

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

US-Canada Lobster Dispute

* fairness too costly *

CASE MNEMONIC: LOBSTER

CASE NAME: Lobster Dispute ^{honest} Conservation or ^{disguised} protectionism?

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.

CORE ARGUMENTS

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.

at base this is the concern of the restrictions / conservation measures

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. honest conservation

(2) 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.

(4)
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. → non-tariff barrier

(3) 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. in effect →

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)?

decision 1
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.

TED Case Studies # 2 [<http://www1.american.edu/TED/shrimp.htm>]

Shrimp and Sea Turtle Case

CASE MNEMONIC: SHRIMP

CASE NAME: Shrimp and Sea Turtle Protection

1. The Issue

The *Earth Island Institute*, a San Francisco-based environmental organization, filed a lawsuit in February 1992, to force the U.S. Departments of State and Commerce to comply with the Federal law requiring the ban of shrimp imports from countries that endanger sea turtles through shrimp fishing. The law is being applied to countries with shrimp operations in the Caribbean and the western central Atlantic. The *Earth Island Institute* believes that the law should be extended to Pacific and Indian Ocean nations such as Japan, Thailand, Indonesia, India, Malaysia, and South Korea, as well as Mexico and Brazil. Countries currently operating under the law only account for ten percent of the world's annual shrimp harvest; the major threats to the sea turtles are posed by nations not required to abide by the U.S. law.

2. Description

Five species of sea turtles are protected under the 1973 *Endangered Species Act* (ESA) and the *Convention on International Trade in Endangered Species* (CITES): the hawksbill, green, leatherback, ridley and loggerhead sea turtle. Large numbers of dead turtles washing ashore on beaches cause great concern among environmental groups. After studying the problem of shrimping methods affecting sea turtles for ten years, the *National Marine Fisheries Service* (NMFS) concluded that "drowning in shrimp trawls is considered the greatest threat to the turtles' survival." NMFS estimates that over 11,000 turtles drown in U.S. trawl nets each year.

To combat this problem, the NMFS developed the turtle excluder device, commonly known as the TED. TEDs are simply a cage-like structure that fits in the neck of a trawl net, preventing turtles and large fish from being caught. Since the turtle cannot pass through the cage, it is forced upward through an escape hatch. Studies by the NMFS on shrimp boats found the device to be 97 percent effective, only reducing shrimp catch by 2 percent. In order to promote conservation of the turtles, the U.S. passed a Federal law in 1987 which was later amended in December 1992. The NMFS intensified the regulations by requiring "that most shrimp[ers] operating in offshore waters...use the devices immediately...and those using smaller boats in offshore and in-shore [areas] will have to use them within two years."

To complement these measures to protect sea turtles, the U.S. passed *Public Law 101-162* in November 1989. Section 609 of that law requires the ban of shrimp from nations that do not take precautionary measures to protect the sea turtles. The Secretary of State must inform the countries of U.S. law (and the international CITES treaty) protecting the turtles and negotiate treaties encouraging similar shrimping practices. The law provides that the country must "receive certification that it has met specific conservation requirements" if it is to continue exporting shrimp to the United States. In May 1991 it became illegal to import shrimp into the U.S. from a country without certification.

non-tariff barrier

Certification requires proof that a country has adopted "a ^{PPM} regulatory program comparable to the US program or...that the fishing environment in its waters does not pose a threat to sea turtles." Implementation of TEDs is encouraged; by May 1994 "the nations affected by this law must require the use of TEDs on all shrimp vessels...or their exports of shrimp to the US will be embargoed." ^{QR (non-tariff) barrier}

The *Earth Island Institute* filed a lawsuit in February 1992 against the U.S. government. They argued that "the defendants failed to certify...that all shrimp harvesting nations have regulatory programs and incidental taking rates of endangered sea turtles comparable to those in the US." Specifically, *Earth Island* claims that India, Indonesia, Thailand, Japan, Mexico, Malaysia, South Korea and Brazil, who are the largest shrimp exporters to the United States, are among the dozens of countries "whose fishing fleets...kill more than 150,000 turtles a year." *Earth Island* also argues that the U.S. government is required by law to negotiate treaties with those countries and encourage the use of TEDs for conservation. The effectiveness of the law is undermined when only Caribbean and Atlantic countries must abide by the regulation. Mexico, in response to the *Earth Island Institute* lawsuit against the U.S. government, and fearing an embargo similar to that of Mexican tuna exports to the United States, announced in May 1992 that it too would require protection of sea turtles. India, Indonesia, Thailand, Malaysia and others argued the U.S. sea turtle protection law violates the GATT / WTO trade agreement.

Under US law, became illegal to import shrimp into the US without certification (TED requirement) ^{QR (non-tariff barrier)} EMBARGOED

↳ PPM & environmentalism [trade trumps state power to act in interest of environmental protection]

↳ TBT

QR banned imports → direct tuna embargo ^{source countries} - exporting nations

PPM labelling requirement "dolphin free" by adopting techniques comparable to US

- ↳ "backdown method"
- ↳ "rafts to aid escape"
- ↳ "finer mesh nets"
- ↳ "official observers on vessel"

(VS) purse seine vessels

OR drift net fishing

Tuna Dolphin GATT Case

CASE MNEMONIC: TUNA

CASE NAME: Tuna Dolphin Case

1. The Issue

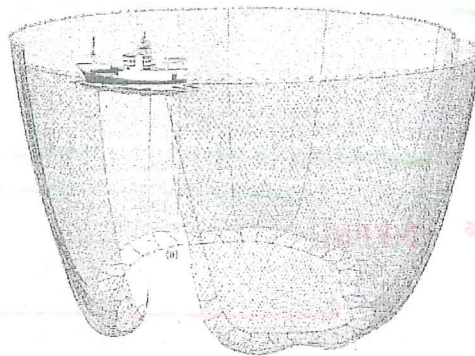
QR (non-tariff barrier)

The United States banned imports of Mexican tuna because Mexico had not taken steps to reduce the number of Eastern Pacific Tropical dolphins killed each year due to tuna fishing. Mexico appealed the case to the General Agreement on Tariffs and Trade (GATT / WTO), where the panel ruled in favour of Mexico. The panel found that the U.S. labelling of "Dolphin Free" tuna did not conform to GATT standards. The case was ultimately solved bilaterally between the U.S. and Mexico.

PPM

2. Description

There has been a long history of dolphins being killed in the Eastern Tropical Pacific (ETP). It became significant in the 1950s when tuna fishermen began to exploit the unique relationship that existed between the tuna and the dolphin. In the ETP zone, the tuna schools swam below the surface swimming dolphin. The fishermen took advantage of this by developing the *purse-seine net fishing method*. They also used the dolphins to track, chase, and encircle the tuna. Fishermen sealed off any escape routes, catching both the dolphins and the tuna in their nets and many dolphins were killed or injured in this process. While some suffocated due to beak and fin entanglement, others were crushed by the weight of the tuna or by passing through the power blocks during net retrieval.



The kill rate was initially low because fishermen could only encircle a small percentage of the dolphin school. However, with the development of the Puretic hydraulic power blocks and lighter stronger nets, fishermen began to use larger nets. These nets were up to 3/4 of a mile long and over 300 feet deep. This allowed the fishermen to increase their efficiency by encircling a larger percentage of both the tuna and the dolphin herd. With this expansion, fishing in the ETP changed dramatically. The previously used bait boats switched to the purse-seine method, increasing the number of dolphin sets (to focus on the dolphin to find the tuna) and the amount of tuna caught. In 1959, it was estimated that 590 sets were made on dolphins. The following year, this number rose to 5,400 sets and was the highest yellowfin tuna catch per standard day ever recorded.

There were a number of other mechanical changes that also increased the efficiency of the purse-seine fishing technique. First, speed boats were introduced, decreasing the time of the chase. Then, helicopters and fixed wing planes were used to reduce the time used to spot dolphin. These innovations increased the fleets capacity nearly five times in fifteen years. In 1965, the fleet caught 48,673 tons of tuna which increased to 189,426 tons by 1980.

With the increased efficiency, the mortality rates of dolphins escalated. U.S. tuna fishermen realized that their fishing technique could not be used without large numbers of dolphin. The U.S. began to develop methods to reduce the dolphin kills and the injury rates. First, they used the "backdown method" in which the vessel would reverse when one-half to two-thirds of the net was retrieved. This allowed the net to sink and the dolphins to escape. Eventually, fisherman also incorporated manned rafts into this procedure to assist them in their escape. Second, finer mesh nets were developed to reduce the chance for dolphin entanglement. Even with fisherman using these techniques the dolphin kill rate remained high. It was estimated that 300,000 dolphin were killed per year.

The public became concerned with these rates, and the U.S. government responded by passing the *Marine Mammal Protection Act (MMPA)* in 1972. This law was intended to reduce the dolphin kills "to levels approaching zero" by legally requiring U.S. tuna fishermen to incorporate the techniques described above. Furthermore, the law established a permit system, setting a fixed ceiling for dolphin kills and limiting the taking rate for species that were endangered. To ensure that these regulations were abided by, the MMPA also required U.S. vessels to carry official observers to ensure compliance.

The MMPA greatly reduced the number of dolphins killed by U.S. vessels. However, the composition of ships also changed, and the total number of dolphin kills did not decline. In the 1960s, U.S. vessels comprised 99 percent of the ETP fleet, but by 1986, only 34 of the 103 purse-seiner ships using dolphin sets were registered in the U.S. The remaining 69 consisted of foreign vessels: with 43 from Mexico, 15 from Venezuela, 4 from Vanatu, 2 from Spain and one from the Cayman Islands, Costa Rica, El Salvador, and Panama. The U.S. estimated the kill rates for these ships were two to four times higher (100,000 per year) than U.S. kill rates.

The U.S. became concerned with these high foreign kill rates, and in 1984 it inserted the *Direct Embargo Provision* into the MMPA. The goal of this provision was to decrease foreign kills by prohibiting the importation of yellowfin tuna from nations that did not have conservation programs and mortality rates comparable to the U.S. methods → PPM

QR → non-tariff barrier
If countries did not meet these standards the MMPA required the U.S. to implement a direct tuna embargo. To further ensure compliance with the MMPA's *Direct Embargo Provision*, the U.S. banned countries that exported tuna to the U.S. caught by other nations that did not comply with the MMPA.

In addition to the MMPA, the *Dolphin Protection Consumer Information Act (DPCIA)* stated that producers, importers, exporters, distributors, or sellers of tuna products could only include a dolphin safe label if the tuna were harvested in a manner that was not harmful to dolphin. Therefore, tuna caught by purse seine vessels in the ETP or tuna taken on the high seas by drift net fishing could not be labeled as dolphin safe. ← PPM →

PPM
During the period of 1990/1991, the U.S. implemented tuna embargoes on Mexico, Venezuela, Ecuador, Panama, and Vanatu. QR