

1993

## U.S. Trade Law and Policy Series No. 22: Trade and the Environment: A Snapshot from Tuna/Dolphins to the NAFTA and Beyond

Alan F. Holmer

Judith H. Bello

---

### Recommended Citation

Alan F. Holmer & Judith H. Bello, *U.S. Trade Law and Policy Series No. 22: Trade and the Environment: A Snapshot from Tuna/Dolphins to the NAFTA and Beyond*, 27 INT'L L. 169 (1993)  
<https://scholar.smu.edu/til/vol27/iss1/9>

This Current Developments is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

## ***U.S. Trade Law and Policy Series No. 22: Trade and the Environment: A Snapshot from Tuna/Dolphins to the NAFTA and Beyond***

On the occasion of its twenty-fifth birthday in 1987, the Office of the U.S. Trade Representative, part of the Executive Office of the President, was described in the media as “an obscure, elite agency.”<sup>1</sup> During the Bush administration, environmental interest groups nonetheless found their way to its obscure, elite offices in the Winder Building across from the Old Executive Office Building—and are unlikely ever to leave.

This article offers a snapshot of milestones in a perceived collision between U.S. public policies in promoting trade and protecting the environment. It first focuses on the North American Free Trade Agreement (NAFTA) negotiations, the congressional debate in 1991 concerning whether to grant President Bush’s request for a two-year extension of fast-track procedures, and the *Tuna/Dolphin* dispute settlement case in the General Agreement on Tariffs and Trade (GATT). Second, it outlines likely developments in the congressional debate this year on a bill to implement the NAFTA and implications for the handling of trade-environmental issues in the future. Third, the article assesses the trade-environment conflicts as part of an overall increase, within an increasingly global

---

\*Attorney in the Washington, D.C. office of Sidley & Austin. From 1985–1989 Mr. Holmer served in the Office of the U.S. Trade Representative, ultimately as Deputy U.S. Trade Representative.

\*\*Attorney in the Washington, D.C. office of Sidley & Austin. From 1985–1989 Ms. Bello served in the Office of the U.S. Trade Representative, ultimately as General Counsel.

The authors are indebted to insights provided by Daniel C. Esty, Deputy Assistant Administrator for Policy, Planning and Evaluation, Environmental Protection Agency, Washington, D.C.

1. Stuart Auerbach, *An Obscure Elite Agency Marks 25 Years Survival*, WASH. POST, Nov. 16, 1987, at A11.

economy, in international rulemaking concerning issues previously considered purely domestic.

### I. The NAFTA, Fast Track, and the *Tuna/Dolphin* GATT Cases

Public policies on trade promotion and environmental protection occasionally collided with each other prior to 1991, to be sure. For example, over the administration's objection, the Congress included differential taxes on United States and foreign petroleum and petrochemical production in the 1986 Superfund Amendments and Reauthorization Act.<sup>2</sup> The object of the legislation was to fund the Superfund cleanup program, a high priority on the nation's environmental agenda.

By objecting to the bill's imposition of a higher tax on imported petroleum than domestic petroleum, the administration sought to comply with the obligations of the United States under the GATT.<sup>3</sup> Article III of the GATT generally prohibits, with respect to taxation, treating products of the GATT signatories less favorably than domestically-made products. The administration believed that imposing an 11.7 cents per barrel fee on imported oil, versus only an 8.2 cents per barrel fee on domestic oil, would be challenged in the GATT, perhaps successfully.

Enactment of the Superfund bill provoked almost immediate protests by the governments of Canada, the European Communities, and Mexico. When consultations failed to achieve a mutually satisfactory result, those governments requested the establishment of a panel under the dispute settlement procedures of the GATT article XXIII:2. The panel ruled in the challengers' favor,<sup>4</sup> and the GATT Council adopted the panel report.<sup>5</sup>

The Superfund GATT dispute was a distinctly minor event in the environmental community, however, compared to President Bush's proposal in the fall of 1990 of a North American Free Trade Agreement with Canada and Mexico<sup>6</sup>—the first free trade agreement to be negotiated with a developing country with dramatically lower labor rates. The President notified the Senate Finance and House Ways and Means Committees of his intention to enter into these negotiations with Mexico<sup>7</sup>

2. Superfund Revenue Act of 1986, Pub. L. No. 99-499, 100 Stat. 1760 (1986) (codified as amended in scattered sections of 26 U.S.C.).

3. General Agreement on Tariffs and Trade (GATT), *opened for signature* Oct. 30, 1987, 61 Stat. A3, 55 U.N.T.S. 187.

4. General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Superfund Excise Taxes, June 17, 1987, 27 I.L.M. 1596 (1988).

5. The United States eventually eliminated the offending tax differential, and thus came into conformity with its GATT obligations. See Steel Trade Liberalization Program Implementation Act § 8, Pub. L. No. 101-221, 103 Stat. 1886, 1891 (1989).

6. The White House, Office of the Press Secretary, Joint Statement by the Presidents of Mexico and the United States on Negotiation of a Free Trade Agreement (June 11, 1990), *reprinted in* JUDITH H. BELLO & ALAN F. HOLMER, GUIDE TO THE U.S.-CANADA FREE-TRADE AGREEMENT app. A-2 at 982 (Supp. 1991).

7. The White House, Office of the Press Secretary, Text of a Letter from the President to the Chairman of the Senate Committee on Finance and the Chairman of the House Committee on Ways and Means (Sept. 26, 1990), *reprinted in* BELLO & HOLMER, *supra* note 6, app. A-4 at 988-89.

and Canada;<sup>8</sup> the committees' inaction to disapprove the negotiations rendered them eligible for fast-track congressional approval procedures.<sup>9</sup> Under the "fast track," any bill submitted by the President to implement a trade agreement would be considered on a fixed timetable and would not be subject to amendments.<sup>10</sup>

However, authority for the fast-track procedures would have expired on March 1, 1991,<sup>11</sup> unless by that date the President either notified the Congress of his intention to enter into a trade agreement or requested a two-year extension of the fast-track procedures.<sup>12</sup> Obviously, the NAFTA negotiations then were only beginning. Therefore, to preserve the fast track, on March 1, 1991, the President transmitted to the Congress his request for the two-year extension.<sup>13</sup>

The initial response of many in the Congress was decidedly negative. Organized labor and many environmental groups, at least initially, opposed any extension of the fast track. Organized labor feared American jobs would be exported to Mexico under a free trade agreement, since Mexican labor rates are dramatically lower than United States rates.

Various environmental groups, on the other hand, were concerned that growth in trade with Mexico could jeopardize the environment, both along the border and in Mexico. More extreme groups based their opposition on the prospect of growth alone. Moderate groups supported the economic and trade growth that the NAFTA was intended to stimulate, provided that environmental objectives were not sacrificed to developmental objectives. The moderates sought assurances that the environment, as well as trade, would prosper under the NAFTA.

Ultimately, the environmental community and its supporters in the Congress received such assurances. In the Action Plan for the NAFTA submitted to the Congress on May 1, 1991, the President made commitments regarding the protection of the environment in any North American trade agreement negotiated by his administration.<sup>14</sup> In particular, the President stressed that U.S. health, safety, and environmental standards would not be compromised, and that the NAFTA would

---

8. Letter from President Bush to Dan Rostenkowski, Chairman, Committee on Ways and Means (Feb. 5, 1991), *reprinted in* BELLO & HOLMER, *supra* note 6, app. A-6 at 993.

9. *See* Omnibus Trade and Competitiveness Act of 1988, § 1102(c)(3)(C), Pub. L. No. 100-418, 102 Stat. 1107, 1127 (codified as amended at 19 U.S.C. § 2902(c)(3)(C)) [hereinafter 1988 Act].

10. Trade Act of 1974, § 151, Pub. L. No. 93-618, 88 Stat. 1978, 2001-04 (1975) (codified as amended at 19 U.S.C. § 2191).

11. 1988 Act, *supra* note 9, § 1103(b)(2), 19 U.S.C. § 2903(b)(2).

12. *Id.*

13. The White House, Office of the Press Secretary, Letter from President Bush to Congress, *reprinted in* BELLO & HOLMER, *supra* note 6, app. A-7 at 998. *See also* Office of the U.S. Trade Representative, President Bush Asks Congress to Extend Fast-Track Procedures (Mar. 1, 1991); REPORT TO THE CONGRESS ON THE EXTENSION OF FAST-TRACK PROCEEDINGS PURSUANT TO SECTION 1103(B) OF THE OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988, H.R. DOC. NO. 51, 102D CONG., 1ST SESS. (1991).

14. The President's Action Plan responded to requests made by Senate Finance Committee Chairman Lloyd Bentsen and House Ways and Means Committee Chairman Dan Rostenkowski for more information about how the environment and workers would be protected under the NAFTA. *See* COMMITTEE ON WAYS AND MEANS, 102D CONG., 1ST SESS., EXCHANGE OF LETTERS ON ISSUES

not result in the dilution of U.S. minimum standards in these areas. Moreover, he agreed to address bilateral environmental issues separately, but concurrently, with the NAFTA talks.

With these assurances, the tide turned in the congressional fast-track debate and an overwhelming majority voted to defeat resolutions that would have disapproved the President's request for an extension.<sup>15</sup> Also by an overwhelming majority, the House of Representatives passed a resolution offered by House Majority Leader Richard Gephardt and Ways and Means Committee Chairman Dan Rostenkowski, stressing the importance of the administration's commitments to protect the environment and workers as well as to promote trade in negotiating an agreement with Mexico.<sup>16</sup>

## II. The *Tuna/Dolphin* Developments

If the debate on the extension of fast-track procedures framed the environmental concerns posed by trade agreements in general and the NAFTA in particular, the *Tuna/Dolphin* GATT case magnified them.

Under the Marine Mammal Protection Act, the U.S. embargoes imports of tuna from any nation whose fishing fleets are found to use purse seine nets, which catch an unduly large number of porpoises when used to fish for tuna.<sup>17</sup> This embargo is applied without regard to where the tuna (and, inadvertently, the porpoises) are caught, even if they are caught in international or foreign waters by foreign nationals on foreign flag vessels.

In 1990, the United States determined that tuna fishing fleets of Mexico and several other countries were using the porpoise-unfriendly fishing methods; under the Marine Mammal Protection Act, therefore, imports of tuna from these countries were blocked.<sup>18</sup> Moreover, the United States threatened secondary boycotts against other countries that failed to embargo imports of tuna from the offending countries.

Mexico challenged the U.S. action in the GATT, article XI of which generally prohibits the imposition of quantitative restrictions.<sup>19</sup> While article XI provides some exceptions to the rule, the dispute settlement panel convened under article XXIII:2 found that none of the exceptions applied in the case of the U.S. embargo

---

CONCERNING THE NEGOTIATION OF A NORTH AMERICAN FREE TRADE AGREEMENT (Comm. Print 1991). This compilation contains the March 7, 1991, letter to the President from Chairmen Bentsen and Rostenkowski (app. at 87), as well as the President's response.

15. The House vote on the resolution to disapprove the President's request was 192-231. 137 CONG. REC. H3588 (daily ed. May 23, 1991). The Senate vote on its identical disapproval resolution was 36-59. 137 CONG. REC. S6829 (daily ed. May 24, 1991).

16. 137 CONG. REC. H3610-11 (daily ed. May 23, 1991) (recording the vote of 329-85 in favor of the Gephardt-Rostenkowski resolution).

17. Marine Mammal Protection Act of 1972, § 101(a)(2), Pub. L. No. 92-522, 86 Stat. 1027, 1030 (1972) (codified as amended in scattered sections of 16 U.S.C.).

18. See *Earth Island Institute v. Mosbacher*, 746 F. Supp. 964, 966 (N.D. Cal. 1990).

19. GATT, *supra* note 3, art. XI.

of imports of yellowfin tuna. Accordingly, the panel ruled in Mexico's favor.<sup>20</sup>

Because the United States and Mexico achieved a mutually satisfactory bilateral resolution, the GATT Council never adopted the panel report.<sup>21</sup>

The U.S. environmental community considered the *Tuna/Dolphin* outcome a nightmare come true. Not only did new NAFTA negotiations jeopardize the environment; even existing trade rules in the GATT impeded the environmental community's ability to use the clout of the U.S. market to protect the environment.

The *Tuna/Dolphin* outcome unleashed a spate of full-page newspaper advertisements featuring leaping dolphins. The Government of Mexico's advertisement stressed its continued commitment to the adequate protection of environmental resources.<sup>22</sup> Several environmental groups, on the other hand, stressed the betrayal of U.S. environmental objectives by "faceless GATT bureaucrats" whose "secret" trade negotiations constitute a "sneak attack on democracy."<sup>23</sup> While the particular issues involved in the *Tuna/Dolphin* case are expected to be resolved outside the GATT,<sup>24</sup> the case emblemizes the concern of many in the environmental community that, in the pursuit of its trade agenda, the administration may fail to make environmental protection a sufficiently high priority.

### III. United Nations Conference on Environment and Development

Against the backdrop of escalating tensions on trade and environmental issues in the NAFTA and the GATT, the United States participated in a long-scheduled United Nations Conference on Environment and Development (UNCED or Earth Summit) in Rio de Janeiro in June 1992. A front-page newspaper photograph during the conference depicted Administrator William K. Reilly of the U.S. Environmental Protection Agency standing before a large homemade sign depicting the words "NAFTA" and "GATT" with a superimposed international "nix" sign.<sup>25</sup>

The Earth Summit broadly addressed many environmental issues, on many of

---

20. *General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna*, Aug. 16, 1991, 30 I.L.M. 1594 (1991).

21. See WASH. POST, June 10, 1992, at A1. If the panel report had been adopted, the U.S. would have been obliged either to: (1) come into conformity with its GATT obligations by lifting the embargo; (2) provide compensatory trade benefits to adversely affected GATT trading partners, including Mexico; or (3) suffer the loss of trade concessions made by the adversely affected GATT signatories (i.e., retaliation by them against U.S. exports).

22. WASH. POST, Sept. 27, 1991, at A26.

23. *Sabotage of America's Health, Food Safety and Environmental Laws*, WASH. POST, Apr. 22, 1992, at A18.

24. See The International Dolphin Conservation Act, 1992, Pub. L. No. 102-523, 106 Stat. 3425 (1992), amending the Marine Mammal Protection Act to authorize the negotiation of international agreements to establish a global moratorium to prohibit harvesting of tuna through the use of purse seine nets.

25. WASH. POST, June 10, 1992, at A1.

which the United States effectively exercised leadership. However, the isolation of the United States on at least two high-profile issues, biodiversity and forests, highlighted the continuing tension between trade and development objectives (jobs for people), and the environmental agenda (protection of resources). While the UNCED had no direct effect on either the NAFTA negotiations or the GATT Uruguay Round, we are likely to feel its repercussions in trade negotiations for years to come.

#### IV. The Outlook for 1993

Having concluded the path-breaking, historic North American Free Trade Agreement last year, the administration is expected to seek congressional passage of implementing trade legislation this year under fast-track procedures. While each of the trade provisions will be scrutinized carefully, the outcome of the congressional debate on the NAFTA implementing bill may well hinge on parallel environmental commitments rather than the NAFTA text itself.

Basically, Congress will ask itself (and will be asked by the private sector, in particular nongovernmental environmental organizations) two questions: Do provisions in the NAFTA parallel agreed undertakings, or unilateral U.S. law sufficiently ensure the protection of the environment? And have the administrations of the United States and Mexico<sup>26</sup> struck an appropriate, defensible balance between trade and environmental objectives?

Many who oppose the NAFTA for nonenvironmental reasons are expected to use the environmental mantle to cloak the real, less politically correct motive for their opposition. These "protectionists in environmental clothing"<sup>27</sup> include those who believe they cannot compete with imports from Mexico. Since their real objective is to kill the NAFTA or exempt themselves from it, it will be impossible to appease this camp on the environmental issues.

However, there are many groups and members of Congress whose leading (and for some, only) concern with the NAFTA is its likely impact on the environment. They will scrutinize the agreement and any parallel undertakings to assess such impact, including: the continuing sovereignty of the United States to establish unilateral, higher environmental standards and to exclude imports from Mexico that fail to meet those standards; the prospects for creating a pollution haven in Mexico under the NAFTA; the promulgation of adequate substantive environmental laws and standards to ensure protection of the environment, especially along the border; and the commitment of sufficient revenues by the United States and Mexico, jointly or severally, to fund enforcement of environmental laws and regulations. If Congress rejects the NAFTA implementing bill, it would largely

26. While Canada is expected to be a party to the NAFTA as well, the environmental concerns are focused almost exclusively on Mexico as a developing country.

27. Gary N. Edso (General Counsel, Office of the U.S. Trade Representative), Remarks Before the Institute for International Economics, Washington, D.C. (July 27, 1992).

be a function of these environmental concerns, rather than the prospect of adjustment by some labor-intensive U.S. industries to increasing competition from Mexico because of lower labor rates there.

## V. The Trend Reflected in the Trade and Environment Issues

Aside from immediate repercussions regarding the fate of the NAFTA (and perhaps also the GATT Uruguay Round multilateral trade negotiations), the trade-environment issues presage an overarching development in international governance for the 1990s and beyond. In an increasingly global economy, issues that had been considered strictly domestic nonetheless affect the international competitiveness of workers and industry—in some cases, dramatically. Therefore, they have spawned international efforts to develop agreed supranational rules.

As a sovereign nation the United States continues to enjoy the right to determine its environmental standards unilaterally. However, when the United States unilaterally establishes more stringent environmental standards than those applied by its trading partners and requires industry to bear the cost (for example, the 1990 Clean Air Act Amendments<sup>28</sup>), its environmental objectives collide with its trade promotion objectives. As environmental compliance costs increase, the competitiveness of key U.S. industries (such as petrochemical, glass, and steel producers and workers) is reduced against competitors in countries with lower standards (or comparable standards that are not as effectively enforced).

Of course, Americans understandably want to eat their cake and have it too. The United States wants to establish and enforce adequate environmental standards, but in doing so it does not wish to undermine the competitiveness of American industry or agriculture. The United States' unilaterally enhanced protection of the environment undermines American competitiveness and, therefore, provokes legislative proposals designed to offset the competitive advantage conferred on U.S. trading partners.<sup>29</sup>

To promote trade and protect the environment, America needs to export its environmental standards as well as its products and services. The only way to do so is, of course, to negotiate adequate substantive standards and commitments to enforce the standards effectively. Developing countries are more likely to be prepared to assume such commitments (thus eliminating the competitive advantage of lower environmental compliance costs) only if such assumption is linked to their own economic development. In an era of continuing U.S. federal budget deficits, the best way to foster an LDC's development is by facilitating its access to developed country markets. Thus, for example, the NAFTA offers a balanced

---

28. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

29. See S. 59, 102d Cong., 1st Sess. (1991); see also S. 201, 102d Cong., 1st Sess. (1991).



way to achieve both the United States's objectives: its primary purpose is to promote trade and economic growth, but the revenues derived from such growth will then enable each country to enforce its substantive environmental standards more effectively.

The larger trend in international governance, then, is to negotiate international rules and standards. This is generally preferable to unilateral national action that, in a global economy, usually shoots the actor in the foot by undermining its competitiveness. Further, proliferating unilateral national action raises tensions that then must be managed. When the United States, for example, unilaterally enacts and enforces environmental standards higher than those of some of its trading partners, it undermines U.S. competitiveness. The reduced competitiveness fuels national legislative proposals to unilaterally close off or reduce access to the U.S. market for products whose foreign producers gain a competitive advantage through lower environmental compliance costs. Any such closing of the U.S. market, however, may further reduce American competitiveness. It may also violate the GATT rules largely written by the United States (with Great Britain) after World War II. This would undermine U.S. leadership on global trade and on economic and environmental issues.

The long-term answer to this dilemma is to negotiate adequate and effective international standards for subjects previously considered to be domestic issues. The short-term challenges are to: (1) manage trade tensions effectively until such negotiations can begin to succeed; and (2) facilitate and expedite acceptable outcomes in these negotiations.

While many believe the best way to meet both challenges is to resort to more unilateral trade action, this is a "catch-22" that contributes to the spiral of "unilateralism" that further heightens tensions, reduces our own competitiveness, and so forth.<sup>30</sup>

Despite these grave complications, the trend is clear: In an increasingly global economy, more and more domestic decisions of federal, state, and local governments dramatically affect the international competitiveness of American industry and agriculture. Therefore, effective international governance through the negotiation and enforcement of acceptable standards is necessary to reconcile environmental and international trade objectives as much as possible. Unilateral national action contrary to international rules can be justified occasionally as civil disobedience necessary to expedite desirable change. However, it cannot provide a constructive long-term solution, and often proves harmful even in the short term.

---

30. See generally *AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* (Jagdish Bhagwati & Hugh T. Patrick eds., 1990).