The Embargo upon Endangered Species: Accidental Jurisdiction in the Court of International Trade

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I. INTRODUCTION

The United States Court of International Trade (CIT) is an Article III federal court created by the United States Congress to address

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challenges to federal governmental actions involving international trade and affirmative civil actions brought by the government to recover lost customs duties or penalties for violations of the customs laws. The CIT's exclusive jurisdiction is narrowly defined by statute to include specific matters, primarily involving claims for refunds of duties brought by importers or foreign exporters, actions seeking relief on behalf of members of a domestic manufacturing industry affected by foreign competition, and affirmative civil enforcement actions brought by the government against importers and their sureties.[1] Additionally, the CIT possesses exclusive jurisdiction to entertain claims against the government arising under U.S. laws that provide for certain embargoes, as well as agencies' "administration and enforcement" of such embargoes.[2]

In this Article, I will discuss how certain cases under the Endangered Species Act (ESA) and other statutes designed to protect various plant and animal species fall within the plain language of the CIT's exclusive statutory jurisdiction with respect to embargoes, as well as the unintended consequences of this jurisdiction. I will also discuss options available to rectify these unintended consequences.

II. BACKGROUND

A. The Court of International Trade's Jurisdiction

The CIT possesses exclusive subject matter jurisdiction to entertain the discrete group of cases identified in 28 U.S.C. §§ 1581-1584.[3] Subsections 1581(a)-(h) and (j) identify challenges to specific agency determinations issued under discrete statutory grants of authority.[4] None involve agency action under the environmental laws.

Section 1581(i) confers subject matter jurisdiction to the CIT to address:

> any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or (4) administration and enforcement with respect to the matters

1. 28 U.S.C. §§ 1581-1584 (2006).
2. *Id.* § 1581(i)(3)-(4).
3. *Id.* §§ 1581-1584.
4. *Id.* § 1581(a)-(h), (j).

> referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.[5]

Section 1581(i) is often referred to as the CIT's "residual" jurisdiction.[6]

Congress also identified the parties who would possess standing to initiate a § 1581(i) action, mandating that a § 1581(i) action "may be commenced in the court by any person adversely affected or aggrieved by agency action within the meaning of section 702 of title 5 [the Administrative Procedures Act (APA) standing provision]."[7]

In 1980, Congress created the CIT, eliminating the United States Customs Court and transferring that court's functions to a new Article III court.[8] At the time, Congress intended that the CIT's jurisdiction remain similar to that of the old Customs Court, including valuation of imported merchandise and assessment of duties.[9] Likewise, Congress intended to provide a clear jurisdictional statute that would eliminate confusion over whether an action should be brought in the CIT or in a district court:

> This provision makes it clear that all suits of the type specified are properly commenced only in the Court of International Trade. The [Judiciary] Committee has included this provision in the legislation to eliminate much of the difficulty experienced by international trade litigants who in the past commenced suits in the district courts only to have those suits dismissed for want of subject matter jurisdiction. The grant of jurisdiction in subsection (i) will ensure that these suits will be heard on their merits.[10]

When a trade association of importers expressed concern that the embargo provision would expand the new court's jurisdiction to include issues of health and safety, the Judiciary Committee amended the statute so that such issues would remain before the district courts.[11] "In keeping with the intent of the Customs Court Act of 1980 to provide a uniformity of jurisdiction, the Committee adopted a more precise subsection (i) in

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5. *Id.* § 1581(i).

6. Volkswagen of Am., Inc. v. United States, 532 F.3d 1365, 1369 (Fed. Cir. 2008).

7. 28 U.S.C. § 2631(i); *Volkswagen of Am.*, 532 F.3d at 1369.

8. 28 U.S.C. § 251; Markus B. Zimmer, *Overview of Specialized Courts*, 2 INT'L J. FOR CT. ADMIN. 46, 56 (2009), http://www.iaca.ws/files/IJCA-ThirdEdition.pdf.

9. Zimmer, *supra* note 8, at 56.

10. H.R. REP. NO. 96-1235, at 47 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3759.

11. *Id.* at 47-48. ("The American Importers Association (AIA) testified that subsection (i) could have been interpreted to permit the court to assert jurisdiction over civil actions involving the application of the Federal Food, Drug and Cosmetic Act or the Toxic Substances Control Act to imported merchandise. AIA believed that these actions do not involve questions of classification, valuation or rate of duty but rather questions of public health and safety. As such, it was AIA's position that those questions should be treated the same whether a court is dealing with domestic or imported goods and more appropriately should come within the jurisdiction of the district courts.").

an effort to remove any confusion over the jurisdiction of the Court of International Trade regarding this or similar issues."[12]

The legislative history does not contain similar comments by environmental groups or other parties with respect to the environmental laws relating to the importation of wildlife, even though, as noted above, § 1581(i)(3)'s embargo provision need not necessarily involve questions of "classification, valuation, or rate of duty," which were the mainstay of the Customs Court's docket.[13]

B. Endangered Species Act

The ESA was enacted "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species."[14] An endangered species is one that "is in danger of extinction throughout all or a significant portion of its range,"[15] and a threatened species is one that "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[16] The ESA delegates' responsibility is to determine whether a species should be listed as endangered or threatened and to report their findings to the United States Secretaries of the Interior and of Commerce, as appropriate.[17] The Secretary of the Interior administers the ESA through the United States Fish and Wildlife Service (FWS), and the Secretary of Commerce administers the ESA through the National Marine Fisheries Service (NMFS).[18]

1. ESA Section 9(a)—Import Prohibition on Enforcement of the CITES

Endangered species of fish and wildlife are protected by section 9(a)(1) of the ESA, which makes it unlawful to

> (A) import any such species into, or export any such species from the United States;
> (B) take any such species within the United States or the territorial sea of the United States;

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12. *Id.* at 48.
13. *Id.* at 46; *see supra* text accompanying note 9.
14. 16 U.S.C. § 1531(b) (2006).
15. *Id.* § 1532(6).
16. *Id.* § 1532(20).
17. *Id.* §§ 1532(15), 1533(a).
18. U.S. FISH & WILDLIFE SERV., ESA BASICS: 40 YEARS OF CONSERVING ENDANGERED SPECIES 1 (Jan. 2013), www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf.

> (C) take any such species upon the high seas;
> (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);
> (E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;
> (F) sell or offer for sale in interstate or foreign commerce any such species; or
> (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.[19]

In addition to the prohibition upon the importation of ESA-listed species, ESA section 9(c) regulates the importation of species listed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). ESA section 9(c) makes it unlawful "to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention."[20]

The CITES is an international agreement that contains procedures for signatories to follow with respect to the trade of certain plant and animal species of particular interest.[21] There are 177 parties to the CITES, including the United States.[22] The CITES provides a three-tier system of procedures concerning the trade in species listed in its three appendices.[23]

The first tier species are identified in appendix I of the CITES. "Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances."[24] Grant of a permit requires "a Scientific Authority of the State of export [to] advise[] that such export will not be detrimental to the survival of that species" and for the "Management Authority of the State of export [to be] satisfied that the specimen was not obtained in

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19. Endangered Species Act § 9(a)(1), 16 U.S.C. § 1538(a)(1) (2006) (emphasis added).
20. *Id.* § 1538(c)(1).
21. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].
22. *Member Countries*, CITES, http://www.cites.org/eng/disc/parties/index.php (last visited Feb. 15, 2013).
23. *See* CITES, *supra* note 21.
24. *Id.* art. II(1).

contravention of the laws of that State for the protection of fauna and flora" and "that an import permit has been granted for the specimen."[25]

The CITES also imposes the affirmative duty upon the importing country to issue an import permit for any appendix I species, when the importing country's Scientific Authority "has advised that the import will be for purposes which are not detrimental to the survival of the species involved; . . . and . . . a Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes."[26]

Accordingly, and relevant to the CIT's jurisdiction with respect to laws of the United States providing for "embargoes or other quantitative restrictions,"[27] the CITES, as implemented by ESA section 9(c), imposes an absolute ban on the import of appendix I species for commercial purposes.[28] Likewise, FWS has promulgated regulations that prohibit the import of "any specimen of a species listed in Appendix I, II, or III" unless the conditions identified in the CITES are met.[29]

The CITES appendix II identifies species that

> although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival . . . and . . . other species which must be subject to regulation in order that trade in specimens of [other appendix II species] may be brought under effective control.[30]

The CITES article IV contains procedures that govern the granting of export permits for appendix II species.[31] Specifically:

> An export permit shall only be granted when the following conditions have been met: (a) a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species; (b) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora.[32]

Unlike appendix I species, trade in appendix II species does not require the importing country to issue import permits. Rather, the CITES requires: "The import of any specimen of a species included in

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25. *Id.* art. III(2).
26. *Id.* art. III(3).
27. 28 U.S.C. § 1581(i)(3) (2006).
28. *See* 16 U.S.C. § 1538(c)(2) (2006).
29. 50 C.F.R. § 23.13 (2011).
30. CITES, *supra* note 21, art. II(2).
31. *Id.* art. IV(2)-(3).
32. *Id.* art. IV(2).

Appendix II shall require the prior presentation of either an export permit or a re-export certificate."[33]

Appendix III species are afforded the lowest level of protection. Appendix III includes "all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation."[34] As with appendix II species, importation of appendix III species requires only a certificate of origin (or a reexport certificate) and an export permit from the country of origin.[35]

2. ESA Section 11—Citizen Suit Provision

Section 11 of the ESA, enacted before creation of the CIT, authorizes the United States to impose civil and criminal penalties for ESA violations.[36] Section 11 also contains the "citizen suit" provision, which allows private citizens to initiate certain actions in the district courts:

> (1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—
>
> (A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or
>
> . . . .
>
> (C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be.[37]

III. DISCUSSION

Because the ESA and other statutes impose embargoes, certain limited court challenges fall within the jurisdiction of the CIT.[38] In some cases, the CIT is a good forum for hearing these disputes, given that it is a court of national jurisdiction, and thus, its decisions, as well as those of

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33. *Id.* art. IV(4).
34. *Id.* art. II(3).
35. *Id.* art. V(3)-(4).
36. Endangered Species Act § 11(a)-(b), 16 U.S.C. § 1540(a)-(b) (2006).
37. *Id.* § 1540(g).
38. *See supra* Part I.

the reviewing United States Court of Appeals for the Federal Circuit, will provide a uniform body of law regulating imports at all ports.[39] In other instances, this apparently accidental jurisdiction acts to prevent the CIT from granting the full relief envisioned by statute and fragments jurisdiction between district courts and the CIT.

A. The "Embargo" Jurisprudence of the Court of International Trade

The CIT possesses jurisdiction to entertain any case "that arises out of any law of the United States providing for— . . . (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety."[40]

1. The Supreme Court's *K Mart* Test

The United States Supreme Court has relied upon dictionary definitions to define the CIT's jurisdiction in embargo cases.[41] An embargo is "[a] prohibition; a ban."[42] The Court, in *K Mart Corp. v. Cartier, Inc.*, explained, "[T]he ordinary meaning of 'embargo,' and the meaning that Congress apparently adopted in the statutory language 'embargoes or other quantitative restrictions,' is a governmentally imposed quantitative restriction—of zero—on the importation of merchandise."[43] The Court first reasoned that there was "no evidence that Congress intended to constrain the ordinary meaning of the word 'embargoes' to mean 'embargoes that are grounded in trade policy,'" given the explicit exclusion of embargoes "for the 'protection of the public health or safety'" and the exclusion of "certain 'immoral articles'" from 28 U.S.C. § 1581.[44]

Despite agreeing that § 1581(i)(3) does not contain unstated limitations upon the subject matter of any covered embargo, the Court reasoned that

> [a]n importation prohibition is not an embargo if rather than reflecting a *governmental* restriction on the quantity of a particular product that will enter, it merely provides a mechanism by which a private party might, at its

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39. *About the Court*, U.S. COURT OF INT'L TRADE, http://www.cit.uscourts.gov/About TheCourt.html (last modified Feb. 4, 2013).

40. 28 U.S.C. § 1581(i) (2006).

41. *See, e.g.*, Salmon Spawning & Recovery Alliance v. Spero, No. C05-1878Z, 2006, U.S. Dist. LEXIS 28432, at *17-18 (W.D. Wash. May 3, 2006) (discussing the Supreme Court's analysis in K Mart Corp. v. Cartier, Inc., 485 U.S. 176 (1988)).

42. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 581 (5th ed. 2011).

43. 485 U.S. 176, 185, *aff'd in relevant part*, *rev'd in part*, 486 U.S. 281 (1988) (quoting 28 U.S.C. § 1581(i)(3)).

44. *Id.* at 184 (quoting 28 U.S.C. § 1581(i)(3), (j)).

> own option, enlist the Government's aid in restricting the quantity of imports in order to enforce a private right.[45]

Accordingly, statutes like section 9(a) of the ESA, which contain blanket prohibitions on importation, provide for "embargoes" or "quantitative restriction[s]—of zero—on the importation of merchandise."[46]

Lastly, that a statute provides for limited exceptions to an outright ban, or other quantitative limit on imports, does not necessarily exclude CIT review. As discussed *infra*, the cases generally teach that as long as a law provides for an outright prohibition or numerical limit on imports, exceptions to the statutory prohibition are insufficient to remove review from the CIT.[47]

2. Environmental Embargo Decisions Issued by the Court of International Trade

a. Section 9(a) of the Endangered Species Act Bar upon Importation of ESA-Listed Species

As previously noted, the ESA proscribes the importation of any endangered species and then provides limited exceptions to this blanket prohibition.[48] The courts have concluded that this prohibition is an embargo and that decisions under ESA subsection 9(a) must be reviewed by the CIT.[49] In one case seeking to compel governmental action at the border to prevent the importation of ESA-listed salmon by recreational fishermen returning to the United States from Canada, a district court explained, "Section 9(a)(1)(A)'s prohibition on the import of ESA-listed salmon is a *governmental* restriction."[50] The court then rejected the plaintiff's arguments that "(1) ESA-listed salmon are not 'merchandise,' and (2) Section 9(a)(1)(A)'s prohibition on the import of ESA-listed salmon is not a quantitative restriction of zero on salmon imports."[51]

With respect to the first argument, the district court noted that certain dictionary and statutory definitions of the term "merchandise" were ambiguous with respect to the inclusion of specimens of an ESA-

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45. *Id.* at 185; *see also* Sakar Int'l, Inc. v. United States, 516 F.3d 1340, 1341-42 (Fed. Cir. 2008) (holding that the CIT lacked jurisdiction to address an administrative penalty assessed upon the seizure of counterfeit imported merchandise).

46. *K Mart*, 485 U.S. at 185.

47. *See id.*

48. 16 U.S.C. § 1538 (2006).

49. Salmon Spawning & Recovery Alliance v. Spero, No. C05-1878Z, 2006 U.S. Dist. LEXIS 28432, at *17-19 (W.D. Wash. May 3, 2006).

50. *Id.* at *20.

51. *Id.* at *20, *25-26.

listed species imported for personal consumption.[52] Nevertheless, the court reasoned, "In the Ninth Circuit, '[c]onflicts between the broad grants of jurisdiction to the district courts and the grant of exclusive jurisdiction to the [CIT, formerly the Customs Court] are to be resolved by upholding the exclusivity of the [CIT] jurisdiction.'"[53]

Second, the district court reasoned that the ESA prohibition upon importation was not a "qualitative" restriction, but rather was more akin to a quantitative restriction as envisioned by the Supreme Court in *K Mart*.[54] The court explained that the Ninth Circuit had previously concluded that the CIT possessed jurisdiction to entertain cases involving an import ban that was more qualitative in nature than the outright ban contained in ESA section 9(a), and thus concluded that the ESA section 9(a) bar upon importation imposes an embargo.[55]

The district court also transferred the claim of the complaint that attempted to compel ESA section 7(a)(2) consultation between NMFS and the United States Customs and Border Patrol (Customs), concluding that the CIT could assert supplemental jurisdiction over that claim.[56]

Upon transfer, the CIT ultimately dismissed the complaint for lack of jurisdiction because the agency "action" that the Salmon Spawning Recovery Alliance (SSRA) sought to compel under section 9(a) was committed to agency discretion and there was no requirement to consult under section 7(a) with respect to unexercised discretion.[57]

On appeal, the Federal Circuit affirmed the dismissal of SSRA's claim that the government had violated ESA section 9(a) by allegedly allowing others to unlawfully import ESA-listed salmon.[58] Relying upon *Heckler v. Chaney*, the court explained, "[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[59] Accordingly, the Federal Circuit explained, "[A]n agency's decision not

52. *Id.* at *21-22 & n.8, *25.
53. *Id.* at *25 (citations omitted).
54. *Id.* at *26-28.
55. *Id.* *27-28.
56. *Id.* at *10, *28-29 (citing 28 U.S.C. § 1367(a) (2006)). The Federal Circuit held in a later case that the CIT may not assert supplemental jurisdiction. Sioux Honey Ass'n v. Hartford Fire Ins. Co., 672 F.3d 1041, 1051-54 (Fed. Cir. 2012).
57. Salmon Spawning & Recovery Alliance v. Basham, 31 Ct. Int'l Trade 267, 272-76 (2007).
58. Salmon Spawning & Recovery Alliance v. U.S. Customs & Border Prot., 550 F.3d 1121, 1128 (Fed. Cir. 2008).
59. *Id.* (quoting Heckler v. Chaney, 470 U.S. 821, 831 (1985)) (internal quotation marks omitted).

to undertake enforcement actions is 'presumptively unreviewable' under the APA."[60]

b. Shrimp Embargo for Sea Turtle Protection

The courts have further concluded that regulation of importation involves an "embargo" if there is an outright ban upon importation of species that are caught in an environmentally harmful manner.[61] In *Earth Island Institute v. Christopher*, the Ninth Circuit dismissed an action seeking to compel agency action to protect sea turtles from accidental drowning by prohibiting "[t]he importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely . . . sea turtles," unless the United States President certifies that the targeted countries have initiated regulatory schemes comparable to the measures followed by United States fishermen.[62] The court relied upon *K Mart*'s reasoning that embargoes need not relate solely to international trade to fall within the CIT's subject matter jurisdiction, explaining, "The Supreme Court reasoned that embargoes are imposed for a broad range of purposes, including public health, safety, morality, foreign affairs interests, law enforcement, and ecology."[63] Moreover, the Ninth Circuit found persuasive the fact that the Supreme Court "expressly cited a regulation that prohibits the importation of sea otters as an example of an embargo in the field of ecology, over which the CIT would have exclusive jurisdiction."[64]

c. Embargo in Retaliation for Driftnet Fishing

The Driftnet Fishing Act[65] prohibits imports of all seafood products and recreational fishing equipment from countries that utilize driftnets outside their exclusive economic zones.[66]

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60. *Id.* (citations omitted). The court also remanded to the CIT to determine, in the first instance, whether it possessed jurisdiction to hear the claim seeking to compel consultations between NMFS and Customs. *Id.* at 1134; *see supra* note 56 and accompanying text.

61. Earth Island Inst. v. Christopher, 6 F.3d 648, 652 (9th Cir. 1993).

62. *Id.* at 649-50 & n.1.

63. *Id.* at 651.

64. *Id.* (citation omitted); Turtle Island Restoration Network v. Evans, 284 F.3d 1282, 1284 (Fed. Cir. 2002) (reversing a CIT decision enjoining importation of certain shrimp and sustaining agencies' enforcement of embargo).

65. 16 U.S.C. § 1826 (2006).

66. *Id.*; *see, e.g.*, Humane Soc'y of the U.S. v. Clinton, 236 F.3d 1320, 1321-22 (Fed. Cir. 2001) (citation omitted) (denying petition for "a writ of mandamus directing the President to impose sanctions on Italy for violation of the Driftnet Fishing Act" and sustaining the CIT decision to compel Secretary of Commerce to identify Italy as a country that engages in large scale high seas driftnet fishing).

d. Tuna Embargo for Dolphin Protection

The CIT's jurisdiction has also extended to challenges to regulations governing the fishing practices of U.S. fleets, where those regulations form the basis for an embargo upon foreign fisheries that do not follow similar conservation measures.[67] The CIT thus entertained actions concerning the prohibition upon imports of Eastern Tropical Pacific tuna caught in purse seine nets[68] using non-dolphin-safe techniques.[69] Because, as the Federal Circuit explained, dolphins in the Eastern Tropical Pacific often swim with large schools of yellowfin tuna, this fishing technique, without the safeguards, detrimentally impacts the dolphin population.[70]

To address the harm to dolphins caused by the purse seine tuna fishery, Congress enacted the Act of July 17, 1984.[71] There, Congress amended section 101(a)(2) of the Maritime Mammal Protection Act (MMPA) to require governments of nations that export into the United States yellowfin tuna harvested in the purse seine fishery in the Eastern Tropical Pacific Ocean to provide documentary evidence that they have "adopted a regulatory program governing the . . . taking of marine mammals . . . that is comparable to that of the United States . . . and [that] the average rate of . . . incidental taking . . . of the harvesting nations is comparable" to that of the United States.[72] In 1988, Congress amended the MMPA by specifying criteria that must be satisfied in order for the regulatory program of a tuna-harvesting nation to be considered comparable to that of the United States.[73]

One method of freeing dolphins is through the "'backdown' procedure," whereby dolphins are released "when the fishermen reverse

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67. Defenders of Wildlife v. Hogarth, 25 Ct. Int'l Trade 1309 (2001).

68. *Id.*

> Purse seine fishing is based on the principle that dolphins must break the surface of the water to breathe every several minutes, allowing fishermen to easily identify and locate groups of dolphins. Once a large dolphin group is located, fishermen use motorboats, explosives, and helicopters to chase the dolphins for extended periods in an attempt to exhaust them.

Defenders of Wildlife v. Hogarth, 330 F.3d 1358, 1360-61.

69. *Defenders of Wildlife*, 25 Ct. Int'l Trade at 1316-25.

70. *Defenders of Wildlife*, 330 F.3d at 1360-61.

> Eventually, the group [of dolphins] is herded into a small area, where the fishermen first surround the dolphins and the submerged yellowfin tuna with an immense fishing net, called a purse seine, and then draw the bottom of the net together to trap the tuna. The fishermen then haul the net on board to recover the tuna.

Id. at 1361.

71. Pub. L. No. 98-364, § 101, 98 Stat. 440 (1984).

72. *Id.*

73. Pub. L. No. 100-711, § 4, 102 Stat. 4755 (1988).

the vessel's direction after approximately one-half of the purse seine net has been rolled onboard."[74] After numerous discussions with the primary Eastern Tropical Pacific tuna exporting countries, the United States and those countries signed the Panama Declaration.[75] The Panama Declaration formalized, modified, and enhanced informal agreements among the stakeholders in the Eastern Tropical Pacific tuna fishery and contained statements of intent to establish the International Dolphin Conservation Program (IDCP).[76] Pursuant to this agreement, other nations committed to strengthen the protection of dolphins and to negotiate a new binding agreement to establish the IDCP, but only if "the United States amend[ed] its laws to (a) lift the embargoes imposed under the MMPA; (b) permit the sale of both dolphin-safe and non-dolphin safe tuna in the [U.S.] market; and (c) change the definition of 'dolphin-safe tuna' to mean 'tuna harvested without dolphin mortality.'"[77]

In 1997, Congress enacted the International Dolphin Conservation Program Act (IDCPA).[78] The three purposes of the IDCPA were to (1) "give effect to the Declaration of Panama['s]" intent that the United States negotiate a binding agreement to establish the IDCP, (2) recognize the "significant reductions in dolphin mortality," and (3) end the ban on tuna imports from nations that comply with the IDCPA.[79] The IDCPA revised the criteria for banning imports by amending the MMPA. Pursuant to this amendment, a foreign nation may export tuna to the United States if the foreign nation provides documentary evidence that it (1) participates in the IDCPA and is a member (or applicant member) of the Inter-American Tropical Tuna Commission, (2) is meeting its obligations under the IDCPA and the Inter-American Tropical Tuna Commission, and (3) does not exceed certain dolphin mortality limits.[80]

The IDCPA also provided "Regulatory [A]uthority" to the United States Department of Commerce (Commerce), directing that agency to "issue regulations, and revise those regulations as may be appropriate, to implement the [IDCPA]," including "regulations to authorize and govern the taking of marine mammals in the eastern tropical Pacific Ocean . . . by vessels of the United States."[81]

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74. *Defenders of Wildlife*, 330 F.3d at 1361.
75. *Id.* at 1362.
76. *Id.*
77. Defenders of Wildlife v. Hogarth, 25 Ct. Int'l Trade 1309, 1312 (2001).
78. *Defenders of Wildlife*, 330 F.3d at 1362.
79. Pub. L. No. 105-42, § 2, 111 Stat. 1122, 1122 (1997).
80. 16 U.S.C. § 1371(a)(2)(B) (2006).
81. *Id.* § 1413.

The IDCPA thus directed Commerce to issue regulations governing the U.S. fleet, "ensuring that the backdown procedure during sets of purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later than 30 minutes *before* sundown."[82] Nevertheless, after entry into force of the Panama Declaration, Commerce issued a regulation mandating that "the backdown procedure must be completed no later than one-half hour *after* sundown," as envisioned by the Panama Declaration.[83] The effect of this regulation was to allow the U.S. fleet to begin backdown thirty minutes after sundown, presumably allowing importation of tuna caught by foreign purse seine fleets pursuant to the same restriction. A coalition of environmental groups challenged the new regulation in the CIT, arguing that the scope of the regulation upon the U.S. fishing fleet also governed the embargo upon tuna that did not comply with the IDCPA.[84]

Unfortunately, the relevant CIT and Federal Circuit decisions provide no analysis whether jurisdiction should lie in the CIT or the district courts. Rather, the courts merely cited § 1581(i)(3) without determining whether a regulation that, on its face, regulates fishing practices of U.S. vessels is a "law of the United States" providing for embargoes or other quantitative restrictions on the import of tuna.[85] Indeed, if an American fishing vessel owner had challenged the regulation as too onerous, the correct forum may well have been the district court. This confusion, however, remains unresolved because the courts have not set the bounds of the CIT's exclusive jurisdiction in embargo cases.

3. No Embargo upon the CITES Appendix II Species

In contrast to the cases where an import ban is conditioned upon certification by the United States that a foreign government has taken (or not taken) some action, the CIT refused to assert jurisdiction in a case in which the ban upon imports was conditioned upon certifications made by foreign governments.[86] In that case, various public interest groups sued the government and certain importers of bigleaf mahogany wood from Peru, alleging that the Peruvian government's CITES certification

82. *Id.* § 1413(a)(2)(B)(v) (emphasis added).

83. 50 C.F.R. § 216.24(c)(6)(iii) (2011) (emphasis added).

84. *See, e.g.*, Defenders of Wildlife v. Dalton, 24 Ct. Int'l Trade 258, 258, 263 (2000) (denying motion for preliminary injunction to reimpose embargo upon Mexican tuna).

85. *Id.* at 258 ("Since this motion involve[d] an embargo, the court exercise[d] jurisdiction under 28 U.S.C. § 1581(i)(3)."); 28 U.S.C. § 1581(i) (2006).

86. Native Fed'n of the Madre De Dios River & Tributaries v. Bozovich Timber Prods., Inc., 31 Ct. Int'l Trade 585, 586 (2007).

misstated that the export of this merchandise did not harm the species, thereby violating the CITES.[87] Among the many issues raised, the CIT concluded that the ESA imposed no embargo upon CITES appendix II species because there was no quantitative restriction upon such imports, only a qualitative restriction.[88]

B. Options for Resolving the Current Jurisdictional Uncertainty

There is currently significant confusion in the environmental arena, exacerbated by the splitting of jurisdiction within certain statutory schemes. Accordingly, although the government may be subject to suit in the CIT, individual defendants would be sued in the district courts. Furthermore, some actions that involve international trade and commerce are relegated to district courts, whereas identical actions involving ESA-listed species may wind up before the CIT. Should there ultimately be a larger number of such cases, this confusion will only compound.

Providing a measure of certainty to the public requires consistency. One option would involve expansion of the CIT's jurisdiction to entertain claims involving embargoes beyond its current jurisdiction, which is limited by the Supreme Court's decision in *K Mart* to "quantitative restrictions," as opposed to qualitative restrictions.[89] Likewise, Congress could repeal 28 U.S.C. § 1581(i)(3). Under this alternative, all questions concerning embargoes would revert to the district courts under general APA and ESA jurisdiction.[90] A third alternative would be a limited repeal of the CIT's embargo jurisdiction with respect to embargoes enacted for reasons other than the protection of flora or fauna, just as "embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety" are excluded.[91]

The first option would place before the CIT actions actually involving international trade in certain CITES species, overruling the *Native Federation of the Madre De Dios River & Tributaries v. Bozovich*

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87. *Id.* at 586-87.

88. *Id.* at 592, 598.

89. K Mart Corp. v. Cartier, Inc., 485 U.S. 176, 185, *aff'd in relevant part*, *rev'd in part*, 486 U.S. 281 (1988).

90. *See* 16 U.S.C. § 1540(g) (2006) (citizen suit provision providing for district court review); 5 U.S.C. § 703 (2006) (providing for APA review "in a court of competent jurisdiction"); Int'l Bhd. of Teamsters v. Pena, 17 F.3d 1478 (D.C. Cir. 1994). "Unless a statute provides otherwise, persons seeking review of agency action go first to district court rather than to a court of appeals." *Id.* at 1481 (citation omitted).

91. 28 U.S.C. § 1581(i)(3) (2006).

Timer Products, Inc.[92] opinion concerning the trade in bigleaf mahogany. This would better use the CIT's expertise in trade matters and provide consistent rules governing all ports of entry, because the CIT and the Federal Circuit are courts of nationwide jurisdiction.

The second option of repealing all of the CIT's embargo jurisdiction would provide for certainty; however, it would eliminate from the CIT's docket matters that are clearly within its expertise. Indeed, the "administration and enforcement"[93] of embargoes would necessarily involve country-of-origin determinations. Moreover, embargoes may be limited to specific product classifications, the review of which falls squarely within the CIT's expertise.[94]

Finally, the third option would eliminate much confusion concerning in which court to initiate an action by explicitly placing all such wildlife-related matters before the district courts, which have likewise developed expertise under numerous environmental statutes. Although the risk of circuit splits would remain as it currently does with respect to embargoes for "the protection of the public health or safety,"[95] returning this jurisdiction to the district courts would be consistent with the spirit of numerous environmental statutes, which all envision district court review of citizen suits.[96]

Moreover, the legislative history does not indicate that Congress intended the CIT to address environmental cases under its embargo jurisdiction. Indeed, as previously noted, the legislative history indicates that Congress intended to affirmatively limit the CIT's jurisdiction to matters concerning "classification, valuation or rate of duty."[97] Indeed, the legislative history acknowledges the request that Congress exclude "questions of public health and safety" from the CIT's jurisdiction.[98] Had the same question been posed to Congress with respect to statutes that address the importation of wildlife, it is probable that Congress would likewise have excluded actions under these statutes as well.

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92. *See* 31 Ct. Int'l Trade 585 (2007).

93. 28 U.S.C. § 1581(i)(4).

94. *See id.* § 1581(a) (providing for review of Customs classification decisions); 19 U.S.C. § 1202 (2006) (directing publication of the Harmonized Tariff Schedule by Customs as the statutory basis for classification of imported merchandise).

95. 28 U.S.C. § 1581(i)(3).

96. *See, e.g.*, 16 U.S.C. § 1540(g) (2006) (ESA citizen suit provision); 33 U.S.C. § 1365 (2006) (Federal Water Pollution Control Act citizen suit provision); 42 U.S.C. § 4911 (2006) (Noise Control Act citizen suit provision); *id.* § 6972 (Resource Conservation and Recovery Act citizen suit provision); *id.* § 7604 (Clean Air Act citizen suit provision).

97. H.R. REP. NO. 96-1235, at 47-48 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3759.

98. *Id.*

In conclusion, given congressional intent apparent from the legislative history of the CIT's jurisdictional statute and that court's expertise in classification, valuation, or rate of duty, on balance, it would be beneficial for Congress to make clear that the district courts possess exclusive jurisdiction with respect to environmental laws relating to the importation of wildlife.