

A Hole in the Net:

Errors in Statutory Interpretation Undermine Efforts to Reduce Dolphin Mortality in *Defenders of Wildlife v.* *Hogarth*

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*Defenders of Wildlife v. Hogarth*¹ illustrates the conflict over domestic and international efforts to address dolphin mortalities associated with the Eastern Pacific tuna fishery. In upholding a rule promulgated by the National Marine Fisheries Service (NMFS), the court effectively contravened the International Dolphin Conservation Program Act (IDCPA), a duly enacted Congressional statute. As a dissenting judge stated, this holding “permits a new form of uneasy and illegitimate partnership between Congress and executive agencies that has previously been rejected by the United States Supreme Court.”² An analysis reveals that the decision does not follow canons of traditional statutory interpretation or the Supremacy Clause. The effects of this decision are to allow agency interpretations to trump their enabling statutes and to weaken the domestic dolphin protection regime.

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1. *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358 (Fed. Cir. 2003).

2. *Defenders of Wildlife v. Hogarth*, 344 F.3d 1333, 1335 (Fed. Cir. 2003) (petition for rehearing en banc) (Gajarsa, J., dissenting).

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INTRODUCTION

For the last thirty years, the United States government has spearheaded the movement to reduce dolphin mortalities associated with the Eastern Pacific tuna fishery. The United States first implemented domestic measures, such as the 1972 Marine Mammal Protection Act (MMPA)³ and its amendments, in response to public fury that the use of purse seine nets has had devastating effects on dolphin populations, reducing the eastern spinner dolphin by eighty percent and off-shore spotted dolphin populations by half.⁴ In the last twelve years, the United States has worked to bring other countries on board, eventually creating

3. 16 U.S.C. § 1361-1407, Pub. L. No. 92-522, 86 Stat. 1027 (1972).

4. Dick Russell, *Tuna-Dolphin Wars*, DEFENDERS MAGAZINE (2002), available at <http://www.defenders.org/defendersmag/issues/summer02/tunadolphin.html> [hereinafter Russell, DEFENDERS MAGAZINE].

the International Dolphin Conservation Program in 1998.⁵ The success of efforts to curtail dolphin mortality has been due in no small part to the United States' ability to respond to public opinion by enacting and amending legislation, and to influence the practices of foreign fleets by restricting access to its domestic tuna market.

These efforts have succeeded in reducing dolphin mortality from an estimated 368,600 dolphins killed in 1972 by U.S. vessels alone to approximately 2,000 dolphins killed each year since 1998.⁶ However, the tuna fishery still causes a number of needless dolphin deaths, particularly when fishing in low light levels, such as those found around sunset.⁷ The low light prevents the fishermen from properly maneuvering the nets to allow the dolphins to escape, and may also impair the dolphins' ability to find their way out of the nets. Therefore, both domestic and international agreements provide for a limit on when fishermen can set the nets. The problem is that these sundown provisions differ as to whether the limit is a half-hour before sunset or a half-hour after sunset.

In *Defenders of Wildlife v. Hogarth*, a group of environmental organizations and individuals sued the National Marine Fisheries Service (NMFS) for deviating from Congress's sundown prohibition contained in the International Dolphin Conservation Program Act (IDCPA).⁸ The IDCPA mandates that fishing nets be removed from the water a half hour *before* sundown.⁹ However, NMFS's Interim Final Rule directly contradicts the IDCPA by providing that backdown must be completed a half hour *after* sundown. The Court of International Trade ruled in favor of NMFS, explaining that the sundown prohibition in the IDCPA was a Congressional drafting error. On appeal, the Federal Circuit ruled that the plain meaning of the IDCPA prohibition was not a mistake and could not be any clearer. Nevertheless, it also ruled in favor of NMFS on the grounds that another subsection of the statute, the adjustment provision, allowed the agency to make "adjustments as may be appropriate," including changing the IDCPA to allow post-sundown sets.

This note argues that the court failed to follow established canons of statutory interpretation and the Constitution in upholding the NMFS rule. Part I explores the problems of purse seine fishing and dolphin mortality, and the domestic and international attempts to address these

5. Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean, 33 I.L.M. 935 (1994).

6. Inter-American Tropical Tuna Commission, *AIDCP Dolphin Safe*, at <http://www.iattc.org/DolphinSafeENG.htm> (last visited June 22, 2004). See also Russell, DEFENDERS MAGAZINE, *supra* note 4.

7. See *infra* text accompanying notes 18-23 and 32-33.

8. *Defenders of Wildlife v. Hogarth*, 177 F. Supp. 2d 1336 (Ct. Int'l. Trade 2001), *aff'd*, 330 F.3d 1358 (Fed. Cir. 2003), *cert. denied*, 124 S.Ct. 2093 (U.S. 2004).

9. International Dolphin Conservation Protection Act (IDCPA), 54 U.S.C. § 1413(a)(2)(B)(v) (2000).

problems. Part II presents the decisions by the Court of International Trade and the Federal Circuit to uphold the NMFS sundown rule. Finally, Part III analyzes the Federal Circuit decision and its impact both on dolphin mortality and the power of agencies to overrule Congressional acts. The Federal Circuit misapplied statutory construction doctrine in at least three ways: (a) by failing to follow the clear, plain text meaning of the statute; (b) by failing to evaluate the rule on the justification that NMFS originally provided (in accord with the *Chenery Doctrine*); and (c) by failing to apply a reasonable agency interpretation to the statute. Furthermore, the decision, by allowing an executive agreement and an agency decision to trump a Congressional mandate, is contrary to the Supremacy Clause and the separation of powers principles in the Constitution. As a result, the opinion improperly relaxes the level of dolphin protection afforded by Congress in the IDCPA and will consequently result in increased dolphin mortalities. It sets a precedent for allowing agency regulations to change the language of their enabling statutes, rendering futile the congressional debate and compromise underlying the language of the statute. Finally, the decision puts the United States in a race to the bottom with other countries with respect to the way it deals with dolphin-safe tuna.

I. DOLPHIN MORTALITY IN THE TUNA FISHERY

A. Purse Seine Net Tuna Fishing

Spanning more than seven million square miles of ocean, the Eastern Tropical Pacific Ocean (ETP) runs from the coasts of Chile through California,¹⁰ and out into the high seas (more than 200 nautical miles off the coast) to 160 degrees West longitude, making the ETP roughly the size of the continental United States.¹¹ One quarter of the world's tuna catch occurs in the ETP,¹² of which yellowfin tuna is the most economically significant.¹³

Though the biological association between dolphins and yellowfin tuna is still not fully understood, fishermen discovered in the 1950s that yellowfin tuna aggregate beneath schools of dolphins.¹⁴ As mammals,

10. Michael L. Gosliner, *The Tuna-Dolphin Controversy*, in CONSERVATION AND MANAGEMENT OF MARINE MAMMALS 120 (John R. Twiss Jr. & Randall R. Reeves eds., 1999).

11. Brief for Plaintiffs-Appellants at 5, *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358 (Fed. Cir. 2003) (No. 02-1224).

12. James Joseph, *The Tuna-Dolphin Controversy in the Eastern Pacific Ocean: Biological, Economic, and Political Impacts*, 25 OCEAN DEV. AND INT'L L. 1 (1994).

13. *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358, 1360 (Fed. Cir. 2003).

14. National Oceanic and Atmospheric Administration, *Dolphin Interactions with the Eastern Tropical Tuna Purse Seine Fishery (Tuna/Dolphin Program)*, available at http://www.nmfs.noaa.gov/prot_res/PR2/Tuna_Dolphin/tunadolphin.html (last visited Oct. 10,

dolphins must come up to the surface of the water to breathe every several minutes, making them easy to find from above water. Once fishermen recognized this tuna-dolphin synergy, they developed a method of fishing using purse seine nets to encircle the dolphins and catch the tuna swimming underneath them.¹⁵

Purse seine fishing involves using motorboats, explosives, and helicopters to chase a dolphin pod for extended periods of time until the animals are exhausted and can be herded into a tight group.¹⁶ A purse seine boat then surrounds the dolphins with a net, driving around the pod with one end while a skiff holds the other end stationary.¹⁷ Then the net's bottom is cinched, or "pursed" together, to trap the tuna that swim below.¹⁸ If the dolphins become entangled in the net or do not leave the net before the net is pursed, they can asphyxiate and drown.¹⁹ Additional unreported dolphin mortalities result from the stress effects of muscle damage, disruption of the reproduction cycles of female dolphins, and cow-calf separation.²⁰

The development of purse seine net tuna fishing resulted in nearly doubling a vessel's catch rate, and within several years, most tuna fishermen had converted to purse seining.²¹ Although it has enabled tuna fishermen to increase their catch, it has caused incidental dolphin mortalities in the range of five to seven million.²² In 1972, the estimated incidental kill of dolphins in the tuna purse seine fishery of the ETP by U.S. vessels alone was 368,600 dolphins.²³ Within a decade after purse seining was introduced, the population of eastern spinner dolphins had

2003). See also R.L. McNeely, *The Purse Seine Revolution in Tuna Fishing*, 59 PACIFIC FISHERMAN No. 7, at 27-58 (1961).

15. *Defenders*, 330 F.3d at 1360.

16. *Id.* at 1360-61.

17. Whale and Dolphin Conservation Society (WCDS), *Introduction to the Tuna/Dolphin Issue available at*

<http://www.wcds.org/dan/publishing.nsf/allweb/ADED9F368A73DC3280256E1B003F367C> (last visited May 1, 2004).

18. *Id.*; Gosliner, *supra* note 10, at 121.

19. Whale and Dolphin Conservation Society (WCDS), *supra* note 17.

20. MMPA, 16 U.S.C. § 1414(a) (2000).

21. Joseph, *supra* note 12, at 1. See also Gosliner, *supra* note 10, at 121 (stating that, of the bait boats operating in the fishery in 1959, more than half had been converted to purse seiners by 1961, and that the purse seine fleet continued to grow throughout the 1960s).

22. National Oceanic and Atmospheric Administration, *Dolphin Interactions with the Eastern Tropical Tuna Purse Seine Fishery (Tuna/Dolphin Program)*, available at http://www.nmfs.noaa.gov/prot_res/PR2/Tuna_Dolphin/tunadolpin.html (citing seven million) (last visited on June 22, 2004); Chris Hedley, *The 1998 Agreement on the International Dolphin Conservation Program: Recent Developments in the Tuna-Dolphin Controversy in the Eastern Pacific Ocean*, in 32 OCEAN DEV. & INT'L L. 71, 72 (2001) available at www.oceanlaw.net/hedley/pubs/32odil71.pdf (citing five million).

23. Gosliner, *supra* note 10, at 124 tbl. 6-1.

fallen by 80 percent and the offshore spotted dolphin population was cut in half.²⁴

B. Domestic & International Attempts to Reduce Dolphin Mortality Rates

The alarming levels of dolphin mortalities associated with the tuna fishery led to public outcry, which called for greater efforts to regulate the fishery. In 1972, Congress passed the Marine Mammal Protection Act (MMPA), in part, to address dolphin mortalities associated with the tuna fishery.²⁵ The principal method of achieving this goal was to establish a moratorium, subject to limited exceptions,²⁶ on the taking of marine mammals.²⁷

The MMPA stated that it was "the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate."²⁸ The act also instituted a ban on "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."²⁹ The effects of the MMPA were dramatic. By 1976, dolphin mortality had dropped to one third of pre-1972 levels.³⁰

Fishermen were able to reduce the mortality rate with the development of a "backdown" procedure that allowed the dolphins to escape over the net.³¹ Toward the end of the set, most of the net is hauled back on board, and the captain puts the boat into reverse. As the slack of the net eases, a special panel of fine webbing that is designed not to snag the dolphins drops below the water line, allowing the dolphins to escape into the open ocean.³²

24. Russell, DEFENDERS MAGAZINE, *supra* note 4.

25. Pub. L. No. 92-522, 86 Stat. 1027 (1972) (codified as amended at 16 U.S.C. §§ 1361-1407(2000)).

26. The two exceptions to the moratorium applied to dolphin species that were not endangered and allowed 1) taking for subsistence or traditional purposes by Alaskan Native (§ 1371(b)(1)), and 2) incidental captures during commercial fishing operations. § 1371(a)(2). See also Joseph, *supra* note 12, at 2.

27. Joseph, *supra* note 12, at 2.

28. *Id.*

29. *Id.*

30. Hedley, *supra* note 22, at 73; Gosliner, *supra* note 10, at 124 tbl. 6-1 (showing that estimated incidental dolphin kills in 1976 had dropped to 108,740 dolphins from 368,600 dolphins in 1972).

31. Gosliner, *supra* note 10, at 121.

32. Russell, DEFENDERS MAGAZINE, *supra* note 4.

These procedures are not always successful in freeing the dolphins, especially at sunset. The low light and glare at sundown impedes the ability of the dolphins to find their way out. These dolphins suffocate under water after becoming trapped under the net. Other dolphins suffer broken beaks or have pectoral fins torn from their sockets, causing them to die soon after.³³ The low light at sunset also makes it difficult for the fishermen to avoid trapping the dolphins while operating the boats and gear.³⁴

Congress later promulgated stricter measures on dolphin-associated fishing under the 1988 MMPA amendments.³⁵ These amendments prohibited setting nets after sundown, as research had shown that dolphin mortality increases considerably when nets are set late in the day.³⁶ The amendments also required the use of backdown procedures, the use of rescue rafts and other means to rescue dolphins from the net by hand, and the use of observers on vessels with a capacity of more than 400 short tons.³⁷ Furthermore, in response to consumer boycotts,³⁸ Congress passed the Dolphin Protection Consumer Information Act ("DPCIA") in 1990 which labeled cans of tuna as "dolphin-safe" if the tuna were caught without intentionally deploying nets around dolphins.³⁹

Despite the reduction in dolphin mortality levels among U.S. vessels, concerns arose that harmful fishing practices of the growing international

33. *Id.* Sundown sets can entangle, injure, and kill an entire community of 500-2,000 dolphins. *See id.*

34. *Id.* A book by the National Research Council's Commission on Life Sciences reported that "usually, this elevated mortality is blamed on the increased difficulty of net handling and of carrying out seamanship in low light levels. However, the dolphins in the net may experience even greater difficulties than the fisherman. At dusk their ability to avoid entrapment or assist in their own release may be severely reduced, because the reduction in illumination beneath the sea surface at dusk is much more profound than in air (100 times or more). Commission on Life Sciences, Dolphins and the Tuna Industry 88, (National Academy Press 1992), available at <http://books.nap.edu/books/0309047358/html/88.html#pagetop>.

35. The MMPA was amended, *inter alia*, in 1976 (through Public Law 94-265), 1981 (Public Law 97-58), 1984 (Public Law 98-364), 1988 (Public Law 100-711), 1990, (101-627), and 1994 (Public Law 103-238). Hedley, *supra* note 22, at n.13.

36. Hedley, *supra* note 22, at 73 (citing 16 U.S.C. §1371 et seq. (1988); Pub. L. No. 100-711); Gosliner, *supra* note 10, at 136.

37. Hedley, *supra* note 22, at 73 (citing the MMPA amendments of 1988).

38. After a national consumer boycott of tuna prompted this legislation, the three largest U.S. tuna canners—StarKist, Chicken of the Sea, and Bumble Bee—announced that they would not purchase tuna caught in association with dolphins. Dick Russell, *Tuna-Dolphin Wars*, MARINE CONNECTION, July 17, 2002, at http://www.marineconnection.org/archives/bycatch/bycatch_tuna_dolphin_wars.htm [hereinafter Russell, MARINE CONNECTION].

39. Dolphin Protection Consumer Information Act § 901, Pub. L. No. 101-627, 104 Stat. 4465 (codified as amended at 16 U.S.C. § 1385 (2000)). "Dolphin-Safe" was defined as a product made from tuna harvested by a fishing vessel that the Secretary of Commerce had determined incapable of deploying its purse seine nets on dolphins, whose owner or manager had a written statement that there was an approved observer on board the vessel during the entire trip in question, and whose net was not intentionally deployed on or around dolphins. § 1385(d)(2).

fleet were negating the U.S. fleet's marine mammal conservation efforts.⁴⁰ Dolphin mortality caused by non-U.S. vessels was still high – estimated at more than 100,000 in 1986.⁴¹ In response, the 1988 MMPA amendments required tuna-exporting states to use standards comparable or equivalent to the standards required of U.S. vessels under the act.⁴² Prompted by litigation in domestic courts, the United States imposed a series of primary and secondary embargos on more than 20 countries after the 1988 amendments were passed.⁴³ Although Mexico and the European Union challenged these embargoes, and a GATT panel ruled that the U.S. action violated GATT standards, the GATT council never adopted the rulings.⁴⁴ The embargoes and the GATT challenges served as an impetus for tuna-importing countries to arrive at a consensus to voluntarily protect dolphins through international agreements.

In 1992, the countries involved in tuna fishing in the ETP met in La Jolla, California, and adopted a voluntary non-binding agreement known as the "La Jolla Agreement."⁴⁵ This agreement created the International Dolphin Conservation Program (IDCP) and established a dolphin mortality reduction schedule.⁴⁶ The program was successful, achieving its final year target of fewer than 5,000 dolphin deaths in its first year.⁴⁷ In

40. Gosliner, *supra* note 10, at 139; Hedley, *supra* note 22, at 73.

41. *Id.* (reporting dolphin mortality level of 133,000); Gosliner, *supra* note 10, at 124 tbl. 6-1 (reporting dolphin mortality level of 112,482).

42. Hedley, *supra* note 22, at 73; Joseph, *supra* note 12, at 6; Gosliner, *supra* note 10, at 142-43. The state had to prove 1) that it has a regulatory program governing the taking of marine mammals in the fishery that is comparable to the US program, and 2) average rate of incidental mortality in that nation's fleet was not more than 1.25 times the U.S. rate. Joseph, *supra* note 12, at 6.

43. Joseph, *supra* note 12, at 7. These embargos were mostly a result of litigation by environmental organizations in American courts. *Id.*; see also text accompanying *infra* note 153.

44. Prompted by litigation by the environmental group Earth Island Institute, the United States imposed an embargo against Mexico and other nations that did not adhere to US standards, causing Mexico to protest the decision in front of a dispute settlement panel of the General Agreement on Trade and Tariffs (GATT). H.R. REP. NO. 105-74, pt. 1, at 13 (1997), reprinted in 1997 U.S.C.C.A.N. 1628, 1631; Gosliner, *supra* note 10, at 144; Russell, MARINE CONNECTION, *supra* note 38. The GATT panel ruled in 1991 that the US action violated GATT standards, however the GATT Council did not adopt the decision. Gosliner, *supra* note 10, at 144-45; Brief for Defendants-Appellees at 6, *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358 (Fed. Cir. 2003) (No. 02-1224); Russell, MARINE CONNECTION, *supra* note 38. In 1993, the European Union also filed a GATT challenge relating to the tuna embargo. Again, the GATT panel ruled against the U.S. but the decision was not adopted by the GATT Council. Brief for Defendants-Appellees at 6, *Defenders*, (No. 02-1224).

45. Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean, 33 I.L.M. 935 (1994) [hereinafter La Jolla Agreement]. Signatories were Colombia, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Spain, United States, Vanuatu, and Venezuela. Hedley, *supra* note 22, at 88 n.36.

46. Hedley, *supra* note 22, at 88 n.3. See also 65 Fed. Reg. 30 (Jan. 3, 2000).

47. Hedley, *supra* note 22, at 75 (also providing a table of dolphin mortality estimates between 1979 to 1999).

1995, many of the same countries negotiated the Panama Declaration,⁴⁸ in which the United States agreed to modify its embargo legislation and dolphin-safe labeling legislation in exchange for converting the La Jolla Agreement into a legally binding instrument.⁴⁹ The Panama Declaration sought to progressively reduce dolphin mortality to levels approaching zero by eliminating dolphin mortality in the fishery, and seeking more ecologically sound means of capturing yellow-fin tuna.⁵⁰ Notably, neither agreement contained a sundown provision, as had been found in the 1988 MMPA Amendments.

Congress, however, did insert a sundown provision in the law that implemented the Panama Declaration—the International Dolphin Conservation Program Act (IDCPA). The Panama Declaration was not self-executing, meaning that its provisions could not become legally binding until Congress implemented them through domestic legislation.⁵¹ Congress enacted the IDCPA in 1997,⁵² 1) to give effect to the Panama Declaration and establish the International Dolphin Conservation Program; 2) to recognize the significant accomplishments by tuna-fishing countries in the ETP to reduce dolphin mortalities; and 3) to eliminate the ban on tuna imports from countries that comply with the IDCP.⁵³ The IDCPA also included language on reducing bycatch that was stricter than that included in the Panama Declaration.⁵⁴ Of special importance is the

48. Reproduced in Inter-American Tropical Tuna Commission (IATTC), Minutes of the 30th Intergovernmental Meeting on the Conservation of Tunas and Dolphins in the Eastern Pacific Ocean, Panama City, Panama, 1995, available at www.oceanlaw.net/texts/panama.htm. The Panama Declaration was signed by twelve countries—Belize, Columbia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, United States of America, Vanuatu and Venezuela.

49. *Id.* app. I.

50. *Id.* See also Brief for Plaintiffs-Appellants at 10, *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358 (Fed. Cir. 2003) (No. 02-1224).

51. *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358, 1362 (Fed. Cir. 2003).

52. Pub. L. No. 105-42 (codified as amended at 16 U.S.C. §§ 1361-1421 (2000)).

53. § (2)(a) (codified in the notes to 16 U.S.C. § 1361). The IDCPA directs the Secretary to issue regulations to implement the Panama Declaration. 16 U.S.C. § 1413(a). It amends the MMPA and the Dolphin Protection Consumer Information Act. § 1385. The IDCPA allows a nation to import tuna into the U.S. if it provides documentary evidence that 1) it participates in the IDCP and is a member of the IATTC; 2) it meets its obligations under the IDCP; and 3) it does not exceed specified dolphin mortality limits. *Defenders*, 330 F.3d at 1362 (citing 16 U.S.C. § 1371(a)(2)(B) (2000)).

54. Russell, MARINE CONNECTION, *supra* note 38. This was a result of concern in Congress that the chase and encirclement techniques involved in purse seine fishing were having physiological stress effects that were impeding the recovery of the dolphin populations. Hedley, *supra* note 22, at 76. In spite of the decreased mortality rates, three dolphin stocks – the Northeastern offshore spotted dolphin, Eastern Spinner dolphin, and the coastal spotted dolphin – continued to be classified as depleted under the MMPA. Hedley, *supra* note 22, at 88 n.42 (citing T. Gerrodette, *Preliminary Estimates of 1998 Abundance of Four Dolphin Stocks in the Eastern Tropical Pacific*, Southwest Fisheries Science Centre Administrative Report LJ-99-04 (La Jolla: NMFS, 1999); and NMFS, *Fact Sheet on the Status of Depleted Dolphin Stocks in the Eastern Tropical Pacific Ocean*, www.nmfs.noaa.gov/prot_res/

sundown prohibition of the IDCPA, in which Congress instructed the Secretary to ensure that backdown procedures during sets of purse seine net on dolphins are completed no later than thirty minutes *before* sundown.⁵⁵

In 1999, the United States signed the Agreement on the International Dolphin Conservation Program ("International Agreement"), which bound the United States to implement the IDCP as created by the Panama Declaration.⁵⁶ The objectives of the International Agreement were: 1) to progressively reduce incidental dolphin mortalities in the tuna purse seine fishery to levels approaching zero; 2) to seek ecologically sound means of capturing large yellowfin tuna without harming dolphins; and 3) to ensure the long-term sustainability of the tuna stocks in the agreement area.⁵⁷ The International Agreement reopened the U.S. market to foreign fishing states by relaxing the embargos and redefining the "dolphin-safe" labeling requirements.⁵⁸ Furthermore, in its Annex describing operational requirements for vessels, the International Agreement specified that fishermen complete backdown procedures no later than thirty minutes *after* sunset.⁵⁹

C. *The Interim Final Rule*

Defenders of Wildlife v. Hogarth addresses backdown procedures required by NMFS in its Interim Final Rule implementing the IDCPA.⁶⁰ The rule's sundown provisions instruct that "[o]n every set encircling the dolphin, the backdown procedure must be completed no later than one-half hour *after* sundown."⁶¹ This is consistent with the 1988 MMPA Amendments and the International Agreement. However, the IDCPA statute, which the rule was designed to implement, states that regulations issued under the statute shall ensure that "the backdown procedure

PR2/Conservation_and_Recovery_Program/listedmms.html.

55. 16 U.S.C. § 1413(a)(2)(B)(v) (2000).

56. Agreement on the International Dolphin Conservation Program, State Dept. no. 99-42, 1999 WL 230818, Feb. 15, 1999, Agreement on the International Dolphin Conservation Program, State Dept. no. 99-42, 1999 WL 230818, February 15, 1999, Annex VIII.3.e (hereinafter International Agreement).

57. *Id.* See also Hedley, *supra* note 22, at 76-77.

58. Hedley, *supra* note 22, at 83.

59. International Agreement, *supra* note 57, at Annex VIII.3.e.

60. *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358, 1363 (Fed. Cir. 2003); 16 U.S.C. § 1413 (2000); 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"). The Administrative Procedures Act (APA) notice and comment provisions require federal agencies to publish a general notice of proposed rule making and give the public an opportunity to comment. See 5 U.S.C. § 553(b)-(c). An interim final rule, then is a draft of the language of the final rule that the agency intends to publish, once it has complied with the APA's notice and comment requirements.

61. 50 C.F.R. § 216.24(c)(6)(iii), 65 Fed. Reg. at 51 (Jan. 3, 2000) (emphasis added).

during sets of purse seine net fishing on marine mammals is completed and rolling of the net to sack up has begun no later than 30 minutes before sundown.”⁶² The difference between Congress’s law and the NMFS rule to implement that law prompted several environmental organizations to challenge the rule in *Defenders of Wildlife v. Hogarth*.

II. DEFENDERS OF WILDLIFE V. HOGARTH

A. Decision of the Court of International Trade

In 2001, Defenders of Wildlife and various other environmental organizations and individuals⁶³ filed suit in the Court of International Trade (CIT) challenging the NMFS rule.⁶⁴ They argued that the sundown provision of the rule violated the IDCPA.⁶⁵ The court concluded that the provision in the IDCPA was a clerical mistake, and upheld the rule.

The court concluded that external sources indicated “that Congress intended to use the word ‘after,’ rather than ‘before,’ to establish the cut-off period for sundown sets.”⁶⁶ It did not place much importance on the plain language of the statute and instead, immediately jumped to an analysis of congressional intent. Looking to prior legislation from the 25-year dolphin protection legislative scheme, the court explained that “Congressional intent is paramount; therefore, a court may disregard obvious mistakes, interpreting the statute so as to correct such mistakes.”⁶⁷ The court went so far as to say that an after-sunset backdown rule made more practical sense than a before-sunset rule, reasoning that it would be much easier for fishermen to determine an “easily observable

62. 16 U.S.C. § 1413(a)(2)(B) (emphasis added) [hereinafter sundown prohibition].

63. Plaintiffs were Defenders of Wildlife, Earth Island Institute, Humane Society of the United States, Environmental Solutions International, Animal Welfare Institute, International Wildlife Coalition, American Humane Association, Earthtrust, Greenpeace Foundation, Animal Fund, American Society for the Prevention of Cruelty to Animals, David Brower, Samuel Labudde, Craig Van Note and the Sierra Club.

64. *Defenders of Wildlife v. Hogarth*, 177 F. Supp. 2d 1336 (Ct. Int’l. Trade 2001).

65. *Id.* at 1338. Plaintiffs also brought claims alleging that the Environmental Assessment prepared by the defendants violated the National Environmental Policy Act (NEPA) and that the affirmative finding rendered by the U.S. Department of Commerce, which lifted the United States’ ten year tuna embargo against Mexico, violated the International Dolphin Conservation Program Act (IDCPA) and NEPA. *Id.* As to the plaintiffs’ NEPA claim, the CIT ruled that Commerce’s decision not to prepare an Environmental Impact Statement does not violate NEPA. *Id.* As to the plaintiffs’ claim that the Secretary’s affirmative findings regarding Mexican tuna imports were flawed, the CIT disagreed. *Id.* at 1368-69.

66. *Id.* at 1346.

67. *Id.* at 1345-46 (citing a 1988 statement by the Committee on Merchant Marine and Fisheries, H.R. Rep. No. 100-970, at 31 (1988); 1988 IDCPA Amendments, Pub. L. No. 100-711, § 4, 102 Stat. 4755, 4767 (1988); Annex VIII to the International Agreement on the IDCP, Annex VIII.3.e.

phenomenon like sundown itself” than to anticipate ahead of time when sundown will occur.⁶⁸

The court found that the provision instructing that backdown sets be completed one half hour *after* sunset was legal,⁶⁹ specifying that “[a]lthough the language of the regulation does appear to conflict with the express statutory language regarding sundown sets, it does not conflict with the intent of Congress.”⁷⁰ The court acknowledged that in order to arrive at this decision, it went beyond the text of the statute to resolve the apparent conflict between the statute and the language in the enabling regulation.

To justify this decision, the court pointed out that the case at hand was unique for two reasons. First, it noted that “the IDCPA is a culmination of a quarter-century of legislative and administrative action, not legislation written on a blank slate.”⁷¹ Second, the court pointed out that in this case, the “traditional chronological order” of an International Agreement and its implementing legislation was inverted, and that the IDCPA gave authority to the executive branch to issue regulations enabling the negotiated agreement “*without returning to Congress* for authorization.” This implied that the court must look beyond the text of the earlier statute to the various statutory revisions, legislative histories, international agreements, diplomatic declarations and the historical practices of the fishing industry in the ETP” to determine Congressional intent.⁷²

Hence, the court concluded that NMFS’s after-sundown rule was actually consistent with Congressional intent and that the clear language of the IDCPA’s sundown prohibition in fact contained a drafting error.⁷³ The court shifted the burden of proof to the plaintiffs to prove that the wording of the IDCPA statute actually contained the “true expression of Congress’ intent,” (as evidenced by the legislative history and the Interim Final Rule) stating that “Defenders [of Wildlife] do not convince the court that Congress’s use of the word ‘before’ is a true expression of the Congress’s intent; therefore, the Interim Final Rule is not contrary to law.”⁷⁴

68. 177 F. Supp. 2d at 1346.

69. *Id.* at 1344.

70. *Id.* at 1345.

71. *Id.* at 1344-45.

72. *Id.* at 1345.

73. *Id.* at 1346; *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358, 1365 (Fed. Cir. 2003).

74. 177 F. Supp. 2d at 1346.

B. The Federal Circuit Decision

On appeal, the Federal Circuit disagreed with the CIT's reasoning, but upheld the after-sundown rule of the NMFS rule on other grounds.⁷⁵ The plaintiffs maintained that the after-sundown rule was not in accordance with the IDCPA and that the agency rule frustrated the intent of Congress to achieve dolphin protection, a goal furthered by the plain language of the statute.⁷⁶ The government maintained its position that the use of the word "before" in the IDCPA was an inadvertent drafting mistake that should be corrected by the court.⁷⁷ In addition to its drafting mistake argument, NMFS also provided a new argument, that the IDCPA authorized the Secretary of Commerce to adjust the requirements of the statute as appropriate and consistent with the statute.⁷⁸ The court ultimately affirmed the CIT's ruling based on this new ground. Notably, it did not defer to Congress to repair what the court perceived as a discrepancy.

Instead, the appellate court held that the word "before" in the sundown prohibition of the IDCPA was *not* a clear drafting mistake.⁷⁹ Correctly drawing upon canons of statutory interpretation, the court first looked to the text of the statute to see if Congress had "directly spoken to the precise question at issue."⁸⁰ The court determined that the IDCPA "could not be clearer in its use of the term 'before,'" and that the language in this case represented a clear statement of congressional intent.⁸¹ Holding that doctrine of mistake cases usually contain mistakes that are clear from the text of the statute, the court stated that "it is not clear from the face of the IDCPA...that the word 'before' is a drafting error."⁸² It stated that the reliance by the government and the CIT on Congress's prior use of the word "after" in legislative history ignores the fact that Congress may change the meaning of a statute from past provisions and imports no additional information regarding whether Congress's recent use of the word "before" was intentional or not.⁸³ The court concluded that the IDCPA clearly requires backdown procedures to be completed one-half hour before sunset.⁸⁴

75. 330 F.3d at 1367-68.

76. Brief for Plaintiffs-Appellants at 22, *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358, 1365 (Fed. Cir. 2003) (No. 02-1224); *Defenders*, 330 F.3d at 1365.

77. *Defenders*, 330 F.3d at 1366.

78. *Id.*

79. *Id.*

80. *Id.* (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)).

81. *Id.*

82. *Id.*

83. *Id.* at 1367.

84. *Id.*

Next, the court looked to the Government's new, alternative argument that § 1413(a)(2)(C) (the "adjustment provision") of the IDCPA allows the Secretary of Commerce to make "adjustments as may be appropriate to requirements . . . that pertain to . . . fishing practices to the extent the adjustments are consistent with the International Dolphin Conservation Program."⁸⁵ Drawing upon this provision, the Defendants argued that the IDCPA authorized the Secretary of Commerce, through NMFS, to alter the sundown prohibition in the Interim Final Rule.⁸⁶ The court agreed, reasoning that the NMFS had the authority to alter the period for backdown procedures because this pertains to fishing practices.⁸⁷ The court further reasoned that the Interim Final Rule was supposed to be drafted in a manner consistent with the International Dolphin Conservation Program (IDCP), and that since the International Agreement on the IDCP (drafted subsequent to the IDCPA) contained an after-sunset rule, the Interim Final Rule's after-sunset rule was in accordance with the law.⁸⁸

In her dissent, Judge Newman argued that it was inappropriate to allow the Interim Final Rule to contradict congressional mandate.⁸⁹ Newman further argued that the adjustment provision does not authorize the Secretary to change the sundown prohibition.⁹⁰ In making this argument, first, Newman distinguished between "adjustments" and contradictions of a critical provision of the statute, the Interim Final Rule falling into the latter category.⁹¹ Furthermore, Judge Newman noted that the intent of Congress was unambiguously clear, and that the time to complete the backdown procedure was not left to agency discretion or interpretation, but rather was explicitly provided for in the statute.⁹² Finally, the dissent pointed out that the court's reliance on the adjustment provision violates the *Chenery* doctrine, since the agency did not originally base its decision on this ground.⁹³ The *Chenery* doctrine states that if the agency's grounds are improper, the court cannot affirm the administrative action by substituting other grounds.⁹⁴

85. *Id.* (citing 16 U.S.C. § 1413(a)(2)(C)).

86. *Id.*

87. *Id.* at 1368.

88. *Id.*

89. *Id.* at 1375 (Newman, J., dissenting).

90. *Id.*

91. *Id.* at 1376.

92. *Id.*

93. *Id.* (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

94. *Id.* Judge Newman wrote, "this court is not free to affirm a discretionary agency action on grounds upon which the agency did not rely. . . . Since the Secretary's decision was based on the erroneous conclusion that Congress made a mistake, the court cannot rehabilitate the agency's action on some other ground." *Id.*

After the Federal Circuit ruling, Plaintiffs filed a petition for rehearing *en banc*, which was denied.⁹⁵ Judge Gajarsa, joined by Judge Newman, dissented in a separate opinion, stating that the majority opinion “erroneously permits the Secretary of Commerce to trump a duly enacted statute with a regulation.”⁹⁶ The dissent argued that the “supremacy of administrative over legislative authority is a concept foreign to the structure of our government...[and] is therefore unconstitutional.”⁹⁷ The plaintiffs’ petition for certiorari was later denied.⁹⁸

III. ANALYSIS

A. Critique of Statutory Interpretation of the Sundown Prohibition

Instead of following established canons of statutory interpretation, the Federal Circuit deviated in various ways from standard judiciary procedure and creatively interpreted the legal boundaries of the IDCPA to accommodate a drafting of the Interim Final Rule that directly contradicted it. First, the court’s statutory analysis should have ended once it found that the wording of the sundown prohibition was clear and evinced a plain meaning. Second, by embracing a new, alternative explanation presented to the appellate court for the agency’s Interim Final Rule—that the adjustment provision authorized the Secretary to make “adjustments as may be appropriate”—the court failed to follow the *Chenery* doctrine. Third, assuming, *arguendo*, that the *Chenery* doctrine permitted the court to consider the government’s new alternative argument, the court still stretched the meaning of “adjustments” and “appropriate” beyond their reasonable interpretations, allowing the IDCPA’s adjustment provision to trump other provisions of the statute. Fourth, in justifying the agency action on the basis of the adjustment provision, the court violated constitutional presentment requirements in that it permitted the Executive to rewrite legislation. Finally, the court violated the Supremacy Clause by allowing an executive agreement—the International Agreement on the IDCP, upon which the rationale for such an “adjustment” was deemed “appropriate”—to trump a duly enacted statute.

95. *Defenders of Wildlife v. Hogarth*, 344 F.3d 1333 (Fed. Cir. 2003) (petition for rehearing *en banc*).

96. *Id.* at 1334.

97. *Id.*

98. 124 S.Ct. 2093 (U.S. 2004).

1. *The IDCPA Sundown Prohibition Is Clear on Its Face, So Analysis Should Have Ended There*

In *Chevron*, the Supreme Court directed courts to apply a two-step analysis to determine their level of deference to agency decisions.⁹⁹ First, the court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."¹⁰⁰ If the statute is silent or ambiguous with respect to a specific issue, only then may the court move to the second step and defer to the agency's interpretation, as long as it is reasonable.¹⁰¹

The Supreme Court has stated, "[a]s in any case of statutory construction, our analysis begins with 'the language of the statute.' Where the statutory language provides a clear answer, it ends there as well."¹⁰² Since the sundown prohibition of the IDCPA is clear on its face, the court's analysis should have ended with the language of the statute. Essentially, *Defenders of Wildlife v. Hogarth* ought to have turned on a *Chevron* 'step one' analysis.

The only exception to following the plain text meaning of the statute is if it leads to an absurd result or is a scrivener's error.¹⁰³ Although the CIT held that the after-sundown rule was a drafting mistake,¹⁰⁴ on appeal, the Federal Circuit court held that the language of the IDCPA neither contained a drafting mistake nor led to an absurd result, stating that the wording represented the clear intent of Congress.¹⁰⁵ Given this recognition, there was no need for the Federal Circuit to move on to the second step of the *Chevron* analysis to determine the reasonableness of NMFS's after-sundown prohibition or to scour the rest of the statute in

99. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

100. *Id.*

101. *Id.* at 843.

102. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)); *Chevron*, 467 U.S. at 843 n.9 (stating "the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.") (citing *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981); *SEC v. Sloan*, 436 U.S. 103, 117-118 (1978); *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-746 (1973); *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968); *NLRB v. Brown*, 380 U.S. 278, 291 (1965); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946); *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16 (1932); *Webster v. Luther*, 163 U.S. 331, 342 (1896)).

103. WILLIAM N. ESKRIDGE, JR., ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* app.B 19 (3d ed. 2001).

104. *Defenders of Wildlife v. Hogarth*, 177 F. Supp. 2d 1336, 1346 (Ct. Int'l. Trade 2001).

105. *Defenders*, 330 F.3d at 1366 (distinguishing *Bohac v. Dep't of Agric.*, 239 F.3d 1334 (Fed. Cir. 2001), in which the plain language of the statute made clear that the word "changes" had erroneously been recorded in place of the word "damages").

order to find a section that might allow the contradictory language of the Interim Final Rule's sundown prohibition to stand.

2. *The Federal Circuit Erroneously Based its Holding on the Adjustment Provision and Failed to Follow the Chenery Doctrine*

By relying on the adjustment provision, the court violated the *Chenery* Doctrine.¹⁰⁶ This doctrine restricts the grounds on which the court may uphold the Interim Final Rule to those grounds originally used by NMFS in promulgating the rule. The doctrine prevents courts from blocking proper delegation of congressional power by 1) placing special importance on the agency's justification of its action by requiring it in the first instance to explain its actions; 2) preventing the courts from invading the agency function; and 3) disregarding the creative legal arguments made in court that might retroactively justify the agency action.¹⁰⁷ Instead, the court found a new basis, the adjustment provision, on which to uphold the rule, violating the *Chenery* Doctrine.

First, the Federal Circuit considered NMFS original justification and rejected it. NMFS initially justified its Interim Final Rule on the ground that the IDCPA contained an inadvertent drafting mistake. NMFS used this justification in the Federal Register notice announcing the Interim Final Rule, explaining that the IDCPA's before-sunset rule was a drafting error.¹⁰⁸ In defending the rule before the Court of International Trade, NMFS reiterated its justification that the IDCPA's sundown prohibition was not an accurate expression of Congressional intent, and the CIT upheld the rule on this basis.¹⁰⁹ The Federal Circuit rejected this theory, stating that "the government's argument ignores the fact that Congress may change the meaning of a statute from past provisions" and that the language in the IDCPA is clear and cannot be read to contain a mistake.¹¹⁰

Having reviewed and rejected the grounds upon which the agency originally justified its rule, there was no reason for the court to entertain any new, alternative justifications provided by the agency's lawyers at the appellate level.¹¹¹ Under *Chenery*, where the agency has not relied on any other justification when promulgating a rule, neither may the court.¹¹²

106. SEC v. *Chenery Corp.*, 318 U.S. 80 (1943).

107. See *id.*

108. Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP); Action: Interim Final Rule; Request for Comments, 65 Fed. Reg. 30, 39 (January 3, 2000).

109. *Defenders of Wildlife v. Hogarth*, 177 F. Supp. 2d 1336, 1344-46 (Ct. Int'l. Trade 2001).

110. 330 F.3d at 1367.

111. See SEC v. *Chenery Corp.*, 318 U.S. 80, 89 (1943) (stating that the administrative action "must be judged by the standards which the Commission itself invoked").

112. *Id.*

The agency action must be measured by what the agency did, "not by what it might have done."¹¹³ The Federal Circuit circumvented this doctrine by justifying the rule on an alternative defense that the government only argued at the appellate level. The court stated that "the agency would have reached the same conclusion had it addressed the legal issue on which we rest our judgment."¹¹⁴

The court maintained that relying on the adjustment provision was not inconsistent with *Chenery*.¹¹⁵ Relying on its own interpretation of *Chenery*, the Federal Circuit qualified the holding as standing for "the proposition that a court may not make its own factual findings to support an agency's determination."¹¹⁶ The court stated that it was not relying on any independent factual findings.¹¹⁷ It noted that NMFS relied on the International Agreement, which required backdown sets to be completed thirty minutes after sunset.¹¹⁸ The court thus concluded that NMFS would have reached the same adjustment provision argument had it addressed this legal issue.¹¹⁹

This Federal Circuit interpretation turns the *Chenery* doctrine on its head. This doctrine has been applied to prevent agencies from making *post hoc* rationalizations. Judge Newman's dissent recognized this, arguing that "the majority then affirms the agency regulatory action on different grounds, not relied upon by the agency. . . . [T]his is not only a violation of administrative law, but an incorrect statutory interpretation."¹²⁰ Holding that the backdown procedures were neither a matter of agency discretion or interpretation, the court "cannot rehabilitate the agency's action on some other ground."¹²¹

3. *The Court Stretched the Meaning of the Term "Adjustments as May Be Appropriate" Beyond What Was Reasonable*

Assuming *arguendo* that the *Chenery* doctrine did not apply, the court still misapplied the statute. It stretched the meaning of the adjustment provision beyond what canons of statutory interpretation allow, effectively permitting the subsection to swallow the entire law by delegating significant authority to the Secretary to rewrite parts of the statute to contradict Congress' clearly expressed intent.

113. *Id.* at 94.

114. *Defenders*, 330 F.3d at 1368.

115. *Id.* ("In this case, there is not a *Chenery* problem.").

116. *Id.* (citing *Chenery*, 318 U.S. at 94).

117. *Id.*

118. International Agreement, *supra* note 57, Annex, Annex VIII.3.e.

119. *Defenders*, 330 F.3d at 1368.

120. *Id.* at 1375 (Newman, J., dissenting).

121. *Id.* at 1376 (citing *Fleishman v. West*, 138 F.3d 1429, 1433 (Fed. Cir. 1998)).

a. *The Adjustment Provision Only Permits Minor Modifications*

A *Chevron* analysis of the adjustment provision reveals that in authorizing the Secretary to make adjustments, Congress did not intend to allow the Secretary to directly contradict other provisions of the statute.¹²² The provision states: “The Secretary may make such adjustments *as may be appropriate*. . .that pertain to fishing gear vessel equipment, and fishing practices to the extent the adjustments are consistent with the International Dolphin Conservation Program.”¹²³ A plain language analysis shows that the adjustment provision does not authorize NMFS to change Congress’ mandate by replacing a word in the IDCPA statute with its antonym (i.e. replacing “before” with “after”). Since statutory interpretation is a ‘holistic’ endeavor, the interpreter should consider textual integrity—each statutory provision should be read with reference to the whole act. NMFS’s interpretation of “adjustments as may be appropriate” destroys the textual integrity of the statute by allowing the exception to swallow the rule. Under NMFS’s interpretation, the agency could re-write the statute or disobey it on the justification that it is an “adjustment.”

Caselaw supports the canon that statutory exceptions should be read narrowly.¹²⁴ In *MCI Telecommunications Corp. v. Amer. Tel. & Tel. Co.*,¹²⁵ the Supreme Court overturned an FCC regulation on the word “modify.” The Court held that a statute authorizing an agency to “modify any requirement” allowed only for a minor change, and does not contemplate a basic or fundamental change in the statutory scheme.¹²⁶ In interpreting the scope of an administrative agency to modify a regulatory scheme, the Supreme Court and the agency are bound by Congress’ ultimate purposes.¹²⁷ So in the case of the IDCPA, a qualified change such as “adjustments as may be appropriate” can not mean more than “modification,” or a minor change. Substituting a word of the statute for its antonym—changing “before” to “after”—is more than a minor change or modification; it is a 180 degree shift.

In this case, Congress provided for the policy of the statute in specific language found in the sundown prohibition. Therefore, the adjustment provision, a statutory exception, should be read narrowly and should not contradict Congress’ specific and explicit directions with regard to sundown sets. As Judge Gajarsa explains in the dissenting

122. 16 U.S.C. § 1413(a)(2)(C) (2000).

123. § 1413(a)(2)(C) (emphasis added).

124. WILLIAM N. ESKRIDGE, JR., ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY, app. at 376 (West 3d ed. 2001).

125. 512 U.S. 218 (1994).

126. *Id.* at 228.

127. *Id.* at 231 n.4.

opinion to the Federal Circuit's denial of a rehearing en banc, "the mandate of subparagraph (B)(v) [the sundown prohibition] has effectively disappeared, consumed by [the adjustment provision]. Following this logic, there is no reason that any provision of subparagraph (B) should withstand regulatory amendment."¹²⁸

Furthermore, interpretation canons direct the court to avoid interpreting a provision in a way that is inconsistent with the structure of the statute, derogates from another provision, or renders another provision unnecessary.¹²⁹ The issue is whether Congress took pains to negotiate and write a statute with specific, expressed mandates – such as the sundown prohibition – but then intended for NMFS to disregard them. In accepting NMFS's interpretation of the adjustment provision, the court has allowed the agency to promulgate a rule that is contrary to the plain meaning of the sundown prohibition.¹³⁰

Additionally, the fact that Congress already specifically dealt with the issue of sundown sets elsewhere in the statute should have precluded a broad reading of the more general adjustment provision. Textual integrity canons dictate that "specific provisions targeting a particular issue apply instead of provisions more generally covering the issue."¹³¹ More to the point, the "general statutory provision in the latter section cannot trump the clear language of the more specific [provision]."¹³²

b. The Adjustment Was Not Appropriate Because It Was Inconsistent With the Goals and Legislative History of the IDCPA

According to extrinsic source canons, the interpreter should consider whether the legislative history supports a determination that "adjusting" the sundown prohibition to allow sundown sets is "appropriate." Unfortunately, little legislative history is available to interpret what Congress intended with regard to whether adjusting the sundown provision would be appropriate.¹³³ Plaintiffs contended that "the final legislative language in the Senate was laden with various hard-fought

128. *Defenders of Wildlife v. Hogarth*, 344 F.3d 1333, 1335 (Fed. Cir. 2003) (petition for rehearing en banc) (Gajarsa, J., dissenting).

129. *Id.* at 835 and app. 376.

130. Judge Newman picks up on this canon in her dissent, stating that "the Secretary was authorized only to make 'such adjustments as may be appropriate,' not to contradict a critical provision of the statute. Since the court agrees that 'before sundown' was not a mistake, it cannot be 'appropriate' or an 'adjustment' to change it." *Defenders*, 330 F.3d at 1375-76.

131. WILLIAM N. ESKRIDGE, JR., ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY*, app. at 376 (West 3d ed. 2001).

132. *Dep't of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 134 n.5 (2002), cited in *Petition for Rehearing En Banc by Brief for Plaintiffs-Appellants* at 6.

133. See *Brief for Plaintiffs-Appellants* at 18, *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358 (Fed. Cir. 2003) (No. 02-1224).

compromises,”¹³⁴ suggesting that the change in the rule from the IDCP was neither accidental nor a scrivener’s error. Plaintiffs pointed to a declaration of U.S. Senator Barbara Boxer, one of the architects of the Senate bill and a proponent of the sundown prohibition, in which she states, “among the compromises I secured was legislative language pertaining to when sundown sets must be completed. . . . Sundown sets are known to be particularly injurious to dolphins.”¹³⁵ The sparse legislative history available suggests that Congress was deliberate in its intent to limit backdown sets on dolphins during sunset. The policy behind the statute reinforces this fact.

The agency interpretation of the adjustment provision contradicts both the policy and purpose of the statute. All of the policies stated in the IDCPA pertain to furthering the domestic and international effort to reduce dolphin mortalities associated with tuna fishing in the ETP.¹³⁶ With this in mind, it is hard to see how adjusting the explicit language of the statute to relax fishing guidelines such that more dolphins are sure to be injured or killed is “appropriate” for a statute designed to reduce these mortalities.

4. *Agency Regulation May Not Trump a Duly Enacted Statute*

The rationale for allowing the adjustment provision to trump the sundown prohibition lies in the fact that the IDCPA ordered the Secretary to issue regulations to implement the International Dolphin

134. *Id.* at 13.

135. *Defenders of Wildlife v. Hogarth*, 177 F. Supp. 2d 1336, 1347 n.7 (Ct. Int’l. Trade 2001) (quoting declaration of Barbara Boxer).

136. As stated in 16 U.S.C. § 1411(b), the public policy behind the IDCPA statute is to:

- (1) eliminate the marine mammal mortality resulting from the intentional encirclement of dolphins and other marine mammals in tuna purse seine fisheries;
- (2) support the International Dolphin Conservation Program and efforts within the Program to reduce, with the goal of eliminating, the mortality referred to in paragraph (1);
- (3) ensure that the market of the United States does not act as an incentive to the harvest of tuna caught with driftnets or caught by purse seine vessels in the eastern tropical Pacific Ocean not operating in compliance with the International Dolphin Conservation Program;
- (4) secure appropriate multilateral agreements to ensure that United States tuna fishing vessels shall have continued access to productive tuna fishing grounds in the South Pacific Ocean and elsewhere; and
- (5) encourage observer coverage on purse seine vessels fishing for tuna outside of the eastern tropical Pacific Ocean in a fishery in which the Secretary has determined that a regular and significant association occurs between marine mammals and tuna, and in which tuna is harvested through the use of purse seine nets deployed on or to encircle marine mammals.

Conservation Program (IDCP).¹³⁷ Even if the adjustment provision could be reasonably interpreted to allow changing the word “before” to “after,” the Interim Final Rule still cannot contravene the plain text of the IDCPA, since an agency regulation may not trump a duly enacted statute.¹³⁸ The Supreme Court addressed this issue in *Clinton v. City of New York*,¹³⁹ which held that the Line Item Veto Act—which gave the President “unilateral power to change the text of duly enacted statutes”—did not satisfy constitutional requirements of presentment and bicameralism expressed in Article I § 7 of the Constitution.¹⁴⁰ Although modifications are permissible, they must come through the amendment process described in Article V of the Constitution.¹⁴¹ The majority opinion in the case at hand is inconsistent with the prohibition of *Clinton*.¹⁴² As Judge Gajarsa explained in his dissent, “[t]he contents of subparagraph (B) [the sundown prohibition], however, remain part of the Act. Having been placed there by Congress, only Congress may remove them. . . an executive agency may not amend legislation with regulation. This is the import of Article I, § 7 and of *Clinton*.”¹⁴³

5. *A Duly Enacted Statute is Supreme Over an Executive Agreement*

The court’s decision violated the Supremacy Clause of the United States Constitution by allowing an executive agreement, the International Agreement on the IDCP, to trump the explicit language of a duly enacted statute.¹⁴⁴ The United States argued that NMFS was allowed to adjust the sundown prohibition because the International Agreement, signed two years later, contained a similar provision. They essentially argued that the International Agreement gave the agency the authority to rewrite an Act of Congress. This proposition violates the Supremacy Clause.

The Supremacy Clause states that the laws of the United States and all treaties made “shall be the supreme Law of the Land.”¹⁴⁵ Unlike a treaty, which becomes effective upon Senate ratification, an executive agreement between the United States and a foreign government becomes effective when signed by the President.¹⁴⁶ When an executive agreement violates another constitutional provision or a federal statute, its

137. 16 U.S.C. § 1413(a)(1) (2000).

138. *Clinton v. City of New York*, 524 U.S. 417, 448-49 (1998).

139. 524 U.S. 417 (1998).

140. *Id.* at 447.

141. *Defenders of Wildlife v. Hogarth*, 344 F.3d 1333, 1335 (Fed. Cir. 2003) (petition for rehearing en banc) (Gajarsa, J., dissenting) (citing *Clinton*, 524 U.S. at 449).

142. *Id.* at 1335.

143. *See id.*

144. *See* U.S. CONST. art. VI, § 2.

145. *Id.*

146. ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 358-59 (2d ed., 2002).

constitutionality can be challenged.¹⁴⁷ The court stated in *Defenders of Wildlife v. Hogarth* that the agency was “entitled to alter its regulation consistent with the IDCP” and that the adjustment in backdown procedures was consistent with the International Agreement.¹⁴⁸ The consequence of the court’s holding was to permit an executive agreement, signed by the President only, to trump the IDCPA statute, which was passed by both houses of Congress and signed by the President. Ironically, the majority concedes this in its opinion, stating the Supremacy Clause mandates that a statute is supreme over an executive agreement, such as the International Agreement on the IDCP. Congress, therefore, could not have intended, without more, for the International Agreement to govern the implementation of the regulations. The IDCPA clearly requires that the backdown procedure be completed one-half hour before sunset.¹⁴⁹

In circular reasoning, the court reconciled this inconsistency by relying on the adjustment provision, instead of the International Agreement, to justify the Interim-Final Rule. By allowing the adjustment provision to prevail over the explicit requirements that Congress delineated in the sundown prohibition, the Federal Circuit rendered futile the exercise of Congressional debate, information-sharing, and compromise.

B. Impacts of This Ruling

The implications of the Federal Circuit’s ruling are varied. First, the court’s decision undermines the public’s confidence in the judiciary since it misinterpreted a congressional statute. This ruling allows an administrative agency charged with implementing a statute to change the statute itself based on a *post hoc* rationale, further subjecting dolphin conservation enforcement to the often inconsistent political positions of each new administration. Though executive agencies generally have the authority to alter regulations or enforcement priorities, *Defenders of Wildlife v. Hogarth* stands for the unsettling proposition that executive agencies might also have the authority to override statutes enacted by Congress. This raises the threat of the slippery slope argument: now, a general provision authorizing the administering agency to make adjustments could similarly undermine the specific and explicit provisions of statutes in other areas of law. The court’s interpretation thus violates fundamental notions of separation of powers.

Second, this ruling will have the effect of more closely aligning U.S. tuna fishery regulations with the lower environmental standards of other

147. CHEMERINSKY, at 360-61.

148. *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358, 1367 (Fed. Cir. 2003).

149. *Id.*

countries fishing in the ETP. The court's holding risks putting the U.S. based fleet in a "race to the bottom" in order to remain consistent with international fishing practices and trade standards. The court's decision is also important in light of the fact that any meaningful effort to reduce dolphin-mortalities must be continuous: while dolphin mortalities had decreased due to domestic and international efforts over the last 30 years, dolphin mortalities are rising once again.¹⁵⁰

Third, this ruling promotes trade between the U.S. and the international tuna fishing community. Prior to this decision, the U.S. administration was burdened with defending its dolphin protection regime against challenges from its trading partners and was at risk of losing trade opportunities as a result of bad will.

The history of trade negotiation problems over the tuna-dolphin issue is long and varied. By diverging from the Panama Agreement, and later, the International Agreement, the MMPA Amendments directed the U.S. to ban tuna imports from countries with dolphin protection measures that were less stringent than U.S. standards.¹⁵¹ However, NMFS only reluctantly imposed embargos on tuna imports from those countries that did not meet the comparability requirements dictated by the MMPA and its amendments.¹⁵² Such reluctance prompted environmental organizations to seek the Act's enforcement through litigation.¹⁵³ This led

150. Despite decreased mortality rates, three dolphin stocks – the northeastern offshore spotted dolphin, eastern spinner dolphin and the coastal spotted dolphin – continue to be classified as depleted under the MMPA. Hedley, *supra* note 22, at 88 n.42; and NMFS, Fact Sheet on the Status of Depleted Dolphin Stocks in the Eastern Tropical Pacific Ocean, www.nmfs.noaa.gov/prot_res/PR2/Conservation_and_Recovery_Program/listeddmms.html. Russell, MARINE CONNECTION, *supra* note 38. The fact that dolphin populations haven't rebounded remains unexplained by government scientists. Edward Epstein, *Fisheries Official Defends Tuna Decision: Foreign Boats OK Despite Allegation of Inspector Bribery*, San Francisco Chronicle A-4, April 30, 2004; available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/04/30/MNG016DAU51.DTL>. See discussion surrounding n.54. A leaked 1998 internal NMFS memo alleging that independent observers on tuna vessels have been regularly bribed to say the boats were not netting dolphins is one possible explanation. *Id.*

151. 16 U.S.C. § 1371(a)(2) states that "The Secretary of the Treasury shall 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." Pub. L. No. 100-711 (codified as amended at 16 U.S.C. §1371(a)(2) (1988)).

152. See Gosliner, *supra* note 10, at 142 (stating "[NMFS] had acted slowly to implement the comparability requirements of the 1984 amendments"); at 143 (stating "[d]espite explicit direction from Congress, the National Marine Fisheries Service continued to seek ways around the Act's requirements, at times seeming to go out of its way to avoid embargoing tuna from other nations."); at 144 (stating "If it could not avoid the inevitable imposition of additional tuna embargos, the Service intended to do its best to delay their effect.").

153. For an in depth discussion of this protracted litigation, see Gosliner, *supra* note 10, at 143-44. This source cites *Earth Island Institute v. Verity*, No. C88-1380 (N.D. Cal. 18 Jan. 1989) (issuing a temporary restraining order mandating that no certificated U.S. tuna vessel could depart on a fishing trip or set on dolphins without an observer); *Earth Island Institute v.*

to further litigation on the international level. In 1993, the European Union filed a GATT challenge relating to the tuna embargo provisions of the MMPA and its amendments.¹⁵⁴ As in the Mexican challenge of 1991,¹⁵⁵ the GATT panel ruled against the United States (however, the GATT Council did not adopt the decision).¹⁵⁶ These embargos, instituted through domestic litigation and imposed in spite of international litigation in front of a Dispute Settlement Body of the GATT,¹⁵⁷ made for difficult trade relations between the U.S. and its tuna-fishing trade partners in the hemisphere.¹⁵⁸

Furthermore, trade disputes threaten to chill domestic public support for U.S. participation in international trade agreements. Expensive arbitration awards undoubtedly make headlines, and effectively dampen public enthusiasm for U.S. participation in international trade agreements in the first place. This also chills agency support for stricter standards.

Lastly, what is really at stake here is that this decision allows for more dolphin mortalities associated in the ETP tuna fishery, even though the purpose of the IDCPA was to reduce dolphin mortality. Allowing sundown sets will affect not only American purse seine tuna vessels, but also stands to reduce the level of dolphin protection throughout the global tuna fishery. The number of vessels in the U.S. tuna fleet has been steadily declining for decades,¹⁵⁹ making the U.S.'s ability to affect tuna-dolphin practices increasingly dependent on its role as a tuna importer.

Mosbacher, 746 F. Supp. 964 (N.D. Cal. 1990) (ordering embargos against all yellowfin tuna caught by foreign fleets in the ETP pending required comparability findings by NMFS); *Earth Island Institute v. Mosbacher*, No. C88-1380 (N.D. Cal. Oct. 4, 1990) (reimposing an embargo of Mexican tuna); *affirmed by Earth Island Institute v. Mosbacher*, 929 F.2d 1449 (9th Cir. 1991); *Earth Island Institute v. Mosbacher*, No. C88-1380 (N.D. Cal. Mar. 26, 1991) (reasserting the deadline for foreign nations to submit comparability findings); *Earth Island Institute v. Mosbacher*, 785 F.Supp. 826 (N.D. Cal. 1992) (requiring intermediary nations to provide certification and reasonable proof that it has acted to prohibit the import of the same products that are banned from direct imports in the United States). *See also* Joseph, *supra* note 12, at 7.

154. Brief for Defendants-Appellees at 6, *Defenders* (No. 02-1224).

155. World Trade Organization, *Environment: Disputes 4: Mexico etc versus US: "tuna-dolphin"*, Sept. 3, 1991, at http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm. *See also supra* note 44.

156. Brief for Defendants-Appellees at 6-7, *Defenders* (No. 02-1224).

157. *See* Gosliner, *supra* note 10, at 144-45 (citing GATT Ruling on 3 Sept 1991).

158. *See* CNN.com, *US Bars Tuna from Spain, Panama, Over Dolphins*, Aug. 18, 2000, at <http://www.cnn.com/2000/FOOD/news/08/18/mexico.usa.tuna.reut>.

(stating that the US restricted tuna imports from Spain and Panama due to non-compliance with US dolphin-safe standards and that the US has weakened its dolphin protection standards in the past in order to ease trade frictions with countries that have weaker standards).

159. In 1970, the US had almost 60 purse seine vessels with more than 400 ton capacity in the ETP. By 1996, this number had decreased to about 4 vessels. Gosliner, *supra* note 10, at 135, fig. 6-4. American vessels have mostly left the region for the abundant skipjack tuna fishery in the western Pacific, where the tuna-dolphin association doesn't occur. Russell, *MARINE CONNECTION*, *supra* note 38.

This power to influence tuna practices is nevertheless significant, since the U.S. provides a large market for tuna importers.¹⁶⁰

CONCLUSION

By upholding the after-sundown provision of NMFS's Interim Final Rule, the court methodically disregarded the plain language of the duly enacted IDCPA and contravened other traditional canons of statutory interpretation. The court strayed from legal canons of legislative interpretation – such as the plain meaning rule, the *Chenery* doctrine, and the requirement to reasonably interpret the provisions of a statute.

There are various consequences of this decision. It relaxes the level of dolphin protection afforded by Congress in the IDCPA, therefore resulting in more dolphin mortalities than would otherwise occur if the statute had been upheld by the court. It harmonizes the U.S. tuna-dolphin protection regime with those of other countries that are members of the International Dolphin Conservation Program. While perhaps beneficial for U.S. diplomacy in the short term since the effect of the ruling is to eliminate international friction caused by a domestic dolphin protection regime that is more stringent than the one abroad, this occurs at the expense of dolphin populations throughout the Pacific, undermining the original purpose of the international dolphin conservation regime. Finally, it sets a precedent for allowing agency regulations to change the language of their enabling statutes, causing an unsettling shift in the delegation of Congressional legislative authority.

160. US tuna imports were worth at least \$795.7 million in 2003. NMFS, *Composition of Major US Seafood Imports, 2003*, in 2003 US TRADE, at slides 7-8, available at <http://www.nmfs.noaa.gov/trade/2003ustrade.pdf> (stating that Tuna imports comprise 7.3% of US seafood imports, totaling \$10.9 billion; elsewhere, it states that tuna comprised 8% of US seafood imports). Furthermore, US demand for seafood is expected to rise to over 8 million metric tons by 2025; demand was just over 6 million metric tons in 2003. *Id.* at slide 9.