

Committee on Resources

Witness Testimony

Testimony of
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Before the Subcommittee on Fisheries

Wildlife, and Oceans

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Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to testify today. My name is Jeffrey Pike and I am coordinator of the Dolphin Safe Fair Trade Campaign. I am testifying today on behalf of a coalition of over 70 trade, consumer, labor, conservation and animal welfare organizations. These organizations have a strong commitment to ending dolphin mortality resulting from encirclement of dolphins in the Eastern Tropical Pacific Ocean (ETP). The Dolphin Safe Fair Trade Campaign supports the Miller bill, H.R. 2856, and is strongly opposed to the Gilchrest/Cunningham bill, H.R. 2823. The combined membership of these groups in the United States is in excess of 5 million individuals.

I. SUMMARY

The Dolphin Safe Fair Trade Campaign supports the Miller bill because it:

Maintains the current strict federal definition of "Dolphin Safe;"

Rewards foreign dolphin safe tuna fishers by opening up U.S. markets to their catch;

Requires annual reductions in the dolphin kill quota authorized by the IATTC;

Reinforces the IATTC's Dolphin Conservation Program, using the U.S. market to continue incentives for fishers to fish dolphin-safe; and

Sends a strong message that U.S. environmental, health, consumer safety standards and animal protection laws will not be weakened or repealed whenever they appear to conflict with U.S. trade obligations.

II. OVERVIEW

In the thirty-seven years since tuna fishers first employed the technique of chasing down dolphins with speed boats and helicopters and encircling them with mile-long purse-seine nets, more than seven million dolphins have been killed. According to the National Marine Fisheries Service, this represents the world's largest killing of marine mammals, dwarfing the total kill of whales by whaling nations, even eclipsing those years when industrial whalers drove many whale species to near extinction.

The tuna/dolphin fishery of the ETP is not like other marine mammal interaction fisheries. In the ETP tuna fishery, targeting of dolphin schools is deliberate. Yet, 96% or more of tuna worldwide is caught by hook and line fisheries or by setting nets without encircling any dolphins.

In 1972, Congress enacted the Marine Mammal Protection Act, largely to stop the carnage resulting from the intentional encirclement and slaughter of dolphins by tuna seiners. On six occasions since then, Congress has amended the Act's tuna/dolphin provisions, in each instance requiring U.S. and foreign fleets to reduce their dolphin kill in an attempt to bring mortality down to levels approaching zero.

By 1988, foreign countries began to dominate the fishery and, since then, have been responsible for the vast majority of dolphins killed. As a result, Congress strengthened the trade provisions contained in the MMPA to address the killing of dolphins by foreign nations. As Rep. Gerry Studds, then Chairman of the

Subcommittee on Fisheries and Wildlife Conservation and the Environment, stated in 1989:

We do not have the power to regulate foreign fishing operations in foreign waters or on the high seas. But we do have the right to bar our markets to any nation that does not share our concern for the conservation of marine mammals.

Rep. Studds' statement is as relevant today as it was seven years ago. Eight years ago the American people spoke out against the carnage of dolphins when millions of Americans threatened to boycott all tuna rather than have the U.S. market contribute to the death of hundreds of thousands of dolphins. Responding to this public outcry, the major U.S. tuna canners became "dolphin safe."

Today, dolphins are under a new threat - it is called "free trade." The American public feels strongly, as evidenced by the current Presidential debates and numerous polls, that the U.S. should continue to maintain strong environmental standards, irrespective of threats by foreign nations that they will challenge the United States at the World Trade Organization (WTO).

Clearly, U.S. tuna import restrictions have succeeded in dramatically reducing dolphin deaths. Our high standards, coupled with our market restrictions, have forced other countries to harmonize their standards upward. Our import restrictions helped persuade Ecuador and Panama to prohibit their fleets from any encirclement of dolphins, and other nations including Thailand, Taiwan, the UK, Germany, and France to prohibit imports of dolphin-unsafe tuna. U.S. import restrictions also provided the necessary leverage to encourage foreign countries to carry more observers, use better dolphin-safety equipment and techniques, require better training of captains, enact prohibitions on the use of explosives, and stop the setting of nets on dolphins during hours of darkness when dolphin mortality is three to five times higher. By any measure, our import restrictions have been the impetus for real change.

Yet despite this winning strategy, there are those who want to undo our successes and repeal key provisions of our U.S. tuna/dolphin laws. To do so is to turn back the clock, abdicate U.S. environmental leadership and set a precedent of repealing U.S. environmental laws whenever they appear to conflict with U.S. trade obligations.

III. MAKING MODIFICATIONS TO U.S. LAW TO ALLOW IMPORTATION OF "DOLPHIN SAFE" TUNA AND PROMOTE INTERNATIONAL COOPERATION, WHILE MAINTAINING CURRENT U.S. LABELING LAWS TO PREVENT CONSUMER FRAUD.

At issue today are three U.S. laws: the current embargo provisions contained in the MMPA (prohibiting the importation of yellowfin tuna from any country whose tuna fishers kill dolphins at a rate more than 25% higher than U.S. fishers), the International Dolphin Conservation Act (prohibiting the sale of dolphin unsafe tuna in the U.S. market) and the Dolphin Protection Consumer Information Act (prohibiting the use of the "dolphin-safe" label on any tuna caught by chasing, encircling and capturing dolphins).

A. Environmental Controversies

H.R. 2823 would (1) repeal the current embargo provisions, (2) repeal the prohibition on the sale of dolphin unsafe tuna in the U.S. market, and (3) substantially alter the definition of "dolphin safe" to permit the chase, encirclement, capture, and injury of dolphins so long as no dolphins are "observed" killed.

At the heart of the debate over whether to repeal U.S. "dolphin safe" laws is the fact that several countries, Mexico in particular, want access to our two billion dollar U.S. canned tuna market and are willing to press their claim at the WTO. To claim, as supporters of H.R. 2823 do, that we need to change U.S. dolphin safe laws for "environmental" reasons is simply nonsense. Mexico's concern is trade, not the environment.

B. Acknowledging Significant Efforts to Reduce Dolphin Mortality, The Miller bill 2856 Lifts the Current Embargoes

Recognizing the significant effort by U.S. and foreign fishers to reduce dolphin mortality in the Eastern Tropical Pacific (ETP) tuna fishery, H.R. 2856 would maintain current U.S. market standards, but would lift

the MMPA embargo to permit all "dolphin safe" tuna to be sold in the United States. By repealing the current embargo provisions, but maintaining U.S. domestic standards, H.R. 2856 creates an added incentive for foreign and U.S. fishers to fish for yellowfin tuna without chasing, netting and capturing dolphins.

Under current U.S. law foreign fishers who fish dolphin safe are penalized if their colleagues kill too many dolphins. The MMPA currently establishes a country standard, which means that the country as a whole has to meet U.S. standards or all fishers from that country are penalized. H.R. 2856 would eliminate the country standard and instead establish a "vessel" standard. Each vessel that meets current U.S. standards could import its tuna into the United States.

The Miller bill allows each fisher to make his or her own economic choice. Over 90 percent of the world canned tuna market is dolphin safe. If a fisher can profitably sell his or her tuna in a dolphin-safe market such as the dominant U.S. market, that fisher will have an incentive to fish dolphin safe. If, for any reason, a fisher decides to set on dolphins and sell to a non-dolphin safe market, but later in the season decides to go on a dolphin safe voyage, this latter tuna can be imported without penalty, as long as only the tuna from the dolphin safe voyage is imported into the United States. This change to current law makes sense ecologically, as well as economically. It encourages fishers to fish dolphin safe without penalizing them if they don't perform 100% of the time.

C. Preserving the Integrity of U.S. Dolphin-Safe Labeling Law and Preventing Consumer Fraud

The Gilchrest/Cunningham bill would change the definition of "dolphin safe" to include tuna harvested by chasing, netting and capturing dolphins, a practice which most Americans deplore, and in our view is decidedly not "dolphin safe." Under the Gilchrest/Cunningham bill, tuna is considered "dolphin safe" as long as no dolphins are "observed" killed during the set in which the tuna is caught.

Tuna seiners make many sets (average is 30-40) during a single voyage. The Gilchrest/Cunningham bill envisions a system whereby both dolphin unsafe and newly defined "dolphin safe" tuna are kept on board a single vessel during a single voyage. Such a system not only undermines the integrity of U.S. laws, but is unenforceable. Under the Gilchrest/Cunningham bill the reliability of such a regime will depend solely on a single observer who will be under tremendous economic pressure not to "see" dead dolphins. The reality will be that dolphin deadly tuna will flood into the United States labeled as "dolphin safe" and consumer confidence will be undermined. Lack of confidence by consumers could again spark a consumer boycott of canned tuna which would, in turn, damage the U.S. market for U.S. canners and fishers.

The Miller bill preserves the current definition of "dolphin safe," thereby preventing consumer fraud and safeguarding consumer confidence.

D. Implementing the Panama Declaration and Addressing By-Catch and Other Scientific Concerns

The Miller bill promotes international cooperation by implementing key provisions of the Panama Declaration as it has been interpreted by the Clinton Administration and the five environmental groups supporting the Gilchrest/Cunningham bill. It requires that the total annual dolphin mortality in the ETP purse seine fishery not exceed 5000 animals in 1996, and that this number be reduced by a statistically significant amount each year thereafter with the goal of eliminating dolphin mortality in the fishery. The Miller bill also requires that countries become members of the IATTC and ensures that countries will enforce their obligations under the IATTC by requiring that a country embargo be reestablished for any country which consistently fails to take enforcement action.

The Gilchrest/Cunningham bill is not satisfactory because it fails to provide even minimal enforcement provisions and does not require countries importing tuna to the United States to be members of the IATTC, the international organization responsible for the ETP tuna fishery.

The Miller bill addresses scientific concerns by requiring the establishment of a research program to determine: (1) the effect of harassment by chase and encirclement on the health and biology of dolphins and its impact on dolphin populations encircled by purse seine nets in the ETP, and (2) the extent to which the incidental take of non-target species, including juvenile tuna, occurs when fishing for yellowfin tuna

using dolphin-safe methods and the impact of that incidental take on tuna stocks. H.R. 2856 authorizes up to \$1,000,000 to be spent on such research and requires that the Secretary of Commerce report to Congress within three years the results of such research, thus ensuring timely completion.

The Gilchrest/Cunningham bill requires no by-catch research and allocates no money towards any research.

IV. A BAILOUT FOR THE MEXICAN TUNA INDUSTRY AND A TERRIBLE GATT PRECEDENT

Many of the organizations which support the Miller bill opposed the North American Free Trade Agreement (NAFTA) and the implementation of the World Trade Organization (WTO) because we believed it was only a matter of time before these agreements would be used offensively against democratically enacted domestic laws. Supporters of NAFTA and GATT promised that a vote for "free trade" would not be a vote against American values, and that our environmental laws, in particular, would be safe from attack.

Not satisfied with its NAFTA gains - a huge trade surplus with the United States and over 20 billion dollars in U.S. aid, Mexican President Zedillo sought assurances last fall that the Clinton Administration would support the repeal of our dolphin safe laws.

A. A Bad GATT/WTO Precedent

In 1991 and 1994, GATT ruled that the tuna/dolphin provisions of the MMPA were inconsistent with U.S. GATT obligations. Under the old GATT rules, the U.S. could ignore these rulings - which it did. Now, faced with mandatory trade sanctions under the new WTO, the Clinton Administration is seeking to avoid another trade challenge by Mexico - one that could be enforced with trade penalties.

The precedent that is being set, however, is to quickly and quietly repeal U.S. environmental laws which conflict with GATT/WTO. What other laws might be affected by this strategy?

The very first case filed at the WTO is a case challenging certain provisions of the U.S. Clean Air Act. The WTO ruled against the U.S. in that case. Other likely future challenges include the U.S. High Seas Driftnet Enforcement Act and U.S. laws protecting sea turtles.

Last December the U.S. Court of International Trade (CIT) ruled that the Clinton Administration had wrongly failed to enforce a U.S. conservation law enacted in 1989 to protect tens of thousands of sea turtles from being killed by U.S. and foreign shrimp trawlers. Currently, all U.S. shrimp trawlers use Turtle Excluder Devices (TED), as required by U.S. law, but many foreign vessels do not. Under the terms of the CIT Order, by June 1996, shrimp from over 50 countries may be embargoed if the foreign vessels have not complied with U.S. standards. The E.U. is threatening a WTO challenge if this conservation law is enforced against any of its member nations. Will this law also be repealed because it too conflicts with WTO rules?

This month the CIT again ruled against the Clinton Administration for failing to enforce the High Seas Driftnet Enforcement Act. If Italian vessels do not stop using oversized driftnets on the high seas within 60 days, the Administration will be required by court order to embargo Italian fish products. The European Union has already indicated that it will challenge this U.S. law at the WTO if the U.S. enforces it. Will it too be repealed for the sake of GATT consistency?

B. A Better Approach

The Miller bill adopts a fair trade approach, rather than the trade supremacist approach of Gilchrest/Cunningham bill. The Miller bill repeals the comparability provision of the MMPA, which is the only provision of current U.S. law that has been determined (by a GATT panel) to be inconsistent with GATT rules. Instead of eradicating over 20 years of conservation effort, the Miller approach is to maintain high U.S. standards while allowing individual foreign vessels that meet our standards to have access to the U.S. market. It was the fact that the United States embargoed even "dolphin safe" tuna from countries which did not meet the U.S. comparability standard that caused the most concern to a previous GATT panel. The Miller bill rectifies this problem by allowing all "dolphin safe" tuna to be imported into the United States.

V. THE LATIN AMERICAN FACTOR

According to industry sources, 28 of Mexico's 39 class six seiners are fishing dolphin safe and selling their tuna to dolphin safe markets. This represents almost three-quarters of the Mexican class six vessels. What is needed is a mechanism to encourage the remaining Mexican tuna seiners to fish dolphin safe. The Miller bill does this by giving them access (which they currently do not have) to the U.S. market for their dolphin safe tuna. Incidentally, if more Mexican fishers shift to dolphin-safe techniques they will gain increased access to the European dolphin-safe market as well.

Supporters of the Gilchrest/Cunningham bill claim that Mexico "will walk" from the international program if the United States does not open its markets to Mexico's dolphin unsafe tuna and change the U.S. definition of "dolphin safe." The implicit threat is that Mexico will go back to the days of killing tens of thousands of dolphins. While this claim may be emotionally appealing, it is not grounded in fact.

Ironically, Mexico is currently not a member of the IATTC. Although it has the largest tuna seining fleet in the ETP, Mexico pays none of the operating cost of the international regime. Only 50% of the Mexican vessels participate in the IATTC's observer program. Although the other 50% participate in a Mexican observer program, Mexico is seriously behind in its reporting to the IATTC the results of its observer program. Despite hundreds of violations of IATTC's rules regarding dolphin protection, not one Mexican fisher has ever been fined or punished. Clearly, Mexico now is barely "participating" in the current international regime.

The vast majority of the worldwide canned tuna market is now dolphin safe.

Although supporters of the Gilchrest/Cunningham bill claim that the growing Latin and Asian markets for canned tuna make the U.S. embargoes increasingly meaningless in terms of market impact, FAO statistics demonstrate that in 1993, no Latin country other than Colombia had even a notable market share of the canned tuna market. Furthermore, no Asian country other than Japan has any significant market share of canned tuna, and even Japan's market share is tiny. According to industry sources, the statistics for 1994 and 1995 (which have not been published yet) do not differ significantly from the 1993 trends. The United States, Europe and Canada, which all have dolphin-safe markets, consume more than 90% of the world's supply of canned tuna.

If Mexico "walks" and Mexican fishers again kill tens of thousands of dolphin, where will Mexico sell its tuna? Clearly, even if it is Mexico's intention to carry out its threat to kill tens of thousands of dolphins, such action will have severe economic consequences to Mexico.

VI. ENCIRCLEMENT, THE PRECAUTIONARY PRINCIPLE AND SOUND SCIENCE

Supporters of the Gilchrest/Cunningham bill argue that the dramatic reduction since 1989 in dolphin deaths in the ETP tuna fishery demonstrates that encirclement is an acceptable method of fishing. They argue that although dolphin sets as a percentage of total sets have decreased in the last eight years by only slightly more than 30%, dolphin mortality has decreased by almost 96%, demonstrating that dolphin deaths can be reduced even with encirclement.

The impact of encirclement on ETP dolphin populations, however, is more than just an issue of dolphin mortality. The real issue is which dolphin populations are being affected and what is the impact on them.

The two most commonly encircled dolphin populations -- the Northeastern offshore spotted and the Eastern spinner dolphins -- are severely depleted according to recent National Marine Fisheries Service Assessments. The Northeastern offshore spotted dolphins have been reduced to only 23% of their pre-exploitation population size and the Eastern spinner has been reduced to 44%. Both are far below the 60% threshold used for full protection under the Marine Mammal Protection Act. Moreover, despite relatively low numbers of "observed kills" in recent years, both populations have continued to decline for reasons which are unclear to scientists.

Some scientists believe that certain stress factors related to chase and encirclement may provide some

preliminary answers to this. Although the studies conducted to date are preliminary, initial observations indicate that dolphins caught in the ETP tuna fishery are subjected to many strong, unavoidable stimuli, including repeated forced high-speed swimming (some estimate that schools of targeted dolphins are chased and encircled twice or more a day by the purse seiners), close pursuit, gear and vessel noise, turbulence, confinement and crowding. These dolphins have indices of stress not found in similar dolphin species not directly affected by the fishery or affected at lower rates. Results of preliminary studies on heavily fished populations of spotted dolphins indicate a substantially lower pregnancy rate and a significantly delayed age at sexual maturity, compared to a less exploited stock. While scientists have not ruled out other causes for this, application of the precautionary principle would require that absent scientific proof that encirclement is not a problem for these severely depleted populations, their encirclement should be drastically reduced if not eliminated altogether.

Current scientific data strongly suggest that encirclement and its effects on targeted dolphin populations should be subject to a thorough scientific examination before abandoning a 20-year U.S. goal of eliminating encirclement and dolphin mortality. To do anything else would not be sound science and would represent very poor resource management.

VII. BY-CATCH ASSOCIATED WITH LOG AND SCHOOL SETS

IATTC observer data indicate that non-dolphin by-catch is higher in log and school sets than in dolphin sets. Supporters of Gilchrest/Cunningham bill fear that if dolphin sets are further decreased or eliminated, log and school sets would increase, thereby further increasing non-dolphin discards, especially juvenile tuna. They support the Gilchrest/Cunningham bill because it encourages fishers to continue to set on dolphins, thereby giving them an alternative to log and school sets.

This issue has been misconstrued by the supporters of the Gilchrest/Cunningham bill.

Dolphin sets occur primarily on the high seas. Log and school sets occur predominately within coastal waters or within exclusive economic zones (EEZs). In fact, more than 57% of all sightings and sets on logs occur just in the Panama Bight, an area which encompasses the coastal waters of Costa Rica, Panama, Colombia and the northern tip of Ecuador.

The key issue therefore, is whether encouraging fishers to set on dolphins on the high seas will correspondingly encourage them not to set on logs or schools in coastal waters. We believe the answer is no.

Historically, even when ETP tuna fishers can set on dolphins without regulation or penalty, they also continue to fish on logs and schools of tuna a significant portion of the time. A review of IATTC log book data spanning the past 20 years demonstrates that even during the years when there were large numbers of dolphins sets (and hundreds of thousands of dolphins killed annually) the number of log and school sets was still higher than it is today. The reason for this is that large yellowfin tuna are present in the coastal areas at certain times of the year and fishermen will continue to exploit this situation.

Absent domestic regulation by foreign governments (tuna seining does not occur in U.S. coastal waters) the history of the fishery demonstrates that foreign fishers are not going to voluntarily leave their coastal zones to fish exclusively, or even primarily on the high seas.

Thus, amending U.S. law to encourage sets on dolphins will not significantly reduce or even address the non-dolphin by-catch issue.

A more appropriate and effective way to address the by-catch issue, especially the by-catch of juvenile tuna, is to require time and area closure on log sets in coastal waters, such as the Panama Bight where there is a high incidence of juvenile tuna and other by-catch species. For example, according to the IATTC, during the months of March-May there is a proliferation of small tuna in the Panama Bight area. A closure of the Panama Bight to log sets during those months would thus directly reduce the by-catch of juvenile tuna. It would also reduce the by-catch of all other species since the coastal and nearshore areas of the Panama Bight have been shown to contain all the species assemblages measured by the IATTC.

An additional solution is to develop incentives or regulatory measures for encouraging tuna canneries to accept (without price differential) smaller yellowfin tuna. Prior to 1985, the tuna canneries did not have a price differential for the larger tuna. This meant that purse seine vessel owners received the same economic return for all yellowfin tuna weighing more than about 7 lbs. Without an economic incentive to separate the large tuna from the small, tuna seiners had fewer incentives to discard small tuna. After the price differential went into effect in 1985, the amount of small tuna discards rose dramatically.

It is likely that the number of small yellowfin tuna harvested and kept before 1985 was not substantially lower than the number harvested and discarded today. Yet, the IATTC has never claimed that the number of small yellowfin tuna harvested prior to 1985 had a measurable impact on the overall yellowfin tuna biomass in the ETP. On the contrary, the IATTC has stated that the stock of yellowfin tuna in the ETP increased dramatically during the mid to late 1980's. Thus despite recent claims to the contrary by supporters of the Gilchrest/Cunningham bill, it seems likely that the harvest of small yellowfin tuna has not negatively impacted the status of the stocks of yellowfin tuna in the ETP, whether kept and canned or discarded.

Supporters of the Gilchrest/Cunningham bill also continue to incorrectly portray the ETP fishery as a high by-catch fishery, which it is not. Claims of large sea turtle mortality also have not been substantiated.

VIII. THE INTERNATIONAL REGIME HAS NO COMPLIANCE MECHANISM

A review of the IATTC's compliance record demonstrates that the IATTC has no enforceable compliance mechanisms and has failed to penalize reported infractions. Thus, even though there are observers aboard each vessel, the observer reports are not acted on by the international regime.

To date, despite the fact that hundreds of violations have been reported, no monetary fines have been collected or penalties assessed.

In fact, a review of the IATTC's International Review Panel (IRP) reports demonstrate that many countries have failed to take action against severe infractions. Mexico is one of the worst offenders. In 1994, Mexican vessels made 19 night sets. The IRP recommends a penalty of \$20,000 for each night set infraction. No penalties were collected. During the same period, Mexican vessels used explosives 102 times, an infraction for which the IRP recommends a penalty of \$20,000 per use. No penalties were collected. In fact, in most instances, the Mexican government took no action whatsoever. Similarly, in 1994 during four trips IATTC observers reported that they were prohibited by the vessel captain from carrying out their duties, an offense for which the IRP recommends a penalty of \$50,000 each from the captain and the vessel owners. In no case was the penalty collected.

These are only a few of the reported infractions which occur without any penalty or even notice by the governments involved. In practice, the IATTC regime is not working. Therefore, it is not an adequate substitute for strong U.S. laws.

Absent a complete overhaul of the IATTC system, by means of a multilateral negotiation of an enforceable, legally binding and fully implemented fisheries agreement, enforcement under the Panama Declaration will be as non-existent as under the current regime.

The Panama Declaration makes no provision for enforcement. It simply provides that the members will "adopt cooperative measures to ensure compliance," and "enhance the practice of reviewing and reporting on compliance...building upon past practices under the La Jolla Agreement." This is a rather meaningless statement given that there has been no enforcement under the La Jolla Agreement.

IX. CONCLUSION

Despite reductions in dolphin deaths, the 20 year U.S. goal to eliminate encirclement of dolphins is still valid absent sound scientific evidence that encirclement is not harmful, especially to already severely depleted dolphin populations.

Nothing in the Panama Declaration requires the decrease of non-dolphin by-catch, nor will maintaining the current definition of "dolphin-safe" and the U.S. market prohibition on the sale of dolphin unsafe tuna increase non-dolphin by-catch.

Latin American fishers have a strong market dis-incentive to return to the days of killing tens of thousands of dolphins even if the U.S. does not substantially weaken its laws.

Access to the U.S. market acts as a major and continuing incentive for tuna seiners to use dolphin safe methods.

In the absence of a strong, reliable, enforceable international regime, the best protection for dolphins is still strong U.S. and foreign dolphin safe laws and labeling requirements.

We hope that the information provided herein will encourage you to support HR. 2856, the Miller bill. Your support would greatly enhance efforts to promote dolphin protection.

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