WORLD TRADE ORGANIZATION

ENVIRONMENT: DISPUTES 4

Mexico etc versus US: 'tuna-dolphin'

A case brought by Mexico and others against the US under GATT. The panel report was circulated in 1991, but not adopted, so it does not have the status of a legal interpretation of GATT law. The US and Mexico settled "out of court".

United States — Restrictions on Imports of Tuna

Not adopted, circulated on 3 September 1991

This case still attracts a lot of attention because of its implications for environmental disputes. It was handled under the old GATT dispute settlement procedure. Key questions are:

- can one country tell another what its environmental regulations should be?
- do trade rules permit action to be taken against the *method* used to produce goods (rather than the quality of the goods themselves)?

was it all about?

In eastern tropical areas of the Pacific Ocean, schools of yellowfin tuna often swim beneath schools of dolphins. When tuna is harvested with purse seine nets, dolphins are trapped in the nets. They often die unless they are released.

The US Marine Mammal Protection Act sets dolphin protection standards for the domestic American fishing fleet and for countries whose fishing boats catch yellowfin tuna in that part of the Pacific Ocean. If a country exporting tuna to the United States cannot prove to US authorities that it meets the dolphin protection standards set out in US law, the US government must embargo all imports of the fish from that country. In this dispute, Mexico was the exporting country concerned. Its exports of tuna to the US were banned. Mexico complained in 1991 under the GATT dispute settlement procedure.

The embargo also applies to "intermediary" countries handling the tuna en route from Mexico to the United States. Often the tuna is processed and canned in one of these countries. In this dispute, the "intermediary" countries facing the embargo were Costa Rica, Italy, Japan, and Spain, and earlier France, the Netherlands Antilles, and the United Kingdom. Others, including Canada, Colombia, the Republic of Korea, and members of the Association of Southeast Asian Nations, were also named as "intermediaries".

The panel

Mexico asked for a panel (../../thewto_e/whatis_e/tif_e/disp2_e.htm) in February 1991. A number of "intermediary" countries also expressed an interest. The panel reported to GATT members in September 1991. It concluded:

- that the US could not embargo imports of tuna products from Mexico simply because Mexican regulations on *the way tuna was produced* did not satisfy US regulations. (But the US could apply its regulations on *the quality or content* of the tuna imported.) This has become known as a "product" versus "process" (cte03_e.htm#productvprocess) issue.
- that GATT rules did not allow one country to take trade action for the purpose of attempting to enforce its own domestic laws in another country — even to protect animal health or exhaustible natural resources. The term used here is "extra-territoriality".

What was the reasoning behind this ruling? If the US arguments were accepted, then any country could ban imports of a product from another country merely because the exporting country has different environmental, health and social policies from its own. This would create a virtually open-ended route for any country to apply trade restrictions unilaterally — and to do so not just to enforce its own laws domestically, but to impose its own standards on other countries. The door would be opened to a possible flood of protectionist abuses. This would conflict with the main purpose of the multilateral trading system (../../thewto_e/whatis_e/tif_e/fact1_e.htm#mts) — to achieve predictability through trade rules.

The panel's task was restricted to examining how GATT rules applied to the issue. It was not asked whether the policy was environmentally correct. It suggested that the US policy could be made compatible with GATT rules if members agreed on amendments or reached a decision to waive the rules specially for this issue. That way, the members could negotiate the specific issues, and could set limits that would prevent protectionist abuse.

The panel was also asked to judge the US policy of requiring tuna products to be labelled "dolphin-safe" (leaving to consumers the choice of whether to buy the product). It concluded that this did not violate GATT rules because it was designed to prevent deceptive advertising practices on all tuna products, whether imported or domestically produced.

P.S. The report was never adopted

Under the present WTO system, if WTO members (meeting as the Dispute Settlement Body (../../thewto_e/whatis_e/tif_e/disp1_e.htm)) do not by consensus reject a panel report after 60 days, it is automatically accepted ("adopted"). That was not the case under the old GATT. Mexico decided not to pursue the case and the panel report was never adopted even though some of the "intermediary" countries pressed for its adoption. Mexico and the United States held their own bilateral consultations aimed at reaching agreement outside GATT.

In 1992, the European Union lodged its own complaint (edis05_e.htm). This led to a second panel report circulated to GATT members in mid 1994. The report upheld some of the findings of the first panel and modified others. Although the European Union and other countries pressed for the report to be adopted, the United States told a series of meetings of the GATT Council and the final meeting of GATT contracting parties (i.e. members) that it had not had time to complete its studies of the report. There was therefore no consensus to adopt the report, a requirement under the old GATT system.

On 1 January 1995, GATT made way for the WTO.

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The US Marine Mammal Protection Act:

The US Marine Mammal Protection Act (MMPA) prohibited the "taking" (harassment, hunting, capture, killing or attempt to do any of these), and importation into the US, of marine mammals, except with explicit authorization.

It governed, in particular, the taking of marine mammals incidental to harvesting yellowfin tuna in the Eastern Tropical Pacific Ocean, an area where dolphins are known to swim above schools of tuna.

The act meant a ban on the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of US standards.

In particular, the importation of yellowfin tuna harvested with purse-seine nets in the Eastern Tropical Pacific Ocean was prohibited (*primary nation embargo*), unless the competent US authorities established that:

(i) the government of the harvesting country had a programme regulating the taking of marine mammals, comparable to that of the US, and

(ii) the average rate of incidental taking of marine mammals by vessels of the harvesting nation was comparable to the average rate of such taking by US vessels.

The average incidental taking rate (in terms of dolphins killed each time in the purse-seine nets are set) for that country's tuna fleet were not to exceed 1.25 times the average taking rate of US vessels in the same period. Imports of tuna from countries purchasing tuna from a country subject to the primary nation embargo were also prohibited (*intermediary nation embargo*).

Legally speaking:

Mexico claimed that the import prohibition on yellow fin tuna and tuna products was inconsistent with Articles XI, XIII and III of GATT. The US requested the Panel to find that the *direct embargo* was consistent with Article III and, in the alternative, was covered by Articles XX(b) and XX(g). The US also argued that the *intermediary nation* embargo was consistent with Article III and, in the alternative, was justified by Article XX, paragraphs (b), (d) and (g).

The Panel found that the import prohibition under the *direct* and the *intermediary* embargoes did not constitute internal regulations within the meaning of Article III, was inconsistent with Article XI:1 and was not justified by Article XX paragraphs (b) and (g). Moreover, the *intermediary* embargo was not justified under Article XX(d).