Winter 1998

The Humane Society and Italian Driftnetters: Environmental Activists and Unilateral Action in International Environmental Law

Amy Blackwell

Follow this and additional works at: http://scholarship.law.unc.edu/ncilj

Recommended Citation
Available at: http://scholarship.law.unc.edu/ncilj/vol23/iss2/3

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law and Commercial Regulation by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
The Humane Society and Italian Driftnetters: Environmental Activists and Unilateral Action in International Environmental Law

Cover Page Footnote
International Law; Commercial Law; Law
I. Introduction

The global fishing industry has doubled in size since 1970 with an estimated one million large vessels currently prowling the world's oceans in search of fish. The burgeoning fleet is also becoming increasingly efficient. Spotter planes and satellite positioning systems help locate fish, while automatic trawl nets and special driftnets snare every bit of significant marine life in a given area.

Driftnetting can be an extremely destructive practice. According to the United Nations Food and Agriculture Organization, with driftnetting about seventy percent of the world's marine stock is overexploited, and if current rates of depletion continue, there will be a shortage of about thirty million tons of fish by the year 2000. Moreover, driftnets, which are...
usually made of non-biodegradable plastic, indiscriminately catch almost all marine creatures, including whales, sea turtles, and birds.\(^5\) Many of these creatures are killed by the driftnets and are discarded by fishermen.\(^6\)

Despite the overexploitation, there is good evidence that most fish populations can recover when intense fishing pressure is removed.\(^7\) During the last decade, fishing nations have made a semi-concerted effort to limit the use of driftnets. The United States passed legislation that bans driftnet fishing by American fishermen and allows for sanctions against other nations that continue to use driftnets.\(^8\) In addition, the United Nations has passed two primary resolutions calling for the reduction of driftnet fishing, as have regional treaty organizations such as the South Pacific Forum.\(^9\)

While these legislative efforts established a necessary legal framework, enforcement remains the primary problem. The United Nations’ resolutions call for a moratorium on driftnets, but the United Nations has no enforcement provisions of its own. Instead it calls on member nations to pass their own legislation to effect the moratorium.\(^10\) Not all countries have done this. In particular, the members of the European Union have not been willing to ban approximately 13 kilograms per person and that, due to population expansion, to hold that level steady through the year 2010, there would have to be a 25% increase in fish production).

\(^5\) See id.


\(^7\) See Russell, supra note 1, at 29.


\(^10\) See Pelagic Driftnet Fishing I, supra note 9, at 1558; Pelagic Driftnet Fishing II, supra note 9, at 242.
the nets, and several countries, including Italy, have openly continued to use driftnets.

While the driftnet enforcement issue is ostensibly left up to each individual country, legislation passed by the United States has proved an unlikely, but effective mechanism for controlling the use of driftnets worldwide. Congress passed the High Seas Driftnet Fisheries Enforcement Act (HSDFEA) in 1992, a law which requires the Secretary of Commerce to identify other nations that continue to fish with driftnets. Under the law, once a country is identified, the President must ask the offending country to stop using the nets. If the identified country refuses, the Secretary then must prohibit the import of fish and fish products from that country. The threat of HSDFEA sanctions serve as strong encouragement for those nations which depend on the substantial U.S. fish market. However, for political and diplomatic reasons, the United States may be hesitant to enforce the HSDFEA against friendly nations.

Although the United States may be hesitant, the HSDFEA provides special interest and environmental groups the power to affect driftnetting worldwide. In the recent past, private environmental groups have effectively skirted the international diplomatic barriers by bringing suit in the Court of International Trade (CIT). The CIT is rapidly becoming a sympathetic forum

12 See id.
14 See id. §§ 1826(e)(5), (6).
15 See id.
16 For example, a U.S. embargo on fish products from Italy cost the Italians an estimated $1 billion per year. See Bonino, supra note 11.
17 See infra notes 194-98 and accompanying text.
18 Since 1980, the CIT has exercised exclusive jurisdiction over actions against the United States, its agencies or officers, arising out of any U.S. law authorizing embargoes for reasons other than public health or safety, and actions concerning the administration and enforcement of these embargoes. See David Paget & Lemuel M. Srolovic, Protecting Endangered Species: Customs Court Becomes Potent Forum, N.Y. L.J., June 3, 1996, at S1, available in LEXIS, Legenew Library, NYLawJ File. The CIT, formerly the U.S. Customs Court, has all powers in law and equity exercised by federal district
where these groups can successfully force the U.S. government to enforce its existing environmental laws against other nations. 19

This is precisely the route taken recently by several American environmental groups that sought to stop driftnetting by Italian fishermen. 20 The groups, led by the Humane Society of the United States, successfully brought an action against the federal government in the CIT, alleging that the Department of Commerce had not taken the actions required by the HSDFEA against Italy after acquiring knowledge of illegal Italian driftnetting. 21 The victory in the CIT forced the Department of Commerce to threaten sanctions against Italian fish products and persuaded the European Union to seriously address the driftnet issue. 22

The case illustrated the complex way in which federal law, federal courts, environmental activists, and foreign governments interact in the field of international environmental law. It offers some hope that laws can be enforced even by reluctant governments if they are confronted with enough outside pressure. 23 The case also raised questions about the wisdom or feasibility of taking unilateral action to enforce international law.

This paper begins by examining the United Nations resolutions on driftnet fishing 24 and the related Wellington Convention, 25 the sources of current international law regarding driftnets and the justification for the United States’ involvement in the reduction of driftnet use worldwide. 26 Part III discusses the related HSDFEA, 27 and the current driftnet situation in Europe. 28 Part IV examines the
the role of the CIT in enforcing environmental regulations, focusing particularly on Humane Society. By examining these elements in the context of the Italian driftnet case, this paper underscores the power of the U.S. government to influence international environmental policy by unilateral economic actions. It also demonstrates that private special interest groups are key players in the process because of their ability to police driftnetting activity and to use the HSDFEA to force other nations to comply with the United States' environmental policy.

II. International Law

A. United Nations Resolutions

In 1989, in hopes of reducing driftnet fishing throughout the world, the United Nations adopted Resolution 44/225. The resolution described large-scale pelagic driftnet fishing as "a method of fishing with a net or combination of nets intended to be held in a more or less vertical position by floats and weights, the purpose of which is to enmesh fish by drifting on the surface of or in the water." The drafters of the resolution were concerned about the presence of more than one thousand vessels using driftnets on the high seas, while coastal states were concerned that driftnet fishing was exploiting the resources just outside of their exclusive economic zones.

The resolution called for regulatory measures that would take

---

29 See infra notes 144-72 and accompanying text.
31 See infra notes 194-208 and accompanying text.
32 See infra notes 194-208 and accompanying text.
33 See Pelagic Driftnet Fishing I, supra note 9, at 1556.
34 Id.
35 See id. at 1557. According the United Nations Convention on the Law of the Sea, Article 57, the exclusive economic zone of a nation may extend up to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. See Convention on the Law of the Sea, 21 I.L.M. 1261 (1982). Article 56 gives the coastal state sovereign rights to exploit and manage the resources in its exclusive economic zone, including protecting and preserving the marine environment. See id.
account of the best scientific data and analysis available. To achieve the goal of scientific accuracy, the resolution exhorted the members of the international community to cooperate in collecting and sharing data and to strengthen cooperation in conserving and managing living marine resources. It called for a moratorium on all large-scale pelagic driftnet fishing by June 30, 1992, allowing for exceptions if necessary. It also sought to reduce driftnet fishing in the Pacific and to halt expansion in other areas. Also, the resolutions sought to have the Secretary General of the United Nations bring the issue to the attention of the international community, and sought to have specialized agencies study the impact of driftnet fishing in accordance with the resolution’s commitment to accurate scientific data. The drafters further recommended that the international community review this data and agree on regulating and monitoring measures by June 30, 1991.

Scientific review after the passage of Resolution 44/225 uncovered some bad news. Researchers predictably found that driftnet fishing had an adverse impact on the conservation and sustainable management of living marine resources. Furthermore, there were concerns about the reports of large-scale pelagic driftnet fishing activities in direct contravention of Resolution 44/225. As a result, at the end of 1991, the United Nations adopted Resolution 46/215, which called for a more general moratorium on driftnet fishing.

While resolution 46/215 commended the unilateral, regional, and international efforts of many members of the international community in their implementation of Resolution 44/225, it nevertheless called for a moratorium on large-scale driftnet

36 See Pelagic Driftnet Fishing I, supra note 9, at 1558.
37 See id.
38 See id.
39 See id.
40 See id. at 1559.
41 See id. at 1558.
42 See Pelagic Driftnet Fishing II, supra note 9, at 242.
43 See id. at 241.
44 See id.
fishing. It called for such a moratorium even though the moratorium would cause adverse socio-economic consequences. Starting on January 1, 1992, members were required to reduce large-scale pelagic high seas driftnet fisheries by reducing the number of vessels involved, the length of the nets used, and the areas open for fishing. Under the resolution, the number of driftnet fisheries were supposed to have been reduced by fifty percent by December 31, 1992. The global moratorium was to be fully implemented by that same date and was to include enclosed and semi-enclosed seas. Despite the Secretary General's admonishment to all members of the international community to take measures individually and collectively to stop driftnet fishing, the target dates have come and gone and driftnetting problems continue.

The primary weakness of the U.N. resolution is its lack of an enforcement mechanism. The resolution is enforceable only if member states pass their own bans on driftnet fishing. This is a problem common to many international conservation conventions, and it predictably frustrates those who look for strict enforcement. While the United States and many other nations

---

45 See id. at 242.
46 See id.
47 See id.
48 See id.
49 See id. According to the UN Convention on the Law of the Sea, Article 122, "enclosed or semi-enclosed sea" means "a gulf, basin, or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet, or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States." Convention on the Law of the Sea, 21 I.L.M. 1261 (1982).
50 See Pelagic Driftnet Fishing II, supra note 9, at 241.
51 See infra Part III.B and accompanying text for a discussion of continuing problems in Europe.
52 See id.
have passed national legislation banning driftnets, many others lag behind.

B. The Wellington Convention

The Wellington Convention was adopted in 1990 by a number of nations concerned about driftnet fishing in the South Pacific. The Convention area consists of a large rectangle of ocean that begins roughly from a point in the Pacific Ocean west of Central America and runs due west to the Philipines. It then extends southward to a point south of Australia. The area then bears east towards the southern part of Chile and closes again to the west of Central America. Australia, New Zealand, Hawaii, most South Pacific Islands, and most of Southeast Asia are included in the Convention area. Parties to the Convention agree to prohibit their nationals from fishing with driftnets in the above-stated area. For fishing outside that area, it sets the maximum length for driftnets at the international default standard of 2.5 kilometers.

The Wellington Convention also has two supplemental Protocols. Protocol I is open for signature to any state whose nationals or vessels fish within the Convention area, or any state invited to join by the Convention members. Parties to Protocol I agree to prohibit their nationals from using driftnets, to transmit to the South Pacific Forum Fisheries Agency information on measures they have implemented, to cooperate with other parties on managing albacore tuna within the Convention area, and to take

56 See Wellington Convention, supra note 9, at 1455. The precise geographic coordinates of the Convention area are 10 degrees north latitude to 50 degrees south, and 130 degrees east longitude to 120 degrees west. See id. The area also includes all waters under the fisheries jurisdiction of member states. See id.
57 See id.
58 See id.
59 See id.
60 See id. at 1456.
61 See id. at 1455.
62 See id. at 1462-63.
63 See id. at 1462.
appropriate enforcement measures. In contrast, Protocol II is only open to Pacific rim countries. It requires parties to prohibit the use of driftnets in areas under their jurisdiction and to deny driftnet fishing vessels access to their ports and facilities.

Parties to the Convention may take various steps to prevent the use of driftnets. A member state may prohibit the landing of driftnet catches, the processing of those catches within its territory, the import of fish caught in driftnets, or restrict port access for vessels using driftnets. Member states are required to ensure fair application and enforcement of the Convention's provisions. A member nation can also request consultations with any nation that is eligible to become a member, and whose driftnet fishing activities are adversely affecting the conservation of marine resources within the Convention area.

The South Pacific Forum adopted this Convention in 1990, at about the same time that the United Nations adopted Resolution 44/225. South Pacific governments passed the treaty primarily as a response to growing concern for the dwindling albacore tuna population in the area.

The United States signed the Wellington Convention on November 14, 1990, and Protocol I on February 26, 1991. Ratification of the Convention was consistent with the U.S. position on driftnet fishing. The United States became a party to

---

64 See id.
65 See id. at 1449.
66 See id. at 1463.
67 See id. at 1457.
68 See id.
69 See id. at 1458.
70 See id.; Pelagic Driftnet Fishing II, supra note 9, at 241.
71 See Wellington Convention, supra note 9, at 1449. Some of the Wellington Convention's first signatories included Australia, the Cook Islands, the Federated States of Micronesia, the French Republic, the Republic of Kiribati, the Republic of the Marshall Islands, the Republic of Nauru, New Zealand, Niue, the Republic of Palau, Tokelau, Tuvalu, the United States of America, and the Republic of Vanuatu. See id. at 1450.
73 See id. at 669.
the Convention on the understanding that it would be "obligated to prohibit driftnet fishing in all areas of exclusive economic zone within the Convention Area, and to prohibit all United States nationals and vessels documented under United States laws from fishing with driftnets in the Convention Area." The United States' support for international agreements like the Wellington Convention and the U.N.'s Driftnet Resolution is mirrored in tough domestic legislation against driftnets.

III. Current Legal Regimes

A. United States Law

Several years prior to the U.N.'s involvement in the driftnetting area, Congress took steps to reduce the damage caused by driftnets in the North Pacific and Bering Sea. The Driftnet Impact Monitoring, Assessment, and Control Act of 1987 (DIMACA) required the Secretary of State to initiate negotiations with foreign governments conducting driftnet fishing in those waters. In 1990, the same year the U.N. passed Resolution 44/225, Congress expanded the coverage of DIMACA and expressly proclaimed that its policies were to enforce the moratorium on driftnet fishing called for by Resolution 44/225, to support the Wellington Declaration, and to secure a ban on large-scale driftnets on the high seas.

The amended act stated that "the Secretary [of Commerce], through the Secretary of State and the Secretary of the department in which the Coast Guard is operating, shall seek to secure international agreements to implement immediately the findings, policy, and provisions of this section, and in particular an international ban on large-scale driftnet fishing." To carry out this directive, the Secretary of Commerce has the duty to insure

---

74 Id. (quoting letter from Lawrence Eagleburger, U.S. Deputy Secretary of State, to President George Bush (May 13, 1991)).
77 See id.
78 Id. § 1826(d).
that all drifnet-fishing vessels are included in the agreement, that all vessels are equipped with a satellite transmitter for monitoring, and that the taking of species are carefully monitored. Further, United States officials have the right to board and inspect any vessel using driftnets when the vessel is operating in designated areas beyond the exclusive economic zone of any nation. The law also requires that all large-scale driftnets be constructed of biodegradable materials and that they be marked in such a way as to identify the vessel and flag nation responsible for them.

DIMACA also created substantial reporting requirements. The Commerce Secretary must submit an annual report to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives. The report must include steps taken to carry out the law and evaluate its progress. The report also must identify any nation which conducts large-scale driftnet fishing in a manner inconsistent with any international agreement to which they and the United States are a party.

DIMACA was followed by the High Seas Driftnet Fisheries Enforcement Act of 1992 (HSDFEA). This Act required the Secretary of Commerce to identify by January 10, 1993 each nation whose nationals or vessels were conducting large-scale driftnet fishing on the high seas, and to notify the President and each affected nation. While that deadline has come and gone, the remainder of the Act is currently in force and is the basis for the Humane Society’s lawsuit against the U.S. Departments of

79 See id.
80 See id. The right is limited to vessels operating under the flag of a party to the agreement. See id.
81 See id.
83 See id.
84 See id. Any nation so identified is certified to the President, which is deemed a certification for the purposes of § 8(a) of the Fishermen’s Protective Act of 1967. See id. at § 1826(f).
86 See id. § 1826a(b)(1)(A).
Commerce and State. 87

Under the HSDFEA, identification of an offending country triggers a ninety-day consultation period during which the President must attempt to persuade the offending country to immediately halt large-scale driftnetting. 88 If the President’s efforts are unsuccessful, he must direct the Secretary of the Treasury to prohibit imports of fish, fish products, and fishing equipment from that country. If these sanctions prove ineffective, the United States may impose an embargo on any product from that country. 89

To comply with U.N. Resolution 46/215, in 1995, Congress adopted Title VI of the Fisheries Act of 1995, 90 which strengthened the moratorium on driftnet fishing called for by the Resolution. 91 Title VI bars the United States from entering into any international agreement relating to the conservation and management of living marine resources or high seas fishing that would prevent the implementation of the global moratorium on driftnets required by the Resolution. 92 It also urges the Secretary of State to make use of international agreements and organizations to implement the ban, 93 and requires the President to use the Department of Defense, the Coast Guard, and other agencies to prevent violations of the moratorium in U.S. and international waters. 94 This enforcement applies not only to fisheries under the jurisdiction of the United States, but also to fisheries not under U.S. jurisdiction to the fullest extent permitted under international law. 95

89 See id.
93 See id. § 1826e.
94 See id. § 1826g.
95 See id.
The United States has enjoyed some success enforcing its driftnet laws. In 1993, when the Coast Guard found two Chinese vessels conducting illegal driftnet fishing in international waters in the north Pacific, the vessels were sent back to China for prosecution.\(^9\) In 1995, Coast Guard officers seized a vessel 1,500 miles northwest of Midway Island for violating the U.N. moratorium.\(^7\) Also, in the summer of 1996, a Coast Guard cutter spent a week pursuing a Taiwanese vessel caught using a two-mile long driftnet in international waters southwest of the Aleutian Islands.\(^8\) As the Coast Guard cutter drew near, the fishing boat cut away its driftnet and sped off.\(^9\) The Coast Guard took a six-foot sample of the net containing two salmon and set off in pursuit of the vessel.\(^10\) After several days, the fishing boat hoisted a Taiwanese flag and tossed a message overboard in a bottle. This message gave the vessel’s name and said that it had stopped fishing because of a broken freezer.\(^10\) Taiwan claimed jurisdiction over the boat, and refused to allow the U.S. Coast Guard to board it until Taiwanese police had arrived at the scene, which by now was near Yokohama.\(^10\)

The Taiwanese incident underscored one of the primary problems with enforcement of the driftnet legislation. Pursuant to international agreement, prosecution of illegal driftnetting is left to the country of origin, not the capturing country.\(^10\) For example, the captain of the Taiwanese boat, if convicted, faced a maximum

---


\(^8\) See Helen Jung, Coast Guard Pursues Driftneter in 2-day Chase, ANCHORAGE DAILY NEWS, July 9, 1996, at 1A, available in LEXIS, News Library, Anchdn File.

\(^9\) See id.

\(^10\) See id.
three-year sentence and loss of the boat's fishing license. But it was unknown how seriously the captain's offense would be treated in Taiwan. While Taiwan has been using police boats to enforce the U.N. driftnet ban in the north Pacific, it is not a U.N. member state, nor is it a signatory to any driftnet accord. Preliminary investigations of the vessel failed to turn up any evidence of illegal driftnetting—not surprising since the captain had a week to dispose of any incriminating materials. Republican Senator Frank Murkowski of Alaska said that this was a good reason for talks between the United States and Taiwan to implement a new fisheries treaty that would allow parties to search each others' boats when violations were suspected.

B. Driftnetting in Europe

The European Union has yet to agree to a ban on driftnet fishing. Although it has already made driftnets longer than 2.5 kilometers illegal, some member nations refuse to outlaw them completely. The failure can be traced to historic disagreement among members of the European Union on the need for a total driftnet ban. The current proposal, originally drafted in April 1994, would ban all driftnets in the northeast Atlantic, Mediterranean, and Baltic Seas. But its adoption has been blocked consistently by France, the United Kingdom, Ireland, Italy, Denmark, Sweden, Finland, and Germany. These countries have traditionally claimed that scientific research does

104 See Taiwanese Driftnet Trawler, supra note 102.
105 See id.
107 See id.
108 See id.
109 See Spain & Portugal: Commission Proposes New Access Plans for Iberian Fishermen, Agri Service Int'l, June 9, 1995, available in LEXIS, News Library, Arcnws File. The European Fisheries Commission has come out squarely on the side of banning driftnets. See id. As support for its position, the Commission argues that an estimated twenty percent of total annual fisheries output is lost through illegal fishing. See id.
111 See id.
not support the necessity for such a ban.\textsuperscript{112}

Recent developments, however, suggest that a complete ban is near, and may occur sometime in 1998. In a dramatic reversal of policy, the United Kingdom announced on October 30, 1997 that it would support a total ban on driftnets during 1998, the year of its presidency in the European Union.\textsuperscript{113} Moreover, the United Kingdom’s abrupt about-face means that “for the first time in almost four years there are enough votes within the Council to ban driftnets completely.”\textsuperscript{114}

But dissenting nations are not likely to accept a ban without a fight. In addition to their scientific arguments that a ban is not necessary, these nations have complained about the practical difficulties involved in enforcing an absolute ban. For example, Ireland recently passed legislation banning monofilament driftnets for salmon fishing, but the Minister of State for the Marine found that the ban was too expensive and was unenforceable.\textsuperscript{115} He claimed that other less severe measures would provide for simpler, more realistic enforcement.\textsuperscript{116} Some of the alternatives suggested by the Minister included postponing the opening date of driftnetting season, limiting fishing to four days a week during daylight hours only, and banning driftnets outside a six mile limit to make it simpler for regional fisheries boards to enforce the measures.\textsuperscript{117} The Irish Fisherman’s Organization favored the initiative, claiming that legal driftnetting may not be the main


\textsuperscript{116} See id.

\textsuperscript{117} See id.
cause of the perceived decline in salmon stocks.118

The European Union has tried to improve enforcement of fisheries laws. In June 1995, the European Fisheries Commission chartered a British fisheries inspection vessel to patrol tuna driftnet fishing in the northeast Atlantic and Mediterranean.119 The European Union hoped that the vessel’s presence might help discourage violence between boats from Spain and Portugal, which use traditional fishing methods, and those from France, Britain, and Ireland, which use driftnets.120 Two E.U. inspectors patrol the seas on this boat, ensuring that fishermen comply with the 2.5 kilometer limit on driftnet length.121 The boat also carries E.U. inspectors from member states who want to check on their own country’s vessels.122

The European Fisheries Commission has also formulated a plan to monitor fishing vessels with a satellite surveillance system (VMS).123 The masters of the vessels are supposed to ensure that the system is working and specified information is being transmitted to the proper location.124 Each member state is supposed to establish a “Fisheries Monitoring Centre” to monitor the activities of both its own vessels, wherever they might be, and vessels of other countries fishing in waters under its jurisdiction.125 The member states are supposed to record the data received from their vessels and the Fisheries Commission has direct access to these files.126 The system will go into effect transitionally in July 1998 and apply to all E.U. vessels over twenty meters in length as

118 See id. While the particular fishing at issue here does not occur on the high seas and therefore is not part of the international moratorium, the debate is indicative of the country’s attitudes toward driftnetting in general.

119 See Spain & Portugal, supra note 109.

120 See id.; see also infra notes 132-34 and accompanying text.

121 See id.

122 See id. The boat can also be used for fisheries research and to provide medical support for fishing vessels. See id.


124 See id.

125 See id.

126 See id.
of January 2000.\footnote{127}

Irish Fisheries Minister Sean Barrett said that he hoped that the VMS system would usher in a new era of fisheries enforcement.\footnote{128} He hoped that the VMS would have "a significant impact in reducing the level of illegal activities in E.U. waters and ensuring the fishing vessels across the [European Union] are monitored in a more uniform and comprehensive fashion."\footnote{129} While the satellite system will only be able to show the location of boats, and not what they are doing,\footnote{130} the Fisheries Ministers believe that the system will be cheaper than building more inspection boats and will allow much more efficient communication between vessels and fisheries protection agencies.\footnote{131}

Although European nations are trying to work together to establish a satisfactory fisheries policy, there have been clashes between fishermen who disagree about the best fishing methods. Spain is violently opposed to the use of driftnets on the high seas.\footnote{132} Spanish fishermen, who use the traditional hook and line method to catch fish,\footnote{133} have a history of violent clashes with fishing boats from France, Britain, and Ireland, which use driftnets.\footnote{134}

These clashes occur mostly in the Atlantic, but the Mediterranean is also the scene of altercations involving driftnetters. Italy has continued to use driftnets of up to twenty kilometers long in its Mediterranean swordfish fleet, despite the E.U. ban on driftnets longer than 2.5 kilometers.\footnote{135} In June 1996, fifteen out of sixteen Italian boats were using driftnets averaging five kilometers in length.\footnote{136} Believing that driftnets within the

\footnote{127} See id. 
\footnote{128} See id. 
\footnote{129} Id. 
\footnote{130} See id. 
\footnote{131} See id. 
\footnote{133} See id. 
\footnote{134} See id. 
\footnote{135} See Bonino, supra note 11. 
\footnote{136} See id. 

legal limits are not economically viable, the fishermen had a strong incentive to ignore the rules.\textsuperscript{137}

The Italian government’s reluctance to enforce the driftnet ban is fueled in part by a concern that a ban would threaten two to three thousand fishing jobs in southern Italy, an area already crippled by a high unemployment rate.\textsuperscript{138} The Italian government also contended that fishing in Italy was controlled by organized crime, which made the industry difficult for the government to control.\textsuperscript{139} Finally, Italy maintained that if it were to accept a driftnet ban, it would require E.U. assistance to help fishermen retire or be retrained in other livelihoods.\textsuperscript{140}

Despite the Italian government’s protests, illegal fishing continues to be a major problem. A recent Food and Agriculture Organization report concluded that the primary region of illegal fishing was the Mediterranean, and most of that fishing was being done by Italian vessels.\textsuperscript{141} In addition, scientific studies have shown that about eighty percent of what the Italian fleet catches in driftnets is bycatch—dolphins, whales, sharks, and unwanted varieties of fish—that are thrown back into the sea, usually dead.\textsuperscript{142}

\textsuperscript{137} See id.
\textsuperscript{138} See id.
\textsuperscript{139} See id.
\textsuperscript{140} See Satellite Tracking, supra note 123. The Italian government also claimed that other countries, including Japan, South Korea, Morocco, Tunisia, Turkey, Algeria, Malta, and Albania, continue to use driftnets in the Mediterranean. See Bonino, supra note 11.

The European Fisheries Commission attributed illegal fishing in the Mediterranean to the fact that exclusive economic zones do not extend the full 200 miles allowable, which made it difficult to control both Italian fishermen and foreign boats which use the same waters. See Phase Out, supra note 110.


\textsuperscript{142} See Phase Out, supra note 110.
Only one-fifth of the haul is actually the targeted swordfish.\textsuperscript{143}

IV. The CIT: A History of Environmental Friendliness

While U.S. and U.N. laws present a solid front against driftnetting, enforcement has always lagged a step behind. Private environmental groups have quickly grown tired of waiting for results. The Humane Society of the United States, dissatisfied with the United States’ reluctance to impose sanctions on Italy, decided to challenge the U.S. inaction in the CIT.\textsuperscript{144}

\textit{A. Florsheim Shoe Co. v. United States}

The decision to seek relief in the CIT may have been spurred by two earlier CIT decisions favorable to environmental organizations. In \textit{Florsheim Shoe Co. v. United States},\textsuperscript{145} plaintiffs challenged the U.S. Fish and Wildlife Service’s denial of entry of elk skin shoes imported by Florsheim from Taiwan.\textsuperscript{146} The U.S. prohibition was based on the Pelly Amendment to the Fishermen’s Protective Act of 1967,\textsuperscript{147} which authorizes restrictions on imports of products from countries whose trade practices threaten

\textsuperscript{143} See id.

\textsuperscript{144} See infra notes 145-72 and accompanying text. Environmental groups have tried the same enforcement tactic in other courts, but with less success. In 1986, the American Cetacean Society tried to force the Secretary of Commerce to certify Japan under the Pelly Amendment, see Pelly Amendment to the Fisherman’s Protective Act of 1967, 22 U.S.C. § 1978 (1982), for violating the International Whaling Convention (IWC). See Japan Whaling Ass’n v. Am. Cetacean Soc’y, 478 U.S. 221, 228 (1986). Like the driftnet resolutions, the IWC lacks authority to enforce its measures and relies on member states to implement their own enforcement mechanisms. See Whitney & Perles, supra note 54, at 683. The Supreme Court held, contrary to the plaintiff’s position, that the Secretary of Commerce had the option of either certifying the offending nation, with the accompanying threat of sanctions, or entering into a more conciliatory executive agreement with the country. See Japan Whaling, 478 U.S. at 241; Whitney & Perles, supra note 54, at 683. Instead of threatening sanctions, the United States chose to enter a phase-out agreement with Japan whereby Japan agreed to cease commercial whaling by 1988. In fact, Japan continued to catch a large number of whales for supposedly non-commercial uses. See Whitney & Perles, supra note 54, at 680-81.


\textsuperscript{146} See id. at 849.

endangered species.\footnote{See Florsheim Shoe, 880 F. Supp. at 849.} Taiwan had already been certified under the Pelly Amendment for violating the Convention on International Trade in Endangered Species of Wild Fauna and Flora because it continued to trade in rhinoceros and tiger parts and products.\footnote{See id.} The Pelly Amendment authorizes the President to prohibit the importation of any products from the offending country.\footnote{See id.}

The President proposed an embargo of goods from Taiwan in November 1993 and gave Taiwan an opportunity to change its practices regarding endangered species.\footnote{See id.} By August 1994, the President prohibited the importation of certain fish and wildlife parts and products from Taiwan.\footnote{See id. at 850.} Two months later, the Fish and Wildlife Service seized elk skin shoes manufactured in Taiwan from imported Finnish leather as articles barred under the Proclamation.\footnote{See id.}

Florsheim, the importer of the shoes, argued that the embargo should not cover these shoes because the shoes were made from animals that did not come from Taiwan.\footnote{See id.} Florsheim contended that the words “of Taiwan” were intended to modify “wildlife,” and as such the embargo should only extend to products made from animals native to Taiwan.\footnote{See id. at 850.} The CIT rejected this argument, holding that Florsheim’s reading of the statute would effectively render it inoperative.\footnote{See id.} Instead, the CIT applied the ban to all wildlife products from Taiwan, regardless of where the animals came from.\footnote{See id. at 851-53.}

**B. Earth Island v. Christopher**

The next major environmental case before the CIT was *Earth
Island v. Christopher.\textsuperscript{158} Earth Island established the CIT as the leading forum for legal disputes involving international trade issues.\textsuperscript{159} It also set an important precedent on the standing of environmental plaintiffs,\textsuperscript{160} holding that plaintiffs seeking review of U.S. government actions do have standing to sue as long as the remedy sought is likely to further the plaintiffs’ specific interests.\textsuperscript{161}

Earth Island involved the enforcement of legislation passed by Congress to protect endangered sea turtles.\textsuperscript{162} The law required the Secretary of Commerce to prohibit importation of shrimp products from countries that have failed to implement protective measures to protect sea turtles comparable to the protection afforded under U.S. law.\textsuperscript{163} The regulation was designed to apply to all countries, but the State Department added language limiting the geographic scope of the law to nations in the western Atlantic and Caribbean.\textsuperscript{164} While the stated purpose of this limiting language was to apply the law only to sea turtles in or migrating through U.S. waters, the actual purpose was the Bush and Clinton administrations’ desire to avoid international trade disputes that could undermine the adoption of GATT and NAFTA.\textsuperscript{165}

In February 1992, Earth Island Institute, a non-governmental organization whose goal is to protect sea turtles, filed suit in federal court, challenging the State Department’s right to limit the application of the law.\textsuperscript{166} The State Department contended that the

\textsuperscript{158} 913 F. Supp. 559 (Ct. Int’l Trade 1995).

\textsuperscript{159} See Paul Stanton Kibel, Justice for the Sea Turtle: Marine Conservation and the Court of International Trade, 15 UCLA J. ENV’T L. & POL’Y 57, 58 (1996-97).

\textsuperscript{160} See id. at 72 (quoting an Earth Island attorney: “This decision clearly established environmental plaintiffs’ right to seek judicial enforcement of U.S. laws aimed at the global protection of threatened and endangered animals.”).

\textsuperscript{161} See Earth Island, 913 F. Supp. at 567.


\textsuperscript{163} See id.

\textsuperscript{164} See Kibel, supra note 159 at 63 (citing Public Notice, 58 Fed. Reg. 9,015-16 (1993)).

\textsuperscript{165} See id. at 64.

\textsuperscript{166} See id.
federal district court lacked subject matter jurisdiction and that the CIT was the proper forum, with exclusive jurisdiction over cases involving import and export restrictions. The district court agreed and dismissed the case.

Earth Island had no choice but to bring its case before the CIT. It did so with some trepidation because the CIT judges were known to be “trade experts” who seemed unlikely to care about environmental protection, especially if it came at the cost of free trade. To everyone’s surprise, the CIT found that the government’s failure to implement its laws was a threat to Earth Island’s demonstrated interest in turtle preservation, so Earth Island did have standing to pursue the matter. The CIT then found that the State Department’s interpretation of the new law was an invalid limitation on the scope of the statute. Lastly, the CIT ordered the State Department to comply with the law by prohibiting the importation of shrimp from countries that had not reduced sea turtle mortality from shrimp fishing by ninety-seven percent.

C. Humane Society v. Brown

Perhaps based in part on the good fortune enjoyed by other environmental groups, the Humane Society also decided to file its Italian driftnet suit in the CIT in an attempt to force the U.S. government to impose sanctions on Italy as required under the HSDFEA. The plaintiffs hoped enforcement of a driftnet ban

167 See id.
168 See id. at 68.
169 See id. at 67. Environmentalists feared that the CIT would have the same attitudes as the GATT dispute panel that ruled that a U.S. law banning the import of tuna caught in driftnets was in violation of international trade rules. See id.
171 See id. at 578-79.
172 See id. at 579-80.
would convince the European Union to ban driftnets altogether and to help establish net buy-back programs in Italy.  

Procedurally, the Humane Society maintained that it had standing to sue in this matter because Humane Society members derive great benefit from watching wildlife, including whales and dolphins, and that large-scale driftnet fishing harms their members because it kills the animals they enjoy watching. The plaintiffs then alleged that Italy had a large Mediterranean fleet that continued to use driftnets longer than 2.5 kilometers, in contravention of UN Resolutions 44/225 and 46/215, and argued that the HSDFEA required the Commerce Department to initiate negotiations with Italy and possibly impose sanctions on its exports. 

The defendants countered that the HSDFEA mandated such action only if the Secretary of Commerce "has reason to believe" that unacceptable driftnet fishing is occurring, and that the Secretary had no such information. The CIT disagreed, however, finding that the Commerce Department had ample reason to identify Italy under the HSDFEA. The CIT also believed that enforcing the Act would reduce the mortality of cetaceans caught in driftnets by forcing the Italian government to end the driftnet fishing industry.

The plaintiffs completed their victory in February 1996, when the CIT ruled that the Commerce and State Departments must declare officially that Italy was violating the ban on driftnet fishing. The plaintiffs had essentially forced the U.S.}

(Humane Soc'y I). The defendants, Secretary of Commerce Ron Brown and Secretary of State Warren Christopher, were being sued in their official capacities for failing to enforce the High Seas Driftnet Fisheries Enforcement Act. See id. at 341.

174 See Vinzant, supra note 173.
175 See Humane Soc'y I, 901 F. Supp. at 341.
178 See id. at 192.
179 See id. at 195.
180 See id. at 204-05.
government’s hand. As a result of the CIT’s order, the Commerce Department gave Italy ninety days to agree to stop its fishermen from using driftnets longer than 2.5 kilometers or face restrictions on U.S. imports of fish and fish products. However, the Commerce Department expected Italy to avoid any sanctions.

Subsequent to the court’s holding, the Italian government committed itself to improving enforcement of its own and European Union driftnet laws. As of July 1996, Italy had formulated a plan to eliminate its driftnet fleet. At that time, it was unclear whether the United States actually would enforce its sanctions against Italy, but the European Fisheries Commissioner Emma Bonino decided to take the threat seriously. Talk of a plan to eliminate the fleet has predictably aroused the ire of fishermen in southern Italy, who fear the severe economic consequences the ban could have on an already depressed economy.

Italy’s plan attempted to soften the blow to the Italian fishing industry, offering financial incentives to vessels and fishermen who abandon their nets. The plan will cost ECU 100 million over three years. It targets 680 boats and almost 3,000 fishermen in the Adriatic and Ionian Seas. Experts hope that France, Ireland, and Britain might also be persuaded to stop using driftnets when Italy gets rid of its fleet.

_Humane Society_, in conjunction with the prior _Florsheim_ and _Earth Island_ decisions, solidified the CIT’s position as an

---


183 See id.

184 See id.

185 See _Bonino, supra_ note 11.

186 See id.

187 See _Phase Out, supra_ note 110.

188 See id.

189 See id.

190 See _Bonino, supra_ note 11.

191 See _supra_ notes 145-72 and accompanying text. See _generally_ _Florsheim Shoe Co. v. United States_, 880 F. Supp. 848 (Ct. Int’l Trade 1995) (ordering the prohibition
effective forum for claims brought by environmental activist groups. Some experts see the CIT as “an important new forum for enforcing international standards protecting endangered species.” The CIT is currently the leading judicial forum for issues involving trade-based environmental restrictions.

IV. Conclusion

By using domestic courts to force the government to uphold its own laws, environmental activist groups have found a new way of fighting for their goals. There is no doubt that one country can influence the policies of the international community. Hilary French, Senior Researcher at the World Watch Institute, said, “[I]t 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.” Similarly, Professor Kibel noted that “in the field of international environmental diplomacy, the progressive policies of individual countries can serve as a catalyst to global awareness and consensus.” The Humane Society and other environmental activists who have used the CIT to enforce environmental regulations have taken advantage of this fact. The U.S. government is often reluctant to take a strong stance on environmental issues for fear of damaging trade relationships, but environmental groups have now found a way to require the government to enforce its laws. Situations such as the Italian driftnet case show how one country, pushed by its concerned citizens, can influence the development of both customary international law and actual statutory law.

---

192 Paget & Srolovic, supra note 18, at 51.
193 See Kibel, supra note 159, at 58.
194 Id. at 61 (quoting Hilary F. French, The Gatt: Menace or Ally?, WORLDWATCH, 14 (Sept./Oct. 1991)).
195 Id.
However, there is another side to the practice of using unilateral actions to enforce norms of international law. While U.S. environmental groups now have a forum sympathetic to their causes, it is only part of the battle. The executive branch may bristle at judicial mandates to impose sanctions against other countries, even if such sanctions may be required by statute. In the case of the Italian driftnetters, the Commerce Department has yet to take any real action against Italy even though years have passed since the CIT’s decision. The federal government fears international trade repercussions if it violates World Trade Organization obligations.

Because of the government’s reluctance, there is no guarantee that Italy will eliminate its driftnet fleet. The Italian driftnet plan remains vague and does not clearly specify how the financial incentives would work. Moreover, the proposal includes no guarantee that any replacement method of fishing will solve the base issue of overfishing. Nor does the proposed plan address the problem of third-country vessels, such as those from Taiwan and Korea, that continue to use driftnets in the area.

The Commerce Department has a history of using the threat of sanctions to encourage compliance by other nations, and in some cases this ploy has been effective. But if Congress is satisfied with the Commerce Department’s enforcement methods, it would not keep passing stronger enforcement provisions, such as the HSDFEA.

In the last decade, Congress has strengthened driftnet enforcement provisions. The HSDFEA, for example, gives the Secretary of Commerce less discretion in enforcement than existed

---

196 Sensitive matters concerning international relations have traditionally been the province of the executive.
197 See Phase Out, supra note 110.
198 See id.
199 See id. In 1981, in a similarly unclear move, Taiwan chose to avoid U.S. sanctions by banning its nationals from whaling. See id.
200 See id.
201 See id.
202 See Whitney & Perles, supra note 54, at 684 n.34.
in prior legislation.\textsuperscript{203} This is helpful to those who want to see stricter environmental regulation worldwide, but it is also somewhat coercive; using the United States' enormous economic weight to force other countries to change their environmental ways. For the United States to put its muscular unilateralism ahead of international goodwill is dubious policy. There is always the danger that the executive branch will oppose strong legislation through Presidential vetoes, or that Congress will remove some of the enforcement provisions from existing laws. Were the executive branch to balk, however, the opposition to the clear voice of Congress, and therefore the people of the United States, might threaten the domestic balance of power.

*Humane Society* and its aftermath have raised a number of difficult issues in international environmental law. While U.S. citizens, courts, and Congress all appear supportive of strong enforcement legislation, the executive branch, which must balance international trade obligations with U.S. environmental interests, remains reluctant to bow to domestic forces in the international arena.

Nonetheless, the current trend in international environmental policy is toward stronger enforcement of laws. In the wake of the U.N. driftnet resolutions, regional groups have implemented treaty organizations such as the Wellington Convention.\textsuperscript{204} The European Union is struggling with fisheries issues and moving closer to a total ban on long driftnets.\textsuperscript{205} The United States has passed strong anti-driftnet legislation.\textsuperscript{206} In the CIT, Congress has graciously granted a sympathetic forum for disgruntled environmentalists.\textsuperscript{207} Although the executive branch is reluctant to take too hard a line in international trade, it has threatened sanctions against Italian fish products.\textsuperscript{208} This has given impetus to Italy and the rest of the European Union to change their driftnet policies.

\textsuperscript{204} See supra notes 56-74 and accompanying text.
\textsuperscript{205} See supra notes 109-43 and accompanying text.
\textsuperscript{206} See supra notes 75-108 and accompanying text.
\textsuperscript{207} See supra notes 144-93 and accompanying text.
\textsuperscript{208} See supra note 182 and accompanying text.
In sum, though unilateral action by the United States in international environmental law has certain problems, it can be an effective means of improving global environmental regulation. By keeping the executive foot to the fire, environmental activist groups may continue to increase their presence in international environmental affairs.