

The Tuna-Dolphin Case

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The Tuna-Dolphin Case

The origin of what became known as the “tuna-dolphin” case was the United States’ Marine Mammal Protection Act (MMPA), which imposed a ban on imports of tuna from countries that did not have a conservation program designed to protect dolphins in the tuna-fishing process. Tuna, it turns out, are often found swimming in schools underneath dolphins. In order to catch the tuna, fishermen used to drag large nets through the water and then pull them up under the tuna.

Dolphins swimming above the tuna would be caught at the same time and die in the nets along with the tuna. The MMPA therefore required American tuna fishermen to adjust their fishing practices to avoid such deaths and banned tuna from countries in which dolphin deaths from tuna fishing exceeded deaths from U.S. tuna fishing by more than 25 percent. As a result, tuna from Mexico, Venezuela, Panama, Ecuador, and the tiny Pacific island of Vanuatu were banned in 1990.

Mexico and Venezuela challenged the U.S. action in the dispute resolution system of the GATT and won their cases in 1991 and 1992. The decision in the Mexico case is considered a key turning point in jurisprudence of the world trade system, even though it was not officially adopted as a binding decision by the members of the GATT.

Prior to reforms of the Dispute Settlement Process in the Uruguay Round of trade negotiations (1986-1994), adoption of a dispute panel report by the GATT could be blocked by the country found to be in violation of GATT rules. Thus, many findings, including the tuna-dolphin panel decision, never took effect. The Uruguay Round reforms reversed this—now, all panel reports are binding unless a consensus of all WTO members blocks adoption. Mexico and the United States later settled the dispute through negotiations.

The dispute resolution panel decided that the United States could not justify the MMPA’s ban on Mexican tuna imports for several reasons.

- First, the panel said that Article XX’s exceptions must be interpreted narrowly so that any one country cannot undermine the [multilateral](#) trade rules.
- Second, the panel said that the United States had not proved that the tuna ban was “necessary,” i.e., that it was the least-trade restrictive way to protect dolphins, in contrast to, for example, negotiating dolphin-protection agreements with other countries.
- Third, the panel said that the percentage link to U.S. dolphin deaths made it difficult for Mexican authorities to predict in advance the acceptable level of Mexican dolphin deaths.
- Finally, the panel said that the United States could not use the Article XX exceptions to regulate natural resources outside of its borders.

The case thus laid out some of the issues that have continued to frame the debate over the environment and trade. The panel approached the dispute with a distinct pro-trade bias, analyzing each of the contested points from the perspective of the effect of the MMPA on free trade. Furthermore, the panel viewed preserving the multilateral free trade system as more important than any one country’s evaluation of the need to protect the environment. These results should not be too surprising, however. After all, the GATT panel’s mandate was to interpret the GATT—a trade treaty. The panel evidently could not find any authority for placing environmental concerns on par with the thrust of the GATT to promote free trade.

In addition, the decision explicitly limited the right of a country to protect environmental resources extra-territorially. The panel could not find authority within the language of the agreement to allow one country to affect the environmental resources in another. This should not be surprising, since the prospect of one country taking actions to interfere with the resources of another country could be abused and lead to innumerable disputes.

Even now, 19 years later, the idea that one country can impose its view of the need for environmental protection on another country’s resources is highly controversial. In fact, a second dispute arose out of the tuna-dolphin case because the MMPA also banned tuna and tuna products from third world countries that imported tuna from other countries that did not comply with the MMPA. The GATT overturned this ban, as well.

Finally, another key issue from this case that continues to affect the debate over environmental protection in a globalized economy is the contrast between the wealthy United States and its ability to have sophisticated

What do you think?

Should governments prioritize trade in relation to the environment?

Does one need to trump the other?

What would you recommend in the Tuna-Dolphin Case?

fishing techniques with the limited resources of the developing countries and related constraints on the affordability of environmental protection tools.

After the GATT decision, the tuna-dolphin dispute was resolved by agreements negotiated between the United States and the affected countries that called for dolphin protection measures and through a multilateral declaration on the importance of dolphin conservation. The U.S. Congress later called for a binding agreement to implement the declaration, and the International Dolphin Conservation Program was established. Some environmentalists, nevertheless, are skeptical that anything practically beneficial will come of the program.

The United States and Mexico both appealed the panel report and the Appellate Body circulated a new report in May 2012. The Appellate Body reversed some of the panel's findings including the decision of the court that the dolphin-safe labeling provisions were inconsistent with the TBT agreement. The reversal of many of the panel's findings allowed for the U.S. to continue with its labeling decision. Further, these findings significantly increase the jurisprudence relating to the TBT agreement (Mayer Brown, 2012). The decision has led to the need for stronger dolphin safe labeling requirements in dealing with future such issues.

Was the tuna-dolphin case a victory or a defeat, then, for the environmental movement? On the one hand, the GATT dispute resolution panel gave priority to free trade over environmental protection (on sound grounds when viewed in the context of Article XX). On the other hand, the U.S. loss before the panel gave impetus to an internationally agreed-upon action program. In fact, the International Dolphin Conservation Program could be more effective than a unilateral U.S. law. Yet we still do not know how effective that program may turn out to be.

In any event, the tuna-dolphin case dramatically raised the stakes in the debate over the relationship between international trade and the environment because it came at the same time that two major sets of trade negotiations were in high gear-those to create the North American Free Trade Area (NAFTA) and to finish the Uruguay Round in the GATT and create the WTO. The tuna-dolphin case therefore became ammunition for both environmentalists and strict believers in American sovereignty.

* Picture source: www.picapp.com

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