishing gear. Rather, . . . [i]t is a purposeful hunting, harassment, capture and, in some cases, killing of marine mammals." Greenpeace Statement, *supra* note 7, at 17.

29. 53 Fed. Reg. 8911 (1988) (codified at 50 C.F.R. § 216).

30. MMPA Amendments, *supra* note 5, at 2.

MMPA.<sup>31</sup> If a vessel meets the permit standards, the MMC grants the vessel a permit thereby allowing the vessel to take dolphins in the course of its fishing operations.<sup>32</sup>

Observers from the Inter-American Tropical Tuna Commission<sup>33</sup> [hereinafter Tuna Commission] provide the information necessary to determine whether a permit is granted.<sup>34</sup> Observers on the fishing vessels monitor dolphin mortality during tuna fishing and record data on fishing practices.<sup>35</sup> The MMC uses this data to determine whether permit standards are met. For example, the data is used to determine if the quota on dolphin mortality of 20,500 dolphins per season is followed.<sup>36</sup> A recent amendment to the MMPA requires a 100% observer coverage rate on all domestic fleets.<sup>37</sup> Such coverage ensures accurate data.<sup>38</sup>

### *B. Domestic Compliance with the Act*

The domestic fishing fleets presently comply with the provisions of the MMPA.<sup>39</sup> Since January 1, 1989, the domestic fleets have maintained a 100% observer coverage rate.<sup>40</sup> In 1989,

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31. *Id.* at 3. "The Act directed the Secretary of Commerce to establish a permit system and issue regulations which would ensure that the techniques and equipment used by fishermen would produce the least practicable hazard to marine mammals." *Id.* "The National Marine Fisheries Service, on behalf of the Secretary, issues 'general permits' for the take of relatively large numbers of marine mammals by U.S. and foreign fishermen. . . . The Secretary of Commerce [is] to obtain reasonable proof from foreign governments in order to make a finding that foreign commercial fishing techniques were not resulting in kills or injuries in excess of U.S. standards." *Id.*

32. MMPA, *supra* note 2, §§ 1372-74 (discussing permit system).

33. The Tuna Commission is an international scientific body funded by the tuna industry which monitors tuna fisheries in the Eastern Tropical Pacific Ocean.

34. 54 Fed. Reg. 20,171 (1989).

35. *Id.*

36. 54 Fed. Reg. 20,172 (1989) (A 1980 MMPA amendment imposes a ceiling on dolphin mortality of 20,500 dolphins per season).

37. 54 Fed. Reg. 20,171 (1989) (100% observer coverage is mandatory unless, for reasons beyond the control of the Secretary of Commerce, an observer is not available for such purpose).

38. 54 Fed. Reg. 51,919 (1989).

39. *MMPA Hearings*, *supra* note 1, at 11 (statement of Mr. Fullerton, Director of National Marine Fisheries Service). See *MMPA Reauthorization*, *infra* note 52, at 2 (statement of Sen. Kerry) ("I think that our U.S. fleet should be applauded for their initial efforts to decrease the mortality of porpoises. In the past decade, the industry has reduced the killing from hundreds of thousands per year down to about 13,000 a year. And this year's level is expected to go down to perhaps 10,000.").

40. *MMPA Hearings*, *supra* note 1, at 11 (statement of Mr. Fullerton).



with 70% of the year gone, the projected U.S. dolphin mortality rate was 30% under quota.<sup>41</sup> Thus, domestic fleets abide by the provisions of the Act thereby decreasing dolphin mortality.

### *C. Foreign Standards Under the MMPA*

International enforcement of the Act is similar to domestic enforcement of the Act. As in the United States, the Tuna Commission observers provide data regarding the fishing practices of the foreign fleet. The National Marine Fisheries Service<sup>42</sup> [hereinafter Fisheries Service] assimilates the data and uses it to enforce the Act internationally.<sup>43</sup> The Fisheries Service compares Tuna Commission observations of international dolphin mortality with U.S. data to determine if the foreign fisheries comply with the MMPA.<sup>44</sup> If a foreign fishery's kill data exceeds the U.S. rates, that foreign fishery is denied access to the U.S. tuna market.<sup>45</sup>

In addition, the 1984 and 1988 amendments to the Act extend the permit system to encompass foreign fisheries seeking to export tuna products to the U.S.<sup>46</sup> In order to export tuna products to the

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41. *Id.* at 28 (statement of August Felando, American Tunaboat Association President).

42. The National Marine Fisheries Service is a U.S. agency, in the Department of Commerce, in charge of the international enforcement of the Act.

43. MMPA, *supra* note 2, §§ 1373, 1382.

44. 54 Fed. Reg. 20,172 (1989) ("The primary duties of observers in the international program is to monitor and record the number of dolphin deaths by species/stocks during each trip. This data is used by the Inter-American Tropical Tuna Commission to estimate the total dolphin mortality for the major species/stock for the entire international fleet on an annual basis.").

45. MMPA, *supra* note 2, § 1371(a)(2); 54 Fed. Reg. 7933 (1989) ("[I]n order to import yellowfin tuna into the United States, any nation which has purse seine vessels of 400 tons carrying capacity or greater operating in the [Eastern Tropical Pacific] must supply documentary evidence that it has a regulatory program governing the incidental taking of marine mammals . . . in the tuna fishery and a resultant mortality rate of marine mammals which are comparable to that of the United States.").

46. 54 Fed. Reg. 50,764 (1989). The Fisheries Service promulgated an interim rule to implement the MMPA Amendments of 1988, concerning the importation of yellowfin tuna caught by purse seining in the Eastern Tropical Pacific. 54 Fed. Reg. 9438 (1989). Under this rule, to import yellowfin tuna into the United States during 1990, any nation which has purse seine vessels greater than 400 tons carrying capacity operating in the Eastern Tropical Pacific must supply documentary evidence that it has a regulatory program governing the incidental taking of marine mammals in the tuna fishery comparable in most respects to that of the United States. *Id.*

U.S., a foreign nation's fishing fleets must apply fishing practices that are comparable to U.S. practices.<sup>47</sup>

The Fisheries Service annually employs a two-part test to determine whether to grant, or to extend, a finding of comparability in order to issue a permit to foreign fleets.<sup>48</sup> First, a foreign fleet must have a regulatory program to protect mammals comparable to the U.S. program.<sup>49</sup> The effectiveness of each foreign fleet's regulatory program is determined by its annual marine mammal kill rate.<sup>50</sup> Second, to qualify for tuna exportation to the U.S., each foreign fleet must demonstrate, through reliable and verifiable data, that its average annual rate of incidental mortality is comparable to the rate achieved by the U.S. fleets.<sup>51</sup>

If a foreign fleet's dolphin mortality rate is not comparable to the U.S. mortality rate, the foreign vessel has violated the MMPA. Consequently, the foreign fleet may not export tuna to the U.S. However, the MMPA is only effective if violations of the Act are detected and properly enforced.<sup>52</sup> Unfortunately many foreign

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47. See 54 Fed. Reg. 9443-46 (1989) (providing a detailed explanation of the comparability test). A foreign nation has standards comparable to the U.S. standards if it meets the following requirements: "[I]t has adopted a regulatory program containing the same prohibitions applicable to U.S. vessels, within 180 days after the U.S. has imposed such restriction on its vessels; that the average kill rate of its fleet is no more than two times the U.S. rate during the same period of time by the end of 1989 and no more than 1.25 [times] the U.S. rate by the end of 1990; the percentage of eastern spinners and coastal spotted dolphin does not exceed 16 percent and 2 percent respectively of its total number of marine mammals taken in any year; [and] its fishing operations are monitored, to the same degree as U.S. vessels, by an observer program of [the Tuna Commission] or an equivalent international program." *Id.*

48. 54 Fed. Reg. 9442 (1989). The two-part test applies only to vessels of greater than 400 tons carrying capacity that purse seines for tuna in the Eastern Tropical Pacific. This vessel size is consistent with the U.S. experience that smaller vessels cannot effectively set, and do not set, on marine mammals. *Id.*

49. 54 Fed. Reg. 9442 (1989). "The annual evaluation of the regulatory program will consider the comparability of laws, regulations, guidelines, the observer program, and the enforcement program which govern the vessel operators and the gear and techniques they must use to prevent or minimize the number of marine mammals killed and seriously injured when purse seining for yellowfin tuna." *Id.*

50. *Id.*

51. *Id.*

52. *Hearings Before the National Ocean Policy Study of the Committee on Commerce, Science, and Transportation on the Reauthorization of the Marine Mammal Protection Act*, 100th Cong., 2d Sess. 53 (1988) [hereinafter *MMPA Reauthorization*] (statement of Mr. LaBudde and Mr. Phillips of the Earth Island Institute) ("[B]oth Mexican and U.S. observers can attest to the falsification of data concerning the numbers of dolphins killed.").

fleets continue to violate the Act. Moreover, the Fisheries Service is aware of the violations yet it fails to adequately sanction the foreign fleets.<sup>53</sup>

### *1. Foreign Noncompliance with the Act*

In contrast to the domestic fleets, the MMPA is ineffective in regulating the dolphin mortality rates of the foreign fleets. Foreign tuna fishermen continue to kill large numbers of dolphins. For example, as of 1987 foreign vessels tuna fishing in the Eastern Tropical Pacific slaughtered over 100,000 dolphins annually.<sup>54</sup> Although the foreign fleets in this area are only twice the size of the U.S. fleet, their estimated dolphin mortality rates are approximately four times as high.<sup>55</sup> The foreign fleets continue to violate the Act's provisions despite their understanding of the consequences of failing to meet the requirements of the MMPA.<sup>56</sup>

High dolphin mortality among the foreign fleets is directly linked to the Fisheries Service's ineffective enforcement of the Act internationally.<sup>57</sup> "The problem is not with [the U.S.] tuna industry. The problem is with the foreign fishermen, who take four times more porpoises than our industry does . . . And even equally as bad, our government has not done anything about it."<sup>58</sup> To attain the goal of reducing dolphin mortality, enforcement must be effective internationally as well as domestically.

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53. *Id.* (statement of Sen. Breaux).

54. MMPA Amendments, *supra* note 5, at 7. Foreign vessels caught 60% of the tuna and killed 80% of the dolphins in the Eastern Tropical Pacific. *Id.*

55. See MMPA Hearings, *supra* note 1 (statement of Mr. Croft) (noting that the size of the U.S. fleet has decreased, and that the foreign fleets' mortality rates have increased).

56. MMPA Hearings, *supra* note 1, at 12 (statement of Mr. Fullerton) ("For the most part, the tuna industries of [foreign] nations are keenly aware of the consequences [of denied tuna exports to the U.S. due to the failure] to meet the MMPA requirements but have had difficulty in getting their governments to recognize the requirements of the law.").

57. 134 CONG. REC. H8243 (daily ed. Sept. 26, 1988) (statement of Rep. Jones) ("It is important to remember that it is the greatly increased mortality caused by foreign tuna boats which is responsible for most of the porpoise deaths.").

58. MMPA Reauthorization, *supra* note 52, at 156 (statement of Sen. Breaux).

## 2. *U.S. Reaction to Foreign Noncompliance*

In an attempt to ensure foreign fleets are responsible in their tuna fishing practices,<sup>59</sup> Congress passed a provision in 1984 mandating that nations exporting tuna to the U.S. have an adequate marine mammal protection program.<sup>60</sup> In addition, the 1988 Amendments to the MMPA require the foreign fleets to lower the number of dolphins killed to an average incidental take rate comparable to the take rate of the U.S. fleet.<sup>61</sup> Congress intended these measures to aid in the international reduction of dolphin mortality.

However, such modifications to the Act are ineffective. Foreign fleets continue to kill an unacceptable number of dolphins. Although frustration exists within the foreign fisheries because the U.S. unilaterally imposed the Act, the foreign fisheries recognize the need to reduce dolphin mortality.<sup>62</sup> If the Fisheries Service properly enforced the Act, the provisions would effectively reduce foreign dolphin mortality.

### III. PROBLEMS WITH THE MMPA

The MMPA's success in regulating the U.S. dolphin mortality rate is not duplicated by the foreign fleets. Excessive international dolphin mortality is largely a result of the Fisheries Service's ineffective enforcement of the Act's provisions.<sup>63</sup> Illustrative of this point is the Fisheries Service's faulty enforcement of the fishing practices of the Mexican fleet.

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59. 134 CONG. REC. S16,345 (daily ed. Oct. 14, 1988) (statement of Sen. Kerry).

60. *Id.*

61. *Id.* See *supra* note 47 (defining a comparable take rate).

62. MMPA Hearings, *supra* note 1, at 12 (statement of Mr. Fullerton).

63. See *supra* note 53 and accompanying text (noting that the Fisheries Service does not sanction known violations of the Act).

A. *Earth Island Institute v. Mosbacher*.<sup>64</sup> *an Example of Ineffective MMPA Enforcement*

The issue in *Earth Island* was whether the Fisheries Service may use less than one year of dolphin-kill data to determine whether Mexico is complying with the MMPA. On August 28, 1990, in response to an action initiated by Earth Island Institute and other environmental groups, the United States District Court for the Northern District of California ordered the Secretary of Commerce to embargo tuna products from Mexico.<sup>65</sup> The court conditioned this embargo on the finding that Mexico's incidental dolphin takes were not comparable to the United States as defined under the Act.<sup>66</sup>

Within two weeks of the court order, the Fisheries Service lifted the embargo. Although initial Fisheries Service findings indicated that Mexico exceeded comparability standards, thereby violating the Act, the Fisheries Service permitted Mexico, under a Fisheries Service regulation, to submit new data for reconsideration.<sup>67</sup> Based on six months of Mexican fleet performance statistics, the Fisheries Service found that during the first six months of 1990 Mexico met the requirements of the

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64. *Earth Island*, *supra* note 20. The action was initiated by Earth Island Institute, a California nonprofit corporation, the Marine Mammal Fund, a California nonprofit corporation, and David R. Brower.

65. 746 F. Supp. at 969.

66. *Id.* See 55 Fed. Reg. 11,921 (1990) (providing the statutory criteria); *supra* note 47 and accompanying text (describing the comparability argument).

67. 50 C.F.R. § 216.24(e)(5)(viii); 55 Fed. Reg. 11,929 (1990) (If a foreign nation has exceeded the limitations for a given year, and therefore remains under the embargo, the Secretary may nevertheless reconsider the embargo and certify compliance with the statute's provision based upon data for only the first six months following the year the limits were exceeded).

comparability test.<sup>68</sup> Based on this finding, the Fisheries Service allowed Mexico to resume exporting its tuna product to the U.S.<sup>69</sup>

Earth Island moved for a temporary restraining order to embargo all tuna exports from Mexico, alleging that the Fisheries Service violated the Court's order. The Fisheries Service analyzed Mexico's dolphin mortality data based on less than a full fishing season. The Court found that the Fisheries Service clearly violated the MMPA provision which requires the determination of the percentage of dolphin taken to be based upon data for an entire season.<sup>70</sup> Thus, the Court granted the temporary restraining order forbidding Mexico from exporting tuna and tuna products to the United States until Mexico provided a full year of evidence supporting its compliance with the MMPA.<sup>71</sup>

The *Earth Island* decision illustrates the Fisheries Service's ineptitude for enforcing the MMPA's provisions.<sup>72</sup> The Act expressly requires dolphin mortality findings to be based upon data for an entire fishing season.<sup>73</sup> By implementing the reconsideration regulation that permits the use of data for less than an entire season to determine comparability, the Fisheries Service

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68. 746 F. Supp. at 970-72, *aff'd*, 929 F.2d at 1451. Ten days after the court order, the Fisheries Service found that for the first eight months of 1990, Mexico's incidental dolphin taking rate was 1.58 times that of United States vessels for the same period, which was below the 2.0 times standard. The Fisheries Service also found that eastern spinner dolphins comprised 10.3% of the total number of dolphins taken by Mexican vessels. This is less than the 15% standard set by the MMPA. The court noted that the speed of the Fisheries Service's findings raise serious concerns. In previous hearings the Fisheries Service claimed that the complexity of the calculations justify an eight month delay in making findings regarding the importing countries. But now the Fisheries Service can issue findings in two weeks. *Id.* at 972-73.

69. *Id.*

70. 746 F. Supp. at 971, *aff'd*, 929 F.2d at 1452. MMPA, *supra* note 2, § 1371(a)(2)(B)(ii)(III) (An embargo is required unless the total number of eastern spinner dolphin incidentally taken during the 1989 and subsequent fishing seasons does not exceed 15% of the total number of marine mammals incidentally taken by such vessels in such year). See MMPA Amendments, *supra* note 5, at 6 (referring to the annual quota of dolphins killed).

71. 746 F. Supp. at 969.

72. 929 F.2d at 1453. The court noted the Fisheries Service's record of nonenforcement of congressional directives during the years which preceded the 1988 amendments. In enacting those amendments, Congress expressed its concern that the Fisheries Service was not holding foreign vessels to U.S. standards. *Id.* See 134 CONG. REC. S16,345 (statement of Sen. Kerry) ("[U]ntil recently the [Fisheries Service] had not issued or even drafted for that matter, regulations putting in place many necessary and important changes.").

73. MMPA, *supra* note 2, § 1371(a)(2)(b)(ii)(III).

relaxed the enforcement standards.<sup>74</sup> As a result of the Fisheries Service's action discussed in *Earth Island*, Mexico, which exceeded MMPA standards for an entire year, was not embargoed.<sup>75</sup>

Moreover, under the Fisheries Service's reconsideration regulations foreign nations may continually exceed MMPA limits for six months of each year, yet never be subject to an embargo.<sup>76</sup> Furthermore, this case indicates the Fisheries Service's willingness to accept a foreign government's data concerning comparability without making an independent finding as mandated by the Act.<sup>77</sup> Thus, the Fisheries Service's reconsideration regulation creates a potential for abuse and results in the circumvention of Congressional intent.<sup>78</sup>

### *B. Inaccurate Administrative Interpretations of the Act*

The MMPA is ineffective internationally because of erroneous administrative interpretations by the Fisheries Service. Two

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74. Telephone interview with Joshua R. Floum, in San Francisco, attorney for the plaintiffs-appellees in *Earth Island* (Jan. 12, 1991). See Second Amended Complaint for Declaratory Judgment at 11-12, *Earth Island*, *supra* note 20 ("[T]he [Fisheries Service] has actually relaxed its standards in many cases.").

75. 929 F.2d at 1452.

76. *Id.* at 1452-53.

77. *Id.* at 1451 ("It is difficult to understand how the government could issue a favorable determination in this case in less than two weeks when it had previously argued that it needed at least six months to collect and analyze data from foreign nations."); Court Order at 5 n.2, *Earth Island*, *supra* note 20 (In the court order enjoining the Fisheries Service from allowing the importation of tuna from Mexico, the court speaks with cynicism about the Fisheries Service's findings. "The speed of the [Fisheries Service's] determination raises serious concerns. At the August hearing in this case, the defendants argued at length that the complexity of the calculations required by the statute justified the eight month delay in making findings concerning the importing countries. Now the [Fisheries Service] is somehow able to issue findings on September 7, 1990 regarding the taking rates for both Mexico and the United States for the first eight months of 1990. These calculations were made in approximately two weeks. The federal defendants argue that the earlier delay was due to the fact that data for the 1989 season was not due from importing countries until the end of July 1990, at which time [the Fisheries Service] began to make its calculations. [The Fisheries Service] argued that this procedure allowed them to make more complete calculations by including the data from fishing vessels which left port at the end of 1990, but which did not return until sometime well into the 1990 fishing season. While the existence of radios raises questions as to why the defendants had to wait until the fishing vessels returned to port to get data concerning the dolphin kills, the fact that a similar delay was not required for the calculations at issue in the instant application for TRO only underscores the Court's concern.").

78. 929 F.2d at 1453.

examples illustrate the Fisheries Service's actions that limit the MMPA's usefulness on the international level. For example, on December 15, 1988, the Fisheries Service embargoed tuna from a vessel believed to be Spanish.<sup>79</sup> The vessel failed to submit, in a timely manner, the necessary documentation on marine mammal mortality rates.<sup>80</sup> Consequently, the Fisheries Service denied Spain exportation rights for over two months.

However, on February 24, 1989, the Fisheries Service rescinded the ban on tuna importation from the allegedly Spanish vessel.<sup>81</sup> This change in policy resulted from the Fisheries Service's improper assumption that the vessel originally denied exportation rights was Spanish.<sup>82</sup> Actually, the vessel was certified as Ecuadorian for MMPA purposes. Ecuador was, at that time, in conformity with the Act.<sup>83</sup> Thus, Spain was improperly embargoed.<sup>84</sup> This faulty assumption by the Fisheries Service is an example of inaccurate findings which confuse and frustrate foreign fleets attempting to comply with MMPA provisions.<sup>85</sup>

Another example of inconsistent enforcement of the Act is evidenced by the Fisheries Service's 1989 statement that Ecuador conformed with the Act.<sup>86</sup> This statement permitted Ecuador to export tuna into the U.S. while a previous finding of

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79. 53 Fed. Reg. 50,420 (1989).

80. *Id.*

81. 54 Fed. Reg. 7933 (1989).

82. *Id.*

83. *Id.* (The vessel was covered by an agreement between Ecuador and Spain. Furthermore, Ecuador had a marine mammal finding of conformity).

84. *Id.* Spain must no longer meet the requirements of an Eastern Tropical Pacific harvesting nation to have its tuna imported into the United States. *Id.*

85. Inter-Am. Tropical Tuna Comm'n, Report at the Tuna-Dolphin Workshop in San José, Costa Rica 8-9 (Mar. 14-16, 1989) (available from Scripps Institute of Oceanography, in La Jolla, California) ("As the U.S. fleet rates may change considerably from year to year, the captains of non-U.S. boats do not have clear goals to aim at. Being told that their performance must fall below a certain rate allows the captains to know how well they are doing and to strive to reach those goals. At the same time, goals that are too stringent may discourage them and lead them to give up. Dr. Hall said he believed that realistic goals would help to motivate the captains, and that more stringent goals could be set when the current ones were reached.").

86. 54 Fed. Reg. 7933 (1989). "The Republic of Ecuador currently has a marine mammal finding of conformance." *Id.*



nonconformance was still in effect.<sup>87</sup> The Fisheries Service made an official finding of conformity months later; only then did Ecuador conform with the Act while exporting tuna into the U.S.<sup>88</sup> Thus, for months the Fisheries Service misapplied a provision of the Act by allowing Ecuador to export tuna into the U.S. in violation of the Act.

These two examples are evidence of the Fisheries Service's inaccurate enforcement of the Act. The Fisheries Service confuses and misapplies the provisions of the Act. As illustrated above, the Fisheries Service's enforcement of the Act is either too relaxed or too stringent. If countries are not properly advised of violations of the Act, they cannot change their practices accordingly to reduce dolphin mortality. In addition, incorrect sanctions decrease the incentive to comply with the Act.

### *C. Insufficient Observer Coverage*

#### *1. Current Observer Coverage*

In addition to the Fisheries Service's ineffective enforcement and misapplication of the Act's provisions, the MMPA contains a major substantive shortcoming: insufficient observer coverage on the foreign fleets. Currently, the Fisheries Service accepts a 33% observer coverage rate, requiring 33% of the foreign vessels to carry a Tuna Commission observer on board to monitor fishing practices.<sup>89</sup> Underlying the Fisheries Service's designation of an acceptable observer coverage rate is the assumption that the unobserved mortality rate, the estimated number of dolphins killed

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87. 53 Fed. Reg. 39,743 (1988) (Ecuador had not submitted the required documentation relating to marine mammal mortality in their fishery).

88. 53 Fed. Reg. 39,744 (1988). "In order for yellowfin tuna from any of these nations to be allowed into the United States, a notice must be published in the Federal Register announcing that the Assistant Administrator for Fisheries has determined that the nation [conforms with the Act]." *Id.*

89. 54 Fed. Reg. 51,919 (1989) (The Fisheries Service accepted 33% observer coverage for 1989 because that level produces a mortality rate estimate with a coefficient of variation similar to that of the U.S. dolphin mortality rate. A 50% observer coverage is required for Ecuador, Panama, and Vanuatu which have fleets of five to nine vessels).

on an unobserved vessel, is the same as the mortality rate from an observed vessel.<sup>90</sup> Thus, according to the Fisheries Service, a 33% observer coverage rate accurately reflects the total dolphin mortality rate.

However, the kill data from vessels with and without observers is inconsistent.<sup>91</sup> Periods of a low percentage of observed vessels tend to have higher dolphin mortality rates than periods with a high percentage of observed vessels.<sup>92</sup> For example, in 1987, the first year the domestic fleet had almost complete observer coverage, the U.S. dolphin mortality rate dropped 30% from the previous year.<sup>93</sup> This decline is a result of the "observer effect,"<sup>94</sup> which posits that observed vessels have fewer mortalities than unobserved vessels.<sup>95</sup>

In order to verify the accuracy of the data collected, the Fisheries Service extended its observer coverage of the U.S. fleets from 50% in 1986 to 100% in 1987.<sup>96</sup> The Fisheries Service reduced observer coverage back to 50% in 1988.<sup>97</sup> In the 1988 MMPA amendments, Congress required 100% observer coverage for U.S. fleets during the 1989 season and all subsequent fishing seasons.<sup>98</sup> Hence, Congress determined that 100% observer

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90. 54 Fed. Reg. 51,919 (1989) ("There is concern that the mortality on observed vessels is less than that on unobserved vessels.").

91. *MMPA Reauthorization*, *supra* note 52, at 22 (1988) (questions submitted to NOAA by Sen. Kerry) ("In 1987, the dolphin mortality resulting from U.S. fleet operations dropped by about 30% from the level of the previous year. In addition, this was the first year in which the U.S. fleet had almost complete observer coverage. . . . Is the drop in mortality with increased observer coverage a coincidence, or an illustration of the need for more observers?").

92. *Id.*

93. *Id.*

94. 54 Fed. Reg. 51,919 (1989). See C. Denisoff, A Policy Analysis of the Tuna-Dolphin Conflict in the Eastern Tropical Pacific 16 (Oct. 1988) (copy on file in the office of *The Transnational Lawyer*) ("The 'observer effect' argues that captains don't perform as well during unobserved trips.").

95. 54 Fed. Reg. 51,919 (1989) (The observer effect has not been proven). The observer effect is a reasonable supposition. On observed vessels the fishermen have an incentive to kill as few dolphin as possible. The fewer they kill the greater the chance that they will be able to continue to export their tuna to the U.S. On unobserved vessels the incentive to not kill dolphins is absent. The number of tuna caught is the object and the means are relatively insignificant.

96. 54 Fed. Reg. 20,171 (1989).

97. *Id.*

98. See *supra* note 37 (noting an exception where an observer is unavailable).

coverage provides the most reliable information on dolphin mortality.

Actually, the 1988 amendments required 100% observer coverage for foreign and domestic vessels.<sup>99</sup> However, the requirement was qualified: the amendment required 100% observer coverage unless the Fisheries Service determined that an alternative program “will provide sufficiently reliable documentary evidence of the average rate of incidental taking of marine mammals in th[e] fishery.”<sup>100</sup> The Fisheries Service determined that the international observer program of the Tuna Commission, which provides 33% coverage, is an acceptable alternative program under the 1988 Amendments.<sup>101</sup> This decision was made because of insufficient funds for a 100% observer coverage program on the foreign fleet.<sup>102</sup> Currently, however, funds are available for a 100% observer coverage program.<sup>103</sup> The Fisheries Service’s willingness to accept 33% observer coverage further exemplifies its disinterest in decreasing dolphin mortality. The Fisheries Service ignored congressional findings that a 100% observer coverage program, if possible to fund, provides reliable data on dolphin mortality.

## *2. Inadequacy of Current Observer Coverage*

The 33% observer coverage program is inadequate for the foreign fleets because of the “observer effect.” It is unreasonable to assume that the dolphin mortality rate on the 67% unobserved foreign vessels equals the dolphin mortality rate of the observed vessels. For example, a study presented to the U.S. Congress

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99. *See id.*

100. 54 Fed. Reg. 20,172 (1989).

101. 54 Fed. Reg. 20,173 (1989).

102. 54 Fed. Reg. 20,172 (1989) (The Tuna Commission indicated that the logistics and financial commitments necessary to achieve 100% coverage in 1989 would not be possible. In addition, the Deputy Assistant Secretary for Oceans and Fisheries Affairs agreed that additional funding would be in the interest of the U.S. toward achieving marine mammal conservation but such funding could not be made available to the Tuna Commission via the State Department until the fiscal year 1991).

103. *Id.*

provided evidence of unreported high dolphin mortality rates on a vessel without an observer.<sup>104</sup> Thus, findings of comparability are based upon data that does not truly reflect the number of dolphins actually killed by foreign fleets. To accurately determine total dolphin mortality rates, the MMPA should mandate observers aboard all foreign vessels.<sup>105</sup>

An inadequate international observer rate coupled with ineffective enforcement of the Act results in a powerless MMPA on the international level. The U.S. Congress' intent to substantially decrease the dolphin mortality rate is frustrated by the foreign fleet's excessive dolphin mortality rate. However, two amendments to the MMPA could appreciably improve the foreign regulation of dolphin mortality.

#### IV. POSSIBLE AMENDMENTS TO THE MMPA

##### A. 100% Observer Coverage

The first possible amendment to the MMPA would require foreign fisheries to maintain a 100% observer program if they wish to export their tuna and tuna products to the United States.<sup>106</sup> Both the U.S. Congress and the Fisheries Service recognize the advantages of such a program.<sup>107</sup>

Maintaining a 100% observer coverage rate provides several benefits.<sup>108</sup> First, the accuracy of the estimates of the mortality rates improve by reducing the uncertainty caused by the "observer

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104. See *supra* note 37 (noting an exception where an observer is unavailable).

105. 54 Fed. Reg. 51,919 (1989). See L. Scheele, Greenpeace International Background Paper on the Eastern Tropical Pacific Tuna/Dolphin Issue 43 (Apr. 1988) ("The intentional take of marine mammals by the tuna fishery is not a random event as may be the case with other fisheries. The operator is in control as to where, when, how, and on which species a set is made. Therefore, observer coverage . . . at less than 100 percent cannot ensure reliable mortality statistics.").

106. The 100% observer coverage rate should apply to all nations which have tuna purse seine vessels of 400 tons carrying capacity or greater operating in the Eastern Tropical Pacific.

107. 54 Fed. Reg. 51,919 (1989) ("Although observer coverage of 33% and 50% are statistically acceptable to determine comparability of average mortality rates, there are several benefits from 100% coverage that make a higher level of coverage more desirable.").

108. *Id.*

effect.”<sup>109</sup> Accurate dolphin mortality rates are essential in reducing the number of dolphins killed. Second, the 100% observer level provides the most accurate basis for determining whether specific species limitations mandated by the MMPA are followed.<sup>110</sup> Third, a 100% observer program provides a greater quantity of data for foreign governments and industry to help implement their vessel operator performance system and enforcement programs as required under the 1988 amendments.<sup>111</sup>

Moreover, Congress never intended the 33% observer coverage program to be permanent for the foreign fleets.<sup>112</sup> Rather, Congress intended the 33% observer coverage plan to be temporary until arrangements could be made to expand the provisions of the Act.<sup>113</sup> The time to expand observer coverage has arrived. In the past, the primary reason for not implementing a 100% foreign observer program was lack of funding.<sup>114</sup> The Tuna Commission estimates that an additional \$1.23 million will be necessary to implement a 100% observer program.<sup>115</sup> Because funding is feasible, a 100% observer coverage program must be implemented on the foreign fleets.

Several options are available for funding a 100% observer program.<sup>116</sup> Currently, the Tuna Commission funds the observer

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109. *Id.*

110. *Id.* (“Observer coverage at the 100% level also provides the most accurate basis to determine whether or not no more than 15% eastern spinner or no more than 2% of coastal spotted dolphin are taken annually as required by the MMPA.”).

111. *Id.*

112. 54 Fed. Reg. 51,920 (1989) (“The proposed determination to accept an alternative foreign observer program will extend to the end of 1990 or to such earlier time as arrangements can be made to expand the level of observer coverage.”).

113. *Id.*

114. 54 Fed. Reg. 51,919 (1989) (The Fisheries Service explains that “[a] 100 percent foreign observer program will require time to implement and resources that are not presently available.”). The Tuna Commission also estimated that it would take about eight months to develop the program and recruit, train and place the observers. *Id.* See 54 Fed. Reg. 51,920 (1989) (“In the absence of institutional arrangements to expand the foreign observer program at this time, [the Fisheries Service] is proposing to accept an alternative foreign observer program with less than 100 percent observer coverage while continuing to pursue an institutional arrangement which will provide for an expanded program.”).

115. 54 Fed. Reg. 51,919 (1989).

116. Background Paper, *supra* note 23, at BPI-90B/10.

program principally from contributions of its member countries.<sup>117</sup> The United States contributes approximately 90% of the Tuna Commission's total budget.<sup>118</sup> Thus, one funding option is to increase the contributions of the other member countries.<sup>119</sup> By budgeting an increase in contributions the member countries share in the expenses of a 100% observer coverage program.

A second option is to require all governments whose vessels participate in the Tuna Commission's observer program to share in the cost of the expansion.<sup>120</sup> Many countries participate in the program but few are actually members of the program. Currently, only the United States and Panama contribute to the observer plan, although Mexico, Ecuador, Venezuela, and Vanuatu form the majority of the international fleet.<sup>121</sup> Because all the nations that participate in the program recognize a need to protect dolphins, they should be willing to contribute to the funding of a program designed to protect the dolphin.<sup>122</sup> On the other hand, less developed nations may be unable to bear the expense of the high ecological standards of protecting dolphins.<sup>123</sup>

The third, and perhaps best, option to fund a 100% observation program is to request financing from the tuna industry.<sup>124</sup> This option would pass the costs of financing the program on to the tuna consumers of the United States. Studies indicate that American

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117. *Id.* Member countries include the U.S., France, and Japan. "The contribution of each is based upon the proportion of the catch of tunas in the eastern Pacific Ocean which is utilized by that nation." *Id.* at BPI-90B/9-10.

118. *Id.* France contributes 5%, Japan 4% and other members 1% of the total budget. *Id.* at BPI-90B/10.

119. *Id.* Increasing the contributions of the member countries may cause a problem because the typical budgetary process requires that the budgets be submitted two years in advance. However, an emergency funding program could be set up. *Id.*

120. *Id.* "Currently vessels flying the flags of Ecuador, Mexico, Panama, the United States, Vanuatu, and Venezuela participate in the program." *Id.*

121. Background Paper, *supra* note 23, at BPI-90B/10. "The fleets of non-member nations currently share in the cost of the program, however, because they defray the scientific technicians' living expenses aboard the vessels; this amounts to between 1 and 2 thousand dollars per trip." *Id.*

122. *See supra* note 62 (noting foreign countries' recognition of the need to reduce dolphin mortality).

123. 55 Fed. Reg. 11,923 (1990).

124. Background Paper, *supra* note 23, at BPI-90B/10. "Many components of the industry have expressed interest in supporting the program. If this alternative were pursued, the IATTC would need to establish clear policies and rules governing the establishment and operation of the program." *Id.*

consumers are more than willing to pay more for an environmentally safe product.<sup>125</sup>

Thus, funds for a 100% observer coverage program are available. Tuna consumers of the U.S. can bear the expense of increasing the percentage of observer coverage. The program must be implemented before the international fleets kill more dolphins.

### *B. A New Enforcement Agency*

The second possible Amendment to the MMPA would create a new enforcement organization. Evidence of the Fisheries Service's weak enforcement and misapplication of the Act's provisions illustrate the necessity of creating a new enforcement agency. The District Court in *Earth Island* expressed its concern regarding the quality of the Fisheries Service's enforcement of the Act.<sup>126</sup> Congress also intimated dissatisfaction with the work of the Fisheries Service in implementing recent provisions.<sup>127</sup> Thus, as a result of the Fisheries Service's substandard enforcement of the Act, judicial intervention is necessary to ensure that the provisions of the Act are carried out in the manner intended by Congress. A nongovernmental enforcement agency could effectively execute the Act's provisions.

The new organization would consist of members of environmental groups from those nations regulated by the Act and

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125. Trendwatch, *Playing it Dolphin Safe. Starkist Seafood and Other Tuna Companies Respond to Environmental Pressure*, 9 FOOD & BEVERAGE MARKETING 10 (June 1990) (Lexis, Nexis library, Foodbv file) ("New York research firm Find/SVP estimates the current total of 'environmentally-responsible' shoppers to consist of between 14 and 19 million households, or 15% to 20% of the population, and forecasts a rise to almost 22 million households by the end of this year. By 1995, Find/SVP predicts 52% of all U.S. households will fit this definition. 'This broad-based population comprises a group of consumers who show an increasing willingness to pay a premium for environmentally-friendly products,' according to the Find/SVP report."). See MMPA Hearings, *supra* note 1, at 5 (statement of Rep. Boxer) ("The public would be willing to pay a higher price for tuna than see the tuna industry continue killing porpoises in their nets."). See also Manning, *supra* note 24 (stating that the U.S. consumes about 40% of the world's canned tuna and that dolphin-safe tuna will probably only cost a few extra cents per can).

126. 746 F. Supp. at 968-971 (The court noted the Fisheries Service's lax record of promulgating and enforcing standards for foreign fleets).

127. See *supra* note 72 (indicating concern by Congress in the process of enacting the 1988 MMPA amendments).

involved in the Tuna Commission's observer program.<sup>128</sup> Political neutrality and a true concern for dolphins warrant environmental groups enforcing the Act. This agency would administer the provisions of the Act guided by the goal of reducing the incidental killing and injuring of dolphin to insignificant levels. Although the membership of the enforcement agency would be international, the United States would retain jurisdiction over the agency, and the MMPA would govern its actions.<sup>129</sup> Funding for the organization would be provided from funds previously used by the Fisheries Service under the Act.<sup>130</sup>

The MMPA was enacted partly in response to the public's concern for the health and welfare of marine mammals.<sup>131</sup> A politically neutral enforcement agency with environmental interests will effectively preserve dolphin without the bureaucratic inefficiencies encountered by the Fisheries Service. Unlike the Fisheries Service, the proposed enforcement agency will not accommodate political interests. Thus, since the agency's sole concern is to preserve the dolphin, foreign fleets would not be given any latitude in the determination of comparability.

In sum, the proposed amendments to the Act, a 100% observer coverage program and a new enforcement agency, will increase the effectiveness of the MMPA on the international level. As with the domestic fleets, the foreign fleets utilize the United States market and thus are susceptible to the regulations of that market.<sup>132</sup> Since the domestic fleets are subject to a 100% observer coverage program, so must the foreign fleets. The foreign fleet's large

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128. See *supra* note 120 (listing participating countries).

129. See generally 16 U.S.C. § 1379 (discussing funding and transfer of authority under the Act).

130. See generally 16 U.S.C. § 1379 (l).

131. 134 CONG. REC. S16,344 (daily ed. Oct. 14, 1988) (statement of Sen. Kerry).

132. 55 Fed. Reg. 11,922 (1990). The use of import bans on tuna is an effective way for the U.S. to influence other harvesting nations to protect dolphin in their purse seine fishing operations. *Id.* See Inter-Am. Tropical Tuna Comm'n, *supra* note 85, at 7 (stating that GATT is not being violated because U.S. fleets are also affected by the legislation). See also L.A. Times, Nov. 17, 1990, § D, at 1, col. 2 (discussing the Court's overturning of the ban on importing Mexican yellowfin tuna, "both [Mexican and American] commerce secretaries carefully avoided saying that the tuna embargo could cause problems in the upcoming free trade talks between the two countries. However, Mexican officials and fishermen clearly considered the embargo an irritant.").



number of dolphin mortality directly contravenes the provisions of the Act. A 100% observer program would ensure that foreign fleets are taking only an acceptable number of dolphin and using the safest practicable fishing techniques if they wish to export their catch to the U.S.<sup>133</sup>

A new enforcement agency will give the strength to the MMPA that Congress had initially intended. The new enforcement agency would further the purpose of the Act by accurately applying enforcement techniques, such as the comparability test, as Congress intended. The original Act and the subsequent amendments specify exactly what needs to be done to export tuna into the U.S., and there is a greater likelihood that the new organization will execute those provisions as intended.

### *C. Domestic Regulation Versus International Regulation*

U.S. unilateral actions to protect dolphin are extremely successful.<sup>134</sup> The possible amendments increase the effectiveness of the MMPA. Most importantly, the dolphin mortality problem is presently attacked by U.S. actions. Despite the U.S. success, the Tuna Commission is working on an international dolphin program claiming that unilateral action has several weaknesses.<sup>135</sup> The major weakness of unilateral action is that vessel owners may be able to successfully market their fish outside the U.S.<sup>136</sup> Thus, the U.S. will lose control over the foreign vessels' fishing practices.

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133. Background Paper, *supra* note 23, at 2 ("Probably the best way to ensure that no [fishing nets are] set on dolphin-associated fish would be to have an observer aboard during every trip of every large purse-seine vessel fishing for tunas in the eastern Pacific Ocean.").

134. 134 CONG. REC. S16,336, S16,345 (1988).

135. Background Paper, *supra* note 23, at 2. "[S]hipments to markets outside the United States have increased. . . . If the vessel owners are able to market their fish successfully outside the United States, the initiative of the U.S. canners and the MMPA import restrictions would not only fail to reduce dolphin mortality, but could conversely increase it. . . . [D]olphin mortality can be reduced significantly from its current level, and possibly to 'insignificant levels' or levels 'approaching zero.' This cannot be achieved through unilateral action by a single government or enterprise, but only through international cooperation among all nations whose vessels fish for tunas associated with dolphin in the eastern Pacific." *Id.*

136. *Id.*

This thwarts U.S. efforts to substantially decrease dolphin mortality.<sup>137</sup>

An international program, on the other hand, may be more effective than the MMPA in reducing dolphin mortality from its current level to insignificant levels.<sup>138</sup> Currently, however, international agreements which effectively regulate dolphin mortality in the Eastern Tropical Pacific are nonexistent. The U.S. Congress reacted to dolphin mortality in the international arena by enacting the MMPA and utilizing access to the powerful U.S. tuna market to underpin its regulations.<sup>139</sup> Embargoes prohibiting foreign vessels from exporting tuna to the U.S. would provide foreign vessels with a strong incentive to abide by the MMPA. Thus, these possible amendments to the MMPA would effectively regulate dolphin mortality until an international program is enacted.

## V. CONCLUSION

The MMPA significantly bolstered efforts to preserve dolphins. Since the Act's inception in 1972 the number of dolphins killed annually by U.S. fishermen dropped from 370,000 to less than 20,000.<sup>140</sup> The most dangerous, yet effective, fishing techniques have been abandoned.<sup>141</sup>

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137. 55 Fed. Reg. 11,921 (1990). However, this result is unlikely under the 1988 MMPA Amendments which require an intermediary nation, which wants yellowfin tuna imported into the U.S., to ban the importation of yellowfin tuna from any nation that is prohibited from exporting directly to the U.S. *Id.*

138. Background Paper, *supra* note 23, at 2 ("[D]olphin mortality can be reduced significantly from its current level, and possibly to insignificant levels or levels approaching zero. This cannot be achieved through unilateral action by a single government or enterprise, but only through international cooperation among all nations whose vessels fish for tunas associated with dolphins in the eastern Pacific."). See C. Denisoff, *supra* note 94, at 60 (Fishery biologists, economists, and environmental and fleet representatives all agree on the need for an international management approach).

139. D. KING & H. BATEMAN, THE ECONOMIC IMPACT OF RECENT CHANGES IN THE U.S. TUNA INDUSTRY 2 (California Sea Grant College Working Paper No. P-T-47, 1985) (A small decline in U.S. tuna consumption, from a consumer boycott, could dump enough extra tuna onto the world market to create disruptions in all national tuna markets, and could result in idle capacity in fish harvesting and processing in many regional tuna industries).

140. 134 CONG. REC. S16,336, S16,345 (1988).

141. See MMPA Hearings, *supra* note 1, at 27 (Seal bombs, which explode and injure dolphin, and sundown sets, fishing at sundown so that the dolphin cannot be untangled from the nets, have been discontinued despite their effectiveness).

However, the MMPA is relatively ineffective in regulating foreign fleets. Since the MMPA's enactment seventeen years ago, the number of dolphins killed annually by foreign fishermen increased from 20,000 to 100,000.<sup>142</sup>

Foreign fleets successfully circumvent the purpose of the MMPA. Inaccurate data allow foreign fisheries to appear as though they are comparable to the U.S. fisheries. In reality foreign fleets violate the comparability provision of the Act. The Fisheries Service is extremely indulgent in determining whether a foreign country passes the comparability test. Thus, the purpose of the Act, to reduce the number of dolphins incidentally killed, is frustrated.

The proposals made herein will further the reduction of dolphin mortality. A 100% observer coverage rate ensures that foreign fishing vessels comply with the MMPA. The enforcement agency's decision whether to embargo the tuna products of the foreign fishery shall be based on data from all tuna fishing vessels and compiled over the one year fishing season. The observer effect will no longer cloud the reality of the excessive dolphin mortality rate by the foreign fleets.

A nongovernmental, neutral enforcement agency will efficiently implement the provisions of the Act. It will be unnecessary for the judiciary to police the enforcement of the Act thereby saving time and money. Congress' intent is clear and without any conflicting interests, political or ideological, the new agency will be able to properly execute the Act.

The MMPA illustrates that domestic legislation is effective in addressing an international problem. The prerequisite to effective regulation is a large market. Free trade does not necessarily require a total absence of regulation of the market as long as the regulations are administered even-handedly with no crippling effects. The possible amendments would mandate 100% observer coverage on both domestic and foreign fleets. In addition, an environmentally conscious enforcement agency will fairly execute the provisions of the Act for all nations resulting in a significant

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142. *Id.*

*1991 / The Marine Mammal Protection Act*

reduction in dolphin mortality. The possible amendments to the MMPA offer an effective solution to an important international problem.

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