

1996

Justice For the Sea Turtle: Marine Conservation and the Court of International Trade

Paul S. Kibel

Golden Gate University School of Law, pkibel@ggu.edu

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/pubs>



Part of the [Environmental Law Commons](#), and the [International Trade Law Commons](#)

Recommended Citation

15 UCLA J. of Env't'l. L. & Pol. 57 (1996)

This Article is brought to you for free and open access by the Faculty Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Publications by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

Justice For the Sea Turtle: Marine Conservation and the Court of International Trade

Paul Stanton Kibel*

I.

INTRODUCTION: THE PLAINTIFF SURFACES

On April 10, 1996, the United States Court of International Trade (CIT) issued a landmark decision in *Earth Island Institute v. Christopher*.¹ In this case, the CIT ordered the U.S. State, Commerce, and Treasury Departments to block the importation of shrimp from all nations that had not adopted adequate policies to protect sea turtles.² Worldwide, over one hundred thousand sea turtles are killed each year as a result of shrimp-harvesting operations: the turtles drown trying to escape the shrimp nets.³

The CIT based its ruling on an interpretation of a 1989 amendment to the federal Endangered Species Act (ESA), § 609.⁴ Sec-

* Adjunct Professor, Golden Gate University School of Law (San Francisco). J.D., Willamette; B.A., Colgate. The author thanks Nicole Walthall and Deborah Sivas (Attorneys, Conservation Law Project), Judge Thomas Aquilino (U.S. Court of International Trade), Todd Steiner (Director, Sea Turtle Restoration Project) and Steve Charnovitz (Director, Yale's Global Environment and Trade Study) for their comments on the first draft of this article.

1. *Earth Island Inst. v. Christopher*, 922 F. Supp. 616 (Ct. Int'l Trade 1996). The April 1996 decision was a hearing to determine whether to grant a one-year extension to the CIT's December 1995 ruling, *Earth Island Inst. v. Christopher*, 913 F. Supp. 559 (Ct. Int'l Trade 1995). Thus, the December 1995 and April 1996 CIT decisions are really two aspects of a single litigation. To indicate their relatedness, and to avoid unnecessary confusion, the two decisions are collectively referred to as *Earth Island v. Christopher* in the text of this article.

2. See *Earth Island Inst.*, 922 F. Supp. at 627.

3. See *id.* at 624 (citing *Earth Island Inst.*, 913 F. Supp. at 568). See also *Turtles in the Soup*, *ECONOMIST*, Mar. 16, 1996, at 64; see also *Giant Legal Victory for Sea Turtles!*, *VIVA LA TORTUGA* (Sea Turtle Restoration Project, San Francisco, Cal.), Issue No. 1 1996, at 1 [hereinafter *VIVA LA TORTUGA*].

4. See *Earth Island Inst.*, 922 F. Supp. at 617 (citing Conservation of Sea Turtles; Importation of Shrimp, Pub. L. No. 101-162, § 609, 103 Stat. 1988, 1037 (1989) (to be codified at 16 U.S.C. § 1537)). Technically, the 1991 sea turtle amendments were not formal amendments to the Endangered Species Act (ESA), because they were adopted and codified as free-standing legislation. The Court of International Trade,

tion 609 created a shrimp "certification" program, wherein nations desiring to export shrimp to the U.S. must be certified by the U.S. government.⁵ The U.S. government can only provide this certification if the exporting nation can demonstrate that it harvests shrimp using methods that provide a level of protection to sea turtles *comparable* to protection provided for under U.S. conservation laws.⁶ Absent proof of comparable turtle protection laws, the U.S. government is required to ban shrimp imports.⁷

Although § 609 requires that the shrimp certification be in place by May 1991, U.S. agencies did not meet this deadline.⁸ Instead, they adopted regulations to limit the nations to which § 609 applied, and to delay the application of the certification/embargo provisions to these nations.⁹ The plaintiffs in *Earth Island* challenged the legality of the government's limiting and delaying regulations, alleging that such regulations were inconsistent with the plain language and requirements of § 609.¹⁰ The CIT agreed with the plaintiffs, and ordered the State, Commerce, and Treasury Departments to implement the certification and import ban programs by May 1, 1996.¹¹

The *Earth Island* litigation is significant for at least three reasons. First, it establishes the CIT as the leading judicial forum, and most likely the exclusive trial court, for resolving legal issues surrounding trade-based environmental restrictions. Given the emerging nexus, both legally and economically, between international trade and the environment, this jurisdictional point is likely to take on ever-increasing importance. Second, on the issue of standing for environmental advocates, the *Earth Island* de-

however, concluded that because the 1991 amendments were based in part on the ESA listing and habitat scheme, and because the amendments furthered the policy objectives of the ESA, they should be treated as part of the ESA regime. *See also infra* note 30.

5. *See* Pub. L. No. 101-162, § 609(b).

6. *See id.* § 609(b).

7. *See id.* § 609(b).

8. VIVA LA TORTUGA, *supra* note 3, at 2. According to Nicole Walthall, an attorney for Earth Island Institute, "The Administration had thwarted the will of Congress and the American people by not enforcing this law which is aimed at the global protection of endangered and threatened sea turtles." *Id.*

9. Revised Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 58 Fed. Reg. 9,015-16, (1993).

10. *See Earth Island Inst. v. Christopher*, 922 F. Supp. 616, 626 (Ct. Int'l Trade 1996).

11. *See id.* at 627.

cision provided an important clarification of the U.S. Supreme Court's 1992 decision in *Lujan v. Defenders of Wildlife*.¹² More specifically, it found that the *Lujan* decision was not a significant obstacle for environmental plaintiffs seeking review of U.S. government actions, so long as the remedy sought was likely to further or protect the plaintiffs' specific interests. Third, the CIT decision is significant for the arguments and legal principles that the court chose to reject. Most noteworthy was the CIT's rejection of the agencies' inadequate time and resources defense, and its conclusion that the shrimp certification program did not compromise U.S. international trade obligations.

This article will explore the origins and likely implications of the CIT's ruling in *Earth Island*. First, it will examine the threat posed to sea turtles by international shrimp fishing practices, and the U.S. Congressional response to this threat. Next, it will summarize the history and outcome of the *Earth Island* decision. Finally, the article will discuss the emerging conflict between § 609 and the rules of international trade, in particular the rules established under the General Agreement on Tariffs and Trade.¹³

II.

SEA TURTLES UNDER THREAT: THE CONGRESSIONAL RESPONSE

The population of sea turtles worldwide is threatened by destructive fishing practices.¹⁴ The scientific community now recognizes that several species of sea turtles are now facing possible extinction.¹⁵ It is estimated that over 125,000 turtles die every year, not to serve as food for people, but because they are hauled in (and drowned) as unwanted bycatch for target catch such as shrimp and tuna.¹⁶ As such, the sea turtles are a casualty of industrial fishing practices, of technology designed to increase the efficiency and decrease the expense of harvesting marketable target fish products and seafood.

12. 504 U.S. 553 (1992).

13. General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187 [hereinafter GATT].

14. See Katherine Bishop, *Lawsuit Seeks Ban on Shrimp Imports: Group Asks to Curb Nations Not Protecting Sea Turtles*, N.Y. TIMES, Feb. 25, 1992 at A13 [hereinafter Bishop].

15. See generally WEBER, CROUSE, IRWIN & IUDICELLO, *DELAY AND DENIAL: A POLITICAL HISTORY OF SEA TURTLES AND SHRIMP FISHING* (1995).

16. See *id.*

According to the National Marine Fisheries Service (NMFS), a U.S. Commerce Department subagency responsible for implementing the federal Endangered Species Act, there are currently at least four species of sea turtles that now face possible extinction: the loggerhead, the green leatherback, the hawksbill and the Kemp's ridley.¹⁷ Of these species, the Kemp's ridley turtle is the most threatened, with fewer than 1500 nesting turtles remaining in the wild.¹⁸

In terms of industrial fishing, there are two fish harvesting practices that have had particularly harsh impacts on sea turtles. The first is the use of large-scale pelagic nets. The second is the use of mechanized shrimp trawlers. The United States has played a leadership role in enacting domestic laws to reduce the destructive impact of these industrial fishing practices on sea turtles.¹⁹

Large-scale pelagic driftnets are giant nets, sometimes extending for thirty miles and reaching forty feet in depth, that entrap everything that swims or drifts into their path.²⁰ "[O]ne of the most deadly fishing methods ever developed,"²¹ driftnets, sometimes called "curtains of death," are now the subject of several pieces of U.S. legislation.²² First, the U.S. has banned all U.S. fishing vessels (ships officially registered with the U.S.) from using driftnets, whether the vessels operate in U.S., international, or foreign waters.²³ The U.S. has also adopted two laws that provide for import bans, as well as other sanctions, against the fish products of countries that permit the use of driftnets.²⁴ These laws, the Marine Mammal Protection Act²⁵ and the High Seas

17. *State Department Guidelines Implement Sea Turtle Decision*, Int'l Trade Rep. (BNA) No. 17, at 687 (Apr. 24, 1996) [hereinafter BNA Int'l Trade Rep.-Apr. 1996].

18. See TURTLE EXPERT WORKING GROUP, NATIONAL MARINE FISHERIES SERVICE, A REPORT OF THE TURTLE EXPERT WORKING GROUP: RESULTS OF A SERIES OF DELIBERATIONS HELD IN MIAMI, FLORIDA, JUNE 1995 - JUNE 1996 (July 2, 1996).

19. For discussion of these laws, see *infra* notes 20-32.

20. See *Pelagic Driftnet Fisheries 1985: Hearings Before the National Ocean Policy Study Before the Senate Comm. on Commerce, Science, and Transp.*, 99th Cong. 10 (1985) (statement of William G. Gordon, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, Department of Commerce).

21. See LINDA PAUL, EARTHTRUST, HIGH SEAS DRIFTNETTING: PLUNDER OF THE GLOBAL COMMONS iii (1991) [hereinafter PLUNDER].

22. See Robert Eisenbud, *Problems and Prospects for the Pelagic Driftnet*, 12 B.C. ENVTL. AFF. L. REV. 473, 474 (1985).

23. See Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(M) (1996). See also 16 U.S.C. § 1826 (1996).

24. See *infra* notes 25-26.

25. Marine Mammal Protection Act, 16 U.S.C.A. § 1361 (1972).

Driftnet Fisheries Enforcement Act,²⁶ have proven effective in encouraging other nations and the international community to better respond to the environmental threats of driftnet fishing. More specifically, U.S. leadership helped induce the United Nations General Assembly to adopt resolutions in 1989 and 1991 calling for a global moratorium on large-scale use of driftnets on the high seas.²⁷

The lesson of the purse-seine net issue is that, in the field of international environmental diplomacy, the progressive policies of individual countries can serve as a catalyst to global awareness and consensus. As Hilary French, Senior Researcher at the WorldWatch Institute, has observed, "it is most often a unilateral action by one country, sometimes backed by trade measures against others, that eventually spurs the international community to act collectively."²⁸ These points were echoed by the Canadian Environmental Law Association's Steven Shrybman: "[e]nvironmental progress in one jurisdiction has often created a 'follow-the-leader' dynamic in which other jurisdictions are pressured to conform to the higher standard."²⁹

On the issue of shrimp trawlers, U.S. regulation has focused primarily on mandating or encouraging the use of turtle-exclusion devices (TEDs). TEDs are metal trap-doors attached to shrimp nets that enable turtles to escape and thereby avoid drowning.³⁰ It is estimated that TEDs can reduce sea turtle mortality from shrimp fishing operations by ninety-seven percent.³¹

26. High Seas Driftnet Fisheries Enforcement Act, Pub. L. No. 102-582, 106 Stat. 4900 (1992).

27. See G.A. Res. 44/225, U.N. GAOR, 44th Sess., Agenda Item 82(f) (1990), reprinted in 29 I.L.M. 1555 (1990); G.A. Res. 46/216, U.N. GAOR, 46th Sess., Agenda Item 77(e) (1992), reprinted in 31 I.L.M. 241 (1992). These U.N. resolutions called for "immediate cessation of further expansion of large-scale pelagic driftnet fishing on the high seas of the North Pacific and all other high seas outside the Pacific Ocean. . . ." For a good discussion of the international driftnet issue, see Leslie A. Davis, Note, *North Pacific Pelagic Driftnetting: Untangling the High Seas Controversy*, 64 S. CAL. L. REV. 1057 (1991). For a discussion of how unilateral environmental leadership can impact international environmental consensus-building, see *infra* notes 27-30.

28. Hilary F. French, *The GATT: Menace or Ally?*, WORLDWATCH MAG., 14 (Sept./Oct. 1991).

29. Steven Shrybman, *Trading Away the Environment*, WORLD POLICY J. 93, 105 (Winter 1991-92).

30. Jane Kay, *Rare Turtles Figure in Trade Pact*, S.F. EXAMINER, Sept. 18, 1993, at A4.

31. *Environmentalists Win CIT Decision That Could Yield Shrimp Import Bans*, Int'l Env't Daily (BNA) (Jan. 17, 1996), available in LEXIS, BNA Library, Bnaevr File.

In 1987, the NMFS promulgated regulations under the federal Endangered Species Act (ESA) that required the entire U.S. shrimp fishing fleet to use TEDs.³² In 1989, Congress adopted legislation that took the NMFS' TED regulations one step further.³³

In 1989, Congress created a "certification" program to encourage foreign countries to upgrade their sea turtle protection practices and technology. The heart of the 1989 turtle protection program is found in § 609, which sets forth two basic requirements. First, § 609(a) requires the Secretary of State to initiate negotiations with all foreign countries to develop treaties to protect sea turtles and to report to Congress on such negotiations. Second, § 609(b) requires the Secretaries of State, Commerce, and Treasury to prohibit the importation of shrimp products from all countries that have failed to mandate shrimp fishing practices that provide sea turtle protection *comparable* to that provided under U.S. law. Although TEDs are the primary means to ensure comparable levels of sea turtle protection, foreign countries can also comply with § 609(b)'s requirements by demonstrating that they use other turtle-safe shrimping practices. One example of an alternative, non-TED, turtle-safe shrimping practice is requiring fishermen to manually haul in their shrimp nets, instead of using mechanical hauling devices.³⁴

The certification program is the specific method by which the goals of § 609(b) are achieved. The President of the United States, acting through the Secretary of State, must officially certify that foreign countries have adopted fishing policies that adequately protect sea turtles. This certification must be supported by credible evidence, not merely by the unsubstantiated declara-

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

33. Pub. L. No. 101-162, Title VI § 609, 103 Stat. 988, 1037-38 (1989) (codified as amended at 16 U.S.C.A. § 1537 (West Supp. 1996)).

34. See BNA Int'l Trade Rep.-Apr. 1996, *supra* note 17, at 687. There is currently a debate as to whether raising shrimp in aquaculture ponds should be recognized as a valid shrimping practice under § 609. Although aquaculture ponds do not pose a direct threat to sea turtles, they are nonetheless very damaging from an environmental standpoint. Particularly in Southeast Asia, the creation of aquaculture ponds has often come at the expense of the destruction of natural mangrove forests. This has had adverse impacts on both wildlife and fish habitat. Many environmentalists maintain that recognizing aquaculture shrimp as "turtle-safe" under § 609's certification program would have the unfortunate effect of encouraging the spread of environmentally-destructive aquaculture activities.

tions of foreign governments.³⁵ Without this certification, and the evidence to support it, the United States is required to block the importation of shrimp and shrimp products from the foreign country in question.³⁶

Although the legislation creating the turtle protection program was enacted in 1989, Congress postponed formal implementation of § 609's certification program until May 1, 1991.³⁷ Most likely, Congress was aware that the administrative and economic consequences of the new law might be considerable. Administratively, federal agencies would need time to develop more specific guidelines for certifying foreign countries, and for ensuring that uncertified shrimp was effectively banned from importation into the U.S. Economically, foreign shrimp exporters committed to maintaining access to the U.S. market might need time to bring their fishing practices into compliance. The delay in implementation provided agencies and foreign countries with reasonable time period to anticipate and respond to the new law.

The economic reasoning behind, and the policy objectives of, § 609 were straightforward. The United States is a major purchaser of shrimp. According to a 1995 U.S. Commerce Department report, U.S. shrimp imports total more than \$1.2 billion annually.³⁸ Foreign nations that export shrimp have a clear interest in being able to sell their product in the lucrative U.S. market. By conditioning access to the U.S. market on adherence to minimal sea turtle protection standards, foreign nations are encouraged to improve the environmental performance of their shrimping industry. Moreover, the import requirement creates a level-playing field for U.S. fishermen, who must already comply with the 1987 turtle protection regulations.³⁹

Although the language of § 609 stated that the sea turtle protection requirements applied to all countries, the State Department promulgated regulations that limited the geographic scope

35. *Id.* at 687-88.

36. *Id.* at 687.

37. *Id.*

38. *Ruling Seen Barring Most Shrimp Imports to U.S.*, Reuters (May 3, 1996) available in LEXIS, News Library, Wires file.

39. VIVA LA TORTUGA, *supra* note 3, at 2. "US shrimpers also hailed the decision, as it 'levels the playing field' in the competitive shrimp market while protecting marine ecosystems." *Id.* "Foreign countries not using TEDs are willfully killing sea turtles. It's way past time that shrimpers from all countries started using TEDs in order to preserve our shared marine environment." *Id.* (quoting Jack d'Antignac, U.S. shrimper and President of the Georgia Fisherman's Association).

of this language. These regulations interpreted § 609 as applying only to shrimp fishing nations in the Western Atlantic/Caribbean region.⁴⁰ The State Department justified this limited interpretation of § 609 on the grounds that Congress only intended the TED requirement to apply to sea turtles that are harvested in, or migrate through, U.S. coastal waters.⁴¹ As a result, § 609 was initially applied to only sixteen foreign nations, fourteen of which were found to be non-compliant.⁴²

The real impetus behind the State Department's limiting regulation, however, had very little to do with U.S. coastal waters or the migratory patterns of turtles. It had to do with the Bush and Clinton Administrations' interest in avoiding a high-profile international trade dispute.⁴³ Such a dispute could potentially undermine the United States' credibility as a free trade advocate, and therefore undermine adoption and implementation of GATT and NAFTA.⁴⁴

III.

THE TURTLE ON TRIAL:

EARTH ISLAND INSTITUTE V. CHRISTOPHER

The environmental and marine conservation community intensely criticized the State Department's decision to limit § 609's application to Atlantic and Caribbean shrimp fishing nations.⁴⁵ The most prominent of these critics was Earth Island Institute (Earth Island), a non-governmental organization based in San Francisco, California. Earth Island directs the Sea Turtle Restoration Project, whose goal is the protection of "sea turtle populations in ways that meet the ecological needs of the sea turtles and the needs of local communities who share the beaches and waters with these endangered species."⁴⁶

40. See Public Notice, 58 Fed. Reg. 9,015-16 (1993).

41. See *id.*

42. See David Paget & Lemuel M. Srolovic, *Protecting Endangered Species: Customs Court Becomes Potent Forum*, N.Y.L.J., June 3, 1996, available in LEXIS, Legnew Library, NYLawJ File [hereinafter Paget & Srolovic].

43. *Judge Says Law to Save Turtles Prevents Most Imports of Shrimp*, N.Y. TIMES, Jan. 8, 1996, at A9. "The issue arose during the Bush Administration when the State Department complained that enforcing the sea turtle law would hurt countries that exported up to \$3 billion worth of shrimp to the United States." *Id.*

44. Stephen J. Orava, *Court Decision on Shrimping Undermines U.S. Trade Policy* WASH. LEGAL FOUND. LEGAL BACKGROUNDER, May 24, 1996, available in LEXIS, Legnew Library, WLF File.

45. See Bishop, *supra* note 14, at A13.

46. SEA TURTLE RESTORATION PROJECT, VIVA LA TORTUGA 12 (1996).

For many years, Earth Island has played a leading role in educating consumers, national governments, and the fishing industry about the threats to sea turtles and the pressing need for TEDs.⁴⁷ The group has undertaken scientific research regarding sea turtles, and political organizing to promote turtle conservation.⁴⁸ The Sea Turtle Restoration Project has established strong partnerships with conservation groups in Southeast Asia and Central America.⁴⁹ Prompt and full implementation of the turtle protection program's § 609 was a major policy goal for Earth Island, because such implementation would likely result in greater worldwide use of TEDs.⁵⁰ The State Department's narrow interpretation of the provision's geographic scope threatened to undercut this goal.

In February 1992, Earth Island filed suit in federal district court in San Francisco, challenging the State Department regulations limiting the application of § 609.⁵¹ In its complaint, Earth Island asked the court for two remedies: (1) an order compelling the State Department to initiate negotiations regarding sea turtle protection with all foreign governments that export shrimp to the U.S.; and (2) an order compelling the State Department, as well as other federal agencies, to apply the shrimp certification requirements to all foreign countries, regardless of geographic location.⁵² The defendants responded initially to the suit not by challenging the legal merits of Earth Island's claim, but by contending that the federal district court lacked subject matter jurisdiction over the controversy. The State Department maintained that the United States Court of International Trade (Court of International Trade), located in New York City, had exclusive jurisdiction over cases involving import and export restrictions, and asked that the case be dismissed.⁵³

The State Department's subject matter argument was based on the Customs Court Act of 1980.⁵⁴ This law was enacted to clarify

47. Press Release of Earth Island Institute, *Protest Targeted at Mexican President Salinas Over Slaughter of Endangered Sea Turtles*, (Sept. 23, 1993) (on file with author) [hereinafter *Earth Island Press Release*].

48. *See* SEA TURTLE RESTORATION PROJECT, *VIVA LA TORTUGA* 12 (1996).

49. Earth Island Press Release, *supra* note 47.

50. *Id.*

51. Telephone Interview with Deborah Sivas and Nicole Walthall, attorneys, Conservation Law Project (Oct. 23, 1996).

52. *Id.*

53. *Id.*

54. Customs Court Act of 1980, Pub. L. No. 96-417, § 201, 94 Stat. 1728 (1980) (codified as amended at 28 U.S.C. §§ 1581-1584 (1994)). The Court's jurisdiction ex-

the jurisdictional relationship between the United States Customs Court (Customs Court) and the federal district courts.⁵⁵ The Customs Court, established in 1926, was intended to provide a specialized forum for handling legal issues concerning embargoes and tariffs. In 1980, Congress expanded the jurisdiction of the Customs Court to include "new and increased responsibilities in the field of international trade litigation, particularly with regard to antidumping and countervailing duty cases."⁵⁶

Although the 1926 and 1970 laws appeared to give the Customs Court jurisdiction over most embargo and tariff disputes, there remained considerable uncertainty as to whether it retained *exclusive* jurisdiction, or merely *concurrent* jurisdiction with federal district courts.⁵⁷ This uncertainty led to a troubling situation, wherein different federal district courts and federal circuits were rendering different interpretations of U.S. trade law. Moreover, because Customs Court decisions were not accorded a higher legal status than federal district court decisions, the Customs Court was unable to promote uniform application of U.S. trade law. This, in turn, undermined the primary reason the Customs Court was established in the first place, namely to provide clarity and expertise in a field of law that was becoming increasingly specialized.⁵⁸ Ironically, the Customs Court was spawning the very confusion that it was intended to curtail.⁵⁹

The Customs Court Act of 1980 was passed to help resolve jurisdictional uncertainty in the area of U.S. trade law. First, the name of the Customs Court was changed to the Court of Interna-

tends to civil suits involving certain specified import transactions, such as classification and valuation of merchandise, charging duties and fees on the importation of merchandise, the exclusion of merchandise from entry under provisions of the customs laws, the liquidation of entries, and challenges to antidumping and countervailing duty cases.

55. See generally Gregory Carman, *Jurisdiction and the Court of International Trade: Remarks of the Honorable Gregory W. Carman at the Conference for Dispute Resolution on February 27-28, 1992*, 13 NW. J. INT'L L. & BUS. 245 (1992), available in LEXIS, Lawrev Library, Allrev File [hereinafter Carman].

56. Scott H. Segal & Stephen J. Orava, *Playing the Zone and Controlling the Board: The Emerging Jurisdictional Consensus and the Court of International Trade*, 44 AM. U.L. REV. 2393 (1995) (quoting H.R. Rep. No. 1235, 96th Cong., 2d Sess. 18 (1980)) [hereinafter *Playing the Zone*].

57. Carman, *supra* note 55, at 247.

58. See generally Andrew P. Vance, *The Unrealized Jurisdiction of 28 U.S.C. §1581(i): A View From the Plaintiff's Bar*, 58 ST. JOHN'S L. REV. 793 (1984).

59. *Customs Courts Act of 1980: Hearings on H.R. 6394 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong. 7 (1980).

tional Trade (CIT), to more accurately reflect the broad range of issues the court was charged with overseeing. Second, and more importantly, the law expressly expanded the jurisdiction of the Customs Court, and provided the court with exclusive, rather than merely concurrent, jurisdiction in the area of international embargo and tariff disputes.⁶⁰

While the Customs Court Act of 1980 was welcomed by most trade lawyers and the international business community, it was viewed less enthusiastically by most environmental protection advocates. Environmentalists were skeptical about a panel of "trade experts" empowered to judge the appropriateness of import or export restrictions related to environmental protection.⁶¹ Given the Customs Court's specialized focus on economics and trade, there was concern that the judges would be ill-equipped to evaluate environmental issues, or that environmental policies would be accorded subordinate status to free trade considerations.⁶² These concerns led environmentalists to resist efforts to provide the CIT with exclusive jurisdiction over conflicts relating to conservation-related trade restrictions.

Environmentalists' mistrust of the CIT also grew as a result of a ruling by an international tribunal, established by the General Agreement on Tariffs and Trade (GATT).⁶³ In 1991, a GATT dispute panel ruled that a U.S. law banning the import of tuna caught in driftnets violated international trade rules.⁶⁴ This ruling provoked a flood of international criticism, and caused many environmentalists to ask whether trade-focused adjudicatory bodies were the appropriate forums to resolve global conservation issues.⁶⁵ In the eyes of many environmentalists, the CIT was subject to the same shortcomings, namely pro-trade ideological inclinations, as the GATT.⁶⁶

60. See 126 CONG. REC. 27,063 (1980).

61. See *Playing the Zone*, *supra* note 56, at 2426.

62. See Daniel Magraw, *NAFTA's Repercussions: Is Green Trade Possible?*, ENVIRONMENT, Mar. 1994 at 14, 19.

63. See Jessica Mathews, *Dolphins, Tuna and Free Trade: No Country Can Protect Its Own Smidgen of Air or Ocean*, WASH. POST, Oct. 18, 1991, at A21.

64. See GATT Dispute Settlement Panel Report on U. S. Restrictions on Imports of Tuna, 30 I.L.M. 1594, 1598 (1991) [hereinafter GATT Tuna Report].

65. See Hamilton Southworth III, Comment, *GATT and the Environment*, 32 VA. J. INT'L L. 997 (1992). See also Matthew Hunter 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).

66. See *Playing the Zone*, *supra* note 56, at 2426. This article discussed why environmentalists may be skeptical about the CIT:

Given the uncertainties of, and unfamiliarity with, the CIT's environmental jurisprudence, the sea turtle litigation was initiated by taking what was perceived as the path of least resistance. In 1993 Earth Island first attempted to enforce § 609 in federal district court.⁶⁷ In response to the State Department's contention that the CIT was the proper forum, Earth Island argued that a ban on imports was an *environmental* and not a *trade* barrier, and as such was beyond the CIT's expertise and jurisdiction.⁶⁸ The federal district court rejected Earth Island's contention, as did the Ninth Circuit Court of Appeals. In upholding the district court's dismissal, Judge Schroder of the Ninth Circuit observed that "embargoes are imposed for a broad range of purposes, including public health, safety, morality, foreign affairs interests, law enforcement, and ecology."⁶⁹ The Court found, however, that even if an embargo has an underlying purpose other than trade, that does not make it any less an embargo. Judge Schroder's majority opinion thus concluded that legal questions surrounding § 609's shrimp embargo provisions fell squarely within the exclusive jurisdiction of the CIT.⁷⁰

In its 1993 opinion upholding the federal district court's dismissal of Earth Island's claim on subject matter jurisdiction grounds, the Ninth Circuit also ruled on the separation of powers issue. This issue involved § 609(a), which required the State Department to initiate negotiations with foreign countries regarding sea turtle protection policies.⁷¹ Given that the CIT was found to have exclusive jurisdiction over the case, the Ninth Circuit's decision to rule on the constitutionality of § 609(a) was, at least from a jurisdictional standpoint, somewhat unorthodox.⁷² This point

The notion that trade law should be centralized has both its proponents as well as its opponents. In the case of centralizing authority for international trade issues in a specialized tribunal, trade law purists might applaud the precision, coherence, and accuracy that results. Critics of the prevailing structure of the trade system, however, might oppose centralization on much the same grounds. For example, the environmental community opposed the passage of the North American Free Trade Agreement in part because the cloistered community of trade "experts" seemed to place inadequate emphasis on public participation and overarching environmental principles.

Id.

67. Telephone Interview with Deborah Sivas and Nicole Walthall, attorneys, Conservation Law Project (Oct. 23, 1996).

68. See *Earth Island Inst. v. Christopher*, 6 F.3d 648, 651 (9th Cir. 1993).

69. *Id.* at 651.

70. See *id.* at 652.

71. See *id.* at 652-54.

72. See *id.* at 654-56.

was not lost on Judge Brunetti, who in a dissenting opinion maintained:

Because section 609 as a whole is a "law providing for embargoes or other quantitative restrictions," both the claims under 609(a) and 609(b) arise out of it, and both claims lie within the exclusive jurisdiction of the CIT. This court is therefore without jurisdiction and is powerless to rule on the constitutionality of 609(a) at this time.⁷³

Writing for the majority, Judge Schroder disagreed with Judge Brunetti's analysis. Concluding that only § 609(b) concerned subject matter within the exclusive jurisdiction of the CIT, Judge Schroder determined that the Ninth Circuit possessed the authority, and should take the opportunity, to resolve the constitutional issues relating to § 609(a) at this juncture in the litigation.⁷⁴ In considering the issue, the majority found that "[t]his Court has not and cannot lawfully order the Executive to comply with the terms of a statute that impinges upon power exclusively granted to the Executive Branch under the Constitution."⁷⁵ As such, because § 609(a) intruded on the Executive's discretion in the field of foreign relations, the Ninth Circuit found the provision to be beyond the scope of judicial enforcement.

As a result of the Ninth Circuit's ruling, Earth Island's only course of legal redress lay with the CIT. Although the prospects for a pro-conservation CIT decision appeared slim in 1993, a 1995 CIT decision indicated that the court was heading in a more progressive environmental direction. In *Florsheim Shoe Co. v. United States*, a U.S. importer challenged an import ban on shoes manufactured in Taiwan from Finnish elk skin.⁷⁶ The import ban was based on the Pelly Amendment to the 1967 Fishermen's Protection Act, which allows the President to restrict the importation of *any* products from countries that engage in the endangered species trade.⁷⁷ Although Finnish elk were not considered an endangered species, Taiwan was a major importer of endangered rhinoceros and tiger body parts. It was Taiwan's participation in the rhinoceros and tiger trade, which is forbidden

73. *Earth Island Inst. v. Christopher*, 6 F.3d 648, 656 (9th Cir. 1993) (dissenting opinion of Judge Brunetti).

74. *See id.* at 654.

75. *Id.* at 653.

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

77. 22 U.S.C.A. §1978(a)(4) (West Supp. 1996).

under the 1972 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), that led the U.S. to impose the Pelly Amendment's ban on *all* wildlife imports from the country.⁷⁸

In *Florsheim*, the plaintiff argued that the Pelly Amendment could only be invoked if a country was trading in endangered species that had been taken from the wild within its own borders.⁷⁹ According to the plaintiff, because Taiwan had imported the rhinoceros and tiger parts from other countries, the import ban was inappropriate and should be lifted.⁸⁰ In a strongly worded opinion, the CIT rejected the plaintiff's interpretation and upheld the import ban. According to the CIT, allowing Taiwan to profit from the type of destructive commerce that CITES expressly prohibits would condone "the very mischief the President sought to to avert."⁸¹

The CIT's ruling in *Florsheim* indicated that Earth Island's prospects might not be so bleak. Given the CIT's willingness to aggressively enforce the Pelly Amendment and CITES, perhaps environmentalists' fear of institutional and ideological bias in the CIT had been unfounded.⁸² Such, at least, were the questions and possibilities that surfaced after the *Florsheim* decision.

Thus, with the jurisdictional question finally resolved and *Florsheim* on the books, the 1995 CIT case of *Earth Island v. Christopher* picked up where the 1993 federal district court case of *Earth Island v. Christopher* had left off. At last, the substantive phase of the sea turtle litigation was underway.

The government-defendants responded to Earth Island's claim with two basic arguments. First, they argued that Earth Island lacked standing to bring the suit, because the group did not have a legally sufficient interest in ensuring § 609's full implementation.⁸³ Second, the government argued that the State Department's regulation limiting the geographic scope of § 609 was a reasonable interpretation of the underlying legislation.⁸⁴

The government's challenge to Earth Island's standing was based primarily on the U.S. Supreme Court's 1992 ruling in *Lu-*

78. See Paget & Srolovic, *supra* note 42.

79. See *Florsheim*, 880 F. Supp. at 850.

80. *Id.*

81. *Id.* at 853.

82. See Paget & Srolovic, *supra* note 42.

83. See *Earth Island Inst. v. Christopher*, 913 F. Supp. 559, 564-66 (Ct. Int'l Trade 1995).

84. See *id.* at 567-69.

jan v. Defenders of Wildlife.⁸⁵ In *Lujan*, the Supreme Court denied standing to a non-governmental organization (NGO) that sought judicial review of U.S. government funded projects that were likely to injure endangered species in Egypt and Sri Lanka. The plaintiffs in *Lujan* were members of the NGO who had been engaged in the scientific study of the endangered species threatened by the projects. Writing for the Court, Justice Scalia concluded that the plaintiffs' connection to the species and the projects was too speculative, and that there was insufficient evidence to indicate that the plaintiffs were likely to suffer "actual or imminent" harm to their personal interests.⁸⁶ Additionally, Justice Scalia expressed his disdain for public interest litigation *per se*, insisting that "[v]indicating the *public* interest . . . is the function of Congress and the Chief Executive."⁸⁷

If Justice Scalia's opinion was interpreted broadly, the *Lujan* decision posed a serious obstacle to public interest environmental lawsuits. Since the early 1970s, such lawsuits had played a critical role in improving compliance with and enforcement of environmental law.⁸⁸ This was true for two primary reasons. First, environmental agencies often lacked the resources to monitor and enforce environmental laws against private parties, and public interest lawsuits supplemented agency efforts.⁸⁹ Second, because the government does not, or often legally cannot sue itself, public interest litigation is often the only means to ensure that the government is complying with environmental laws.⁹⁰ *Lujan* presented a challenge to the legal viability of such litigation.

Earth Island v. Christopher provided the CIT with a high-profile opportunity to help define the reach, or limits, of the *Lujan*

85. *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992). For an excellent discussion of the decision's constitutional implications, as well as a critique of its underlying analysis, see Cass Sunstein, *What's Standing After Lujan: Of Citizen Suits, "Injuries", and Article III*, 91 MICH. L. REV. 163 (1992).

86. *Lujan*, 112 S.Ct. at 2138-39.

87. *Id.* at 2145 (emphasis added).

88. See MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS 1-2 to 1-11 (1993) [hereinafter AXLINE]. "Any thoughtful observer must be impressed with the level of government and private sector accountability that has been achieved through the device of the citizen suit." *Id.* at 1-10 to 1-11.

89. See generally J. Henry Habicht, *Citizen Suits Against Polluters: The Enforcement Community's Role*, 2 NAT'L ENVTL. ENFORCEMENT J. (1987).

90. See generally Note, *Assuring Federal Facility Compliance with RCRA and Other Environmental Statutes: An Administrative Proposal*, 28 WM. & MARY L. REV. 513 (1986).

decision. The CIT responded with a ruling that, although still consistent with *Lujan*'s analytical framework, represented a significant departure from the spirit of Justice Scalia's 1992 opinion.⁹¹ The CIT found that Earth Island had demonstrated its members' longstanding interest in sea turtle conservation, and also demonstrated that the government's failure to implement § 609 presented an immediate and imminent danger to this interest, and that the relief sought (full enforcement of § 609) would provide effective redress to the identified harm.⁹² The Court therefore held that the plaintiffs had standing to challenge the government's compliance with legislation protecting sea turtles. As Judge Aquilino surmised: "Suffice it to state that this court cannot and therefore does not find that the [plaintiffs] are within the realm of 'pure speculation and fantasy' here, that is, that they fail to show any 'perceptible harm' or to show that they are within the 'zone of interests to be protected by the statute' in question."⁹³

Although they welcomed the CIT's ruling on the standing issue, some environmental advocates were disappointed that Judge Aquilino's opinion did not undertake a more rigorous application and more deliberate modification of *Lujan*.⁹⁴ Such language would have proven extremely useful for environmental litigants. Nonetheless, the CIT's take on *Lujan* was good news not only to Earth Island, but to environmental advocates in general. It suggested that, notwithstanding Justice Scalia's dislike (expressed in *Lujan*'s dicta) of public interest litigation *per se*, *Lujan*'s new standing requirements should not present a major procedural hurdle for non-governmental groups seeking to ensure environmental compliance through judicial review. As Nicole Walthall, an attorney for Earth Island, commented after the decision: "This case also set an important precedent on the issue of standing for environmental and conservation plaintiffs. . . . [T]his decision clearly establishe[d] environmental plaintiffs' right to seek judicial enforcement of U.S. laws . . . aimed at the global protection of threatened and endangered animals."⁹⁵

91. See *Earth Island Inst. v. Christopher*, 913 F. Supp. 559, 566-67 (Ct. Int'l Trade 1995).

92. See *id.* at 567.

93. *Id.* (quoting *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.* 115 S.Ct. 1278, 1283 (1995)).

94. Telephone Interview with Deborah Sivas and Nicole Walthall, attorneys, Conservation Law Project (Oct. 23, 1996).

95. *VIVA LA TORTUGA*, *supra* note 3, at 2.

The CIT next turned its attention to the government's second main argument, whether the State Department's interpretation of § 609 limiting its application to Atlantic and Caribbean foreign nations was reasonable. In the 1984 case of *Chevron v. Natural Resources Defense Council*,⁹⁶ the U.S. Supreme Court established a two part test for reviewing administrative interpretations of law. First, the court will consider whether the meaning of the legislative provision in question is clear and unambiguous. If so, the court will adopt this clear and unambiguous meaning, regardless of the agency's previous interpretation.⁹⁷ Second, if the legislative provision is not clear and unambiguous, the court will uphold the agency's interpretation if it is reasonable.⁹⁸ Under *Chevron's* administrative law framework, an agency's reasonable interpretation will be upheld even if the court, considering the issue *de novo*, might have opted for an alternative interpretation.⁹⁹

Employing the first prong of the administrative review methodology established in *Chevron*, the CIT asked whether the underlying legislative provision, § 609, was "clear and unambiguous."¹⁰⁰ The CIT found that § 609's language requiring that the shrimp certification program be applied to all foreign countries was indeed clear and unambiguous.¹⁰¹ According to the Court, the meaning of the word *all* is plain enough. It means *all*, not *some*.

The CIT therefore held that the State Department's interpretation of § 609, which limited the geographic scope of the shrimp certification program was not the clear interpretation of § 609, and thus the State Department's interpretation was unreasonable and invalid.¹⁰² The court issued an order compelling the federal government to prohibit the importation of shrimp or shrimp products into the United States from all foreign nations that have not reduced sea turtle mortality from shrimp fishing operations by ninety-seven percent, the level that can be achieved through

96. 467 U.S. 837 (1984).

97. *Id.* at 843.

98. *Id.* at 844.

99. *Id.* at 845.

100. *Earth Island Inst. v. Christopher*, 913 F.Supp. 559, 575 (Ct. Int'l Trade 1995). See also *CIT Hands Plaintiffs Decision That Could Result in Shrimp Embargoes*, Int'l Trade Rep. (BNA) No. 3 (Jan. 17, 1993), at 73.

101. See *id.*

102. See *id.* at 578-79.

the use of TEDs.¹⁰³ Furthermore, the CIT ordered the government to comply with the order no later than May 1, 1996.¹⁰⁴

In yet another effort to avoid compliance with the May 1, 1996 deadline, the government petitioned the CIT for a hearing to consider extending the compliance deadline an additional year.¹⁰⁵ In its petition, the government maintained that there were administrative considerations that made compliance within the proposed timeframe impossible. The court granted this petition, and in April 1996 held a hearing to consider the government's request.

At this hearing, the government's request for extension was denied. In a stinging opinion, CIT Judge Thomas Aquilino declared that "the paucity of evidence offered in support of this motion enables this decision to be expeditious,"¹⁰⁶ and that "§ 609's mandate to negotiate *as soon as possible* and to apprise Congress *not later than one year* after the date of enactment hardly bespeaks an additional annum of delay more than six year after that date."¹⁰⁷

Judge Aquilino further added that the evidentiary "inadequacy" of the government's petition might warrant sanctions under CIT Rule 11. This rule forbids parties from submitting motions primarily intended to "harass or to cause unnecessary delay or needless increase in the cost of litigation."¹⁰⁸ Although, in the interest of ending the litigation, Judge Aquilino chose not to pursue Rule 11 sanctions, he warned that the government's motion for extension caused "exactly the kind of confusion which the rule [was] adopted to prevent."¹⁰⁹

The most recent development in the sea turtle litigation came in October 1996. In response to the CIT's December 1995 and April 1996 decisions, the State Department promulgated new regulations to implement the shrimp certification program.¹¹⁰

103. *See id.* at 579-80.

104. *Id.* at 580.

105. *See Earth Island Inst. v. Christopher*, 922 F. Supp. 616, 618 (Ct. Int'l Trade 1996).

106. *Id.* at 618.

107. *Id.* at 625 (emphasis added).

108. *Id.* (quoting CIT Rule 11).

109. *Id.* at 626. *See also* Paget & Srolovic, *supra* note 42, at S6: "But for the paramount interest in ending litigation, the court stated, it would have ordered the defendants to show cause why they should not be sanctioned under the CIT's Rule 11 for seeking the extension of time to comply with the law without an adequate basis."

110. Public Notice, 61 Fed. Reg. 17,342 (1996). The regulation provides, in part:

These regulations held that a foreign country would be certified so long as the particular shrimp being imported into the U.S. were caught using turtle-safe methods.¹¹¹ Under the regulations, foreign nations did not have to demonstrate that their entire shrimping fleet was turtle-safe to be certified.¹¹² As such, the regulations represented yet another effort to limit the scope of § 609.

In response, Earth Island filed a motion with the CIT contending that the State Department regulations were not in conformity with § 609 and the December 1995 and April 1996 CIT rulings.¹¹³ According to Earth Island, the State Department regulations "eviscerated"¹¹⁴ Congress's purposes because foreign "[c]ountries can evade the Law's embargo by exporting to the United States those shrimp caught by a few designated vessels which are equipped with TEDs, while exporting elsewhere shrimp caught by those which are not."¹¹⁵

The CIT agreed with the plaintiffs, and issued yet another strongly worded opinion against the Clinton Administration. Judge Aquilino held:

They [the State Department] blame this litigation for their approach now. But the regime upon which it is based has governed them since May 1, 1991, and been part of the United States Code before then. Certainly they have had ample opportunity to propose, if not realize, legislative amelioration of what is now clearly perceived to be a daunting remedy. Perhaps the reason this has not happened is that the harm the remedy attempts to allay has been equally well-understood, by both President and the Congress.¹¹⁶

The turtle, it appeared, had at last navigated its way to victory in court.

The Department of State has determined that, in order to achieve effective implementation of Section 609 on a world-wide basis, beginning May 1 1996 [sic], all shipments of shrimp and products of shrimp into the United States must be accompanied by a declaration . . . attesting that the shrimp accompanying the declaration was harvested either under conditions that do not adversely affect sea turtles . . . or in waters subject to the jurisdiction of a nation currently certified pursuant to Section 609.

Id.

111. *See id.*

112. *See id.*

113. *Earth Island Inst. v. Christopher*, No. 96-165, slip op. (Ct. Int'l Trade Oct. 8, 1996).

114. *Id.* at 6 (quoting Plaintiff's Memorandum of Points and Authorities at 3).

115. *Id.*

116. *Id.* at 15-16.

IV.

A CONFLICT EMERGING: THE *EARTH ISLAND* RULING
AND GATT

In addition to arguments based on standing and the reasonableness of the State Department's regulations, the defendants in the *Earth Island* litigation also offered a third contention in support of their limited geographic application of § 609. This third contention focused on the United States' international free trade obligations under the General Agreement on Tariffs and Trade (GATT).¹¹⁷ According to the government, the shrimp certification program established under § 609 conflicted with GATT's trade rules; therefore federal agencies, as well as the CIT, should interpret § 609 to minimize or avoid these conflicts.¹¹⁸

In support of this contention, the federal government focused on Articles III, XI and XX of GATT. Article III states that GATT contracting parties may employ domestic regulations affecting the import of other contracting parties, so long as these regulations do not discriminate between foreign and domestic products (like-treatment principle). Article XI provides that, subject to certain limited exceptions, a GATT contracting nation shall not impose quantitative import restrictions or embargoes on the product of another GATT contracting party.¹¹⁹ Article XX lists the exceptions which justify a deviation from the basic free trade rules articulated in Articles III and XI. Among these exceptions are trade restrictions "necessary to protect human, animal, or plant life and health,"¹²⁰ and measures "relating to the conservation of exhaustible natural resources."¹²¹

To help resolve conflicts among contracting parties, the GATT frequently convenes dispute panels.¹²² Several of these quasi-ad-

117. See *Earth Island Inst. v. Christopher*, 913 F. Supp. 559, 579 (Ct. Int'l Trade, 1995). "An ancillary argument, pressed by the intervenor, is that 'there are very serious questions relating to the consistency of [section 609] with U.S. GATT obligations.'" *Id.* (quoting Memorandum of Defendant-Intervenor at 44).

118. See *id.* at 579. Defendants maintained that "it is appropriate to seek to minimize or reduce conflict to the maximum extent possible. In this case, this means construing [s]ection 609 so that it affects the fewest nations and products possible, consistent with its basic statutory purposes." *Id.* (quoting Memorandum of Defendant-Intervenor at 44).

119. GATT art. XI(1).

120. GATT art. XX(b).

121. GATT art. XX(g).

122. The General Agreement on Tariffs and Trade (GATT) is both an agreement and an organization. The organization, which is headquartered in Geneva, Switzerland, is charged with implementing the GATT agreement. As a result of the 1994

judicatory panels have considered the relation of environmental trade measures to GATT's free trade requirements. The two most significant panel rulings concerned a Canadian restriction on the export of unprocessed salmon and herring,¹²³ and a United States restriction on the import of tuna caught in purse-seine nets.

In the Canadian fish processing dispute, Canada argued that its processing requirement was justified under Articles XX(b) and XX(g). Canada maintained that the provision was closely related to the country's efforts to prevent over-fishing by ensuring that Canadian fishermen did not lose the value of their more limited catch.¹²⁴ The GATT disagreed, concluding that the processing requirement was not "necessary" to protect fish stocks, and that its primary purpose was to protect the domestic fishing industry, not to promote conservation.¹²⁵

In the tuna purse-seine controversy, discussed earlier, the GATT considered a U.S. law banning the import of tuna caught in a manner that results in a high dolphin mortality rate.¹²⁶ The United States offered two arguments in defense of its import restriction. First, it argued that the restriction did not violate Article III, because the ban on purse-seine-tuna applied to both domestic and foreign parties. Second, the United States claimed that, even if the import restriction was found to violate Article III, it was justified under Articles XX(g)'s conservation exception. The GATT rejected both of these arguments.¹²⁷ First, it found that the import restriction applied to *production methods* (fishing practices), not *products*, and that GATT did not permit production-based trade restrictions.¹²⁸ Second, the panel found that because the restriction was "primarily aimed" at forcing

Uruguay Round, the name of the GATT organization was changed to the World Trade Organization (WTO).

123. Canada Measures Affecting Exports of Unprocessed Herring and Salmon, Mar. 22, 1988, GATT B.I.S.D. (35th Supp.) at 98 (1989).

124. *Id.*

125. See generally Ted L. Mc Dorman, *International Trade Law Meets International Fisheries Law: The Canada-U.S. Salmon and Herring Dispute*, 7:4 J. Int'l Arb. 107-21 (1990).

126. See generally GATT Tuna Report, *supra* note 64, at 1599. In addition to the 1992 GATT Tuna Report, there was a second GATT dispute panel report on the issue in 1994. In referring to the tuna-driftnet controversy, I am referring collectively the 1992 and 1994 GATT panel decisions.

127. *Id.* at 1603, 1607.

128. *GATT Tuna-Dolphin II: Environmental Protection Continues to Clash With Free Trade* (1994 Report by Center for International Environmental Law), at 2.

other countries to change their policies, not marine conservation, it did not fall within the meaning of Article XX(g).¹²⁹

There are at least three principles that appear to emerge from the Canadian fish processing and U.S. tuna import rulings. First, Article III's like-treatment requirement applies only to products, not production methods. Second, if a national conservation measure provides significant economic benefits to a national industry, it may violate GATT even if it also has some pro-environmental goals. Third, national policies that aim to force other countries to change their environmental policies are not justified under Article XX(g).

In the *Earth Island* litigation, these rulings and principles provided the legal background for the defendants' contention that § 609 was inconsistent with the United States' GATT obligations. The government argued that broad application of § 609 would likely prompt a formal GATT challenge, and that, under principles established in previous panel rulings, the U.S. was likely to lose this challenge.¹³⁰ In considering this argument, the CIT conceded that it was appropriate to "seek to minimize or reduce conflict to the maximum extent possible . . . consistent with [§ 609's] basic statutory purposes."¹³¹ The CIT also stated, however, that "the record of enforcement of section 609 to date does not reveal troubling tensions with the foreign sovereigns already deemed covered, including those not certified positively and thus subject to embargoes."¹³² As such, the CIT seemed to suggest that § 609's alleged conflict with GATT was too speculative to warrant limiting the application of the shrimp certification program.

Although not addressed directly by the CIT, there may be an additional reason for rejecting the government's argument concerning the impact of U.S. GATT obligations. Increasingly, trade and environmental experts have begun to question the legal grounds supporting the distinction between measures regulating products, and measures regulating production methods.¹³³ More specifically, there is now considerable support for the position that Article III's like-treatment rules relating to products have been fundamentally misunderstood, and misapplied, by GATT

129. *Id.* at 4.

130. See *Earth Island Inst. v. Christopher*, 913 F. Supp 559, 579 (Ct. Int'l Trade 1995).

131. *Id.* at 579 (quoting Memorandum of Defendant-Intervenor).

132. *Id.* at 579.

133. See Arden-Clarke, *The Cruel Trade-Off*, THE GUARDIAN (London, Sept. 11, 1991), available in LEXIS, News Library, Guardn File.

dispute panels.¹³⁴ Steve Charnovitz, Director of Yale's Global Environment and Trade Study, has provided perhaps the most comprehensive reassessment of Article III, and of the product/production method distinction.¹³⁵

Charnovitz maintains that, at the time GATT was adopted in 1947, there were already many longstanding examples of trade restrictions based on production methods relating to environmental and health concerns.¹³⁶ Although GATT dispute panels, and many trade experts, have assumed that the 1947 agreement sought to outlaw these existing measures, Charnovitz finds no evidence to support this assumption.¹³⁷ Conversely, he maintains that GATT actually reaffirmed the appropriateness of such production-based measures, and that a "good case can be made that the GATT has green roots."¹³⁸ Charnovitz thus concludes, "The issue is not whether process standards are acceptable as trade rules. That was settled decades ago. The issue is what specific standards are appropriate."¹³⁹

While the CIT did not find it necessary to reconsider the product/production method distinction in *Earth Island v. Christopher*, the World Trade Organization (WTO) may soon have such an opportunity. The WTO is the successor organization to the General Agreement on Tariffs and Trade, and is now charged with overseeing the agreement's implementation. In response to the CIT's April 1996 decision, many nations, including all six members of the Association of Southeast Asian Nations (ASEAN), protested the U.S. ruling to the WTO's Council for Trade in Goods.¹⁴⁰ In July 1996, Suvit Khunkitti, Thailand's Agriculture and Cooperatives Minister, warned that if the United States does

134. See DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* 51 (1994).

This differentiation between products and production processes cannot be sustained in an ecologically interdependent world. For example, to say a nation must accept an imported semiconductor because it physically resembles a domestically produced semiconductor is absurd if the product was made in violation of the Montreal Protocol, restricting the use of chemicals harmful to the ozone layer.

Id.

135. Steve Charnovitz, *Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures*, 7 TUL. ENVTL. L.J. 299 (1994).

136. *Id.* at 348-49.

137. *Id.* at 340.

138. *Id.* at 349.

139. Steve Charnovitz, *Environmental Harmonization and Trade Policy*, in *TRADE AND THE ENVIRONMENT: LAW, ECONOMICS AND POLICY* 269-70 (1993).

140. Candace Batycki, *Trade War Over Turtles?*, EARTH ISLAND JOURNAL 9 (Summer 1996).

not ease the ban, ASEAN members will raise the issue at the World Trade Organization's December 1996 meeting in Singapore.¹⁴¹

The WTO recently had its first major opportunity to consider the trade-environment nexus. From an environmental standpoint, the results were not encouraging. In May 1996, the WTO Appellate Body, a new judicial forum created under the 1994 Uruguay Round to the GATT, reviewed United States' Clean Air Act legislation concerning taxes and restrictions on the import of refined gasoline.¹⁴² It concluded that the U.S. legislation violated GATT's trade rules.¹⁴³ In its decision, the WTO Appellate Body criticized the United States for failing to take into account the costs the Clean Air Act provisions would place on foreign oil producers, and for failing to pursue "cooperative negotiations" with foreign governments before imposing the restrictions.¹⁴⁴ This ruling appears to place new hurdles in the path of nations seeking to defend environmental-based trade restrictions.

If a formal challenge is brought before the WTO regarding the U.S. shrimp certification program, the CIT's resolution of the GATT-consistency issue will likely prove inadequate. Once a formal WTO challenge is filed, the "troubling tensions" that were absent in the CIT case will be plainly present, and the issue will no longer be a matter of mere legal speculation. If events proceed along this path, and a WTO dispute panel is convened to resolve the issue, several difficult questions may arise. Should the WTO reject the product/production method distinction recognized in earlier panel decisions? Was the United States obliged to undertake a detailed analysis of the impact of foreign trade partners, or pursue cooperative negotiations, before banning shrimp imports? If the WTO finds § 609 inconsistent with international trade rules, should the U.S. Congress amend the law, or should the U.S. courts reevaluate the CIT's April 1996 decision? The answers to these questions will determine the course of the U.S. sea turtle protection program.

141. Ron Corben, *Thailand Targets U.S. Curbs on Shrimp*, J. COM., July 19, 1996.

142. See WTO Report of the Appellate Body in United States, *Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 26 1996), reprinted in 35 I.L.M. 603 (1996).

143. See *id.*

144. Steve Charnovitz, *New WTO Adjudication and Its Implications for the Environment*, INT'L ENV'T REP. (BNA) 851 (Sept. 18, 1996), available in LEXIS, BNA Library, Intenv File.

V.

CONCLUSION: PROGRESS SWIMS AHEAD

The sea turtle is swimming into a complex and unknown future. The CIT's ruling in *Earth Island v. Christopher* indicates that marine conservation advocates have managed to make progress on the international trade front. The CIT's decision has helped elevate the legal status of global conservation and environmental protection goals. This victory, however, may be short-lived. In addition to the emerging GATT challenge, there have also been calls for Congress to amend § 609. As the *Food Institute Report*, an industry publication opposed to the shrimp import ban, suggested, "[l]egislative relief is not to be ruled out either."¹⁴⁵ These WTO and Congressional efforts threaten to weaken, and perhaps overturn, the CIT's landmark decision.

At least for now, however, the sea turtle has managed to achieve some degree of justice. This justice is of the most basic and essential nature. It is based on the right to exist, the right to not be driven into extinction by outdated and destructive fishing practices.¹⁴⁶ As the World Trade Organization, and perhaps the U.S. Congress, turn their attention to the issue, this right to exist must not be submerged beneath the technical language that often dominates the trade policy arena. The fate of the sea turtle must remain on the surface of the debate.

145. *U.S. Wild Shrimp Embargo Looming*, Food Institute Report (Feb. 19, 1996), available in LEXIS, News Library, Nwltrs File. "Legislative relief is not to be ruled out either and some legislators are said to be considering introducing a measure that would at least delay the deadline to allow foreign producers to comply." *Id.*

146. Le Dieu Duc & Steven Broad, *Exploitation of Hawksbill Turtles in Vietnam*, 15 TRAFFIC BULL. 77 (1995). See also Joel Simon, *Mexico's Turmoil Victimizing Sea Turtles*, S.F. CHRON., Oct. 10, 1996, at A12.