

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: HONORABLE JUDITH M. BARZILAY, JUDGE

DEFENDERS OF WILDLIFE, ET AL.,)
)
)
 Plaintiffs,)
)
 v.) Court No. 00-02-00060
)
 PENELOPE D. DALTON, ET AL.,)
)
)
 Defendants.)
_____)

ORDER

Upon consideration of plaintiffs' Rule 56.1 motion for judgment upon the agency record, defendants' response in opposition to the motion, and all other pertinent papers, it is hereby

ORDERED that the motion is denied; and it is further

ORDERED that this action is dismissed.

JUDGE

Dated: _____, 2001
New York, N.Y.

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DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' RULE 56.1 MOTION
FOR JUDGMENT UPON THE AGENCY RECORD

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DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' RULE 56.1 MOTION
FOR JUDGMENT UPON THE AGENCY RECORD

In recognition of the fact that significant reductions in dolphin mortality have been achieved by nations fishing for yellowfin tuna in the eastern tropical Pacific Ocean ("ETP"), Congress enacted the International Dolphin Conservation Program Act ("IDCPA") "to eliminate the import bans on tuna from those nations that are certified to be in compliance with the International Dolphin Conservation Program." **H. R. Rep. No. 105-74(I), at 11 (1997), reprinted in 1997 U. S. C. C. A. N. 1628.** The International Dolphin Conservation Program ("IDCP") is noteworthy in several respects: it is a conservation program developed in cooperation with nations interested in the ETP tuna fishery; the program garners the support of many of our Nation's most respected environmental organizations;

and, most importantly, the program has reduced dolphin mortality associated with tuna fishing in the ETP to less than 2,000 per year. Among the international management regimes in effect today, the IDCP is exemplary both in terms of its multilateral approach as well as its success in achieving its conservation goal.

Plaintiffs, Defenders of Wildlife, et al. ("Defenders"), now seek to disrupt the IDCP by challenging three administrative determinations associated with that program. Specifically, Defenders have filed a Rule 56.1 motion for judgment upon the agency record that challenges: (1) certain aspects of Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), 65 Fed. Reg. 30 (Jan. 3, **2000**) ("**Interim-Final Rule**") ; (2) the Government's application of the National Environmental Policy Act ("NEPA") to the Interim-Final Rule and the Agreement on the IDCP; and (3) the affirmative finding rendered by the United States Department of Commerce ("Commerce") with respect to the Government of Mexico.

We oppose the motion. As we will demonstrate, the challenged determinations are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Thus, the Court should deny the motion in all respects and dismiss this action.

I. STATEMENT PURSUANT TO RULE 56.1(C)

A. The Administrative Determinations Under Review

The administrative determinations under review are (1) Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), 65 Fed. Reg. 30 (Jan. 3, 2000) ("**Interim-Final Rule**") (Def. App. 1); (2) the Environmental Assessment ("EA") prepared by Commerce for purposes of the Interim-Final Rule (Def. App. 2) and the absence of an EA for the Agreement on the IDCP; and (3) the affirmative finding rendered by Commerce with respect to the Government of Mexico (Def. App. 3).

B. The Issues Presented For Review

1. Whether the Interim-Final Rule is in accordance with law.

2. Whether (a) the EA prepared by Commerce for purposes of the Interim-Final Rule is arbitrary, capricious, an abuse of discretion and otherwise in accordance with law; and (b) the United States Department of State ("State") had an obligation to adhere to NEPA for purposes of the Agreement on the IDCP.

3. Whether the affirmative finding rendered by Commerce with respect to the Government of Mexico is arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law.

II. STATEMENT OF FACTS

A. The Relevant Statutory Language, Legislative History, And International Agreements And Declarations

In 1972, Congress enacted the Marine Mammal Protection Act of 1972 ("MMPA"). Pub. L. No. 92-522, 86 Stat. 1027 (1972). The main purpose of this law was to protect marine mammals by, among other things, establishing a moratorium upon the taking and importation of marine mammals. Specifically, the law created a ban upon "the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards." Id. at § 101(a)(2), 86 Stat. at 1030 (codified at 16 U.S.C.A. § 1371(a)(2) (West 2000)).¹

¹ Copies of the portions of the session laws referenced in this brief are reproduced in Defendants' Filing Of Statutory

Provisions Cited In Defendants' Response In Opposition To Plaintiffs' Motion For Temporary Restraining Order, filed with the Court on April 14, 2000. Copies of the portions of the United States Code Annotated referenced in this brief are reproduced in Defendants' Appendix 6.

In 1984, Congress enacted the Act of July 17, 1984 ("1984 Act"). Pub. L. No. 98-364, 98 Stat. 440 (1984). By this Act, Congress amended section 101(a)(2) of the MMPA to require governments of nations that export yellowfin tuna harvested in the purse seine fishery in the ETP to provide documentary evidence that the government has adopted a regulatory program governing the taking of marine mammals that is comparable to that of the United States and the average rate of incidental taking of the harvesting nations is comparable to that of the United States. Id. at § 101, 98 Stat. at 440.

A "purse seine" is a type of commercial fishing net (called a "seine") that is placed in the water around a school of fish. Once the net is lowered into the water, it hangs much like a curtain around the school. A drawstring around the bottom of the net is then closed ("pursed") to capture the target fish as well as any non-target species caught in the net. One strategy used by purse seine fishermen in the ETP is to deploy their nets around groups of dolphins because dolphins tend to swim above schools of tuna. In the early 1970's, an estimated 350,000 dolphins were killed annually in purse seine nets; by 1998, dolphin mortality was reduced to approximately 2,000 per year. See generally Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna

Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP); Initial Finding, 64 Fed. Reg. 24590 (May 7, 1999); H. R. Rep. No. 105-74(I), at 11-12, 1997 U. S. C. C. A. N. at 1629-30.

In 1988, Congress enacted the Marine Mammal Protection Act Amendments of 1988 ("MMPA/1988"). Pub. L. No. 100-711, 102 Stat. 4755 (1988). In relevant part, the MMPA/1988 amended the MMPA by specifying criteria that must be satisfied in order for the regulatory program of a tuna harvesting nation to be considered comparable to that of the United States. Id. at § 4, 102 Stat. at 4765.

In 1990, Congress enacted the Dolphin Protection Consumer Information Act ("DPCIA"). Pub. L. No. 101-627, § 901, 104 Stat. 4465 (1990). This law made it a violation of section 5 of the Federal Trade Commission Act for any producer, importer, exporter, distributor, or seller of any tuna product sold or exported from the United States to label that product as "dolphin-safe" if the product contains tuna harvested (1) upon the high seas by a vessel engaging in driftnet fishing; or (2) in the ETP by a vessel using purse seines (unless the product is accompanied by various statements demonstrating that no dolphin was intentionally encircled during the trip in which the tuna was caught).

In August 1990, Mexico was embargoed pursuant to the

MMPA/1988 for not achieving comparability with the U. S. tuna fleet. H. R. Rep. No. 105-74(I), at 13, 1997 U. S. C. C. A. N. at 1631. Subsequently, Mexico requested that a dispute settlement panel be established pursuant to the General Agreement on Tariffs and Trade ("GATT"). The GATT panel issued a decision in favor of Mexico, but that decision was not adopted by the GATT Council. "At present, Mexico has not reinstated the challenge to the World Trade Organization, which is the successor to GATT." Id. at 14, 1997 U. S. C. C. A. N. at 1632.

In 1992, Congress enacted the International Dolphin Conservation Act of 1992 ("IDCA"). Pub. L. No. 102-523, 106 Stat. 3425 (1992). The IDCA amended the MMPA to (1) impose a five-year moratorium upon the harvesting of tuna with purse seine nets deployed on or to encircle dolphins; and (2) lift the tuna embargo for those nations that made a declared commitment to implement the moratorium and take other steps to reduce dolphin mortality. No nation issued an intent to honor the provisions of the IDCA. H. R. Rep. No. 105-74(I), at 14, 1997 U. S. C. C. A. N. at 1632.

In June of 1992, the United States and certain other nations entered into a non-binding agreement (the La Jolla Agreement) that set forth a wide range of undertakings to

protect dolphins from harm in the ETP purse seine fishery, including a schedule for significant reductions in dolphin mortality. AR III-31 (Def. App. 9).

In 1993, the European Union brought a GATT challenge relating to the tuna embargo provisions of the MMPA and related legislation. Again, a GATT panel ruled against the United States, but the GATT Council did not adopt that decision.

In October of 1995, the United States and eleven other nations signed the Panama Declaration. AR IV-64 (Def. App. 10). Other nations made commitments to strengthen the protection of dolphins and negotiate a new binding agreement to establish the IDCP, but only if the United States amended its laws to (1) lift the embargoes imposed under the MMPA; (2) permit the sale of both dolphin-safe and non-dolphin safe tuna in the U.S. market; and (3) change the definition of "dolphin-safe tuna" to mean "tuna harvested without dolphin mortality."

In 1997, Congress enacted the International Dolphin Conservation Program Act ("IDCPA"). Pub. L. No. 105-42, 111 Stat. 1122 (1997). The three purposes of the IDCPA were to (1) give effect to the Declaration of Panama; (2) recognize that nations fishing for tuna in the eastern tropical Pacific Ocean have achieved significant reductions in dolphin

mortality; and (3) eliminate the ban on imports of tuna from those nations in compliance with the IDCP. Id. at § 2, 111 Stat. at 1122. The IDCP was defined as the La Jolla Agreement, as formalized, modified, and enhanced by the Declaration of Panama. Id. at § 3, 111 Stat. at 1123 (codified at 16 U.S.C.A. § 1362(28)).

The IDCPA revised the criteria for banning imports by amending the MMPA. Pursuant to this amendment, nations are permitted to export tuna to the United States if a nation provides documentary evidence that it (1) participates in the IDCP and is a member (or applicant member) of the Inter-American Tropical Tuna Commission; (2) is meeting its obligations under the IDCP and the Inter-American Tropical Tuna Commission; and (3) does not exceed certain dolphin mortality limits. Id. at § 4, 111 Stat. at 1123-1124 (codified at 16 U.S.C.A. 1371(a)(2)(B)).

The IDCPA also provided for a change in the "dolphin-safe" labeling standard by amending the DPCIA. Pursuant to this amendment, the Secretary of Commerce was directed to make an initial and final finding "whether the intentional deployment on or encirclement of dolphin with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the eastern tropical Pacific Ocean." These findings

would be used to determine whether to revise the definition of "dolphin-safe" tuna. Id. at § 5, 111 Stat. at 1125-1129 (codified at 16 U.S.C.A. § 1385(d)).

The IDCPA provided that it would become effective upon the date that the Secretary of State certifies that a legally-binding instrument establishing the IDCP has been adopted and is in force. Id. at § 8, 111 Stat. at 1139. "In May 1998, eight nations, including the United States, signed a binding, international agreement to implement the IDCP." Interim-Final Rule, 65 Fed. Reg. at 31. "The Agreement on the IDCP became effective on February 15, 1999, after four nations (United States, Panama, Ecuador, and Mexico) deposited their instruments of ratification, acceptance, or adherence with the depository for the agreement." Id.

Accompanying the IDCPA was House Report No. 105-74. **H. R. Rep. No. 105-74 (1997), reprinted in 1997 U. S. C. C. A. N. 1628 (Def. App. 7).**

Part I of the House Report was generated by the House Committee on Resources. In discussing the background and need for this legislation, the Resources Committee noted that "[t]he current level of dolphin mortality for 1996 was 2,547 animals, a level considered to be below biological significance." Id. at 12, **1997 U. S. C. C. A. N. at 1630 (emphasis**

added).²

Part II of the House Report was generated by the House Committee on Ways and Means. The Committee stated its belief "that if countries are in compliance with the multilateral standard for the fishing of yellowfin tuna as memorialized in the International Dolphin Conservation Program, then the import ban should not apply." Id. at 4, 1997 U.S.C.C.A.N. at 1659-60. In addition, "[r]eplacement of the unilateral U.S. standard with the international IDCP standard should serve as an equal incentive while, at the same time, putting the United States in compliance with its international agreements." Id., 1997 U.S.C.C.A.N. at 1660. The Committee further stated its belief "that enforcement actions are the most effective when they are based on international consensus, and that such consensus would be more constructive to effective management of the ETP tuna fishery by all countries concerned." Id. at 5, 1997 U.S.C.C.A.N. at 1661.

In May 1998, eight nations, including the United States,

² Compare this number to 1,436, the 1999 dolphin mortality estimate in the eastern Pacific Ocean purse seine tuna fishery as reported by the Inter-American Tropical Tuna Commission. Loy Declaration (Def. App. 5) at attachment.

signed a binding, international agreement to implement the IDCP. AR VII-97 (Def. App. 11).

B. The Initial Finding Issued By The Department Of
Commerce

On May 7, 1999, Commerce (acting through the National Marine Fisheries Service ("NMFS"), National Oceanic and Atmospheric Administration ("NOAA")) published its initial finding pursuant to the IDCPA. Commerce concluded that there is insufficient evidence to conclude that intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse effect on any depleted dolphin stock in the eastern tropical Pacific Ocean. **Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP); Initial Finding**, 64 Fed. Reg. 24590, 24591 (May 7, 1999) ("**Initial Finding**") (Def. App. 12). That finding was **challenged** by a group of individuals and non-governmental organizations (many of whom are plaintiffs in this action) in the United States District Court for the Northern District of California, which rendered its decision on April 11, 2000. **Brower v. Daley**, 93 F. Supp. 2d 1071 (N. D. Cal. 2000), **appeal docketed**, No. 00-15968 (9th Cir. May 24, 2000).

C. The Interim-Final Rule Issued By The Department Of
Commerce

On June 14, 1999, Commerce published a proposed rule to implement the IDCPA. Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), 64 Fed. Reg. 31806 (June 14, 1999) ("Proposed Rule") (Def. App. 13). Commerce invited the public to provide their views with respect to the Proposed Rule.

On July 9, 1999, the Center for Marine Conservation ("CMC") filed comments with respect to the Proposed Rule. AR XX-849 (Def. App. 14). CMC stated that "[i]t is clear that the National Marine Fisheries Service (NMFS) has given a great deal of thought and conducted extensive background research to develop these regulations." Id. at 1. CMS also stated that it "supports NMFS's interpretation in the proposed rule that requires that the backdown procedure be completed no later than one-half hour **after** sundown for every set encircling dolphins." Id. at 4 (emphasis in original).

After receiving and considering numerous comments, Commerce then published its interim-final rule. Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), 65 Fed. Reg. 30 (Jan. 3, 2000) ("Interim-Final Rule")

(Def. App. 1).

D. The Affirmative Finding And Removal Of The Tuna Embargo For Mexico

On April 12, 2000, Commerce found "that the documentary evidence before NMFS demonstrates that the Government of Mexico meets the requirements of MMPA section 101(a)(2)(B) and (C) to import into the U.S. yellowfin tuna harvested in the ETP by purse seine vessels." AR MAF 50 (Def. App. 3). Notice of this finding was published in the Federal Register on May 8, 2000. Taking and Importing of Marine Mammals, 65 Fed. Reg. 26585 (May 8, 2000) (Def. App. 4).

E. Counter-Statement Of Facts

In its statement of facts, Defenders make certain assertions that require correction or clarification.

On page 3 of its brief, Defenders assert that there purportedly exists a "dolphin carnage" because "dolphins are chased for several hours by helicopters and speedboats, subjected to explosive bomb devices, and surrounded by mile-long nets that frequently entangle them." This assertion ignores the fact that (1) Congress was aware of the practice "for large tuna purse-seine vessels to deploy several speedboats and a helicopter in a high-speed, non-stop chase"

(H.R. Rep. No. 105-42(I), at 64, 1997 U.S.C.C.A.N. at 1653 (dissenting views)), but took no action in response; (2) "[t]he use of explosive devices is prohibited during all tuna purse seine operations that involve marine mammals" (50 C.F.R. § 216.24(b)(8)(iii)); and (3) while Congress stated that it is the policy of the United States that the U.S. market does not act an incentive for the harvesting of tuna with driftnets (16 U.S.C.A. § 1411(b)(3)) (a policy that Commerce incorporated in its regulations at 50 C.F.R. § 216.24(f)(7)(ii)), Congress did not otherwise express an opinion regarding the permissible length of purse seine nets.

Also on page 3 of its brief, Defenders assert that at least three populations of ETP dolphins have been designated as "depleted" pursuant to the MMPA. However, in enacting the IDCPA, Congress was aware of the fact that certain dolphin species in the ETP were depleted. See H.R. Rep. No. 105-74(I), at 15, 1997 U.S.C.C.A.N. at 1633 ("the National Marine Fisheries Service (NMFS) notes that the rebuilding of one of the two stocks which are considered depleted, the northeastern spotted dolphin, will not be adversely affected by the continued practice of encircling dolphins"). This fact did not deter Congress from enacting the IDCPA. Rather, Congress found that it was "important to note that none of the dolphin

stocks in the ETP are considered endangered or threatened."
Id.

On page 6 of its brief, Defenders assert that "[t]he legislative language and history of the IDCPA is clear that while Congress wanted to give effect to the Panama Declaration, it also expressly reserved the right and authority to make key changes that would allow the U.S. market to act as an incentive for dolphin and ecosystem protection in the ETP." While it is true that Congress viewed the U.S. market as an incentive for foreign nations (see H.R. Rep. No. 105-74(I), at 23, 1997 U.S.C.C.A.N. at 1640 ("provisions in the MMPA that impose a ban on the imports of tuna from nations fishing in the ETP have served as an incentive to reduce dolphin mortalities")), it is equally true that Congress intended the IDCP to serve as the benchmark for determining whether the ban upon imports should be lifted (see H.R. Rep. No. 105-74(II), at 4, 1997 U.S.C.C.A.N. at 1659 ("The Committee believes that if countries are in compliance with the multilateral standard for the fishing of yellowfin tuna as memorialized in the International Dolphin Conservation Program, then the import ban should not apply")). Stated differently, "[r]eplacement of the unilateral U.S. standard with the international IDCP standard should serve as an equal

incentive while, at the same time, putting the United States in compliance with its international agreements."

Id. (emphasis added).

Also on page 6 of its brief, Defenders state that the Agreement on the IDCP, "which was not ratified by the Senate and is not a treaty, became effective in March 1999." It should be noted, however, that Congress specifically directed the Secretary of State to "secure a binding international agreement to establish an International Dolphin Conservation Program" Pub. L. No. 105-42 at § 6, 111 Stat. at 1130 (codified at 16 U.S.C.A. § 1412). Moreover, the Agreement on the IDCP became effective with respect to the United States on February 15, 1999. Interim-Final Rule, 65 Fed. Reg. at 31.

On page 7 of its brief, Defenders assert that "Defendants never provided public notice or comment on the draft Environmental Assessment (EA) pursuant to NEPA." We disagree. See Proposed Rule, 64 Fed. Reg. at 31811 ("In these tracking and verification regulations and the Environmental Assessment analyzing this program, NMFS has addressed each subsection of section (f) of the DPCIA . . .") (emphasis added).

III. SUMMARY OF THE ARGUMENT

1. The Interim-Final Rule is in accordance with law.

The regulation addressing sundown sets properly requires completion of those sets 30 minutes after sundown. The reference in the statute to 30 minutes before sundown is a drafting error as demonstrated by (1) Congress' use of the 30 minutes "after" standard in previous Acts; and (2) the reference in the IDCPA legislative history to 30 minutes "after" sundown. Even if Congress had expressed a desire in the IDCPA for Commerce to issue regulations containing a cut-off period of 30 minutes "before" sundown, the 30 minutes "after" standard is still in accordance with law because (1) the IDCPA permits Commerce to adjust its regulations pertaining to fishing gear, fishing vessels and fishing practices to the extent the adjustments are consistent with the IDCP (16 U.S.C.A. § 1413(a)(2)(C)); and (2) the Agreement on the IDCP utilizes the 30 minutes "after" standard.

The regulation addressing extraordinary circumstances is in accordance with law. The statute authorized Commerce to issue regulations and to revise those regulations, as may be appropriate, to implement the IDCP. 16 U.S.C.A. § 1413(a)(1).

Commerce's regulation properly implements a provision addressing extraordinary circumstances that is contained in the Agreement on the IDCP.

The regulation addressing dolphin mortality limits

("DMLs") is in accordance with law. 16 U.S.C. § 1371(a)(2)(B)(iii) may be fairly read as requiring a harvesting nation to adhere to the IDCP's national allocation system only to the extent that such a national system exists.

The regulation addressing the taking of prohibited dolphins "not readily observable" at the start of a set is in accordance with law. The statute only prohibits the making of "intentional" sets upon dolphins after reaching the pertinent limits. The situation contemplated by the regulation does not involve an intentional set upon a prohibited stock. Rather, it involves the situation where a prohibited stock was not "reasonably observable" prior to the start of a set.

The regulations properly require annual affirmative findings with documentary evidence provided by the government of a harvesting nation every five years. To the extent that Commerce needs information to make its findings at times other than every five years, it can obtain this information from other sources (i.e., State or the IATTC). Moreover, Commerce has retained the discretion to request information from the harvesting nation at any time.

The regulation addressing tracking and verification is in accordance with law. Commerce's tracking and verification program tracks "dolphin-safe" and "non-dolphin safe" tuna

during fishing, offloading and canning. The program effectively tracks imported tuna. The program also contains effective verification procedures.

2. The Government's application of NEPA to the Interim-Final Rule and the Agreement on the IDCP should be sustained.

The environmental assessment ("EA") prepared by Commerce for purposes of the Interim-Final Rule is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Defenders argue that the alternatives to the Interim-Final Rule considered by Commerce were "unreasonably limited." However, regulations issued by the Council on Economic Quality have interpreted that statutory phrase "to the fullest extent possible" (42 U.S.C. § 4332) as meaning that an agency must comply with section 4332 unless existing law expressly prohibits or makes compliance impossible. Each of the alternatives proffered by Defenders is either inconsistent with the IDCPA, the Agreement on the IDCP, or both.

The United States Department of State did not have an obligation to initiate the NEPA process with respect to the Agreement on the IDCP. The negotiation and conclusion of the Agreement on the IDCP did not constitute a major Federal action significantly affecting the quality of the human

environment. NEPA should not be construed as requiring the preparation of either an EA or an EIS with respect to the Agreement because such a construction would improperly impinge upon the exclusive power of the Executive Branch to negotiate international agreements. Finally, Defenders never argued before State that a NEPA analysis was required before concluding the Agreement on the IDCP. Thus, Defenders have failed to exhaust their administrative remedies concerning this issue.

3. The Affirmative Finding with respect to the Government of Mexico is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In its determination, Commerce found that the documentation submitted by the Government of Mexico satisfied the statutory requirements of 16 U.S.C.A. § 1371(a)(2). Defenders have not demonstrated any error in these findings.

4. In the event that the Court finds error with respect to any of the challenged administrative determinations, it should remand the matter for further proceedings while permitting the Interim-Final Rule and the Affirmative Finding for Mexico to remain in effect. While arguing that the Interim-Final Rule and the Affirmative Finding should be "set aside," Defenders have not presented evidence that irreparable

injury will result in the absence of this relief. In contrast, the Government is providing the Court with the Declaration of Alan P. Larson, Under Secretary for Economic, Business and Agricultural Affairs of the U.S. Department of State. Mr. Larson's declaration establishes that the foreign policy concerns identified by the Government in April, 2000 still exist today.

IV. ARGUMENT

A. The Standard Of Review

In an action instituted pursuant to 28 U.S.C. § 1581(i), "the Court of International Trade shall review the matter as provided in section 706 of title 5." 28 U.S.C. § 2640(e). Thus, the Court should sustain the challenged administrative determination unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Applying this standard of review, an administrative action is to be upheld if the agency has "considered the relevant factors and articulated a rational connection between the facts found and the choice made." Baltimore Gas & Electric v. N.R.D.C., 462 U.S. 87, 105 (1983). The Court has recognized that this standard is "highly deferential" to the administrative agency's factual findings. Shakeproof

Industrial Products Division of Illinois Tool Works Inc. v. United States, 104 F.3d 1309, 1313 (Fed. Cir. 1997). In other words, of all the available standards of review, the arbitrary and capricious standard gives the "narrowest latitude" to a reviewing court. SSIH Equipment S.A. v. United States International Trade Commission, 718 F.2d 365, 383 (Fed. Cir. 1983) (additional comments of Judge Nies).

B. The Relevant Statutory Criteria

The statute directs the Secretary of the Treasury to "ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards." 16 U.S.C.A. § 1371(a)(2).

This import ban does not apply in the case of yellowfin tuna harvested with purse seine nets in the ETP if the government of the exporting nation provides Commerce with documentary evidence that: (1) the tuna or tuna products (a) were not banned from importation before the effective date of section 4 of the IDCPA; and (b) were harvested by vessels of a nation that participates in the IDCP and is either a member of the Inter-American Tropical Tuna Commission ("IATTC") or has initiated all steps required of applicant nations; (2) the

exporting nation "is meeting the obligations of the International Dolphin Conservation Program and the obligations of membership in the Inter-American Tropical Tuna Commission, including all financial obligations"; and (3) "the total dolphin mortality limits, and per-stock per-year dolphin mortality limits permitted for that nation's vessels under the International Dolphin Conservation Program do not exceed the limits determined for 1997, or for any year thereafter, consistent with the objective of progressively reducing dolphin mortality to a level approaching zero and the goal of eliminating dolphin mortality, and requirements of the International Dolphin Conservation Program" 16 U.S.C.A. § 1371(a)(2)(B).

The statute specifies that Commerce may not accept documentary evidence from a nation that seeks to export yellowfin tuna to the United States if (1) the government of the harvesting nation does not provide directly, or authorize the IATTC to release, complete and accurate information to Commerce in a timely manner to allow the agency to determine whether (a) the harvesting nation is in compliance with the IDCP; and (b) the tracking and verification requirements of 16 U.S.C.A. § 1385(f) have been met; or (2) Commerce finds that the harvesting nation is not in compliance with the IDCP

"after taking into consideration such information, findings of the Inter-American Tropical Tuna Commission, and any other relevant information, including information that a nation is consistently failing to take enforcement actions which diminish the effectiveness of the International Dolphin Conservation Program" 16 U.S.C.A. § 1371(a)(2)(C).

In the IDCPA, Congress directed the Secretary of State to "seek to secure a binding international agreement to establish an International Dolphin Conservation Program" 16 U.S.C.A. § 1412. Congress also directed Commerce to "issue regulations, and revise those regulations as may be appropriate, to implement the International Dolphin Conservation Program." 16 U.S.C.A. § 1413(a)(1).

C. The Interim-Final Rule Is In Accordance With Law

It is established that "[r]egulations promulgated pursuant to rulemaking authority granted to administrative agencies are analyzed under the two-step procedure established in the Supreme Court's Chevron decision" Haggard Apparel Co. v. United States, 222 F.3d 1337, 1340 (Fed. Cir. 2000). If the statute is silent or ambiguous with respect to the specific issue, "our inquiry is confined to the question of whether the agency's interpretation of the statute is 'inconsistent with [the] statutory mandate or . . .

frustrate[s] the congressional policy underlying a statute.' "

Id. at 7 (quoting Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Authority, 464 U.S. 89, 97 (1983)).

"That is, we have refused to defer to an agency's interpretation of a statute, as expressed in duly-promulgated regulations, only when such an interpretation was 'contrary to the intent of [C]ongress, as divined from the statute and its legislative history.'" Id. (quoting Muwwakkil v. Office of Personnel Management, 18 F.3d 921, 925 (Fed. Cir. 1994)); see also Consumer Products Division, SCM Corp. v. Silver Reed America, Inc., 753 F.2d 1033, 1039 (Fed. Cir. 1985) ("In determining whether a regulation is reasonable, we must give considerable deference to the expertise of the agency, i.e., the 'masters of the subject'") (quoting National Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979)).

In light of these standards, Defenders' various arguments fail to demonstrate error in the Interim-Final Rule.

1. Sundown Sets

In the Interim-Final Rule, 65 Fed. Reg. at 51 (to be codified at 50 C.F.R. § 216.24(c)(6)(iii)), Commerce provided that "[o]n every set encircling dolphin, the backdown procedure must be completed no later than one-half hour after sundown . . ." (emphasis added). This regulation is in

accordance with law.

"It is well settled law that the plain and unambiguous meaning of the words used by Congress prevails in the absence of a clearly expressed legislative intent to the contrary." Newman v. Teigeler, 898 F.2d 1574, 1576 (Fed. Cir. 1990) (citations omitted). When the structure, language, and subject matter of a statute reveal "obvious mistakes," however, a court may interpret the statute so as to correct those mistakes. Bohac v. Dep't of Agriculture, 239 F.3d 1334, 1337 (Fed. Cir. 2001) (quoting United States v. Colon-Ortiz, 866 F.2d 6, 10 (1st Cir.), cert. denied, 490 U.S. 1051 (1989)), for the proposition that "'an inadvertent drafting error" should be stricken from the statute and that "'in legislative (as in judicial) affairs, allowance must be made for human error and inadvertence'").

In this case, section 6 of the IDCPA directed Commerce to issue regulations "ensuring that the backdown procedure during sets of purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later than 30 minutes before sundown" Pub. L. No. 105-42 at § 6, 111 Stat. at 1131 (codified at 16 U.S.C.A. § 1413(a)(2)(B)(v)) (emphasis added). In promulgating subsection 216.24(c)(6)(iii), Commerce was well-aware of this provision,

but concluded that the phrase "30 minutes before sundown" was a drafting error upon the part of Congress. See Interim-Final Rule, 65 Fed. Reg. at 39 ("Since no congressional reports or colloquy indicated that this 'revision' was adopted purposefully, NMFS concludes the language in the IDCPA stating that backdown procedures must be completed no later than one-half hour before sundown must have been a drafting error"). The traditional tools of statutory construction support the conclusion that Congress did not intent to utilize the word "before" for purposes of establishing the cut-off period for sundown sets.

Prior legislative enactments reveal that Congress has always intended for backdown procedures to be completed 30 minutes after sundown. The sundown set provisions were first created in the MMPA/1988. At that time, Congress expressed a concern about the high porpoise mortality associated with sundown sets. H.R. Rep. No. 100-970, at 31 (1988), reprinted in 1988 U.S.C.C.A.N. 6154, 6172. The Committee on Merchant Marine and Fisheries stated that it did not specifically define the phrase "sets of the purse seine net on marine mammals are completed," expecting that Commerce would define that phrase during its rulemaking process. Id. However, it did intend "that the back-down procedures would be completed

and the net would be close to the seine vessel by 30 minutes after sundown, recognizing that the net may not be totally aboard the vessel." Id. (emphasis added). This standard was crafted to "ensure that tuna fisherman have completed those procedures necessary to release porpoise in the net before dark while allowing them to finish taking tuna out of the net." Id. As a result, in the MMPA/1988, Congress directed Commerce to "prescribe regulations to ensure that the backdown procedure during sets of the purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later than thirty minutes after sundown." Pub. L. No. 100-711, § 4, 102 Stat. 4755, 4767 (1988) (emphasis added).

The legislative history that accompanied the IDCPA clearly reveals that Congress intended to continue this 30 minutes "after" sundown standard. When describing the regulations that would be promulgated by Commerce, the House Committee on Resources stated that the regulations would contain provisions "ensuring that the backdown procedure or deployment of nets begin no later than 30 minutes after sundown." H.R. Rep. No. 105-42(I), at 26, 1997 U.S.C.C.A.N. at 1643 (emphasis added). No other discussion of sundown sets exists in the legislative history. This absence of discussion reveals that Congress did not contemplate a

change in the 30-minute standard for sundown sets but, rather, merely intended to continue the current standard.

Even if Congress had expressed a desire in the IDCPA for Commerce to issue regulations containing a cut-off period of 30 minutes "before" sundown, the 30 minutes "after" standard adopted by the agency is still in accordance with law. In addition to directing Commerce to issue specific regulations, the IDCPA also provided the agency with the following latitude: "The Secretary may make such adjustments as may be appropriate to requirements of subparagraph (b) that pertain to fishing gear, vessel equipment, and fishing practices to the extent the adjustments are consistent with the International Dolphin Conservation Program." Pub. L. No. 105-42, § 6, 111 Stat. at 1132 (codified at 16 U.S.C.A. § 1413(a)(2)(C)). The cut-off period for sundown sets is undoubtedly a "fishing practice" that pertains to "fishing gear" and "vessel equipment." Annex VIII to the Agreement on the IDCP, entitled "Operational Requirements For Vessels", provides that a vessel with a carrying capacity of more than 363 metric tons (400 short tons) operating in the Agreement Area must, among other things, "[c]omplete backdown no later than thirty minutes after sunset, as determined by an accurate and reliable source approved by the Parties." AR VII-97 (Def.

App. 11) at Annex VIII.3.e (emphasis added). Accordingly, it was within Commerce's discretion to adjust the requirements of subparagraph (b) with respect to sundown sets because the standard adopted by the agency is consistent with the standard articulated in the Agreement on the IDCP.

2. Extraordinary Circumstances

In the Interim-Final Rule, 65 Fed. Reg. at 55 (to be codified at 50 C.F.R. §§ 216.24(f)(9)(i)(C)(2) & (D)(3)), Commerce provided that, even if a harvesting nation's purse seine fleet exceeded the aggregated total of the mortality limits (subparagraph (C)(2)) or the per-stock per-year limits (subparagraph (D)(3)) assigned by the IDCP, that harvesting nation would still be eligible for an affirmative finding if:

- (1) the dolphin mortality in excess of the assigned limits resulted from "extraordinary circumstances beyond the control of the nation and the vessel captains"; and
- (2) "Immediately after the national authorities" discovered that the mortality limits had been exceeded, "the nation required all its vessels to cease fishing for tuna in association with dolphins for the remainder of the calendar year . . .

."

This regulation is in accordance with law.

The Proposed Rule issued by Commerce had no provision discussing extraordinary circumstances. However, parties commenting upon the Proposed Rule noted that the Agreement on the IDCP had such a provision. Specifically, Annex IV.IV.1 to that agreement specified that the Parties would ensure that the agreed-upon Dolphin Mortality Limits ("DMLs") would not be exceeded. In addition, Annex IV.IV.2 provided that, "[i]n cases involving unusual or extraordinary circumstances not foreseen in this Annex, the Parties, as recommended by the [International Review Panel], may take such measures as are necessary, consistent with the provisions of this Annex, in order to implement the DML system." In light of this provision, Commerce changed its rule so that, if a harvesting nation exceeds its DML due to "extraordinary circumstances" beyond the control of the nation and the vessel captains, that nation would still be eligible for an affirmative finding. As explained by Commerce, "[t]his flexibility should encourage harvesting nations to comply with the Agreement on the IDCP, yet threaten economic sanctions against nations that do not control or manage their fleets." Interim-Final Rule, 65 Fed. Reg. at 32.

In the IDCPA, Congress emphasized that "if countries are in compliance with the multilateral standard for the fishing of yellowfin tuna as memorialized in the International Dolphin Conservation Program, then the import ban should not apply." H.R. Rep. No. 105-74(II), at 4, 1997 U.S.C.C.A.N. at 1659-60.

To this end, Congress authorized Commerce to "issue regulations, and revise those regulations as may be appropriate, to implement the International Dolphin Conservation Program." 16 U.S.C.A. § 1413(a)(1). Here, subsections 216.24(f)(9)(i)(C)(2) & (D)(3) implement the "extraordinary circumstances" provision contained in the Agreement on the IDCP; thus, Commerce had the authority to issue these regulatory provisions as provided by 16 U.S.C.A. § 1413(a)(1).

3. Dolphin Mortality Limits

In the Interim-Final Rule, 65 Fed. Reg. at 55 (to be codified at 50 C.F.R. § 216.24(f)(9)(i)), Commerce provided that, in order for the Assistant Administrator of NMFS to make an affirmative finding (that would allow the importation of yellowfin tuna from the ETP), four conditions must be satisfied. First, the harvesting nation must participate in the IDCP and either be a member of the IATTC or take all steps

required of applicant nations. Second, the harvesting nation must meet its obligations under the IDCP and the IATTC, including all financial obligations. Third, the annual total dolphin mortality of the harvesting nation's purse seine fleet must not exceed the aggregated total of the mortality limits assigned by the IDCP. Fourth, a harvesting nation must respond to a notification from the IATTC that a global per-stock per-year quota has been met by prohibiting any additional sets upon that stock or, to the extent that a per-stock per-year quota is allocated to each nation, the per-stock per-year dolphin mortality of the harvesting nation's purse seine fleet must not exceed the national limits established by the IDCP. This regulation is in accordance with law.

The statute provides that the import ban does not apply to yellowfin tuna harvested with purse seine nets in the ETP if, among other things, the government of the exporting nation provides Commerce with documentary evidence that "the total dolphin mortality limits, and per-stock per-year dolphin mortality limits permitted for that nation's vessels under the International Dolphin Conservation Program do not exceed the limits determined for 1997, or for any year thereafter, consistent with the objective of progressively reducing

dolphin mortality to a level approaching zero and the goal of eliminating dolphin mortality, and requirements of the International Dolphin Conservation Program" 16 U.S.C.A. § 1371(a)(2)(B)(iii). In describing this provision, the legislative history explains that "[t]otal dolphin mortality under the Program [is] not to exceed 5,000 in 1997, or any year thereafter." H.R. Rep. No. 105-74(II), at 5, 1997 U.S.C.C.A.N. at 1661.

In the Agreement on the IDCP, the Parties agreed to "[l]imit total incidental dolphin mortality in the purse-seine tuna fishery in the Agreement Area to no more than five thousand annually." AR VII-97 (Def. App. 11) at Article V.1.

To this end, the Parties further agreed that, "[s]hould the total mortalities of the fleet of any Party meet or exceed the total amount of DML distributed to it pursuant to this Annex, fishing for tuna in association with dolphins shall cease for all vessels operating under the jurisdiction of that Party." Id. at Annex IV.I.9. This provision is implemented by subsection 214.24(f)(9)(i)(C)(1) of Commerce's regulations, which provides that a harvesting nation's fleet may not exceed "the aggregated total of the mortality limits assigned by the IDCP for that nation's purse seine vessels"

In the Agreement on the IDCP, the Parties also agreed to

"[e]stablish per-stock per-year dolphin mortality caps, and review and assess the effects of these caps" Id. at Article V.2. This goal is accomplished in two ways. First, "[u]p to the year 2001, in the event that annual mortality of 0.2 percent of N_{min} [minimum population estimate] is exceeded for any stock of dolphins, all sets on that stock and on any mixed schools containing members of that stock shall cease for that year." Id. at Annex III.2. This standard changes to 0.1 percent of N_{min} beginning in year 2001. Second, "[w]ithin six months of the entry into force of this Agreement, the Parties shall establish a system for the allocation of the per-stock per-year dolphin mortality cap for each stock for the ensuing year and years thereafter." Id. at Annex III.5. Commerce's regulations implement these goals in subsections 216.24(f)(9)(i)(D)(1) (providing that harvesting nations must respond to a notification from the IATTC that an individual stock quota has been reached "by prohibiting any additional sets on the stock for which the quota had been reached") and 216.24(f)(9)(i)(D)(2) (providing that, "[i]f a per-stock per-year quota is allocated to each nation," the per-stock per-year dolphin mortality of the harvesting nation's fleet may not exceed the limits assigned by the IDCP for that nation's vessels).

Defenders argue that 50 C.F.R. § 216.24(f)(9)(i)(C)(1) is illegal. Defenders Br. at 17. However, Defenders' brief contains no analysis in support of this argument other than a comparison of the language of this regulation with the language of 16 U.S.C.A. § 1371(a)(2)(B)(iii). The mere fact that the regulatory language adopted by Commerce differs from the language contained in the IDCPA does not establish that the regulation is contrary to law. "Congress has recognized its own inability to anticipate in its legislation all 'appropriate circumstances', every 'factor', and all 'foreign policy repercussions.'" Melamine Chemicals, Inc. v. United States, 732 F.2d 924, 930 (Fed. Cir. 1984). Thus, "there is no stultifying requirement" that an agency "cite a statute detailing in haec verba the specific action it may take when confronted with a particular set of circumstances among the myriad that may occur." Id. This principle carries considerable force here because Congress specifically authorized Commerce to issue regulations "to implement the International Dolphin Conservation Program." 16 U.S.C.A. § 1413(a)(1). Such authorization would be meaningless if Congress expected the agency's regulations to simply mirror the statute.

Defenders also challenge subsection 216.24(f)(9)(i)(D) to

the extent that it requires harvesting nations to be in compliance with the IDCP's global allocation system for per-stock per-year quotas as well as the IDCP's national allocation system for per-stock per-year quotas, if the IDCP creates such a national system. Defenders Br. at 16. Focusing solely upon 16 U.S.C.A. § 1371(a)(2)(B)(iii) (which provides that a harvesting nation must provide documentary evidence that the "per-stock per-year dolphin mortality limits permitted for that nation's vessels under the International Dolphin Conservation Program do not exceed the limits determined for 1997, or for any year thereafter") (emphasis added), Defenders argue that Commerce is only authorized to adopt regulations regarding a national allocation system. We disagree.

As we have demonstrated, the only discernable congressional intent with respect to this provision is that total dolphin mortality pursuant to the IDCP is not to exceed 5,000 dolphins in 1997, or any year thereafter. H.R. Rep. No. 105-74(II), at 5, 1997 U.S.C.C.A.N. at 1661. Moreover, in directing the Secretary of State to negotiate an agreement to establish the IDCP, Congress specified that the agreement should require "the establishment of a per-stock per-year dolphin mortality limit, beginning with the calendar year

2001, at a level less than or equal to 0.1 percent of the minimum population estimate, as calculated, revised, or approved by the Secretary" 16 U.S.C.A. § 1412(3) (emphasis added). **Congress did not direct the Secretary of State to negotiate an agreement that includes a national allocation system for the per-stock per-year quotas.**

Nor does the plain language of subsection 1371(a)(2)(B)(iii) require such a national allocation system.

Instead, that provision may be fairly read as requiring a harvesting nation to adhere to the IDCP's national allocation system only to the extent that such a national system exists.

See Proposed Rule, 64 Fed. Reg. at 31808-09 (discussing the various possible interpretations of subsection

1371(a)(2)(B)(iii)); Interim-Final Rule, 65 Fed. Reg. at 33 (noting that an interpretation of subsection

1371(a)(2)(B)(iii) that focused upon a nation's mortality limits would penalize a nation whose fleet has grown without affecting overall international dolphin mortality). In

circumstances in which a statute is susceptible to more than one reading, a court may not substitute its own interpretation for a reasonable interpretation made by the administrator of an agency. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

4. No Enforcement Action For Taking Prohibited
Dolphins "Not Readily Observable" At The Start
Of A Set

In the Interim-Final Rule, 65 Fed. Reg. at 52 (to be codified at 50 C.F.R. § 216.24(c)(9)(ix)), Commerce provided that, "[i]f individual dolphins belonging to a stock that is prohibited from being taken are not reasonably observable at the time the net skiff attached to the net is released from the vessel at the start of a set, the fact that individuals of that stock are subsequently taken will not be cause for enforcement action provided that all procedures required by the applicable regulations have been followed" (emphasis added). This regulation is in accordance with law.

In response to comments by interested parties, Commerce explained its rationale for this regulation as follows. "NMFS recognizes that occasionally a prohibited species is not detected prior to the time the skiff attached to the net is released from the vessel at the start of a set. To accommodate this unlikely event, NMFS is keeping the 'reasonably observable' language in the regulatory text." Interim-Final Rule, 65 Fed. Reg. at 38.

Defenders challenge this rule. Defenders Br. at 16.

However, the statutory provision cited by Defenders does not prohibit the issuance of subsection 216.24(c)(9)(ix). On the contrary, 16 U.S.C.A. § 1413(a)(2)(B)(vii) actually supports issuance of the regulation because it directs Commerce to issue a regulation "preventing the making of intentional sets on dolphins after reaching either the vessel maximum annual dolphin mortality limits, total dolphin mortality limits, or per-stock per-year mortality limits . . ." (emphasis added). The situation contemplated by Commerce does not involve an intentional set upon a prohibited stock. Rather, it involves the situation where a prohibited stock was not "reasonably observable" prior to the start of the set.

5. Affirmative Findings - Made Annually With
Documentary Evidence Provided By The Government
Of A Harvesting Nation Every Five Years

In the Interim-Final Rule, 65 Fed. Reg. at 55 (to be codified at 50 C.F.R. § 216.24(f)(9)(i)), Commerce provided that (1) "[t]he Assistant Administrator will determine, on an annual basis, whether to make an affirmative finding based upon documentary evidence provided by the government of the exporting nation, by the government of the harvesting nation, if different, or by the IDCP and the IATTC, and will publish the finding in the Federal Register"; (2) "[a] finding will remain valid for 1 year or for such other period as the Assistant Administrator may determine"; (3) "[a]n affirmative finding will be terminated if the Assistant Administrator determines that the requirements of this paragraph are no longer being met; (4) "[e]very 5 years, the government of the harvesting nation, must submit such documentary evidence directly to the Assistant Administrator and request an affirmative finding"; and (5) "[d]ocumentary evidence needs to be submitted by the harvesting nation for the first affirmative finding subsequent to the effective date of this rule." This regulation is in accordance with law.

Defenders argue that this regulation authorizes a "five-

year lapse" for documentary evidence from a foreign nation for purposes of affirmative findings. Defenders Br. at 17. Commerce, however, recognized that it can "gather the necessary documentary information through other channels (e.g., the Department of State and/or the IATTC), provided nations authorize the release of the information, instead of having each nation submit the information to NMFS on an annual basis." Interim-Final Rule, 65 Fed. Reg. at 33. In this manner, the agency will have in its possession all of the information that is necessary to make its annual findings. Moreover, the agency has retained the discretion to request information from harvesting nations at any time. See id. ("Beginning with the first year the regulations are effective and every 5 years thereafter, or if requested, nations will need to submit sufficient documentary evidence to NMFS for an affirmative finding")(emphasis added); id. at 55 (50 C.F.R. § 215.24(f)(9)(i)) ("The Assistant Administrator may require the submission of supporting documentation or other verification of statements made in connection with requests to allow importations"). As a result, Defenders' concern about a "lapse" in evidence is misplaced.

Again, none of the statutory provisions cited by Defenders prohibits the issuance of subsection

216.24(f)(9)(i). It is true that the statute discusses per-stock per-year DMLs and a showing that a nation is meeting its financial obligations in the IATTC, information that may change from year-to-year. 16 U.S.C. § 1371(a)(2)(B).

However, it is also true that the statute contemplates that Commerce may obtain this information directly from the IATTC itself. Specifically, the statute provides that Commerce may not accept documentary evidence from a harvesting nation if, among other things, "the government of the harvesting nation does not provide directly or authorize the Inter-American Tropical Tuna Commission to release complete and accurate information to the Secretary in a timely manner" 16 U.S.C.A. § 1371(a)(2)(C)(i) (emphasis added). In light of this provision, Commerce acted well within its discretion by its issuance of subsection 216.24(f)(9)(i).

6. Tracking And Verification

In the Interim-Final Rule, 65 Fed. Reg. at 57-58 (to be codified at 50 C.F.R. §§ 216.92 - 216.94), Commerce established a tracking and verification program to accurately document the "dolphin-safe" condition of tuna. This regulation is in accordance with law.

In the IDCPA, Congress changed the "dolphin-safe" labeling standard applicable to yellowfin tuna harvested in

the ETP. 16 U.S.C.A. § 1385(d). In addition, Congress also directed Commerce to issue regulations that would, among other things, "establish a domestic tracking and verification program that provides for the effective tracking of tuna labeled under subsection (d) of this section." 16 U.S.C.A. § 1385(f). Commerce's program fully complies with this directive.

Commerce's program tracks "dolphin-safe" and "non-dolphin safe" tuna during fishing operations. During cruises in the ETP, information with respect to the date of trip, set number, date of loading, name of the vessel, vessel Captain's name, observer's name, well number, weights by species composition, estimated tons loaded, and the date of the set, must be reported on IDCP-approved Tuna Tracking Forms ("TTFs"). 50 C.F.R. § 216.94(a) (discussing the TTF requirements for U.S.-flag tuna purse seine vessels).³ Tuna caught in "dolphin-safe" sets must be stored separately from tuna caught in "non-dolphin safe" sets from the time of capture through unloading, unless one of the limited exceptions for a "mixed well" are met. 50 C.F.R. § 216.94(b)(1)-(2). Two TTFs are generated - one for tuna that is harvested in a "dolphin-safe" manner and

³ **The responsibility for generating TTFs rests with each harvesting nation.**

another for tuna that is harvested in a "non-dolphin-safe" manner. 50 C.F.R. § 216.94(b)(1). The information on both TTFs are certified as accurate by both the vessel Captain as well as the IDCP-approved observer. Id. "The captain, managing owner, or vessel agent of a U.S. purse seine vessel returning to port from a trip, any part of which included fishing in the ETP, must provide at least 48 hours notice of the vessel's intended place of landing, arrival time, and schedule of unloading to the Administrator, Southwest Region." 50 C.F.R. § 216.94(b)(3).

Commerce's program also tracks "dolphin-safe" and "non-dolphin safe" tuna during offloading operations. For trips that terminate to unload part of its catch, new TTFs are assigned to the new trip and any information concerning tuna that remains on the ship must be recorded as the first entry on the new TTF. 50 C.F.R. § 216.94(b)(4). If a trip is not terminated following a partial unloading, the vessel retains the original TTF and submits a copy to NMFS. Id. "Tuna offloaded to trucks, storage facilities or carrier vessels must be loaded or stored in such a way as to maintain and safeguard the identification of the 'dolphin-safe' or 'non-dolphin-safe' designation of the tuna as it left the fishing

vessel." 50 C.F.R. § 216.94(b)(5). If a U.S. purse seine vessel offloads ETP tuna directly to a U.S. canner or to a carrier vessel for transport to a U.S. processing location, "a NMFS representative may meet the U.S. purse seiner to receive the TTFs from the vessel observer and to monitor the handling of 'dolphin-safe' and 'non-dolphin-safe' tuna." 50 C.F.R. § 216.94(b)(6)(i). If a U.S. purse seine vessel offloads ETP tuna in the United States that is subsequently transported to a cannery outside the jurisdiction of the United States, a NMFS representative may again meet the vessel to receive the TTFs and to monitor the offloading. 50 C.F.R. § 216.94(b)(6)(ii). In such a situation, "[t]he U.S. caught tuna becomes the tracking and verification responsibility of the foreign buyer when it is offloaded from the U.S. vessel." Id. Finally, if a U.S. purse seine vessel offloads ETP tuna directly to a processing facility located outside the jurisdiction of the United States, "the national authority in whose area of jurisdiction the tuna is to be processed will assume the responsibility for tracking and verification of the tuna offloaded." 50 C.F.R. § 216.94(b)(6)(iv). A representative of that national authority will forward copies of the relevant TTFs to NMFS. Id.

Finally, Commerce's program tracks "dolphin-safe" and

"non-dolphin safe" tuna during canning operations. Tuna canning companies in the United States that are scheduled to receive a shipment of domestic or imported ETP tuna "must provide at least 48 hours notice of the location and arrival date and time of such a shipment, to the Administrator, Southwest Region, so that a NMFS representative can be present to monitor delivery and verify that 'dolphin-safe' and 'non-dolphin-safe' tuna are clearly identified and remain segregated." 50 C.F.R. § 216.94(c). Various reports must be provided to NMFS. Moreover, "[d]uring canning activities, 'non-dolphin-safe' tuna may not be mixed in any manner or at any time in its processing with any 'dolphin-safe' tuna or tuna products and may not share the same storage containers, cookers, conveyers, tables, or other canning and labeling machinery." 50 C.F.R. § 216.94(c)(4).

Commerce's program contains special provisions to ensure the "dolphin-safe" status of imported tuna. Specifically, tuna products (except fresh tuna) that are imported into the United States must be accompanied by a properly certified Fisheries Certificate of Origin ("FCO"). 50 C.F.R. § 216.94(d). An FCO, certified by the exporter and each importer who takes custody of the shipment, must contain various information, including the "dolphin safe" condition of

the tuna. 50 C.F.R. § 216.24(f).

Commerce's program also contains comprehensive verification requirements. First, "[a]ny exporter, transshipper, importer, or processor of any tuna or tuna products containing tuna harvested in the ETP must maintain records related to that tuna for at least 3 years." 50 C.F.R. § 216.94(e)(1). Second, "[w]ithin 30 days of receiving a written request from the Administrator, Southwest Region, any exporter, transshipper, importer, or processor of any tuna or tuna products containing tuna harvested in the ETP must submit to the Administrator any record required to be maintained under paragraph (e)(1) of this section." 50 C.F.R. § 216.94(e)(2). Third, "[u]pon request of the Administrator, Southwest Region, any such exporter, transshipper, importer, or processor must provide the Administrator, Southwest Region, timely access to all pertinent records and facilities to allow for audits and spot-checks on caught, landed, and processed tuna." 50 C.F.R. § 216.94(e)(3).

Defenders' various arguments fail to demonstrate error in these procedures.

a. Documentation

Defenders argue that the tracking and verification system developed by Commerce suffers from purported "gaps in the

paper trail." We disagree.

Defenders argue that 50 C.F.R. § 216.93 (pertaining to the submission of certain documentation) is a violation of the IDCPA because it remains largely unchanged from its predecessor. Defenders Br. at 20. This argument ignores the fact that (1) both section 216.93 and its predecessor referred to other provisions for purposes of identifying the documents that must accompany the tuna product at all times; and (2) these other provisions - sections 216.91 (which incorporates, by reference, the documentation requirements of section 216.94) and 216.92 - impose numerous requirements that did not previously exist. More importantly, Commerce's regulations require parties to maintain records associated with tuna harvesting and processing for at least three years. 50 C.F.R. § 216.94(e)(1). All of this information must be submitted to Commerce, upon the agency's request. 50 C.F.R. § 216.94(e)(2).

Defenders also assert that "imported tuna from foreign nations will not be accompanied by tuna tracking forms (TTF), or copies thereof, at any point in time when in the United States." Defenders Br. at 21. However, the documents that "must accompany the tuna product whenever it is offered for sale or export" in the United States (50 C.F.R. § 216.93(b))

includes "a listing of vessel names and identifying numbers of the associated Tuna Tracking Forms for each trip of which tuna in the shipment originates . . ." (50 C.F.R. § 216.92(b)(4)).

Thus, for an individual shipment of imported tuna, Commerce will be able to determine the identifying number of the TTF. This identifying number would then permit the agency to request the actual TTF if necessary.

Defenders are concerned that the current FCO "no longer contains information on whether dolphins were encircled intentionally by purse seine nets in the ETP" Defenders Br. at 21. However, one of the documents that must accompany imported tuna "whenever it is offered for sale or export" is valid documentation signed by a representative of the appropriate IDCP member nation that certifies that "[t]he tuna contained in the shipment were caught according to the dolphin-safe labeling standards of § 216.91." 50 C.F.R. § 216.92(b)(3)(ii). Subsection 216.91 specifies that, if the Assistant Administrator finds "that the intentional deployment of purse seine nets on or encirclement of dolphins is having a significant adverse impact on any depleted stock," then a tuna product may only be labeled "dolphin safe" if (A) "[n]o tuna products were caught on a trip using a purse seine net intentionally deployed on or to encircle dolphins; and (B)

"[n]o dolphins were killed or seriously injured during the sets in which the tuna were caught." Thus, the information whether dolphins were encircled during the tuna harvesting process is now provided by the certification of a representative of the IDCP-member nation.

Defenders complain that there is "no public way to track foreign-caused dolphin mortality" Defenders Br. at 21. Congress, however, did not contemplate such public dissemination. On the contrary, Congress provided that Commerce will "establish appropriate procedures for ensuring the confidentiality of proprietary information the submission of which is voluntary or mandatory." 16 U.S.C.A. § 1385(f).

b. Purported "Problems At Ports"

Defenders argue that "nowhere in the final rule do Defendants specify when or how 'periodic audits and spot checks' will occur." Defenders Br. at 22. Defenders are incorrect. The regulations specify that, "[u]pon request of the Administrator, Southwest Region, any such exporter, transshipper, importer, or processor must provide the Administrator, Southwest Region, timely access to all pertinent records and facilities to allow for audits and spot-checks on caught, landed, and processed tuna." 50 C.F.R. § 216.94(e)(1). The statute does not direct the manner in which

Commerce will conduct these verifications, other than that they be "periodic." 16 U.S.C.A. § 1385(f). Thus, it is apparent that Congress intended that Commerce exercise its discretion in determining the manner and timing of these verifications.

Defenders' argument that Commerce has "ignored the expertise" of the United States Customs Service ("Customs") is misplaced. Defenders Br. at 23. The statute directs Commerce to consult with the Secretary of the Treasury for purposes of issuing tracking and verification regulations. 16 U.S.C.A. § 1385. Commerce did so. See Interim-Final Rule, 65 Fed. Reg. at 31 ("In addition to publishing the proposed rule in the Federal Register, NMFS sent it to industry representatives, environmental groups, vessel and operator certificate of inclusion holders, importers, IDCP member nations, Department of State, IATTC, U.S. Commissioners to the IATTC, Department of the Treasury, U.S. Customs Service, Marine Mammal Commission, Department of Justice, and the Federal Trade Commission"). There exists no requirement that Commerce adopt all of Customs's proposed changes.

c. Purported "Jurisdictional Gaps"

Defenders argue that a "jurisdictional gap" exists in the tracking and verification program when a U.S. vessel offloads

tuna to a foreign carrier vessel. Defenders Br. at 23-25. Again, we disagree.

As we have demonstrated, Commerce's regulations provide for the tracking of "dolphin-safe" tuna during fishing operations, offloading operations, and canning operations. These regulations specifically contemplate and address the situation where a U.S. purse seine vessel offloads tuna to the foreign carrier vessel. 50 C.F.R. § 216.94(b)(6)(ii). Consistent with the Agreement on the IDCP, the regulations provide that a NMFS official may be present during the offloading process "to receive copies of the TTFs from the observer and monitor the offloading." Id. Defenders appear to be concerned about the potential for U.S.-caught tuna to be offloaded to a foreign carrier vessel, shipped to a foreign country, and then re-entered into the United States as a canned product. Defenders Br. at 23-24. The regulations, however, effectively cover this situation. Imported tuna products (which would include canned tuna) must comply with the documentation requirements of sections 216.91 through 216.94. These requirements include "a properly completed FCO" as well as "a listing of vessel names and identifying numbers of the associated Tuna Tracking Forms for each trip of which tuna in the shipment originates." 50 C.F.R. §

216.92(b)(3)(i), (b)(4). This information would allow Commerce to track the imports back to the U.S. vessel that originally harvested the tuna in question.

d. Mixed Wells

In the Interim-Final Rule, 65 Fed. Reg. at 58 (to be codified at 50 C.F.R. § 216.94(b)(2)), Commerce provided for two acceptable conditions under which a "mixed well" (i.e., a situation in which "dolphin-safe" and "non-dolphin-safe" tuna are stored in the same well) may exist: (1) when dolphin mortality or serious injury is observed during the loading process; and (2) when, during the end of an ETP fishing trip, there is an opportunity to make one last set. This regulation is in accordance with law.⁴

Defenders argue that the second "mixed well" provision violates 16 U.S.C.A. § 1385(f)(3), which requires Commerce to issue regulations that address "[t]he designation of well location, procedures for sealing holds, procedures for monitoring and certifying both above and below deck, or

⁴ We have been advised that Commerce no longer permits the use of mixed wells, a change that will be incorporated into its final regulations. Once those final regulations are issued, we will promptly inform the Court.

through equally effective methods, the tracking and verification of tuna labeled under subsection (d) of this section." However, as recognized by Commerce in the Interim-Final Rule, 65 Fed. Reg. at 42, the statute also provides that the agency "may make such adjustments as may be appropriate to the regulations promulgated under this subsection to implement an international tracking and verification program that meets or exceeds the minimum requirements established by the Secretary under this subsection." 16 U.S.C.A. § 1385(f) (emphasis added). Moreover, while Congress envisioned that the sealing of holds would be an appropriate means to segregate "dolphin-safe" and "non-dolphin-safe" tuna, it also permitted Commerce to utilize "equally effective methods" to achieve this result. 16 U.S.C.A. § 1385(f)(3).

Commerce found that its "mixed well" provisions were appropriate and not a violation of subsection 1385(f)(3) because "[s]ealing and unsealing wells during a trip does not provide additional confidence of the well contents than having an observer record the contents of the well during the loading process and during periodic inspections." Interim-Final Rule, 65 Fed. Reg. at 42. In addition, when a party stores "dolphin-safe" tuna with "non-dolphin-safe" tuna caught during the last set of a trip, "[t]he 'dolphin-safe' tuna must be

kept physically separate from the 'non-dolphin-safe' tuna already in the well, using netting or other material." 50 C.F.R. § 216.94(b)(2)(ii). This method is equal in effectiveness to sealed wells for ensuring that "dolphin-safe" and "non-dolphin safe" tuna remain segregated.

e. Vessel Observers

In the Interim-Final Rule, 65 Fed. Reg. at 49 (to be codified at 50 C.F.R. § 216.24(b)(8)(ii)), Commerce provided that, by obtaining a permit to catch, possess, or land tuna in the ETP, "the permit holder consents to the placement of an observer on the vessel during every trip involving operations in the ETP and agrees to payment of the fees for observer placement." This regulation is in accordance with law.

Defenders argue that the statute requires multiple observers. Defenders' challenge, however, is limited to a mere recitation of 16 U.S.C.A. § 1413(a)(2)(B)(i), which directs Commerce to issue regulations "requiring observers on each vessel" (emphasis added). Defenders Br. at 25 n.13. This argument fails to recognize that, elsewhere in the IDCPA, Congress referred to the use of a single "observer." See 16 U.S.C.A. § 1385(d)(2)(B) (tuna harvested in the ETP may be considered "dolphin-safe" if, among other things, the product is accompanied by a written statement "which states that there

was an observer approved by the International Dolphin Conservation Program on board the vessel during the entire trip and that such observer provided the certification required under subsection (h) of this section") (emphasis added). In addition, the legislative history that accompanies the IDCPA notes that "H.R. 408 implements the La Jolla Agreement and the Declaration of Panama for the United States" and described the Panama Declaration as requiring "the use of mandatory observer coverage on all vessels." **H. R. Rep. No. 105-74(I), at 16, reprinted in 1997 U.S.C.C.A.N.** at 1634 (emphasis added). Finally, Annex II.2 to the Agreement on the IDCP provides that "[e]ach Party shall require its vessels with a carrying capacity greater than 363 metric tons (400 short tons) and that operate in the Agreement Area, to carry an observer during each fishing trip in the Agreement Area" (emphasis added).

The courts recognize that "[t]he meaning - or ambiguity - of certain words or phrases may only become evident when placed in context." **Food and Drug Admin. v. Brown & Williamson Tobacco Corp.**, 120 S. Ct. 1291, 1301 (2000) (citing **Brown v. Gardner**, 513 U.S. 115, 118 (1994)). When such a comprehensive analysis is applied to the IDCPA, it is apparent that Congress only envisioned regulations that require a

single IDCP-approved observer.

f. Incentives

In the Interim-Final Rule, 65 Fed. Reg. at 37, Commerce stated that it "has not developed incentives to include in the interim final rule." This determination is in accordance with law.

None of the provisions relied upon by Defenders actually requires Commerce to issue regulations addressing the issue of incentives. Subsection 1371(a)(2)(B)(iii) is merely hortatory in nature in that it describes the IDCP's "objective of progressively reducing dolphin mortality . . ." (emphasis added). Subsection 1412(8) directed the Secretary of State to "seek to secure" a binding international agreement that would establish "a system of incentives to vessel captains to continue to reduce dolphin mortality, with the goal of eliminating dolphin mortality." Other courts have recognized that a "statute's requirement that the Executive initiate discussions with foreign nations violates the separation of powers, and this court cannot enforce it." Earth Island Institute v. Christopher, 6 F.3d 648, 652 (9th Cir. 1993); see also 1997 U.S.C.C.A.N. at 1670 (Statement by President William J. Clinton Upon Signing H.R. 408: "Unfortunately, H.R. 408 also contains provisions that could be construed to direct how

the Nation's foreign affairs should be conducted. The Constitution vests the President with special authority to conduct the Nation's foreign affairs, and this authority necessarily entails the exercise of discretion"). Thus, the provisions contained in subsection 1412(8) are not subject to judicial review. Even if the Court were to construe subsection 1412(8), it would conclude that, by its use of the phrase, "shall seek to secure," Congress merely anticipated that the Executive would seek to reach the best possible deal with foreign nations by taking into account the numerous elements listed in subsection 1412(8).

With respect to the issue of incentives, the Executive has fully achieved the objective outlined by Congress. Article V.1.a of the Agreement on the IDCP contemplates the "establishment of a system that provides incentives to vessel captains to continue to reduce incidental dolphin mortality, with the goal of eliminating dolphin mortality in this fishery." As recognized by Commerce in the Interim-Final Rule, 65 Fed. Reg. at 37, a working group of the IDCP is developing those incentives. However, in light of the fact that Congress did not direct Commerce to issue regulations with respect to this issue, Defenders' challenge must fail.

C. The Government's Application Of The National Environmental Policy Act To The Interim-Final Rule And The Agreement On The International Dolphin Conservation Program Should Be Sustained

Defenders also challenge the Government's application of NEPA to the Interim-Final Rule and the Agreement on the IDCP. As we demonstrate, this challenge should be rejected.

1. The Relevant Statutory And Regulatory Criteria

Congress enacted NEPA in 1969. Pub. L. No. 91-190, 83 Stat. 852 (1969). The Act had three major purposes: "(1) to declare protection of environmental quality to be a national policy and provide a mandate to all Federal agencies to effect that policy; (2) to create a Council on Environmental Quality to insure that the mandate is carried out; and (3) to establish a set of 'action forcing' procedures requiring an environmental impact statement on any proposed major Federal action which could significantly affect the quality of the environment." S. Rep. No. 94-52, at 3 (1975), reprinted in 1975 U.S.C.C.A.N. 859, 860.

NEPA requires that, "to the fullest extent possible," all agencies of the Federal Government:

C) include in every recommendation or report on proposals for legislation and

other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332 (emphasis added).

Regulations issued by the Council on Environmental Quality ("CEQ") provide that the phrase "to the fullest extent possible" in 42 U.S.C. § 4332 "means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible." 40 C.F.R. § 1500.6 (emphasis added).

Pursuant to these regulations, an agency will utilize an environmental assessment ("EA") to "make its determination whether to prepare an environmental impact statement" ("EIS").

40 C.F.R. § 1501.4(c).

An EA is "a concise public document" that serves to (1) "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact" ("FONSI"); (2) "[a]id an agency's compliance with the Act when no environmental impact statement is necessary"; and (3) "[f]acilitate preparation of a statement when one is necessary." 40 C.F.R. § 1508.9(a) (emphasis added).

"'Major Federal action' includes actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. "Major reinforces but does not have a meaning independent of significantly (§ 1508.27)." Id.

"'Significantly' as used in NEPA requires considerations of both context and intensity." 40 C.F.R. § 1508.27.

"Context" means "that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27(a).

"Intensity" refers the severity of impact, a concept that is evaluated using several enumerated factors. 40 C.F.R. § 1508.27(b).

"'Finding of No Significant Impact' ["FONSI"] means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared." 40 C.F.R. § 1508.13.

2. The Environmental Assessment Prepared By
Commerce For Purposes Of The Interim-Final Rule
Is Not Arbitrary, Capricious, An Abuse Of
Discretion, Or Otherwise In Accordance With Law

On December 8, 1999, Commerce issued a Environmental Assessment ("EA") with respect to the Interim-Final Rule. AR X-151 (Def. App. 2). This determination is not arbitrary, capricious, an abuse of discretion, or otherwise in accordance with law.

In the EA, Commerce determined that the Interim-Final Rule "would not significantly affect the quality of the human environment, and that the preparation of an environmental impact statement on these actions is not required by Section 102(2) of the National Environmental Policy Act or its implementing regulations." Id. at 58. In reaching this conclusion, Commerce examined the available alternatives: (1)

maintaining the status quo (id. at 6-7); (2) adopting the Interim-Final Rule (the preferred alternative) (id. at 7-10); and (3) adjusting the Interim-Final Rule (id. at 10-13).

Commerce first found that the affected environment was comprised of the physical environment, the biological environment, tuna purse seine fishing in the ETP, and the economic environment. Id. at 16-40.

Commerce then examined the environmental and socio-economic effects of the three alternatives under consideration. Specifically, the agency examined the effects of each of its alternatives with respect to: marine mammals; tuna; sea turtles; other finfish; the U.S. purse seine fleet; foreign purse seine fleets; the U.S. canned tuna processing industry; foreign canned tuna processing industries; U.S. consumers; exporters, importers, and consumers of other fish and fish products; and the governments of the United States and foreign nations. Id. at 40-57.

Defenders make various arguments with respect to the EA. None of these arguments establish error in the EA.

Without citation, Defenders argue that Commerce failed to utilize the "best available scientific information" for purposes of its EA. Defenders Br. at 29. While it is true that other statutes such as the Endangered Species Act (16

U.S.C. § 1536(a)(1)) and the Magnuson Fishery Conservation and Management Act (16 U.S.C. § 1851(a)(2)) require the use of the best scientific information available for purposes of their respective inquiries, the information relied upon by an agency for purposes of a NEPA analysis must merely be of "high quality" (40 C.F.R. § 1500.1(b)).⁵

Defenders are incorrect in their assertion that Commerce was obligated to rely upon its 1999 Report to Congress with respect to the Initial Finding. Defenders Br. at 29. Commerce prepared that report in light of 16 U.S.C.A. § 1414a(a)(4), which directed the agency to submit a report to Congress concerning the results of the population abundance surveys and stress studies undertaken to determine whether "encirclement is having a significant adverse impact on any depleted dolphin stock in the eastern tropical Pacific Ocean." 16 U.S.C. § 1414a(a)(1).

Even though Commerce did not specifically cite the 1999 Report to Congress in its EA, it did consider the different

⁵ Even when the Endangered Species Act is at issue, the requirement for the "use of 'best available' data does not require perfect data." National Wildlife Federation v. Babbitt, 128 F. Supp.2d 1274, 1300 (E. D. Cal. 2000).

labeling standards implicated by that document. Pursuant to Alternative 1 (status quo), "[t]he dolphin-safe label would only be used on tuna caught by a vessel that did not set on dolphins throughout its entire trip." AR X-151 (Def. App. 2) at 6. Pursuant to Alternative 2 (preferred), the dolphin-safe label would be permitted if "no dolphins were killed or seriously injured during the sets in which tuna were caught."

Id. at 8. Pursuant to Alternative 3 (adjustments to the preferred alternative) the dolphin-safe label would be permitted if "no dolphins were intentionally encircled to catch tuna during the entire trip, and no dolphins were killed or seriously injured during the set in which the tuna were caught." Id. at 11. As properly recognized by the agency, "actions in the categories of labeling, trade restrictions, and embargoes work together, not independently." Id. at 5.

The purported differences between the EA and the 1999 Report are either immaterial or non-existent. The reference in the EA to the "stable or slightly increasing" eastern spinner stock and northeastern offshore spotted stock must be read in the context of the entire sentence in which it was made. Commerce noted that all stocks, including these two specific stocks, "are stable or slightly increasing, fluctuating around the same levels for the past two decades."

AR X-151 (Def. App. 2) at 42. This observation, which focuses upon a long, two-decade period of time, is not inconsistent with the statement in the 1999 Report that the eastern spinner dolphin population "was nearly stable or declined slightly from 1991 to 1998" (AR S2-21 (Def. App. 15) at 19), which refers to a different period of time.

Contrary to Defenders' position at page 31 of its brief, the EA did consider the effects of the purse seine fishery upon dolphins. AR X-151 (Def. App. 2) at 42, 47, 54.

Contrary to Defenders' position at page 33 of its brief, Commerce considered - and rejected - alternatives to its preferred tracking and verification program. Specifically, the agency considered an alternative that would require food companies and retailers that buy tuna or tuna products to maintain tracking and verification paperwork. AR X-151 (Def. App. 2) at 15. "This alternative was rejected because it would impose too substantial a paperwork burden for too many parties." Id. In addition, the agency determined that it could engage in effective tracking and verification by means of spot checks and verifications. Id.; see also 16 U.S.C.A. § 1385(f)(6)(Commerce to issue tracking and verification regulations that would address "[t]he use of periodic audits and spot checks for caught, landed, and processed tuna

products labeled in accordance with subsection (d) of this section").

Defenders argue that there was inadequate public involvement with respect to the EA. Defenders Br. at 35-37. We disagree. The CEQ regulations clearly specify that, "[i]n certain limited circumstances," the agency "shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin." 40 C.F.R. § 1501.4(b)(2). These circumstances are: "(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or (ii) The nature of the proposed action is one without precedent." Id. Neither of these conditions exist here. Commerce has experience with the NEPA-consequences of the tuna-dolphin issue. For example, it conducted an EA in January 1999 with respect to management and conservation measures pursuant to the Pacific Tunas Conventions Act. AR VIII-120 (Def. App. 16). This analysis required the agency to consider, among other things, the effects of its proposed action upon dolphin stocks in the ETP

tuna purse seine fishery. Id. at 7-12. Thus, there is precedent for the proposed action. Defenders argue that an EIS was required here because, in 1980, Commerce issued an EIS with respect to regulations governing the incidental taking of marine mammals associated with tuna purse seine operations. AR S2-2 (Def. App. 17). However, the January 1999 EA resulted in a FONSI, not an EIS. Thus, the Interim-Final Rule is not the type of action that "normally" requires an EIS, the standard contained in 40 C.F.R. § 1501.4(b)(2)(i).

To the extent that Defenders possessed a desire to examine the draft EA, they had notice of that document and could have requested a copy from the agency. In the Proposed Rule, 64 Fed. Reg. at 31811, Commerce stated that, "[i]n these tracking and verification regulations and the Environmental Assessment analyzing this program, NMFS has addressed each subsection of section (f) of the DPCIA" Defenders are well-aware of the fact that "[t]he Environmental Assessment (EA) is the first step in the NEPA process" (Defenders Br. at 28) and have extensive NEPA litigation experience (e.g., Defenders of Wildlife v. Andrus, 627 F.2d 1238 (D.C. Cir. 1980)). Thus, they had adequate notice that Commerce was preparing an EA for purposes of the Interim-Final Rule.

Defenders are incorrect in their assertion that Commerce

was obligated to follow the standards contained in section 6.02 of NOAA Administrative Order ("NAO") 216-6. Defenders Br. at 44. Those standards apply to fishery management actions. The purpose of the Interim-Final Rule is not to regulate the harvest of fish per se, but to conserve marine mammals. Section 6.02 of the NAO refers to the Magnuson Act's "national standard guidelines" at 50 CFR part 600, subpart D. This reference is an indication that section 6.02 only applies to Magnuson Act fishery management actions. Moreover, by its own terms, NAO 216-6 is not "binding" upon Commerce in the manner suggested by Defenders. In relevant part, section 7.01.c.2 of the Order recognizes that, "[w]hen full compliance with this Order is not possible," consideration may be given to the preparation of "concise reviews of the environmental issues involved, including EAs, summary environmental analyses, or other appropriate documents."

Defenders argue that the alternatives considered by Commerce were "unreasonably limited." Defenders Br. at 45. This argument fails to recognize that the alternatives considered by an agency must fit within the parameters set forth by Congress. For this reason, an agency's obligation to comply with NEPA is not absolute. Rather, it must comply with NEPA "to the fullest extent possible" (42 U.S.C. § 4332), a

phrase that the CEQ has interpreted to mean "that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible." 40 C.F.R. § 1500.6 (emphasis added). Commerce was well-aware of this principle in its EA. In addition to the three alternatives specifically examined, the agency considered - but rejected - other alternatives, finding that "[m]any of these alternative actions were determined to be either not legal, not practicable and/or not cost-effective and were thus rejected without detailed analysis as part of the overall program to implement the IDCPA." Id. at 13, 13-16.

Defenders argue that Commerce was required to consider "an alternative where the number of sets on dolphins in the ETP is explicitly analyzed and limited." Defenders Br. at 47 (emphasis in original). However, the purpose of the IDCPA was to eliminate the import ban for those nations certified to be in compliance with the IDCP. Specifically, the IDCPA provides that the import ban would not apply if certain criteria are met (i.e., participation in the IDCP, membership in the IATTC, and compliance with the total and per-stock per-year DML). Regulations that limited the number of sets upon dolphins would be inconsistent with both the IDCPA as well as the

Agreement on the IDCP. Thus, Commerce was not required to consider this alternative.

Defenders argue that Commerce was required to consider "eco-friendly" means of harvesting mature tuna. Defenders Br. at 47-51. In the IDCPA, Congress authorized the undertaking of research pertaining to the development of cost-effective fishing methods that (1) would reduce the incidental mortality and serious injury of marine mammals in connection with commercial purse seine fishing; and (2) do not involve setting upon dolphins or other marine mammals. 16 U.S.C.A. § 1414a(b)(2)(B), (C). However, the lifting of the yellowfin tuna embargo was not contingent upon the use of such methods of fishing. Regulations that mandated the use of such fishing techniques would be inconsistent with both the IDCPA as well as the Agreement on the IDCP. Thus, Commerce was not required to consider this alternative.

Defenders argue that Commerce was required to consider alternatives that addressed the purported fleet over-capacity and over-fishing of yellowfin tuna in the ETP. Defenders Br. at 51. Again, the lifting of the embargo was not contingent upon fleet size or amount of tuna harvested. Commerce was not required to consider this alternative.

Defenders argue that Commerce was required to consider an

alternative that addressed a bycatch protocol. Defenders Br. at 53. While Congress authorized research with respect to this issue (16 U.S.C.A. § 1414a(b)(2)(D)), it did not make the lifting of the embargo contingent upon the use of fishing techniques that reduced the take of nontarget species. Again, an agency is not required to consider alternatives that would be inconsistent with existing law.

The analysis undertaken by Commerce required an assessment of the potential effects of the Interim-Final Rule and permissible alternatives to that rule with respect to a variety of components of the human environment. The analysis required the agency to rely upon its extensive experience with NEPA and tuna- and dolphin-related issues. Finally, the analysis required the agency to balance various factors in reaching its conclusion that the Interim-Final Rule would not significantly affect the quality of the human environment. Defenders have not demonstrated any error in this analysis.

3. The United States Department Of State Did Not Have An Obligation To Initiate The NEPA Process With Respect To The Agreement On The IDCP

Defenders further argue that the United States Department of State ("State") had an obligation to initiate the NEPA process before negotiating the Agreement on the IDCP.

Defenders Br. at 44. We disagree.

Negotiation of the Agreement on the IDCP did not constitute a "major Federal action[] significantly affecting the quality of the human environment" within the meaning of 42 U.S.C. § 4332. In Public Citizen v. Office Of The United States Trade Representative, 970 F.2d 916, 919 (D.C. Cir. 1992), the court recognized that section 4332 "specifically identifies the time when an agency's action is sufficiently concrete to trigger the EIS requirement" and that no such triggering event had occurred with respect to either the North American Free Trade Agreement ("NAFTA") or Uruguay Round negotiations. "No final agreement has yet been produced in either the NAFTA or Uruguay Round negotiations, and it is unclear whether either round will ever produce a final agreement for the President to submit to Congress." Id. (emphasis in original). The same principle applies to the IDCP negotiations. As with all international negotiations, there was never a guarantee that an agreement would be reached. Thus, the IDCP negotiations were not sufficiently concrete so as to require a NEPA analysis.

Stated differently, the negotiation process represented non-final agency action. In Franklin v. Massachusetts, 505 U.S. 788, 797 (1992), the Court explained that, for purposes

of determining whether an agency action is final, "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." In a subsequent case involving NAFTA and the Uruguay Round, the United States Court of Appeals for the D.C. Circuit relied upon the Franklin test in concluding that it did not possess jurisdiction to entertain a challenge to an alleged failure to prepare an EIS because negotiation of these trade agreements did not constitute "final agency action." Public Citizen v. Office Of The United States Trade Representative, 5 F.3d 549, 551 (D.C. Cir. 1993). Similarly, negotiation of the Agreement of the IDCP was not a final agency action.

Conclusion of the Agreement on the IDCP also did not constitute a "major Federal action[] significantly affecting the quality of the human environment." Indeed, that Agreement had no effects upon the human environment. The statute provides that the lifting of the tuna embargo may occur only when a harvesting nation provides Commerce with documentary evidence that the criteria specified in 16 U.S.C.A. § 1371(a)(2)(B) are met. These actions could only occur upon promulgation of regulations by Commerce.

The Court should decline to rule upon this issue because

it involves a nonjusticiable political question. It is established that a "controversy is nonjusticiable - i.e., involves a political question - where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it'" Nixon v. United States, 506 U.S. 224, 227 (1993) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)). In Earth Island, 6 F.3d at 652-53, the court recognized that "[t]he President alone has the authority to negotiate treaties with foreign countries" and that "'[i]nto the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it'" (quoting United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936)). As a result, NEPA should not be construed as requiring the preparation of either an EA or an EIS with respect to the Agreement on the IDCP because such a construction would improperly impinge upon the exclusive power of the Executive Branch to negotiate international agreements.

Finally, the Court should decline to entertain this issue due to Defenders' failure to exhaust their administrative remedies. In McCarthy v. Madigan, 503 U.S. 140, 145 (1992), the Supreme Court recognized that agencies have the "primary

responsibility" for the programs that Congress has charged them to administer and that the exhaustion doctrine promotes this goal. In the administrative proceedings, Defenders argued before Commerce that a NEPA analysis was required before promulgation of the Interim-Final Rule. AR XX-849 (Def. App. 18). No such effort was made with respect to the Agreement on the IDCP.

D. The Affirmative Finding With Respect To The Government Of Mexico Is Not Arbitrary, Capricious, An Abuse Of Discretion, Or Otherwise Not In Accordance With Law

On April 12, 2000, Commerce rendered an affirmative finding for the Government of Mexico that entitled that nation to export to the United States yellowfin tuna harvested in the ETP by Mexican purse seine vessels. This determination is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

In its determination, Commerce found that the documentation submitted by the Government of Mexico satisfied the statutory requirements of 16 U.S.C.A. § 1371(a)(2). Specifically, Commerce found that (1) Mexico had provided a

statement requesting an affirmative finding; (2) there existed evidence that Mexico was a member of the IATTC; (3) there existed evidence that Mexico was meeting its obligations to the IATTC, including financial obligations; (4) there existed evidence that Mexico was complying with the IDCP, including the adoption and enforcement of tuna tracking and verification regulations; (5) there existed evidence that Mexico did not exceed the national DMLs in the year preceding its application and there were no national per-stock per-year mortality limits in effect during that time; and (6) Mexico authorized the IATTC to provide or release information necessary to verify information on Mexican TTFs. AF MAF-50 (Def. App. 3) at 1.

1. IDCP/IATTC Obligations

Defenders argue, in error, that Mexico is violating four provisions of the IDCP. Defenders Br. at 56-57.

Contrary to Defenders' position, the regulations of the Government of Mexico properly define sundown sets. Those regulations define "night sets" as "those in which the back-down maneuvers are not completed 30 minutes after sunset extending to include those that begin more than 30 minutes prior to sunrise." AR MAR-4 (Def. App. 19) at § 3.14. The regulations further specify that "[n]ight sets are prohibited." Id. at § 4.2.15.1.8. Annex VIII.3.e to the

Agreement on the IDCP provides that a vessel with a carrying capacity of more than 363 metric tons (400 short tons) operating in the Agreement Area shall, among other things, "[c]omplete backdown no later than thirty minutes after sunset, as determined by an accurate and reliable source approved by the Parties" (emphasis added). Mexico's night set regulation is consistent with this standard.

Defenders are correct that Article V.1.h of the Agreement on the IDCP contemplates that the Parties will conduct research "for the purpose of seeking ecologically sound means of capturing large yellowfin tunas not in association with dolphins." However, no aspect of the Agreement specifies that Parties must begin such research at any specific time. Instead, the Agreement merely requires that existing "scientific research data" be exchanged among the parties "on a full and timely basis." Id. at Article V.1.g. This interpretation of the Agreement is consistent with Congress's own understanding of the required research. In the IDCPA, Congress directed Commerce to "undertake or support appropriate scientific research to further the goals of the International Dolphin Conservation Program." 16 U.S.C.A. § 1414a(b)(1). Congress further specified that this research may include "projects to develop cost-effective methods of

fishing for mature yellowfin tuna without setting nets on dolphins or other marine mammals." 16 U.S.C.A. § 1414a(b)(2)(B). In contrast to other research projects contemplated by Congress (see 16 U.S.C.A. § 1414a(a)(1) (directing Commerce to commence a study on October 1, 1997 to examine the effect of intentional encirclement on dolphin and dolphin stock)), no deadline was set for the commencement of research into harvesting methods that do not involving setting upon dolphins. This absence of a deadline in the Interim-Final Rule is not an abrogation of the United States' IDCP obligations. Similarly, the absence of a deadline in the regulations issued by the Government of Mexico does not mean that Mexico is in violation of its IDCP obligations.

Defenders also argue that the Government of Mexico has not developed incentives to reduce dolphin mortality. This argument, however, ignores the fact that, when the Agreement on the IDCP refers to the "establishment of a system that provides incentives to vessel captains to continue to reduce incidental dolphin mortality" (Article V.1.a), it refers to a collective system that must first be developed by all the Parties before it is implemented by individual Parties. This interpretation is supported by the fact the Agreement also refers to the establishment of a system of DMLs, limits that

are undoubtedly developed first by all the Parties before being imposed upon individual Parties. This interpretation is also supported by the actions of the Parties themselves. As noted by Commerce in the Interim-Final Rule, 65 Fed. Reg. at 37, a working group of the IDCP is currently developing these incentives. Cf. Blinderman Construction Co., Inc. v. United States, 695 F.2d 552, 558 (Fed. Cir. 1982) ("The conduct of both parties during construction and before the contractor's claim was submitted to the project manager provides persuasive evidence that the contract should be construed as urged by the contractor")

The purported "intransigence over important scientific research" (Defenders Br. at 57) also does not reveal that the Government of Mexico is violating a provision of the IDCP. The documents relied upon by Defenders all relate to the issue of whether Mexico will permit necropsies (autopsies) of dolphins that are incidentally taken aboard Mexican tuna vessels. While such necropsies might prove useful for purposes of the stress studies conducted by Commerce pursuant to 16 U.S.C.A. § 1414a(a)(3) (studies that are not implicated by this litigation), the Agreement on the IDCP does not require parties to conduct or support research with respect to this issue. Instead, that agreement merely addresses research

that pertains to gear, equipment, and fishing techniques (Article V.1.c) as well as an "ecologically sound means of capturing large yellowfin tunas not in association with dolphins" (Article V.1.h). None of the assertions made by Defenders pertain to these topics.

2. Financial Obligations

Relying upon the 1949 Convention that established the IATTC, Defenders argue that "Mexico is underpaying its fair share" of IATTC expenses. Defenders Br. at 58. We disagree.

In relevant part, the Convention Between The United States Of America And The Republic Of Costa Rica For The Establishment Of An Inter-American Tropical Tuna Commission provides that "[j]oint expenses incurred by the Commission shall be paid by the High Contracting Parties through contributions in the form and proportion recommended by the Commission and approved by the High Contracting Parties." AR S2-1 (Def. App. 20) at 1-2. Moreover, "[t]he proportion of joint expenses to be paid by each High Contracting Party shall be related to the proportion of the total catch from the fisheries covered by this Convention utilized by that High Contracting Party." Id. at 2. In the IDCPA, Congress provided the import ban upon yellowfin tuna harvested in the ETP does not apply if an exporting nation provides, among

other things, documentary evidence that "all financial obligations" of its membership in the IATTC are met. 16 U.S.C.A. § 1371(a)(2)(B)(ii).

Defenders complain that Mexico's fiscal year 2000 IATTC commitment of \$1,000,000 is somehow inconsistent with the "proportion of joint expenses" standard contained in the IATTC Convention. However, in its resolution creating the payment schedules for fiscal year 2000, the IATTC gave "*due consideration*" to the requirement in the Convention establishing the IATTC that the proportion of the expenses paid by each Party should be related to the proportion of the total catch utilized by that Party." AR CO2-39 (Def. App. 21) at App. 3 (*italics in original*). In this manner, the IATTC properly recognized that its Convention does not require a strict, one-to-one, proportionality between the expenses paid by each Party and the total catch utilized by each Party. Instead, the Convention merely requires that the expenses be "related" to the proportion of the total catch.

More importantly, decisions rendered by the IATTC are not subject to judicial review. Congress has provided that international organizations are entitled to certain privileges, exemptions, and immunities. Specifically,

"[i]nternational organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." 22 U.S.C. § 288a(b) (emphasis added).

"International organizations" are those public international organizations in which the United States participates pursuant to treaty or Act of Congress and which the President designates as being entitled to enjoy the privileges, exemptions, and immunities that are provided by law. 22 U.S.C. § 288. The President has made such a designation with respect to the IATTC. See Designating Public International Organizations Entitled To Enjoy Certain Privileges, Exemptions, And Immunities, 27 Fed. Reg. 10405 (Oct. 23, 1962)

("I hereby designate the Inter-American Tropical Tuna Commission, the Great Lakes Fishery Commission, and the International Pacific Halibut Commission as public international organizations entitled to enjoy the privileges, exemptions, and immunities conferred by the International Organizations Immunities Act, except those conferred pursuant

to Sections 4(b), 4(e), and 5(a) of that Act").⁶ As a result, even if the IATTC erred in its determination of the financial contribution for Mexico for fiscal year 2000, that determination is not subject to judicial review.

3. Total Annual Dolphin Mortality Limits

Defenders argue that the DMLs assigned to Mexico for year 2001 violate the IDCPA because (1) they are purportedly greater than the DMLs set for Mexico for year 2000; and (2) they purportedly exceed the total annual limits "for any year thereafter" within the meaning of 16 U.S.C.A. § 1371(a)(2)(B)(iii). Defenders Br. at 58.

By letter dated March 29, 2000, the IATTC informed Commerce that "no Mexican tuna purse-seine vessel that was allocated a Dolphin Mortality Limit (DML) during the 1999 fishing year exceeded its DML" and "the total dolphin mortality for the Mexican fleet in 1999 did not exceed the total of the DMLs allocated to its vessels." AR MAF-41 (Def. App. 22) (emphasis added). In its Affirmative Finding for

⁶ Sections 4(b), 4(e) and 5(a) of the International Organizations Immunities Act involve the treatment of income and social security taxes. Pub. L. No. 79-291, 59 Stat. 669 (1945).

Mexico, Commerce relied upon this letter as evidence in support of its conclusion that Mexico did not exceed its national fleet DMLs. AR MAF-50 (Def. App. 3) at ¶ 5.

The Court should decline to entertain Defenders' arguments because there is no justiciable case or controversy concerning the DMLs issued to Mexico for years 2000-2001. Those DMLs were not issued by the IATTC at the time that Commerce rendered its Affirmative Finding. Thus, those DMLs have no bearing upon the question whether the Affirmative Finding is arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law. See **Verson, A Div. of Allied Products Corp. v. United States**, 5 F. Supp.2d 963, 966 (CIT 1998) ("a federal court does not have the 'power to render an advisory opinion on a question simply because [it] may have to face the same question in the future'") (citation omitted).

4. Tracking And Verification

Defenders also challenge four aspects of the Government of Mexico's tracking and verification program. Defenders Br. at 58-59.

The statute provides that Commerce may not accept documentary evidence that would permit the lifting of the yellowfin tuna embargo if, among other things, "the government

of the harvesting nation does not provide directly or authorize the Inter-American Tropical Tuna Commission to release complete and accurate information to the Secretary in a timely manner . . . for the purposes of tracking and verifying compliance with the minimum requirements established by the Secretary in regulations promulgated under subsection (f) of the Dolphin Protection Consumer Information Act (16 U.S.C. 1385(f))." 16 U.S.C.A. § 1371(a)(2)(B).

In the Affirmative Finding at paragraph 5, Commerce determined that there exists evidence that the Government of Mexico maintains a tracking and verification program that is "comparable to the U.S. tracking and verification regulations at 50 CFR 216.94." In support of this determination, Commerce reviewed and relied upon the common elements of the U.S. and Mexican tuna tracking and verification systems.

Defenders first argues that "neither the record nor any other source indicate the public availability of Mexican tuna tracking forms (TTFs)." Defenders Br. at 59. This observation does not reveal error in the Affirmative Finding because the Interim-Final Rule itself does not authorize the public release of tuna tracking forms. See 50 C.F.R. § 216.94(f) ("Information submitted to the Assistant Administrator under this section will be treated as

confidential in accordance with NOAA Administrative Order 216-100 'Protection of Confidential Fisheries Statistics').

Public release of data was not contemplated by Congress in the IDCPA. See 16 U.S.C.A. § 1385(f) ("In the development of these regulations, the Secretary shall establish appropriate procedures for ensuring the confidentiality of proprietary information the submission of which is voluntary or mandatory").

Defenders also argue that the Mexican regulations "do not, on their face, indicate if and/or how TTFs are actually transmitted to the IATTC." Defenders Br. at 59. By section 4.2.16.2 of its regulations, however, the Government of Mexico has directed observers to submit their reports "to the Director of IATTC if they are observers from that agency, or to the Director of the National Tuna Development and Dolphin Protection Program if they are observers from that Program." While there exists no explicit provision in the regulations providing for the transmission of TTFs from the National Tuna Development and Dolphin Protection Program (a national observer program authorized by the Agreement on the IDCP) to the IATTC, none was needed. As a signatory to the Agreement on the IDCP, Mexico has agreed to "provide to the Director copies of all raw data collected by observers from their

respective national programs in a timely manner upon the conclusion of the trip during which the data were collected, along with summaries and reports comparable to those provided by IATTC observers." AR VII-97 (Def. App. 11) at Annex II.7.b. The absence of a specific regulation addressing the transmission of TTFs to the IATTC is justified because no such provision exists in the Interim-Final Rule. Nor did Congress impose such a regulatory requirement in the IDCPA.

While recognizing that the Government of Mexico has a regulatory provision that provides for "regular audits and reviews so as to assure compliance with the Tuna Tracking and Verification System" (AR MAF-4 (Def. App. 19) at Annex 2, III.D), Defenders argue that there is no evidence indicating the level of resources for implementing this system. However, the "minimum requirements" contained in the Interim-Final Rule for tracking and verification also do not include a specified level of resources. By the IDCPA, Congress did not indicate what level of agency resources should be devoted to tracking and verification. Instead, Congress merely directed Commerce to issue regulations that addressed "[t]he use of periodic audits and spot checks for caught, landed, and processed tuna products labeled in accordance with subsection (d) of this section." 16 U.S.C.A. § 1385(f)(6) (emphasis added). Thus,

the regulations issued by Mexico properly meet the "minimum requirements" contained in the Interim-Final Rule.

Finally, Defenders assert that there is no record evidence that the Government of Mexico has accounted for the "no encirclement" standard of dolphin-safe tuna pursuant to Brower v. Daley, 93 F. Supp.2d 1071 (N.D. Cal. 2000), appeal docketed, No. 00-15968 (**9th Cir. May 24, 2000**). Defenders Br. at 59. That decision, however, is currently on appeal.

5. Enforcement And Compliance

Defenders argue that the tuna embargo should be reinstituted because the Government of Mexico has failed to take enforcement actions with respect to purported violations of IDCP requirements. Defenders Br. at 59-60. We disagree.

The statute provides that Commerce may not accept documentary evidence that would permit the lifting of the yellowfin tuna embargo if, among other things, "after taking into consideration such information, findings of the Inter-American Tropical Tuna Commission, and any other relevant information, including information that a nation is consistently failing to take enforcement actions on violations which diminish the effectiveness of the International Dolphin Conservation Program, the Secretary, in consultation with the Secretary of State, finds that the harvesting nation is not in

compliance with the International Dolphin Conservation Program." 16 U.S.C.A. § 1371(a)(2)(C)(ii) (emphasis added).

The documents relied upon by Defenders do not demonstrate that the Government of Mexico is failing to take enforcement actions with respect to violations that diminish the effectiveness of the IDCP. The incidents described in these documents merely involve purported violations. For example, the 1997 Annual Report of the International Review Panel lists "all possible infractions" AR CO2-8 (Def. App. 23) at 4. "Each possible infraction is listed, followed by a brief description of the action take by the government, as reported to the Secretariat; if no action is listed, this indicates that the Secretariat has not received a response from the government." Id. The information provided with respect to the Mexican fleet reveals that the Government of Mexico diligently investigates and responds to reports of violations.

Moreover, Defenders have made no showing that there exist violations that diminish the effectiveness of the IDCP.

In rendering its Affirmative Finding for Mexico at paragraph 4, Commerce was well-aware of reports of purported violations. The agency explained that "[a]s the first fishing year under the new Mexican dolphin-protection regulations progresses, NMFS will monitor enforcement of the regulations

by the Mexican fisheries authorities via the International Review Panel process, in which we receive reports of alleged infractions by vessels under Mexican jurisdiction, and the enforcement actions of the Mexican authorities in response to those allegations" (emphasis added). AF MAF-50 (Def. App. 3) at ¶ 4. In addition, the agency determined that "the Government of Mexico has been implementing the IDCP and taking enforcement actions against vessels under Mexican jurisdiction found to have violated dolphin-protection measures." Id.

By its use of the phrase "consistently failing to take enforcement actions on violations," it is apparent that Congress expected Commerce to withhold affirmative findings only for those nations that took no enforcement actions or only minimal enforcement actions. In concluding that the Government of Mexico is implementing the IDCP and taking necessary enforcement actions, Commerce considered the relevant factors and articulated a rational connection between the facts found and the choice made. Thus, its finding should be sustained.

E. In The Event That The Court Finds Error With Respect To Any Of The Challenged Administrative Determinations, It Should Remand The Matter For

Further Proceedings While Permitting The Interim-Final Rule and The Affirmative Finding For Mexico To Remain In Effect

In the event that the Court finds error with respect to any of the challenged administrative determinations, it should remand the matter for further proceedings while permitting the Interim-Final Rule and the Affirmative Finding for Mexico to remain in effect.

Previously, the Court held that Defenders' argument that irreparable injury is presumed in environmental cases is "unavailing." Defenders of Wildlife v. Dalton, 97 F. Supp.2d 1197, 1200 (CIT 2000). Rather, the Court properly recognized that the granting of injunctive relief is extraordinary and that the party seeking injunctive relief must produce evidence demonstrating that (1) it will be immediately and irreparably injured; (2) there is a likelihood of success on the merits; (3) the public interest would be better served by the relief requested; and (4) the balance of hardships on all the parties favors the movant. Id. at 1199 (citing Zenith Radio Corp. v. United States, 710 F.2d 806, 809 (Fed. Cir. 1983)).

Even where a statutory violation is established, "[t]he grant of jurisdiction to ensure compliance with a statute

hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982). Thus, "an injunction is an equitable remedy that does not issue as a matter of course." Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987). Moreover, the courts are still obliged to consider where the public interest lies in deciding whether to grant or deny injunctive relief. American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 965 (9th Cir. 1983).

These principles also apply in circumstances in which a party establishes a violation of NEPA. See State of Wisconsin v. Weinberger, 745 F.2d 412, 425 (7th Cir. 1984) ("There is no presumption mandating an injunction in this type of case"; "the national well-being and security as determined by the Congress and the President demand consideration before an injunction should issue for a NEPA violation"); Environmental Defense Fund v. Marsh, 651 F.2d 983, 1005 (5th Cir. Unit A 1981) ("The court should tailor its relief to fit each particular case, balancing the environmental concerns of NEPA against the larger interests of society that might be adversely affected by an overly broad injunction") (citation

omitted).

In this case, Defenders profess that they "do not, at this time, seek a motion to re-instate the ban against Mexican tuna and tuna products, but reserve the right to do so." Defenders Br. at 61. However, they "seek a judgment setting aside the present affirmative finding for the Government of Mexico" (id.), an action that could require the re-imposition of the import ban contained in 16 U.S.C.A. § 1371(a)(2). Elsewhere, Defenders request that the Interim-Final Rule "be set aside." Motion for Judgment, dated February 28, 2001, at 2. Even if the Court finds error with respect to any of the challenged administrative determinations, it should grant none of the requested relief.

While Defenders have filed several declarations in conjunction with its motion for judgment, none demonstrates that irreparable harm will occur in the absence of injunctive relief. In denying Defenders' motions for a temporary restraining order and preliminary injunction, the Court recognized that, "one way to show irreparable harm would be for Plaintiffs to provide evidence that this number [i.e., 5,000 dolphin mortalities] would be exceeded, or that a specific stock's assigned mortality limits would be exceeded." Defenders, 97 F. Supp.2d at 1200 n.6. No such evidence has

been produced.

In contrast, the Government is producing evidence that the granting of injunctive relief at this time would have adverse foreign policy consequences for the United States.

Earlier, the Government provided the Declaration of Frank E. Loy, then-Under Secretary for Global Affairs of the U.S. Department of State, and the Declaration and testimony of David A. Balton, Director of the Office of Marine Conservation, U.S. Department of State. The Court found that (1) both declarants were "highly competent to speculate on the effects continuing the embargo might have"; (2) the evidence presented by the declarants demonstrated "that if the embargo remains in place, the international agreement will likely fall apart, leaving the dolphins in the EPO [ETP] with no protection"; and (3) the Balton declaration presented "particularly compelling evidence of the delicate state of the International Program." Defenders, 97 F. Supp.2d at 1201 & 1201 n.8.

The Government now provides the Declaration of Alan P. Larson.⁷ Mr. Larson is the Under Secretary for Economic,

⁷ **This declaration is provided solely for determining what relief, if any, should be granted in the event that the Court finds error in the challenged administrative determinations. The declaration is not provided for purposes of defending any aspect of the challenged determinations.**

Business and Agricultural Affairs of the U.S. Department of State. Larson Declaration at ¶ 1 (Def. App. 5). He has principal responsibility, among other functions, for managing the use of trade restrictive measures, including import prohibitions, to advance the foreign policy objectives of the United States. Id.

Mr. Larson states that he is familiar with the declarations of Messrs. Loy and Balton (id. at ¶ 2) and that "the granting of the relief sought by the plaintiffs at this stage of the litigation could result in the same serious adverse consequences for the foreign policy of the United States set forth in the Loy and Balton Declarations" (id. at ¶ 8). Stated differently, the foreign policy concerns identified by Messrs. Loy and Balton in April, 2000 still exist today.

As a result, in the event that the Court grants any aspect of Defenders' motion for judgment upon the agency record, it should remand the matter to either Commerce or State for reconsideration in accordance with the Court's opinion. However, while the remand is in progress - and while the Court subsequently considers the results of the remand - the Interim-Final Rule and the Affirmative Finding for the Government of Mexico should remain in effect.

V. CONCLUSION

For these reasons, the Court should (1) sustain the Interim-Final Rule, the EA prepared by NMFS for purposes of the Interim-Final Rule, and the Affirmative Finding prepared by NMFS with respect to the Government of Mexico; and (2) dismiss this action.

Respectfully submitted,

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April 27, 2001

CERTIFICATE OF SERVICE

I hereby declare that on the 27th day of April, 2001, I caused to be served copies of "DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' RULE 56.1 MOTION FOR JUDGMENT UPON THE AGENCY RECORD" in the following manner addressed as follows:

By Hand-Delivery

William J. Snape, III
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Lucius B. Lau

CERTIFICATE OF COMPLIANCE WITH
THE COURT'S ORDER OF APRIL 9, 2001

I hereby declare that "DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' RULE 56.1 MOTION FOR JUDGMENT UPON THE AGENCY RECORD" contains 19,512 words (excluding tables of contents and authorities, appendices and other such additions), utilizing the word count feature of the WordPerfect 9 word processing system, thus complying with the 19,562 word limitation specified in the Court's order of April 9, 2001.

Lucius B. Lau

