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Dolphins, Sea Turtles, and Finnish Elks: Is the Court of International Trade the Proper Forum for Environmental Disputes?

Birgit Kurtz*

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DOLPHINS, SEA TURTLES, AND FINNISH ELKS: IS THE COURT OF INTERNATIONAL TRADE THE PROPER FORUM FOR ENVIRONMENTAL DISPUTES?

BIRGIT KURTZ*

INTRODUCTION

In June of 1994, the Court of Appeals for the Ninth Circuit affirmed dismissal of a suit brought under a provision of the Marine Mammal Protection Act ("MMPA")¹ because, the court held, the matter fell within the exclusive jurisdiction of the Court of International Trade ("CIT").² The environmental groups that brought the suit³ had fought hard to stay in the federal district court on the apparent belief that the CIT judges' specialized expertise in international trade and customs law would most likely lead to pro-trade and anti-environment decisions.⁴ The purpose of this Note is to demonstrate that such fears are unfounded.

This Note focuses on a series of congressional efforts to regulate in the field of environmental law, beginning with the MMPA as a prime example of environmental legislation that is inextricably intertwined with United States international trade policies. This legislation belies the notion that litigation in the CIT should come as any surprise.⁵ Environmental concerns are increasingly recognized as international in scope.⁶ Congress has thus repeatedly resorted to its best weapon in the international arena—trade sanctions—in order to achieve regulatory objectives in the field of environmental

* J.D. Candidate, 1996, Fordham University School of Law.

1. 16 U.S.C. § 1371(a)(2)(C) (1994).

2. See *Earth Island Institute v. Brown*, 28 F.3d 76 (9th Cir.), cert. denied, 115 S. Ct. 509 (1994).

3. Plaintiffs were Earth Island Institute, the Marine Mammal Fund, and David R. Brower. *Id.*

4. See *infra* text accompanying note 163-64.

5. See *supra* note 1.

6. See *infra* text accompanying notes 90-96.

law. Therefore, it may not only be proper but indeed necessary to resolve environmental disputes in a specialized trade court.

To approach this topic systematically, this Note will divide its discussion into three parts. Since a substantial component of the inquiry is what may be the proper subject matter for a court of "international trade," Part I will look at the history of the CIT and its traditional caseload. In particular, the reader will be provided with a jurisdictional context, including congressional enactment and Supreme Court interpretation, with emphasis on the use and meaning of the term "embargo." Part II will provide a substantive evaluation of two separate environmental laws aimed at the protection of dolphins and sea turtles, respectively,⁷ and some of the litigation that has arisen out of those provisions. This part of the Note will describe a series of battles over not only what the laws mean, but also which court should decide any resulting disputes. After completing this analysis, Part III will examine how the CIT has handled the environmental cases that have so far come before it. This Note concludes that the approach Congress has taken to protect the environment on an international level will lead to an increase in environmental disputes litigated in the CIT, and that this will in no way disadvantage any environmental interests.

I. THE SCOPE OF CIT JURISDICTION

According to the Honorable Edward Re, former Chief Judge of the CIT, international trade "is today the single common language among all nations."⁸ Trade policy, therefore, is a vital tool used by the United States in its dealings with other countries.⁹ Not surprisingly, the growing impact on the American economy of international trade matters corresponds with growing numbers of disputes—between nations, private citizens, businesses, and others.¹⁰

7. See 16 U.S.C. § 1371 (provision regarding protection of dolphins); § 609 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1990, 16 U.S.C. § 1537 (Supp. 1990) (provision regarding protection of sea turtles).

8. Honorable Edward D. Re, *Litigation before the United States Court of International Trade*, 19 U.S.C.A. XIII-XLV (West Supp. 1995).

9. See *id.*

10. HONORABLE DOMINICK L. DICARLO, *THE UNITED STATES COURT OF INTERNATIONAL TRADE* at i (1992). Judge DiCarlo is the present Chief Judge of the

The CIT, as it stands today, is the product of congressional efforts to equip the federal judiciary to deal effectively and efficiently with increasingly complex disputes arising from international trade legislation.¹¹

A. *The History of the Court*

In 1890, Congress created the Board of General Appraisers, a quasi-judicial administrative unit within the Department of the Treasury.¹² The nine general appraisers reviewed decisions by United States Customs officials concerning the amount of duties to be paid on merchandise imported into the United States.¹³ As the number and types of decisions relating to imports expanded, Congress, in 1926, replaced the outmoded Board with the United States Customs Court, a court established under Article I¹⁴ of the Constitution.¹⁵ The change was little more than a change in name, however, for the jurisdiction and powers of this new tribunal remained essentially the same, and the Customs Court continued to function as the Board of General Appraisers had.¹⁶

Over the next thirty years, the Customs Court was gradually integrated into the federal judicial system until, in 1956, Congress reestablished the court under Article III¹⁷ of the Constitution.¹⁸ Despite this important change in status, the jurisdictional powers

Court of International Trade.

11. *Id.* at i.

12. Customs Administrative Act, ch. 407, §§ 12, 13, 26 Stat. 136-137 (1890).
See also Re, supra note 8, at XIV.

13. *Re, supra* note 8, at XIV.

14. U.S. CONST. ART. I § 8 (1). This provision reads: “[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States” *Id.*

15. *Re, supra* note 8, at XIV.

16. *Id.*

17. U.S. CONST. ART. III § 1. This provision reads in pertinent part: “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” *Id.*

18. *Re, supra* note 8, at XIV.

and procedures of the court followed the pattern of its statutory predecessors.¹⁹ In the late 1960s, Congress recognized that fundamental changes were needed in the court's statutory procedures as well as in its jurisdiction and powers.²⁰ The scope of these changes was so broad that, in the Customs Courts Act of 1970,²¹ Congress limited its efforts to procedural reforms,²² deferring for subsequent legislation issues of the court's jurisdiction and remedial powers.

In the Customs Courts Act of 1980,²³ Congress clarified and expanded the status, jurisdiction, and powers of the former United States Customs Court and changed the name of the court to United States Court of International Trade.²⁴ The new name more accurately describes the court's expanded jurisdiction and its increased judicial functions relating to international trade disputes.²⁵

Senator Dennis DeConcini, Chairman of the Subcommittee on Improvements in Judicial Machinery, actively sponsored the Act,

19. DICARLO, *supra* note 10, at 2.

20. *Id.*

21. Pub. L. 91-271, 84 Stat. 274 (1970).

22. DICARLO, *supra* note 10, at 2.

23. Pub. L. No. 96-417, 94 Stat. 1727 (1980).

24. *Re, supra* note 8, at XIV-XV.

25. *Id.* at XV. The CIT consists of nine judges, appointed for life by the President with Senate approval. 28 U.S.C. § 251(a) (1994). Actions are generally assigned to one single judge. *Id.* §§ 253(c), 254 (1994). The Chief Judge may, however, assign the action to a three-judge panel if he or she finds that a case involves "the constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or [] has broad or significant implications in the administration or interpretation of the customs laws." *Id.* § 255(a) (1994). *See, e.g.,* United States Shoe Corp. v. United States, 907 F. Supp. 408 (Ct. Int'l Trade 1995) (Musgrave, J., concurring) (holding the "Harbor Maintenance Tax" unconstitutional). CIT judges may also perform judicial duties in different federal courts across the nation. 28 U.S.C. § 293(a) (1994). Although the CIT is located in New York City, *id.* § 251(c), the court hears cases which arise nationwide. *Id.* § 256(a). The majority of customs and international trade cases, however, are tried in one of the main ports of the U.S., such as Boston, New York City, Washington, D.C., Houston, Dallas, Chicago, Detroit, San Francisco, and Los Angeles. *Re, supra* note 8, at XVIII. "[T]he court is a national court . . .," *id.* at XVII, and is authorized to hold hearings in foreign countries. 28 U.S.C. § 256(b) (1994). The Court of Appeals for the Federal Circuit provides appellate review. *Id.* § 1295(a)(5) (1994).

which he said offered “a vastly improved forum” for judicial review of agency actions dealing with imports.²⁶ Recognizing that courts as well as litigants were often unclear as to the precise demarcation between the CIT and the other Article III courts, Senator DeConcini was convinced that the 1980 Act would “eliminate the considerable jurisdictional confusion” existing at the time and would “result[] in uniformity without sacrificing the expeditious resolution of import related disputes.”²⁷ Some of the main goals of the Act, as stated by the Committee on the Judiciary for the House of Representatives, were: (1) “the explicit grant of all judicial powers in law and equity”²⁸ to the CIT as a full-fledged Article III court, (2) the “re-emphasis and clarification of Congress’ intent that the expertise and national jurisdiction of the [CIT] be exclusively utilized in the resolution of conflicts and disputes arising out of the tariff and international trade laws,”²⁹ and (3) the “transfer of exclusive jurisdiction to the [CIT] for civil actions for the recovery” of certain penalties or duties paid pursuant to the customs and trade laws.³⁰ When President Carter signed the bill into law in October of 1980, he called it “a comprehensive system for judicial review of civil actions arising out of import transactions and federal statutes affecting international trade.”³¹

Section 1581 grants the CIT subject matter jurisdiction over certain civil actions against the United States, its agencies and its officers.³² The scope of the CIT’s jurisdiction includes all cases

26. Senator Dennis DeConcini, Chairman, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, United States Senate. 126 CONG. REC. 27,063, 27,064 (1980).

27. *Re, supra* note 8, at XIV-XV (citing 126 CONG. REC. 27,063 (1980)).

28. *Id.* at XV (citing H.R. REP. NO. 1235, 96th Cong., 2d Sess. 18, 27-28, reprinted in 1980 U.S.C.C.A.N. 3729, 3739).

29. *Id.*

30. *Id.*

31. 16 WEEKLY COMP. PRES. DOC. 2183 (Oct. 11, 1980).

32. *Id.* § 1581 (1994). Sections 1581-1585 define the CIT’s subject matter jurisdiction. Section 1581 covers civil actions against the U.S. and its agencies and officers, section 1582 covers civil actions commenced by the United States, section 1583 regulates counterclaims, cross-claims, and third party actions, section 1584 gives the CIT subject matter jurisdiction over civil actions under the United States-Canada Free-Trade Agreement, and section 1585 states that the CIT shall possess all the powers in law and equity of, or as conferred by statute upon,

involving the monitoring and enforcement of international trade agreements,³³ the imposition of antidumping³⁴ and countervailing duties,³⁵ and the classification³⁶ and valuation³⁷ of imported merchandise for the purpose of imposing customs duties.³⁸ Under section 1581(i)(3), the CIT also has exclusive subject matter jurisdiction over an action "that arises out of any law of the United States providing for . . . *embargoes or other quantitative restrictions* on the importation of merchandise for reasons other than the protection of the public health or safety"³⁹ Congress used this language in section 1581(i)(3) to redress the previous misconception as to the seemingly overlapping jurisdictions of the CIT and the district courts over cases involving certain import restrictions.⁴⁰

B. *Defining Jurisdiction Over "Embargoes"*

Eight years after the enactment of the Customs Courts Act of 1980, the United States Supreme Court defined the scope of the term "embargo" in *K Mart Corp. v. Cartier, Inc.*,⁴¹ a case involving the importation of grey-market goods. Plaintiffs, a coalition of United States trademark holders, brought the case in federal district court, attacking what they considered too permissive a Customs policy regarding the admission of grey-market goods.⁴² The Su-

a district court of the United States. *Id.* §§ 1581-1585.

33. *Id.* § 1581(e).

34. *Id.* § 1581(f).

35. *Id.* § 1581(b).

36. *Id.* § 1581(h).

37. *Id.*

38. In a recent case involving the challenge of a decision by the Foreign Trade Zone Board, the Court of Appeals for the Federal Circuit considerably expanded the jurisdiction of the CIT. *Conoco Inc. v. United States*, 18 F.3d 1581 (Fed. Cir. 1994). For a detailed discussion of the implications of this case, see Lynn S. Baker & Michael E. Roll, *Securing Judicial Review in the United States Court of International Trade: Has Conoco, Inc. v. United States Broadened the Jurisdictional Boundaries?*, 18 *FORDHAM INT'L L.J.* 726 (1995).

39. 28 U.S.C. § 1581(i)(3) (emphasis added).

40. *Re, supra* note 8, at XXXIX (quoting H.R. REP. NO. 1235, 96th Cong., 2d Sess. 18, 47, reprinted in 1980 U.S.C.C.A.N. 3729, 3759).

41. 485 U.S. 176 (1988).

42. *Id.* at 181.

preme Court ruled that the federal district courts had federal question jurisdiction, assuming jurisdiction was otherwise proper, in all trade cases not consigned to the exclusive jurisdiction of the CIT.⁴³ Thus, the district courts may not review embargo cases. The Court held that an “embargo” under 28 U.S.C. § 1581(i)(3) is a “governmentally imposed quantitative restriction—of zero—on the importation of merchandise,”⁴⁴ and that “trade policy is not the sole, nor perhaps even the primary, purpose served by embargoes.”⁴⁵

According to the Court, embargoes are imposed for a broad range of purposes, including public health, safety, morality, foreign affairs interests, law enforcement, and ecology.⁴⁶ As an example of an embargo employed in the field of ecology, the Court cited a regulation that prohibits the importation of sea otters and noted that the CIT would have exclusive jurisdiction.⁴⁷ In contrast, the Court explained, mere “import restrictions” were not within the plain meaning of the term “embargo,” and as such, were not within the exclusive jurisdiction of the CIT. Examples of such import restrictions were: permit requirements, tagging, licensing of items such as milk, cream and other dairy products and inspecting products such as meat.⁴⁸ The distinction thus drawn by the Court between quantitative and other restrictions as a measure of jurisdictional scope ultimately became the key issue disputed in some of the cases that are the subject of this Note.⁴⁹

II. ENVIRONMENTAL REGULATION AND INTERNATIONAL TRADE DISPUTES

In recent years, countries around the world have begun to realize “that protection of the environment must be addressed on a global basis.”⁵⁰ Thus, in the 1990s, the often different goals of free trade

43. *Id.* at 182-83.

44. *Id.* at 185.

45. *Id.* at 184.

46. *Id.*

47. *Id.* (citing 19 C.F.R. § 12.60 (1987) (prohibiting transportation, import, sale, or possession of fur seal or sea otter skins taken contrary to statutory authority)).

48. *Id.* at 187.

49. *See, e.g., infra* text accompanying notes 139-73.

50. Thomas J. Schoenbaum, *Free International Trade and Protection of the*

and international environmental protection materialized as some of the "most significant and contentious issues facing the international community."⁵¹ To alleviate some of the friction between the two areas of law, a large number of bilateral and multilateral treaties have been agreed upon.⁵² In addition to international agreements, however, the United States has used the "threat of trade sanctions [as a] fundamental instrument of U.S. fisheries and marine conservation policy."⁵³ The following will examine two such laws⁵⁴ and the litigation in which a number of environmental groups challenged the Executive Branch's interpretation of those provisions. Part A will explore the legislation that was passed to protect dolphins from the harm caused by tuna fishermen, while Part B will study the law enacted to protect sea turtles from the dangers of commercial shrimp fishing and subsequent litigation.

A. *Dolphins v. Tuna*

The prime example of environmental legislation that intersects with trade law is section 1371 of the MMPA.⁵⁵ When enacted in 1972, commentators called the MMPA "one of the most progressive, far reaching pieces of environmental legislation ever drafted."⁵⁶ Acknowledging both aesthetic and economic value in dol-

Environment: Irreconcilable Conflict?, 86 AM. J. INT'L L. 700, 717 (1992).

51. Richard J. McLaughlin, *UNCLOS and the Demise of the United States' Use of Trade Sanctions to Protect Dolphins, Sea Turtles, Whales, and Other International Marine Living Resources*, 21 *ECOLOGY L.Q.* 1, 8 (1994).

52. Schoenbaum, *supra* note 50, at 717.

53. McLaughlin, *supra* note 51, at 7.

54. *See supra* note 7 and accompanying text.

55. Section 101(a)(2)(C) of the Marine Mammal Protection Act, Pub. L. No. 92-522, 88 Stat. 1030, *codified at* 16 U.S.C. § 1371(a)(2)(C) (1994). It provides in pertinent part that

the Secretary [of the Treasury] . . . shall *require the government of any intermediary nation . . . to certify and provide reasonable proof* to the Secretary that it has not imported, within the preceding six months, any yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation to the United States under subparagraph (B)

Id. (emphasis added).

56. Andrew Davis, *Can we Save the Marine Mammals? The Deadly Decline of the Marine Mammal Protection Act*, *GREENPEACE*, Jan.-Feb. 1988, at 11.

phins,⁵⁷ Congress aimed to protect "certain species and population stocks of marine mammals [that] are, or may be, in danger of extinction or depletion as a result of man's activities,"⁵⁸ in particular, commercial tuna fishing.

Recognizing that spotted dolphins and schools of yellowfin tuna travel together in the Eastern Tropical Pacific Ocean ("ETP"),⁵⁹ commercial fishing fleets find tuna schools by looking for dolphins in the water.⁶⁰ The fishermen lay "purse seine" nets around the dolphins,⁶¹ encircle the school, and trap the tuna by closing off the net from below.⁶² While some dolphins are able to leap over the nets, many are caught.⁶³ These dolphins either drown⁶⁴ or are crushed in the machinery used to retrieve the net.⁶⁵ Discovery of

57. See 16 U.S.C. § 1361(6), which states that "Congress finds . . . that marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic"

58. *Id.* § 1361(1). "[S]uch species and population should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part" *Id.* 1361(2).

59. See Thomas E. Skilton, *GATT and the Environment in Conflict: The Tuna-Dolphin Dispute and the Quest for an International Conservation Strategy*, 26 CORNELL INT'L L.J. 455, 458 n.23 (1993) (citing Margaret Palmer Gordon, Comment, *International Aspects of the Tuna-Porpoise Association Phenomenon: How Much Protection for Poseidon's Sacred Messengers?*, 7 CAL. W. INT'L L.J. 639, 643 (1977) and K. Patrick Conner, *The Conversion of Starkist*, S.F. CHRON., June 17, 1990, at 7/Z).

60. *Id.*

61. A process known in the tuna industry as "setting on dolphin." Don Mayer & David Hoch, *International Environmental Protection and the GATT: The Tuna/Dolphin Controversy*, 31 AM. BUS. L.J. 187, 198 (1993).

62. Skilton, *supra* note 59, at 458 n.23.

63. Some dolphins that are able to escape the net often return to take care of their young only to find themselves caught in the net and killed after all. See Mayer & Hoch, *supra* note 61, at 198.

64. As mammals, dolphins must breathe air. When they are trapped in the nets, however, they can oftentimes not reach the surface in time to breathe and, thus, must drown. *Id.*

65. Kerry L. Holland, Comment, *Exploitation on Porpoise: The Use of Purse Seine Nets by Commercial Tuna Fishermen in the Eastern Tropical Pacific Ocean*, 17 SYRACUSE J. INT'L L. & COM. 267, 268-70 (1991). Some dolphins survive, but are severely maimed by the process. Stanley M. Spracker & David C. Lundsgaard, *Dolphins and Tuna: Renewed Attention on the Future of Free Trade and Protection of the Environment*, 18 COLUM. J. ENVTL. L. 385, 388

the correlation between dolphins and tuna, combined with major technological advances in commercial fishing equipment, led to a steep increase in "incidental killings" of dolphins in the ETP, which peaked in 1965 at 365,000 dolphins killed in that year alone.⁶⁶ Prompted by a national outcry⁶⁷ against these killings, Congress enacted the MMPA.⁶⁸

1. Legislative Framework

To limit these incidental killings, the MMPA regulates: (1) the catching of tuna by fishermen subject to United States jurisdiction⁶⁹ and (2) the importation of tuna caught while using techniques which result in an incidental kill of ocean mammals in excess of United States practices.⁷⁰ The MMPA attempts to preserve the Optimum Sustainable Population ("OSP")⁷¹ of marine mammal species,⁷² and establishes a moratorium⁷³ on the taking⁷⁴ and im-

(1993).

66. Mayer & Hoch, *supra* note 61, at 198. It is estimated that about six million dolphins have been killed over the last 30 years. Skilton, *supra* note 59, at 458 n.23.

67. See Tim W. Ferguson, *Business World: One Entangling Edible in the GATT Fight*, WALL ST. J. EUR., Nov. 26, 1993, at 8.

68. 16 U.S.C. §§ 1361-1421h (1994).

69. See *id.* § 1374(h), which regulates the issuance of permits and certificates in general.

70. See generally *id.* § 1371.

71. *Id.* § 1361(6). According to 16 U.S.C. § 1362(9), OSP "means, with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element."

72. According to 16 U.S.C. § 1362(6), "[t]he term 'marine mammal' means any mammal which (A) is morphologically adapted to the marine environment (including sea otters and members of the orders Sirenia, Pinnipedia and Cetacea), or (B) primarily inhabits the marine environment (such as the polar bear); and, for the purposes of this chapter, includes any part of any such marine mammal, including its raw, dressed, or dyed fur or skin."

73. According to 16 U.S.C. § 1362(8), "[t]he term 'moratorium' means a complete cessation of the taking of marine mammals and a complete ban on the importation into the United States of marine mammals and marine mammal products"

74. 16 U.S.C. § 1362(13) defines the term "to take" as "to harass, hunt, cap-

portation of marine mammals and marine mammal products.⁷⁵ The MMPA provides that “it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.”⁷⁶

To reach its stated goal, the MMPA directs the Secretary of Commerce to issue regulations protecting dolphins and other marine mammals.⁷⁷ The National Marine Fisheries Service (“NMFS”), as part of the Commerce Department, issues most of these permits and certificates.⁷⁸ The MMPA’s prohibitions cover all takings within waters under the jurisdiction of the United States,⁷⁹ “except as expressly provided for by an international treaty, convention, or agreement to which the United States is a party and which was entered into before the [MMPA’s] effective date.”⁸⁰ The MMPA’s provisions similarly apply to takings on the high seas by persons or vessels that are subject to the jurisdiction of the United States.⁸¹

In 1976, a coalition of environmental groups challenged the authority of the NMFS to grant permits and certificates.⁸² In re-

ture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.”

75. 16 U.S.C. § 1362(7) defines “marine mammal product” as “any item of merchandise which consists, or is composed in whole or in part, of any marine mammal.”

76. 16 U.S.C. § 1371(a)(2). There are exceptions from the moratorium for scientific research purposes, photography for educational or commercial purposes, or enhancing the survival or recovery of a species or stock. *Id.* § 1371(a)(1)-(3).

77. *Id.* § 1362(a). The Secretary also has discretionary authority to issue permits to groups or industries that qualify for exemptions from the moratorium. *Id.* § 1371(a)(1).

78. *See id.* § 1374.

79. *Id.* Section 1362(15)(A)-(B) defines “waters under the jurisdiction of the United States” to mean “the territorial sea of the United States, and [] the waters included within a zone, contiguous to the territorial sea of the United States, of which the inner boundary is a line coterminous with the seaward boundary of each coastal State, and the outer boundary is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.”

80. *Id.* § 1372(a)(2).

81. *Id.* § 1372(a)(1).

82. Committee for Humane Legislation, Inc. v. Richardson, 414 F. Supp. 297 (D.D.C.), *aff’d on reh’g and modified*, 540 F.2d 1141 (D.C. Cir. 1976).

response, Congress amended the MMPA⁸³ with "compromise language agreed upon by both commercial fishermen and environmentalists."⁸⁴ The NMFS clarified the meaning of OSP, proclaiming that it describes "a population size which falls within a range from the population level of a given species or stock which is the largest supportable within the ecosystem to the population level that results in maximum net productivity."⁸⁵ Under the amendments, a species is considered depleted when its number falls below the OSP or when the stock is listed as endangered or threatened under the Endangered Species Act.⁸⁶ Based upon these new definitions, the NMFS issued regulations and a five-year, industry-wide permit to yellowfin tuna fishermen in the ETP, setting an annual "incidental taking" quota of 20,500 dolphins.⁸⁷ While the United States tuna fleet made progress in reducing the incidental kill of dolphins, many United States boats simply reflagged under foreign sails,⁸⁸ avoiding the more stringent MMPA regulations.⁸⁹

By 1984, Congress recognized that foreign fleets⁹⁰ were responsible for most of the dolphin killing in the ETP, with a collective killing estimated at more than 100,000 per year.⁹¹ In particular,

83. Pub. L. No. 97-58, 95 Stat. 979 (1981).

84. Mayer & Hoch, *supra* note 61, at 202.

85. 50 C.F.R. § 216.3 (1995).

86. *See* 16 U.S.C. § 1362(1). The Endangered Species Act of 1973 is codified at 16 U.S.C. §§ 1531-1544 (1994).

87. Taking of Marine Mammals Incidental to Commercial Fishing Operations—Permits, etc., 45 Fed. Reg. 72,178, 72,187 (Dep't Comm. 1979) (*codified as amended* at 50 C.F.R. § 216.24 (1981)).

88. Mayer & Hoch, *supra* note 61, at 203-04 (citing David Phillips, *Statement on Implications of the GATT Panel Ruling on Dolphin Protection and the Environment before the Subcommittee on Health and Environment of the House Energy and Commerce Committee*, 102d Cong., 1st Sess. 4 (Sept. 27, 1991)). "In the past ten years two thirds of the big United States seiners have reflagged with foreign fleets." *Id.*

89. These boats carried few observers, were under no national or international regulatory restrictions, and were not required to use the techniques for which the United States had vigorously fought. *Id.*

90. These foreign fleets were from Ecuador, Mexico, Panama, Vanuatu, and Venezuela. *Earth Island Institute v. Mosbacher*, No. C 88-1380, 1991 WL 163753, at *2 ¶ 1 (N.D. Cal. March 26, 1991).

91. Phillips, *supra* note 88, at 2. Estimates during 1989 claimed that the foreign fleet was killing five times as many dolphins as the U.S. tuna fleet. *See*

estimates of the number of dolphins killed yearly by Mexican fishing vessels vary from 50,000 to 100,000.⁹² Congress therefore tried to "strengthen the requirements of the [MMPA] with respect to documentation of compliance by foreign nations with the essential features of the MMPA."⁹³ The resulting amendment placed an embargo on tuna from any nation whose kill rates were above an amount determined by comparison to the number of dolphins killed by the United States tuna fleet.⁹⁴ Since the United States market accounts for as much as half of the world's tuna consumption,⁹⁵ the strategy seemed promising.⁹⁶ In 1988, Congress again amended the MMPA⁹⁷ adding three basic elements. First, Congress outlined the kind of regulatory program that a foreign country must adopt before the United States would allow imports of yellowfin tuna or tuna products.⁹⁸ This eliminated the Commerce Department's discretion and inserted mandatory embargo language.⁹⁹ Nations wishing to export tuna to the United States during the 1989 fishing season could not exceed two times the United States fleet's rate of dolphin kill, and, during 1990 and beyond, national fleets could not

Holland, *supra* note 65, at 279 (quoting *Animal Rights: Heinz, Purina, and All Canned Tuna*, NAT'L BOYCOTT NEWS, Spring-Summer 1989, at 105).

92. Mayer & Hoch, *supra* note 61, at 204 n.127 (citing K. Gwen Beacham, *International Trade and the Environment: Implications of the General Agreement on Tariffs and Trade for the Future of Environmental Protection Efforts*, 3 COLO. J. INT'L ENVTL. L. & POL'Y 655, 665 n.72 (1992)).

93. H.R. REP. NO. 758, 98th Cong., 2d Sess. 1, 6 (1984), *reprinted in* 1984 U.S.C.C.A.N. 635, 639.

94. 16 U.S.C. § 1371(a)(2)(B)(ii)(II).

95. Mayer & Hoch, *supra* note 61, at 204 (citing John Godges, *Dolphins Hit Rough Seas Again*, SIERRA, May-June 1988, at 24, 26).

96. Indeed, the amendment prompted several countries to require their fleets to adhere to MMPA guidelines by complying with dolphin rescue procedures used by U.S. fishing crews. *See* John W. Kindt, *A Summary of Issues Involving Mammals and Highly Migratory Species*, 18 AKRON L. REV. 1, 56 (1984).

97. Pub. L. No. 100-711, 102 Stat. 4755 (1988). *See also* H.R. REP. NO. 970, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 6154. Before the 1988 Amendments, tuna had been embargoed from the Congo, El Salvador, Peru, Senegal, Spain, and the Soviet Union. Steve Charnovitz, *Trade and the Environment: The Environment vs. Trade Rules: Defogging the Debate*, 23 ENVTL. L. 475, 479 n.19 (1992).

98. *See* 16 U.S.C. § 1371(a)(2)(B)(ii)(II).

99. *Id.* § 1371(a)(2)(C).

exceed 1.25 times the U.S. rate.¹⁰⁰

Second, Congress imposed a secondary embargo on yellowfin tuna or tuna products from intermediary nations that imported those products from nations banned under the primary embargo. Countries under a primary embargo are not allowed under the amendments to export such products directly to the United States¹⁰¹ and, thus, may try to circumvent the laws of the United States by shipping their goods through intermediary countries. Third, Congress required the Secretary of Commerce, within six months after the imposition of an import ban on a country's yellowfin tuna or tuna products, to certify the imposition of that ban to the President.¹⁰² This certification process is significant because it qualifies as a certification under the Pelly Amendment¹⁰³ and thus can lead to an import ban on all fish and wildlife and related offending products.¹⁰⁴

100. *Id.* § 1371(a)(2)(B)(ii)(II).

101. *Id.* § 1371(a)(2)(C). "[W]henver the U.S. imposes a primary embargo, other nations that export tuna and tuna products to the United States must certify to the Secretary of Commerce that they have also banned the importation of these 'tainted' goods." Skilton, *supra* note 59, at 459.

102. 16 U.S.C. § 1371(a)(2)(D).

103. *See, e.g., infra* note 251. Certification triggers the applicability of the Pelly Amendment (Section 8(a) of the Fishermen's Protective Act of 1967, 22 U.S.C. §§ 1971-1980 (1994)), which grants the President authority to embargo all fish or wildlife products from the country in question "for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the GATT." 22 U.S.C. § 1978(a)(4) (1994).

104. In October of 1992, Congress also passed the International Dolphin Conservation Act of 1992, Pub. L. No. 102-523 (1992), 106 Stat. 3425, *codified at* 16 U.S.C. §§ 1411-1418 (1994), granting the Secretary of State authority to "enter into international agreements" to instate a global moratorium of at least five years duration prohibiting tuna harvesting through the use of purse seine nets that capture marine mammals. The policy is to "ensure that the market of the United States does not act as an incentive to the harvest of tuna caught . . . with dolphins" or by using driftnets. 16 U.S.C. § 1411(b)(3).

Also in 1992, Congress passed the Dolphin Protection Consumer Information Act ("DPCIA"), 16 U.S.C. § 1385 (1994), which states in pertinent part:

(d) Labeling Standard

- (1) It is a violation of section 5 of the Federal Trade Commission Act for any producer, importer, exporter, distributor, or seller of any tuna product that is exported from or offered for sale in the United States to include on the label of that product the term "Dolphin Safe" or any other term or symbol that falsely claims or suggests that the tuna

2. Resolving Disputes

By 1990, the Secretary had not issued the comparability findings required by the MMPA to show importing countries had either complied or failed to comply with MMPA standards.¹⁰⁵ Disappointed by this lack of action, Earth Island Institute, a California not-for-profit corporation, filed suit in 1990, seeking to enforce the provisions of the 1988 Amendments.¹⁰⁶ The District Court for the Northern District of California ordered an embargo on August 28, 1990.¹⁰⁷ Less than two weeks later, on September 6, the agency imposed the embargo that the court had ordered.¹⁰⁸ The very next day, however, the government made the required comparability finding and lifted the ban concerning Mexico.¹⁰⁹ Ten days later, Earth Island Institute¹¹⁰ applied to the district court for a tempo-

contained in the product was harvested using a method of fishing that is not harmful to dolphins if the product contains—

(A) tuna harvested on the high seas by a vessel engaged in driftnet fishing; or

(B) tuna harvested in the eastern tropical Pacific Ocean by a vessel using purse seine nets which do not meet the requirements for being considered dolphin safe under paragraph (2).

This legislation introduced the “Dolphin Safe” label, which is attached to tuna products sold in the U.S. so that consumers may make informed decisions about the tuna products they purchase. *See* 16 U.S.C. § 1385(d)(1).

105. *Earth Island Institute v. Mosbacher*, 746 F. Supp. 964, 967 (N.D. Cal. 1990) [*hereinafter Earth Island I-1*], *aff’d*, 929 F.2d 1449 (9th Cir. 1991) [*hereinafter Earth Island I-2*].

106. *Earth Island I-1*, 746 F. Supp. at 964.

107. *See* Taking and Importing of Marine Mammals, Notice of Embargo for Yellowfin Tuna, 56 Fed. Reg. 12,367 (Dep’t Comm. 1991). *See also* Taking and Importing of Marine Mammals Incidental to Commercial Fishing Operations, Notice to Importers, 56 Fed. Reg. 26,995 (Dep’t Comm. 1991). On January 25, 1991, Mexico requested a dispute settlement panel under Article XXIII(2) of the GATT. On September 3, 1991, the panel issued its final opinion in the case, holding that the MMPA, in pertinent provisions, violated the GATT. Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, Aug. 16, 1991, *reprinted at* 30 I.L.M. 1594, 1607. *See also* Skilton, *supra* note 59, at 467.

108. *Earth Island I-2*, 929 F.2d at 1451.

109. *Id.* The findings were required under 50 C.F.R. § 216.24 (1989).

110. Plaintiffs were: (1) Earth Island Institute, a California nonprofit corpora-

rary restraining order prohibiting the importation of yellowfin tuna from Mexico,¹¹¹ arguing that the regulation¹¹² under which the Secretary¹¹³ could reconsider and lift the embargo based on only six months worth of data was invalid as contrary to the statute, which requires embargo determinations based on a full year of data.¹¹⁴ The district court granted this temporary restraining order and later, at the government's request, converted it into a preliminary injunction.¹¹⁵ Judge Henderson stressed that

the continued slaughter and destruction of these innocent victims of the economics of fishing constitutes an irreparable injury to us all, and certainly to the mammals whom Congress intended to protect. Indeed, for those species now threatened with extinction, the harm may be irreparable in the most extreme sense of that overused term.¹¹⁶

The court held that the agency did not have discretion to issue regulations, such as the six-month reconsideration provision, that are in clear conflict with the language in the statute and contrary to its congressional purpose.¹¹⁷ Furthermore, under the regulation, the countries at issue could consistently "exceed MMPA limits for

tion, devoted to the conservation of the world's marine and terrestrial ecosystems, with a membership of approximately 35,000 throughout the United States and the world; (2) the Marine Mammal Fund, a California nonprofit corporation established to "sustain and enhance the ocean ecology with an emphasis on the survival of marine mammal species;" and (3) David R. Brower, a resident of Berkeley, California and a well-known environmental activist. *Earth Island I-1*, 746 F. Supp. at 966.

111. *Earth Island I-2*, 929 F.2d at 1451.

112. 50 C.F.R. § 216.24(e)(5)(viii), 55 Fed. Reg. 11,929 (1990).

113. Defendants were then Secretary of Commerce Robert A. Mosbacher and Secretary of the Treasury Nicholas H. Brady. After succeeding Secretary Mosbacher as Secretary of Commerce, Ronald Brown replaced Mosbacher as a party defendant pursuant to FED. R. APP. P. 43(c)(1). Also defending were Dr. John Knauss, the Administrator of the National Oceanic and Atmospheric Administration, and William W. Fox, Jr., the Assistant Administrator of the National Marine Fisheries Service. *Earth Island I*, 746 F. Supp. at 966. All defendants are collectively referred to as "Federal Defendants."

114. See *Earth Island I-1*, 746 F. Supp. at 969.

115. *Earth Island I-2*, 929 F.2d at 1449.

116. *Earth Island I-1*, 746 F. Supp. at 975.

117. *Id.*

part of each year, yet never be subject to the ban.”¹¹⁸ The court reasoned that, because the regulation created an easy opportunity to circumvent congressional intent,¹¹⁹ the reconsideration regulation does not give foreign countries the incentive to stop the killings, as the Federal Defendants had argued. Ample documentation of its “lax record of promulgating and enforcing standards for foreign fleets”¹²⁰ led the court to conclude that the agency’s programs were not aimed at a more rigid execution of congressional policy.¹²¹

In 1991, the agency had still not implemented a single ban on the importation of tuna. Earth Island again moved for a preliminary injunction,¹²² asking the court to enforce those provisions in the statute that mandated a prohibition of tuna imports from certain foreign countries until positive findings on the incidental taking of dolphins were received.¹²³ Earth Island contended that the MMPA and the district court’s order of August 28, 1990, required the Federal Defendants to ban the importation of tuna from foreign countries “unless and until the Secretary of Commerce had made a positive finding that the average marine mammal incidental taking rate of the exporting nation, as of the end of 1990 was no more than 1.25 times that of the United States fleet.”¹²⁴ The Federal Defendants argued that the Act did not institute any rigid time lines according to which the agency must make its findings, “and that the timing of the findings is therefore a matter of agency discretion.”¹²⁵ Therefore, according to the government, the agency was entitled simply to issue a new regulation extending the deadline to

118. *Earth Island I-2*, 929 F.2d at 1452-53.

119. *Id.* at 1453.

120. *Id.* The court quoted, *inter alia*, the following: “The national marine fisheries service has failed to implement these requirements adequately.” Statement of Sen. Hollings (referring to the 1984 amendments), 134 CONG. REC. S16,336, 16,344 (1988); “[t]he administration has been inexcusably lax in implementing these laws.” Statement of Sen. Adams, *id.* at 16,341.

121. *Earth Island I-2*, 929 F.2d at 1453.

122. *Earth Island Institute v. Mosbacher*, No. C 88-1380, 1991 WL 163753 (N.D. Cal. March 26, 1991).

123. *Id.* at *1.

124. *Id.* at *2.

125. *Id.* at *3.

March 31, 1991.¹²⁶

The court found the data compiled by the NMFS demonstrated that Ecuador, Mexico, Vanuatu, and Venezuela each had exceeded the maximum allowable dolphin kill during the 1989 fishing season¹²⁷ and held that, pursuant to the Act, the Federal Defendants were required to outlaw, by January 1, 1991, the importation of tuna from those countries.¹²⁸ The court further found the Secretary violated the MMPA by failing to make the proper findings and by allowing the continued importation of yellowfin tuna from the four specified nations.¹²⁹

In August of 1991, Earth Island filed another motion in the district court,¹³⁰ this time seeking to compel the enforcement of the secondary embargo provisions contained in section 1371(a)(2)(C) of the MMPA.¹³¹ While both parties agreed that this provision cre-

126. See Extension of Findings Expiration and Interim Final Rule with Request for Comments, 55 Fed. Reg. 53,160-162 (1990).

127. 1991 WL 163753, at *2-*3. The incidental taking rates are rates per country in comparison to the taking rate for United States vessels during the same period: Ecuador (1.4 times the U.S. rate); Mexico (1.58 times the U.S. rate); Vanuatu (1.65 times the U.S. rate); and Venezuela (1.82 times the U.S. rate). *Id.* at *3.

128. *Id.* at *4.

129. *Id.* at *5. The court harshly criticized defendants, stating that they "may not negate the clear statutory intent through the regulatory process," *id.* at *4 (citing *Kokechik Fishermen's Ass'n v. Secretary of Commerce*, 839 F.2d 795, 802-03 (D.C. Cir. 1988)), and that "[i]f the Secretary believes the Act needs an amendment, then it is Congress he must address." *Id.* at *5 (quoting Aug. 28, 1990 Order, 746 F. Supp. 964, 973).

130. *Earth Island Institute v. Mosbacher*, 785 F. Supp. 826 (N.D. Cal. 1992) [*hereinafter Earth Island II-1*], *rev'd sub. nom.* *Earth Island Institute v. Brown*, 28 F.3d 76 (9th Cir.) [*hereinafter Earth Island II-2*], *cert. denied*, 115 S. Ct. 509 (1994).

131. *Earth Island II-1*, 785 F. Supp. at 828. This provision directed the Secretary of the Treasury to

require the government of any intermediary nation from which yellowfin tuna or tuna products will be exported to the United States to certify and provide reasonable proof that it has acted to prohibit the importation of such tuna and tuna products from any nation from which direct export to the United States of such tuna and tuna products is banned under this section within sixty days following the effective date of such ban on importation to the United States.

ated a secondary embargo, they did not agree on the scope of the embargo. Earth Island contended that whereas the primary embargo covered only tuna harvested in the ETP by processes failing to meet U.S. criteria, the secondary boycott covered imports of all tuna and tuna products from intermediary nations, regardless of how the tuna was caught.¹³² The Federal Defendants, on the other hand, claimed that both the primary and the secondary boycott regulated only imports of tuna harvested in the ETP in violation of U.S. standards.¹³³

The district court held that the clear language of section 1371(a)(2)(C) "applie[d] to any intermediary nation from which yellowfin tuna or tuna products will be exported to the United States."¹³⁴ The court reasoned that both Houses of Congress had presumed that the scope of the secondary embargo would encompass the ban of all yellowfin tuna.¹³⁵ Furthermore, the court held

16 U.S.C. § 1371(a)(2)(C).

132. *Earth Island II-1*, 785 F. Supp. at 829-30.

133. *Id.* at 830.

134. *Id.* at 831 (quoting 16 U.S.C. § 1371(a)(2)(C)). According to NMFS regulations, an intermediary nation is "a nation which exports yellowfin tuna or tuna products to the United States, and which imports yellowfin tuna and tuna products." 50 C.F.R. § 216.3 (1995).

The court held that

the secondary embargo provisions of the MMPA specify that in order to overcome the statutory ban and export yellowfin tuna and tuna products—that is, *any and all yellowfin tuna and tuna products*—to the United States, every intermediary nation must provide certification and reasonable proof that it has prohibited the importation of the same products which are banned from direct export to the United States. Failure to meet these requirements subjects the nation to the statutory ban which prohibits the importation of all yellowfin tuna and tuna products from that nation.

Earth Island II-1, 785 F. Supp. at 833 (emphasis added).

135. *Earth Island II-1*, 785 F. Supp. at 833. The court held that the only legislative history available discussing the scope of the secondary embargo supports its interpretation of the unambiguous statutory language. *Id.* at 833-34. The court quoted the House Merchant Marine Fisheries Committee as stating that

[t]he Committee strongly supports this provision in order to prevent embargoed nations from circumventing U.S. restrictions thus weakening the effectiveness of U.S. law. The committee expects that all yellowfin tuna and tuna products, including canned tuna containing

that the decisive question was not whether a certain foreign country actually imported tuna from a nation subject to the ban, but rather, whether this intermediary country has provided the U.S. government with a certification and proof of a prohibition on the importation of tuna that would be banned from direct export from the harvesting country to the U.S.¹³⁶ Thus, the court issued the preliminary injunction, ordering the Federal Defendants to cease the importation of all yellowfin tuna and tuna products from any intermediary nation, until those nations obtained the necessary certification,¹³⁷ and to immediately create procedures to enforce the provisions of any secondary embargo pursuant to the MMPA.¹³⁸ The Federal Defendants appealed to the Ninth Circuit, arguing, for the first time in the course of this litigation,¹³⁹ that the case had been "decided by the wrong federal court" because, pursuant to 28 U.S.C. § 1581(i)(3),¹⁴⁰ the Court of International Trade had exclusive subject matter jurisdiction over the dispute.¹⁴¹

3. Choosing a New Battleground

The Federal Appellants argued that both the ordinary meaning of the term "embargo" and the legislative history of the provision proved that the CIT was the proper court to decide the case. They

any yellowfin tuna, *whether caught in the ETP or not*, will be embargoed."

Id. at 833 (emphasis added) (quoting H.R. REP. NO. 970, 100th Cong., 2d Sess. at 30 (Sept. 23, 1988), reprinted in 1988 U.S.C.C.A.N. 6154).

136. *Id.* at 834. The court furthermore held it was irrelevant whether a foreign country did not import, or had stopped importing tuna banned under the primary embargo or whether a private importer gave a certification of origin regarding a specific tuna shipment. The only requirement of the MMPA is "certification and proof from the government of the intermediary nation." *Id.* at 835.

137. *Id.* at 836.

138. *Id.* Recognizing the burden such an order might impose on U.S. businesses who had already purchased tuna from intermediary nations, the court held that the injunction did not apply to yellowfin tuna and tuna products already purchased. *Id.* at 836-37. The order "appli[ed] to all yellowfin tuna and tuna products exported after Thursday, January 30, 1992." *Id.*

139. Brief of Appellees at 12, *Earth Island II-2*, 28 F.3d 76.

140. See *supra* text accompanying notes 32-48.

141. Opening Brief for Appellants Secretary of Commerce *et al.* at 21, *Earth Island II-2*, 28 F.3d 76.

asserted that, while the MMPA itself did not use the term “embargo,” all relevant players—Congress,¹⁴² the Secretary of Commerce,¹⁴³ the District Court,¹⁴⁴ the Court of Appeals,¹⁴⁵ and Appellees themselves¹⁴⁶—had been using the term in its “ordinary meaning” to describe the MMPA’s contemplated tuna ban against intermediary nations pursuant to 16 U.S.C. § 1371(a)(2)(C).¹⁴⁷ In addition, the Federal Appellants argued that the Supreme Court’s analysis in *K Mart*¹⁴⁸ of the term “embargo” squarely fits the MMPA’s secondary embargo at issue in this case.”¹⁴⁹ The Federal Appellants asserted that “[z]ero is precisely the quantity of merchandise — yellowfin tuna and tuna products — which embargoed intermediary nations can export to the United States.”¹⁵⁰ Appellants further insisted that the Court had unequivocally rebuffed Earth Island’s view that an embargo has to facilitate a “traditional customs purpose” to fit within the scope of the statute.¹⁵¹

142. When adopting the 1988 amendments to the MMPA, “Congress used the terms ‘embargo’ and ‘embargoed’ to describe the intended purpose and effect of both the primary and secondary tuna import bans.” Reply Brief for Appellants Secretary of Commerce at 10, *Earth Island II-2*, 28 F.3d 76 (citing H.R. REP. NO. 970, 100th Cong., 2d Sess. 30 (1988), reprinted in 1988 U.S.C.C.A.N. 6154).

143. *Id.* at 12.

144. The District Court for the Northern District of California, Henderson, C.J., used the term “embargo” throughout its decision in *Earth Island II-1*, 785 F. Supp. 826.

145. The Court of Appeals for the Ninth Circuit, in a case involving a similar provision of the MMPA, used the term “embargo” repeatedly. *Earth Island I-2*, 929 F.2d 1449.

146. Reply Brief for Appellants Secretary of Commerce at 9-10, *Earth Island II-2*, 28 F.3d 76 (citing Plaintiffs’ Pleadings and Reporter’s Transcript of Proceedings, Oct. 7, 1991).

147. *Id.* at 12.

148. See *supra* text accompanying notes 41-48.

149. Opening Brief for Appellants Secretary of Commerce at 22, *Earth Island II-2*, 28 F.3d 76.

150. *Id.*

151. Reply Brief for Appellants Secretary of Commerce at 13, *Earth Island II-2*, 28 F.3d 76 (citing *K Mart*, 485 U.S. at 184, which rejected “trade policy” as the necessary mark of an embargo). The Federal Appellants further claimed that the exception contained in the statute was not applicable because the MMPA embargo was unquestionably not meant to protect “public health or safety,” but

Earth Island, on the other hand, argued that the MMPA did not impose an embargo within the meaning of the Court's decision in *K Mart*, but rather "establishe[d] certain conditions precedent to the importation of some types of tuna from some nations,"¹⁵² otherwise permitting the free importation of any kind and amount of tuna.¹⁵³ Earth Island contended that subsections 1371(a)(2)(B) and (C)

require defendants to prohibit the importation of yellowfin tuna unless the exporting nation first satisfies certain statutorily-prescribed import conditions. In the case of Section 1371(a)(2)(C), the conditions include certification and reasonable documentary proof by the government of the intermediary nation that it has acted to prohibit the importation of yellowfin tuna from those nations whose tuna is subject to direct import sanctions under Section 1371(a)(2)(B).¹⁵⁴

Thus, according to Earth Island, the provision does not impose any restrictions on the importation of tuna, but rather "imposes certain congressionally-mandated *conditions of entry*."¹⁵⁵ Earth Island noted that the Court in *K Mart* had ruled that the grey-market import prohibitions "did *not* constitute embargoes,"¹⁵⁶ and pointed to the Court's analysis:

Congress did not commit to the Court of International Trade's exclusive jurisdiction *every* suit against the government challenging customs-related laws and regulations. Had Congress wished to do so it could have expressed such an intent much more clearly and simply by, for example conveying to the specialized court "exclusive jurisdiction . . . over all civil actions against the [Government] directly affecting imports."¹⁵⁷

Earth Island thus argued that the Court saw a difference between embargoes, which unconditionally preclude merchandise from enter-

rather to conserve marine mammals. Opening Brief for Appellants Secretary of Commerce at 21, *Earth Island II-2*, 28 F.3d 76.

152. Brief of Appellees at 16-17, *Earth Island II-2*, 28 F.3d 76.

153. *Id.* at 17.

154. *Id.*

155. *Id.*

156. *Id.* at 15.

157. *Id.* (quoting *K Mart*, 485 U.S. at 188-89).

ing a country, and import conditions,¹⁵⁸ and asserted that the Court's holding in *K Mart* was clear and unambiguous when it stated that "Congress declined to grant [the CIT] jurisdiction to review challenges to conditions of importation."¹⁵⁹

Earth Island further contended that the Customs Courts Act of 1980,¹⁶⁰ which introduced subparagraph (i) of section 1581, was never intended to enlarge the court's traditional grant of jurisdiction over international trade matters, but rather was enacted to clarify its scope.¹⁶¹ Asserting that the CIT had exclusive jurisdiction over cases "arising out of the federal statutes governing import transactions," cases "involving classification and valuation issues," and "antidumping and countervailing duty investigations,"¹⁶² Earth Island claimed that

nothing . . . in the legislative history, even remotely suggests that the CIT has the authority or the *expertise* to interpret the Secretary of Commerce's mandatory duties under non-trade statutes, such as the MMPA, which impose import conditions to encourage foreign nation cooperation in international environmental protection matters that are otherwise beyond the regulatory reach of the federal government.¹⁶³

Thus, Earth Island argued that none of the issues in the Federal Defendants' substantive arguments "bears any resemblance to the questions of classification, valuation, rate of duties, or other trade matters within the special expertise and traditional jurisdiction of the CIT."¹⁶⁴

Nevertheless, the Ninth Circuit rejected these arguments and dismissed the suit in a four-page opinion.¹⁶⁵ Following the Supreme Court in *K Mart*, the court of appeals stated that the term "embargo," in its "ordinary meaning," was a "government order

158. *Id.* at 16.

159. *Id.* at 20 (quoting *K Mart*, 485 U.S. at 189).

160. Pub. L. No. 96-417, 94 Stat. 1727 (1980). *See also supra* text accompanying notes 23-27.

161. Brief of Appellees at 21-24, *Earth Island II-2*, 28 F.3d 76.

162. *Id.* at 22-23 (quoting H.R. REP. NO. 96-1235, 96th Cong., 2d Sess. at 21 (1980), *reprinted in* 1980 U.S.C.C.A.N. at 3732-33).

163. Brief of Appellees at 24, *Earth Island II-2*, 28 F.3d 76 (emphasis added).

164. *Id.*

165. *Earth Island II-2*, 28 F.3d 76.

prohibiting commercial trade with individuals or businesses of other nations . . . prevent[ing] goods from entering a nation and . . . imposed on a product or on an individual country."¹⁶⁶ The court noted that the term "embargo" did not "encompass all importation prohibitions, but rather name[d] a subclass of importation prohibitions,"¹⁶⁷ and explained that an importation prohibition is not an "embargo" if it only affords "a mechanism by which a private party might . . . enlist the Government's aid in restricting the quantity of imports in order to enforce private rights."¹⁶⁸ The court pointed out that embargoes may be imposed for a variety of "reasons other than the protection of public health or safety,"¹⁶⁹ and that, therefore, Appellees' argument that an embargo must be rooted in international trade policy, was faulty.

Further, the court did not agree with Earth Island's interpretation of the legislative history of the Customs Courts Act of 1980. The court found that the purpose of the Act was to resolve the status, jurisdiction, and powers of the Customs Court.¹⁷⁰ The court rejected Earth Island's argument that the jurisdiction of the CIT should be "interpreted functionally" and should be limited to the court's areas of expertise, finding it contrary to Congress' clearly articulated "jurisdictional line."¹⁷¹ Furthermore, the court pointed out that the Supreme Court had already held that section 1581 "extends jurisdiction to all kinds of embargoes, not just those rooted in trade policy or import transactions."¹⁷² The court reasoned, therefore, that any action brought under 16 U.S.C. § 1371(a)(2)(C) against the United States is subject to the exclusive jurisdiction of the CIT pursuant to 28 U.S.C. § 1581(i)(3).¹⁷³

166. *Id.* at 77 (quoting *K Mart*, 485 U.S. 184).

167. *Id.*

168. *Id.*

169. *Id.* (quoting 28 U.S.C. § 1581(i)(3) (1988)).

170. *Id.* at 78 (quoting H.R. REP. NO. 96-1235, 96th Cong., 2d Sess. 18 (1980), reprinted in 1980 U.S.C.C.A.N. 3729, 3731).

171. *Id.*

172. *Id.*

173. *Id.* at 79. The circuit court vacated the district court's grant of a preliminary injunction, *Earth Island II-1*, 785 F. Supp. 826, and remanded. *Earth Island II-2*, 28 F.3d at 79. The Supreme Court denied *certiorari* on November 14, 1994, *Earth Island Institute v. Brown*, 115 S. Ct. 509 (1994), leaving the environmental

B. *Sea Turtles v. Shrimp*

The Sea Turtle litigation has helped to further clarify the scope of the CIT's jurisdiction as to claims containing environmental issues. Much like the dolphin dispute just discussed, litigation involving the sea turtle law has turned on the interpretation of certain international trade statutes and regulations. Also, like in the dolphin case, the Ninth Circuit concluded that the CIT, a federal court specializing in international trade issues, has indeed the authority and proper expertise to competently handle environmental disputes.

1. Legislative Background

Congressional regulation originated in response to a dramatic decline in the sea turtle population.¹⁷⁴ Today there are only seven species of sea turtles remaining.¹⁷⁵ Five of these seven species¹⁷⁶ are present in the waters off the United States coast between North Carolina and Texas, showing large numbers of incidental killings in shrimp trawls.¹⁷⁷ These five species are currently listed as either endangered or threatened under the Endangered Species Act of 1973.¹⁷⁸

In 1978, the National Marine Fisheries Service commenced a research project to develop a device that would enable shrimp trawlers to leave sea turtles unharmed while incurring minimal costs for the shrimpers.¹⁷⁹ By 1981, NMFS had developed the Turtle Excluder Device ("TED"), a device that would free 97% of the sea turtles caught in shrimp trawls, "with no loss of

groups with a tough decision to make: whether to refile the suit in the CIT after years of litigation in the federal courts. As this Note goes to publication, Earth Island has not filed an action in the CIT challenging the Executive Branch's handling of the dolphin/tuna legislation.

174. Sea Turtle Conservation; Shrimp Trawling Requirements, 52 Fed. Reg. 24,244 (1987).

175. *Id.*

176. These five species are: loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempfi*), green turtle (*Chelonia mydas*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*). *Id.*

177. *Id.*

178. 16 U.S.C. §§ 1531-1544 (1994).

179. 52 Fed. Reg. 24,244.

shrimp.”¹⁸⁰ In 1983, NMFS initiated a program to persuade shrimp fishermen to use the TEDs voluntarily.¹⁸¹ Nevertheless, shrimp fishermen did not regularly use the TEDs,¹⁸² which prompted NMFS to contemplate regulations ordering shrimp fishermen to utilize TEDs or to limit tow times to protect the sea turtles at risk of becoming extinct.¹⁸³ On June 29, 1987, the Department of Commerce issued such regulations.¹⁸⁴

Although substantial compliance with these regulations caused a marked reduction in domestic sea turtle deaths, Congress felt that further laws with the specific purpose of confronting “the global threat to these species posed by the unregulated shrimp fishing operations of foreign fleets” were necessary.¹⁸⁵ In 1989, Congress enacted section 609, the “Sea Turtle Act,”¹⁸⁶ to encourage foreign shrimp trawlers to use TEDs or similar methods in order to avoid the accidental drowning of sea turtles.¹⁸⁷ The Court of Appeals for

180. *Id.* “Since then NMFS has modified its TED a number of times, making it smaller, lighter and collapsible for easier and safer handling. The NMFS TED also releases debris and unwanted bycatch.” *Id.* The technology of the TED is explained in detail at 52 Fed. Reg. 24,257-261.

181. 52 Fed. Reg. 24,244. Working closely with a number of industry groups, NMFS delivered TEDs to shrimp fishermen and explained and demonstrated to them how to install and use the devices. *Id.* at 24,244-245.

182. *Id.* at 24,245.

183. *Id.*

184. Opening Brief of Appellants at 5, *Earth Island Institute v. Christopher*, 6 F.3d 648 (9th Cir. 1993) [*hereinafter Earth Island III*] (citing 52 Fed. Reg. 24,244-45). These regulations were implemented at 50 C.F.R. Parts 217, 222, and 227 (1995).

185. Opening Brief of Appellants at 5, *Earth Island III*, 6 F.3d 648.

186. Section 609 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-162, 103 Stat. 1037, *codified at* 16 U.S.C. § 1537 (Supp. 1990).

187. *Id.* At the time, the provision read:

(a) The Secretary of State, in consultation with the Secretary of Commerce, shall—

(1) *initiate negotiations* . . . for the development of bilateral or multi-lateral agreements with other nations . . . ;

(2) *initiate negotiations* . . . with all foreign governments which are engaged in . . . commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, . . . ;

the Ninth Circuit described the Act as containing two separate and distinct mandates.¹⁸⁸ Subsection (a) “requires the Secretary of State to initiate negotiations with foreign countries to develop treaties to protect sea turtles, and to report to Congress about such negotiations.”¹⁸⁹ Subsection (b) “requires limitations on the importation of shrimp from nations that have not moved to protect sea turtles.”¹⁹⁰

(3) *encourage such other agreements* to promote the purposes of this section with other nations for the protection of specific ocean and land regions which are of special significance to the health and stability of such species of sea turtles;

(4) *initiate the amendment of any existing international treaty* for the protection and conservation of such species of sea turtles to which the United States is a party in order to make such treaty consistent with the purposes and policies of this section

(b)(1) In general.

The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).

(2) Certification procedure.

The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that—

(A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

(B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or

(C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

Id. (emphasis added).

188. See *Earth Island III*, 6 F.3d at 650.

189. *Id.*

190. *Id.*

2. Litigation

Claiming the federal government¹⁹¹ had failed to implement the statutory directives of section 609, on February 24, 1992, Earth Island Institute and Todd Steiner, the Director of the Sea Turtle Restoration Project,¹⁹² filed a complaint in the District Court for the Northern District of California. Earth Island sued for a declaratory judgment, a review of agency action, a writ of mandamus, and injunctive relief. The Federal Defendants moved to dismiss the complaint on jurisdictional grounds before any presentation on the merits.

The District Court granted the Federal Defendants' motion to dismiss the complaint on two grounds.¹⁹³ Noting that Earth Island's claims under section 609(a) implicated the Executive Branch's exclusive foreign affairs function under Article II, Section 2 of the Constitution of the United States, the court held that it lacked subject matter jurisdiction under the political question doctrine.¹⁹⁴ Regarding Earth Island's assertions relating to section 609(b), the court found that those "claims involve 'embargoes' or other 'quantitative restrictions' on the importation of products into the United States, which matters rest within the exclusive jurisdiction of the [CIT] under 28 U.S.C. §§ 1581(i)(3) and (4)."¹⁹⁵ The court dismissed the claims accordingly, and Earth Island appealed.

191. Specifically, the named defendants were Secretary of State James A. Baker, III, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs Curtis Bohlen, Secretary of Commerce Barbara Franklin, and Assistant Administrator of the NMFS Dr. William W. Fox, Jr. [collectively the "Federal Defendants" or "Federal Appellees"]. See FED. R. APP. P. 43(c)(1).

National Fisheries Institute, Inc. ("NFI") moved to intervene on March 19, 1992. NFI's motion to intervene was granted by the court on May 6, 1992. Brief for Defendant-Intervenor/Appellee National Fisheries Institute, Inc. at 5, *Earth Island III*, 6 F.3d 648.

192. The Sea Turtle Restoration Project is a venture established by Earth Island Institute in 1989 in order to protect endangered species of sea turtles. All plaintiffs are collectively referred to as "Earth Island."

193. *Earth Island Institute v. Baker*, No. C 92-0832 JPV, 1992 WL 565222, at *1 (N.D. Cal. Aug. 6, 1992) (Vukasin, J.), *aff'd sub nom.* *Earth Island Institute v. Christopher*, 6 F.3d 648 (9th Cir. 1993).

194. *Id.*

195. *Id.*

On appeal, Earth Island argued that Congress could not have intended to give exclusive jurisdiction to the “narrowly-specialized” CIT through section 1581, “an obscure provision of the Customs Court [sic] Act of 1980.”¹⁹⁶ Earth Island asserted that Congress intended for plaintiffs to have “full access to the ‘specialized expertise’ of the U.S. Customs Court (now the CIT) and the U.S. Court of Customs and Patent Appeals (now the U.S. Court of Appeals for the Federal Circuit)” in cases involving “*import transactions*.”¹⁹⁷ Earth Island further contended that section 1581(i) “was included as a ‘residual grant of jurisdictional authority’ to ensure that *other, similar import-related disputes* were heard on their merits.”¹⁹⁸ Earth Island claimed that section 609 was a “non-trade statute[] . . . that incidentally impose[d] import conditions” to facilitate cooperation by foreign nations in international environmental protection matters.¹⁹⁹

Again, Earth Island urged that the Supreme Court’s interpretation of section 1581 in *K Mart* supported its position.²⁰⁰ Pointing out that “the ‘grey market’ import prohibitions under Section 526(a) did *not* constitute ‘embargoes’ within the meaning of Section 1581(i)(3),”²⁰¹ Earth Island argued that, in this case, like in the examples given by the Supreme Court, section 609(a) merely imposes “*conditions precedent* on the importation of certain shrimp products from foreign nations, adopted by Congress to encourage the protection of endangered and threatened sea turtles by foreign fishing fleets.”²⁰² Earth Island claimed that

while Section 609 imposes certain congressionally-mandated *conditions of entry* on the importation of shrimp and shrimp products, it in no way functions as a quantitative restriction on the amounts of such shrimp and shrimp products that may ultimately enter the country, and it certainly does not constitute an absolute embargo

196. Opening Brief of Appellants at 11, *Earth Island III*, 6 F.3d 648.

197. *Id.* at 13 (citing H.R. REP. NO. 96-1235, 96th Cong., 2d Sess. at 20 (1980), *reprinted in* 1980 U.S.C.C.A.N. at 3731 (emphasis in original)).

198. *Id.* at 13-14 (citing H.R. REP. NO. 96-1235, 96th Cong., 2d Sess. at 47 (1980), *reprinted in* 1980 U.S.C.C.A.N. at 3758-59 (emphasis added)).

199. *Id.* at 15.

200. *Id.*

201. *Id.* at 16.

202. *Id.* at 17-18.

of 'zero' on such products.²⁰³

Earth Island again likened the import provisions of section 609 to "the licensing, tagging and inspection conditions" in *K Mart*.²⁰⁴

Finally, Earth Island claimed that under *Japan Whaling Ass'n v. American Cetacean Society*,²⁰⁵ a factually analogous case, "judicial review of the government's implementation of import sanctions designed to facilitate environmental objectives is proper in the district court."²⁰⁶ In *Japan Whaling*, plaintiffs questioned the Commerce Secretary's failure to "certify"²⁰⁷ Japan for certain whaling activities that decreased the force of international whaling standards. Such a certification would have resulted in an automatic and compulsory "imposition of numerical import restrictions on certain Japanese products."²⁰⁸ Earth Island claimed that if plaintiffs' arguments in *Japan Whaling* had been successful the importation of certain products would have been "*directly affected* . . . in much the same way that Earth Island's challenge to the Secretary's failure to properly certify the compliance of foreign nations under Section 609(b) could affect the importation of certain shrimp . . . from those nations."²⁰⁹ Earth Island reasoned that the Supreme Court's failure to question the district court's subject matter jurisdiction in *Japan Whaling* meant that "not every civil action 'affecting' the importation of goods" is within the CIT's statutory subject matter jurisdiction.²¹⁰

The Federal Appellees, however, argued that the Supreme Court's interpretation of the term "embargo" in section 1581(i)(3) "squarely

203. *Id.* at 18.

204. *Id.*

205. 478 U.S. 221 (1986).

206. Opening Brief of Appellants at 20, *Earth Island III*, 6 F.3d 648.

207. Certification of a foreign country under the 1979 Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1821(e)(2)(A)(i)(1994), results in a reduction of that country's fishery allocation maintained in U.S. waters. See Ted L. McDorman, *The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles*, 24 *GEO. WASH. J. INT'L L. & ECON.* 477, 485-90 (1991).

208. Opening Brief of Appellants at 20, *Earth Island III*, 6 F.3d 648.

209. *Id.*

210. *Id.* at 20-21.

fit section 609's ban on shrimp imports,"²¹¹ contending that every time the federal government prevents the importation of certain products into the United States, this action comprises "an embargo for the purposes of establishing exclusive jurisdiction in the CIT."²¹² The Federal Appellees asserted that the provisions of section 609 did not, as Earth Island argued, "incidentally impos[e] import conditions," but that the import "provision is the primary enforcement measure and constitutes a critical provision of Section 609."²¹³ The Supreme Court, in *K Mart*, the Federal Appellants further contended, unequivocally stated that an embargo or quantitative restriction ensuing from "non-trade related governmentally imposed embargoes, falls within the exclusive jurisdiction of the CIT."²¹⁴ The Federal Appellees pointed to the Supreme Court's example in *K Mart* of a typical embargo found in 19 C.F.R. § 12.60 regarding fur seals and sea otter skins, and claimed that this embargo based on "ecology" proved that even "conditions precedent" to importation of shrimp under section 609 had to be considered an embargo within the meaning of section 1581(i)(3).²¹⁵ The Federal Appellees argued that "[b]oth the statutes and their implementing regulations prohibit importation of certain products unless the product was obtained pursuant to the proper method."²¹⁶

Further, the Federal Appellees argued that Earth Island's reliance on *Japan Whaling* was misplaced²¹⁷ because "no party to [that] case raised an issue concerning exclusive jurisdiction in the

211. Brief of the Federal Appellees at 13, *Earth Island III*, 6 F.3d 648.

212. *Id.*

213. *Id.* at 13-14.

214. *Id.* at 16.

215. *Id.* at 17. Section 19 C.F.R. § 12.60 states that "importation . . . of the skins of fur seals or sea otters is prohibited *if such skins were taken* contrary to the provisions of . . . the act of February 26, 1944." *Id.* (emphasis added). This Act makes it unlawful for "any citizen of the United States . . . to transport, import, offer for sale, or have in possession . . . raw, dressed, or dyed skins of sea otters taken contrary to" this Act. See Brief of the Federal Appellees at 17, *Earth Island III*, 6 F.3d 648.

216. Brief of the Federal Appellees at 18, *Earth Island III*, 6 F.3d 648.

217. *Id.*

CIT.”²¹⁸ In addition, the Federal Appellees contended that the facts in *Japan Whaling* differed in important aspects from those in the present litigation.²¹⁹ In *Japan Whaling*, plaintiffs did not request that the court impose an embargo, but rather asked for an order by the court directing “the Secretary to certify to the President that Japan’s whale harvesting operations ‘diminished the effectiveness’ of the International Convention for the Regulation of Whaling,” thus making the imposition of import restrictions by the President a completely discretionary act.²²⁰

Finally, the Federal Appellees claimed that the legislative history of the Customs Courts Act of 1980 did not support Earth Island’s argument.²²¹ The Federal Appellees claimed that since the language of 28 U.S.C. § 1581(i) was unambiguous as to the meaning of the term “embargo” and Congress expressed no contrary intent, the court was not required to examine the legislative history of the provision.²²² Alternatively, should one resort to legislative history, the Federal Appellees pointed out that according to the legislative history, section 1581(i) was a “residual grant of jurisdictional authority . . . [which] *expands* the exclusive jurisdiction of the Court of International Trade,” and that the enactment of such a “*broad* jurisdictional grant” was to suspend the then existing uncertainty regarding the boundaries between the jurisdiction of the federal district courts and the Court of International Trade.²²³

The Court of Appeals agreed with the Federal Appellees and held that, under *K Mart*, the CIT had exclusive subject matter jurisdiction over the case.²²⁴ It reasoned that Earth Island’s interpretation

218. *Id.* at 18-19.

219. *Id.* at 19.

220. *Id.* at 19-20 (citing 22 U.S.C. § 1978(a)(4) (1994)).

221. *Id.* at 19.

222. *Id.* at 19-20. In construing statutory terms, “[i]f the language is unambiguous, its plain meaning controls unless Congress has clearly expressed a contrary legislative intent.” *Id.* (quoting *Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy*, 898 F.2d 1410, 1417 (9th Cir. 1990)).

223. Brief of the Federal Appellees at 20-21, *Earth Island III*, 6 F.3d 648 (quoting H.R. REP. NO. 96-1235, 96 Cong., 2d Sess. at 47 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3758 (emphasis added)).

224. *Earth Island III*, 6 F.3d at 651.

of *K Mart* was misguided in two aspects.²²⁵ First, the Supreme Court had rejected the view that section 1581(i)(3) referred only “to embargoes arising out of trade policy.”²²⁶ Rather, according to the Supreme Court, “embargoes are imposed for a broad range of purposes, including public health, safety, morality, foreign affairs interests, law enforcement, and ecology.”²²⁷ The court pointed to the regulation prohibiting the importation of sea otters²²⁸ and found that “[t]he similarity between that ban on sea otters, and the ban on shrimp products in this case, undermines appellants’ argument that the subject matter of this lawsuit is beyond the expertise of the CIT.”²²⁹

The court also disagreed with Earth Island’s interpretation of the term “embargo” and the description of the shrimp ban as an “import restriction” or “condition precedent.”²³⁰ The court explained that the Supreme Court, in *K Mart*, did not find an embargo because “there was no governmental ban on importation. Instead, private parties sought to enforce a private right with governmental assistance.”²³¹ In this case, however, the shrimp ban “is clearly a governmental ban” within the *K Mart* definition of embargo.²³² The court also found that it was bound by its decision in *Cornet Stores v. Morton*.²³³ In *Cornet Stores*, the court acknowledged the Customs Court’s exclusive subject matter jurisdiction regarding a case in which an import duty surcharge imposed under the Trading With the Enemy Act had been challenged.²³⁴ The court ruled that

225. *Id.*

226. *Id.* (quoting 485 U.S. 176, 184 (1988)).

227. *Id.*

228. 19 C.F.R. § 12.60 (1987). See also *supra* text accompanying note 47.

229. *Earth Island III*, 6 F.3d at 652.

230. *Id.*

231. *Id.* (emphasis in original).

232. *Id.*

233. 632 F.2d 96 (9th Cir. 1980), *cert. denied*, 451 U.S. 937 (1981). In *Cornet Stores*, plaintiffs sued the Treasurer of the United States to recover customs duties paid pursuant to the Trading with the Enemy Act (“Act”). *Id.* at 97. The court held that although the language of § 9(a) of the Act could be construed to grant jurisdiction to the district courts, Congress had unambiguously given the CIT the exclusive jurisdiction over customs matters, expressly denying the district courts jurisdiction over “matters within the jurisdiction of the Customs Court.” *Id.* at 98.

234. *Earth Island III*, 6 F.3d at 652 (citing Trading With the Enemy Act, 50

any conflict between the exclusive jurisdiction of the Customs Court and the jurisdiction of the federal district courts should be "resolved by upholding the exclusivity of the Customs Court jurisdiction."²³⁵

In an illuminating dissent, Circuit Judge Brunetti argued that the Court of Appeals lacked jurisdiction to make any decision regarding the claims made under section 609(a) and section 609(b).²³⁶ While Judge Brunetti agreed with the majority's interpretation of section 609(b), he did not agree with the holding that the claim under section 609(a) was not justiciable under the political question doctrine.²³⁷ Rather, he reasoned, because the CIT has exclusive jurisdiction over "any action against the government commenced under section 609 . . . we have none at all. We cannot pass on the validity, constitutional or otherwise, of section 609(a) in this case."²³⁸ Judge Brunetti disagreed with the majority's conclusion that subsections (a) and (b) are "entirely separate 'law[s] of the United States.'"²³⁹ Although the claim under 609(a) itself did not request an embargo or other quantitative restriction, there was no question that it "arises out of a law (§ 609) providing for embargoes or other quantitative restrictions."²⁴⁰ Judge Brunetti argued that just as the CIT, in *Vivitar Corp. v. United States*,²⁴¹ looked not to each subsection of the provision at issue, but to the provision as a whole, the court of appeals should, likewise, view section 609 as a whole.²⁴²

Judge Brunetti argued that "[t]his common-sense reading of

U.S.C.A. App. § 5(b) (West 1990 & Supp. 1995)).

235. *Id.* (quoting *Cornet Stores*, 632 F.2d at 98).

236. *Id.* at 654-56.

237. *Id.* at 654.

238. *Id.*

239. *Id.*

240. *Id.* (quoting 28 U.S.C. § 1581(i)(3)).

241. 585 F. Supp. 1419 (Ct. Int'l Trade), *aff'd*, 761 F.2d 1552 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986).

242. *Earth Island III*, 6 F.3d at 654-55. The provision at issue in *Vivitar* was 19 U.S.C. § 1526, which: (a) prohibited the importation of certain merchandise, and subsection (b) provided for the seizure and forfeiture of merchandise imported in violation of customs laws. Judge Brunetti specifically pointed out that this holding was affirmed by the Court of Appeals for the Federal Circuit and that the Supreme Court denied *certiorari*. *Id.* at 654.

§ 1581 effectuates precisely the result Congress directed in enacting that section in 1980.”²⁴³ He continued by noting that nowhere in section 1581(i) or in that section’s legislative history was there any evidence that it granted subject matter jurisdiction only over distinct claims specifically invoking or challenging an embargo.²⁴⁴ Judge Brunetti understood the provision as granting to the CIT jurisdiction only “over *whole civil actions*, not just particular claims,” adding that the statute was unambiguous.²⁴⁵ Moreover, he argued, the majority’s holding created an “unworkable” rule: actions under provisions like section 609 “simply cannot be neatly separated into embargo-related and non-embargo-related parts.”²⁴⁶ Therefore, “it is within the CIT’s jurisdiction to decide whether there is a separation of powers question,” and the case should have been dismissed altogether.²⁴⁷ As will be seen in Part III of this Note, Earth Island refiled this suit in the CIT where it obtained a favorable decision on the merits.

III. ENVIRONMENTAL CASES IN THE CIT

Despite Earth Island’s apparent concern that the CIT judges’ expertise in trade matters would disadvantage environmental causes, a review of the three environmental cases thus far decided by the court does not bear that out.²⁴⁸ To the contrary, all three cases

243. *Id.* at 655. As authority, Judge Brunetti quoted American Ass’n of Exporters & Importers v. United States, 751 F.2d 1239, 1245 (Fed. Cir. 1985), which, in turn, cited S. REP. NO. 466, 96th Cong., at 4-5. “Because the statutes defining the jurisdiction . . . are so intricate and because international trade problems have become so complex, it has become increasingly more difficult to determine” if a specific case is entrusted to “the exclusive subject matter jurisdiction of the Customs Court.” *Id.* Judge Brunetti pointed out that the 1980 amendments sought to change this situation “by clarifying the existing jurisdictional statutes relating to the United States Customs Court and by *expanding the jurisdiction of the Court* to include any civil actions involving imports and a statute, . . . which is directly and substantially concerned with international trade.” *Id.* (emphasis in original).

244. *Id.* (citing H.R. REP. NO. 96-1235, 96th Cong., 2d Sess., *reprinted in* 1980 U.S.C.C.A.N. 3729-3786).

245. *Id.*

246. *Id.*

247. *Id.* at 656.

248. As the date of trade publication, only three environmental cases have been decided by the CIT. Interview with Eric S. Rothman, Senior Law Clerk to the

containing environmental matters have been decided in favor of the environment. The cases have turned on the reasoned and unbiased interpretation of international trade legislation by the CIT. Furthermore, each of the cases was resolved within relatively short periods of time, an added bonus for the prevailing parties.

A. *Finnish Elks*

In 1993, the Secretary of the Interior certified to the President that Taiwan was "a country whose activities were diminishing the effectiveness of international conservation measures."²⁴⁹ This was done pursuant to the Pelly Amendment to the Fisherman's Protective Act of 1967,²⁵⁰ which "permits restriction of imports of any

Honorable Thomas J. Aquilino, Jr., United States Court of International Trade (March 20, 1996).

249. *Florsheim Shoe Co. v. United States*, 880 F. Supp. 848, 849 (Ct. Int'l Trade 1995).

250. The Pelly Amendment to the Fisherman's Protection Act of 1967, 22 U.S.C. § 1978 (1994), reads in pertinent part:

Restriction on importation of fishery or wildlife products from countries which violate international fishery or endangered or threatened species programs

(a) Certification to President

(1) When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the *Secretary of Commerce shall certify such fact* to the President.

(2) When the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary making such finding shall certify such fact to the President.

(3) In administering this subsection, the Secretary of Commerce or the Secretary of the Interior, as appropriate, shall—

(A) *periodically monitor* the activities of foreign nationals that may affect the international programs referred to in paragraphs (1) or (2); and

(B) *promptly investigate* any activity by foreign nationals that, in the opinion of the Secretary, may be cause for certification under paragraph (1) and (2);

(C) *promptly conclude*; and reach a decision with respect to; any

product from countries which violate international fishery or endangered or threatened species programs.”²⁵¹ The Secretary found that while Taiwan did not have indigenous populations of tigers and rhinoceroses, it nevertheless traded in the parts and products of these animals in violation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).²⁵² On August 2, 1994, the President issued a Proclamation, “directing the prohibition of ‘the importation of fish or wildlife, . . . and their parts and products, of Taiwan’”²⁵³

In October of 1994, Plaintiff Florsheim Shoe Corporation attempted to import shoes made from Finnish elk skin and manufactured in Taiwan.²⁵⁴ The United States Fish and Wildlife Service seized the shoes at the point of entry “as articles barred under the Proclamation.”²⁵⁵ Florsheim challenged this decision,²⁵⁶ arguing that the term “of Taiwan” in the Presidential Proclamation “extends only to products made from wildlife native to Taiwan.”²⁵⁷ Thus, Florsheim reasoned, the embargo only extended to products made in Taiwan from fish and wildlife that was itself taken from

investigation commenced under subparagraph (B).

(4) Upon receipt of any certification made under paragraph (1) or (2), the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of *any products from the offending country* for any duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement of Tariffs and Trade. . . .

Id. (emphasis added).

251. *Florsheim Shoe Co.*, 880 F. Supp. at 849. The Fisherman’s Protective Act of 1967 is codified at 22 U.S.C. §§ 1971-1980 (1994). The embargo has since been lifted. *See, e.g., U.S. Lifting Trade Penalties on Taiwan*, N.Y. TIMES, July 1, 1995, at A4, col. 6.

252. *Florsheim Shoe Co.*, 880 F. Supp. at 849. CITES is published at 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975).

253. *Florsheim Shoe Co.*, 880 F. Supp. at 850 (quoting Imposition of Prohibition Pursuant to Section 8(a)(4) of the Fisherman’s Protective Act of 1967, as amended, 59 Fed. Reg. 40,463 (1994)).

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* Florsheim contended that “analysis of the punctuation and grammatical construction of the Proclamation’s primary mandate . . . restricts the scope of the embargo.” *Id.*

the wild in Taiwan.²⁵⁸

Chief Judge DiCarlo of the CIT disagreed.²⁵⁹ He reasoned that rules of punctuation and rules of statutory construction required that the embargo “appl[y] to *all wildlife products* from Taiwan, whether or not the wildlife used to make the product was taken from the wild in Taiwan.”²⁶⁰ The court held that the Proclamation’s incorporation of the Lacy Act definitions²⁶¹ and its import declaration requirements²⁶² “prescribe[] that the phrase, ‘and their parts and products,’ may include products of Taiwan made from wild animals originating elsewhere.”²⁶³ The court further ruled that the design and purpose of the Proclamation demand the same result.²⁶⁴

The objective of the Pelly Amendment to the Fisherman’s Protective Act and the Presidential Proclamation was to stop the commerce in endangered species, “whether or not those species originated in the home country.”²⁶⁵ The court pointed out that Congress was well aware of the need to define the scope broadly when it enlarged the President’s discretionary authority under the Pelly Amendment, expanding it from the power to prohibit only products made of wildlife taken from the country in question, to the ability to “levy import sanctions on *any* product” from that state.²⁶⁶ Any other interpretation, the court reasoned, “would precisely excise the very mischief the President sought to avert—to preclude Taiwan’s trade in rhinoceroses and tigers.”²⁶⁷ For the provision to be effective, the President’s Proclamation must necessarily include all products from wildlife; whether the wildlife is native to the certi-

258. *Id.*

259. *See id.* at 850-51.

260. *Id.* at 851 (emphasis in original).

261. *See* 16 U.S.C. § 3371 (1994); 50 C.F.R. § 10.12 (1995).

262. *See* 50 C.F.R. § 14.61 (1994).

263. *Florsheim Shoe Co.*, 880 F. Supp. at 851-52.

264. *Id.* at 852-53.

265. *Id.* at 852 (citing letter from the Secretary of the Interior to the President, Sept. 7, 1993, at 1)).

266. *Id.* (quoting High Seas Driftnet Fisheries Enforcement Act, H.R. REP. NO. 102-262(I), 102d Cong., 2d Sess. 11, *reprinted in* 1992 U.S.C.C.A.N. 4090, 4097-98 (emphasis added)).

267. *Florsheim Shoe Co.*, 880 F. Supp. at 853 (citing letter from the President to the Speaker of the House, April 11, 1994, at 1).

fied country must be irrelevant. Finding, thus, that “the language, design, and history of the Proclamation unmistakably define the scope of the Proclamation as encompassing products of Taiwan containing wildlife originating from other countries,” the court granted summary judgment in favor of Defendant United States, affirming the Fish and Wildlife Service’s interpretation of the phrase in question.²⁶⁸ Thus, within less than 5 months, the government obtained from the CIT a pro-environment decision on the merits.

B. Driftnets in the Mediterranean Sea

In *Humane Society v. Brown*, a recent case before the CIT, the court once more demonstrated that cases involving environmental causes are given the appropriate treatment.²⁶⁹ The case related to large-scale driftnet fishing by Italian fishermen in the Mediterranean Sea. Driftnet fishing is a means of fishing whereby gillnets with a total length of 2.5 kilometers or more are placed in the water and permitted to drift with the currents and winds in order to entangle fish in the webbing.²⁷⁰ The nets’ panels are made of non-degradable plastic webbing²⁷¹ and placed vertically into the water, with floats on the top and weights on the bottom.²⁷² Driftnets are nonselective, entangling all fish, marine mammals, and sea turtles that cross their paths.²⁷³ Many of the fish caught are not what the fishermen using the nets target, and, thus, a very high percentage of

268. *Id.*

269. No. 95-05-00631, slip op. (Ct. Int’l Trade Feb. 16, 1996) [*hereinafter Humane Soc’y II*]. See also *Humane Society v. Brown*, 901 F. Supp. 338 (Ct. Int’l Trade 1995) [*hereinafter Humane Soc’y I*] (resolving plaintiffs’ motion for a preliminary injunction and defendants’ motion to dismiss).

270. 16 U.S.C. § 1826c(2)(A) (1994).

271. See *Humane Soc’y I*, 901 F. Supp. at 341 (quoting Compl. ¶ 12). Comparable accounts are found in the report to Congress in support of adoption of the Enforcement Act. H.R. REP. NO. 262, Part 1, 102d Cong., 2d Sess. 4 (Oct. 22, 1992). “Large scale driftnets are distinguished by their method of harvest, indiscriminately killing not only non-targeted fish, but dolphins, whales, turtles and seabirds.” *Id.*

272. *Humane Soc’y I*, 901 F. Supp. at 341 (quoting Compl. ¶ 12).

273. *Id.* (quoting Compl. ¶ 13).

the catch is customarily thrown back into the water.²⁷⁴ Moreover, because the nets do not disintegrate, lost or discarded nets or net fragments continue to “ghost-fish,” ensnaring fish and marine mammals as they drift aimlessly in the ocean.²⁷⁵

In 1989, the United Nations General Assembly issued a resolution, suggesting that states impose a “moratorium . . . on the use of large-scale driftnets beyond the exclusive economic zone of any nation.”²⁷⁶ This recommendation was adopted by the European Community²⁷⁷ on January 27, 1992.²⁷⁸ Several years before this, the United States Congress had passed the Driftnet Impact Monitoring, Assessment, and Control Act of 1987.²⁷⁹ The purpose of the legislation was, in part, to “reduce the adverse impacts of driftnets’ in the ‘waters of the North Pacific Ocean, including the Bering Sea.’”²⁸⁰ The Act requires the Secretary of Commerce to “initiate, through the Secretary of State and in consultation with the cabinet Secretary responsible for the U.S. Coast Guard, negotiations with each foreign government which conducted, or authorized its nationals to conduct, driftnet fishing in those waters.”²⁸¹ The Act was amended in 1990.²⁸² The Amendments included congressional findings that “the continued widespread use of large-scale driftnets beyond the exclusive economic zone of any nation is a destructive fishing practice that poses a threat to living marine resources of the world’s oceans.”²⁸³ The Amendments also declared Congress’ policy to “implement the moratorium called for by the United Nations General Assembly . . . [and] secure a permanent ban on the use of

274. *Id.* (quoting Compl. ¶ 14).

275. *Id.* (quoting Compl. ¶ 15).

276. *Id.* at 342.

277. Now the European Union. *See* Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247. *See also Humane Soc’y*, 901 F. Supp. at 342.

278. Council Regulation No. 345/92, O.J. L 42/1 (1992).

279. Pub. L. No. 100-220, Title IV, 101 Stat. 1477 (Dec. 29, 1987). *See also Humane Soc’y I*, 901 F. Supp. at 342.

280. *Humane Soc’y I*, 901 F. Supp. at 342 (quoting Pub. L. No. 100-220, § 4002, 101 Stat. at 1477).

281. *Id.* (citing Pub. L. No. 100-220, § 4006, 101 Stat. at 1479).

282. Driftnet Act Amendments of 1990, Pub. L. No. 101-627, § 107, 104 Stat. 4441 (Nov. 28, 1990).

283. 16 U.S.C. § 1826(b)(1) (1994).

destructive fishing practices, and in particular large-scale driftnets, by persons or vessels fishing beyond the exclusive economic zone of any nation."²⁸⁴ The members of the President's cabinet were instructed to "seek to secure international agreements to immediately implement the findings [and] policy, . . . in particular an international ban on large-scale driftnet fishing."²⁸⁵

In 1992, Congress enacted the High Seas Driftnet Fisheries Enforcement Act ("DFEA"),²⁸⁶ pursuant to which the Secretary of Commerce, together with the Secretary of State, was required to issue a listing "of nations whose nationals or vessels conduct large-scale driftnet fishing beyond the exclusive economic zone of any nation."²⁸⁷ The Secretary of the Treasury was instructed to deny certain port privileges to large-scale driftnet fishing vessels and to deny entry of such vessels into United States waters.²⁸⁸ Furthermore, the Secretary of Commerce was directed to identify those states with nationals or vessels conducting large-scale driftnet fishing and to apprise the President and the country in question of that identification before January 10, 1993.²⁸⁹ Additionally, the Secretary of Commerce was instructed to repeat this identification and notification procedure anytime after that date, "whenever [he] has reason to believe that the nationals or vessels are conducting large-scale driftnet fishing."²⁹⁰

In May of 1995, the Humane Society of the United States and a number of United States and international environmental groups²⁹¹ filed a complaint in the CIT.²⁹² The Humane Society's first count

284. *Id.* § 1826(c)(1) & (3) (1994).

285. *Id.* § 1826(d) (1994). The cabinet members were also directed to report the results of these attempts to Congress every year, starting not later than January 1, 1991. *Id.* § 1826(e) (1994).

286. Pub. L. No. 102-582, 106 Stat. 4900 (Nov. 2, 1992).

287. 16 U.S.C. § 1826a(a)(1) (1994).

288. *Id.* § 1826a(a)(2)(A) & (B) (1994).

289. *Id.* § 1826a(b)(1)(A) (1994).

290. *Id.* § 1826a(b)(1)(B) (1994).

291. Plaintiffs included the: The Humane Society of the United States, Humane Society International, Defenders of Wildlife, the Royal Society for the Prevention of Cruelty to Animals, the Whale and Dolphin Conservation Society, and Earth Island Institute.

292. Plaintiffs alleged and the court agreed that the CIT had subject matter jurisdiction over the action under 28 U.S.C. § 1581(i)(3) & (4) and 28 U.S.C.

alleged that defendant Secretary of Commerce Ronald Brown had violated DFEA²⁹³ by not certifying Italy as a country in violation of the United Nations General Assembly resolution on large-scale driftnets.²⁹⁴ The court agreed that the DFEA required the Secretary of Commerce to certify to the President "each nation whose nationals and vessels were conducting large-scale driftnet fishing beyond the exclusive economic zone of any nation,"²⁹⁵ but dismissed the first claim because the statute of limitations had run.²⁹⁶

The Humane Society's second claim was that the Secretary of Commerce acted arbitrarily, capriciously, and in violation of the Administrative Procedure Act,²⁹⁷ by failing to identify Italy as a violator of the United Nations General Assembly Resolution on large-scale driftnets.²⁹⁸ The Humane Society sought both preliminary and permanent relief. The Federal Defendants moved to dismiss this count, claiming that the Humane Society lacked standing to sue.²⁹⁹ The Federal Defendants asserted that the injury pleaded must be "fairly traceable to the[ir] allegedly unlawful conduct and likely to be redressed by the requested relief."³⁰⁰ The Humane Society argued that "illegal Italian driftnet fishing is causing immediate, irreparable harm to marine resources in the Mediterranean Sea,"³⁰¹ and that plaintiffs were personally and directly harmed by large-scale driftnet fishing because it reduced their opportunity to

§ 1331. *Humane Soc'y I*, 901 F. Supp. at 345, 346. Citing *Earth Island III*, 6 F.3d at 652, the CIT stated that "judicial interpretation [of the Customs Courts Act of 1980] has affirmed the exclusivity of this jurisdiction over an action like the one at bar." *Humane Soc'y I*, 901 F. Supp. at 346.

293. 16 U.S.C. § 1826(f) (1994). The section provides that "[i]f at any time the Secretary [of Commerce] . . . identifies any nation that warrants inclusion in the list described under subsection (e)(6), the Secretary shall certify that fact to the President." *Id.*

294. *Humane Soc'y I*, 901 F. Supp. at 345 (quoting Compl. at ¶ 47).

295. *Id.* at 346.

296. *Id.* (quoting 16 U.S.C. § 1826a(b)(1)(A)). The statute of limitations for a claim brought under 28 U.S.C. § 1581(i) is limited to two years. See 28 U.S.C. § 2636(i) (1994).

297. 5 U.S.C. § 706(2)(A) (1994).

298. *Humane Soc'y I*, 901 F. Supp. at 345.

299. *Id.*

300. *Id.* at 347 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

301. *Id.* at 348.

observe wildlife, specifically endangered species like the sperm whale.³⁰²

With regard to preliminary relief, the court held that the Humane Society's complaint failed to satisfy the requirements for the "extraordinary" relief of a preliminary injunction.³⁰³ With respect to permanent relief, the court, in its August 1995 decision, held that while the Humane Society may, "on final analysis," not be able to prove standing, the court was unable to make that determination "with only the complaint at hand."³⁰⁴ On February 16, 1996, however, after discovery, further briefs, and a hearing, the court granted the Humane Society's motion for summary judgment.³⁰⁵ Finding that the Federal Defendants did not formally deny any of the facts proffered by the Humane Society,³⁰⁶ the court reasoned that there was no dispute as to the facts that would require a trial³⁰⁷ and "that the controlling issues [were] legal."³⁰⁸

The Federal Defendants argued that the court should issue summary judgment in their favor because "the agencies charged with administration of the Driftnet Enforcement Act are entitled to substantial deference and that the Secretary of Commerce has not abused his discretion in not identifying Italy, that is, that that decision is reasonable and supported by the record."³⁰⁹ The court disagreed³¹⁰ and ruled that the documents submitted by the Federal Defendants "give reason in the mind of an ordinarily intelligent

302. *Id.* at 341.

303. *Id.* at 348-49. Immediate relief, as sought by the Humane Society, required "(1) [a] threat of immediate irreparable harm; (2) that the public interest would be better served by issuing than by denying the injunction; (3) a likelihood of success on the merits; and (4) that the balance of hardship on the parties favor[s] issuance." *Id.* at 348 (quoting *S.J. Stile Associates, Ltd. v. Snyder*, 646 F.2d 522, 525 (C.C.P.A. 1981), and *American Stevedoring Inc. v. U.S. Customs Service*, 852 F. Supp. 1067, 1071 (Ct. Int'l Trade 1994)).

304. *Humane Soc'y I*, 901 F. Supp. at 348.

305. *Humane Soc'y II*, No. 95-05-00631, slip op. at 69. See also Thomas W. Lippman, *Italy Faces Cutoff of Exports to U.S.; Federal Court Rules Worldwide Ban on Driftnets is Being Defied*, WASH. POST, March 14, 1996, at A24.

306. *Id.* at 29, 59, 66.

307. *Id.* at 12.

308. *Id.*

309. *Id.* at 30.

310. *Id.* at 36.

person to believe that Italians continue to engage in large-scale driftnet fishing in the Mediterranean Sea in defiance of the law of their own country and of the rest of the world.”³¹¹ The court analogized the case to *Tennessee Valley Authority v. Hill*,³¹² in which the Supreme Court reasoned that “endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.”³¹³ The court thus felt compelled to determine that the “identification of Italy under 16 U.S.C. § 1826a(b)(1)(B) has been unlawfully withheld and unreasonably delayed and also that the Secretary’s decision not to make such identification has been an abuse of discretion” under the Administrative Procedure Act.³¹⁴

The Federal Defendants further argued that the case should be dismissed for lack of standing under Article III of the United States Constitution.³¹⁵ Defendants argued that under *Lujan v. Defenders of Wildlife*,³¹⁶ “the controlling precedent,”³¹⁷ the Humane Society did not fulfill any of the standing requirements.³¹⁸ The court, on the other hand, did not agree and found that the Humane Society did indeed meet all requirements.³¹⁹ Specifically, the court found that the record before the court and before Congress demonstrated that the type of enforcement provisions enacted by Congress “can be and are effective in furtherance of underlying conservation policies.”³²⁰ Furthermore, the court pointed out that it could not find that plaintiff’s standing was, as the Supreme Court stated in *Lujan*,

311. *Id.*

312. 437 U.S. 153 (1978).

313. *Humane Soc’y II*, No. 95-05-00631, slip op. at 42 (quoting *Hill*, 437 U.S. at 125).

314. *Id.* (citing 5 U.S.C. § 706 (1994)).

315. *Id.* at 50-51. The Federal Defendants asserted that the Humane Society’s alleged harm was not imminent enough to show injury-in-fact, that they had not proven actual harm, that the Federal Defendants’ conduct did not cause plaintiffs’ injuries, and that their injuries were “not likely to be redressed by a favorable decision.” *Id.*

316. 504 U.S. 555 (1992).

317. *Humane Soc’y II*, No. 95-05-00631, slip op. at 55 (quoting Defs.’ Mem. at 32).

318. *Id.*

319. *Id.* at 55-69.

320. *Id.* at 67.

within the range of "pure speculation and fantasy."³²¹ The court granted the Humane Society's motion for summary judgment.³²² Thus, after only nine months of litigation in the CIT, the environmental groups obtained a favorable decision on the merits, having first met the stringent standing requirements under *Lujan*.³²³

C. *Sea Turtles*

After years of active litigation and following the dismissal of their case in the Ninth Circuit Court of Appeals due to the lack of subject matter jurisdiction,³²⁴ on June 7, 1994, Earth Island³²⁵ re-filed the sea turtle case in the CIT.³²⁶ Earth Island alleged that

pursuant to . . . defective regulations, defendants have improperly certified a number of nations in the wider Caribbean for the continued importation of shrimp and shrimp products. In addition, defendants have improperly allowed the continued import of shrimp and shrimp products from dozens of other nations which the Secretary of Commerce has determined harvest shrimp with commercial fishing technology that may adversely affect sea turtles.³²⁷

321. *Id.* at 68 (quoting *Lujan*, 504 U.S. at 567).

322. *Id.* at 69. The court instructed the parties to "confer and present to the court . . . a proposed form of final judgment in conformity with this opinion." *Id.* The proposed form of final judgment was to be received by the court by March 15, 1996. *Id.*

323. The complaint was filed in May of 1995, and the decision was issued in February of 1996.

324. *See supra* text accompanying notes 191-247.

325. This time, plaintiffs were: Earth Island Institute, Todd Steiner, the American Society for the Prevention of Cruelty to Animals ("ASPCA"), the Humane Society of the United States ("HSUS"), the Sierra Club, and the Georgia Fishermen's Association, Inc. ("GFA") [collectively "Earth Island"].

326. Earth Island filed a Summons and Complaint, asking the court for declaratory judgment, *see* 28 U.S.C. § 2201 (1994); 16 U.S.C. § 1540 (1994), review of agency action, *see* 5 U.S.C. § 702 (1994), *mandamus*, *see* 28 U.S.C. § 1361 (1994), and injunctive relief. Complaint at 1 ¶ 2, *Earth Island Institute v. Christopher*, 890 F. Supp. 1085 (Ct. Int'l Trade 1995) [*hereinafter Earth Island IV-1*] (resolving Federal Defendants' motion to dismiss). *See also* *Earth Island Institute v. Christopher*, 94-06-00321, 1995 WL 779980 (Ct. Int'l Trade Dec. 29, 1995) [*hereinafter Earth Island IV-2*] (resolving motions for summary judgment).

327. Complaint at 13 ¶ 31, *Earth Island IV-1*, 890 F. Supp. 1085.

Earth Island claimed that “defendants have improperly allowed the continued import of shrimp and shrimp products from Brazil . . . grant[ing] Brazil yet another extension of 6 months to come into compliance with the sea turtle safety requirement.”³²⁸

Earth Island asked the CIT to issue a declaration “that defendants have breached their statutory duties.”³²⁹ Earth Island further asked the court to review defendants’ “agency actions,” alleging that these actions were arbitrary and capricious and inconsistent with the sea turtle statute.³³⁰ Earth Island also alleged that the Federal Defendants violated the Administrative Procedure Act,³³¹ by adopting regulations without giving the public the opportunity to review and comment.³³² In the third claim for relief, Earth Island asked for a writ of *mandamus* “directed at defendants requiring them to perform the duties established by” the statute.³³³ Finally, Earth Island asked the court to

enjoin defendants from allowing the importation of shrimp and shrimp products from any nation with commercial fishing operations which may adversely impact sea turtles unless and until the Secretary of State determines and certifies . . . that the foreign nation has a current and enforceable sea turtle protection program . . . and an incidental taking rate fully comparable to that of the United States.³³⁴

Earth Island argued for equitable relief, since its injuries were “irreparable” and money damages “incalculable and inadequate to compensate for the continued depletion and threatened extinction of sea turtle species which have existed on Earth for millions of years.”³³⁵

The Federal Defendants³³⁶ filed a motion to dismiss all plain-

328. *Id.* at 13 ¶ 32.

329. *Id.* at 14 ¶ 34.

330. *Id.* at 14 ¶ 36.

331. 5 U.S.C. § 553 (1994).

332. Complaint at 14 ¶ 37, *Earth Island IV-2*, 1995 WL 779980.

333. *Id.* at 14-15 ¶¶ 39-40.

334. *Id.* at 16-17 ¶ 7.

335. *Id.* at 15 ¶ 42, 16-17 ¶ 7.

336. The defendants were: Secretary of State Warren Christopher, Secretary of the Treasury Lloyd Bentsen, Assistant Secretary of State for the Bureau of

tiffs except the Georgia Fishermen's Association, Inc. ("GFA"), and to dismiss the case against the Secretary of Commerce and the Assistant Administrator of the NMFS for "lack of standing to sue or be sued."³³⁷ The Federal Defendants argued that the environmental plaintiffs lacked standing because their "allegations regarding causation and redressability are based on predictive facts rather than historical facts and as such must be evaluated with more exacting scrutiny."³³⁸ The Federal Defendants further argued that Earth Island was required to "demonstrate that redressability is 'substantially likely,'"³³⁹ and that Earth Island did not make this showing.³⁴⁰ Earth Island, on the other hand, argued that the only allegations they had to make were that they "(1) suffered a personal injury, (2) which is fairly traceable to the defendant's allegedly unlawful conduct, and (3) which is likely to be redressed by the requested relief."³⁴¹ Earth Island claimed that its complaint clearly stated satisfactory facts to support standing.³⁴²

Judge Aquilino of the CIT, in his June 1995 decision, agreed with Earth Island and dismissed the Federal Defendants' motion for partial summary judgment.³⁴³ The court reasoned that because "defendants' answer places in issue each and every averment as to the named party plaintiffs,"³⁴⁴ plaintiffs' standing "is to be estab-

Oceans, International Environmental and Scientific Affairs Elinor G. Constable, Secretary of Commerce Ronald Brown, Assistant Administrator for Fisheries, National Marine Fisheries Service ("NMFS"), Rolland A. Schmitt, and the National Fisheries Institute, Inc. ("NFI") [collectively "Federal Defendants"].

337. *Earth Island IV-1*, 890 F. Supp. at 1087.

338. Federal Defendants' Reply Memorandum in Support of Partial Motion to Dismiss at 12, *Earth Island IV-1*, 890 F. Supp. 1085.

339. *Id.* at 13 (quoting *Dellums v. U.S. Nuclear Regulatory Comm'n*, 863 F.2d 968, 974 (D.C. Cir. 1988), citing *Allen v. Wright*, 468 U.S. 737, 748, 751 (1984)).

340. *Id.*

341. Plaintiffs' Memorandum in Opposition to Defendants' Partial Motion to Dismiss at 15, *Earth Island IV-1*, 890 F. Supp. 1085 (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

342. *Id.*

343. *Earth Island IV-1*, 890 F. Supp. 1085.

344. *Id.* at 1094.

lished at trial or otherwise.”³⁴⁵ The court also rejected the Federal Defendants’ argument that the case against the Secretary of Commerce and the Assistant Administrator of the NMFS should be dismissed for lack of standing. While the Federal Defendants’ “position [on why the action against two named defendants should be dismissed] may prove well-founded after discovery and development of all material facts, . . . the court is not at liberty to grant the requested, summary relief based on the paucity of such facts already presented.”³⁴⁶

Following a hearing and the renewed filing of briefs, the court granted Earth Island’s motion for summary judgment on December 29, 1995.³⁴⁷ The court began its opinion by pointing out that “[s]cience and government have apparently come to agree that the turtles which have navigated Earth’s oceans for millions of years may not survive modern human habits (and appetites) without the intervention of law.”³⁴⁸ As all parties agreed that no material issues of fact were in dispute, the court proceeded to examine the legal issues.³⁴⁹

The Federal Defendants argued that all plaintiffs should be dismissed for lack of standing.³⁵⁰ While the court found the GFA did not meet the *Lujan* standing requirements because “[g]eneral allegations of economic disadvantage” were not sufficient,³⁵¹ it ruled that all the other plaintiffs did fulfill the *Lujan* criteria.³⁵² Further-

345. *Id.* at 1095.

346. *Id.* at 1093.

347. *Earth Island IV-2*, 1995 WL 779980, at *20. *See also Judge Says Law to Save Turtles Prevents Most Imports of Shrimp*, N.Y. TIMES, Jan. 8, 1996, at A9, col. 1.

348. *Earth Island IV-2*, 1995 WL 779980, at *1.

349. *Id.* at *3.

350. *Id.* at *3-*4.

351. *Id.* at *4.

352. *Id.* at *5-*12. The Humane Society of the United States alleged, *inter alia*, that it has “demonstrated a strong interest in preservation, enhancement, and humane treatment of wildlife, particularly threatened and endangered species, including sea turtles and marine mammals.” *Id.* at *5. The Sierra Club alleged, *inter alia*, that it was “committed to practicing and promoting the responsible use of the Earth’s ecosystems and resources.” *Id.* The ASPCA alleged, *inter alia*, that it “has been involved in the observation and/or study of sea turtles since 1867.” *Id.* at *6.

more, the Federal Defendants contended that the action should be dismissed because the statute of limitations had run.³⁵³ The court held that while Earth Island never requested the transfer of the case from the Ninth Circuit to the CIT,³⁵⁴ “the primary focus of this case is, and must be, on the underlying statute, subsection (b)(2) of which requires certification by the President not later than May 1 *each annum*.”³⁵⁵ Thus, the court ruled that the action was not barred by the statute of limitations because it starts anew each year.³⁵⁶

The Federal Defendants also asserted “that section 609(b) is silent on the geographic scope of its implementation and that defendants’ delimitation to the wider Caribbean is reasonable.”³⁵⁷ The court, however, disagreed and held that section 609 was clear and unambiguous as to its scope.³⁵⁸ The Federal Defendants further contended that because Congress never amended the statute to counteract the “longstanding administrative construction” it “acquiesced in th[e] limited approach and that the court should therefore uphold it.”³⁵⁹ The court disagreed and found that the approach that the agencies have taken “is not longstanding nor, according to the record developed, has Congress revisited section 609.”³⁶⁰ The court held that

[i]n the absence of such extended meaningful interaction between the executive and legislative branches, . . . the critical, unrefuted facts . . . remain plaintiff Steiner’s estimate that 124,000 sea turtles continue to drown annually due to shrimping by countries other than the United States, that Congress (and the President) agreed on enactment of section 609 in an attempt to diminish the

Defendants conceded that Earth Island Institute and Todd Steiner suffered injury, but limited this concession to a certain geographical area. *Id.* at *7. The court, however, did not find a geographical limitation in the sea turtle law and ruled that those two plaintiffs did indeed have standing regarding all geographic areas in issue. *Id.* at *12.

353. *Id.* at *12-*13.

354. *See* 28 U.S.C. § 1631 (1994).

355. *Earth Island IV-2*, 1995 WL 779980, at *14 (emphasis added).

356. *Id.*

357. *Id.* at *15.

358. *Id.*

359. *Id.* at *18 (quoting *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974)).

360. *Id.*

carnage, and that the Supreme Court continues to adhere to the view that the plain intent of this kind of legislation is to halt and reverse the trend toward species extinction, whatever the cost, and to give endangered species priority over the primary missions of federal agencies.³⁶¹

The court, therefore, directed the Federal Defendants "to prohibit not later than May 1, 1996 the importation of shrimp or products of shrimp wherever harvested in the wild with commercial fishing technology which may affect adversely [certain] species of sea turtles . . . , and to report the results thereof to the court."³⁶² Earth Island thus obtained a favorable judgment on the merits in only 18 months of litigation in the CIT, following years of fighting for the protection of sea turtles in the federal courts in California.

CONCLUSION

Under basic principles of international law, the United States may not, with few exceptions, impose its policies and laws on actions taking place outside of its own territory. It nevertheless frequently attempts to impose its own ideas of what is right and what is wrong on other countries. This should, if at all necessary, preferably be done through diplomatic intervention and the negotiation of treaties. However, in many cases, the only way to attempt to change unwanted behavior by foreign subjects is to threaten and impose trade barriers, in the hope that the "rogue" country will change its behavior because of the fear of lost revenues.

International environmental issues are, therefore, often dealt with through trade measures. An intricate system, set up by the United States Congress, authorizes and directs a number of federal agencies to commence negotiations, to investigate and certify countries not in compliance with certain regulations, and to impose trade embargoes if deemed necessary. Unfortunately, these agencies have so far been dragging their feet. Few regulations have been implemented, and often countries are only certified to be in violation of U.S. law after environmentalists have sued the federal government.

361. *Id.* (referring to *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 185 (1978) and *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 115 S. Ct. 2407, 2413 (1995)).

362. *Id.* at *20.

The government, on the other hand, keeps coming up with new reasons why it should not be sued over these issues. The government has argued that the district court lacked subject matter jurisdiction, that the political question doctrine barred judicial review, that there were statute of limitations bars, and, finally, that environmental groups lacked standing to sue under the provisions in question. It is incomprehensible why the Executive Branch is expending inordinate amounts of time and money on this kind of litigation after the Congress has made absolutely clear that the protection of dolphins, sea turtles, and other marine mammals, as well as sea birds, is an extremely important interest of the United States.

While Earth Island Institute and the other environmental groups involved in the cases discussed in this Note initially argued against the Court of International Trade as the proper forum for this kind of environmental dispute, litigation in the CIT has so far been and may continue to be a blessing in disguise for environmental groups after all. The caseload of the judges at the CIT is apparently not as overwhelming as that of many district judges in California and New York, and the CIT judges keep a close reign on their cases, which, in turn, leads to faster judicial resolution. Judge Aquilino of the CIT, in particular, like Judge Henderson of the District Court for the Northern District of California, has already developed a very specialized expertise in this area of law. Because international environmental law is so strongly intertwined with international trade, the Court of International Trade is indeed the proper forum for disputes involving environmental issues.

