

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE RICHARD K. EATON, JUDGE

NATIVE FEDERATION OF THE MADRE)
DE DIOS RIVER AND TRIBUTARIES, ET AL.,)

Plaintiffs,)

v.)

BOZOVICH TIMBER PRODUCTS, INC.,)
ET AL.,)

Defendants.)

Court No. 06-00181

**THE UNITED STATES' MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED COMPLAINT**

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TABLE OF CONTENTS

FACTS	2
I. Relevant International Agreement, Statute, And Regulations	2
A. The CITES	2
B. Endangered Species Act	4
C. Regulations Concerning CITES Enforcement	4
II. Background	5
III. The Complaint	6
SUMMARY OF THE ARGUMENT	7
ARGUMENT	7
I. Standard of Review	7
II. The Court Lacks Jurisdiction To Entertain This Matter	8
A. The Court Lacks Jurisdiction Pursuant To 28 U.S.C. § 1581(i)(3)	8
B. Affirmative Enforcement Of CITES Is Committed To Agency Discretion	12
1. Enforcement Decisions Are Generally Immune From Judicial Review ..	12
2. No Authority Provides For Judicial Review of the Agencies' Enforcement Decisions Here	16
3. The ESA Citizen Suit Provision Is Unavailable To Plaintiffs	16
C. Plaintiffs Lack Standing To Initiate This Action	17
D. The Court May Not Entertain Claims Against The Private Defendants	19
III. Plaintiffs Fail To State A Claim For Which Relief May Be Granted	20
IV. Rule 19 Warrants Dismissal Because Peru Is An Indispensable Party	22
CONCLUSION	25

TABLE OF AUTHORITIES

CASES:	PAGES:
<u>American Greyhound Racing, Inc. v. Hull</u> , 305 F.3d 1015 (9th Cir. 2002)	24
<u>Amoco Oil Co. V. United States</u> , 63 F. Supp. 2d 1332 (CIT 1999), <u>aff'd</u> 234 F. 3d 1374 (Fed. Cir. 2000)	8
<u>Bennett v. Spear</u> , 520 U.S. 154 (1997)	16, 17
<u>Castlewood Products LLC v Norton</u> , 365 F.3d 1076 (D.C. Cir. 2004)	6
<u>Citizens to Preserve Overton Park v. Volpe</u> , 401 U.S. 402 (1971)	13
<u>Dubois v. Thomas</u> , 820 F.2d 943 (8th Cir. 1987)	15
<u>Friedman v. Kantor</u> , 977 F. Supp. 1242 (CIT 1997)	16
<u>Fund for Animals v. Norton</u> , 295 F. Supp. 2d 1 (D.C. Dist. 2003)	18
<u>Heckler v. Chaney</u> , 470 U.S. 821 (1985)	passim
<u>Henke v. United States</u> , 60 F.3d 795 (Fed. Cir. 1995)	7, 8
<u>Hinck v. United States</u> , 446 F.3d 1307 (Fed. Cir. 2006)	8
<u>Holder v. Hall</u> , 512 U.S. 874 (1994)	21

<u>Institut Pasteur v. Cambridge Biotech Corp.</u> , 186 F.3d 1356 (Fed. Cir. 1999)	23
<u>International Labor Rights Fund v. United States</u> , 391 F. Supp. 2d 1370 (CIT 2005)	18
<u>K Mart Corp. v. Cartier, Inc.</u> , 485 U.S. 176, 185 aff'd in relevant part, rev'd in part, 486 U.S. 281 (1988)	passim
<u>McKinney v. U.S. Dep't of Treasury</u> , 799 F.2d 1544 (Fed. Cir. 1986)	17, 18
<u>McNutt v. General Motors Acceptance Corp. Of Indiana</u> , 298 U.S. 178 (1936)	8
<u>Norton v. S. Utah Wilderness Alliance</u> , 542 U.S. 55 (2004)	21, 22
<u>Ontario Forest Ind. Assoc. v. United States</u> , 444 F. Supp. 2d 1309 (CIT 2006)	18, 19
<u>Salmon Spawning Recovery Alliance v. Guitierrez</u> , 2006 US Dist. LEXIS 68955 (W.D. Wash. 2006)	19
<u>Salmon Spawning & Recovery Alliance v. Spero</u> , 2006 U.S. Dist. LEXIS 28432 (W.D. Wa. May 3, 2006)	9
<u>Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States</u> , 102 F. Supp. 2d 486 (CIT 2000)	15
<u>Sierra Club v. Whitman</u> , 268 F.3d 898 (9th Cir. 2001)	15
<u>Steel Co. v. Citizens for a Better Environment</u> , 523 U.S. 83 (1998)	17
<u>Strahan v. Linnon</u> , 967 F. Supp. 581 (D. Mass. 1997)	16
<u>Torrington Co. V. United States</u> , 68 F.3d 1347 (Fed. Cir.1995)	15

<u>Warth v. Seldin,</u> 422 U.S. 490 (1975)	17
<u>Western Watersheds Project v. Matejko,</u> 456 F.3d 922 (9th Cir. 2006)	21
<u>Wichita & Affiliated Tribes v. Hodel,</u> 788 F.2d 765 (D.C. Cir. 1986)	24

STATUTES:

5 U.S.C. § 701(a)(2)	12, 13
5 U.S.C. § 706(1)	6
5 U.S.C. § 706(2)	6
16 U.S.C. § 1531	2
16 U.S.C. § 1538(a)(1)(A)	9
16 U.S.C. § 1538(c)	4
16 U.S.C. § 1538(c)(1)	passim
16 U.S.C. § 1538(g)	6
16 U.S.C. § 1540(g)(1)(A)	16
19 U.S.C. § 1307	18
19 U.S.C. § 1516a	14
28 U.S.C. § 1581(i)	8, 19
28 U.S.C. § 1581(i)(3)	passim
28 U.S.C. § 1581	19, 24
28 U.S.C. § 1604	24

REGULATIONS:

50 C.F.R. § 23.11(a) and (b)(1) passim

50 C.F.R. § 23.12 4, 5

50 C.F.R. § 23.12(a)(1)(i) 21

50 C.F.R. § 23.12(a)(2)(i) 21

50 C.F.R. § 23.12(a)(2) 5

50 C.F.R. § 23.12(a)(2)(i) 4

50 C.F.R. § 23.14(a) 4

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Defendants.)	
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THE UNITED STATES’ MOTION TO DISMISS

Defendants, the United States, the Department of the Interior (“DOI”), the United States Fish and Wildlife Service (“FWS”), the Department of Agriculture (“USDA”), the Animal and Plant Health Inspection Service (“APHIS”), the Department of Homeland Security (“DHS”), the United States Customs and Border Protection (“CBP”), the Secretary of the Interior, the Director of FWS, the Secretary of Agriculture, the Administrator of APHIS, the Secretary of Homeland Security, and the Commissioner of CBP, respectfully request that the Court dismiss this action pursuant to Rule 12(b)(1) for lack of jurisdiction. Alternatively, we respectfully request that the Court dismiss this action pursuant to Rule 12(b)(5) or (6), for failure to state a claim for which relief may be granted or for failure to join an indispensable party.

Plaintiffs, two foreign not-for-profit organizations and one New York-based environmental organization, seek declaratory and injunctive relief against the governmental defendants for purported violations of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), Section 9 of the Endangered Species Act (“ESA”),

16 U.S.C. § 1531, *et seq.*, 50 C.F.R. § 23.11(a) and (b)(1), and the Administrative Procedures Act (“APA”). As demonstrated below, the Court lacks jurisdiction to hear the plaintiffs’ claims, and the plaintiffs have, for various reasons, failed to state a claim for which relief can be granted. Moreover, this matter should be dismissed for failure to join an indispensable party.

FACTS

I. Relevant International Agreement, Statute, And Regulations

A. The CITES

The CITES is an international agreement that contains agreed-upon procedures for signatory nations to follow with respect to the trade of plant or animal species listed in Appendices I, II, and III to the CITES. The full text of the CITES is available at www.cites.org. Both the United States and Peru are parties to the CITES.

CITES provides a three-tier system of procedures concerning the trade in species listed in the three CITES Appendices. The first two tiers are relevant to this case.

The first tier species are identified in Appendix I. “Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.” CITES Art. II ¶ 1. This “particularly strict regulation” requires the “the Scientific Authority” of “the State of export [to] advise[] that such export will not be detrimental to the survival of that species” and the “Management Authority” of “the State of export [to be] satisfied that [1] the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora; . . . [and 2] an import permit has been granted for the specimen.” *Id.* at Art. III ¶ 2.

CITES also imposes the affirmative duty upon the importing country to issue an import permit for any Appendix I species, when the importing country’s “Scientific Authority” “has advised that the import will be for purposes which are not detrimental to the survival of the species involved; . . . and . . . a Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes.” Id. at Art. III ¶ 3.

Appendix II identifies species “which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival; and . . . other species which must be subject to regulation in order that trade in specimens of [other Appendix II species] may be brought under effective control.” Id. at Art II ¶ 2.

CITES Article IV contains procedures for exporting countries to follow for the granting of an export permit for Appendix II species. Specifically, “[a]n export permit shall only be granted when the following conditions have been met: . . . a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species; [and] a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora.” Id. at Art. IV ¶ 2.

Unlike Appendix I species, trade in Appendix II species does not require the importing country to issue import permits. Rather, CITES requires that “[t]he import of any specimen of a species included in Appendix II shall require the prior presentation of either an export permit or a re-export certificate.” Id. at Art. IV. ¶ 4.

Bigleaf mahogany from Peru is a CITES Appendix II species and is not listed as endangered or threatened pursuant to the Endangered Species Act.

B. Endangered Species Act

CITES is implemented through the ESA. ESA Section 9(c) makes it unlawful for any person subject to the jurisdiction of the United States to:

engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention.

16 U.S.C. § 1538(c). Because Peruvian bigleaf mahogany is named in Appendix II of CITES, it is subject to ESA Section 9(c).

C. Regulations Concerning CITES Enforcement

FWS has promulgated regulations, which include the requirement that “[u]nless the requirements in this part 23 are met, or one of the exceptions in this part 23 is applicable, it is unlawful for any person subject to the jurisdiction of the United States to commit, attempt to commit, solicit another to commit, or cause to be committed any of the acts described in paragraphs (b) through (d) of this section,” including a prohibition upon importing “any wildlife or plant listed in [CITES] appendix I, II, or III.” 50 C.F.R. § 23.11(a) and (b)(1).

For Appendix II species, such as bigleaf mahogany, 50 C.F.R. § 23.12 requires that:

in order to import into the United States any wildlife or plant listed in appendix II from any foreign country, a valid foreign export permit issued by the country of origin, or a valid foreign re-export certificate issued by the country of re-export, must be obtained prior to such importation.

50 C.F.R. § 23.12(a)(2)(i). To constitute a valid export permit, “only export permits, re-export certificates, certificates of origin, or other certificates issued and signed by a management authority will be accepted.” 50 C.F.R. § 23.14(a).

II. Background

The parties to CITES elected to list bigleaf mahogany in Appendix II of the CITES in November 2002, Am. Compl. ¶ 54, and this listing occurred in November 2003. Id. at ¶ 57.

As previously discussed, a listing in Appendix II of CITES signifies that, although a species is not currently threatened, regulation is warranted to ensure use compatible with future survival. Thus, each importation of an Appendix II requires either an export permit or a re-export certificate from the exporting nation. 50 C.F.R. § 23.12(a)(2). In Peru, the National Institute of Natural Resources (“INRENA”) is the CITES Management Authority and the National Agrarian University of La Molina (“La Molina”) is the Scientific Authority. La Molina must advise that each export of the mahogany is not detrimental to the species as a whole. Am. Compl. ¶ 58, and INRENA must also be satisfied that the exported mahogany was legally acquired. Id. Once the above criteria are met for each specimen contained in a specific shipment, INRENA issues an export permit for that shipment. As part of this process, the Peruvian government established export quotas for the years 2005 and 2006. Id. at ¶ 102.

FWS implements and enforces the ESA and CITES and serves as the United States scientific and management authorities. APHIS and CBP share responsibility to investigate and enforce the CITES for plant material. No Government agency takes part in the actual importation or trade of bigleaf mahogany. Rather, shipments are cleared for importation upon presentation of export permits issued by the Government of Peru.

FWS has communicated extensively with INRENA regarding the implementation of the listing and the steps being taken to comply with CITES in Peru’s granting of export permits for bigleaf mahogany. Id. at ¶¶ 94-96, 99-102. INRENA has responded with a description of a

number of measures being taken to ensure that trade is consistent with Peru's CITES obligations and noted that La Molina approved the export quotas for both 2005 and 2006. *Id.* at ¶ 102.¹

III. The Amended Complaint

The complaint attempts to invoke the Court's jurisdiction pursuant to 28 U.S.C. § 1581(i)(3), advancing three claims for relief. The first claim seeks a declaratory judgment that the private defendants' importation of Peruvian bigleaf mahogany violates section 9(c)(1) of the ESA, 16 U.S.C. § 1538(c)(1), and its implementing regulations. Am. Cmpl. at ¶¶ 116-18.

The remaining claims involve the Government's allowing importation of Peruvian bigleaf mahogany pursuant to export permits issued by the Government of Peru. The second claim for relief alleges that the Government is "causing a violation of the ESA" under section 9(c)(1) of the ESA, 16 U.S.C. §§ 1538(c)(1) and 1538(g), and 50 C.F.R. §§ 2311(a) & (b)(1), by allowing importation. The third claim for relief maintains that allowing importation violates the APA, as "agency actions unlawfully withheld [that are] arbitrary and capricious, abuses of discretion, and otherwise not in accordance with law." Am. Cmpl. at ¶ 121 (citing 5 U.S.C. §§ 706(1) & (2)).

Plaintiffs request, among other things, that the Court enjoin the continued importation of bigleaf mahogany by the private defendants absent a "valid export permit;" require the seizure of any bigleaf mahogany traded by the private defendants in violation of CITES; and require the Government to prevent importation of all Peruvian bigleaf mahogany, "unless and until bigleaf mahogany specimens from Peru comply with CITES." Am. Cmpl. at 29.

¹ In contrast, the United States has prevented the importation of bigleaf mahogany and detained recent shipments of this product when the Government concluded that certain export permits were not valid. *See generally Castlewood Products LLC v Norton*, 365 F.3d 1076 (D.C. Cir. 2004) (sustaining detention of Brazilian bigleaf mahogany imported under export permits that the United States had deemed invalid).

SUMMARY OF THE ARGUMENT

There are a host reasons why the amended complaint cannot succeed.

With respect to the Court's lack of jurisdiction, plaintiffs' claims fall outside the Court's jurisdiction under 28 U.S.C. § 1581(i)(3), because Peruvian bigleaf mahogany is not the subject of a trade embargo or any other quantitative restriction. Likewise, plaintiffs impermissibly seek judicial review of the agencies' enforcement decisions, which are committed to agency discretion and, therefore, not subject to review. Plaintiffs further lack Article III standing because the injury that they claim is not redressable, given that any offending action is an action of Peru, not the United States. Lastly, the Court lacks *in personam* jurisdiction over the private defendants.

Plaintiffs have also failed to state a claim for which relief may be granted. ESA Section 9 prohibits only affirmative actions, and the plaintiffs have merely alleged a failure by the Government to exercise its prosecutorial discretion. Indeed, governmental enforcement decisions simply cannot be ESA violations and, thus, the Court should dismiss this matter.

Lastly, plaintiffs have neglected to join the Government of Peru, an indispensable party and, thus, the complaint should be dismissed pursuant to Rule 12(b)(6).

Accordingly, we respectfully request that the Court dismiss this action pursuant to Rule 12(b)(1) or, alternatively, Rule 12(b)(5) or 12(b)(6), and enter judgment for the United States.

ARGUMENT

I. Standard Of Review

When deciding a motion to dismiss based upon a failure to state a claim for which relief may be granted, this Court must assume that all undisputed facts alleged in the complaint are true, and must draw all reasonable inferences in favor of the plaintiff. Henke v. United States, 60

F.3d 795, 797 (Fed. Cir. 1995). However, if a defendant challenges the jurisdiction of this Court, plaintiffs may not simply rely upon the allegations contained in their complaint, but must bring forth relevant and competent proof to establish this Court's jurisdiction. McNutt v. General Motors Acceptance Corp. Of Indiana, 298 U.S. 178, 189 (1936).

In instances in which Government agencies are afforded discretion to enforce statutes or regulations, courts generally lack jurisdiction to review. Heckler v. Chaney, 470 U.S. 821, 831 (1985). Because the plaintiffs are asking the Court to exercise jurisdiction over a matter in which there is a presumption against judicial review, they bear the heavy burden of establishing that such jurisdiction exists. Hinck v. United States, 446 F.3d 1307, 1313 (Fed. Cir. 2006).

In deciding a motion to dismiss for a failure to state a claim, the Court must address whether there is any set of facts that would entitle the plaintiffs to the relief that they request. Amoco Oil Co. V. United States, 63 F. Supp. 2d 1332, 1334-35 (CIT 1999), aff'd 234 F. 3d 1374 (Fed. Cir. 2000). Because plaintiffs' complaint rests solely upon the erroneous legal theory that the Government's failure to seize or prosecute causes a violation of Section 9 of the ESA, even if the complaint's allegations were true, plaintiffs' erroneous construction is fatal.

II. The Court Lacks Jurisdiction To Entertain This Matter

A. The Court Lacks Jurisdiction Pursuant To 28 U.S.C. § 1581(i)(3)

This case should be dismissed pursuant to Rule 12(b)(1) because it does not "arise[] out of any law of the United States providing for -- . . . (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety." 28 U.S.C. § 1581(i) (emphasis added). Despite plaintiffs' claim at paragraph five of the complaint, there is no embargo or other quantitative restriction on bigleaf mahogany,

nor is there any United States law placing any restrictions upon the amount of bigleaf mahogany that may enter the United States. Thus, the Court lacks jurisdiction to entertain this matter.

An embargo is “[a] prohibition; a ban.” American Heritage Dictionary, Fourth Edition (2000). Likewise, the Supreme Court explained that “the ordinary meaning of ‘embargo,’ and the meaning that Congress apparently adopted in the statutory language ‘embargoes or other quantitative restrictions,’ is a governmentally imposed quantitative restriction -- of zero -- on the importation of merchandise.” K Mart Corp. v. Cartier, Inc., 485 U.S. 176, 185 aff’d in relevant part, rev’d in part, 486 U.S. 281 (1988). Indeed, the mere fact that the importation of Peruvian bigleaf mahogany is regulated does not mean that it is prohibited or banned from entering the United States. Id. The Convention only regulates. No authority embargoes bigleaf mahogany -- which is not listed as an endangered or threatened species under the ESA.

In contrast to the section 9(c) regulation of trade in CITES-listed species, section 9(a)(1) of the ESA contains a complete ban upon all importation of ESA listed species, with certain limited exceptions. See 16 U.S.C. § 1538(a)(1)(A) (mandating it to be “unlawful for any person . . . to import any such species into . . . the United States”). This import ban upon ESA-listed species does fit within the definition of “embargo,” as construed by the Supreme Court in K Mart, 485 U.S. at 185; see Salmon Spawning & Recovery Alliance v. Spero, 2006 U.S. Dist. LEXIS 28432 (W.D. Wa. May 3, 2006) (transferring ESA case to this Court pursuant to ESA’s embargo provision in section 9(a)(1)(A)).

In contrast, ESA Section 9(c), the provision that addresses the regulation of CITES listed species, simply requires parties to follow CITES procedures: “It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to

the provisions of the Convention.” 16 U.S.C. § 1538(c)(1). There is no import prohibition upon CITES-listed species that are not ESA listed species and, thus, no embargo.

Likewise, the section 1581(i)(3) grant of jurisdiction to entertain claims pursuant to United States laws providing for “other quantitative restrictions on the importation of merchandise” does not confer jurisdiction. Although the importation of Peruvian bigleaf mahogany is regulated due to its status as a CITES Appendix II species, there is no United States law providing for a quantitative restriction upon its importation. Quantitative is defined as “**1a.** Expressed or expressible as a quantity. **b.** Of, relating to, or susceptible of measurement.” American Heritage Dictionary, Fourth Edition (2000). Neither the ESA nor CITES places a numerical value upon the amount of bigleaf mahogany that may be imported. The authority by which the United States abides, rather than being quantitative, is strictly qualitative. The CITES provisions and the implementing regulations are not expressible as a quantitative restriction and are not susceptible to measurement.

Moreover, section 1581(i) limits the Court’s jurisdiction to claims that “arise[] out of any law of the United States.” The only import restrictions here arise out of Peruvian law concerning exports. It is Peru, and not the United States, that is responsible for restricting exports of its bigleaf mahogany, and it does so through its export procedures. Once Peru authorizes exportation, there are no quantitative restrictions placed by United States law upon incoming bigleaf mahogany. In sum, by adding the word quantitative to the statute, Congress demonstrated its intent to limit this Court’s jurisdiction to only those matters in which United States law mandated an actual numerical restriction.

Despite the clear guidance provided by the Supreme Court’s construction of the unambiguous statutory terms at issue here, plaintiffs would have the Court hold that the ESA imposes an “embargo” upon entries that are not accompanied by satisfactory documentation prepared by the government of the exporting country. This cannot be congressional intent because all entries must be accompanied by the correct documentation prepared provided by the importer. Indeed, the absurd results attendant in holding that there is an “embargo” upon all imports that are not accompanied by the requisite paperwork is further highlighted by the vastly different treatment accorded to imports of CITES Appendix I (or ESA-listed) species. CITES Art. III ¶ 3, and ESA Section 9(c) by extension, flatly prohibit the import of all Appendix I species for commercial purposes.

Additionally, plaintiffs’ reading of section 9(c), in conjunction with the section 1581(i)(3) provision of jurisdiction in actions that “arise[] out of any law of the United States providing for . . . embargoes,” would lead to the absurd result of conferring jurisdiction to this Court in all cases against the United States where a person “engage[s] in any trade in any specimens contrary to the provisions of the Convention.” ESA Section 9(c). As plaintiffs appear to acknowledge at paragraph 29 of the amended complaint, this would also include challenges to export permits issued by the United States for CITES-listed American species. Congress never intended such an absurd expansion of the Court’s jurisdiction into the district courts’ arena. Indeed, the predecessors to the “Court of International Trade and the Federal Circuit, had rarely dealt with, much less developed a ‘specialized expertise’ in, [CITES and the ESA]. Nor is there any indication (aside from petitioner’s strained reading of the term ‘embargo’) that Congress wished

the new institutions to acquire expertise in the area in which its predecessors had none.” K Mart Corp. v. Cartier, Inc., 485 U.S. 176, 189 (1988).

Accordingly, this matter falls squarely outside the grant of jurisdiction contained in section 1581(i)(3).

B. Affirmative Enforcement Of CITES Is Committed To Agency Discretion

Though plaintiffs attempt to state their claims in the form of some affirmative action, the complaint amounts to an allegation that the Government is not sufficiently enforcing Section 9(c) of the ESA. Am. Cmpl. at ¶¶ 116-21. The Supreme Court has long recognized that agency decisions concerning resource allocation, administration, and enforcement of the statutes that they are charged with implementing are immune from judicial review. Therefore, the complaint’s second and third claims for relief should be dismissed for lack of jurisdiction.

1. Enforcement Decisions Are Generally Immune From Judicial Review

Review of enforcement decisions is precluded by the exception to review for actions “committed to agency discretion.” 5 U.S.C. § 701(a)(2). In such cases, review is limited to whether: (1) the agencies exceeded their statutory authority; (2) there was a constitutional violation; or (3) the agencies violated their own regulation. Chaney, 470 U.S. at 830-31. None are present here.

In Chaney, Supreme Court explained that the exception to APA review pursuant to 5 U.S.C. § 701(a)(2) applies “if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion. In such a case, the statute (‘law’) can be taken to have ‘committed’ the decisionmaking to the agency’s judgment absolutely.” Chaney, 470 U.S. at 830.

There, the plaintiffs had challenged a Food and Drug Administration (“FDA”) decision not to conduct a review of the off-label use of certain drugs for lethal injections. The appellate court below had concluded that a “policy statement which indicated that the agency was ‘obligated’ to investigate the unapproved use of an approved drug when such use became ‘widespread’ or ‘[endangered] the public health’” provided the law to apply in addressing whether FDA’s action was arbitrary and capricious or an abuse of discretion. Id. at 826 (citations omitted, bracketing by Court). The court below also noted that the FDA had previously “assumed jurisdiction over drugs used to put animals to sleep and the unapproved uses of drugs on prisoners in clinical experiments.” Id. at 826-27. Accordingly, the lower court “found that the FDA’s refusal, for the reasons given, was irrational” and remanded the matter to the agency for further consideration. Id. at 827.

The Supreme Court reversed, concluding that the decision was “committed to agency discretion.” Specifically, the Court contrasted the statute at issue in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), which “involved an affirmative act of approval under a statute that set clear guidelines for determining when such approval should be given,” Chaney, 470 U.S. at 831, with the FDA’s refusal to investigate, concluding that such decisions must be presumptively unreviewable pursuant to 5 U.S.C. § 701(a)(2).

The Court examined in great detail the reasons for non-reviewability, all of which govern here. Id. at 831-833. Non-enforcement decisions involve a balance of factors, including likelihood of success, policy concerns, and available resources, all of which are best left within the expertise of the agency. Id. at 831. The Court explicitly noted:

An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better

equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Id. The Court relied upon the “similar concerns” behind the principles of administrative law by which courts defer to an agency’s interpretation of the statute it administers, and to the procedures adopted to implement that statute. Id. at 832.

The Court also noted that, when an agency acts to enforce, that action provides the focus for judicial review. Id. In contrast, when an agency does not affirmatively enforce, the agency generally does not exercise any of its coercive power over an individual’s liberty or property rights and, thus, does not infringe upon areas that courts are called upon to protect. Id. The Court also stated that an agency’s decision not to enforce a statute is quite similar to

the decision of a prosecutor in the Executive Branch not to indict - a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to “take care that the laws be faithfully executed.”

Chaney, 470 U.S. at 832 (quoting U.S. Const., Art. II § 3). The Court thus explained that, in particular, an “agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.” Id. at 831. For these reasons, the Supreme Court concluded that an agency’s decision not to take enforcement action must be presumed immune from judicial review under the APA. Id. at 832.

The Chaney presumption of unreviewability is not limited to APA cases. This Court and the Federal Circuit have applied the same analysis to antidumping duty cases reviewed pursuant to 19 U.S.C. § 1516a, and the Ninth Circuit has applied the same rule in environmental cases.

Specifically, this Court and the Federal Circuit applied Chaney to review the Department of Commerce’s decisions whether to conduct verification during an antidumping duty

proceeding. Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States, 102 F. Supp. 2d 486, 496 (CIT 2000) (citing Torrington Co. V. United States, 68 F.3d 1347, 1350 (Fed. Cir.1995)).

Likewise, the Ninth Circuit has ruled that the presumption of unreviewability of enforcement decisions mandated by Chaney is equally applicable to claims alleged under environmental statutes' citizen-suit provisions. Sierra Club v. Whitman, 268 F.3d 898, 902 (9th Cir. 2001) (noting that “[t]he presumption of agency discretion recognized in Chaney has a long history and contrary to the Sierra Club’s assertion, is not limited to cases brought under the APA.”). The Whitman court recognized that the principles behind Chaney apply equally to enforcement of environmental laws, because requiring the agency “to expend its limited resources investigating multitudinous complaints, irrespective of the magnitude of their environmental significance” could lead to an inability to investigate and enforce those violations the Administrator believes to be the most serious. Whitman, 268 F.3d at 902-03 (citing Dubois v. Thomas, 820 F.2d 943, 947-48 (8th Cir. 1987) (noting that “[o]nly if the Administrator has discretion to allocate its own resources can a rational enforcement approach be achieved.”)). The Whitman Court recognized that it “is particularly difficult to review a federal agency’s failure to take enforcement actions.” Whitman, 268 F.3d at 903 (citing Chaney, 470 U.S. at 832) (emphasis in original).

2. No Authority Provides For Review Of Enforcement Decisions Here

In Chaney, the Supreme Court noted that the presumption against judicial review of an agency’s discretionary enforcement may be rebutted where the substantive statute has provided guidelines for the agency to follow in the exercise of its enforcement powers. Chaney, 470 U.S.

at 833. The ESA, however, does “not contain the detailed language necessary to remove the enforcement decision from absolute prosecutorial discretion.” Strahan v. Linnon, 967 F. Supp. 581, 605 n. 31 (D. Mass. 1997), aff’d 187 F.3d 623 (1st Cir. 1998) (addressing based upon allegation that United States Coast Guard failed to act pursuant to Marine Mammal Protection Act, the ESA, and other environmental statutes). As there is no language in the ESA or CITES, or any meaningful challenge to an agency’s decision making process, the plaintiffs’ claims seeking judicial review of any alleged non-enforcement of ESA Section 9 should be barred. See also Friedman v. Kantor, 977 F. Supp. 1242, 1250 (CIT 1997) (holding that “agency action is committed to agency discretion by law” when “there are no judicially manageable standards against which to judge the agency's” action).

3. The ESA Citizen Suit Provision Is Unavailable

More telling, though, is the Supreme Court’s analysis of what types of claims are permissibly brought pursuant to the ESA citizen-suit provision, which authorizes injunctive actions against any person “who is alleged to be in violation” of the ESA or its implementing regulations. 16 U.S.C. § 1540(g)(1)(A). In Bennett v. Spear, 520 U.S. 154 (1997), the Government argued that “the Secretary’s conduct in implementing or enforcing the ESA is not a ‘violation’ of the ESA within the meaning of this provision.” Id. at 173 (emphasis added). The Supreme Court agreed, stating that the provision

is a means by which private parties may enforce the substantive provisions of the ESA against regulated parties - both private entities and Government agencies - but is not an alternative avenue for judicial review of the Secretary’s implementation of the statute.

Bennett v. Spear, 520 U.S. 154, 173 (1997). The Court also clarified that “the term ‘violation’ does not include the Secretary’s failure to perform his duties as administrator of the ESA.” Id.

Because the agencies here are simply implementing and enforcing the ESA, the holding in Bennett explicitly forbids plaintiffs' attempt to bring what is essentially a "failure to enforce" claim under the citizen-suit provision of the ESA, as any possible inaction in enforcing CITES falls squarely within the duty to implement the ESA.

C. Plaintiffs Lack Standing

Plaintiffs lack standing because, at the very least, their alleged injury is not redressable. "Fundamentally, the question of standing involves the determination of whether a particular litigant is entitled to invoke the jurisdiction of a federal court to decide the merits of a dispute or of particular issues." McKinney v. U.S. Dep't of Treasury, 799 F.2d 1544, 1549 (Fed. Cir. 1986). The standing "inquiry involves both [1] constitutional limitations on federal-court jurisdiction and [2] prudential limitations on its exercise." Warth v. Seldin, 422 U.S. 490, 498 (1975); see also Bennett v. Spear, 520 U.S. 154, 162 (1997).

The constitutional aspect of the standing analysis focuses upon whether a plaintiff has alleged a "case or controversy" -- in the Article III sense -- with the defendant. Warth, 422 U.S. at 498. This is an "irreducible constitutional minimum of standing." Bennett, 520 U.S. at 162. To seek relief in the courts, a plaintiff must "demonstrate that he has suffered injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." Bennett, 520 U.S. at 162. "This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 103-04 (1998).

Plaintiffs have not demonstrated that any alleged injury is redressable through Court action because the Court may not compel the Government of Peru to stop issuing export permits. Moreover, even if the Court were to order the United States to prevent importation of Peruvian bigleaf mahogany, such action would not stop logging -- legal or illegal -- in Peru, because bigleaf mahogany could simply be exported to different countries.

The Federal Circuit's decision in McKinney is instructive. In that case, various public interest organizations that had petitioned the Department of the Treasury to bar the importation of Soviet-made goods allegedly produced with forced or prison labor pursuant to 19 U.S.C. § 1307 and, dissatisfied with the Government's response, the organizations sued to compel such action. The court held that each plaintiff lacked standing because the alleged injury was not redressable because the courts could not control the internal workings of the Soviet Union:

The conduct of the Customs Service has nothing whatsoever to do with the alleged fact that Ukrainians are political prisoners in Soviet labor camps, which is the result solely of internal political and policy machinations of the Soviet government. Further, no conceivable relief granted by this court could possibly redress such an alleged injury.

McKinney, 799 F.2d at 1558; see International Labor Rights Fund v. United States, 391 F. Supp. 2d 1370, 1375 (CIT 2005) (dismissing similar section 307 complaint for lack of redressability due to the Court's recognized inability to control the use of child labor on cocoa farms in the Ivory Coast); Fund for Animals v. Norton, 295 F. Supp. 2d 1, 7-8 (D.C. Dist. 2003) (holding that alleged injury to public interest group could not be redressed by banning the importation of endangered Mongolian argali sheep trophies because preventing imports would not affect the Mongolian government's granting of hunting permits, as well as poaching, in that country); Ontario Forest Ind. Assoc. v. United States, 444 F. Supp. 2d 1309, 1325 (CIT 2006) ("OFIA")

(“Because commissioning an ECC will require Canada’s independent action, none of the injuries for which Plaintiffs complain would likely be redressed simply by compelling the USTR to appoint the United States’ member.”).

Moreover, one district court recently dismissed a similar complaint concerning salmon fishing in Canadian waters. That court found a lack of causation because the “injury [was] directly caused by Canadian fishermen, parties who are not before the Court.” Salmon Spawning Recovery Alliance v. Guitierrez, 2006 US Dist. Lexis 68955 at *16 (W.D. Wash. 2006). That court also found a lack of redressability, noting that it could not compel the Canadian and United States Governments to negotiate. Id. at *17-18.²

D. The Court May Not Entertain Claims Against The Private Defendants

The Court may not entertain claims involving only private parties. The Court possesses exclusive jurisdiction to entertain a subset of federal questions that involve very specific subject matter. Each jurisdictional statute identifies the parties allowed to bring an action. See 28 U.S.C. § 1581(i) (limited to “civil action[s] commenced against the United States, its agencies, or its officers”); 28 U.S.C. §§ 1581 through 1584 (causes of action against or initiated by the Government). The Court should thus dismiss the private defendants.

² Moreover, pending CITES proceedings involving mahogany address similar subject matter. See October 2006 Standing Committee Executive Summary (rejecting CITES Secretariat recommendation cited at ¶ 110 of the amended complaint) available at <www.cites.org/eng/com/SC/54/E54-ExSum07.pdf>; Plants Committee Report to the Standing Committee available at <www.cites.org/eng/com/SC/54/E54i-08.pdf> (rejecting Secretariat Recommendation). Concurrent proceedings involving much of the same subject matter as this case counsels in favor of dismissal. See OFIA, 444 F. Supp. 2d at 1326-29 (holding that principles of comity merited dismissal where underlying dispute was before international body).

III. Plaintiffs Fail To State A Claim For Which Relief May Be Granted

Plaintiffs attempt to transform a claim of Government inaction into a claim that the Government has affirmatively “caus[ed] a violation of the ESA,” Am. Cmpl. at ¶ 117, by “failing to enjoin” the importation of mahogany. Id. at ¶ 121. In addition to the Court’s lack of jurisdiction pursuant to Chaney, this claim should also be dismissed for failure to state a claim for which relief may be granted. Plaintiffs maintain only that the Government violated the ESA because of its “approval, authorization, and failure to act” with regard to importation of bigleaf mahogany by others. Am. Cmpl. at ¶ 117. Plaintiffs do not allege that the Government itself is engaged in the importation of Peruvian bigleaf mahogany. Thus, although plaintiffs attempt to frame their complaint in terms of actual agency action, by alleging only that each agency has failed to enforce the ESA, the plaintiffs are, in fact, alleging inaction.

Plaintiffs’ ESA Section 9(c)(1) and CITES claims allege that the “government defendants have violated and continue to violate the ESA’s prohibition against causing a violation of the ESA, including trade and possession of bigleaf mahogany in contravention of CITES.” Am. Cmpl. at ¶ 117. ESA Section 9(c)(1) makes it unlawful for any person to “engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention.” 16 U.S.C. § 1538(c)(1).

ESA Section 9 and CITES proscribe only active behavior, and are couched in terms of commission, importing, and engaging. This is in stark contrast with the “failure to act” alleged by plaintiffs to constitute the Government’s alleged violation of ESA Section 9. Am. Cmpl. at ¶ 117. Nowhere do plaintiffs allege that any Government officer, employee, or agent has “engage[d] in,” or plans to engage in, any activity prohibited by CITES. Accordingly, plaintiffs’

theory appears to be that a failure to enforce is an affirmative action. Such a construction of congressional intent would lead to the absurd conclusion that enforcement decisions are affirmative actions. However, the remaining prohibitions in ESA Section 9 are illustrative of Congress's intent to prohibit only affirmative actions. Those prohibitions include the active importing, exporting, taking, selling, delivering, carrying, transporting, or shipping of any listed species. They notably do not include any action that is not, on its face, clearly affirmative. This provides strong evidence that Congress did not intend ESA Section 9 to encompass mere inaction on the part of the agencies. See Holder v. Hall, 512 U.S. 874, 919 (1994) (holding that the nature of a statute's listed examples can provide strong evidence of intent); cf. Western Watersheds Project v. Matejko, 456 F.3d 922, 930 (9th Cir. 2006) (holding that ESA Section 7 duty to consult is triggered only by affirmative action).

CITES too mentions only affirmative actions, such as importation and exportation. Furthermore, the difference between trade in species listed in Appendix I and Appendix II is that the import of Appendix I-listed species requires a United States Government-issued import permit, 50 C.F.R. § 23.12(a)(1)(i), whereas trade in Appendix II species requires only an export permit. 50 C.F.R. § 23.12(a)(2)(i). In contrast to the requirement of an affirmative action of a United States issuance of an import permit to trade the Appendix I species, CITES imposes no affirmative duties on the importing country before permitting import of Appendix II species.

Lastly, plaintiffs have failed to state a cognizable claim pursuant to the APA standard to "agency action unlawfully withheld." Am. Cmpl. at ¶ 121. As a recent unanimous Supreme Court decision recognized, "the only agency action that can be compelled under the APA is action legally required. This limitation appears in § 706(1)'s authorization for courts to 'compel

agency action *unlawfully* withheld.” Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 63 (2004) (emphasis by Court). However, the enforcement decisions at issue here are discretionary, as a matter of law. Likewise, to the extent that plaintiffs’ request that the Court direct the seizure of any merchandise, as implied at paragraph 121 of the amended complaint, such extraordinary relief is precluded by the fact that *mandamus* relief must be limited only to non-discretionary, ministerial acts, whereas enforcement decisions are inherently discretionary. Id. at 63-64.

IV. Rule 19 Warrants Dismissal Because Peru Is An Indispensable Party

In addition to the other fatal flaws in plaintiffs’ complaint, they have not, and cannot, join an indispensable party. Accordingly, this case should be dismissed pursuant to Rule 12(b)(6), which provides for a defense of “failure to join a party under Rule 19.”

Plaintiffs allege that the Government of Peru allows (or cannot prevent) illegal logging. Am. Cmpl. at ¶ 45; id. at ¶¶ 46-53 (alleged damage that may result from the logging of bigleaf mahogany in Peru). Plaintiffs further request that the Court enjoin importation of bigleaf mahogany by the private defendants absent a “valid export permit;” require the Government to seize any bigleaf mahogany traded by the private defendants in violation of CITES; and require the Government to bar importation of all Peruvian bigleaf mahogany, “unless and until bigleaf mahogany specimens from Peru comply with CITES.” Cmpl. at 29.

Plaintiffs thus request the Court to look behind export permits issued by a foreign sovereign and determine whether that sovereign’s decision to issue export permits comports with its international obligations pursuant to CITES. Or, plaintiffs request the Court to assume that Peru’s issuance of export permits violates Peru’s CITES obligation. Either option would impermissibly require the Court to sit in judgment of a foreign sovereign concerning that

sovereign's international obligations, rendering Peru an indispensable party.

Pursuant to Rule 19, the Court conducts a two-step analysis. First, the Court determines whether an absent party is necessary under Rule 19(a). If a party is necessary, the Court analyzes whether dismissal is appropriate pursuant to the factors contained in Rule 19(b). See Institut Pasteur v. Cambridge Biotech Corp., 186 F.3d 1356, 1372 (Fed. Cir. 1999).

The Government of Peru is clearly a necessary party because “complete relief cannot be accorded among those already parties” without the Peruvian Government’s presence. Rule 19(a)(1). The complaint alleges that the Government of Peru allows (or cannot prevent) illegal logging. This problem, if true, must be addressed by Peru. Any collateral damage that may result from the logging of bigleaf mahogany is likewise within the exclusive jurisdiction of Peru. Although plaintiffs maintain that the United States is the world’s “largest importer of Peruvian bigleaf mahogany,” Am. Cmpl. at ¶ 47, it does not follow that prohibiting imports to the United States would protect the Peruvian bigleaf mahogany population or prevent illegal logging. Peru is the world’s leading exporter of bigleaf mahogany. Id. at ¶ 45. Trade of this highly sought-after wood would almost certainly not cease because one country has prevented importation. Rather, trade would most probably shift to different nations. Plaintiffs’ alleged injury may only be redressed by the Peruvian government.

Similarly, the second prong of this analysis, contained in Rule 19(b), merits dismissal. Rule 19(b) provides that, if a party that should be joined pursuant to Rule 19(a), and the Court cannot assert jurisdiction over the party, then in deciding a motion to dismiss, the Court should consider the four factors contained in Rule 19(b):

If a person as described in subdivision (a)(1)-(2) of this rule cannot be made a party, the court shall determine whether in equity and

good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Given these factors, the conclusion must be that Peru is an indispensable party.

First, a ruling against the Government would prejudice the United States by holding it responsible for the actions (or inactions) of a foreign sovereign.

Second, injury alleged in the complaint cannot be rectified through alternative remedies before the Court. Any remedy lies exclusively with the Government of Peru.

Third, any judgment reached in Peru's absence would be inadequate in remedying the true injury claimed. Indeed, plaintiffs' entire complaint simply seeks a Court order compelling the United States to prevent importation of bigleaf mahogany as a means of compelling Peru to act in a manner consistent with plaintiffs' views concerning Peru's CITES obligations.

Fourth, regardless of whether plaintiffs may receive an adequate remedy against the Peruvian government, dismissal would still be appropriate because the Peruvian government's sovereign immunity would overcome any lack of an alternative remedy or forum. See American Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1025 (9th Cir. 2002) (holding that Native American tribe was an indispensable party pursuant to FRCP 19(b), noting that "we have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs."); Wichita & Affiliated Tribes v. Hodel, 788 F.2d 765, 777 (D.C. Cir. 1986). The Court may not assert jurisdiction over the Government of Peru. This Court's

jurisdictional statutes, 28 U.S.C. §§ 1581-84, do not allow the Court to entertain claims against foreign sovereigns, and the conditions under which a foreign state may be subject to the jurisdiction of a court of the United States, under 28 U.S.C. § 1604, are not applicable here.

Accordingly, because Peru is indispensable, the complaint should be dismissed.

CONCLUSION

For these reasons, we respectfully request that the Court dismiss this action pursuant to Rule 12(b)(1) or, alternatively, pursuant to Rules 12(b)(5) or 12(b)(6).

Respectfully submitted,

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November 9, 2006

CERTIFICATE OF SERVICE

I hereby declare that on the 9th day of November 2006, I caused to be served copies of "THE UNITED STATES' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT" in the following manner addressed as follows:

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