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RECENT APPLICATIONS OF UNITED STATES LAWS TO CONSERVE MARINE SPECIES WORLDWIDE: SHOULD TRADE SANCTIONS BE MANDATORY?

*John Alton Duff**

I. INTRODUCTION

A quarter of a century ago, the U.S. Congress enacted one of the first domestic laws aimed at enforcing marine species conservation agreements beyond U.S. territorial limits, the Pelly Amendment.¹ That amendment gave the President the authority and discretion to impose trade sanctions on foreign nations as a means to gain compliance with international fishery conservation agreements.² Since the Pelly Amendment's enactment in 1971, Congress has amended it and promulgated other statutes aimed at conserving not only fish, but a wide array of living marine resources such as whales, dolphins, sea turtles and other wildlife threatened by commercial fishing practices.³

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1. Pelly Amendment to the Fisherman's Protective Act of 1967, Pub. L. No. 92-219, 85 Stat. 786 (1971) (current version at 22 U.S.C. § 1978 (1994)).

2. *Id.* As enacted in 1971, the statute was limited to fishery conservation agreements. In its present form the provision also applies to "program[s] for endangered or threatened species." 22 U.S.C. § 1978(a)(2).

3. See Packwood Amendment to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1821 (1994); Driftnet Impact Monitoring, Assessment, and Control Act of 1987, Pub. L. No. 100-220, 101 Stat. 1477 (1987) (codified at 16 U.S.C. § 1822 note (1994)); Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1371-1407 (1994); Fishery Conservation Amendments of 1990, 16 U.S.C. § 1826 (1994); High Seas

The most recent statutes require, rather than allow, the Executive Branch to impose trade sanctions on nations deemed to be violating marine resource protection pacts. In some cases, sanctions imposed on foreign nations have resulted in bitter trade disputes, such as the tuna-dolphin conflict that went before a General Agreement on Tariffs and Trade dispute resolution panel.⁴ Until recently, the Executive Branch had been successful in limiting conflicts between international conservation and international trade objectives. However, the more recent and less discretionary statutory requirements may impose difficult duties upon members of the Executive Branch who are more comfortable with flexible approaches to trade and foreign affairs issues.

This Article reviews the application of three United States statutes which may trigger trade sanctions for violations of marine resource conservation programs. Recently, three issues have arisen which illustrate the range of enforcement measures that may be taken, the

Driftnet Fisheries Enforcement Act, Pub. L. No. 102-582, 106 Stat. 4900 (1992) (codified at 16 U.S.C. §§ 1826a-1826c (1994)); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. 101-162, § 609, 103 Stat. 988, 1037 [hereinafter Section 609] (codified at 16 U.S.C. § 1537 note (1994)).

4. Joel P. Trachtman, *GATT Dispute Settlement Panel, International Decisions*, 86 AM. J. INT'L L. 142 (1992). Foreign nation tuna fishing practices that resulted in large numbers of incidental dolphin deaths led the United States to impose trade restrictions on States violating dolphin conservation measures as set out in the MMPA. *Id.* See also John P. Manard, Jr., *GATT and the Environment: The Friction Between International Trade and the World's Environment—The Dolphin and Tuna Dispute*, 5 TUL. ENVTL. L.J. 373 (1992); Frederic L. Kirgis, Jr., *Environment and Trade Measures After the Tuna/Dolphin Decision*, 49 WASH. & LEE L. REV. 1221 (1992); Dorothy J. Black, Note, *International Trade v. Environmental Protection: The Case of the U.S. Embargo on Mexican Tuna*, 24 L. & POL'Y INT'L BUS. 123 (1992); Carol J. Beyers, Note, *The U.S./Mexico Tuna Embargo Dispute: A Case Study of the GATT and Environmental Progress*, 16 MD. J. INT'L L. & TRADE 229 (1992); Eric Christensen & Samantha Geffin, *GATT Sets its Net on Environmental Regulation: The GATT Panel Ruling on Mexican Yellowfin Tuna Imports and the Need for Reform of the International Trading System*, 23 U. MIAMI INTER-AM. L. REV. 569 (1991-92); Robert F. Housman & Durwood J. Zaelke, *The Collision of the Environment and Trade: The GATT Tuna/Dolphin Decision*, 22 ENVTL. L. REP. (Envtl. L. Inst.) 10,268 (Apr. 1992); Matthew H. Hurlock, Note, *The GATT, U.S. Law and the Environment: A Proposal to Amend the GATT in Light of the Tuna/Dolphin Decision*, 92 COLUM. L. REV. 2098 (1992); David J. Ross, Note, *Making GATT Dolphin-Safe: Trade and the Environment*, 2 DUKE J. COMP. & INT'L L. 345, 349 (1992); 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 ECOL. L.Q. 1 (1994).

circumstances under which they may be employed, the relative discretion on the part of the Executive Branch in administering the laws, and the repercussions that may result.

Part Two of this Article discusses the oldest U.S. domestic law used to protect whale stocks worldwide, the Pelly Amendment. It outlines the U.S. Secretary of Commerce's investigation of Japan's recent scientific whaling efforts, the resulting certification of Japan under the Pelly Amendment, and Japan's response to certification. It concludes by underscoring the great discretion afforded the President in determining whether or not to impose trade sanctions.

Part Three discusses the United States Court of International Trade's December 1995 application of the Endangered Species Act's sea turtle provision (Section 609).⁵ It outlines the Executive Branch's initial, limited application of Section 609 to the wider Caribbean region. It then examines the claim of environmental organizations that the law mandates worldwide application. Part Three next summarizes the court's determination that the law demands global application. It explains the court's finding that Section 609 leaves little discretion to the Executive Branch in imposing trade sanctions. The section concludes by noting that free trade violation charges levied by affected nations could subject U.S. imposed trade sanctions to an international dispute resolution process.

Part Four reviews the March 1996 U.S. Court of International Trade decision ordering the U.S. Secretary of Commerce to apply the trade sanction provisions of the High Seas Driftnet Fisheries Enforcement Act⁶ against Italy for driftnetting operations in contravention of a global moratorium. It presents the concerns that led to a global moratorium on the use of large scale driftnets on the high seas. It sets out the United States High Seas Driftnet Fisheries Enforcement Act with its congressionally-created worldwide enforcement mechanism, and explains how that law reaches into the Mediterranean Sea to affect Italian fishing practices. Part Four concludes by revisiting questions concerning the need for, and authority of, the global moratorium. It also suggests that a U.S. law that imposes its fishery conservation objectives on fishing in the Mediterranean, an area over which other nations have potentially exclusive fishery jurisdiction, merits review.

5. Section 609, *supra* note 3.

6. 16 U.S.C. §§ 1826a-1826c (1994).

Based on the three issues referred to above, this Article concludes that the increase in statutorily mandated enforcement measures, at a time when the United States is entering larger and more comprehensive trade agreements, inevitably leads to an increasing likelihood of conflict between free trade and marine species conservation goals. Fair trade and sustainable use issues cannot be addressed when isolated from one another. These recent developments indicate that U.S. policymaking in both areas needs to be reviewed and integrated to achieve a mutually acceptable and balanced practice that will be respected by other States and will withstand the scrutiny of international arbiters.

II. JAPAN'S SCIENTIFIC RESEARCH WHALING AND UNITED STATES APPLICATION OF THE PELLY AMENDMENT

A. *International Convention on the Regulation of Whaling*

Both the United States and Japan are States Parties to the International Convention on the Regulation of Whaling.⁷ The provisions of the Convention are administered by the International Whaling Commission (IWC).⁸ In 1982, the IWC called for a moratorium on commercial whaling.⁹ Pursuant to that resolution, a moratorium on commercial whaling began in 1986 and remains in effect.¹⁰ While the moratorium

7. International Convention on the Regulation of Whaling (ICRW), Dec. 2, 1946, T.I.A.S. No. 1849, 161 U.N.T.S. 72. See also 1 PATRICIA BIRNIE, INTERNATIONAL REGULATION OF WHALING, 168-204 (1985) (detailed analysis of ICRW).

8. ICRW, *supra* note 7, art. III.

9. See Kazuo Sumi, *The "Whale War" Between Japan and the United States: Problems and Prospects*, 17 DEN. J. INT'L L. & POL'Y 317, 335 (1989) (quoting *Chairman's Report*, Int'l Whaling Comm'n, 34th Mtg., para. 6 (1982)). In 1982, the IWC amended paragraph 10 of its Schedule by adding the following language:

Notwithstanding the other provision of paragraph 10, catch limit for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.

Id. See also 2 PATRICIA BIRNIE, INTERNATIONAL REGULATION OF WHALING 714 (1985).

10. *Schedule*, Int'l Whaling Comm'n, 47th Mtg., para. 10(d), (e) (as amended Sept. 1995) [hereinafter ICRW Schedule (1995)]. The moratorium on the commercial taking of all whales including Minke whales is illustrated in this 1995 Schedule by Table

has substantially reduced the number of whales taken annually,¹¹ the IWC does allow some whales to be killed each year under its scientific “research whaling” provisions.¹²

B. The Pelly Amendment

The Pelly Amendment to the Fishermen’s Protective Act,¹³ calls on the U.S. Secretary of Commerce to “certify”¹⁴ nations whose actions are found to diminish the effectiveness of international fishery conservation and endangered species conservation programs.¹⁵ The Pelly Amendment gives the President great discretion in determining what, if any, enforcement actions might be taken to persuade a foreign nation to respect such agreements.¹⁶ While certifications have been numerous,

1, Baleen Whale Stock Classifications and Catch Limits. *Id.* at tbl. 1. All commercial catch limits are set at zero through 1997. *Id.*

11. Robert Friedheim, *Moderation in the Pursuit of Justice: Explaining Japan’s Failure in the International Whaling Negotiations* (1995) (manuscript on file with author). The moratorium did not end commercial whaling. Besides the fact that whaling is permitted by the “research whaling” provision, as discussed *infra* note 12, Norway and Iceland, former States Parties to the ICRW, have left the IWC. Therefore they are no longer legally bound by the Convention or the Commission’s allocation schedule, and have resumed commercial whaling. *Id.*

12. ICRW, *supra* note 7, at art. VIII. “[A]ny Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take, and treat whales for purposes of scientific research. . . .” *Id.*

13. 22 U.S.C. § 1978 (1994).

14. 22 U.S.C. § 1978(a)(2) (1994). “Certification” refers to the action the Secretary of Commerce takes in notifying the President 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.” *Id.*

15. Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 AM. U.J. INT’L L. & POL’Y, 751, 758-759 (1994). Originally, the Pelly Amendment applied only to international fishery conservation programs. In 1978, it was amended to also apply to international programs for endangered or threatened species. *Id.* at 758-760. *See also* 22 U.S.C. §§ 1978(a)(1)-(2) (1994).

16. 22 U.S.C. § 1978(a)(4) (1994).

[T]he 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 on Tariffs and Trade.

Id. (emphasis added).

presidents normally decide not to impose trade sanctions.¹⁷ In some instances, the mere threat of trade sanctions has been effective in gaining compliance with marine conservation agreements.¹⁸

C. United States Certification of Japan's Recent Whaling Activities

In recent years, Japan has issued permits allowing more than 300 whales to be taken annually for scientific research.¹⁹ This research whaling has been criticized by some commentators as a continuation of commercial whaling under the rubric of "scientific research."²⁰ Much of Japan's research whaling takes place in the Southern Pacific.²¹ In 1994, IWC member nations voted to establish a Southern Ocean Sanctuary in an area of the southern hemisphere hosting large whale populations.²² The government of Japan lodged an objection to the

17. See Charnovitz, *supra* note 15, at 763-773 (reviewing the fourteen Pelly certifications between 1971 and 1994, the one instance where trade sanctions were announced, and concluding Pelly threats have a fifty-eight percent success rate).

18. *Id.* at 772-775.

19. *U.S. Probes Japan's Whaling with Sanctions in View*, Japan Transp. Scan, Dec. 25, 1995, available in LEXIS, NEWS Library, ZJP1 File.

20. Dean M. Wilkinson, *The Use of Domestic Measures to Enforce International Whaling Agreements: A Critical Perspective*, 17 DEN. J. INT'L L. & POL'Y 271, 277-279, 283 (1989). After the moratorium was in place, efforts to "exploit this [scientific research] loophole became systematic." *Id.* at 277. Conservationists sought to "counter the growing abuse of Article VIII of the Convention and the use of 'scientific research' to cloak commercial whaling operations." *Id.* at 283.

21. See *U.S. Probes Japan's Whaling*, *supra* note 19.

22. ICRW Schedule (1995), *supra* note 10, para. 7(b).

In accordance with Article V(1)(c) of the Convention, commercial whaling, whether by pelagic operations or from land stations, is prohibited in a region designated as the Southern Ocean Sanctuary. This Sanctuary comprises the waters of the Southern Hemisphere southwards of the following line: starting from 40 degrees S, 50 degrees W; thence due east to 20 degrees E; thence due south to 55 degrees S; thence due east to 130 degrees E; thence due north to 40 degrees S; thence due east to 130 degrees W; thence due south to 60 degrees S; thence due east to 50 degrees W; thence due north to the point of beginning. This prohibition applies irrespective of the conservation status of baleen and toothed whale stocks in this Sanctuary, as may from time to time be determined by the Commission. However, this prohibition shall be reviewed ten years after its initial adoption and at succeeding ten year intervals, and could be revised at such times by the Commission.

Id. For all Contracting Governments except Japan, paragraph 7(b) came into force on December 6, 1994. *Id.* para. 7(b) n.**.

Southern Ocean Sanctuary resolution.²³ Therefore, Japan is not legally bound by the terms of the resolution.²⁴ Japan is also requesting a legal determination on the IWC's authority to designate a Southern Ocean Sanctuary.²⁵

In 1995, States Parties to the ICRW voted to restrict scientific research on whales to non-lethal methods in the Southern Ocean Sanctuary.²⁶ The resolution also called on all States Parties to refrain from issuing scientific permits for lethal research in the area.²⁷ Further, IWC members reiterated and strengthened the provisions regarding scientific whaling to emphasize that states should permit lethal research only in exceptional circumstances.²⁸ Japan opted out of the resolutions

23. *Id.* para. 7(b) n.**.

24. *Id.*

25. *Resolution on Legal Matters Related to the Adoption of the Southern Ocean Sanctuary*, Int'l Whaling Comm'n, 47th Mtg., Agenda Item 13, at IWC/47/45 (1995).

26. *Resolution on Whaling Under Special Permit in Sanctuaries*, IWC Resolution 1995-8, Int'l Whaling Comm'n, 47th Mtg. (1995). "Contracting Governments should undertake, and collaborate in, the conduct of a programme of research in the Southern Ocean Sanctuary using non-lethal methods." *Id.* See also *Japan Harpoons Ban on "Research" Whaling*, Agence France Presse, June 5, 1995, available in LEXIS, NEWS Library, AFP File (noting that 23 of the 30 IWC member States voted to adopt non-lethal scientific research methods).

27. *Resolution on Whaling Under Special Permit in Sanctuaries*, *supra* note 26. "Contracting Governments should . . . refrain from issuing Special Permits for research involving the killing of cetaceans in such sanctuaries." *Id.*

28. *Resolution on Whaling Under Special Permit*, IWC Resolution 1995-9, Int'l Whaling Comm'n, 47th Mtg. (1995).

WHEREAS with the development of modern scientific techniques *it is not necessary to kill whales* to obtain the information that is needed for initial implementation of the Revised Management Procedure for a particular whale stock;

NOW THEREFORE the Commission:

RECOMMENDS

-that scientific research intended to assist the comprehensive assessment of whale stocks and the implementation of the Revised Management Procedure shall be undertaken by *non-lethal* means;

-that scientific research involving the killing of cetaceans should only be permitted in *exceptional circumstances* where the questions address critically important issues which cannot be answered by the analysis of existing data and/or use of *non-lethal* research techniques;

....

RECOMMENDS that *Contracting Governments*, in the exercise of their sovereign rights, *refrain from issuing or revoke, permits* to its nationals that the

and indicated that it would continue to pursue its research whaling.²⁹

In Japan's last expedition prior to the 1986 moratorium on whaling, Japan took approximately 2,000 minke whales.³⁰ After the moratorium became effective, Japan restricted its whaling to "scientific research" and issued special permits for the lethal taking of approximately 300 minkes per year.³¹ In 1995, Japan announced that it would increase its scientific whaling level to 440 for the 1995-1996 season.³² Japan indicated that it would not seek further increases for at least seven years.³³

In light of the sanctuary and scientific research resolutions and Japan's intent to increase its whaling efforts, the U.S. Secretary of Commerce began an investigation to determine if Japan's actions would diminish the effectiveness of the ICRW.³⁴ On December 11, 1995, in a letter to the President, the Secretary of Commerce concluded that Japan's disregard for the resolutions diminished the effectiveness of the IWC's conservation efforts.³⁵ Pursuant to the Pelly Amendment, the Secretary certified Japan.³⁶ This certification started the sixty day review period within which the President must determine whether trade sanctions or other means should be used to address the issue.³⁷

Japan protested the certification, arguing that its research is legal under the ICRW.³⁸ Japan's First Secretary for Fisheries called the U.S.

Commission, taking into account the comments of its Scientific Committee, considers do not satisfy the criteria specified above and therefore are not consistent with the Commission's conservation policy.

Id. (emphasis added).

29. See *Japan Harpoons Ban on "Research" Whaling*, *supra* note 26.

30. Sumi, *supra* note 9, at 327.

31. Gene S. Martin, Jr. & James W. Brennan, *Enforcing the International Convention for the Regulation of Whaling: The Pelly and Packwood-Magnuson Amendments*, 17 DEN. J. INT'L L. & POL'Y 293, 305 (1989).

32. *U.S. Probes Japan's Whaling with Sanctions in View*, *supra* note 19.

33. *Id.* (citing statement by U.S. National Marine Fisheries Service spokesman).

34. *Id.*

35. *Id.*; see also *Brown Accuses Japan of Research Whaling*, Jiji Press Ticker Service, Dec. 20, 1995, available in LEXIS, NEWS Library, JIJI File (citing letter from United States Secretary of Commerce Ron Brown to President Clinton). "Japanese Nationals are engaged in scientific whaling activities that diminish the effectiveness of the International Whaling Commission Conservation Program." *Id.*

36. 22 U.S.C. § 1978(a)(2) (1994).

37. 22 U.S.C. § 1978(b) (1994).

38. *Japan Defends Whale Hunts Under U.S. Attack*, Reuters World Service, Dec. 20, 1995, available in LEXIS, NEWS Library, REUWLD File.

action, “a subjective assessment of the situation”³⁹ and noted that the increased scientific whaling effort was based on an IWC science panel determination that past research efforts were inadequate.⁴⁰ However, U.S. officials countered that the increase in lethal research was not connected to the science panel’s analysis.⁴¹ Environmental organizations⁴² and some members of Congress urged sanctions.⁴³

On February 9, 1996, President Clinton announced that he would not impose trade sanctions against Japan.⁴⁴ The President expressed his belief that the issue would be better addressed through other “high level efforts to persuade Japan to reduce” its research whaling.⁴⁵ Advocates

39. *Id.*

40. *Id.*

41. *Id.*

42. *Clinton Set to Decide Action on Japan Whaling*, Reuters, Ltd., Feb. 8, 1996, available in LEXIS, WORLD Library, TXTLNE File.

43. *Id.* “At this point, any efforts short of sanctions would . . . signal a lack of commitment to whale conservation by the United States.” *Id.* (quoting Sen. John Kerry).

44. *Text of Presidential Statement on Int’l Whaling Commission*, U.S. Newswire, Feb. 9, 1996, available in LEXIS, NEWS Library, USNWR File.

45. *Id.*

On December 11, 1995, Secretary of Commerce Ronald Brown certified under [the Pelly Amendment] that Japan has conducted research whaling activities that diminish the effectiveness of the International Whaling Commission (IWC) conservation program

The certification of the Secretary of Commerce was based on Japanese research whaling activities in both the North Pacific and the Southern Ocean Whale Sanctuary. In 1994, Japan expanded its research whaling activities into the North Pacific by permitting the taking of 100 minke whales, 21 of which were taken. The IWC found that this North Pacific whaling failed to satisfy applicable criteria for lethal research and was therefore inconsistent with the IWC’s conservation program. Nevertheless, Japan continued its whaling activities in the North Pacific, taking 100 minke whales in 1995. In addition, during 1995, Japan increased the number of minke whales to be harvested in the Southern Ocean Whale Sanctuary by 33 percent, despite a 1994 finding by the IWC that this lethal research program did not meet all applicable criteria.

In his letter to me of December 11, 1995, Secretary Brown conveyed his concerns not only over the whales that have been killed in this program to date but also over any further expansion of lethal research. While noting that the Japanese have informed us they have no plans for further expansion of lethal research in the Southern Ocean Whale Sanctuary, he expressed particular concern over whaling activity in that area. I share these concerns.

At this stage, I do not believe that the use of trade sanctions is the most constructive approach to resolving our differences over research whaling activities with the Government of Japan. However, I have instructed the

of marine conservation and whale protection took solace in the President's statement that he would seek to resolve the issue before the start of Japan's next Antarctic whaling season.⁴⁶

D. Analysis

The certification process of the Pelly Amendment illustrates a flexible enforcement tool favored by the Executive Branch. While a foreign nation's activities may warrant and even require investigation and certification,⁴⁷ trade sanctions are not required.⁴⁸ As illustrated in this instance, the President has the authority to seek other means to persuade a foreign nation to comply with international conservation agreements. Accordingly, the President can take into account other factors involved in U.S. relations with that nation and "custom fit" a response. As a result, trade sanctions are not used as a matter of practice.⁴⁹

It is perhaps this restraint that has led Congress to enact laws which mandate the imposition of sanctions for certain fishing practices which threaten the conservation of marine species. Two recent cases before the United States Court of International Trade illustrate the difficulties that the Executive Branch is encountering as these action forcing laws are employed for the first time.

Department of State to convey my very strong concerns to the Government of Japan. We will also vigorously pursue high-level efforts to persuade Japan to reduce the number of whales killed in its research program and act consistently with the IWC conservation program. We hope to achieve significant progress on these issues by the beginning of the next Antarctic whaling season and will keep these issues under review. I have instructed the Department of Commerce to continue to monitor closely Japan's research whaling and to report promptly on any further inconsistencies between Japanese whaling activities and the guidelines of the IWC conservation program.

Id.

46. S. Paul, *U.S. Will Not Punish Japan for Continued Whaling*, Reuters, Ltd., Feb. 9, 1996, available in LEXIS, WORLD Library, TXTLNE File (statement of World Wildlife Fund vice-president Richard Mott). See also *Text of Presidential Statement*, *supra* note 44.

47. 22 U.S.C. § 1978(3) (1994).

48. 22 U.S.C. § 1978(4) (1994).

49. Charnovitz, *supra* note 15, at 759-760.

III. UNITED STATES APPLICATION OF THE ENDANGERED SPECIES ACT SEA TURTLE PROTECTION PROVISION: REGULATING SHRIMPING AROUND THE WORLD

On December 29, 1995, in *Earth Island Institute v. Christopher*,⁵⁰ the United States Court of International Trade directed the United States Departments of State, Commerce, and Treasury ("federal defendants") to apply sea turtle protection measures to all nations exporting shrimp to the United States.⁵¹ Most species of sea turtle are considered endangered or threatened.⁵² Large numbers of them drown in shrimp nets around the world.⁵³ In the United States, shrimping operators must employ Turtle Excluder Devices to reduce the number of incidentally caught sea turtles.⁵⁴ However, foreign shrimpers are not subject to similar regulations.

Under a 1989 amendment to the Endangered Species Act (ESA), the United States must ban shrimp imports from countries that fail to reduce sea turtle fatalities in shrimping operations.⁵⁵ However, before *Earth Island Institute v. Christopher*, federal authorities had applied this provision only to those nations catching shrimp in the Gulf of Mexico and wider Caribbean region.⁵⁶

A. *Endangered Species Act Sea Turtle Protection Provision (Section 609)*

The ESA directs all federal departments and agencies to use their authority to conserve endangered and threatened species.⁵⁷ Pursuant to the ESA listing process, five species of sea turtles found in U.S. waters are designated as endangered and one is designated threatened.⁵⁸

50. 913 F. Supp. 559 (Ct. Int'l Trade 1995).

51. *Id.* at 580.

52. *See infra* note 58.

53. *See infra* note 59.

54. *See infra* note 62.

55. Section 609, *supra* note 3.

56. 56 Fed. Reg. 1051 (1991).

57. 16 U.S.C. §§ 1531-1544 (1994).

58. 50 C.F.R. § 17.11 (1994). Green sea turtle (*Chelonia mydas*) – endangered in some areas, threatened elsewhere; Hawksbill sea turtle (*Eretmochelys imbricata*) – endangered; Kemp's (Atlantic) ridley sea turtle (*Lepidochelys kempfi*) – endangered; Leatherback sea turtle (*Dermochelys coriacea*) – endangered; Loggerhead sea turtle

Commercial shrimp fishing has been identified as a primary threat to sea turtles around the world.⁵⁹ In 1989, Congress amended the ESA by adopting measures to reduce the threat to sea turtles within their "geographic range of distribution."⁶⁰

Most U.S. commercial shrimping activity takes place in the Gulf of Mexico and wider Caribbean region including the western Atlantic.⁶¹ In the United States, commercial shrimping vessels operating in sea turtle areas are required to use Turtle Excluder Devices (TEDs) on their nets to allow turtles to escape.⁶² Since the introduction of TEDs, the turtle mortality rate from U.S. commercial shrimping interactions has decreased dramatically.⁶³ Most foreign shrimpers do not employ TEDs.⁶⁴

The United States imports billions of dollars worth of shrimp annually from over seventy nations.⁶⁵ An estimated 124,000 sea turtles drown each year due to shrimping practices by non-U.S. fleets.⁶⁶ To address this threat to the survival of the species, the ESA sea turtle protection provision (known as "Section 609") directs the Secretary of State, in consultation with the Secretary of Commerce to, *inter alia*:

develop agreements with other nations for the conservation of sea turtles;

initiate negotiations with foreign nations engaged in commercial shrimping practices which might adversely affect these species;

encourage the protection of specific ocean and land regions vital to the species' survival; and,

(*Carretta carretta*) – threatened; Olive (Pacific) ridley sea turtle (*Lepidochelys olivacea*) – endangered in some areas, threatened elsewhere. *Id.*

59. WEBER ET AL., DELAY AND DENIAL—A POLITICAL HISTORY OF SEA TURTLES AND SHRIMP FISHING (1995).

60. Section 609, *supra* note 3.

61. See WEBER ET AL., *supra* note 59.

62. 57 Fed. Reg. 57,348 (1992) (codified at 50 C.F.R. pts. 217 and 227).

63. See WEBER ET AL., *supra* note 59.

64. See *infra* note 110.

65. *Judge Says Law to Save Turtles Prevents Most Imports of Shrimp*, N.Y. TIMES, Jan. 8, 1996, at A9.

66. *Earth Island Institute v. Christopher*, 913 F. Supp. at 568 (citing affidavit of Todd Steiner).

provide Congress with a list of nations which conduct commercial shrimping operations within the range of those sea turtles and indicate which nation's operation may adversely affect them.⁶⁷

Section 609 also includes enforcement measures to reduce the global threat to sea turtles. Specifically, it requires that "[t]he 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*," unless the government of the harvesting nation can prove that it has adopted a regulatory program to reduce sea turtle deaths which is comparable to that of the United States.⁶⁸

B. Foreign Shrimping and United States Application of Section 609

Concerned that the application of Section 609 to all nations might adversely affect trade, the State Department directed its efforts toward those nations which operate in the Gulf of Mexico and wider Caribbean region.⁶⁹ This region hosts most of the U.S. shrimping industry and is considered an important sea turtle habitat.⁷⁰ In construing Section 609 in this manner, the State Department applied the sea turtle protection measures to only fourteen of the more than eighty-five countries that export shrimp to the United States.⁷¹ Of the top seven shrimp exporters to the United States, only Mexico fell within the State Department's application of Section 609.⁷²

67. Section 609, *supra* note 3.

68. *Id.* § 609(b) (emphasis added).

69. Turtles in Shrimp Trawl Fishing Operations Protection; Guidelines 56 Fed. Reg. 1051 (1991); *see also* Kathleen D. Yaninek, *Turtle Excluder Device Regulations: Laws Sea Turtles Can Live With*, 21 N.C. CENT. L.J. 256, 293-294 (1995) [hereinafter Yaninek].

70. *See* WEBER ET AL., *supra* note 59.

71. *See* Yaninek, *supra* note 69, at 283.

72. *See* Yaninek, *supra* note 69, at 294.

C. *Where Does Section 609 Apply? Earth Island Institute v. Christopher*

In *Earth Island Institute v. Christopher*,⁷³ environmental organizations argued that the Departments of State and Commerce had improperly limited application of Section 609 to the wider Caribbean.⁷⁴ The environmental organizations read Section 609 to apply globally.⁷⁵ They pointed to commercial shrimp fishing operations as a "major factor in the mortality and decimation of these species."⁷⁶ The plaintiffs argued that the State Department's limiting interpretation rendered part of Section 609 "inoperative and meaningless."⁷⁷ The federal defendants argued that the environmental organizations lacked standing.⁷⁸ In addition, the federal defendants asserted that their interpretation of Section 609 was reasonable.⁷⁹

The intervenor-defendant in the case, the National Fisheries Institute, Inc., also raised the specter of a challenge to U.S. free trade obligations under the General Agreement on Tariffs and Trade (GATT).⁸⁰ Unlike the Pelly Amendment, Section 609 does not include a GATT consistency clause in its trade sanction provisions.⁸¹ This fact, coupled with the lack of discretion under the Pelly Amendment, might lead to unwanted trade disputes with foreign nations. Given that two GATT panels had found analogous provisions of the Marine Mammal Protection Act to violate GATT, the intervenors argued that "there are very serious questions relating to the consistency of [Section 609] with U.S. GATT obligations."⁸²

73. 913 F. Supp. 559 (Ct. Int'l Trade 1995).

74. *Id.* at 567.

75. *Id.* at 569.

76. *Environmental Group Sues Government On Failure to Ban Certain Shrimp Imports*, BNA Int'l Trade Daily, Mar. 4, 1992, available in Westlaw, BNA-BTD Database.

77. *Earth Island Institute v. Christopher*, 913 F. Supp. at 578 (quoting Plaintiffs' Reply and Opposition Memorandum, p. 21).

78. *Id.* at 564.

79. *Id.* at 574-77.

80. *Id.* at 559-579.

81. See 22 U.S.C. § 1978(a)(4) (1994).

82. *Earth Island Institute v. Christopher*, 913 F. Supp. at 579.

1. *Standing*

The federal defendants argued that the environmental organizations did not have a sufficient interest in the issue to constitute legal standing.⁸³ They relied on the Supreme Court ruling in *Lujan v. Defenders of Wildlife*,⁸⁴ where the Court reiterated the requisite elements of standing. A party invoking federal jurisdiction must establish that it has suffered injury in fact, that there is a causal connection between that injury and the conduct complained of, and that the injury is likely to be redressed by a favorable decision.⁸⁵ In *Lujan*, the Supreme Court held that an environmental organization did not present a sufficient "injury in fact" when it made the general argument that a government interpretation of the ESA *might* result in an increase in the rate of extinction of endangered and threatened species.⁸⁶

The Trade Court distinguished the instant case from the facts in *Defenders of Wildlife*, pointing out that here, plaintiffs had supported their claim of injury in fact with sufficient specificity and credibility.⁸⁷ The Trade Court noted that the type of injury claimed by the plaintiffs had been foreseen and deemed sufficient by the Supreme Court in *Defenders of Wildlife*: "[T]he desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."⁸⁸

2. *Interpretation of Section 609*

The Trade Court noted that the main issue of the case at hand was whether the Departments of State and Commerce had properly applied Section 609 in limiting its application to nations that were conducting commercial shrimping operations in the Caribbean region.⁸⁹ The State Department had interpreted Section 609 "to be limited to an effort by the Congress to extend the protection given to threatened and endangered sea turtles protected by U.S. regulations only to those turtles throughout their

83. *Id.* at 564.

84. 504 U.S. 555 (1992).

85. *Id.* at 560.

86. *Id.* at 562.

87. *Earth Island Institute v. Christopher*, 913 F. Supp. at 567-568.

88. *Id.* at 567 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. at 562-563).

89. *Id.* at 575.

range across the Gulf of Mexico, Caribbean, and western central Atlantic (or, more simply, the wider Caribbean).”⁹⁰

In construing Section 609 in this manner, the federal defendants applied the sea turtle protection provision only to the fleets of those nations operating in the wider Caribbean region and exporting shrimp to the United States.⁹¹ They argued that, since Section 609(b) is silent regarding geographic scope of implementation, they had reasonably limited its scope to the wider Caribbean.⁹² Arguing in the alternative, the federal defendants contended that even if Section 609 had originally been enacted to cover all sea turtle-shrimping interactions, Congress had acquiesced to the Department of State’s interpretation of the statute by remaining silent regarding its application.⁹³

The Trade Court began its analysis by noting that, “[t]he starting point in every case involving construction of a statute is the language itself . . . [and i]f the statute is silent or ambiguous with respect to the specific issue, the question of the court is whether the agency’s answer is based on a permissible construction of the statute.”⁹⁴ The federal defendants argued that they had interpreted Section 609 in a permissible manner.⁹⁵ The court disagreed, pointing out that no ambiguity existed which might support their interpretation.⁹⁶ In addition, the court indicated that the statute contained no terms of geographic restriction.⁹⁷ Furthermore, the court did not find the statute silent on the matter, since it was global in its reference to “*all* foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which . . . may affect adversely [endangered or threatened] species of sea turtles.”⁹⁸

90. *Id.* at 577.

91. *Id.* at 574-575 (citing 58 Fed. Reg. at 9015-9016 (1993)); *see also* Yaninek, *supra* note 69, at 294.

92. *Earth Island Institute v. Christopher*, 913 F. Supp. at 559, 576-577.

93. *Id.* at 577.

94. *Id.* at 575 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

95. *Id.* at 576-577.

96. *Id.* at 577-578.

97. *Id.* at 575.

98. *Id.* (quoting Section 609(a)(2) (emphasis added)).

3. *Congressional Acquiescence Argument*

The Trade Court rejected the federal defendants' argument that Congress had effectively acquiesced to the limited geographic scope interpretation.⁹⁹ The court noted that judicial determination of congressional acquiescence is limited to cases in which there has been "extended, meaningful interaction between the executive and legislative branches" and where the Congress has revisited the statute and left the practice untouched.¹⁰⁰ In the case at hand, the federal defendants' interpretation had existed for a short period of time and Congress had not revisited Section 609 or even been asked to do so by the Executive Branch since its enactment.¹⁰¹

4. *GATT Concerns*

In applying Section 609, the Trade Court acknowledged that it must attempt to interpret domestic legislation in a manner that does not require the United States to violate its international obligations.¹⁰² However, in addressing the federal defendants' claim that a mandate to impose trade sanctions might result in international trade disputes, the Trade Court noted that enforcement of Section 609 had not yet raised any "troubling tensions" with foreign governments previously affected by the trade sanction provisions.¹⁰³

5. *Holding and Relief Granted*

Upon reviewing the issues and arguments of the parties, the Trade Court held that "the purview of Section 609 is clear on its face and not susceptible to differing interpretations; it is devoid of words or terms of geographical limitation."¹⁰⁴ The court cited the plain language of the ESA as applicable to *all nations* exporting shrimp to the United States.¹⁰⁵

99. *Id.* at 577.

100. *Id.* (distinguishing facts at hand from those in defendants' supporting case, *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974)).

101. *Id.* at 577.

102. *Id.* at 579 n.39 (citing *Footwear Distributors and Retailers of America v. United States*, 852 F. Supp. 1078 (1994)).

103. *Id.* at 579.

104. *Id.* at 578.

105. *Id.* at 575 (citing Section 609(a)(2)).

Accordingly, the court held that, "the [federal] defendants are not properly enforcing the above-quoted section 609(b) by restricting its mandate to the Gulf of Mexico—Caribbean Sea—western Atlantic Ocean."¹⁰⁶

At the outset of its opinion, the Trade Court noted 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."¹⁰⁷ The court directed the federal departments and agencies to "prohibit not later than May 1, 1996 the importation of shrimp . . . *wherever harvested in the wild* with commercial fishing technology" unless the exporting state adopts sea turtle conservation measures.¹⁰⁸ The order directed the Executive Departments to report the results of their actions to the Trade Court by May 31, 1996.¹⁰⁹

D. Immediate Effects of the Earth Island Case

In February 1996, the State Department issued a preliminary list of over fifty nations and territories that could be subject to a shrimp embargo.¹¹⁰ A coalition of the listed countries brought a complaint

106. *Id.* at 580.

107. *Id.* at 561.

108. *Id.* at 580 (emphasis added).

109. *Id.*

110. *State Department Identifies Nations Potentially Subject to Shrimp Embargo*, 13 Int'l Trade Rep. (BNA) 340 (Feb. 28, 1996). In addition to Mexico, the preliminary list identifies these countries:

Central America: Honduras, Panama, Guatemala, El Salvador, Nicaragua, Costa Rica and Belize;

Caribbean and South America: Ecuador, Venezuela, Brazil, Colombia, Guyana, Trinidad and Tobago, Suriname, French Guiana;

Europe: Italy, Portugal, and Spain;

Middle East: Oman, United Arab Emirates, Bahrain, Egypt, Israel, Turkey;

South Asia: India, Bangladesh, Pakistan, Sri Lanka;

Southeast Asia: Thailand, Indonesia, Philippines, Singapore, Malaysia, Burma, Vietnam;

East Asia: China, Taiwan, Macao, Japan, South Korea, Hong Kong;

Oceania: New Zealand, Australia, French Polynesia; and

Africa: Nigeria, Cote d'Ivoire, Tunisia, Mozambique, Gabon, Madagascar, South Africa.

Id.

against the United States before the World Trade Organization (WTO).¹¹¹ They argued that the embargo provision amounts to an unfair trade barrier.¹¹² A U.S. delegate responded that the potential shrimp ban was not protectionist.¹¹³ In accordance with the Trade Court's order, the State Department identified the nations subject to possible embargoes.¹¹⁴

Additionally, the federal defendants sought leave from the court for a one year extension of time to enforce the sea turtle protection provision of the ESA. However, on April 10, 1996, the Trade Court denied any extension. While the Trade Court honored the request to hold an expeditious hearing on the matter, they ultimately denied the government's motion.¹¹⁵ Thus the Trade Court's May 1, 1996 deadline remained firm. As a result, the State Department issued revised guidelines for determining whether a foreign nation has a "comparable" regulatory program for protecting sea turtles.¹¹⁶

111. *U.S. Ruling on Possible Embargo of Some Shrimp is Attacked in WTO*, 13 Int'l Trade Rep. (BNA) 475 (Mar. 20, 1996) (citing statement by representative of the Philippines on behalf of Association of Southeast Asian Nations (ASEAN)). The complaint was also joined by India, Hong Kong, Mexico, Australia, Venezuela, Pakistan, and South Korea. *Id.* The ASEAN countries said in a statement that they considered the U.S. action to be incompatible with Washington's WTO obligations. "We, just like the U.S., are also cognizant of the need to protect sea turtles as they are not only a natural heritage but also of economic importance, and, in fact, we have our own conservation programs," the ASEAN statement said. "To impose a program comparable to that of the U.S. program be used by shrimp exporters raises the question of extra territorial jurisdiction." The ASEAN statement compared the U.S. action with a previous U.S. ban on tuna imports which led to a GATT dispute. *Id.*

112. *See id.*; *see also Thai Official Calls U.S. Turtle Law Enforcement Unfair*, Xinhua News Agency, Apr. 9, 1996, available in LEXIS, NEWS Library, XINHUA File; *India Plans to Challenge U.S. Decision on Shrimp*, J. COM., Mar. 27, 1996, at A5.

113. *U.S. Ruling on Possible Embargo of Some Shrimp is Attacked in WTO*, *supra* note 111. In reply to the protests by ASEAN, U.S. delegate Andrew Stoler rejected charges voiced by Mexico that the shrimp ban was protectionist. *Id.*

114. *State Department Identifies Nations Potentially Subject to Shrimp Embargo*, *supra* note 110 (citing a United States Department of Justice attorney's statement that an appeal had been filed).

115. *Earth Island Institute v. Christopher*, No. 94-06-00321, 1996 Ct. Int'l Trade LEXIS 71 (Ct. Int'l Trade Apr. 10, 1996).

116. 61 Fed. Reg. 17,342 (1996). These revised guidelines were designed specifically for the protection of turtles in shrimp trawl fishing operations.

E. Analysis

The *Earth Island* case illustrates the increasing difficulty that the three branches of government face in reconciling trade and conservation objectives. Congress enacted Section 609, giving the Executive Branch little discretion in fashioning responses to shrimping practices of foreign nations. In attempting to “fit” the law into its foreign affairs practice, the Executive Branch runs afoul of the law’s mandatory language. As a result, the Trade Court is called upon to resolve the matter. But the Trade Court must also attempt to strike a balance between its adjudication of domestic law and its obligation to do so in a manner that does not result in U.S. violations of international law. In *Earth Island*, the court walked a fine line in concluding that the United States must apply trade sanction provisions against certain foreign nations. While the Trade Court noted that the prior, geographically limited application of Section 609 had not created “troubling tensions” with foreign nations, the international legal challenges following the court’s decision prove that such tensions are quite real.

IV. HIGH SEAS DRIFTNET FISHERIES ENFORCEMENT ACT: UNITED STATES ENFORCEMENT REACHES INTO MEDITERRANEAN

On March 18, 1996, the U.S. Court of International Trade ordered the Secretary of Commerce to “identify” Italy under the High Seas Driftnet Fisheries Enforcement Act,¹¹⁷ paving the way for trade sanctions¹¹⁸ against Italy if its citizens or fishing vessels continued to use large scale driftnets on the high seas.¹¹⁹ In the underlying case, *Humane Society of the United States v. Brown*,¹²⁰ environmental organizations

117. High Seas Driftnet Fisheries Enforcement Act (Driftnet Enforcement Act), 16 U.S.C. § 1826a-1826c (1994). “[W]henver the Secretary of Commerce has reason to believe that the nationals or vessels of any nation are conducting large-scale driftnet fishing beyond the exclusive economic zone of any nation, the Secretary of Commerce shall . . . identify that nation; and . . . notify the President and that nation of the identification” 16 U.S.C. § 1826a(b)(1)(B) (1994).

118. 16 U.S.C. § 1826a (1994). Identification under § 1826a(b)(1)(B) sets the stage for consultations and possible trade sanctions including import restrictions of fish and fish products from the offending nations. *Id.*

119. *Humane Society of the United States (HSUS) v. Brown*, No. 95-05-00631, 1996 Ct. Int’l Trade LEXIS 66 (Ct. Int’l Trade Mar. 15, 1996) (judgment).

120. *Humane Society of the United States (HSUS) v. Brown*, 920 F. Supp. 178

argued that the United States Departments of Commerce and State had failed to apply the driftnet enforcement law.¹²¹ The aim of the law is to enforce a global moratorium on a fishing practice that is perceived to be needlessly wasteful and deadly to a wide array of non-target marine species.¹²² Millions of dollars worth of Italian exports to the United States lie in the balance.¹²³

A. Driftnets and Marine Life

Driftnet fishing entails the use of long panels of almost invisible monofilament netting which is placed in the water and left to drift to entangle and catch large amounts of fish.¹²⁴ Driftnets do not discriminate between target species and other marine species.¹²⁵ As a result, bycatch, including non-target fish species, whales, dolphins, sea turtles and seabirds, become entangled in the nets and die.¹²⁶

The increase in the use of driftnets in the north Pacific Ocean led to the enactment of the Driftnet Impact, Monitoring and Assessment, and Control Act of 1987 (Driftnet Impact Act).¹²⁷ Congress intended for this law to serve as a means to address the adverse impacts of driftnet fishing on U.S. resources.¹²⁸ Since most of the driftnet activity was taking place on the high seas, outside U.S. jurisdiction, the Driftnet Impact Act called

(Ct. Int'l Trade 1996) (trial on the merits).

121. *Id.*

122. See H.R. REP. No. 262, 102d Cong., 2d Sess., pt. 1 (1992) reprinted in 1992 U.S.C.C.A.N. 4090 [hereinafter Legislative History]; *But cf.* Burke et al., *United Nations Resolutions on Driftnet Fishing: An Unsustainable Precedent for High Seas and Coastal Fisheries Management*, 25 OCEAN DEV. & INT'L L. 127 (1994) (critical analysis of United Nations high seas driftnet moratorium and United States driftnet enforcement laws).

123. *EU Concerned Over U.S. Court Ruling on Italian Driftnets*, European Rep., Mar. 6, 1996, available in LEXIS, WORLD Library, EURRPT File.

124. H.R. REP. No. 262, *supra* note 122, at 4, reprinted in 1992 U.S.C.C.A.N. at 4090-4091.

125. *Id.*

126. *Id.*

127. Pub. L. 100-220, Title IV, §§ 4001-4009, 101 Stat. 1477 (codified as Driftnet Impact, Monitoring and Assessment, and Control Act at 16 U.S.C. § 1822 note (1994)).

128. *Id.* § 4004. The Act focuses on anadromous fish stocks which the United States considers "marine resources of the United States" even when found in waters beyond the United States exclusive economic zone. *Id.* § 4003(5).

on the Secretary of Commerce to negotiate monitoring agreements with nations conducting large scale driftnet fishing in the North Pacific Ocean.¹²⁹ The United States entered into agreements with Japan, Taiwan, the Republic of Korea,¹³⁰ and China as a result.¹³¹ Additionally, the United States helped draft an international agreement to prohibit the use of long driftnets in the South Pacific.¹³²

High seas driftnet fishing was not limited to the Pacific Ocean. In 1989, the United Nations General Assembly raised the concern that this method of fishing "is widely considered to threaten the effective conservation of living marine resources . . . [and] that more than one thousand fishing vessels use large-scale driftnets in the Pacific, Atlantic

129. *Id.* § 4004.

The Secretary, through the Secretary of State and in consultation with the Secretary of the Interior, shall immediately initiate, negotiations with each foreign government that conducts, or authorizes its nationals to conduct, *driftnet fishing that results in the taking of marine resources of the United States* in waters of the North Pacific Ocean outside of the exclusive economic zone and territorial sea of any nation, for the purpose of entering into agreements for statistically reliable cooperative monitoring and assessment of the numbers of marine resources of the United States killed and retrieved, discarded, or lost by the foreign government's driftnet fishing vessels.

Id. § 4004(a) (emphasis added).

130. See H.R. REP. No. 262, *supra* note 122, at 5, *reprinted in* 1992 U.S.C.C.A.N. at 4091-4092 (referring to agreements with Japan, Taiwan and South Korea). See also Charnovitz, *supra* note 15, at 765-768. In 1989, the United States Secretary of Commerce certified Taiwan and South Korea under the Pelly Amendment for failing to enter into driftnetting agreements. Both nations subsequently agreed to enter into agreements. In 1991, the United States certified both nations under the Pelly Amendment for failing to adhere to their respective agreements with the United States. Trade sanctions were never imposed. *Id.*

131. *Current Issues in International Fishery Conservation and Management*, Department of State Dispatch, Feb. 13, 1995, *available in* LEXIS, NEWS Library, ASAPII File. In a January 25, 1995 statement before the Subcommittee on Fisheries, Wildlife, and Oceans of the House Committee on Resources, David A. Colson, Deputy Assistant Secretary of State for Oceans and International and Environmental and Scientific Affairs, noted the conclusion of a driftnet restriction agreement with the People's Republic of China. *Id.*

132. See Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (Wellington Convention), Nov. 24, 1989, 29 I.L.M. 1449 (1990). See also Martin A. Rogoff, *The Obligation to Negotiate in International Law: Rules and Realities*, 16 MICH. J. INT'L L. 141, 176, n.140 (1994). The Convention entered into force on May 17, 1991. *Id.*

and Indian Oceans and in other areas of the high seas.¹³³ While some commentators question the scientific basis supporting a driftnet ban,¹³⁴ a United Nations General Assembly (UNGA) resolution called on States to adopt a moratorium on high seas driftnet use to be imposed by June 30, 1992.¹³⁵ This UNGA resolution prompted Congress to expand the scope of the 1987 Driftnet Impact Act by passing the Driftnet Act Amendments of 1990.¹³⁶ The 1990 Amendments express the intent of the United States to implement the United Nations moratorium resolution.¹³⁷

B. *The High Seas Driftnet Fisheries Enforcement Act*

In 1990 and 1991, the United Nations called for renewed and expanded efforts to stop driftnet fishing.¹³⁸ In response, the United

133. *Large-Scale Pelagic Driftnet Fishing and its Impact on the Living Marine Resources of the World's Oceans and Seas*, 44 U.N. GAOR, 85th Plenary Mtg., U.N. Doc. A/Res/44/225 (1989) [hereinafter 1989 UN Resolution].

4. (a) Moratoria should be imposed on all large-scale pelagic driftnet fishing by 30 June 1992, with the understanding that such a measure will not be imposed in a region or, if implemented, can be lifted, should effective conservation and management measures be taken based upon statistically sound analysis to be jointly made by concerned parties of the international community with an interest in the fishery resources of the region, to prevent unacceptable impact of such fishing practices on that region and to ensure the conservation of the living marine resources of that region

Id.

134. See Burke et al., *supra* note 122 (citing scientific questions over need for high seas driftnet ban and questioning legal authority of a United Nations General Assembly moratorium resolution).

135. See 1989 UN Resolution, *supra* note 133.

136. Pub. L. No. 101-627, Title I, § 107(a) 104 Stat. 441 (1990) (codified at 16 U.S.C. § 1826 (1994)).

137. 16 U.S.C. § 1826(c) (1994).

It is declared to be the policy of the Congress in this section that the United States should-

- (1) implement the moratorium called for by the United Nations General Assembly in Resolution Numbered 44-225;
- (2) support the Tarawa Declaration and the Wellington Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific; and
- (3) secure a permanent ban on the use of destructive fishing practices, and in particular large-scale driftnets, by persons or vessels fishing *beyond the exclusive economic zone of any nation*.

Id. (emphasis added).

138. See 45 U.N. GAOR, 71st Plenary Mtg., U.N. Doc. A/Res/45/197, para. 2

States enacted the Driftnet Fisheries Enforcement Act.¹³⁹ The Driftnet Enforcement Act requires the Secretary of Commerce to identify each nation whose citizens or vessels are conducting large-scale driftnet fishing on the high seas.¹⁴⁰ The Secretary of Commerce must then notify the President and that nation of such identification.¹⁴¹ This "identification"¹⁴² begins the ninety-day period within which the identified nation must cease using driftnets on the high seas.¹⁴³ Upon identification, the President *must* consult with that nation in an effort to obtain an agreement that the nation will immediately terminate driftnet fishing by its citizens or vessels.¹⁴⁴ In the event that such an agreement is not reached within ninety days, the President *must* instruct the Secretary of the Treasury to restrict the import of that nation's fish, fish products, and sport fishing products.¹⁴⁵ The Driftnet Enforcement Act gives virtually no discretion to the Executive Branch in the application of trade restrictions.¹⁴⁶

Various Executive Branch departments and agencies were aware that certain nations including Italy had been using large-scale driftnets in high

(1990). Wherein the United Nations General Assembly:

Reaffirms its resolution 44/225, and calls for its full implementation by all members of the international community, in accordance with the measures and time-frame elaborated in paragraph 4 of that resolution concerning large-scale pelagic driftnet fishing on the high seas of all the world's oceans and seas, including enclosed and semi-enclosed seas . . .

Id. See also 46 U.N. GAOR, 79th Plenary Mtg., U.N. Doc. A/Res. 46/215, para. 3

(1991). Wherein the United Nations General Assembly:

Calls upon all members of the international community to implement resolutions 44/225 and 5/197 by, inter alia, taking the following actions: . . .

(c) Ensure that a global moratorium on all large-scale pelagic drift-net fishing is fully implemented on the high seas of the world's oceans and seas, including enclosed seas and semi-enclosed seas, by 31 December 1992

Id.

139. Driftnet Enforcement Act, *supra* note 117.

140. 16 U.S.C. 1826a(b) (1994); The "high seas" are those ocean areas beyond the exclusive economic zone of any nation. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, Art. 86, U.N. Doc. A/CONF. 62/122, *reprinted in* 21 I.L.M. 1261 (1982).

141. 16 U.S.C. § 1826a(b)(1) (1994).

142. 16 U.S.C. § 1826a(b) (1994).

143. 16 U.S.C. § 1826a(b)(3)(A)(ii) (1994).

144. 16 U.S.C. § 1826a(b)(2) (1994).

145. 16 U.S.C. § 1826a(b)(3)(A) (1994).

146. See *supra* notes 140-145.

seas areas.¹⁴⁷ Although Congress had enacted a seemingly straightforward and objective Driftnet Enforcement Act, the Executive Branch refrained from applying it, noting that it could not sufficiently identify any nation in violation of the driftnet moratorium. Environmental organizations, frustrated by the Executive Branch's restraint, brought suit to have them apply the enforcement provisions of the Act.

*C. Reaching into the Mediterranean:
Humane Society of the United States v. Brown*

1. Humane Society Preliminary Injunction Suit

In 1995, the Humane Society of the United States (HSUS) and other environmental organizations provided the U.S. Departments of Commerce and State with information regarding Italy's use of driftnets in high seas areas.¹⁴⁸ The environmental organizations urged the Secretary of Commerce to identify Italy pursuant to the Driftnet Enforcement Act.¹⁴⁹ The Secretary refrained from doing so.¹⁵⁰

As a result, HSUS brought an action in the United States Court of International Trade (Trade Court) alleging the Commerce Secretary's inaction violated the mandate of the Driftnet Enforcement Act.¹⁵¹ The environmental organizations sought declaratory relief and an immediate writ of mandamus directing the Secretary of Commerce to identify Italy.¹⁵²

This was the first time that the Driftnet Enforcement Act would be reviewed, interpreted, and applied by the Trade Court.¹⁵³ The Departments of Commerce and State argued that the Driftnet Enforcement Act did not provide for citizen suits, and that further, the Act

147. See *Current Issues in International Fishery Conservation and Management*, *supra* note 131 (referring to reports that some European countries were ignoring the moratorium and using driftnets in high seas areas of the Northeast Atlantic and in the Mediterranean).

148. *Humane Society of the United States (HSUS) v. Brown*, 901 F. Supp. 338, 345 (Ct. Int'l Trade 1995) (preliminary injunction suit) (citing plaintiff's complaint at para. 47).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. 901 F. Supp. at 346.

should be read to allow discretion in the Executive Branch.¹⁵⁴ Finally, they argued that their earlier forbearance from applying the Act was not now subject to judicial review because there had been no final agency action.¹⁵⁵

2. *Of Standing, Citizens Suits, and Agency Actions*

The Trade Court assessed the parties' contentions and refused to hold that the plaintiffs were incapable of establishing standing.¹⁵⁶ The court noted that, for the purposes of standing, at that point, they had demonstrated a legally sufficient injury in fact from Italy's fishing practices and the Commerce Department's failure to take measures to stop those practices.¹⁵⁷

Responding to the federal agencies' argument that the Driftnet Enforcement Act did not contain an explicit opportunity for a citizen's suit, the Trade Court cited numerous Supreme Court decisions supporting the principle that "judicial review of a agency action 'is available [to citizens] absent some clear and convincing evidence of legislative intention to preclude review.'" ¹⁵⁸ Further, the Trade Court reminded the federal defendants that an agency action subject to judicial review, may include a "failure to act."¹⁵⁹ While the Trade Court ultimately held that the plaintiffs failed to meet the high burden required to warrant a preliminary injunction and immediate writ of mandamus, it did order an expeditious hearing on the merits.¹⁶⁰

3. *HSUS Trial on the Merits*

In the hearing on the merits, the Trade Court noted that the action could be resolved upon a determination of two issues:

154. *Id. passim.*

155. *Id.* at 347.

156. *Id.* at 347-348.

157. *Id.*

158. *Id.* at 349 (citing *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)).

159. *HSUS v. Brown*, 901 F. Supp. at 349 (citing 5 U.S.C. §§ 551(13), 701(a)(2) (1994)).

160. *Id.*

1) whether or not there is reason to believe that nationals or vessels of Italy are conducting large-scale driftnet fishing beyond the exclusive economic zone of any nation and 2) whether or not the plaintiffs have the requisite standing . . . to obtain a declaration adjudging defendant Brown in violation of [the Driftnet Enforcement Act identification provision]. . . .¹⁶¹

The Driftnet Enforcement Act requires the Secretary of Commerce to “*identify* each nation whose nationals or vessels that are conducting large-scale driftnet fishing beyond the exclusive economic zone of any nation. . . .”¹⁶² If, within a ninety day consultation period, the offending nation does not ensure the cessation of its high seas driftnetting, trade sanctions must be imposed.¹⁶³ The plaintiffs argued that the Departments of Commerce and State ignored overwhelming evidence that Italy’s vessels were driftnetting on the high seas.¹⁶⁴ Both Departments acknowledged the existence of some driftnet activity but they deemed it insufficient to trigger the application of the Enforcement Act.¹⁶⁵ The Trade Court sided with the plaintiffs and held that Italy’s activities rose to such a level as to require a finding that they were acting in contravention of the U.N. moratorium and U.S. enforcement standards.¹⁶⁶ In the face of clear evidence, the Trade Court held that the Secretary of Commerce was required by the statute to “*identify*” Italy.¹⁶⁷ The court did not recognize any congressional intent in the statute that might be read as giving the Commerce Department discretion in the identification process.¹⁶⁸

161. Humane Society of the United States (HSUS) v. Brown, 920 F. Supp. 178, 181-182 (Ct. Int’l Trade 1996).

162. 16 U.S.C. § 1826a(b)(1)(A) (1994) (emphasis added).

163. 16 U.S.C. § 1826a(b)(3) (1994). The trade sanctions include prohibition on imports of fish and fish products and sport fishing equipment from the offending nation. *Id.* Further, if these sanctions are determined by the Secretary of Commerce to be ineffective, that nation will be certified under the Pelly Amendment and the President may impose a broader range of trade sanctions. 16 U.S.C. § 1826a(b)(4).

164. HSUS v. Brown, 920 F. Supp. 178, *passim*. (Ct. Int’l Trade 1996).

165. *Id.* at 191-192.

166. *Id.* at *43. The evidence was found to give “reason in the mind of an ordinarily intelligent 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” *Id.*

167. *Id.* at 195.

168. *Id.* at 192. While “maintenance of the best possible foreign relations may

Accordingly, on March 18, 1996, the Trade Court ordered the Secretary of Commerce to: "(i) identify Italy as a nation for which there is reason to believe that its nationals or vessels are conducting large-scale driftnet fishing beyond the exclusive economic zone of any nation and (ii) notify the President of the United States and the nation of Italy of this identification."¹⁶⁹ Pursuant to the order, on March 28, 1996, the Secretary of Commerce identified Italy as a nation conducting large-scale driftnet fishing on the high seas.¹⁷⁰ He also recommended that the Department of State promptly notify Italy of the identification.¹⁷¹ Some commentators indicated that the application of the Driftnet Enforcement Act might trigger a trade war.¹⁷² However, the Department of Commerce noted that Italy's response to the identification was cooperative.¹⁷³

commend [it] . . . the statute under review does not [provide] it." *Id.*

169. *HSUS v. Brown*, No. 95-05-00631, 1996 Ct. Int'l Trade LEXIS 66 (Ct. Int'l Trade Mar. 15, 1996) (judgment).

170. Letter from U.S. Secretary of Commerce Ron Brown to the President of the United States (Mar. 28, 1996) (on file with author).

I have been ordered by the United States Court of International Trade . . . to identify Italy, pursuant to the High Seas Driftnet Fisheries Enforcement Act . . . as a nation for which there is reason to believe that its nationals or vessels are conducting large-scale driftnet fishing beyond the exclusive economic zone of any nation. By this letter, I am so identifying Italy.

The High Seas Driftnet Fisheries Enforcement Act requires you to enter into consultations with the Government of Italy no later than 30 days from the date of this identification for the purpose of obtaining an agreement that will effect the immediate termination of large-scale driftnet fishing by Italian nationals or vessels on the high seas. I have notified the Secretaries of State and Treasury . . . of this identification. I have also recommended that the Department of State promptly notify the Government of Italy of my action and its significance.

Id.

171. *Id.*

172. *U.S. Government Faced with Tough Decision on Italian Fishing Case*, Deutsche Presse-Agentur, Mar. 14, 1996, available in LEXIS, WORLD Library, CURNWS File.

173. *Commerce Department Says Response Positive from Italy on Driftnets*, U.S. Department of Commerce News, Press Release NOAA 96-19 (March 29, 1996).

"Already our contact with the Italian government on this issue has been positive and constructive," said Will Martin, Commerce's deputy assistant secretary for international affairs at the National Oceanic and Atmospheric Administration. "Italian government officials have advised us formally that they are prepared to take the appropriate steps both to strengthen their laws and improve their enforcement of the laws. We believe this is a very constructive

D. Analysis

The application of the Driftnet Enforcement Act raises important political questions regarding the authority to conduct foreign affairs. The Trade Court in this case, has deemed the Driftnet Enforcement Act to be a Congressional grant of international relations power. As such, the Trade Court recognizes the Act's mandatory application by the Executive Branch. This effectively eliminates the discretion of the Secretary of Commerce and the President in determining whether trade sanctions should be imposed. However, the President may have an opportunity to refrain from imposing sanctions, if a satisfactory agreement with the offending nation seems likely.¹⁷⁴ In this case, Italian officials have not challenged the U.S. action. Rather, they have immediately acknowledged the concerns raised and have admitted that they have had difficulties in regulating their own fishermen. They have stated that they wish to resolve the issue in time to prevent sanctions.¹⁷⁵ Italy's cooperation and forthright expressions could lead the Executive Branch to more readily recognize a valid "agreement" that would avert the imposition of sanctions.

If no satisfactory agreement on the cessation of Italy's driftnetting can be reached, the Executive Branch will have no choice but to place an embargo on certain Italian imports to the United States. If that occurs, Italy may be forced into arguing that the United States High Seas Driftnet Fisheries Enforcement Act is an improper extension of prescriptive jurisdiction.

The driftnet activities cited in this case took place in waters of the Mediterranean-deemed high seas. However, the locations referred to in the case were within 30 miles of various Mediterranean States' coasts. But for the restraint of larger Exclusive Economic Zone (EEZ) claims,

first step. Based upon the initial response, we are confident that we can work out an agreement to take the necessary steps to end use of the banned driftnets by Italian fishermen."

Id.

174. 16 U.S.C. § 1826a(b)(3)(A) (1994). "The President . . . if the consultations . . . are not satisfactorily concluded within ninety days, shall direct the Secretary of the Treasury to [impose trade sanctions]." *Id.* (emphasis added).

175. Thomas W. Lippman, *Italy Faces Import Ban in U.S. Over Net Fishing*, INT'L HERALD TRIB., Mar. 15, 1996, available in LEXIS, WORLD Library, CURNWS File. Italy indicated that it was making efforts to stop the driftnetting in the Mediterranean, but that it was having difficulty policing what it referred to as Mafia-influenced fishing. *Id.*

the U.S. law would not apply. This raises certain questions regarding prescriptive jurisdiction in areas that are potentially within the exclusive fisheries jurisdiction of coastal states. If those states have refrained from claiming extensive EEZs for other reasons, e.g., to prevent boundary disputes, should a distant third party State reach into that area and subject it to laws which could not apply but for the coastal states' restraint? Application of U.S. law in the latent EEZs of Mediterranean States could effectively force those States to claim the area.

V. CONCLUSION

The Executive Branch of the U.S. government has been increasingly pressed to employ the full measure of trade restrictions in instances where foreign nations fail to comply with international marine species conservation efforts. Congressional mandates, and the Judiciary's application of them, have narrowed the Executive's permissible range of responses.

Under the Pelly Amendment, the Executive Branch retains ultimate authority in deciding whether United States market access will be used to leverage compliance from foreign nations. The Pelly Amendment's GATT-consistency provision further ensures that any trade restrictions imposed will not run afoul of U.S. free trade obligations. However, the Executive's hesitancy to actually use the Pelly Amendment to impose trade sanctions may be the reason Congress has enacted statutes more mandatory in nature.

Recent trade sanction laws, such as those found in the ESA (Section 609) and the Driftnet Enforcement Act, illustrate the shift in authority away from the Executive Branch and back to Congress. These statutes direct rather than allow the Executive to take certain actions regarding trade sanctions. The Executive Branch's hesitancy to apply these provisions of their own volition has forced a number of these issues into the courtroom.

As a result, the Judiciary is put in the unenviable position of resolving a political authority struggle while at the same time balancing domestic law with U.S. international legal obligations. That balance is difficult to maintain. Recent court rulings ordering the Executive Branch to apply trade restriction provisions have prompted foreign nations to charge that the provisions violate international trade agreements.

The Pelly Amendment, ESA, and Driftnet laws all began as statutes protecting clearly identifiable U.S. resources. They have evolved to

serve as enforcement mechanisms to international laws that might otherwise be purely precatory. However, in a shrinking world, the recent application of some of these laws raises serious questions about the role of the United States as a global ocean policeman.

To achieve conservation goals and to avoid potentially disruptive trade disputes, the U.S. Legislative and Executive Branches should work to integrate marine conservation and free trade policies rather than demand the Judiciary to fashion inflexible court orders which will likely subject U.S. policies to scrutiny by arbiters of international agreements.

