

United States Court of International Trade.

NATIVE FEDERATION OF the MADRE DE DIOS RIVER AND TRIBUTARIES; Racimos De Ungurahui Working Group; and Natural Resources Defense Council, Inc., Plaintiffs,

v.

BOZOVICH TIMBER PRODUCTS, INC.; TBM Hardwoods, Inc.; T. Baird McIlvain International Co.; United States Department of the Interior; United States Fish and Wildlife Service; United States Department of Agriculture; Animal and Plant Health Inspection Service; United States Department of Homeland Security; United States Customs and Border Protection; Secretary of the Interior; Director of the United States Fish and Wildlife Service; Secretary of Agriculture; Administrator of Animal and Plant Health Inspection Service; Secretary of Homeland Security; and Commissioner of United States Customs and Border Protection, Defendants.

Slip Op. 07-57.
Court No. 06-00181.

April 16, 2007.

Simpson Thacher & Bartlett LLP (Robert A. Bourque, Kyle A. Lonergan and Scott D. Laton); Natural Resources Defense Council, Inc. (Mitchell S. Bernard and Thomas Cmar); Schonbrun DeSimone Seplow Harris & Hoffman LLP (Paul Hoffman), of counsel, for plaintiffs Native Federation of the Madre de Dios River and Tributaries; Racimos de Ungurahui Working Group; and the Natural Resources Defense Council, Inc.

Peter D. Keisler, Assistant Attorney General, Jeanne E. Davidson, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Stephen C. Tosini), for defendants U.S. Department of the Interior; U.S. Fish and Wildlife Service; U.S. Department of Agriculture; Animal and Plant Health Inspection Service; U.S. Department of Homeland Security; U.S. Customs and Border Protection; Secretary of the Interior; Director of the U.S. Fish and Wildlife Service; Secretary of Agriculture; Administrator of Animal and Plant Health Inspection Service; Secretary of Homeland Security; and Commissioner of the U.S. Customs and Border Protection.

Hogan & Hartson LLP (Patrick D. Traylor and Jonathan T. Stoel), for defendants Bozovich Timber Products, Inc.; TBM Hardwoods, Inc.; and T. Baird McIlvain International Company.

Before: Richard K. Eaton, Judge.

OPINION

EATON, Judge.

Before the court are the amended motion for a preliminary injunction of plaintiffs Native Federation of the Madre de Dios River and Tributaries; Racimos de Ungurahui Working Group; and the Natural Resources Defense Council, Inc. (“plaintiffs”) and the motions to dismiss of the U.S. Department of the Interior; the U.S. Fish and Wildlife Service (“FWS”); the U.S. Department of Agriculture; the Animal and Plant Health Inspection Service; the U.S. Department of Homeland Security; the U.S. Customs and Border Protection; the Secretary of the Interior; the Director of the FWS; the Secretary of Agriculture; the Administrator of the Animal and Plant Health Inspection Service; the Secretary of Homeland Security; and the Commissioner of U.S. Customs and Border Protection (“Government Defendants”); and Bozovich Timber Products, Inc.; TBM Hardwoods, Inc.; and T. Baird McIlvain International Company (“Private Defendants”) (collectively, “defendants”).

By their complaint and motion for a preliminary injunction, plaintiffs allege that defendants have violated, and continue to violate, Section 9(c) of the Endangered Species Act, 16 U.S.C. § § 1531-1544 (2000) (“ESA”), which implements the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“Convention” or “CITES”). CITES, Convention done at Washington, D.C., Aug. 3, 1973, T.I.A.S. No. 8249, 27 U.S.T. 1087. Specifically, plaintiffs complain that the Private Defendants trade in, and the Government Defendants authorize trade in, *Swietenia macrophylla*, a species of mahogany tree (“bigleaf mahogany”) from Peru without valid export permits. *See* Am. Compl. ¶ 3.

Plaintiffs seek declaratory relief and an injunction directing the Government Defendants to “refrain from permitting the importation into the United States of bigleaf mahogany from Peru;” and directing the Private Defendants to “refrain from the importation into the United States of ... bigleaf mahogany ... from Peru.” Pls.’ Proposed Prelim. Inj. 1-2; *see also* Am. Compl. 29 (seeking, *inter alia*, to “[e]njoin[] Government Defendants from permitting import, trade, and possession of Peruvian bigleaf mahogany unless and until bigleaf mahogany specimens from Peru comply with CITES”). In their respective motions to dismiss, defendants assert a number of defenses, among them that the court lacks

subject matter jurisdiction to entertain plaintiffs' claims.

For the following reasons, the court finds that it does not have jurisdiction over plaintiffs' claims under 28 U.S.C. § 1581(i)(3) or (4) (2000). The court therefore denies plaintiffs' motion for a preliminary injunction and grants defendants' motions to dismiss.

BACKGROUND

I. Factual Summary

Plaintiffs bring this action on behalf of native communities and inhabitants of the Madre de Dios region of the Peruvian Amazon, where bigleaf mahogany is found. Am. Compl. ¶¶ 8-16; *see also* 16 U.S.C. § 1540(g)(1) (providing for citizen suits). International demand for bigleaf mahogany timber is high, due to the dense, hard, high-value quality of the wood.^{FN1} Am. Compl. ¶ 1. Plaintiffs allege that to meet demand, illegal logging of bigleaf mahogany trees takes place in Peru, which threatens the species with extinction and in turn results in injury to plaintiffs. Am. Compl. ¶ 16. It is further alleged that Peru's Scientific Authority, the National Agrarian University of La Molina ("La Molina"), and Peru's Management Authority, the National Institute of Natural Resources ("INRENA"), are aware of this illegal activity, and have nonetheless granted permits to export bigleaf mahogany without determining, as CITES requires, whether the wood to be exported was obtained in contravention of Peruvian law and whether the exports would be detrimental to the survival of bigleaf mahogany. Am. Compl. ¶ 3.

FN1. According to plaintiffs' amended complaint, bigleaf mahogany trees "can grow to more than 150 feet tall and six feet wide over the course of hundreds of years. Its slow growth rate creates a dense, hard, high-value wood that has been coveted by traders for centuries. At more than \$1,500 per cubic meter of imported sawn wood, the timber from a single tree can yield more than \$100,000 when fashioned into luxury furniture." Am. Compl. ¶ 41.

Private Defendants are importers of Peruvian bigleaf mahogany into the United States. There is no dispute that their shipments were accompanied by facially valid export permits. Even so, plaintiffs allege that

the Private Defendants and the Government Defendants have violated the Convention and Section 9 of the ESA by, respectively, trading in and allowing trade in, bigleaf mahogany, because La Molina and INRENA have not made "legitimate non-detriment and lawful acquisition determinations" in connection with exports of bigleaf mahogany. Am. Compl. ¶ 3.

II. Legal Framework

A. The Convention on International Trade in Endangered Species of Wild Fauna and Flora

The Convention is an international agreement to which the United States and Peru are parties. It has as its purpose the "protection of certain species of wild fauna and flora against over-exploitation through international trade." CITES Proclamation of the Contracting States, 27 U.S.T. at 1090 (recognizing that "international cooperation is essential" to achieving this goal).

The species covered by the Convention are listed in three appendices. Species listed in Appendix I are those "threatened with extinction which are or may be affected by trade." CITES, art. II ¶ 1, 27 U.S.T. at 1092. Trade in Appendix I species "must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances." *Id.*, 27 U.S.T. at 1092.

Appendix II species include all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival....

CITES, art. II ¶ 2(a), 27 U.S.T. at 1092.

Appendix III species include all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the co-operation of other parties in the control of trade.

CITES, art. II ¶ 3, 27 U.S.T. at 1092.^{FN2}

FN2. Amendments to the lists of species in Appendices I and II are considered and, where appropriate,

adopted by the parties to the Convention at meetings held biennially. *See* CITES, arts. XI, XV, 27 U.S.T. at 1104-05, 1110-12; *see also* <http://www.cites.org/eng/disc/CoP.shtml> (last visited Apr. 16, 2007). The CITES Secretariat maintains the official list of species contained in each appendix, which is available on the CITES Web site. *See* <http://www.cites.org/eng/app/index.shtml> (last visited Apr. 16, 2007).

The Convention sets forth a detailed framework for regulating trade through permitting processes that are carried out by government agencies in the exporting and importing countries. The permit requirements for trade in Appendix I species and Appendix II species are different. Trade in Appendix I species requires both an export permit, issued by the exporting country, and an import permit, issued by the importing country. *See* CITES, art. III ¶ 3, 27 U.S.T. 1093-94. Trade in Appendix II species, on the other hand, does not require that an import permit be obtained, but only that the exporting country issue a permit for the outgoing shipments. *Compare* CITES, art. III, 27 U.S.T. 1093-94, *with* art. IV, 27 U.S.T. at 1095-96.^{FN3}

FN3. U.S. regulations echo this distinction between requirements for trade in Appendix I and Appendix II species. *See* 50 C.F.R. § 23.12(a)(1)(i) (requiring both “a United States import permit, issued pursuant to § 23.15, and a valid foreign export permit issued by the country of origin” in order to import Appendix I species) & § 23.12(a)(2)(i) (2005) (requiring only “a valid foreign export permit issued by the country of origin” in order to import Appendix II species).

Bigleaf mahogany from Peru is a species of plant listed in Appendix II. By the Convention's terms, “[a]ll trade in specimens of species included in Appendix II shall be in accordance with the provisions of [Article IV of the Convention].” CITES, art. IV ¶ 1, 27 U.S.T. at 1095. In pertinent part, Article IV^{FN4} provides:

FN4. As previously noted, trade in Appendix I species requires both an export permit, issued by the exporting country, and an import permit, issued by the importing country. Thus, Article III of the Convention

contains the same language found in Article IV subparagraphs (a), (b) and (c), with respect to the conditions that must be met before an export permit shall be granted, but also states an additional condition, namely “(d) a Management Authority of the State of export is satisfied that an import permit has been granted for the [Appendix I] specimen.” CITES, art. III ¶ 2(d), 27 U.S.T. at 1093. With respect to the required import permit, it states:

An import permit shall only be granted when the following conditions have been met:

- (a) a Scientific Authority of the State of import has advised that the import will be for purposes which are not detrimental to the survival of the species involved;
 - (b) a Scientific Authority of the State of import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and
 - (c) a Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes.
- CITES, art. III ¶ 3(a)-(c), 27 U.S.T. at 1093-94.

The export of any specimen of a species included in Appendix II shall require the prior grant and presentation of an export permit. An export permit shall only be granted when the following conditions have been met:

- (a) a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species; [and]
- (b) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora....

The import of any specimen of a species included in Appendix II shall require the prior presentation of ... an export permit....

CITES, art. IV ¶¶ 2, 4, 27 U.S.T. at 1095-96. Thus, in order for Peru to export bigleaf mahogany its Scientific Authority (La Molina) and Management Authority (INRENA) must be satisfied that certain enumerated preconditions have been met. The only express obligation that Article IV places on a country importing bigleaf mahogany is to “require the prior presentation of” an export permit. CITES, art. IV ¶ 4, 27 U.S.T. at 1096.

B. The Endangered Species Act

Congress enacted the ESA to conserve endangered and threatened species^{FN5} and the ecosystems on which they depend, and “to take such steps as may be appropriate to achieve the purposes of,” *inter alia*, CITES. 16 U.S.C. § 1531(b). Section 9(c) of the ESA implements the Convention into U.S. law:

FN5. An “endangered species” is one “in danger of extinction throughout all or a significant portion of its range....” 16 U.S.C. § 1532(6). A “threatened species” is one that is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade^{FN6} in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in article I thereof.

FN6. Under Article I of the Convention, “[t]rade” means export, re-export, import and introduction from the sea.” CITES, art. I(c), 27 U.S.T. at 1090. The ESA does not define “trade.”

16 U.S.C. § 1538(c)(1). Plaintiffs assert their claims under Section 9(c).

III. Plaintiffs' Claims

In their complaint, plaintiffs allege that La Molina and INRENA have acknowledged having insufficient information to make the non-detriment and lawful acquisition findings required for export under Article IV of the Convention.^{FN7} See Am. Compl. ¶¶ 58-72, 90-104. Plaintiffs further allege that by honoring the facially valid export permits, the Government Defendants have violated U.S. law. Am. Compl. ¶¶ 3, 90-109. Thus, plaintiffs have brought suit to enjoin defendants from importing bigleaf mahogany into the United States “unless and until bigleaf mahogany specimens from Peru comply with CITES.” Am. Compl. 29.

FN7. See, e.g., Appendix to Pls.' Am. Mot. Prelim. Inj., Exs. M (Letter from Ignacio Lombardi Indacochea (La Molina) to

Rosario Acero Villanes (INRENA) of Nov. 12, 2004); N (Letter from Peter O. Thomas (FWS) to Leoncio Alvarez Vasquez (INRENA) of Dec. 14, 2004); Q (La Molina, Summary of Activities Performed by CITES Scientific Authority in Regard to *Swietenia macrophylla* Species (Feb. 11, 2005)); and R (Letter from Leoncio Alvarez Vasquez (INRENA) to Peter O. Thomas (FWS) of Feb. 9, 2005).

STANDARD OF REVIEW

By their motion for a preliminary injunction, plaintiffs ask the court “to enjoin the importation of Peruvian bigleaf mahogany pending the outcome of this lawsuit.” Mem. Supp. Pls.' Am. Mot. Prelim. Inj. 44. Plaintiffs bear the burden of establishing a right to the relief they seek in light of four factors: (1) the likelihood that plaintiffs will succeed on the merits of their claims; (2) that plaintiffs will suffer irreparable harm without the requested injunctive relief; (3) that the balance of hardships tips in plaintiffs' favor; and (4) that granting the requested relief would not be contrary to the public interest. See *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed.Cir.1993) (citing *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed.Cir.1983)).

In considering plaintiffs' motion for a preliminary injunction and defendants' motions to dismiss, the court accepts as true the well-pled factual allegations made in plaintiffs' first amended complaint and construes “all reasonable inferences in favor of [plaintiffs].” *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed.Cir.1991); see also *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

As to defendants' motions to dismiss for lack of subject matter jurisdiction, plaintiffs bear the burden of establishing the Court's jurisdiction. See *United States v. Biehl & Co.*, 3 CIT 158, 160, 539 F.Supp. 1218, 1220 (1982) (citing, *inter alia*, *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 188-89 (1936)).

DISCUSSION

The Court of Appeals for the Federal Circuit has said that, when ruling on a motion for a preliminary injunction, this Court must consider whether it has subject matter jurisdiction to hear the plaintiff's claims. See *U.S. Ass'n of Imps. of Textiles and Apparel v. United States*, 413 F.3d 1344, 1348 (Fed.Cir.2005) (“The question of jurisdiction closely

affects the [plaintiff's] likelihood of success on its motion for a preliminary injunction. Failing to consider it [is] legal error.”). Where subject matter jurisdiction is lacking, denial of a motion for a preliminary injunction is required. *Id.* at 1350 (reversing grant of preliminary injunction on ground that plaintiff could not show even a “fair chance” of success on the merits because plaintiff's claims were not ripe).

In their complaint, plaintiffs assert that the Court has subject matter jurisdiction under 28 U.S.C. § 1581(i)(3) and (4). Am. Compl. ¶ 5. Section 1581(i)(3) provides:

In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section ..., the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for ...

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety....

28 U.S.C. § 1581(i)(3). Plaintiffs argue that Section 1581(i)(3)'s requirement that the claims they assert “arise[] out of any law of the United States providing for ... [an] embargo[]” is satisfied by Section 9(c) of the ESA. *See* Pls.' Mem. Opp'n Defs.' Mots. Dismiss 8 (“Plaintiffs' claims arise under ESA § 9(c), which makes it ‘unlawful ... to engage in *any* trade in any specimens contrary to the provisions of the Convention.’ Accordingly, because it prohibits all imports in contravention of CITES, ESA § 9(c) provides for an embargo.”) (quoting 16 U.S.C. § 1538(c)(1); emphasis in original). Therefore, plaintiffs argue that their claims fall within the Court's exclusive jurisdiction.

By their motions to dismiss, defendants dispute plaintiffs' jurisdictional claim. In doing so, they distinguish Section 9(a) of the ESA^{FN8} from Section 9(c) and argue that Section 9(c) does not provide for an embargo on trade in species listed in Appendix II of CITES. According to defendants, by adopting Section 9(a), Congress expressly banned imports of certain named species that the Secretary of Commerce or the Secretary of the Interior has determined are “endangered.” *See* 16 U.S.C. § 1533(a). Here, however, because the imported species has not been found by the Secretary to be endangered, but is rather listed in Appendix II of the Convention, defendants insist that there is no embargo under the ESA. *See* Gov't Defs.' Mot. Dismiss Pls.' First Am. Compl. (“Gov't Defs.' Mot.”)

9-10. Rather, defendants insist that “ESA Section 9(c), the provision that addresses the regulation of CITES listed species, simply requires parties to follow CITES procedures....” Gov't Defs.' Mot. 9.

FN8. Section 9(a) is codified at 16 U.S.C. § 1538(a), which provides in pertinent part:

Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of plants listed pursuant to section 1533 of this title, it is unlawful for any person subject to the jurisdiction of the United States to-[*inter alia,*] (A) import any such species into, or export any such species from, the United States....

16 U.S.C. § 1538(a)(2).

Thus, the question for the court is whether CITES and the ESA provide for an embargo on the importation of bigleaf mahogany or for the regulation of trade in the species. For the reasons that follow, the court concludes that Section 9(c) of the ESA does not provide for an embargo on the importation of Appendix II species into the United States and that therefore Section 1581(i)(3) does not provide a basis for hearing plaintiffs' claims.

To determine what constitutes an embargo, a review of *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 173 (1988), is necessary. In *K Mart*, the United States Supreme Court was presented with the question of whether Section 526(a) of the Tariff Act of 1930, 19 U.S.C. § 1526(a),^{FN9} imposed an embargo within the meaning of 28 U.S.C. § 1581(i)(3). The Court found that the word embargo, as it appears in Section 1581(i)(3), is to be given its ordinary meaning, i.e., “a governmentally imposed quantitative restriction-of zero-on the importation of merchandise.” *Id.* at 185.^{FN10} In the course of its analysis, the Court made clear that “not every governmental importation prohibition is an embargo”:

FN9. The version of Section 1526(a) in force at the time provided:

(a) *Importation prohibited*

Except as provided in subsection (d) of this section, it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and

Trademark Office by a person domiciled in the United States ... unless written consent of the owner of such trademark is produced at the time of making entry.

9 U.S.C. § 1526(a) (emphasis added) (quoted in *K Mart Corp.*, 485 U.S. at 179 n. 1).

FN10. Ultimately, the Court held that § 1526(a) did not impose an embargo because it “does not set a *governmentally determined* quantitative limit on the entry of, or foreign trafficking in, any particular product...” *K Mart Corp.*, 485 U.S. at 186 (emphasis added).

To hold otherwise would yield applications of the term “embargo” that are unnatural, to say the least. For example, the prohibitory nature of regulations providing that the “*importation* into the United States of milk and cream is *prohibited*”^{FN11} except by a permit holder, and that “Customs officers *shall not permit the importation* of any milk or cream that is not tagged in accordance with [applicable] regulations,” would convert licensing and tagging requirements into embargoes on unlicensed or improperly tagged dairy products. Similarly, a requirement that certain meat products be inspected prior to importation would magically become an embargo of uninspected (but not necessarily tainted) meat when Congress uses a formulation like, “meat ... products *shall not be released from Customs custody prior to inspection*[.]”

FN11. It is worth noting that the *K Mart* Court recognized that the presence of the word “prohibited” in a statute does not necessarily mean it constitutes an embargo. *K Mart Corp.*, 485 U.S. at 187.

Id. at 187 (citing 19 C.F.R. § § 12.7(a) & (b), 12.8 (1987)) (emphasis, first alteration and ellipsis in original). Thus, by choosing the word “embargoes” over the phrase “importation prohibitions” in Section 1581(i)(3), Congress created a circumscribed subclass of importation prohibitions that falls within the Court’s jurisdiction. *Id.* at 189; *see also Earth Island Inst. v. Brown*, 28 F.3d 76, 77 (9th Cir.1994) (“[T]he [K Mart] Court made it clear that the term ‘embargo’ does not, for purposes of § 1581(i), encompass all importation prohibitions, but rather names a subclass of importation prohibitions.”). In so choosing, Congress declined to grant this Court jurisdiction to review challenges to “conditions of importation” as distinct from those involving embargoes. *K Mart*

Corp., 485 U.S. at 189.

The court finds that Section 9(c) does not forbid trade in species protected under the Convention. Rather, it mandates compliance with the Convention, which “regulates international trade in wild species ... through the requirement that certain forms of documents must accompany shipments of protected species.” *Cayman Turtle Farm, Ltd. v. Andrus*, 478 F.Supp. 125, 130 (D.D.C.1979). “The degree of trade *regulation* under CITES depends on the appendix in which a specimen is listed.” *United States v. Norris*, 452 F.3d 1275, 1278 (11th Cir.2006) (emphasis added).

That it does not forbid trade in species listed in the appendices is evident from the language of CITES itself. The Convention expressly states that the agreement does not infringe on the ability of the parties to adopt stricter measures than are provided in the Convention, including “complete prohibition” of trade in CITES-listed species, or any other species. *See* CITES, art. XIV ¶ 1(a), 27 U.S.T. at 1108 (providing that parties may adopt “stricter domestic measures regarding the conditions for trade, taking possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof”) and (b) (providing same with respect to non-CITES-listed species). If the Convention were intended to ban trade, this language would not be necessary.

Next, in implementing the Convention, the United States elected to track the Convention’s permit requirements in the regulations promulgated by the FWS and to take “stricter measures” only insofar as requiring that an export permit must be “valid.” *Compare* CITES, art. IV ¶ 4, 27 U.S.T. at 1096 (requiring “an export permit”) *with* 50 C.F.R. § 23.12(a)(2)(i) (requiring “a valid foreign export permit issued by the country of origin”). The regulations provide in pertinent part:

(a) *Unless the requirements in this part 23 are met*, ... it is unlawful for any person subject to the jurisdiction of the United States to commit, attempt to commit, solicit another to commit, or cause to be committed any of the acts described in paragraph [](b) ... of this section.

(b) Import. (1) It is unlawful to import into the United States any ... plant listed in appendix I, II or III ... from any foreign country.

50 C.F.R. § 23.11(a) & (b) (emphasis added). The “requirements in this part 23” referenced in § 23.11(a) above are contained in § 23.12(a)(2)(i), which provides: In order to import into the United

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

50 C.F.R. § 23.12(a)(2)(i). The regulations further provide that “[o]nly export permits ... issued and signed by a management authority will be accepted as a valid foreign document from a country that is a party to the Convention.”^{FN12} 50 C.F.R. § 23.14(a). A Customs inspector must validate documentation accompanying Appendix II species at the time of import by endorsing the documentation. *See* 7 C.F.R. § 355.22(a) & (c). “Validation” is defined as “[a]n original stamp, signature, and date of inspection placed upon documentation required by 50 CFR ... part 23 [pertaining to CITES-listed species] by an inspector at the port where the terrestrial plants are to be imported....” *Id.* § 355.2. Thus, like the Convention itself, the regulations do not completely ban trade in Appendix II species but rather regulate it.

FN12. The regulations do not specify any criteria to determine whether a foreign export permit is “valid.” *See Castlewood Prods., LLC v. Norton*, 365 F.3d 1076, 1083 (D.C.Cir.2004) (noting 50 C.F.R. § 23.12(a)(3)(i) “does not specify the conditions that a foreign export permit must meet in order for U.S. officials to regard the permit as valid, i.e., to conclude that the exporting Management Authority was ‘satisfied that the specimen was not obtained in contravention of the laws of that State’ ”). In the past, when a Customs inspector or other U.S. official has found reason to believe the export permit may not be valid, U.S. officials have “looked behind” the permit to ensure the export permit was issued in compliance with CITES. *See, e.g., id.* at 1084 (where Brazilian authorities notified the United States that issuance of export permits with respect to bigleaf mahogany shipments was not the result of an independent judgment made by the Management Authority in Brazil, the court upheld the seizure of such shipments as reasonable); *United States v. 2,507 Live Canary Winged Parakeets*, 689 F.Supp. 1106, 1120 (S.D.Fla.1988) (probable cause to institute forfeiture action was found to exist where Peruvian authorities informed the United States that export permits accompanying shipments of parakeets were

invalid and requested that the United States take appropriate action); *United States v. 3,210 Crusted Sides of Caiman Crocodilus Yacare*, 636 F.Supp. 1281, 1285 (S.D.Fla.1986) (probable cause for instituting forfeiture action was found to exist where export permits were deemed suspicious in that shipments contained thousands more crocodile hides than reported on the permit and the permit was a copy, not an original).

It is clear that Congress anticipated that lines would be drawn between laws that provide for the regulation of trade and those that provide for embargoes in order to avoid the “unnatural” results the Supreme Court cautioned against in *K Mart*. *See K Mart Corp.*, 485 U.S. at 187. An examination of the conditions of importation cited in *K Mart* as insufficient to constitute embargoes reveals that the permit requirements in the Convention and the U.S. regulations do not amount to a ban on trade. For instance, health-related restrictions on importation, such as the “prohibition” against the importation of milk and cream “unless the person by whom such milk or cream is shipped or transported into the United States holds a valid permit,” 19 C.F.R. § 12.7(a) (1987); or the restriction on release of meat products without prior inspection, 19 C.F.R. § 12.8 (“Such meat, meat-food products, horse meat and horse meat-food products shall not be released from Customs custody prior to inspection by an inspector ..., except when authority is given by such inspector for inspection at the importer's premises or other place not under Customs supervision.”) are not embargoes. *See K Mart Corp.*, 485 U.S. at 187. Similarly, the regulation concerning the importation of Appendix II species anticipates trade in those species, on the condition that “the requirements in ... [50 C.F.R. § 23.12(a)(2)(i)] are met,” i.e., the presentation of a valid foreign export permit. 50 C.F.R. § 23.11(a).

Finally, CITES, Section 9(c) of the ESA and the implementing regulations are qualitatively different from laws that this Court has found to provide for embargoes. Absent from those laws is a simple permitting scheme like the one present here. Rather, the laws found to provide for embargoes prohibit trade outright albeit with limited exceptions. *See, e.g., Int'l Labor Rights Fund v. United States*, 29 CIT ----, ----, 391 F.Supp.2d 1370, 1371 (2005) (Section 307 of the Tariff Act of 1930, codified as amended at 19 U.S.C. § 1307 (2002),^{FN13} prohibited importation of merchandise produced by forced labor, except where domestic consumption is greater than domestic

production); *Florsheim Shoe Co. v. United States*, 19 CIT 295, 297, 880 F.Supp. 848, 850 (1995) (Presidential proclamation issued under Pelly Amendment to Fishermen's Protective Act of 1967, codified as amended at 22 U.S.C. § 1978 (Supp. V 1993),^{FN14} prohibited "the importation of fish or wildlife ... and their parts and products, of Taiwan...."); *Humane Soc'y of the United States v. Brown*, 19 CIT 1104, 901 F.Supp. 338 (1995) (High Seas Driftnet Fisheries Enforcement Act, 16 U.S.C. § 1826a (Supp. V 1993) ("Driftnet Act")^{FN15} prohibited the importation of "fish and fish products and sport fishing equipment ... from [a] nation" identified by the Secretary of Commerce to be "conducting large-scale driftnet fishing beyond the exclusive economic zone of any nation...."); *Earth Island Inst. v. Christopher*, 19 CIT 812, 813-14, 890 F.Supp. 1085, 1087-88 (1995) (Note to 16 U.S.C. § 1537^{FN16} prohibited "[t]he importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely [certain] species of sea turtles," except where a finding is made under 16 U.S.C. § 1537(b)(2)). In contrast to the stringent statutory requirements that must be satisfied before merchandise subject to an embargo may enter the country, e.g., the certification procedure in 16 U.S.C. § 1537(b)(2),^{FN17} an importer of an Appendix II species, such as bigleaf mahogany from Peru, may enter the merchandise upon presenting a valid export permit obtained from the Peruvian authorities. See *supra* Part II A at 9.

FN13. Title 19 U.S.C. § 1307 provides:

All goods, wares, articles, and merchandise mined, produced or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, ...; but in no case shall such provisions be applicable to goods, wares, articles, or merchandise so mined, produced, or manufactured which are not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States. "Forced labor", as herein used, shall mean all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily. For purposes of this section, the term "forced labor or/and indentured labor"

includes forced or indentured child labor. 19 U.S.C. § 1307.

FN14. Section 1978 provided, in pertinent part:

Upon receipt of any certification made [Secretary of Commerce or the Secretary of the Interior] under paragraph [(a)](1) or (2), the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of any products from the offending country for any duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariff and Trade. 22 U.S.C. § 1978(a)(4).

FN15. In pertinent part, the Driftnet Act provided:

(b) Sanctions

(1) Identifications

(A) Initial identifications

Not later than January 10, 1993, the Secretary of Commerce shall-

(i) identify each nation whose nationals or vessels are conducting large-scale driftnet fishing beyond the exclusive economic zone of any nation; and

(ii) notify the President and that nation of the identification under clause (i) ...

(3) Prohibition on imports of fish and fish products and sport fishing equipment

(A) Prohibition The President-

(i) upon receipt of notification of the identification of a nation under paragraph (1)(A) ...

shall direct the Secretary of the Treasury to prohibit the importation into the United States of fish and fish products and sport fishing equipment ... from that nation.

16 U.S.C. § 1826a(b). The stated congressional policy underlying the Driftnet Act was to implement a United Nations General Assembly resolution, which called for, among other things, "an *immediate cessation* to further expansion of large-scale driftnet fishing," "a *moratorium* on fishing in the Central Bering Sea" and "a *permanent ban* on the use of destructive fishing practices, and in particular large-scale driftnets, by persons or vessels fishing beyond the exclusive economic zone of any nation." 16 U.S.C. § 1826a (emphasis added).

FN16. The note to Section 1537 of the ESA provided, in pertinent part:

(b)(1) In General.-The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).

(2) Certification Procedure.-The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that-

(A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

(B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or

(C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

16 U.S.C. § 1537 note.

FN17. Notably absent from Section 9(c), the regulations and Article IV of CITES is any requirement that the U.S. Government make a finding with respect to foreign countries based on an investigation of those countries' activities. *Compare, e.g., Florsheim Shoe Co.*, 19 CIT at 297, 880 F.Supp. at 849 (noting that the Secretary of the Interior "certified Taiwan under 22 U.S.C. § 1978 ... as a country whose activities were diminishing the effectiveness of international conservation measures"); *Earth Island Inst.*, 19 CIT at 814, 890 F.Supp. at 1088 (quoting 16 U.S.C. § 1537(b)(2), which provides for certification to Congress that a "harvesting nation" has a regulatory program governing the incidental taking of sea turtles that is comparable to that of the United States); *Humane Soc'y of the United States*, 19 CIT at 1109, 901 F.Supp. at 344 (quoting 16 U.S.C. § 1826a(b)(1)(A), which provides that the Secretary of Commerce "shall identify each nation ... conducting large-scale driftnet fishing beyond the

exclusive economic zone of any nation....").

By entering into the Convention, the United States did not agree to end trade in CITES-listed species, nor did it elect to do so by enacting Section 9(c) to implement the Convention. On the contrary, the aim of CITES and the provisions of the ESA that implement it is to permit trade in certain species in a controlled, sustainable manner. *See* CITES Proclamation of the Contracting States, 27 U.S.T. at 1090 (recognizing that "international cooperation is essential for the protection of certain species of wild fauna and flora against *over-exploitation* through international trade") (emphasis added); 16 U.S.C. § 1531(a)(4)(F) (stating that "the United States has pledged itself as a sovereign state in the international community to conserve *to the extent practicable* the various species of fish or wildlife and plants facing extinction, pursuant to ... [the Convention]") (emphasis added).

In sum, CITES provides for the regulation of trade in bigleaf mahogany. The regulations that implement Section 9(c), and in turn, the Convention, while restricting trade, do not restrict the quantity of imports to zero. *K Mart Corp.*, 485 U.S. at 185. Thus, plaintiffs' Section 9(c) claims do not arise under a U.S. law that provides for an embargo under 28 U.S.C. § 1581(i)(3).

Since plaintiffs have failed to establish jurisdiction under Section 1581(i)(3), Section 1581(i)(4) cannot provide a jurisdictional basis. The latter provision applies where the law pursuant to which a claim is brought provides for the "administration and enforcement with respect to the matters referred to in [*inter alia*] paragraph[] ... (3) of this subsection...." 28 U.S.C. § 1581(i)(4). Since Section 9(c) does not provide for an embargo, Section 1581(i)(4) does not provide an independent basis for jurisdiction. *See Retamal v. United States Customs & Border Prot.*, 439 F.3d 1372, 1375 (Fed.Cir.2006) ("[The plaintiffs] claims do not relate to the 'administration and enforcement' of a matter referred to in subsections 1581(a)-(h) or in 1581(i)(1)-(3). Therefore, section 1581(i)(4) does not provide an independent ground for jurisdiction in this case.").

CONCLUSION

For the forgoing reasons, the court does not have subject matter jurisdiction over plaintiffs' claims. Therefore, plaintiffs have not met their burden of showing a likelihood that they will succeed on the merits, and their motion for a preliminary injunction

must be denied. *See U.S. Ass'n of Imps.*, 413 F.3d at 1350. Further, because the Court lacks subject matter jurisdiction in this case, defendants' motions to dismiss are granted. Judgment shall enter accordingly.

JUDGMENT

This case having been submitted for decision; and the court, after due deliberation, having issued the decision herein; Now therefore, in conformity with said decision, it is hereby

ORDERED that plaintiffs' motion for a preliminary injunction is denied; and it is further

ORDERED that defendants' motions to dismiss are granted.