



International Game Fish Association

Fishing Hall of Fame & Museum

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July 3, 2013

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Director, Office of Sustainable Fisheries
ATTN: Ms. Kim Marshall
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
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Re: Billfish Conservation Act Advanced Notice of Proposed Rulemaking Comments

Dear Mr. Risenhoover:

The International Game Fish Association (IGFA) appreciates the opportunity to comment on the National Marine Fisheries Service's (NMFS) Advanced Notice of Proposed Rulemaking (ANPRM) regarding the proper implementation of the Billfish Conservation Act of 2012 (BCA). Founded in 1939, IGFA represents recreational anglers throughout the world, with active members in over 100 countries. IGFA is the most widely recognized international authority on game fish and provides rules for ethical angling practices. Since our founding, IGFA has been a leader and a global presence in fisheries research and conservation.

The IGFA took a very active role in organizing conservation, environmental and recreational groups to advocate for the passage of the Billfish Conservation Act of 2012. It was a three year concerted effort to achieve this critical law in order to eliminate the largest market for billfish – the United States – finally closing the door on some 30,000 billfish annually caught and imported for domestic consumption. To say IGFA is invested in the proper implementation of the BCA would be in understatement. As the ANPRM for the BCA correctly states, "[a] report on trade of billfish published by the International Game Fish Association (IGFA) in June, 2007 found that the legal sale of billfish caught in the Pacific Ocean may create a market that allows billfish caught in the Atlantic Ocean to enter illegitimately into U.S. markets."¹ The IGFA is grateful for the opportunity to provide NMFS the following comments and legal opinion to properly and effectively implement the BCA.

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¹ *Federal Register*: Vol. 78, No. 65/Thursday, April 4, 2013/Proposed Rules; Billfish Conservation Act of 2012 Implementing Regulations; (NOAA-NMFS-2013-0004).

The International Game Fish Association is a not-for-profit organization committed to the conservation of game fish and the promotion of responsible, ethical angling practices through science, education, rule making and record keeping.

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The ANPRM issued by NMFS on April 4, 2013, raises three primary issues for purposes of issuing future regulations to implement the BCA. The IGFA will focus its comments on the following primary issues articulated in the ANPRM:

1. The scope of the exemption in Section 4(c) of the BCA.
2. The possible use of a modified version of the current billfish Certificate of Eligibility (COE) to document that billfish offered for sale qualifies for exemption from the general prohibition on sale.
3. What, if any, restrictions can NMFS impose on the transportation and sale of billfish caught by U.S. vessels and landed in Hawaii or the Pacific Insular Areas (PIA)?

1. The scope of the exemption in Section 4(c) of the BCA.

The intent of the BCA is to prohibit sales of Pacific billfish in the United States. However, Section 4(c) of the BCA exempts from the general sale prohibition billfish caught by U.S. fishing vessels and landed in Hawaii or the Pacific Insular Areas (HI/PIA). Section 4(c) also exempts billfish caught by foreign vessels and landed in the PIA, but only those exported for sale outside of the United States or retained within the HI/PIA for local consumption.

The scope of the exemption in Section 4(c) of the BCA allows for “traditional fisheries and markets” in Hawaii and neighboring islands for purposes of local traditional subsistence use and for cultural purposes. The local sale and consumption of billfish would continue for these purposes and would be done so under careful U.S. regulation. It was never the intent to encourage or grant large-scale domestic fisheries based in the islands or to export local traditions to the mainland.

The Act's over-riding purpose is to conserve billfish by ending importation of foreign-caught fish – an estimated 30,000 a year – into markets on the U.S. mainland. If billfish caught under the exemption in Section 4(c) are permitted to be transported and sold in mainland markets, the conservation benefits of the Act would be severely curtailed. Further, it would be a perverse reading of the law if the BCA established an exclusive fishing right for U.S.-caught billfish to replace the now prohibited foreign-caught billfish sales to the U.S. mainland markets. This would completely undermine the conservation goals and purpose of the BCA.

Lastly, a prohibition on sale of Pacific billfish will enhance the protection efforts already in place with the sale prohibition on Atlantic billfish. Prohibiting all billfish sales to the mainland, will ensure that no billfish will be transported from the Atlantic and passed off for sale as Pacific billfish, as *all* sales will be prohibited. Enforcement will be clear and not costly to enforce.

2. The possible use of a modified version of the current billfish COE to document that billfish offered for sale qualifies for exemption from the general prohibition on sale.

In the United States, it is currently illegal to commercially harvest marlin, sailfish and spearfish; importation of Atlantic billfish harvested by other countries is also prohibited. Any billfish product imported to the United States must have a COE attesting it was harvested from the Pacific.

The issue with the COE is that there is no requirement for this form to be submitted to any governmental agency, or for it to be retained by dealers. Thus, there is no mechanism for tracking billfish from the country of origin to the consumer's plate.

Moreover, the COE process has suffered from a lack of strict enforcement and oversight, which has had the opposite result of better enforcement to actually creating a black market for Atlantic billfish. An investigation of Food and Drug Administration data has confirmed this, as there are records of billfish entering the United States from countries that have no Pacific coastline. While it is extremely unlikely that these were transshipments of billfish that were caught in the Pacific, there is no way to know for sure.

A complete prohibition on the sale or transportation of Pacific and Atlantic billfish to the U.S. mainland will eliminate the need and cost of implementing a COE program for these species of fish.

3. What, if any, restrictions can NMFS impose on the transportation and sale of billfish caught by U.S. vessels and landed in Hawaii or the Pacific Insular Areas (PIA)? (Emphasis added.)

Presumably, by only asking for input on the transportation and sale of billfish caught by U.S. vessels, NMFS is clear about the restrictions on billfish caught by foreign vessels; that is, a complete prohibition on sales in the United States, other than in HI/PIA for local consumption. Export of foreign-caught fish is allowed, but sales to the U.S. mainland are intentionally banned.

As for the transportation and sale of billfish caught by *U.S. vessels*, the BCA language is less precise. The need for clarification was raised by Mr. Eric Schwaab, NMFS Assistant Administrator, in his testimony before the House Natural Resources Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs, June 19, 2012:

[W]ith respect to the exemption for traditional fisheries and markets, there is currently some percentage of billfish landed and originally sold in Hawaii that is later delivered to the U.S. mainland market. Accordingly, clarification is necessary as to the point of sale versus the point of ultimate delivery, if on the mainland. If the intent is to prevent Hawaii sold fish from moving in otherwise legitimate interstate commerce to the traditional mainland markets (e.g., billfish landed and sold in Hawaii ultimately

served in a mainland restaurant), language clarifying this intent may be necessary.²

In point of fact, the ambiguity remains because Congress did not provide clarification, leaving the agency latitude to interpret the provision within the context of other statutory and international obligations.

The treatment of Pacific billfish caught by U.S. vessels and landed in HI/PIA must comply with the United States' obligations under international law. Depending on how NMFS interprets the BCA language, it could amount to a non-tariff barrier and open the BCA to legal challenge. As such, how NMFS chooses to interpret and implement the Act will determine its ultimate legality. The Act's anticipated conservation benefits are dependent on a correct interpretation by NMFS.

IGFA strongly supports the conservation purposes of the BCA so we raise these concerns in the interest of implementing the strongest – and most legally enforceable – regulations possible to protect Pacific and Atlantic billfish and to avoid any potential challenges to the legal standing of the Act.

On its face, the BCA appears to allow for the disparate treatment of Pacific billfish caught by U.S. vessels and billfish caught by foreign vessels. Billfish landed by foreign vessels in HI/PIA may *only* be sold for export or in HI/PIA for local consumption, which, obviously, prohibits sales to the U.S. mainland.

Conversely, billfish caught by U.S. vessels and landed in HI/PIA are generally exempted from the prohibition on sale, with no language stipulating where the fish may be transported or sales occur. The statutory heading of the BCA exemption Section 4(c) references “Traditional Fisheries and Markets,” but no definition in the Act pertains. Under general statutory interpretation, that which is not prohibited is allowed. Therefore, the exemption for U.S.-caught billfish could be interpreted to permit transportation and sale to Hawaii, the PIA *and* to the mainland United States.

Under the most basic tenet of international trade law, countries cannot discriminate against or between trading partners; a tenet Mr. Schwaab anticipated in his Congressional testimony:

[B]ecause the bill proposes to restrict the international trade in billfish, NOAA encourages the Committee to consult with trade agencies, in particular the Office of the U.S. Trade Representative, to ensure that this bill is consistent with U.S. international trade obligations.³

² *Eric Schwaab, Assistant Administrator NMFS*; Written Testimony before the House Committee on Natural Resources; pg. 8 (June 19, 2012).

³ *Id. Schwaab*; Written Testimony, pg. 9.

In trade law, the principle of “national treatment” – giving others the same treatment as one’s own nationals – is codified in the World Trade Organization (WTO)⁴ agreement controlling trade in goods – GATT 1994.⁵ The rules on non-discrimination are designed to secure fair conditions of trade by encouraging countries to treat foreign goods in trade as they would like their domestic goods to be treated. The United States certainly does not want its goods treated unfairly in international commerce, so it must accord other countries the same respect. Allowing sales of U.S.-caught billfish to the U.S. mainland, while prohibiting the same for foreign-caught billfish, could be interpreted as an unfair, discriminatory action.

The general rule regarding national treatment is found in Article III:4 of GATT 1994:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements **affecting their internal sale, offering for sale, purchase, transportation, distribution** or use. The provisions of this paragraph shall not prevent the application of different internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product. (*Emphasis added*)

As noted earlier, NMFS requested comments on what, if any, restrictions can be imposed on the transportation and sale of U.S.-caught billfish and the answer is a great deal, if the Agency wants to avoid legal challenge under international trade law.

Discriminatory, restrictive trade measures are not *per se* impermissible because international trade law recognizes a country’s autonomy to determine its own environmental policies, but only if justifiable under specific exceptions set out in Article XX of GATT 1994.

Article XX lays out a number of specific instances where general GATT rules like national treatment or most-favored-nation are suspended for specific policy goals. Exceptions (b) and (g) apply to protection of the environment. Under these two exceptions, countries may adopt measures that are inconsistent with the GATT’s general rules but are – necessary to protect human, animal or plant life or health (exception (b)), or relating to the conservation of exhaustible natural resources (exception (g)).

Disparate Treatment Cannot Be Justified Under Articles XX (b) or (g).

The environmental exceptions to Article XX were examined by a WTO Dispute Settlement Panel in the case *United States—Import Prohibition of Certain Shrimp and*

⁴ The WTO, created in 1995, is the successor organization to the General Agreement on Tariffs and Trade (GATT), which was a negotiating forum, set of rules and forum to settle disputes.

⁵ General Agreement on Tariffs and Trade 1994 (GATT 1994), Article III, National Treatment on International Taxation and Regulation.

Shrimp Products (U.S.-Shrimp).⁶ The *U.S.-Shrimp* case, in its simplest form, involved a law protecting sea turtles that closed U.S. markets to foreign shrimp and shrimp products unless the exporting country imposed turtle protection devices or protocols, or something comparable, on their own shrimp industry.

The *U.S.-Shrimp* Appellate Body carried out a two-tier analysis to determine whether the trade restriction qualified as an exception to the general rule of open trade.⁷ First, it examined whether the measure was provisionally justified under an Article XX exception and, then, if that determination was affirmative, whether the measure was ultimately justified under the chapeau (introductory clause) of Article XX, as well. The *Shrimp* decision held the U.S. measure was, indeed, related to the conservation of exhaustible natural resources and thus covered under the Article XX(g) exception, but ruled it could not be ultimately justified because the ban constituted “arbitrary and unjustifiable” discrimination under the chapeau.

The Article XX chapeau and pertinent exceptions read as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures...

(b) necessary to protect human, animal or plant life or health...

(g) relating to the conservation of exhaustive natural resources if such measures are made effective in conjunction with restriction on domestic production or consumption....

Any trade restrictions argued under the BCA cannot be justified based on the following proper interpretation of the Act.

Article XX(b). Confining the sale of foreign-caught billfish to the HI/PIA for local consumption while allowing U.S. caught fish access to the entire United States could be justified under Article XX(b) if it was found to be “necessary to protect human, animal or place life or health.” To determine “necessity” one must look at the importance of the objective being furthered, the contribution of the measure to that objective and the level of restriction the measure imposes on open trade.

One can argue that sale of domestically caught billfish to the mainland undermines the conservation objectives of the BCA, so, if allowed, would negate the necessity of the measure. In fact, the sale of billfish to the mainland will contribute to the expansion of

⁶ See Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Product*, WT/DS58/R, May 15, 1998, and Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Product*, WT/DS58/AB/R, October 12, 1998.

⁷ *U.S.-Shrimp* Appellate Body Report, p. 56.

U.S. catch to fill the domestic market outside the traditional HI/PIA previously served with foreign-caught fish. One of the primary purposes of the BCA is to reduce the market demand for billfish, thereby reducing harvest incentives. Confining the sale of domestically caught billfish to the HI/PIA is absolutely necessary to achieve this objective. Otherwise the Act would establish an exclusive fishing right for only U.S. vessels to land billfish for sale and transport to the single largest consumer of billfish – some 30,000 fish per year – the U.S. mainland. The BCA was never intended to create a de facto protected market for exclusively U.S.-caught billfish.

Article XX(g). Article XX(g) provides an alternative justification for the discrimination against foreign imports. The operative terms to be examined are: relating to the conservation of “exhaustible natural resources” and “in conjunction with” restrictions on domestic production or consumption.

The issue of what constitutes an exhaustible natural resource was discussed at length in both the *U.S.-Shrimp* Panel and Appellate Body Reports. Petitioners argued that exhaustible natural resources meant finite physical resources susceptible to depletion – such as raw materials, minerals, or other non-living natural resources – rather than biological resources. They argued that living resources were renewable, thus not exhaustible.⁸ The Appellate Body rejected that meaning, finding instead that even living resources capable of reproduction (sea turtles in this case) “are in certain circumstances indeed susceptible of depletion, exhaustion and extinction frequently because of human activities.”⁹ If sea turtles are considered an exhaustible natural resource certainly fish would be and, in fact, have been in prior cases.¹⁰

That billfish can be exhausted is evidenced by the absolute ban imposed by NMFS on the sale of Atlantic billfish. Atlantic stocks are substantially worse off than Pacific stocks, but all stocks are exhaustible, especially if a market can be established for them.

Regarding the meaning of “in conjunction with,” the *Shrimp* Panel Report looked to the earlier standard set in the case of *United States–Standards for Reformulated and Conventional Gasoline (U.S.-Gasoline)*:¹¹

As noted by the Appellate Body in the Gasoline case, this prong referred to “governmental measures being promulgated or brought into effect together with restrictions on domestic production or consumption of natural resources.” Specifically, the Appellate Body stated that the language was “a requirement that the measures concerned impose restrictions, not just in respect of [the imported product] but also in respect to [the domestic product]”.

⁸ *U.S.-Shrimp* Panel Report, p. 109.

⁹ *U.S.-Shrimp* Appellate Body Report, p. 47.

¹⁰ See *United States–Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted 22 February 1982, BISD 29S/91, para. 4.9; *Canada–Measures Affecting Exports of Unprocessed Herring and Salmon*, adopted March 1988, BISD 35S/98, para. 4.4.

¹¹ *U.S.-Shrimp* Panel Report, p. 119, quoting *United States–Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, WT/DS2/AB/R, p. 20, May 20, 1996.

This evenhandedness doctrine was subsequently embraced in the in *U.S.-Shrimp* decision.¹² The basis for fair play in international trade is that countries will treat foreign access to their markets the same or at least nearly the same as they allow for their own products. A conclusion that domestically-caught billfish can have access to the entire U.S. marketplace while foreign-caught billfish can only have access to a small portion of it, no matter what the common understanding was upon passage of the bill, runs directly afoul of this doctrine. To comply with Article XX(g), NMFS cannot allow domestically harvested billfish to be sold or transported into the same marketplace from which imports are restricted. They cannot do this under any interpretation.

Disparate Treatment Cannot Be Justified Under the Chapeau. The Article XX exceptions may preliminarily justify a measure's discrimination and deviation from general trade obligations, but only the chapeau can *ultimately* justify an exception. Assuming, for argument, an exception does apply, the chapeau to Article XX would still find the BCA's disparate treatment unacceptable. The purpose of the chapeau is to ensure that implementation of a measure, provisionally allowed under an exception, does not frustrate or defeat the legal obligations of the party claiming the exception, or the rights of the party being discriminated against.

As the Appellate Body stated in *U.S.-Gasoline*:

The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement.¹³

The Article XX chapeau prevents: 1) arbitrary discrimination between countries where the same conditions prevail; 2) unjustifiable discrimination between countries where the same conditions prevail; and 3) a disguised restriction on international trade. If NMFS implements the law in a manner that discriminates between U.S.-caught fish and foreign-caught fish, it will likely be viewed as arbitrary and unjustifiable.

All billfish are caught on the high seas, usually well outside any state's territorial sea and, for the most part, beyond a state's exclusive economic zone. Although there are different kinds of billfish, they are all equally accessible to both domestic and foreign fleets. There are few differences between the harvest, processing and initial sale of billfish, worldwide. A dead billfish processed for sale by a domestic entity and a foreign one are the same for all intents and purposes. It would be extremely difficult to justify discrimination against foreign billfish based on its harvest or processing.

On its face, the BCA is a deliberate attempt to give the domestic industry preferred access to the U.S. market. Without the international context, NMFS could conclude that the

¹² *U.S.-Shrimp* Appellate Body imposed the same requirement of evenhandedness in its analysis. Appellate Body Report, p. 54.

¹³ *U.S.-Gasoline* Appellate Body Report, p. 22.

measure before it only bans the sale of imported product outside the HI/PIA. But this would result in limiting access to a market potentially 100 times, or more, larger than the HI/PIA. There seems little justification for that result.

In its analysis of the chapeau, the Appellate Body in the case *Brazil—Measures Affecting Imports of Retreaded Tyres (Brazil-Tyres)*¹⁴ said “whether discrimination is arbitrary or unjustifiable usually involved an analysis that relates primarily to the cause or the rationale of the discrimination.” There, Brazil’s trade restrictions discriminated depending on whether a country was party to the MERCOSUR¹⁵ agreement, but contended it was “required” to discriminate by a MERCOSUR tribunal. The *Tyre* Appellate Body looked to the *U.S.-Shrimp* decision in deciding the MERCOSUR tribunal was not an acceptable rationale for the discrimination.

[W]e have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX.¹⁶

The policy objective of the BCA is to conserve Pacific billfish and aid in the enforcement of the Atlantic billfish ban by eliminating the amount of Atlantic billfish sold on the West Coast masquerading as Pacific billfish. Prohibiting all billfish sales outside HI/PIA would mean *every* sale on the mainland is an illegal sale, an easily enforceable standard. However, if NMFS decides to allow sales of U.S.-caught billfish to the mainland, the conservation goal is jeopardized. If the intent of the Act is conservation and enforcement, it seems rather arbitrary to allow *any* Pacific billfish to be sold to the mainland, let alone actively discriminating between domestic and foreign product.

If the environmental objectives of the BCA are to conserve Pacific billfish and help enforce the ban on Atlantic billfish sales, an interpretation of the Act allowing domestically-caught billfish sales and transportation to the U.S. mainland does not appear to further either purpose. One need go no further to conclude that the BCA, by opening the entire U.S. market to domestically-caught billfish while closing it to foreign caught billfish, with no accompanying conservation justification, creates a blatant and unsustainable trade restriction.

Ultimately, whether or not the BCA is found GATT-legal depends on the interpretation and implementation of the Act by NMFS. The Act does not appear to violate international trade laws on its face because certain sections are ambiguous enough to allow interpretations that will make it consistent with international law. However, if NMFS implements the Act such that U.S. parties have a competitive advantage over foreign parties and no GATT-approved justification for that discrimination applies, it jeopardizes all the positive conservation benefits that could be achieved.

¹⁴ *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, December 3, 2007, p. 88.


¹⁵ Mercado Común del Sur, a southern common market.

¹⁶ *Brazil-Tyres* Appellate Body Report, p. 90.

In conclusion, based on the above legal analysis, it is the position of the IGFA that NMFS must treat foreign-caught and U.S.-caught billfish similarly and that would require NMFS to restrict transportation of U.S.-caught billfish to HI/PIA. Any other interpretation of the BCA could jeopardize the overall legal standing of the Act through international trade challenges. NMFS can avoid any such challenges by simply restricting the transportation and sale of U.S.-caught billfish to the HI/PIA region in a consistent manner as foreign-caught billfish.

Thank you again for this opportunity to comment on the ANPRM for the BCA.

Sincerely,

A handwritten signature in blue ink that reads "Rob Kramer". The signature is written in a cursive style with a large initial "R" and "K".

Rob Kramer
President
International Game Fish Association