

Sea Turtle Conservation: An “Illegal” Trade Barrier?

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Introduction: By-catch and the Public Response

In fisheries around the globe, by-catch is a serious threat to marine organisms. By-catch includes both non-target species (*e.g.* fish, seabirds, turtles and marine mammals) and immature individuals of the target species. Experts estimate that discarded by-catch accounts for around 30 per cent of the global catch.¹ Several international agreements have addressed the issue of by-catch, including the 1982 United Nations Convention on the Law of the Sea, the 1992 Earth Summit’s Agenda 21 and the 1999 Sixth Conference of the Parties to the Convention on Migratory Species. Despite these calls for selective fishing practices and minimizing by-catch, these non-binding agreements did little to decrease the 17.9–39.5 million tons of non-target species caught each year.²

Despite the major environmental damage inflicted by non-selective fishing practices, the problem of by-catch has generally failed to capture the public imagination. By-catch is not visible to consumers and the usual victim, fish, is not highly charismatic. When the victims are highly charismatic animals, such as sea turtles or dolphins, the US public is much more likely to demand conservation measures. In the case of sea turtles, the unilateral application of US environmental law created international trade disputes brought before the World Trade Organization. Despite the WTO’s original finding that the US law violated the General Agreement on Tariffs and Trade (GATT),

the USA’s actions ultimately led to cooperative global efforts to protect endangered sea turtles.

Sea Turtles and the Shrimp Trawler Threat

All seven species of sea turtles are currently endangered or threatened and are granted the highest level of protection under the Convention on International Trade in Endangered Species (CITES).³ Five of these species (hawksbill, green, leatherback, Kemp’s Ridley and loggerback) are found in US waters and are therefore protected under the US Endangered Species Act.⁴ During the 1970s, dead turtles washing ashore on US beaches raised public awareness about the need to protect sea turtles. At the 1979 World Conference on Sea Turtle Conservation in Washington, DC, shrimp trawling nets were identified as a major culprit in turtle mortality.⁵ A (US) National Marine Fisheries Service study also found that the greatest threat to the turtles comes from shrimp trawlers, which use fine mesh nets in areas of high species diversity.⁶ Other threats include direct hunting and loss of coastal habitat.⁷

Shrimp trawlers are highly wasteful, accounting for 37.2 per cent of global commercial fisheries’ discards with an average of 5 kg of by-catch per 1 kg of shrimp.⁸ On average, shrimp trawlers discard 85 per cent of total catch, creating over 4 million tons of waste per year.⁹ Although turtles can stay underwater for long periods of time, they suffocate and drown when they are caught in shrimp trawler nets and are unable to come to the surface to breathe.¹⁰ Environmentalists estimate that 150,000 turtles per year are killed by shrimp trawlers.¹¹ ➔

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Turtle Excluder Devices and the Labelling Scheme

In the 1980s, the National Marine Fisheries Service invented Turtle Excluder Devices (TEDs – also called Trawling Efficiency Devices) to reduce by-catch by shrimp trawlers.¹² TEDs are hard metal grids or soft webbing panels placed in shrimp nets to exclude and provide an escape route for captured turtles.¹³ As the net moves forward in the water, small organisms such as shrimp move through the bars of the TED into the net while larger organisms such as sea turtles bump into the bars and are guided out of a trapdoor.¹⁴ In February 2003, the National Marine Fisheries Service increased size requirements for escape openings on the devices to ensure that even the largest species could escape from the nets.

The devices reduced sea turtle by-catch by 97 per cent and finfish by-catch by 50–60 per cent.¹⁵ Other benefits included an increased value of prawns because fewer were crushed by by-catch, and decreased fuel and equipment costs because less mass was towed.¹⁶ TEDs are relatively cheap, selling for US \$50–400, and although the original TEDs were heavy and unwieldy, lighter collapsible versions were quickly developed.¹⁷ Despite these benefits, implementing TEDs faced domestic and international resistance.¹⁸

A 1989 law required that all US shrimp trawlers use TEDs. US domestic policy, however, was inadequate because sea turtles are highly migratory. International action was necessary to protect the turtles since their migration patterns do not respect national boundaries.¹⁹ The USA has tried several approaches over the years, including a market-based approach (consumer preference labelling scheme), a regulatory regime (unilateral embargo action), and a consensus agreement (a multilateral, negotiated convention).²⁰

After the Earth Island Institute's Sea Turtle Restoration Project publicity campaign, shrimp labelled as "turtle safe" enjoyed greater sales in the USA.²¹ The World Trade Organization found that private labelling schemes do not violate free trade rules if they do not discriminate between domestic and foreign products.²² Although labelling rewarded compliant companies (those that used TEDs), a high level of fraudulent label use was possible.²³ Clearly, a stricter policy was necessary to protect the sea turtles at an international level.

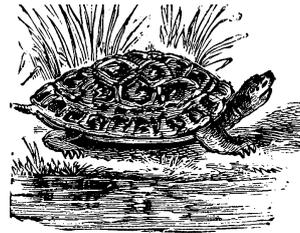
US Embargoes in the Caribbean and Beyond

The next approach by the USA – which imports 80 per cent of its shrimp – was trade embargoes on shrimp from nations that did not employ measures to protect sea turtles from shrimp trawling.²⁴ These unilateral sanctions were to be enforced domestically and responded to the need to protect the highly migratory sea turtles. The 1989 Conservation of Sea Turtles: Importation of Shrimp Law, a rider to the 1989 appropriations bill, required foreign nations to be certified as having sea turtle conservation standards comparable to the USA's in order to import shrimp. Non-compliant nations were to be subject to trade embargoes.²⁵ The law provided a three-year deadline for compliance and called for US-initiated negotiations for

multilateral agreements on sea turtle conservation.²⁶ Countries could also be certified if their shrimp trawlers operated in cold waters where there were no sea turtles or if their shrimp fishermen used only artisanal gear.²⁷ Support for this bill, Section 609 of Public Law 101-162, came from environmentalists as well as shrimp industry representatives concerned that turtle-unsafe shrimp imported from other countries would be cheaper than turtle-safe shrimp harvested by American shrimpers.²⁸ US shrimpers wanted to level the playing field, despite the equity issues raised by a wealthy nation unilaterally imposing technology standards on poorer nations.²⁹ Clearly conservation was not the USA's sole concern; the law also aimed to protect US shrimpers under pressure from the overcapitalized shrimp fishery.³⁰

In 1991 it became illegal to import shrimp from a country that had not received certification by the Department of State that it met certain conservation requirements.³¹ The Department of State interpreted the new law as limiting the embargo to the Caribbean region through which US turtles migrate. Trade sanctions were imposed on 14 of the 16 shrimp-harvesting Caribbean nations, which were granted three years to meet US standards. By 1997, all but two were certified as compliant.³²

Environmental organizations fought to have the geographic scope of the law extended beyond the Caribbean region. In 1992, the Earth Island Institute filed suit against the Secretaries of State and Commerce for failing to certify that all nations exporting shrimp to the USA had regulatory programmes and incidental take rates equivalent to those of the USA.³³ In 1996, the USA placed a



ban on the import of all shrimp from any uncertified nation.³⁴

International Cooperation in the Americas: A Multilateral Approach

In 1992, in response to the lawsuit and fearing an embargo like the dolphin-unsafe tuna embargo, Mexico said that it would require protection of sea turtles.³⁵ In the Americas, international cooperation has characterized the sea turtle issue. The 1996 Inter-American Convention for the Protection and Conservation of Sea Turtles (IAC) established sea turtle conservation programmes in signatory nations and required that each Party's shrimp trawl vessels use properly-installed, functional TEDs.³⁶ The international agreement automatically results in certification of signatory nations; recognizes ecological, cultural and sociopolitical differences; promotes multilateral cooperation and regional management accords; and considers subsistence takes and habitat conservation.³⁷

The Convention created two bodies: the Consultative Committee to review country reports and information on the protection of sea turtles and their habitats (including environmental and cultural impacts of conservation meas-

ures), and the Scientific Committee to review the effectiveness of conservation efforts and recommend measures for further protection.³⁸ This treaty includes a WTO subservience clause, omits reference to other harmful fishery impacts, and leaves many unanswered questions about funding and infrastructure support. Enforcement is another issue of importance, although the US trade sanctions act as a default enforcement mechanism.

Appeals to the World Trade Organization

The USA's unilateral embargoes angered many shrimp-exporting nations, especially those outside of the Americas that did not receive preferential treatment and were not included in a multilateral agreement like the IAC. In March 1996, the ASEAN nations together with India, Pakistan, Hong Kong, Korea, Australia, Mexico and Venezuela protested to the WTO about the US's law.³⁹ In 1997, India, Malaysia, Pakistan and Thailand requested a WTO dispute settlement board to consider the legality of the embargo. These countries claimed that the embargo was an unfair trade barrier that violated Article XI of the GATT, which states that WTO members shall not impose import restrictions. The USA argued that the restrictions were allowable exceptions under Article XX(b) for the protection of animal life or health and Article XX(g) for the conservation of exhaustible natural resources. The Panel agreed with the complainant nations that the endangered turtles were not an exhaustible resource and found the US measures to be an unjustifiable discrimination and barrier to free trade.⁴⁰ In effect, the ruling stated that domestic environmental laws could not interfere with free trade.

Environmental non-governmental organizations (NGOs) submitted an *amicus curiae* (friend of the court) brief to the WTO dispute resolution panel during these proceedings. The NGOs aimed both to provide the WTO with scientific information on the status of sea turtles and give legal arguments for the interpretation of WTO rules in the context of international norms of sustainable development.⁴¹ The dispute panel, however, rejected the brief, confirming a widespread suspicion that the secretive organization was closed to civil society.

When the USA lodged an appeal to the panel's decision in 1998, the Appellate Body found that the US law was justified under Article XX(g) because sea turtles are an exhaustible resource, but not under the general provisions of Article XX because the law arbitrarily and unjustifiably discriminated among WTO members.⁴² The USA had provided Caribbean nations with financial and technical assistance and adequate compliance times, while the four complainant nations did not enjoy these benefits.⁴³ The Appellate Body also noted the USA's inadequate efforts to secure international agreements with the complainant nations.

The Appellate Body emphasized that the US environmental law did not violate WTO obligations, especially in light of the WTO Agreement preamble endorsing sustainable development and environmental protection.⁴⁴ But the panel also emphasized that such laws must not unjustifiably discriminate among WTO members.⁴⁵ Notably, the Appellate Body accepted an *amicus* brief submitted by

environmental NGOs and overturned the earlier ruling that submissions by civil society could not be considered.⁴⁶ The USA agreed to comply with the Appellate Body's findings in a manner that did not jeopardize its commitment to sea turtle protection.

In October 2000, Malaysia challenged US implementation of the Appellate Body ruling, claiming that the ruling mandated the removal of trade embargoes. A WTO dispute settlement panel agreed with the USA that the Appellate Body ruling did not require changing domestic law or lifting the embargoes, and found that the USA had complied by modifying certain aspects of the law's implementation and by pursuing a multilateral agreement for sea turtle conservation.⁴⁷

The panel noted that the USA had revised shrimp-turtle guidelines to provide more due process to exporting nations and tried to negotiate a sea turtle conservation agreement with Asian nations.⁴⁸ Furthermore, the USA had provided training in the design, construction, installation and operation of TEDs to several Asian nations.⁴⁹ The revised Department of State guidelines also increased the transparency and predictability of decision-making under the US shrimp-turtle law.⁵⁰ And, to the chagrin of many environmentalists, the USA began to import shrimp from uncertified nations if a government official from the exporting nation certified that the individual shipment was harvested in a turtle-safe manner.⁵¹ Consequently, in September 1998, the Turtle Island Restoration Network and others filed an ultimately unsuccessful domestic challenge to these revised guidelines as contrary to Congress' intent under Section 609.

Conclusion

The USA's unilateral approach to sea turtle conservation placed an unfair burden on shrimp-exporting developing nations which, unlike the Caribbean nations, did not receive special attention. Their complaints to the WTO were valid in that the US policy discriminated among WTO members. The original WTO decision inappropriately attempted to dictate US domestic environmental policy in the context of international trade, but the Appellate Body's decision reasonably asserted that environmental laws can affect trade if they do not discriminate among WTO members. The USA's compliance with the Appellate Body's decision has translated to increased international cooperation without sacrificing sea turtle protection.

Although the USA's original strategy of applying trade restrictions represents a unilateral approach to global environmental policy, the import restrictions succeeded in their ultimate goal of reducing turtle mortality in shrimp-trawling operations. Had the USA tried to forge a voluntary, non-binding international agreement for sea turtle conservation in the early 1990s instead of unilaterally applying enforceable embargoes, more sea turtles would be dying in shrimp trawler nets today.

Notes

¹ Cullet, Philippe and Annie Patricia Kameri-Mbote. "Dolphin by-catches in tuna fisheries: A smokescreen hiding the real issues?" *Ocean Development and International Law*, Vol. 27, No. 4, Oct-Dec 1996, p. 334. ➔

- ² Gillespie, Alexander. "Wasting the oceans: Searching for principles to control by-catch in international law" *The International Journal of Marine and Coastal Law*, Vol. 17, No. 2, June 2002, p. 163.
- ³ Hunter, David *et al.* "Sea Turtles" *International Environmental Law and Policy* (www.wcl.american.edu/environment/iel/sup5.cfm).
- ⁴ Trade Environment Database (www.american.edu/projects/mandala/TED/shrimp.htm).
- ⁵ *Ibid.*
- ⁶ Gillespie, *supra* n. 2 at 162.
- ⁷ Hunter, *supra* n. 3.
- ⁸ Cullet, *supra* n. 1 at 334.
- ⁹ *Ibid.* at 334.
- ¹⁰ Hunter, *supra* n. 3.
- ¹¹ Knapp, Don. "WTO rejects US ban on shrimp nets that harm sea turtles" October 12, 1998 (www.cnn.com/US/9810/12/world.trade.ruling/).
- ¹² Bache, Sali Jayne. "International by-catch policy: Options for sea turtle conservation" *The International Journal of Marine and Coastal Law*, Vol. 15, No. 3, August 2000, p. 334.
- ¹³ Gillespie, *supra* n. 2 at 179.
- ¹⁴ Balton, David. "Setting the Record Straight on Sea Turtles and Shrimp", 7 December 1999 (www.state.gov/www/policy_remarks/1999/991207_balton_turtles.html).
- ¹⁵ Hunter, *supra* n. 3.
- ¹⁶ Bache, *supra* n. 12 at 335.
- ¹⁷ Hunter, *supra* n. 3.
- ¹⁸ Bache, *supra* n. 12 at 335.
- ¹⁹ *Ibid.* at 334.
- ²⁰ *Ibid.* at 334.
- ²¹ *Ibid.* at 336.
- ²² *Ibid.* at 337.
- ²³ *Ibid.* at 338.
- ²⁴ Balton, *supra* n. 14.
- ²⁵ Bache, *supra* n. 12 at 340.
- ²⁶ Crouse, Deborah. "The WTO Shrimp/Turtle Case" *Marine Turtle Newsletter*, 1999, 83: 1-3.
- ²⁷ Balton, *supra* n. 14.
- ²⁸ Crouse, *supra* n. 26.
- ²⁹ *Ibid.* at 346.
- ³⁰ Bache, *supra* n. 12 at 340.
- ³¹ TED, *supra* n. 4.
- ³² Bache, *supra* n. 12 at 341.
- ³³ TED, *supra* n. 4.
- ³⁴ Bache, *supra* n. 12 at 342.
- ³⁵ TED, *supra* n. 4.
- ³⁶ Gillespie, *supra* n. 2 at 180.
- ³⁷ Bache, *supra* n. 12 at 347.
- ³⁸ Hunter, *supra* n. 3.
- ³⁹ Bache, *supra* n. 12 at 343.
- ⁴⁰ Shrimp vs. Turtles and the WTO (www.econ.ucsb.edu/~mcauslan/Econ180/ShrimpVsTurtles.pdf).
- ⁴¹ Center for International and Environmental Law (www.ciel.org/Tae/shrimp_turtle.html).
- ⁴² "United States: Import Prohibition of Certain Shrimp and Shrimp Products" (World Trade Organization) (www.wto.org/english/tratop_e/envir_e/edis08_e.htm).
- ⁴³ *Ibid.*
- ⁴⁴ "US wins WTO case on sea turtle conservation" US Department of State, 15 June 2001 (<http://usinfo.state.gov/topical/econ/wto/pp0615.htm>).
- ⁴⁵ WTO *supra* n. 42.
- ⁴⁶ CIEL *supra* n. 41.
- ⁴⁷ "NWF Reaction to WTO Sea Turtle Decision", 26 June 2001 (www.nwf.org/trade/wtoturtledecision.html).
- ⁴⁸ *Supra* n. 44.
- ⁴⁹ *Ibid.*
- ⁵⁰ *Ibid.*
- ⁵¹ Balton, *supra* n. 14.

