

The Tuna Dolphin Controversy

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Overview

- The killing of dolphins has been the by-product of catching tuna for a long time in the Eastern Tropical Pacific (ETP). Here, schools of tuna swim below dolphins. Fisherman began to really take advantage of this in the 1950's, using dolphins as a means of tracking down tuna. This is also when the purse-seine net fishing method was developed, which entrapped both tuna and dolphins in its nets.
- As the dolphin mortality rate began to rise, US fishermen realized that their fishing methods would only work if there were still living dolphins in the ETP. As a consequence, they began to develop methods that were dolphin-safe.
- Dolphin mortality rates remained high though, and in 1972 Congress enacted the Marine Mammal Protection Act (MMPA). This act required that fishermen use dolphin-safe techniques, and established a permit system with a fixed ceiling on dolphin mortalities, thus limiting the taking rate.
- The number of dolphins dying due to tuna fishing did not decline though, because the composition of ships fishing in the EPC changed. There were less US ships and more Mexican ships (along with a good number from Venezuela).
- The killing of dolphins rest almost completely on foreign fishing techniques, so Congress added the Direct Embargo Provision to the MMPA. This provision prohibited the importation of tuna from countries that did not have mortality rates and regulatory programs comparable to those of the US. If countries did not prove that these two requirements were met, they would be faced with a direct tuna embargo.
- To ensure compliance, Congress introduced three other measures into the MMPA:
 - The Intermediary Nation Provision: stated that intermediary countries that exported tuna to the US, but were not involved in the catching of the tuna, must prove that they have prohibited tuna from countries banned by the US.
 - The Pelly Amendment: stipulated that after a ban had been in place for six months, the President of the US was to be notified. This gave the President discretionary power to impose a ban of fish products for a period determined by the President.
 - The Dolphin Protection Consumer Information Act: dictated that only tuna products caught through dolphin-safe methods could include a "dolphin safe" label.
- During 1990-91, the US implemented embargos on Mexico, Venezuela, Panama, and Vanuatu (since then, Ecuador and Panama have complied with US standards). Mexico resisted conforming to US policies on the fishing of tuna, and continued to contribute greatly to dolphin deaths
- Articles:
 - GATT
 - I. Most favored nation treatment provision

- prohibits contracting parties from discriminating between like products based on national origin
- III. national treatment provision
 - countries must apply tariffs equally to similar products of all other contracting parties.
- XI. quantitative restriction provision
 - only permits countries to impose tariffs as trade restrictions and prohibits the use of such non-tariff restrictions as quotas and import or export licenses
- XX. Allowance of trade restrictions when deemed "necessary to protect human, animal or plant life or health" or "relating to the conservation of exhaustible natural resources."
- WTO
 - Extension of GATT, more regulated, appellate body.
- WTO / GATT response to MMPA
 - Tuna-Dolphin I (1990)
 - Mexico brings complaint MMPA inconsistent with GATT principles
 - Violates articles III, XI, and does not meet exceptions of XX.
 - III. Product vs. Process
 - XI. Embargoes vs. Tariffs.
 - XX. couldn't be applied outside the jurisdiction of the US
 - Outcome: Mexico won the challenge, but the findings weren't formally adopted due to political pressures of upcoming NAFTA negotiations: not legally binding
- Tuna - Dolphin II (1992)
 - Brought by European Economic Community
 - MMPA did not have right to place embargoes on intermediary nations
 - Violated article XI mostly, but also III and XX
 - GATT ruled against US on basis of Articles XI and III
 - Went against the original ruling and found that it did qualify under exceptions in Article XX in the fact that those resources could be outside of the US, but...
 - It still didn't qualify since the embargo wasn't primarily aimed at conservation
 - Ruling vetoed by US thanks to procedure that predated the WTO
- The Future: another attempt at embargo?
 - Shrimp-Turtle dispute
 - very similar situation
 - contradictory ruling to that of Tuna-Dolphin, helps the case
 - Would need to satisfy 5 things that the Shrimp-Turtle case did not:
 1. state must be flexible in implementation of regulatory program
 2. Limit breadth of embargo
 3. Multilateral approach
 4. Treat all offending countries equally
 5. Lack of due process

- Conclusion
 - Difficult to convince WTO / GATT to rule for environmental protection measures against free trade
 - Bear the burden of proving that these are permissible reasons to bar trade
 - Use appropriate barriers to trade
 - Turtle Shrimp ban sheds light on appropriate actions to take
 - MULTILATERAL discussions

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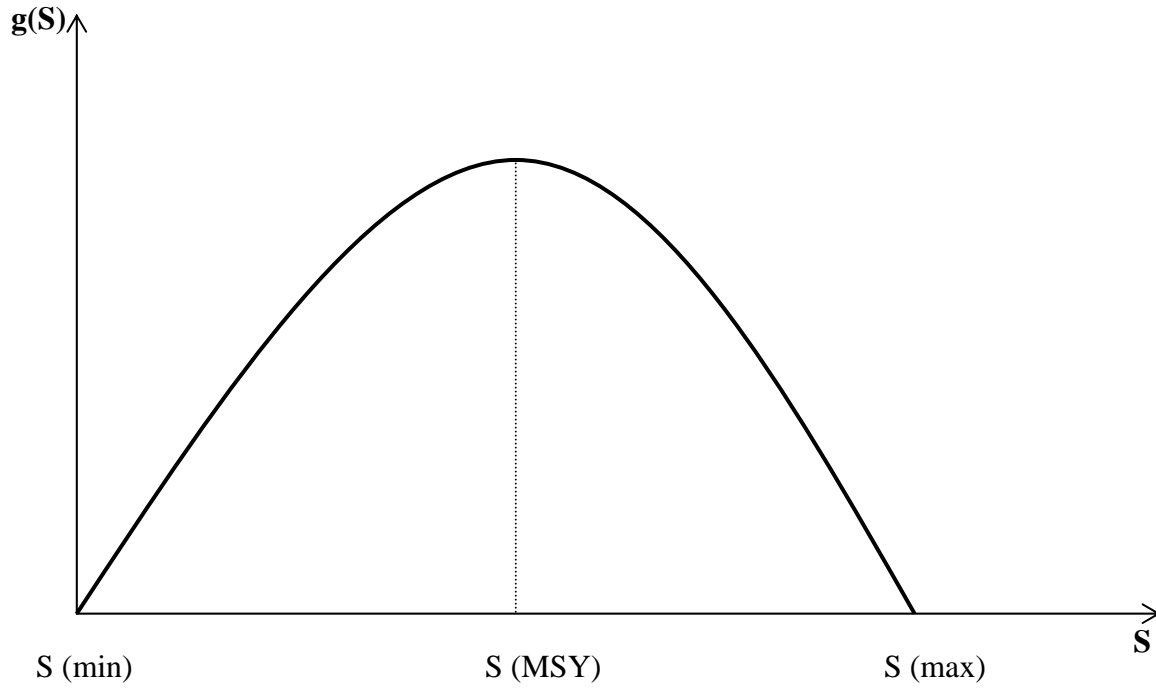
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The biological perspective:



The economic perspective:

