

Turtle case puts USMCA complaints regime to test

Mexico

Conservation groups have filed a petition under the successor accord to the North American Free Trade Agreement (Nafta), alleging Mexico has failed to enforce protections for the endangered North Pacific loggerhead sea turtle (*Caretta caretta*). The case could test whether the citizen-complaint process of the United States-Mexico-Canada Agreement (USMCA), which took effect last July, is more effective than Nafta's was.

The U.S.-based Center for Biological Diversity and the Mexican Center for Environmental Law allege Mexico has failed to enforce restrictions designed to prevent loggerheads' deaths due mainly to entanglement in fishing gear. Their December petition to the Canada-based Commission for Environmental Cooperation (CEC), which-as it had for Nafta-oversees environmental cooperation under the trade accord, is the first filed under the USMCA.

The petition is aimed specifically at loggerheads in the vast Gulf of Ulloa on the state of Baja California Sur's western coast. There, juvenile loggerheads that have been born in Japan and have migrated to Mexico find one of their species' richest feeding grounds. But they are also vulnerable to fishing activity in the gulf, known for its shark, flatfish and seabass stocks. Under threat of U.S. sanctions, Mexico in 2015 created a sea turtle refuge of around 9,000 square kilometers (3,500 square miles) in the Gulf of Ulloa.

Fishing vessels operating there are prohibited from using certain types of gillnets and restricted in their use of others, and the area is subject to an annual bycatch limit of 90 turtles, beyond which most fishing must be suspended. But enforcement has been weak, and turtles continue to die in shocking numbers, according to Alex Olivera, senior scientist and Mexico representative for the Center for Biological Diversity. Nearly 900 loggerhead turtles were found dead on the Pacific coast of Baja California Sur during 2017-19, according to the Mexican government. Preliminary data indicate that another 350 were discovered dead in the region in the first six months of 2020. The numbers refer only to turtle carcasses found on the coast; conservationists estimate the total number is three times higher when taking into account those that have not washed ashore. Olivera calls the annual death toll of loggerheads in the Gulf of Ulloa "a big scandal."

The groups behind the CEC petition hope the USMCA complaints regime will prove more effective in spurring enforcement than was the environmental side-agreement to Nafta. The review process for citizens' submissions under the new agreement establishes tighter deadlines, which experts believe will speed consideration of the petition, as well as more mechanisms for consultation between environmental and trade experts. New provision targeted Specifically, the petitioning groups hope their case will trigger the use of a provision, part of U.S. implementing legislation for the new trade agreement, that could oblige the United States to press Mexico for stronger environmental enforcement. "The new treaty may have some teeth," says Olivera, referring to the clause in the implementing legislation. The petition offers "a challenge" to USMCA signatory nations and an opportunity "to see how they are going to handle it," he adds.

The commission must now decide whether to admit the loggerhead petition; whether to seek a response from Mexico; and whether to write a detailed investigative report on the case, known as a factual record, says Paolo Solano, the CEC's director of legal affairs. CEC factual records carry no sanctions; but if they are made public they can fuel pressure for government enforcement action, conservationists and legal experts say. And the USMCA includes the possibility of follow-on steps once a factual record is issued, Solano says. These, he notes, include "cooperative activities" such as training programs; sharing of information and best practices; capacity building; and an obligation by the party in question—in this case Mexico—to update the CEC on progress in addressing the issue raised. Publication of a factual record would also trigger the U.S. implementing-legislation provision, under which the U.S. government could set in motion a dispute-resolution process. But reaching the factual record stage is not a given.

David Gantz, professor of law at the University of Arizona, notes the three signatory nations occasionally have voted against investigating one another in order to avoid scrutiny.

Elizabeth Trujillo, a professor of international trade law at the University of Houston, is more optimistic. She says the consultation process provided for in the USMCA—which is more elaborate than Nafta's—will allow trade and environmental regulators to "sit down and find common ground." And she observes that the environment nowadays is at the "forefront of trade and investment." Says Trujillo: "This isn't the 80s and 90s anymore. I'm hopeful."

Intent to sue in U.S.

Separately, the Center for Biological Diversity on Jan. 11 filed notice of its intent to sue the U.S. government over a rule aimed at preventing various species of sea turtles from dying in shrimp nets. Joined by Defenders of Wildlife, Turtle Island Restoration Network and Earthjustice, it objects to a measure signed by the Trump administration and scheduled to take effect in April. As currently written, the measure will require the use of turtle excluder devices—equipment installed in fishing nets to ensure sea turtles are shunted aside—by vessels 40 feet or longer.

By exempting smaller boats, the groups say, the long-awaited rule could allow hundreds of sea turtles to die each year in the Gulf of Mexico and Atlantic waters off the southern United States. Conservation groups estimate that about 3,000 turtles die in shrimp trawl nets every year, about half of them in nets pulled by smaller vessels.

Jaclyn Lopez, Florida director for the Center for Biological Diversity, says shrimp fishing in the southeastern United States kills more sea turtles than any other human activity in the region—“more than oil and gas, longline fishing, you name it.” The organizations seeking to apply the turtle-excluder device requirement to all fishing boats say five endangered or threatened sea turtle species will be harmed by the measure in its current form. Most at risk, says Lopez, is the Kemp’s Ridley (*Lepidochelys kempii*), the smallest species of sea turtle.

The National Marine Fisheries Service and the U.S. Department of Commerce have 60 days to respond to the notice of intent to sue.

—Victoria Burnet