

The Embargo Upon Endangered Species:  
Accidental Jurisdiction In The Court of International Trade\*

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The Court of International Trade is an Article III federal court created by the Congress to address 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 court'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 action brought by the Government against importers and their sureties.<sup>2</sup> Additionally, the court possesses exclusive jurisdiction to entertain claims against the Government arising from United States laws that provide for certain embargoes, as well as agencies' "administration and enforcement" of such

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<sup>2</sup> 28 U.S.C. §§ 1581-1584.

embargoes.<sup>3</sup>

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 court’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.

## **BACKGROUND**

### **I. The Court Of International Trade’s Jurisdiction**

The Court of International Trade possesses exclusive subject matter jurisdiction to entertain the discrete group of cases identified in 28 U.S.C. §§ 1581 through 1584. Sections 1581(a)-1581(h); and 1581(j), identify challenges to specific agency determinations issued under discrete statutory grants of authority. None involve agency action under the environmental laws.

Section 1581(i) confers subject matter jurisdiction to the court 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; (4) or . . . administration and

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<sup>3</sup> 28 U.S.C. §§ 1581(i)(3), (4).

enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.” Section 1581(i) is often referred to as the court’s “residual” jurisdiction.<sup>4</sup>

Congress also identified the parties who would possess standing to initiate a section 1581(i) action, mandating that a section 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].”<sup>5</sup>

In 1980, Congress created the Court of International Trade, eliminating the Customs Court, and transferring that court’s functions to a new Article III court.<sup>6</sup> At the time, Congress intended that the Court of International Trade’s jurisdiction remain similar to that of the old Customs Court, with a primary focus upon valuation of imported merchandise and assessment of duties. Likewise, Congress intended to provide a clear jurisdictional statute that would bit lead to confusion over whether an action should be brought in the Court of International Trade or the district court:

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<sup>4</sup> *Volkswagen of America, Inc. v. United States*, 532 F.3d 1365, 1369 (Fed. Cir. 2008).

<sup>5</sup> 28 U.S.C. § 2631(i).

<sup>6</sup> 28 U.S.C. § 251, *et seq.*

The purpose of this broad jurisdictional grant is to eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the district courts and the Court of International Trade. This provision makes it clear that all suits of the type specified are properly commenced only in the Court of International Trade. The 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.<sup>7</sup>

However, Congress was careful not to expand the subject matter over which the new court would possess jurisdiction. Rather, 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 committee amended the statute so that such issues would remain before the district courts:

Some witnesses expressed concern over the breadth of subsection (i) in its introduced form. The American Importers Association (AIA) testified that subsection (i) could have been interpreted to permit the court to assert jurisdiction over 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 proposition that those questions should be treated

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<sup>7</sup> H.R. Rep. 96-1235 at 47, reprinted in, 1980 U.S.C.C.A.N. 3729, 3759 (1980).

the same whether a court is dealing with domestic or imported goods and more appropriately should come within the jurisdiction of the district courts.

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 an effort to remove any confusion over the jurisdiction of the Court of International Trade regarding this or similar issues.<sup>8</sup>

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, section 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.

## **II. Relevant Statutes And Regulations**

### **A. Endangered Species Act**

The Endangered Species Act 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."<sup>9</sup> An endangered species is one that is in danger of

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<sup>8</sup> *Id.* at 47-48.

<sup>9</sup> 16 U.S.C. § 1531(b).

extinction throughout all or a significant portion of its range<sup>10</sup>, and a threatened species is one that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range.<sup>11</sup> The ESA delegates responsibility to determine whether a species should be listed as endangered or threatened to the Secretaries of the Interior and Commerce, as appropriate.<sup>12</sup> The Secretary of the Interior administers the ESA through the Fish and Wildlife Service, and the Secretary of Commerce administers the ESA through the National Marine Fisheries Service (NMFS).

#### **1. ESA Section 9(a) - Import Prohibition On Listed Species**

With respect to any endangered species of fish or wildlife listed pursuant to the ESA, section 9(a)(1) of the ESA 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;
- (C) take any such species upon the high seas;
- (D) possess, sell, deliver, carry, transport, or ship, by any

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<sup>10</sup> 16 U.S.C. § 1532(6).

<sup>11</sup> 16 U.S.C. § 1532(20).

<sup>12</sup> 16 U.S.C. §§ 1533(a),1532(15).

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 4 of this Act [16 U.S.C. § 1533] and promulgated by the Secretary pursuant to authority provided by this Act.<sup>13</sup>

## **2. ESA Section 9(c) - Enforcement Of The CITES**

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 or “Convention”). ESA Section 9(c) makes it unlawful for any person subject to the jurisdiction of the United States 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, or to possess any specimens traded contrary to the provisions of the Convention.<sup>14</sup>

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<sup>13</sup> 16 U.S.C. § 1538(a)(1) (emphasis supplied).

<sup>14</sup> 16 U.S.C. § 1538(c).

The CITES is an international agreement that contains procedures for signatory nations to follow with respect to the trade of certain plant and animal species of particular interest. The full text of the CITES is available at [www.cites.org](http://www.cites.org). There are 175 Parties to the CITES, including the United States.

CITES provides a three-tier system of procedures concerning the trade in species listed in the three CITES Appendices.

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.”<sup>15</sup> This “particularly strict regulation” requires the “the Scientific Authority” of “the State of export [to] advise[] that such export will not be detrimental to the survival of that species” and the “Management Authority” of “the State of export [to be] satisfied that [1] the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora; . . . [and 2] an import permit has been granted for the specimen.”<sup>16</sup>

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<sup>15</sup> CITES Art. II ¶ 1.

<sup>16</sup> *Id.* at Art. III ¶ 2.

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."<sup>17</sup>

Accordingly, and relevant to the Court of International Trade's jurisdiction with respect to laws of the United States providing for "embargoes or other quantitative restrictions," the CITES, as implemented by ESA section 9(c), imposes an absolute ban on the import of Appendix I species for commercial purposes, but allows limited international trade for non-commercial purposes such as scientific research or education. Likewise, FWS has promulgated regulations that prohibit the import of "any wildlife or plant listed in [CITES] appendix I, II, or III" unless the conditions identified in the CITES are met.<sup>18</sup>

CITES Appendix II identifies species "which 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

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<sup>17</sup> *Id.* at Art. III ¶ 3.

<sup>18</sup> 50 C.F.R. §§ 23.11(a), (b)(1)

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.”<sup>19</sup> CITES Article IV contains procedures for exporting countries to follow for the granting of an export permit for Appendix II species.

Specifically, “[a]n export permit shall only be granted when the following conditions have been met: . . . a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species; [and] 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.”<sup>20</sup> Unlike Appendix I species, trade in Appendix II species does not require the importing country to issue import permits. Rather, CITES requires that “[t]he import of any specimen of a species included in Appendix II shall require the prior presentation of either an export permit or a re-export certificate.”<sup>21</sup>

Appendix III species are afforded the lowest level of protection. Appendix III includes “all species which any Party identifies as being subject to regulation

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<sup>19</sup> *Id.* at Art. II ¶ 2.

<sup>20</sup> *Id.* at Art. IV ¶ 2.

<sup>21</sup> *Id.* at Art. IV ¶ 4.

within its jurisdiction for the purpose of preventing or restricting exploitation.”<sup>22</sup>

As with Appendix II species, importation of Article III species requires only an export permit from the country of origin.<sup>23</sup>

### **3. ESA Section 11 - Citizen Suit Provision**

Section 11 of the ESA, enacted before creation of the Court of International Trade, authorizes the United States to impose civil and criminal penalties for ESA violations.<sup>24</sup> 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 Act or regulation issued under the authority thereof; or

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(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 4 [16 U.S.C. § 1533] which is not discretionary with the Secretary.

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<sup>22</sup> *Id.* at Art. II ¶ 2.

<sup>23</sup> *Id.* at Art. V ¶ 3.

<sup>24</sup> 16 U.S.C. §§ 1540(a), (b).

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. . . .<sup>25</sup>

## **B. Other Statutes**

Congress has also, from time to time, enacted statutes that afford protection to certain species. One prong of those statutes has been to impose an embargo upon certain merchandise. *See, e.g.*, 1990 ESA Amendments (prohibition upon import of shrimp which have been harvested with fishing technology that may harm sea turtles);<sup>26</sup> Driftnet Fishing Act (ban upon importation of seafood and recreational fishing equipment from countries whose fishing fleets engage in large scale driftnet fishing on the high seas);<sup>27</sup> Marine Mammal Protection Act (MMPA) Amendments of 1988 (specifying criteria for allowing access to the United States market by tuna harvesting nations and imposed embargoes upon tuna imports from countries that failed to meet those criteria).<sup>28</sup>

## **DISCUSSION**

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<sup>25</sup> 16 U.S.C. § 1540(g).

<sup>26</sup> Pub. L. No. 101-162 § 609, 103 Stat. 988 (1990).

<sup>27</sup> 16 U.S.C. § 1826, *et seq.*

<sup>28</sup> Pub. L. No. 100-711, 102 Stat. 4755 (1988).

The ESA and other statutes impose “embargoes” and, thus, certain limited court challenges fall within the jurisdiction of the Court of International Trade. In some cases, that court 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 the reviewing Court of Appeals for the Federal Circuit, will provide a uniform body of law regulating imports at all ports. In other instances, this apparently accidental jurisdiction acts to prevent the court from granting the full relief envisioned by statute and fragments jurisdiction between district courts and the Court of International Trade.

#### **I. The “Embargo” Jurisprudence Of The Court Of International Trade**

The Court Of International Trade 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.”<sup>29</sup>

##### **A. The Supreme Court’s *K Mart* Test**

The Supreme Court relied upon dictionary definitions to define the Court of International Trade’s jurisdiction in “embargo” cases. An embargo is “[a]

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<sup>29</sup> 28 U.S.C. § 1581(i).

prohibition; a ban.”<sup>30</sup> The Supreme Court, in *K Mart*, explained that “the 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.”<sup>31</sup> In *K Mart*, the Court concluded that the district court, pursuant to the general federal question jurisdiction was the correct forum to challenge a regulation issued under a statute that, “prohibits importing ‘into the United States any merchandise of foreign manufacture if such merchandise . . . bears a trademark owned by a citizen of . . . the United States, and registered . . . by a person domiciled in the United States . . ., unless written consent of the owner . . . is produced at the time of making entry.’”<sup>32</sup>

The Supreme 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

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<sup>30</sup> American Heritage Dictionary, Fourth Edition (2000).

<sup>31</sup> *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) (quoting 28 U.S.C. § 1581(i)(3)).

<sup>32</sup> *Id.* at 179 (quoting 19 U.S.C. § 1526(a)).

“certain ‘immoral articles’” from section 1581.<sup>33</sup>

Despite agreeing that section 1581(i)(3) does not contain unstated limitations upon the subject matter of any covered “embargo,” the Court reasoned that an “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 own option, enlist the Government's aid in restricting the quantity of imports in order to enforce a private right.”<sup>34</sup>

Accordingly, statutes like section 9(a) of the ESA, that contain blanket prohibitions on importation, provide for “embargoes” or “quantitative restriction[s] -- of zero -- on the importation of merchandise.”<sup>35</sup>

Lastly, that a statute provides for limited exceptions to an outright ban or other quantitative limit on imports does not necessarily exclude Court of International Trade review. As discussed below, the cases generally teach that, so

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<sup>33</sup> *Id.* at 180-81 (quoting 28 U.S.C. §§ 1581(i)(3), 1581(j); 19 U.S.C. § 1305).

<sup>34</sup> *Id.* at 185; *see also Sakar Intern., Inc. v. United States*, 516 F.3d 1340 (Fed. Cir. 2008) (holding that Court of International Trade lacked jurisdiction to address administrative penalty assessed upon the seizure of counterfeit imported merchandise).

<sup>35</sup> *Id.*

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 Court of International Trade.

**B. Environmental Embargo Decisions Issued By The Court Of International Trade**

**1. Section 9(a) Of The Endangered Species Act Bar Upon Importation Of ESA Listed Species**

As previously noted, the Endangered Species Act proscribes the importation of any endangered species, and then provides limited exceptions to this blanket prohibition. The courts have concluded that this prohibition is an embargo and that decisions under ESA subsection 9(a) must be reviewed by the Court of International Trade. 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 that “Section 9(a)(1)(A)’s prohibition on the import of ESA-listed salmon is a governmental restriction.”<sup>36</sup> 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

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<sup>36</sup> *Salmon Spawning & Recovery Alliance v. Spero*, 2006 U.S. Dist. LEXIS 28432 \*20 (W.D. Wash., 2006) (*SSRA I*).

imports.”<sup>37</sup>

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-listed species imported for personal consumption. Nevertheless, the court reasoned that, “[i]n the Ninth Circuit, ‘[c]onflicts between the broad grants of jurisdiction to the district courts and the grant of exclusive jurisdiction to the [Court of International Trade] are to be resolved by upholding the exclusivity of the [Court of International Trade] jurisdiction.’”<sup>38</sup>

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*.<sup>39</sup> The court explained that the Ninth Circuit had previously concluded that the Court of International Trade possesses jurisdiction to entertain cases involving an import ban that was more “qualitative” in nature than the outright ban contained in ESA

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 25 (quoting *Cornet Stores v. Morton*, 632 F.2d 96, 98 (9th Cir. 1980); *Fritz v. United States*, 535 F.2d 1192, 1194 (9th Cir. 1976))

<sup>39</sup> *Id.* at 26.

section 9(a), and thus concluded that the ESA section 9(a) bar upon importation imposes an “embargo.”<sup>40</sup>

The district court also transferred the count of the complaint that attempted to compel ESA section 7(a)(2) consultation between NMFS and Customs, concluding that the Court of International Trade could assert supplemental jurisdiction over that claim.<sup>41</sup>

Upon transfer, the Court of International Trade ultimately dismissed the complaint for lack of jurisdiction because the agency “action” that 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.<sup>42</sup>

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

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<sup>40</sup> *Id.* (citing *Earth Island Inst. v. Brown*, 28 F.3d 76 (9th Cir. 1994), and *Earth Island Inst. v. Christopher*, 6 F.3d 648 (9th Cir. 1993) (*Christopher*), which involved bans upon the import of shrimp caught in a manner harmful to sea turtles).

<sup>41</sup> *Id.* at 28-29 (citing 28 U.S.C. § 1367; *Associacao Dos Industriais de Cordoaria E Redes v. United States*, 828 F. Supp. 978 (Ct. Int’l Trade 1993); *B-West Imports, Inc. v. United States*, 880 F. Supp. 853 (Ct. Int’l Trade 1995), *aff’d* 75 F.3d 633 (Fed. Cir. 1996)). The Federal Circuit later held that the Court of International Trade may not assert supplemental jurisdiction. *Sioux Honey Ass’n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1051-54 (Fed. Cir. 2012).

<sup>42</sup> *Salmon Spawning & Recovery Alliance v. Basham*, 477 F. Supp. 2d 1301 (*SSRA II*), *reconsideration denied*, 2007 WL 1362434 (Ct. Int’l Trade 2007) (*SSRA*

unlawfully import ESA-listed salmon.<sup>43</sup> Relying upon *Heckler v. Chaney*, the court explained that ““an 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.””<sup>44</sup> Accordingly, the Federal Circuit explained that “an agency’s decision not to undertake enforcement actions is ‘presumptively unreviewable’ under the APA.”<sup>45</sup>

## 2. Shrimp Embargo For Sea Turtle Protection

The courts have further concluded that regulation of importation involved an “embargo” if there is an outright ban upon importation of species that is caught in an environmentally harmful manner.<sup>46</sup> In *Christopher*, the Ninth Circuit dismissed an action seeking to compel agency action to protect sea turtles from accidental take by prohibiting “[t]he importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may

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III).

<sup>43</sup> *Salmon Spawning Recovery Alliance v. United States*, 532 F.3d 1338, 1345 (Fed. Cir. 2008) (*SSRA IV*).

<sup>44</sup> *Id.* (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

<sup>45</sup> *Id.* The court also remanded to the Court of International Trade to determine, in the first instance, whether it possessed jurisdiction to hear the claim seeking to compel consultations between NMFS and Customs.

<sup>46</sup> *Christopher*, 6 F.3d 648.

affect adversely . . . sea turtles,” unless the President certifies that the targeted countries have initiated regulatory schemes comparable to the measures followed by United States fishermen.<sup>47</sup> The court relied upon *K Mart*’s reasoning that embargoes need not relate solely to international trade to fall within the Court of International Trade’s subject matter jurisdiction, explaining that “[t]he 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.”<sup>48</sup> 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 [Court of International Trade] would have exclusive jurisdiction.”<sup>49</sup>

### **3. Embargo In Retaliation For Driftnet Fishing**

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<sup>47</sup> 16 U.S.C. § 1537(b) (1993).

<sup>48</sup> *Earth Island*, 6 F.3d at 651 (citing *K Mart*, 485 U.S. at 184).

<sup>49</sup> *Id.* (citing 19 C.F.R. § 12.60 (1987)); *see also id.* (noting similarity between bans upon imports of uncertified shrimp and sea otter pelts under section 12.60); *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282 (Fed. Cir. 2002) (reversing Court of International Trade decision enjoining importation of certain shrimp and sustaining agencies’ enforcement of embargo).

The Driftnet Fishing Act<sup>50</sup> prohibits imports of all seafood products and recreational fishing equipment from countries that utilize driftnets outside their exclusive economic zones.<sup>51</sup>

#### **4. Tuna Embargo For Dolphin Protection**

The Court of International Trade's jurisdiction has also extended to challenges to regulations governing the fishing practices of United States fleets, where those regulations form the basis for an embargo upon foreign fisheries that do not follow similar conservation measures. The Court of International Trade thus entertained actions concerning the prohibition upon imports of Eastern Tropical Pacific tuna caught in purse seine nets using non-dolphin safe techniques. As the Federal Circuit explained, dolphins in the Eastern Tropical Pacific often swim with large schools of yellowfin tuna. As a result,

[p]urse 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,

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<sup>50</sup> 16 U.S.C. § 1826, *et seq.*

<sup>51</sup> *Humane Soc. of United States v. Clinton*, 236 F.3d 1320 (Fed. Cir. 2001) (denying petition for a writ of *mandamus* directing the President to impose sanctions against Italy for violation of the Driftnet Fishing Act and sustaining Court of International Trade decision to compel Department of Commerce to identify Italy as a country that engages in large scale high seas driftnet fishing).

explosives, and helicopters to chase the dolphins for extended periods in an attempt to exhaust them.

Eventually, the group 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.<sup>52</sup>

To address the harm to dolphins caused by the purse seine tuna fishery, Congress enacted the Act of July 17, 1984.<sup>53</sup> There, Congress amended section 101(a)(2) of the MMPA to require governments of nations that export 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. In 1998, 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.<sup>54</sup>

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<sup>52</sup> *Defenders of Wildlife v. United States*, 330 F.3d 1358, 1360-61, *rehearing and rehearing en banc denied*, 344 F.3d 1333 (Fed. Cir. 2003), *cert. denied*, 541 U.S. 1029 (2004).

<sup>53</sup> Pub. L. No. 98-364, 98 Stat. 440 (1984).

<sup>54</sup> Pub. L. No. 100-711 at § 4, 102 Stat. at 4765.

One method of reducing dolphin mortality is the “backdown” procedure. “Dolphins are released through a ‘backdown’ procedure, which takes place when the fishermen reverse the vessel’s direction after approximately one-half of the purse seine net has been rolled onboard.”<sup>55</sup> After numerous discussions with the primary Eastern Pacific tuna exporting countries, the United States and those countries signed the Panama Declaration. The Panama Declaration formalized, modified, and enhanced informal agreements among the stakeholders in the Eastern Pacific tuna fishery and contained statements of intent to establish the International Dolphin Conservation Program (IDCP). 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 amended its laws to: (1) lift the embargoes imposed under the MMPA; (2) permit the sale of both dolphin-safe and non-dolphin safe tuna in the U.S. market; and (3) change the definition of “dolphin-safe tuna” to mean “tuna harvested without dolphin mortality.”<sup>56</sup>

In 1997, Congress enacted the International Dolphin Conservation Program Act (IDCPA). The three purposes of the IDCPA were to: (1) give effect to the

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<sup>55</sup> *Defenders*, 330 F.3d at 1361.

<sup>56</sup> *Id.* at 1362.

Declaration of Panama's intent that the United States negotiate a binding agreement to establish the IDCP; (2) recognize that nations fishing for tuna in the ETP have achieved significant reductions in dolphin mortality; and (3) end the ban on imports of tuna from nations that comply with the IDCP.<sup>57</sup> The IDCOPA 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 IDCP and is a member (or applicant member) of the Inter-American Tropical Tuna Commission; (2) is meeting its obligations under the IDCP and the Inter-American Tropical Tuna Commission; and (3) does not exceed certain dolphin mortality limits.<sup>58</sup>

The IDCOPA also provided “Regulatory Authority” to the United States Department of Commerce, directing that agency to “issue regulations, and revise those regulations as may be appropriate, to implement the International Dolphin Conservation Program,” including “regulations to authorize and govern the taking of marine mammals in the eastern tropical Pacific Ocean . . . by vessels of the United States.”<sup>59</sup>

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<sup>57</sup> Pub. L. No. 105-42 at § 2, 111 Stat. 1122, 1122 (1997).

<sup>58</sup> 16 U.S.C. § 1371(a)(2)(B).

<sup>59</sup> 16 U.S.C. § 1413.

The IDCPA thus directed Commerce to issue regulations governing the United States 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.”<sup>60</sup> 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.<sup>61</sup> The effect of this regulation was to allow the United States fleet to begin backdown 30 minutes after sundown, 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 Court of International Trade, reasoning that the scope of the regulation upon the United States fishing fleet also governed the embargo upon tuna that did not comply with the IDCPA.<sup>62</sup>

Unfortunately, the relevant Court of International Trade and Federal Circuit

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<sup>60</sup> 16 U.S.C. § 1413(a)(2)(B)(v) (emphasis supplied).

<sup>61</sup> 50 C.F.R. § 216.24(c)(6)(iii) (emphasis supplied).

<sup>62</sup> *See, e.g., Defenders of Wildlife v. Dalton*, 97 F. Supp. 2d 1197 (Ct. Int’l Trade 2000) (denying motion for preliminary injunction to reimpose embargo upon Mexican tuna).

decisions provide no analysis whether jurisdiction should lie in the Court of International Trade or the district courts. Rather, the courts merely cited to section 1581(i)(3), without determining whether a regulation that, on its face, regulates fishing practices of United States vessels, is a “law of the United States” providing for “embargo or other quantitative restrictions” on the import of tuna.<sup>63</sup> 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 Court of International Trade’s exclusive jurisdiction in embargo cases.

### **C. No Embargo Upon 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 Court of International Trade refused to assert jurisdiction in a case in which the a ban upon imports was conditioned upon certifications made by foreign governments.<sup>64</sup> In that case, various public interest groups sued the Government and certain importers of bigleaf mahogany wood from Peru, alleging that the

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<sup>63</sup> *Id.* at 1199 (“Since this motion involves an embargo, the court exercises jurisdiction under 28 U.S.C. § 1581(i)(3)”).

<sup>64</sup> *Native Federation of Madre De Dios River and Tributaries v. Bozovich Timber Products*, 491 F. Supp. 2d 1174 (Ct. Int’l Trade 2007).

Peruvian government's CITES certification that the export of this merchandise did not harm the species violated the Convention. Among the many issues raised, the court 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.<sup>65</sup>

## **II. Options For Resolving The Current Jurisdictional Uncertainty**

There is currently significant confusion in the environmental arena, and even the splitting of jurisdiction within certain statutory schemes. Accordingly, although the Government may be subject to suit in the Court of International Trade, 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 Court of International Trade. 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 Court of International Trade's jurisdiction to entertain claims involving "embargos" beyond the court's current jurisdiction,

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<sup>65</sup> See also *Castlewood Products LLC v Norton*, 365 F.3d 1076 (D.C. Cir. 2004) (sustaining Forest Service decision to reject entries of Brazilian mahogany wood as non-CITES compliant, even though that merchandise was entered with

which is limited by the Supreme Court’s decision in *K Mart* to “quantitative restrictions,” as opposed to qualitative restrictions.<sup>66</sup> 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.<sup>67</sup> A third alternative would be a limited repeal the Court of International Trade’s embargo jurisdiction with respect to embargos 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.<sup>68</sup>

The first option would place before the Court of International Trade actions actually involving international trade in certain CITES species, overruling the

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governmental certifications).

<sup>66</sup> 485 U.S. at 185.

<sup>67</sup> See 16 U.S.C. § 1540 (citizen suit provision providing for district court review); 5 U.S.C. § 703 (providing for APA review in “court of competent jurisdiction”); *International Brotherhood of Teamsters v. Pena*, 17 F.3d 1478 (D.C. Cir. 1994) (citing 5 U.S.C. § 703 for proposition that, “[u]nless a statute provides otherwise, persons seeking review of agency action go first to district court rather than to a court of appeals.”).

<sup>68</sup> 28 U.S.C. § 1581(i)(3).

*Native Federation*<sup>69</sup> opinion concerning the trade in bigleaf mahogany. This would better use the court's expertise in trade matters and provide consistent rules governing all ports of entry, because the Court of International Trade and the Federal Circuit are courts of nationwide jurisdiction.

The second option of repealing all of the Court of International Trade's embargo jurisdiction would provide for certainty; however, it would eliminate from the court's docket matters that are clearly within its expertise. Indeed, the "administration and enforcement"<sup>70</sup> 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 that court's expertise.<sup>71</sup>

Finally, the third option would eliminate much confusion concerning which court in which 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,

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<sup>69</sup> 491 F. Supp. 2d 1174.

<sup>70</sup> 28 U.S.C. § 1581(i)(4).

<sup>71</sup> See 28 U.S.C. § 1581(a) (providing for review of CBP classification decisions); 19 U.S.C. § 1202 (directing publication of the Harmonized Tariff Schedule by CBP, as statutory basis for classification of imported merchandise).

as it currently does with respect to “embargos” for “the protection of the public health or safety,”<sup>72</sup> 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.<sup>73</sup>

Moreover, the legislative history of the embargo provision does not indicate that the Congress intended the Court of International Trade to address environmental cases under its “embargo” jurisdiction. Indeed, as previously noted, the legislative history indicates that Congress intended to affirmatively limit the court’s jurisdiction to matters concerning “classification, valuation or rate of duty.”<sup>74</sup> Indeed, the legislative history acknowledges the request that Congress exclude “questions of public health and safety” from the court’s jurisdiction.<sup>75</sup> 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

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<sup>72</sup> 28 U.S.C. § 1581(i)(3).

<sup>73</sup> See, e.g., 16 U.S.C. § 1540 (ESA citizen suit provision); 33 U.S.C. § 1365 (Federal Water Pollution Control Act citizen suit provision); 42 U.S.C. § 4911 (Noise Control Act citizen suit provision); 42 U.S.C. § 6972 (Resource Conservation and Recovery Act citizen suit provision); 42 U.S.C. § 7604 (Clean Air Act citizen suit provision).

<sup>74</sup> H.R. Rep. 96-1235 at 47, *reprinted in*, 1980 U.S.C.C.A.N. at 3759.

<sup>75</sup> *Id.*

excluded actions under these statutes as well.

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

\*This is a draft of an article that is forthcoming in 21 Tul. J. Int'l & Comp. L. (2013).  
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