

TED Case Studies # 1 [<http://www1.american.edu/ted/LOBSTER.HTM>]

US-Canada Lobster Dispute

CASE MNEMONIC: LOBSTER

CASE NAME: Lobster Dispute

1. The Issue

Is the American Lobster (*Homarus Americanus*) in danger of extinction? The case involves Canada and the U.S. and was brought up for arbitration under the Canada-United States *Free Trade Agreement (FTA)*. The panel determined that the species was in danger of extinction and restrictions were placed on lobster fishing rights. However, there were side issues involving the importation of Canadian lobsters into the United States and problems in distinguishing between the two countries' lobsters. Here, the *FTA* panel sided with the U.S. on the grounds of cost.

2. Description

In 1985 there was a large decrease in marine life in North Atlantic waters, especially the American lobster. Scientists and lobster fishers alike noticed the depletion of the stock. *U.S. lobster-boat owners were threatened by low stocks and import competition from the subsidized Canadian fleet.* In 1989, the U.S. government took measures to ensure effective management of U.S. commercial fishery stock (including lobsters) by passing the *Magnuson Act* (the "new law"). That move was quickly challenged by Canada as violating *Article 407* of the *FTA*, which incorporates *Article XI* of the *General Agreement on Tariffs and Trade (GATT)*.

According to the new law, it is illegal to ship, move, sell or buy American lobsters that are smaller than a minimum size for harvesting determined through the *American Lobster Fishery Management Plan*. It is also illegal to deal in the lobsters if they are egg-bearing females or if there is evidence their egg cases have been forcibly removed.

Canada challenged the new law and suggested it was targeted at Canadian lobster imports to the U.S. The U.S. argued that the new law was a legitimate step to protect dwindling lobster populations, was clearer than past conservation attempts, and did not treat U.S. and Canadian lobster fishers unequally.

From a scientific perspective, the U.S. further argued, size is a good measure of a lobster's maturity because the animals grow by shedding their external shells, or molting. American lobsters generally reach U.S. legal commercial size after five to seven growing seasons, depending on water temperatures.

The U.S. also argued that in the event *GATT Article XI* was violated by the new lobster protection law, Canada should look instead to *GATT Article XX (g)*, which sets up a balancing test as to whether a restriction relates to conservation or is a disguised restriction on international trade.

According to *GATT*, a conservation measure must satisfy four conditions in order to qualify for an *Article XX (g)* exemption: (1) the measure must relate to an exhaustible natural resource; (2) domestic production or consumption of the product must be limited; (3) the measure may not create arbitrary or unjustifiable discrimination between foreign countries; and (4) the measure must be primarily aimed at conservation.

The U.S. argued that lobsters are a natural resource than can be exhausted by overfishing. Second, U.S. domestic production of lobsters is limited by a series of conservation laws. Third, the new law applies equally to foreign and domestic lobsters. Finally, new law is designed to prevent the harvesting of sub-sized lobsters in the U.S.

GATT Article XX (g) has two tests to determine whether a measure is "primarily aimed at conservation". First, does the law provide real conservation benefits and whether other measures might have accomplished the same goals? Second, would the law already exist had it paid for its conservation enforcement costs?

The U.S. argued that the new law provides genuine conservation benefits and, therefore, meets the first test. To support this argument, the U.S. claimed that the new law eliminates the harvest of sub-sized lobsters in the American fishery by taking away any financial incentive in the marketplace. In addition, the U.S. argued that the new law was carefully drafted to avoid undue trade restrictions, while serving as an important conservation measure. The U.S. argued that no practicable alternative to the new law exists.

The U.S. also argued the new law meets the second test because U.S. nationals have been bearing the costs of minimum size requirements alone since 1988. U.S. firms may not sell sub-sized lobsters anywhere in the world, while third country markets are open to smaller Canadian lobsters.

Canada argued that *GATT* exceptions should be narrowly interpreted and the U.S. had not met its burden of proving the new law falls within *GATT Article XX (g)*. Canada argued that the new law was a disguised restriction on international trade, adopted in response to the U.S. perception that American lobster fishers were at a competitive disadvantage. The U.S. responded with an import ban on Canadian sub-sized live lobsters.

Although Canada agreed that lobsters are an exhaustible natural resource, it maintained that the new law was not primarily aimed at conservation. The new law was not directed at the catch in U.S. waters and did nothing to add to the conservation measures already in place. Because the new law banned only Canadian lobsters, Canada argued it was not directed at U.S. lobster catches.

Canada also argued that it faced excessive costs in helping the U.S. carry out the new restrictions, in part because checks of U.S. catch are done at dockside but Canadian lobsters face such checking and rejection when importing them to the U.S. by road or by air, with resulting higher costs. Thus, the new law deals with the resource enforcement problem in a trade restrictive manner and places the burden of U.S. enforcement efforts on Canada. Canada claimed that *GATT Article XX (g)* disallowed the most trade-restrictive approach to deal with a domestic conservation situation.

Finally, Canada argued that no consistent, universal restrictions exist on the catch of lobster in the U.S. Canada pointed to the lack of uniform size restrictions among individual states and the federal government. Because state laws governing the catch of lobster can be changed regardless of federal law, Canada argued that the U.S. did not impose effective conservation measures concerning lobster.

A panel of *FTA* experts was asked to decide the dispute. Both the U.S. and Canada sought answers to two questions:

(1) Is the new law targeting sub-sized American lobsters inconsistent with the *FTA* and, by extension, with *GATT Article XI*?

(2) If so, is the new law eligible for exemption under *GATT Article XX (g)*?

A majority of the *FTA* dispute panel agreed with the U.S., that it was within U.S. power to ban the import of live lobsters that did not meet a specific size requirement and that the cost to differentiate between Canadian sub-sized, yet mature, and Canadian sub-sized, yet not mature, lobsters would be an unreasonable burden on the U.S.

In an odd turn of events, in 1991 there was a surge in the number of lobsters in Canadian and U.S. waters. There was no scientific explanation for it and was not necessarily attributed to the new U.S. conservation law.