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David A. Wirth

Boston College Law School, wirthd@bc.edu

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The President, the Environment, and Foreign Policy: The Globalization of Environmental Politics

*David A. Wirth**

I. INTRODUCTION

By comparison with domestic environmental issues, international environmental diplomacy is distinguished by one overarching attribute: the far greater role of the executive branch, and in particular the presidency. Although Congress is far from irrelevant in the international sphere and can exercise considerable leverage at certain important junctures, as a general matter there is a commensurate decrease in the importance of domestic legislative activity in international environmental law and politics. Further, the role of the courts is often attenuated, meaning that the president plays a far more expansive role than anticipated by the Constitution's mandate to "take Care that the Laws be faithfully executed."¹ Accordingly, the institutional dynamics in international environmental policy-making are very different from their domestic analogues.

From the point of view of the environment, this heightened emphasis on executive branch discretion is something of a two-edged sword. A president with a proactive commitment to progress on environmental issues is in a position to accomplish a great deal through his unilateral initiative on behalf of the United States when tied to reciprocal commitments from other governments. Conversely, there is little that other branches of the federal government can do to motivate an unenthusiastic or lethargic chief executive.

Both of these Janus-like faces of presidential power were represented in the negotiation of the Montreal Protocol on Substances That Deplete the Ozone Layer,² which is widely regarded as one of the most effective instruments to result from international environmental diplomacy. Initially, the executive branch was aggressive in advocating deep cuts in production and consumption of compounds that deplete ozone in the stratosphere. At a crucial moment, however, the Reagan administration appeared prepared to do an about-face; Secretary of the Interior, Donald Hodel, questioned the need for a regulatory intervention, advocating instead that individuals protect themselves from elevated ultraviolet radiation by making use of hats, sunglasses, and

* Professor of Law and Director of International Programs, Boston College Law School, Newton, Massachusetts. This Essay is based on the author's presentation at the Wallace Stegner Center Fifth Annual Symposium entitled "The Presidency and the Environment: The Twentieth Century and Beyond," held at the University of Utah, S.J. Quinney College of Law on March 31, 2000.

¹ U.S. CONST. art. II, § 3.

² Sept. 16, 1987, 26 I.L.M. 1550

sunscreen.³ This provided an opportunity for some memorable quips from a former colleague, who described Hodel's proposal as the "Ray Ban Plan," and asked the rhetorical question, "What does Secretary Hodel want, an entire country that looks like the Blues Brothers?" The political cartoonist for the Washington Post also had a field day, producing a classic contribution depicting fish, birds, animals, trees, and crops, all wearing hats and sunglasses.⁴

This article addresses the complexity of this duality in presidential power as manifested by two more recent examples. The first, dealing with climate change from an international perspective, suggests the limits to presidential power as applied in the service of an environmental protection agenda. The second, treating the issue of trade and environment, illustrates the extent to which the presidential prerogative in foreign relations can be employed to compromise environmental objectives.

II. CLIMATE CHANGE

On the multilateral level, the history of the climate change issue for the past decade or so has been one of partially realized potential for overcoming impediments to collective international action. The situation in the United States, which accounts for about a quarter of all greenhouse gas emissions, demonstrates the important role of the presidency in furthering or impeding international action to protect the global environment.

Formal international cooperation to protect the global climate commenced in 1992 with the adoption of the UN Framework Convention on Climate Change (Convention or FCCC),⁵ negotiated for the United States by the first Bush administration and adopted at the United Nations Conference on Environment and Development. During negotiations on the Convention, there was considerable debate as to whether that instrument should contain substantive emissions limitations for greenhouse gases or, alternatively, should serve only as a procedural framework for future cooperation on the climate problem.⁶ In the end, the drafters fashioned a compromise of constructive ambiguity, adopting a goal of limiting greenhouse gas emissions from industrialized countries to their 1990 levels, which could be (and has been)

³ Cass Peterson, *Administration Ozone Policy May Favor Sunglasses, Hats; Support for Chemical Cutbacks Reconsidered*, WASH. POST, May 29, 1987, at A1.

⁴ *For the Record*, WASH. POST, June 3, 1987, at A18 (editorial cartoon).

⁵ United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. NO. 102-38 (1992), 1771 U.N.T.S. 108, 31 I.L.M. 851 (1992).

⁶ Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451, 493 (1993).

interpreted by some as mandatory and binding, and by others as “soft” or advisory only.⁷

To give more concrete content to emissions reductions targets, the parties to the FCCC in 1997 adopted the Kyoto Protocol⁸ (Protocol), an ancillary instrument to the Convention negotiated on behalf of the U.S. by the Clinton administration. Among other things, the Kyoto Protocol sets out commitments on the part of thirty-three industrialized nations, along with others that are making the transition to market economies, to reduce emissions of greenhouse gases by as much as eight percent from 1990 levels during a first commitment period covering the years 2008 to 2012. Although the substantive obligations have not yet been negotiated, the Kyoto Protocol anticipates additional reductions in subsequent commitment periods.

Even before the Kyoto Protocol's adoption, the Senate had expressed its objection to the agreement in a resolution⁹ sponsored by Senators Byrd and Hagel and adopted by a vote of 95-0.¹⁰ The Clinton administration consequently had relatively little expectation of obtaining Senate advice and consent to ratification of the Protocol by the two-thirds majority required by Article II, Section 2 of the Constitution.¹¹ The executive branch nonetheless signed the Kyoto Protocol,¹² presumably on the expectation that the

⁷ *Id.* at 496.

⁸ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc. FCCC/CP/1997/7/Add.2, 37 I.L.M. 22 (1998) [hereinafter Kyoto Protocol or Protocol].

⁹ S. Res. 98, 105th Cong. (1997).

¹⁰ 143 CONG. REC. S8138 (1997) (specifying that “the United States should not be a signatory to any protocol to, or other agreement regarding, the United Nations Framework Convention on Climate Change of 1992, at negotiations in Kyoto in December 1997, or thereafter, which would . . . mandate new commitments to limit or reduce greenhouse gas emissions for the Annex I Parties [to the Convention, consisting of industrialized states], unless the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period”).

¹¹ Some, and indeed most, international agreements entered into by the United States do not require Senate advice and consent to ratification, allowing the president to enter into binding international obligations without congressional consultation or participation. In such cases, however, there must be independent legal authority for the agreement, which in the case of environmental matters is generally supplied by statute. As the statutory basis for requiring reductions in emissions of key greenhouse gases, notably methane and carbon dioxide, is uncertain or absent, there is at least reason to believe that the president could not conclude the Kyoto Protocol without Senate advice and consent.

¹² Signature of a multilateral treaty ordinarily indicates a preliminary intent to be bound, subject to confirmation by subsequent domestic ratification. Vienna Convention on the Law of Treaties, July, 1969, art. 14, 1155 U.N.T.S. 331, 385, 8 I.L.M. 679, 685. Although signature absent ratification does not bind a state to full performance of the obligations in a treaty, a signatory state is obliged to refrain from defeating the objects and purposes of the treaty until it has expressed its intention not to ratify. *Id.* at 686, art. 18. The Vienna Convention is ordinarily considered a codification of customary international law concerning treaties and is considered authoritative, if not binding, in the U.S. See Introductory Note to RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).

composition of the Senate in the future would shift in a direction more receptive to Kyoto.

Even for countries that did not face the domestic impediments found in the United States, the framework of the Protocol required further elaboration before it could be ratified. Among the principal outstanding issues were the terms for implementing the agreement's novel "flexible mechanisms," which were designed to reduce the cost of implementation by expanding the range of options available to states in fulfilling their obligations, principally in the form of trading emissions rights.¹³ The rules according to which the Protocol's flexible mechanisms were to be applied were controversial, and could be expected to have a major impact on both the efficacy of the agreement and the shape of international markets in emissions rights.

Accordingly, the parties to the Convention continued to work on the rules for implementing the Kyoto Protocol at their annual meetings, on the expectation that few if any states with substantive emissions reduction obligations under the agreement would ratify it until the terms of implementation were agreed. As of the end of the November 2000 annual meeting, held in the Hague while the outcome of the U.S. presidential election was still uncertain, agreement still had not been reached on decisions to implement the Kyoto Protocol. Consequently, parties to the Convention agreed to convene a resumed sixth session in Bonn, the seat of the Convention's Secretariat, in 2001.

Meanwhile, in late March 2001, the prospects for progress on Kyoto rules darkened considerably when President Bush announced that the United States would not ratify the Kyoto Protocol.¹⁴ That same spring, the Intergovernmental Panel on Climate Change (IPCC)¹⁵ released its Third Assessment Report. Contrary to the U.S. government's position, the report reinforced the seriousness of the global warming problem, concluding that "[t]he Earth's climate system has demonstrably changed on both global and regional scales

¹³ See Kyoto Protocol, *supra* note 9, at art. 6. See generally David A. Wirth, *The Sixth Session (Part Two) and Seventh Session of the Conference of the Parties to the Framework Convention on Climate Change*, 96 AM. J. INT'L L. 648 (2002).

¹⁴ See Andrew C. Revkin, *Bush's Shift Could Doom Air Pact, Some Say*, N.Y. TIMES, Mar. 17, 2001, at A7.

¹⁵ The IPCC, which met for the first time in November 1988, was created under the auspices of the United Nations Environment Program (UNEP) and the World Meteorological Organization (WMO) with a mandate to study the climate change issue primarily from a scientific perspective. The IPCC's principal activities are divided among three working groups: a science working group addressing the causes of climate change, a working group studying social and environmental impacts of climate change, and a working group addressing response options for limiting greenhouse gas emissions and mitigating the effects of climate change. The IPCC's first and second assessment reports, released in 1990 and 1995, respectively, provided much of the scientific basis for the Convention and the Protocol.

since the pre-industrial era, with some of these changes attributable to human activities.”¹⁶

Notwithstanding the IPCC's broad international composition, consensus-based decision making process, and high degree of international respect, the Bush administration requested the U.S. National Academy of Sciences to review the Intergovernmental Panel's work product. Instead of contradicting the IPCC's conclusions, the National Academy reaffirmed them, thereby negating any inference that the panel's conclusions had been politically motivated.¹⁷ While the Bush administration could hardly deny the seriousness of the global warming problem after the National Academy's report, the president nonetheless reiterated his opposition to the Kyoto Protocol—mere days after the report's release. Labeling the Kyoto Protocol “fundamentally flawed,” the Bush administration's June 2001 critique of the agreement identified five themes familiar from earlier debates on the greenhouse issue, but which until that time had not prevented executive branch support for the Protocol.¹⁸

The Bush decision sent shock waves through the negotiating process at a critical juncture, but ultimately did not derail adoption of the implementing rules, known as the Marrakesh Accords,¹⁹ in November 2002. As of this writing, 121 states have ratified the Protocol, more than twice as many as the minimum fifty-five ratifications needed as one of two conditions precedent for the Protocol to enter into force.²⁰ The second condition requires ratifications from states representing fifty-five percent of 1990 global emissions of carbon dioxide; emissions from ratifying countries now represent 44.2 percent of that level.²¹ Despite the Russian Federation's recent indications that it might revisit its intent to ratify, the likelihood of achieving the fifty-five percent cutoff in the near future is nonetheless reasonably high and contrary to the premature predictions of the death of the Protocol.

Having completed its own review of the climate change issue, the White House in February 2002 released a new Clear Skies and Global Climate

¹⁶ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001: SYNTHESIS REPORT, SUMMARY FOR POLICYMAKERS 4 (2001), available at <http://www.ipcc.ch/pub/SYRspm.pdf> (last visited Apr. 19, 2004).

¹⁷ See Katharine Q. Seelye & Andrew C. Revkin, *Panel Tells Bush Global Warming is Getting Worse*, N.Y. TIMES, June 7, 2001, at A1.

¹⁸ See Edmund L. Andrews, *Frustrated Europeans Set to Battle U.S. on Climate*, N.Y. TIMES, July 16, 2001, at A1.

¹⁹ The Marrakesh Accords & The Marrakesh Declaration (Nov. 11, 2001) (draft), available at http://unfccc.int/cop7/documents/accords_draft.pdf (last visited Apr. 19, 2004).

²⁰ See Kyoto Protocol, *supra* note 9, at art. 24(1).

²¹ *Id.*; see also UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, KYOTO PROTOCOL THERMOMETER (Apr. 15, 2004), at <http://unfccc.int/resource/kpthermo.html> (last visited Apr. 19, 2004).

Change Initiative. Instead of reducing emissions from a fixed baseline, as specified in the Kyoto Protocol, the Bush proposal would lower the intensity of greenhouse gases, defined as “the ratio of greenhouse gas emissions to economic output,” from today's 183 metric tons per million dollars of GDP to 151 by 2012.²² The proposal includes such features as tax credits for investments in renewable energy, and progress is to be reassessed in 2012, the end of the first commitment period under the Kyoto Protocol.²³ It is not yet clear whether this proposal could be meshed with the Kyoto approach, in particular because actual emissions are keyed to economic performance, a formula that may allow actual emissions to increase if economic activity is sufficiently vigorous.

More or less simultaneously, the Bush administration declined to support the candidacy of Dr. Robert Watson, a U.S. national, for a subsequent term as chairman of the IPCC.²⁴ To a storm of international controversy, Watson—one of the world's leading climate scientists who had worked previously for the National Aeronautics and Space Administration, later in the Clinton White House, and is currently Chief Scientist and Director of the Environmentally and Socially Sustainable Development Network at the World Bank²⁵—was replaced by Indian scientist Rajendra Pachauri, director general of a private research organization in New Delhi, India.

The case history of the Kyoto Protocol demonstrates a number of important dynamic characteristics of international negotiations, principal among them the preeminent role of the president and the executive branch. Because of the president's constitutional prerogatives as “the sole organ of the nation in its external relations, and its sole representative with foreign nations,”²⁶ he is the principal domestic actor in crafting the international law of the environment, as in other areas, on behalf of the United States in multilateral processes. To that extent, his function is very different from the domestic arena, where we are accustomed to think of Congress as the principal law-giver and the executive branch, as the name suggests, as responsible primarily for implementation of the law as written by the legislature. Among other things, this structural attribute means that policy shifts in international settings can be much more rapid and dramatic than is likely to be the case in

²² Press Release, The White House, Fact Sheet: President Bush Announces Clear Skies & Global Climate Change Initiatives (Feb 14, 2002), at <http://www.whitehouse.gov/news/releases/2002/02/20020214.html> (last visited Apr. 19, 2004).

²³ *Id.*

²⁴ See Andrew C. Revkin, *Dispute Arises Over a Push to Change Climate Panel*, N.Y. TIMES, Apr. 2, 2002, at A10.

²⁵ See WORLD BANK GROUP, ROBERT T. WATSON (2004), at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20025869~menuPK:34490~pagePK:36880~piPK:36882,00.html> (last visited Apr. 19, 2004).

²⁶ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

Congress, which has multiple actors and a bicameral structure in which only a third of the upper chamber can be replaced over any two-year period due to staggered terms. As demonstrated by this example, the president has great discretion in exercising the authority of the United States not only in law-making settings, such as the Marrakesh Accords, but also in the day-to-day conduct of multilateral interactions, as in the IPCC, with relatively little oversight from the other branches of the federal government.

Ironically, the U.S. under the Clinton administration was a principal architect of the Kyoto trading scheme, which was designed in part to make the agreement more palatable to a skeptical Senate. Then, as the Senate grew somewhat more receptive to action on the climate issue, Kyoto was rejected by a new president, leaving the rest of the world to work through the minutiae of an agreement whose shape had been crafted largely by a state that no longer intended to become a party to the instrument. This demonstrates not only the dominant position of the president, but also the subordinate function of Congress in international affairs of all kinds, including those relating to the global environment. No matter how enthusiastic Congress might be about an international agreement, there is little that it can do to coerce an unwilling president into negotiating, signing, or ratifying such an agreement. The Senate's role is largely passive and negative, in the sense that the upper chamber cannot craft new obligations, but only accept or reject those that have been shaped by the president. The House of Representatives plays a lesser role still, although it is likely to have some say on statutory matters typically required to implement international agreements.

III. INTERNATIONAL TRADE AGREEMENTS

If the history of the Kyoto Protocol demonstrates the president's capacity to frustrate multilateral efforts to protect the environment, recent experience with trade agreements demonstrates the potential for the president to use international obligations to undermine environmental guarantees. As long ago as the early nineteenth century the British economist David Ricardo, responding to the prevalent mercantilist and colonialist views of the time, hypothesized that countries that reciprocally open their borders to foreign trade will inevitably be better off than countries that impede or prohibit trade. Ricardo observed that free trade encourages specialization and global economic efficiency, both of which benefit the public. The Ricardo theory of comparative advantage is alive and well today in modern trade agreements, including the General Agreement on Tariffs and Trade (GATT),²⁷ the

²⁷ General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194.

agreement creating the World Trade Organization (WTO),²⁸ and the North American Free Trade Agreement (NAFTA).²⁹

International agreements, of virtually all sorts, are characterized by a flow of rights and obligations. The obligations in international trade agreements—including the GATT, WTO agreements, and NAFTA—are basically ones of nondiscrimination and are expressed legally in three principal ways. The first of the principal obligations or “disciplines” found in international trade agreements is the requirement for most favored nation (MFN) treatment. For countries that have MFN status with the United States, the U.S. has promised to not treat those countries’ goods differently than the goods of other MFN nations. So, if the U.S. is carrying on trade relations with the fictional countries of Fredonia and Ruritania, and both have MFN status, the U.S. is obliged to treat Ruritania no less well than it treats Fredonia, and vice versa. With respect to nationally produced goods, the second principal discipline—the national treatment obligation—requires treatment of imported products no less well than similar, domestically manufactured products. So, for instance, if the United States imports widgets from Fredonia, it must treat the imported Fredonian widgets no less well than it treats the domestically manufactured widgets. The national treatment requirement, taken together with the MFN obligation, results in a kind of equal protection clause for goods in international trade. A third discipline, the prohibition on quantitative restrictions, can be thought of as a corollary to the national treatment obligation. If a country does not have restrictions on the quantity of a certain product that can be produced domestically, it cannot put quantitative restrictions on imported versions of that product. Collectively, these three nondiscrimination obligations operate something like the “dormant commerce clause” under the U.S. Constitution, which domestically restricts a state’s capacity to regulate in ways that interferes with interstate trade *within* the United States.

To understand the trade and environment dynamic, it helps to understand the structure of trade negotiations. Using Ruritania and Fredonia again as examples, assume both countries have trade barriers of whatever kind—tariffs, embargoes, regulations—that impede the free movement of goods between the two countries. Neither of them acting on its own is likely to lower those trade barriers. On the other hand, Ricardo tells us that if they get together and in a reciprocal way promise to reduce their trade barriers simultaneously, they will both be better off. Hence, the purpose of an international trade agreement—in

²⁸ Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 155, 33 I.L.M. 1125.

²⁹ N. Am. Free Trade Agreement, Dec. 8, 11, 14, & 17, 1992, U.S.-Canada-Mexico, 32 I.L.M. 289, 612.

contrast to a unilateral action by either Fredonia or Ruritania—is to overcome “prisoners' dilemmas” that otherwise would inhibit action by either party. Each side is invited to agree reciprocally to reduce its trade barriers in return for a promise from the other side similarly to reduce its barriers. Large multilateral trade agreements, such as the WTO suite of agreements, are somewhat more complicated but in principle have a similar structure.

The obligations in these reciprocal trade agreements are significant for a state's economic well-being. If Ruritania agrees to lower its trade barriers in return for similar promises from Fredonia, Fredonia has a legitimate expectation that Ruritania will perform on those obligations. That Ruritania might not do so demonstrates the need to craft effective means for settling disputes in some binding third party process like a court proceeding.

What does all of this mean for the environment? One can usefully start from the perspective that international obligations on trade are almost exclusively “negative.” The term is not intended to be judgmental or pejorative, but descriptive. Trade obligations are negative in the same sense that the First Amendment is negative: to the extent that we have free speech in this country, it is because the government is disabled by the First Amendment from intruding into an otherwise free market of ideas. Similarly, trade agreements that encourage liberalized or free trade are defined by obligations that limit governmental intrusion into what otherwise would be a free market. It is this freedom from governmental interference that largely defines liberalization. Another word for this phenomenon might be deregulation—in the sense of reducing the level of governmental intrusion in the market—and trade agreements, by virtue of their negative obligations, are inherently deregulatory. This deregulatory momentum largely explains the phenomenon of globalization, at least as it has been defined for the past decade or so—getting governments out of the business of impeding private interactions and transactions, thereby facilitating their global reach.

By contrast, environmental protection anticipates affirmative governmental interventions in the marketplace to offset market failures. There in a nutshell is the clash between the two approaches: One operates to disable governmental action and the other depends on invigorating government. Obligations in trade agreements *proscribe* certain activities, whereas environmental statutes *prescribe* other governmental actions. The same is true of international environmental agreements: The Kyoto Protocol requires parties to intervene in their domestic jurisdictions, presumably in a regulatory manner, to accomplish certain concrete results in the form of prohibitions on private actions. By contrast, trade agreements, with a few exceptions not relevant here, contain no affirmative rule making authority. Unlike international trade agreements, in domestic legal systems there is normally

some affirmative governmental regulatory authority to offset the externalities created by market liberalization.

An example of where the concepts of free trade and environmental regulation come into conflict is the EU's ban on hormone treated beef.³⁰ The EU depicts the ban as a health and safety measure. The United States, on the other hand, insists the ban is a protectionist measure designed to ensure access by European beef producers to European markets and to keep out competition. The result is that free traders may identify a health and safety regulation as an impediment to trade, a "non-tariff barrier." Consequently, the negative obligations found in international trade agreements will always be pushing towards a relaxation of the rigor of domestic health, safety, and environmental measures. This has been described by some as a "race to the bottom."

IV. INTERNATIONAL TRADE AGREEMENTS AND PRESIDENTIAL POWER

From a constitutional perspective, the very phrase "international trade agreement" presents something of a conundrum. Our Constitution divides authority over international trade between Congress, on the one hand, and the president on the other. Under Article I, Section 8 of the Constitution, Congress, and only Congress, has the power to regulate international trade. So, Congress can put tariffs in place by legislation. It can prohibit the importation of foreign goods, put fees on them, or allow importation only under certain circumstances. But Congress does not have the power to negotiate with other states to overcome the prisoners' dilemmas that characterize international trade. Article II, Section 2 of the Constitution, on the other hand, gives the president the exclusive authority to conduct foreign relations and to make treaties. But as we have seen earlier, the president does not have the unilateral power to legislate. So, in the usual case, the president negotiates an international agreement, brings it home, and presents it to the Senate for its advice and consent to ratification by a two-thirds majority.

From the point of view of international trade there are some difficulties with this approach. First, the Senate can tinker with an agreement brokered by the president and alter its terms through the ratification process. Given the content of most trade agreements, each is almost certain to contain some provisions that will negatively affect some domestic constituency. The whole point of trade agreements is to lower trade barriers for the benefit of the public as a whole, but industries and other constituencies that benefit from trade barriers are obviously going to object to their removal. The result is a high

³⁰ See EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the U.S., Report of the Panel, WT/DS26/R/USA (Aug. 18 1997), available at http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm (last visited Apr. 19, 2004).

likelihood that a trade agreement may be revisited in substantial part and subject to revision in the Senate. The second problem with this approach is that it leaves out the House of Representatives.

To remedy this difficulty, the executive and legislative branches have crafted an innovation called a “congressional-executive agreement,” which is the form in which trade agreements have been adopted since 1974. Congress, exercising its Article I, Section 8 powers, authorizes the president, by prior statute, to negotiate an international trade agreement on general terms, provided that the agreement not enter into force until Congress adopts subsequent implementing legislation.³¹ The president carries out the negotiations, brings home an agreement, and then presents the agreement to Congress, along with implementing legislation that is typically drafted by the executive branch.

The principal innovation in this scheme is that the subsequent implementing legislation is adopted on what was formerly called the “fast-track,” which allows for no amendments and only limited public participation. More recently, this form of congressional authorization has been called, somewhat euphemistically, “trade promotion authority,” presumably to dispel some of the negative baggage associated with the term “fast-track.” Although most constitutional scholars believe that congressional-executive agreements are fully the equivalent of treaties that have gone through the Senate advice-and-consent process, the agreements in fact provide Congress with a much smaller role. Under fast-track procedures, Congress has only one very unattractive remedy if it does not like an agreement, which is to disapprove it altogether. Congress has essentially forgone the normal domestic statutory processes, thereby substantially increasing the executive’s role in the law-making function with respect to international trade. Moreover, in a case seeking compliance with the National Environmental Policy Act for the negotiation of NAFTA, the United States District Court of Appeals for the District of Columbia held that the judicial branch has no role in reviewing the fast-track trade agreement process.³² So, in addition to Congress’s reduced role, the courts are essentially cut out of the process, further enhancing presidential prerogative.

Fast-track agreements also have impacts on the administrative process, which can significantly affect environmental interests. Under normal law-making processes, Congress adopts a statute through public hearings, with published texts of bills and a variety of procedural guarantees designed to

³¹ See, e.g., Trade Act of 1974 § 101, 19 U.S.C. § 2111 (2000) (authorizing negotiation of trade agreements, including Tokyo Round of Trade Negotiations in GATT and United States-Canada Free-Trade Agreement); Omnibus Trade and Competitiveness Act of 1988 § 1102, 19 U.S.C. § 2902 (2000) (same, including Uruguay Round of Trade Negotiations in GATT and North American Free Trade Agreement).

³² *Pub. Citizen v. Office of the United States Trade Representative*, 5 F.3d 549, 553 (D.C. Cir. 1993).

insure the accountability and transparency of the legislative process. The enacted legislation usually includes a mandate to an agency, such as the Environmental Protection Agency (EPA), to elaborate the statutory requirements by adopting regulations. These regulations are promulgated by the agency with additional procedural guarantees, such as notice to the public, an opportunity for public comment, and the requirement that the agency respond to the comments. If an affected constituency is dissatisfied with the results of the administrative process, it can go to court and challenge the agency action through a judicial review proceeding, for which there will also be public hearings and publicly available briefs.

The process of negotiating and implementing trade agreements is considerably less accountable and less transparent to the public. In terms of making the law in the first place, the international negotiating sessions that lead to an agreement are closed to the public. Non-governmental observers are not permitted, and interim drafts are not usually published. Similarly, the dispute settlement process (the analogue to judicial review) in most trade agreements is largely closed to the public. Although these proceedings have opened up somewhat in recent years, written submissions may not be publicly available in their entirety, there is no possibility for private party intervention, and only very limited opportunity to participate in a quasi-*amicus curiae* capacity. Moreover, most of the dispute settlement panel members are not experts on the kinds of scientific questions that come up in environmental cases. So, panel members frequently must refer issues to outside experts, and that process is also quite opaque. Further, the United States is represented as a litigant by the only part of the federal government with the power to conduct foreign policy, the executive branch, which might be overly accommodating in its litigation posture, particularly in the case of rules that it may not enthusiastically support.

An example of one regulation that was challenged in this way is a rule promulgated by the Environmental Protection Agency under the Clean Air Act dealing with reformulated gasoline. For gasoline to qualify as reformulated it must be compared to a baseline, unreformulated state. In its rule, EPA specified that domestic refiners could choose from a variety of baselines. Because there were fewer data about foreign refiners, making enforcement much more difficult, EPA did not give foreign refiners a choice, but instead assigned them a baseline. As a matter of trade law, this was a relatively easy case of facial discrimination, violating the basic GATT and WTO disciplines.³³

³³ See Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 35 I.L.M. 603 (May 20, 1996), available at http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm (last visited Apr. 19, 2004).

The real issue, however, was what happened *after* the WTO dispute settlement panel report on the rule came out. As a matter of domestic U.S. law, dispute settlement panel reports have no domestic legal effect; to be implemented, the report had to go back to EPA for remedial action. The agency subsequently started a new rule making process by publishing a notice of proposed rule making, soliciting comments, and the like. The problem was that at the same time that the rule making was going on, another part of the executive branch, the U.S. Trade Representative, was reassuring the challenging party (Venezuela) that the new regulation would comply with the WTO panel's report. This tended to attenuate, if not entirely undermine, the rights of public participation that we are accustomed to in the ordinary administrative process, and which have given domestic environmental law such vigor. Later, the amended rule was challenged by a coalition of domestic refiners and environmental organizations. Before it was challenged for violating international trade agreements, the original rule was an ordinary garden-variety regulation. Hence, if it had been challenged at that point, the court would have used ordinary domestic law as the standard for the judicial review process. The *amended* rule, however, was now an issue of foreign affairs because it was necessary for the United States to comply with its international obligations as determined by the WTO. This situation created a dilemma for the court: Applying the domestic statutory standards might compel the United States, by judicial order, to violate its international obligations. In the end, the D.C. Circuit sought to harmonize the international obligations with domestic law, and upheld the amended rule.³⁴ Arguably, this tended to dilute normal domestic statutory law in favor of an international agreement that, as we have already seen, was drafted and applied, both internationally and domestically, through a process dominated by the executive.

International trade agreements can present similar imbalances between the federal government and the states. An example is a Massachusetts statute that prohibited procurement by the state government of products from companies that do business in Myanmar (formerly Burma) out of concern over human rights violations by the regime there. This was not a regulatory statute. The government of Massachusetts was not prohibiting private parties from doing anything;

³⁴ *George E. Warren Corp. v. U.S. Env'tl. Prot. Agency*, 164 F.3d 676 (D.C. Cir. 1998).

rather, the state merely chose not to purchase on its own behalf from companies that do business in Myanmar. Although the statute was successfully challenged on domestic legal grounds,³⁵ there were also potential international trade problems because the legislation arguably discriminated between those companies doing business in Myanmar and those operating in every other country on the planet. The statute, as a result, would quite possibly have fallen under the purview of the WTO Agreement on Government Procurement.³⁶ Although this case never reached that stage, it illustrates how trade agreements negotiated by the executive and adopted on the fast track could tie the hands of the states.³⁷

V. CONCLUSION: PRESIDENTIAL POWER AND ENVIRONMENTAL DIPLOMACY

The defects and limitations, both legal and policy, in the process of crafting international agreements are perhaps most obvious in the field of international trade. To remedy these imbalances, one might implement three specific changes. First, abandon fast-track processes, or, at the very least, open the negotiations for trade agreements and the debates over implementing legislation to the public. Second, specify that adverse dispute settlement panel reports have no effect on statutory mandates, are entitled to no deference in court proceedings, have no effect in domestic, administrative, or judicial proceedings, and have no preemptive effect on state law.

Although this latter suggestion might appear to be advocating violation of international law, that is not the case. We live in a federal system with a federal government characterized by a separation of powers. For example, in the case of a state law that violates a trade agreement, the federal government can always negotiate with the state, and if that fails Congress can enact a special statute that supersedes the state law in question. The current system leaves virtually all that power to the executive, which has the capacity to bring a judicial action against a state to assure compliance. Similarly, in the case of an administrative regulation required by a regulatory statute that contravenes a trade agreement, Congress can always amend the statutory mandate. For the

³⁵ Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

³⁶ Agreement on Government Procurement, LT/UR/A-4/PLURI/2 (Apr. 15, 1994), available at http://www.wto.org/english/docs_e/legal_e/gpr-94.pdf (last visited Apr. 19, 2004).

³⁷ Presumably as a consequence of such concerns, forty-four state attorneys general entered the debate over the Uruguay Round implementing legislation by requesting a summit meeting with then-President Clinton.

courts to artificially craft a newfound kind of deference to the executive in such circumstances simply risks distorting the delicate balance in our domestic regulatory regime.

None of this is to say, however, that the exercise of presidential power in foreign relations more generally ought necessarily to be constrained. The use of international agreements in the fields of both the environment and international trade is a long-standing technique that can overcome domestic, political, and, sometimes, legal constraints. That is generally for the good. Unfortunately, while the president has assembled greater power to act on trade issues, that power has rarely, if ever, been applied with the same sort of zeal to environmental matters. Instead, we have what might be called ordinary environmental diplomacy, where we end up with watered-down agreements that tend to languish in the Senate. In fact, to the extent that creative thinking has happened in foreign relations, it has tended to operate to the *detriment* of the environment, as in the trade area. It is not at all clear that there is a legal remedy to this essentially political problem. All presidents are jealous of the prerogatives of the office—mild-mannered souls like Jimmy Carter just as much as the more rugged type personified by Ronald Reagan. While the principles of presidential power are content-neutral, it is fair to say that we have yet to see a president who even begins to exhaust their potential for creative use in international diplomacy for the benefit of the environment.