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EC [European Community] Tuna/Dolphin GATT [General Agreement on Tariffs and Trade] Case March 2, 1993

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EC TUNA/DOLPHIN GATT CASE

MMPA TUNA EMBARGOES

o The Marine Mammal Protection Act (MMPA) bans imports of yellowfin tuna harvested with purse seine nets in the Eastern Tropical Pacific Ocean from countries whose fishing vessels kill more dolphins than U.S. vessels may kill consistent with the law. Mexico, Venezuela, Colombia and Panama are presently subject to this "primary" embargo.

o The MMPA also bans imports of all yellowfin tuna from intermediary nations, *i.e.*, those which import tuna subject to the primary embargo. Italy, Spain, Japan, and Costa Rica are currently subject to this embargo.

MEXICO GATT CASE

o Two years ago, Mexico brought a GATT case against us, claiming that the MMPA embargoes were GATT-inconsistent. Ten governments and the EC intervened in that case, none supporting the United States. A GATT Panel held in favor of Mexico, finding:

-- the embargoes did not qualify as permissible regulations of a *product* (tuna), but impermissibly banned importation based on the *process* by which the product is produced (level of dolphin mortality);

-- the exceptions in GATT Article XX that permit certain trade measures for environmental purposes do not apply to measures seeking to protect animal life or conserving exhaustible natural resources *outside* a party's jurisdiction, such as these dolphin. (It should be noted that most of these dolphin were not on the high seas, but within Mexico's exclusive economic zone.);

   -- a contrary conclusion would invite chaos, with each country free to dictate its unilaterally-determined environmental standards on areas outside its jurisdiction and to impose trade measures on countries that do not comply with such standards;

-- the tuna embargoes were particularly suspect from a GATT perspective because the permissible dolphin mortality level for foreign fleets varied each year, based retroactively on the performance of the U.S. fleet that year;

- o Mexico has never pushed for GATT Council adoption of the Panel report, however, instead seeking to work bilaterally and through the Inter-American Tropical Tuna Commission to resolve the issue (largely because of NAFTA concerns).

EC GATT CASE

- o As noted above, two EC Member States (Spain and Italy) are subject to the intermediary nation embargo (as was France previously).

- o The EC, frustrated by the unwillingness of Mexico to push for adoption of the earlier Panel report, instituted its own complaint against us.

- o The initial EC brief relies heavily on the reasoning of the Panel report, arguing that the intermediary nation embargoes are GATT-inconsistent. The EC also tries to argue that it is harmed indirectly by the primary embargoes.

- o The initial U.S. brief is due either March 18 or 25. The two sides will subsequently file additional briefs simultaneously, after which a hearing will take place.

- o If we were to respond to the EC brief as we responded in the Mexican case, we would argue that the embargoes are permissible regulations of a product, and, even if not, the GATT Article XX environmental exceptions are broad enough to cover this case. In terms of the Article XX argument, we would in effect be contending that the GATT permits a country to use trade sanctions where other countries do not comply with its unilaterally-determined environmental standards with regard to resources in their jurisdiction, where there is no alleged transboundary impact.

IMPLICATIONS

- o Because this case directly raises key "trade and environment" issues that are to be reviewed pursuant to NSC Directive 12, and because the USG would be likely to lose this case (and be faced, as in the first case, with domestic anti-GATT pressure and international anti-unilateral measures pressure), our response to the EC's brief should be carefully considered.

- o How broadly GATT Article XX should be interpreted has been one of the most difficult issues that USG agencies have been grappling with since the tuna/dolphin panel decision.

-- the U.S. has a host of environmental/conservation laws containing trade measures that apply to resources outside the jurisdiction of the United States; given that any one of these might someday have to be defended in the GATT, it would be helpful to have established a broad interpretation of Article XX;

-- at the same time, given the extreme facts of this case (see below):

  o it is highly unlikely that this case would lead to a helpful interpretation;

  o in defending this case, the USG would have to advance an interpretation of GATT Article XX that might be difficult to live with if applied in the opposite direction against us (we arguably crossed part of this bridge when we defended the first tuna/dolphin case*, but this case, given that it involves the intermediary, vice primary, embargo, would require us to go even further).

o The U.S. tuna/dolphin law presents an extreme factual situation, possibly the most difficult to defend of all U.S. environmental/conservation laws:

-- it has been argued that the law addresses an "aesthetic," as opposed to "environmental," problem, given that the resource targeted for protection -- dolphin -- is not in danger of extinction. (Compare to the turtle/shrimp law, which targets endangered turtles.)

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* The U.S. defense of the primary embargo raises the issue whether we could, for example, live with a ban on the import of U.S. furs produced from animals caught in leg-hold traps that another country unilaterally determined were unacceptable (we have complained about this in the past); a ban on the import of U.S. cosmetics produced using animal-testing that another country unilaterally determined was unacceptable; a ban on the import of U.S. steel produced in factories that emit a level of carbon dioxide that exceeds a standard unilaterally developed by another country (noting that, in this case, the other country could argue global environmental impact).

-- the standard is based on process (i.e., the manner in which tuna is harvested), rather than product (i.e., there is nothing environmentally wrong with the tuna itself);

-- it applies a U.S. unilaterally-determined environmental standard on other countries with respect to resources within their jurisdiction, with no alleged environmental impact on the United States (unlike, for example, either a case where the resources to be protected are in the global commons or a case where the resources are located in a foreign country but the environmental impact of not protecting such resources is a global/transboundary one); and

-- the standard applied would be difficult to implement, even if a country were inclined to comply (i.e., the permissible dolphin mortality level for foreign fleets varies each year, based retroactively on the performance of the U.S. fleet that year).

o The particular provisions of the tuna/dolphin law at issue in this case -- the intermediary embargo -- present an even worse factual situation than the primary embargo, the subject of the tuna/dolphin case brought by Mexico:

-- tuna exports from a country can be embargoed even where that country itself bans setting on dolphins and the tuna exported to the United States does *not* come from the country subject to the primary embargo (e.g., Mexico);

-- in order for a country to avoid an intermediary embargo, it has to take steps (i.e., put in place the functional equivalent of the U.S. primary embargo) that it may believe are GATT-inconsistent.

<u>OPTIONS</u>

o It should be considered whether it is more in our interest:

-- to defend this case, recognizing that we are likely to lose and be exposed to resulting domestic and international pressures; or

-- somehow settle with the EC.

o Settlement options would have to be identified.