

FREE TRADE AND NATIONAL ENVIRONMENTAL POLICY: LESSONS FROM THE TUNA/DOLPHIN CONFLICT

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SUMMARY: I. National policies and free trade. II. Background. III. GATT Panel --- Tuna/Dolphin I. IV. GATT Panel --- Tuna/Dolphin II. V. The aftermath of the GATT Panel decisions. VI. Conclusion.

I. NATIONAL POLICIES AND FREE TRADE

In America, the newest challenge to national environmental law in the 1990s has also been the most unexpected. It has come from the conflict between environmental protection and international free trade. Traditionally, environmental concerns have been addressed domestically through national laws. These laws might be struck down because they were in conflict with the US Constitution, but they were never under threat from international trade agreements. Recently, however, a number of US laws designed to protect the international environment through the use of trade restriction have come under legal attack not in Washington, D.C., but in Geneva at the World Trade Organization.

One example, of which I am sure we have all heard about, is the US ban on certain tuna imports from the Eastern Tropical Pacific (ETP) tuna fishery. In 1991, and again in 1994, challenges were brought before GATT dispute panels against a US law. Mexico and later European intermediary market nations argued that because the Marine Mammal Protection Act imposes unilateral trade restrictions against tuna imports from countries whose dolphin protection mea-

sures are not comparable to those of the US such measures violated the GATT. The US lost in each of these decisions.

During my remarks, using the example of the tuna/dolphin issue, I will explain the basis of the tuna/dolphin conflict. This conflict warrants careful examination for it brings into focus the relative importance of national environmental protection measures and international trade and, more important, how the two can reinforce one another.

II. BACKGROUND

No one knows why, but schools of yellowfin tuna swim beneath groups of dolphins. Since the late 1940s, tuna fishers have taken advantage of this association and have caught tuna by setting their nets around and encircling dolphins. In the 1970s, this method of fishing, called purse-seining, resulted in the death of some 200,000 to 400,000 dolphins. At that time, the US fishing fleet dominated the tuna fishery in the ETP and was responsible for more than 80 percent of the dolphin mortality.

In 1972, the United States Congress enacted the Marine Mammal Protection Act. Congress required that the incidental kill (known as “take”) or serious injury of marine mammals during commercial fishing operations should gradually be reduced to a zero mortality rate and serious injury rate. This was done through a general permit requirement which set quotas on the number of incidental takes of marine mammals, required onboard observers, imposed fishing gear restrictions such as the use of fine mesh net less likely to ensnare dolphin, and other safeguards. With the implementation of these regulations, dolphin mortality caused by US vessels dropped significantly. The use of purse-seine nets, however, continued.

In 1980, dolphin mortality due to US fishing activities was down around 15,000, much lower than just five years earlier. But it was clear that a level of deaths approaching zero, as mandated by the MMPA, would not be achieved by the tuna industry. As a consequence, the MMPA was amended to require boats in the ETP fishery

to apply the “best marine mammal safety techniques and equipment that are ecologically and technologically practicable.”

Through the 1980s the number of US vessels present in the ETP fishery began to decline while the number of foreign vessels participating in the fishery grew. Many US vessels were re-flagged under the flag of another country in order to evade the strict MMPA regulations, and high operating and labor costs in the US. By 1991, the proportion of the catch taken by US vessels in the fishery had dropped down to 11% compared to 1980. At the same time, the catch of Latin American nations had increased to 57%. This was an important shift in the fishery and meant that the foreign vessel fleet was now contributing heavily to the dolphin mortality. The remaining US boats requested that Congress focus on limiting dolphin mortality from foreign boats. This request, in conjunction with a growing public awareness and concern over the protection of dolphins, led to amendments of the MMPA in 1984 and 1988.

These amendments did three things. First, each nation exporting tuna to the US had to adopt a dolphin conservation program comparable to that of the US and the dolphin mortality caused by its fleet had to be comparable to that of the US fleet. If a nation did not meet those requirements, the import of any tuna from that nation *would be banned*. Second, nations which were exporting tuna to the US had to prove that they were not importing tuna from countries whose exports were already banned under the MMPA. Exports from these *intermediary market nations* *would be banned* if the tuna shipped to the US had been purchased from embargoed nations. Third, specific standards of proof were established for a foreign nation to prove its dolphin protection standards were comparable to the US laws. In particular, there had to be specific prohibitions on encirclement using purse seine nets and an average incidental take rate no greater than 1.25 times that of US vessels. Through these laws, the US clearly, intentionally applied its own dolphin protection laws to other nations fishing in the ETP tuna fishery.

Even after the amendments, public concern grew against the continued high levels of dolphin mortality. Recognizing the opportunity

for a marketing opportunity and faced with threatened consumer boycotts, major US canners voluntarily started labelling their cans. Star-kist was the first to announce that it would no longer purchase any tuna caught in association with dolphins and that it would begin labelling cans of tuna with “dolphin safe” symbols, bearing the message “no harm to dolphins”. Other major US canners quickly followed suit. Congress responded, as well, with the “Dolphin Protection Consumer Information Act of 1990,” which established a labeling requirement.

The Dolphin Protection Consumer Information Act (DPCIA) required that all tuna caught in the ETP and labeled dolphin-safe must be verified as not having been caught in association with dolphins. Thus vessels are required to certify that the tuna was not caught by intentionally deploying purse seine nets around dolphin. Absent that certification, tuna imported into the US could not be marketed as dolphin-safe on US supermarket shelves. In practice, this measure was more effective and less interventionist than the MMPA ban because canners simply would not buy tuna that was not “dolphin-safe.”

By the end of the 1980s, environmental groups realized that with exodus of US vessels from the ETP fishery the practices of foreign boats were increasingly important yet the bans of the MMPA had not been imposed against any nations. As a result, beginning in 1990, suits were filed in US courts forcing the government to order embargoes against tuna harvesting nations that did not have dolphin protection programs comparable to the US, had average dolphin mortality rates that were in excess of those prescribed under the MMPA, or employed purse seine nets.

III. GATT PANEL — TUNA/DOLPHIN I

In October, 1990, because its domestic standard for regulating tuna harvesting techniques did not satisfy the MMPA’s requirements, Mexico’s tuna was embargoed. In response, Mexico initiated a challenge under the GATT dispute resolution process against the embargo and the tuna labeling provisions of the DPCIA. In its decision, the

GATT Dispute Panel found that the MMPA import ban constituted both a quantitative restriction and illegitimately regulated the method by which the tuna product was caught. The labeling provisions, however, because they applied equally to all nations fishing for tuna and because they did not restrict the sale of tuna products were found to valid under the GATT.

This panel report alarmed environmental groups who described the ruling as an example of the disastrous effect of free trade agreements on the environment. In the process of negotiating the NAFTA accord with the US, Mexico did not submit the report for adoption by the Contracting Parties to the GATT. As a result, there was no congressional action to amend the MMPA.

IV. GATT PANEL — TUNA/DOLPHIN II

A separate challenge to the embargoes associated with intermediary nations was filed under the GATT in July, 1992 by the European Union and the Netherlands, claiming that the secondary embargo on intermediary markets constituted an unfair trade practice. In February 1993, a different dispute panel held that the MMPA's secondary embargo provisions also violated the GATT. Volumes have already been written on these decisions. For our purposes, you should note two of the holdings. First, the decision suggested that the MMPA could stand despite its extraterritorial application if it addressed dolphin conservation more directly than through a secondary embargo. Second, because the labeling requirements were applied evenhandedly they were valid trade measures. The tacit acknowledgement that dolphin conservation is a legitimate objective to conserve an exhaustible natural resource partially assuaged the fears of environmental groups that the goals of trade and environmental policy were hopelessly incompatible.

The second panel decision was not adopted by the GATT Parties, either. Thus Congress continued to receive constituent pressure to protect dolphins while facing no international mandate to amend the MMPA and make it compliant with the GATT panel decisions. Since

Congress gives great weight to the immediate concerns of its constituents over the non-binding nature of GATT panel decisions, it is unsurprising that subsequent domestic legislation has not brought the MMPA into conformity with the GATT. There is still no Mexican tuna sold in the United States.

V. THE AFTERMATH OF THE GATT PANEL DECISIONS

While there is no dispute that the ETP fishery was once a killing field for dolphins, since 1992 tuna fisherman in the ETP from many nations have been operating under a stringent, voluntary, multinational agreement, called the La Jolla Agreement. The Agreement calls for greater use of fishing methods that avoid killing dolphins and equipment which releases dolphins from purse seine nets. The Agreement is regulated and controlled by the Inter-American Tropical Tuna Commission (IATTC) and has been effective. The La Jolla Agreement is, however, non-binding.

Despite the La Jolla Agreement, the US ban continued and in October 1995, major environmental groups and representatives from Mexico and other Latin American governments engaged in tuna fishing met to discuss the controversy over the protection of dolphins in the ETP fishery. They came to an agreement called the Panama Declaration. The objectives of the Panama Declaration are to reduce dolphin mortality in the ETP and to seek an ecologically sound method of capturing the tuna without killing dolphins. The Panama Declaration is designed to give consumers complete confidence that tuna caught in the region would mean *no dolphins died* in the harvest of that tuna. Managed by the IATTC, the declaration establishes a binding program to protect a wide variety of species throughout the ETP ecosystem and requires that internationally trained observers are on all tuna vessels. It further calls for the establishment of a scientific committee to make progress reports, recommend research, implement ecologically sound fishing practices. Together, the La Jolla Agreement and Panama Declaration have resulted in practices which have reduced

dolphin mortality by over 90% in the ETP, dropping to only 3,274 dolphins in 1995. Today, almost 85% of fishing sets are dolphin safe.

These international agreements have been effective and the number of dolphins killed each year has dropped. The problem remains, however, that countries like Mexico, which have *voluntarily* taken steps to reduce mortality in the fishery under the La Jolla Agreement, continue to be banned from importing tuna into the US under the embargo imposed by the MMPA, in spite of the GATT panel decision they won holding the US embargo provisions to be inconsistent with international trade policy.

There is now a growing fear on the part of some environmental groups that if the US continues to apply its unilateral trade sanctions then the signatories of the La Jolla Agreement and Panama Declaration will abandon the voluntary measures they have taken to harmonize their fishing practices to the stringent levels found in US domestic law, and instead focus their efforts on non-US markets. Because they have seen little reward for their voluntary efforts to comply with the trade-inconsistent, extraterritorial application of US environmental standards, a number of nations are threatening to walk away from the voluntary measures they have taken to date and to press for full consideration of the GATT panel decisions.

This may all change in the near future, however. In the Summer and Autumn of 1996, legislation was proposed in Congress to amend the MMPA and implement the Panama Declaration. The bill would lift the tuna ban and modify the phrase, “dolphin-safe,” to mean no dolphins actually died during the harvesting of the tuna. The version of the bill in the House of Representatives passed with resounding support, 316-108, in late July. The Senate bill, however, was voted out of committee but died without going to a full vote as the congressional session expired.

Some environmental groups maintain that any change in US marine mammal protection laws is a bailout for foreign tuna industries and a terrible GATT precedent. Organizations which oppose the Panama Declaration opposed NAFTA and the implementation of the WTO because they believed it was only a matter of time before these

agreements would be used offensively against domestic laws like the MMPA. They view the current legislative proposals to amend the MMPA as an example of weakening of domestic environmental laws by caving in to US free-trade obligations.

However, several of the environmental organizations which support the Panama Declaration and accompanying US legislation, *and which strongly opposed NAFTA*, like Greenpeace, support the US legislation. Greenpeace has testified before the US Congress that, “the notion that the Panama Declaration is part of a free-trade agenda to weaken US conservation policy, or that it undermines the ability of the US to use trade sanctions to pursue conservation aims, is erroneous.”

The Clinton Administration has promised to re-introduce the same legislation when the new Congress convenes in January, 1997, and pledged to lobby hard for its passage.

VI. CONCLUSION

What does this story tell us about free trade and national environmental law?

First, while unpopular with other countries, national laws that restrict trade *work*. To date, the tuna import restrictions coupled with US high standards have forced other countries to harmonize their standards upward. The attraction of the US market has encouraged foreign countries to take steps to modify their fishing apparatus, to enact prohibitions on use of explosives, and to stop night sets which incur greater dolphin mortality. The Panama Declaration, by tying US market access to a no mortality standard, rather than a no encirclement standard, uses the desire to access the US market to move toward a zero mortality level.

The US and Europe together account for 62% of the global tuna market. Countries like Mexico have little alternative if their foreign markets *require* that dolphins be protected. Tuna boats in the ETP now have observers on board, are using better dolphin-safety equip-

ment, and other dolphin-friendly procedures. This has all happened because the US used a trade ban.

Second, national laws restricting trade *can* force the adoption of binding international agreements. The drafters of NAFTA set out to achieve economic development in an environmentally sustainable manner and to establish trade objectives in a manner consistent with environmental protection and conservation. Thus, NAFTA preserves the right of parties to enforce trade obligations arising under international environmental treaties. If the Panama Declaration is implemented domestically in the US and the commitment of the other countries to sign a binding international document remains, the proposed amendments to the MMPA could be an unchallengeable coup for international dolphin conservation. Clearly, the La Jolla and Panama agreements were created, and complied with, in response to the US ban. And they are effective. Dolphin mortality has been reduced.

But if the bans work, does that mean they are a good thing? Personally, I believe there is a heavy price in using a trade ban as a stick. Most Latin American tuna still is not accepted in the US and, given everything these countries' boats have done to improve, this seems unfair. If the current bill in Congress passes the Senate, their tuna will again be sold in the US. And from many environmentalists perspective in the US, this will have been a success story. Other countries improved their environmental performance because of trade pressure. From the perspective of free trade advocates, however, I believe this story is viewed as a dangerous precedent.

The last point is that other measures in this case would have been far preferable, and as effective, as a trade ban. I suspect the labeling requirements defining the use of "dolphin-friendly" labels would also have led to the same results as the La Jolla and Panama. If American consumers want to buy only dolphin-friendly tuna, that is their right and the market will respond accordingly. Labeling measures, as former GATT Secretary General Arthur Dunkel noted at the time, would have avoided entirely the GATT problems and unpopular threats of the MMPA ban.

For myself, the biggest question posed by the tuna/dolphin story lies in the future. Given the effectiveness of the ban in changing other countries' behavior, will we see more of these laws in the coming years? More fundamentally, in the pursuit of environmental protection, when is it appropriate to sacrifice free trade?

I trust my remarks today have given you an added perspective on these fundamental issues.