The Uneasy Interface between Domestic and International Environmental Law

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David A. Wirth*

INTRODUCTION

Under the title "How the Foreign Policy Machine Broke Down," a recent article in the New York Times Magazine levels a scathing but insightful attack on United States foreign policy since World War II. The article's central thesis can be summarized in one sentence:

The United States, because it became a superpower during the early nuclear era, created for itself a foreign-policy-making machinery that in the end had little to do with the principles underlying the country's institutions and political beliefs.  

The author then goes on to state that, with the end of both the Cold War and divided government in Washington, the United States can and should get on with the important business "of making a democratic foreign policy."  

The New York Times article addresses traditional national security and foreign policy concerns, focusing on the use of military force and providing such examples as the Bay of Pigs, Vietnam, Grenada, Noriega and Panama, Iraq and Operation Desert Storm, and Iran-Contra. The same analysis applies equally well or better to the "new" foreign policy issues, which are more concerned with human welfare than military security and which have assumed relatively greater prominence since the end of the Cold War. These issues include population, trade, labor,

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2. Id.

3. Id. (emphasis in original).

4. Id.
public health, and the environment. In contrast to many longstanding foreign policy preoccupations, these recently invigorated areas have direct analogues in national law and regulation.

Indeed, the "new" foreign policy concerns are, in many cases, characterized by an "internationalization" of areas previously considered to be strictly domestic matters subject only to municipal law and regulation. For example, the North American Free Trade Agreement⁵ and the Uruguay Round of Trade Negotiations of the General Agreement on Tariffs and Trade (GATT)⁶ potentially subject most domestic environmental, public health, and safety regulations to new trade disciplines as possible non-tariff barriers to trade.

This Essay argues that there is great urgency for rethinking both international and domestic decision making processes applicable to fields governed by domestic regulation—specifically, the law of the environment—to assure that actions taken in multilateral fora reflect the underlying values of our society and our legal system.

Multilateral discussions now often supplant the national statutory and regulatory schemes crafted in the late 1970s and early 1980s to respond to the threat of such environmental hazards as stratospheric ozone depletion and the export of hazardous wastes. Tackling international environmental problems in a global context has obvious benefits. A multilateral setting provides a unique opportunity to design effective and efficient international legal structures that advance critical environmental goals while simultaneously reflecting the needs and expectations of all countries.

This trend toward multilateral resolution of international environmental questions has generally been applauded. At the same time, there is considerable potential for tension and even clashes between the procedure and substance of the international and domestic legal frameworks. Considerable differences exist between the international and national legal orders with respect to questions of process. Many bedrock principles of United States environmental and administrative law—including notice to

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the public, an opportunity to be heard, and judicial review to assure rational decision making—are reflected poorly, if at all, in the international legal system. Indeed, the notion that any of these components might be essential to the integrity of international legal processes, including international environmental decision making, borders on heresy. In extreme cases, decisions that could directly affect the health and well-being of people within the United States could be lifted out of domestic processes and placed in a legal context that barely acknowledges the existence of individuals.

I. INTERNATIONAL PROCESSES AND DOMESTIC LAW

Legal obligations in the international environmental field arise principally through international agreements, among which the "legislative" instruments of binding multilateral agreements have assumed principal importance. The development of customary international law through the accretion of widespread practice by states, a second mechanism resulting in obligatory duties on the international level, has been considerably less important in defining international environmental law.

Multilateral agreements in the environmental area increasingly articulate specific and often complex regulatory schemes with measurable, crisp procedural and substantive requirements for implementation by individual states. These multilateral instruments are analogous in many ways to domestic regulatory structures in their precision. For example, as the name suggests, the 1985 Protocol on Reduction of Sulfur Emissions or Their Transboundary Fluxes by at Least 30 Per Cent, requires each state party to achieve a uniform percentage decrease in pollution, measured from an agreed base year, by a firm deadline. The 1988 Protocol Concerning the Control of Emissions of Nitrogen Oxides (NO₂) or Their Transboundary Fluxes sets out highly specific technology-based standards for pollution control. The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal mandates detailed procedures governing the export of municipal trash and toxic detritus. The subjects of these agreements, such as acid rain and international traffic in hazardous wastes, often overlap with

domestic statutory requirements.

Although the products of these multilateral undertakings may bear considerable resemblance to domestic environmental statutes or regulations, the processes by which these instruments are formulated do not. Because until relatively recently only states were considered subjects of international law, multilateral bodies are still primarily organizations of states represented by their governments. Presumably because they are principally, if not exclusively, fora for intergovernmental negotiations, many multilateral processes typically lack the openness and public accountability accepted as a matter of course in domestic legislative and administrative law.

Public scrutiny and access may be difficult or even non-existent. Although some scientists, businesspersons, and non-governmental organizations have managed to carve out niches for themselves as observers or advisers to multilateral institutions, policy and practice among international organizations regarding public participation has not been standardized. Although some documents may circulate informally, distribution of proposals for, and drafts of, multilateral agreements and other important lawmaking instruments may also be confined to governments. Enforcement and adjudicatory processes in the international legal system similarly may exclude the public.

The recent and already celebrated “tuna/dolphin” GATT panel decision reflects in a microcosm the serious divergences between domestic and international law and practice in making, implementing, and adjudicating law and policy. Moreover, the tuna/dolphin decision demonstrates the need for greater public participation in international processes. The dispute involved a provision of the Marine Mammal Protection Act (MMPA),10 a statute enacted in 1972 and amended in major respects in 198411 and 1988,12 but never fully implemented by the executive branch. The current statute requires that the killing of dolphin by foreign fleets incidental to fishing for yellowfin tuna be commensurate with that of the United States fleet.

The statutory sanction for a failure to meet this standard is trade restrictions on yellowfin tuna imports from the offending country. The Earth Island Institute, a private non-profit organization, sued in the United States District Court for the Northern District of California under a theory of judicial review. The Institute obtained a court order directing the executive branch to carry out its non-discretionary duties under the MMPA by imposing a ban on imports of yellowfin tuna from Mexico and other countries. The executive branch then applied an administrative regulation promulgated by the National Oceanic and Atmospheric Administration (NOAA) and adopted after the publication of a proposed rule and an opportunity for public comment. Relying on that regulation, NOAA made a finding that Mexico had satisfied the statutory standard and lifted the import prohibition. Subsequently, the district court issued a second order reaffirming the ban after concluding that the regulation was inconsistent with the MMPA and was therefore illegal. On appeal, the United States Court of Appeals for the Ninth Circuit affirmed both orders of the district court.

Mexico initiated a dispute settlement process against the United States under the GATT, challenging the import ban as a non-tariff barrier to trade. Unlike the domestic legislative and administrative processes, GATT dispute settlement does not provide for participation by private parties as intervenors or amici. In contrast to the opportunities for public input into the domestic judicial process, but consistent with standard GATT procedures, the documents and oral proceedings in the tuna/dolphin case were not accessible to the public.

16. Earth Island Inst. v. Mosbacher, 929 F.2d 1449 (9th Cir. 1991).
18. See, e.g., Understanding Regarding Notification, Consultation, Dispute Settle-
In the tuna/dolphin case, however, the European Economic Community and ten GATT parties other than the United States made written submissions to the panel, all of which were critical of the MMPA ban and most of which argued that the ban is inconsistent with GATT. Further, the United States Government was represented in the GATT dispute settlement process by its executive branch, which had flouted three statutory directives, adopted an illegal regulation, and reluctantly implemented the import ban only under court order. Particularly against the closed nature of the GATT process, questions as to whether the executive branch vigorously defended the validity of the ban naturally arose.

The inaccessibility of the proceedings to members of the public strongly suggests that important perspectives were not adequately presented to the GATT dispute settlement panel, at least as a formal matter. Although the executive branch solicited some input from certain members of the public in the preparation of its submission, those views at most affected only the United States submission to the panel, which must ultimately reflect the Government's position. While helpful, that practice is not a substitute for an opportunity for written and oral submissions directly to a dispute settlement panel.

In short, the many entry points for public participation in making, implementing, and adjudicating law on the domestic level are duplicated poorly, if at all, on the international level. In addition, as more and more domestic regulatory issues are taken up in international contexts,
instances of this divergence will likely increase in number and frequency.

Although treaties adopted pursuant to constitutionally prescribed processes and congressional legislation are of equal legal authority, the formulation of international commitments differs considerably from the enactment of domestic statutes. The President, as the “sole organ of the nation in its external relations,” has the exclusive power to “make Treaties” and, in effect, simultaneously to define both national law and international legal obligations. In contrast to domestic legislation, the President negotiates a treaty, often in secret, and then, after it has been concluded, presents the treaty to the Senate for post hoc advice and consent to subsequent ratification. The Administrative Procedure Act exempts “a military or foreign affairs function of the United States” from that statute’s fundamental requirements for notice-and-comment rulemaking. Additionally, the “political question” doctrine, which precludes judicial review of certain actions of the political branches, and especially the executive branch, has particular vitality in the area of foreign relations.

Even if the “political question” doctrine does not apply, the courts nonetheless have displayed a pronounced deference to executive branch

20. See Whitney v. Robertson, 124 U.S. 190, 194 (1888) (holding that the Constitution ranks treaties and legislative acts at the same level); 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987) (stating that an international treaty entered into by the United States becomes the law of the United States) [hereinafter RESTATEMENT].


24. See, e.g., Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring) (citing Baker v. Carr, 369 U.S. 186, 217 (1962)) (emphasizing that the political question doctrine involves three questions: (1) whether the Constitution grants jurisdiction over the issue to a different branch of Government; (2) whether the issue goes beyond the expertise of the Court; and (3) whether there are valid considerations cautioning against judicial intervention). See generally THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992) (questioning the longstanding exemption of foreign affairs from judicial scrutiny); Thomas M. Franck, COURTS AND FOREIGN Policy, FOREIGN POL’Y, Summer 1991, at 66 (claiming that no structural reasons exist for preventing the courts from hearing cases involving foreign affairs); Harold H. Koh, Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair, 97 YALE L.J. 1255, 1305-17 (1988) (arguing that the “Iran-Contra affair” resulted from a lengthy foreign policy process whereby the President circumvented legislative restraints to executive branch power).
interpretations of statutes that arise in a foreign affairs context. For instance, in the mid-1980s, the Environmental Protection Agency (EPA) banned the use of the fumigant ethylene dibromide (EDB) on domestically-grown produce, acting on evidence that EDB increases the risks of cancer, genetic mutations, and adverse reproductive effects in human beings. In contrast, EPA promulgated a tolerance allowing imported mangoes to contain EDB residues of thirty parts per billion (ppb) or less. EPA subsequently extended the tolerance in response to assertions by the Department of State that a complete ban would damage the economies of friendly exporting countries. In response to a petition for review, the United States Court of Appeals for the District of Columbia Circuit concluded that, because EPA was required by statute to base pesticide limits on health considerations alone, the agency's reliance solely on foreign affairs concerns in establishing a pesticide residue tolerance was illegal.25

On remand, EPA reaffirmed the residue limitation for imported mangoes, but came up with new justifications for that tolerance. EPA stated that a special exemption was warranted because of ongoing cooperative efforts with food-exporting nations to ensure that fruits and vegetables enter the United States free of pests like the Mediterranean fruitfly, diseases, and unsafe levels of pesticides. Moreover, EPA asserted that mango-producing nations were channelling export revenues into the search for alternatives to EDB. Accordingly, EPA concluded that revoking the EDB tolerance and prohibiting the importation of contaminated mangoes into the United States would pose a greater risk to the food supply than would the continued import of produce carrying pesticide residues. This reasoning seems counter-intuitive at best. Nonetheless, after EPA provided assurances that the EDB tolerance standard for imported mangoes would be of limited duration, the court of appeals approved the very same tolerance that it had earlier rejected as a violation of the statutory standard.26

Although the D.C. Circuit's second review of the EDB tolerance was phrased as a pure question of statutory interpretation of the health-based standard in the governing statute, the court could hardly have been deaf to the Government's clear assertions of harm to foreign relations. As this example demonstrates, there is a need to affirm process-oriented

values such as public participation not only on the international level, but also in domestic proceedings regarding human welfare issues, such as public health and the environment, that arise in a foreign affairs context.

II. EXECUTIVE AGREEMENTS AND THE CONGRESS

As discussed above, the President may enter into treaties on behalf of the United States pursuant to article II, section 2 of the Constitution after the Senate gives its advice and consent by a two-thirds majority. The executive branch, however, also concludes a distinct and very large category of "executive agreements" on behalf of the United States which, unlike treaties in the strict constitutional sense, do not require subsequent congressional endorsement. Although subject to some debate, the status of executive agreements in domestic law is very similar to that of a congressionally-enacted federal statute or an article II, section 2 treaty. Some executive agreements entered into by the executive branch rely on existing statutory authority, but are neither expressly authorized by statute nor approved, like a treaty adopted pursuant to article II, section 2 of the Constitution, by the Congress after the fact.

28. "Executive agreements," entered into by the President without the requirement that the Senate provide advice and consent, may have as their authority one or more of the following: (1) congressional legislation; (2) an article II, section 2 treaty; or (3) the President's own constitutional powers. 11 F.A.M. § 721.2, reprinted in I MICHAEL J. GLENNON & THOMAS M. FRANCK, UNITED STATES FOREIGN RELATIONS LAW: DOCUMENTS AND SOURCES 204 (1980) [hereinafter GLENNON & FRANCK].
29. Between 1949 and 1990, 683 international agreements were concluded as treaties in the constitutional sense. In contrast, during the same period 12,122 executive agreements—nearly eighteen times as many instruments—were entered into. Treaty Affairs Staff, Office of the Legal Adviser, U.S. Department of State, Treaties and Other International Agreements Concluded During the Year (1991).
30. See RESTATEMENT, supra note 20, § 303 (describing the position of executive agreements in the domestic legal system). But see United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), aff'd on other grounds, 348 U.S. 296 (1955) (invalidating an executive agreement as inconsistent with a statute); Swearingen v. United States, 565 F. Supp. 1019 (D. Colo. 1983) (invalidating an executive agreement as inconsistent with a statute). Although possible as a matter of principle, the number of instances in which courts have declined to give domestic legal effect to international agreements is very small.
31. According to State Department policy, the choice between concluding an international agreement as, on the one hand, a treaty as described in the Constitution and, on the other, an executive agreement, is determined through consideration of the
A number of international air pollution agreements demonstrate the potential of this practice to "short circuit" congressional consultation and participation in an area governed by the Clean Air Act, which is one of the most complex regulatory schemes in existence.

After negotiations held under the auspices of the United Nations Economic Commission for Europe (ECE), the Convention on Long-Range Transboundary Air Pollution (LRTAP Convention)\(^{32}\) was concluded in 1979. An ancillary protocol (NO\(_x\) Protocol) to limit emissions of the polluting nitrogen oxides, one of the principal components of acid rain, was signed in 1988.\(^{33}\) Another protocol (VOC Protocol) on volatile organic compounds, intended to address one of the primary causes of photochemical smog pollution, was adopted in 1991.\(^{34}\) After articulating a nebulous commitment to "limit and, as far as possible, gradually reduce and prevent air pollution," the LRTAP Convention sets out a general framework for international cooperation, consultation, and exchange of information on air pollution. By contrast, the NO\(_x\) Protocol states an overall obligation to limit emissions of the pollutants governed

following eight factors:

1. the extent to which the agreement involves commitments or risks affecting the nation as a whole;
2. whether the agreement is intended to affect State laws;
3. whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
4. past United States practice with respect to similar agreements;
5. the preference of the Congress with respect to a particular type of agreement;
6. the degree of formality desired for an agreement;
7. the proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
8. the general international practice with respect to similar agreements.

GLENNON & FRANCK, supra note 28, at 205. State Department policy also cautions against any infringement upon the constitutional authority of the Congress and the President. Id.

33. NO\(_x\) Protocol, supra note 8.
by that instrument to 1987 levels by 1994 and enumerates precise engineering requirements for mobile and stationary sources of nitrogen oxides. Likewise, the VOC Protocol contains overall emissions reduction targets and timetables, supplemented by detailed technological requirements.

The United States entered into the LRTAP Convention and the NOx and VOC Protocols as executive agreements without congressional participation. Likewise, after the enactment of the Clean Air Act Amendments of 1990, the United States concluded an executive agreement with Canada after a decade-long, highly publicized dispute over the transboundary impacts of acid rain. There was no public notice in the Federal Register and no formal opportunity for the public to comment on any of these four international environmental agreements. Although the executive branch informally consulted with interested members of Congress with respect to these air pollution pacts, the Congress as an institution had no formal role in the adoption of these instruments, either through prior authorization of their negotiation and conclusion or through their entry into force as treaties after Senate advice and consent to ratification.

These air pollution agreements may have serious domestic legal implications, despite the fact that some of the statutory and regulatory mechanisms for compliance were in place prior to the conclusion of the agreements. The executive branch appears to have chosen the vehicle of an executive agreement instead of an article II, section 2 treaty in each case because the implementing authority necessary to fulfill the obligations in the agreement was supposedly already in place as a matter of domestic law. No domestic statute, however, expressly authorizes these four international agreements. Without prior or subsequent legislative participation in these instruments, the executive branch’s conclusion regarding the adequacy of legal authority was necessarily unilateral. “Locking in” the status quo at the international level through action exclusively on the part of the executive branch may constrain future legislative or administrative action in a manner which could well be inconsistent with congressional intent. Both statutory and constitu-

37. See, e.g., Administrative Procedure Act § 4(d), 5 U.S.C. § 553(e) (1988) requiring federal agencies to allow interested persons to participate in the rulemaking
ational avenues for petitioning the Executive for regulatory modifications may be compromised.

Furthermore, and perhaps most important, these air pollution pacts undertaken as executive agreements with little or no congressional input may represent missed opportunities. The lack of formal notice may deprive the Congress and the public of a significant opportunity for input on policy making at least as important as many administrative regulations. For instance, the context of the 1991 bilateral Air Quality Agreement with Canada suggests that that instrument was not viewed by the executive branch as a serious vehicle for environmental policy making. First, the agreement was concluded only after the enactment of amendments to the Clean Air Act, which for the first time set out a domestic regulatory structure specifically for combating acid rain. Second, the text of the 1991 agreement limits reductions in emissions of acid rain precursors to levels required by the domestic statutory and regulatory program. Finally, the decision to treat the bilateral instrument as an executive agreement without formal participation by the legislature eliminated the possibility that Congress or, for that matter, the Government of Canada might utilize the agreement to address the need for additional reductions necessitated by international considerations that may not have been adequately addressed in the United States' legislative process.

Although the proposition is sometimes difficult to demonstrate empirically, the form of these agreements as a matter of United States law—executive agreements concluded without congressional participation—appears to have been predetermined by domestic political dynamics before the content of the international compacts was settled. Consequently, the outcome of these bilateral and multilateral negotiations, which were consciously structured as lawmaking instruments on the international level, would be substantially constrained by existing United States legislation. If, as it appears to have been the case with each of these air pollution agreements, congressional interest is low or nonexistent, a least-common-denominator result constricted by the confines of the municipal legal requirements of the United States is virtually inevitable.

The treatment of two major agreements on the protection of the

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38. U.S. Const. amend. I (stating that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances").
stratospheric ozone layer compellingly demonstrates the executive branch's inconsistent approach to the question of choice of instrument. As in the case of the ECE agreements,\textsuperscript{39} the executive branch expressly concluded that the statutory authority to implement the Vienna Convention for the Protection of the Ozone Layer\textsuperscript{40} (Vienna Convention) and the Montreal Protocol on Substances That Deplete the Ozone Layer\textsuperscript{41} (Montreal Protocol) was already in place at the time of their conclusion.\textsuperscript{42} But in contrast to the ECE air pollution instruments, Congress had expressly authorized the ozone pacts by prior statute.\textsuperscript{43} If anything, this explicit statutory authorization argues even more strongly than in the case of the ECE agreements, for which there is no express legislative mandate, for treating the two ozone compacts as executive agreements. Nonetheless, the executive branch submitted both the Vienna Convention and the Montreal Protocol to the Senate for its advice and consent to ratification as article II, section 2 treaties.\textsuperscript{44}

Executive agreements entered into without congressional participation, based on the executive branch's unilateral interpretation of a statute, can disrupt existing legislative and regulatory structures in unpredictable and

\textsuperscript{39} See supra text accompanying notes 32-34.
\textsuperscript{40} Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. No. 11,097 [hereinafter Vienna Convention].
\textsuperscript{42} See S. TREATY DOC. No. 10, 100th Cong., 1st Sess. VIII (1987) (citing powers given to the Environmental Protection Agency as providing statutory authority for the Montreal Protocol); S. TREATY DOC. No. 9, 99th Cong., 1st Sess. vii (1985) (stating that the Vienna Convention does not commit the United States to an additional regulatory undertaking, thus assuming domestic authority currently exists).
\textsuperscript{43} See Clean Air Act § 156, 42 U.S.C. 7456 (repealed 1990) (authorizing the President to enter into international agreements to protect the stratosphere from ozone depletion); \textit{cf}. Clean Air Act § 617, 42 U.S.C. § 7671p(a) (Supp. III 1991) (authorizing the President to enter into international agreements to protect the stratosphere).
unintended ways. For example, in *Japan Whaling Association v. American Cetacean Society*, the Supreme Court construed the Packwood Amendment to the Magnuson Fishery Conservation and Management Act (Packwood Amendment) and the Pelly Amendment to the Fishermen's Protective Act of 1967 (Pelly Amendment) in light of a subsequent executive agreement with Japan. The existence of that agreement was decisive in the Court's rejection of arguments that a federal official had violated a statutory directive.

Shortly after World War II, more than forty nations entered into a multilateral agreement known as the International Convention for the Regulation of Whaling (Whaling Convention) that created the International Whaling Commission (IWC). The IWC has the power to set limits on the harvesting of various whale species. An "opt-out" procedure allows each nation party to the Whaling Convention unilaterally to reject these quotas, rendering them legally ineffective with respect to that country as a matter of international law. Although the quotas are binding on member nations that do not opt out, the IWC nevertheless has no power to impose sanctions for violations.

The Pelly and Packwood Amendments attempt to reinforce the Whaling Convention on the domestic level by requiring the Secretary of Commerce to monitor the whaling activities of foreign nationals and to investigate potential violations of the Whaling Convention. Upon com-

45. See *Joseph Paige*, *The Law Nobody Knows* 64-65 (1977) (observing that a power struggle exists between the executive branch and Congress because executive agreements deal not with just minor international matters, but with major issues of growing significance) [hereinafter PAIGE].


52. *Id.* art. III, para. 1.

53. *Id.* art. IV, para. 1.

54. *Id.* art. V, para. 3.

55. *Id.* art. IX.

pletion of this investigation, the Secretary of Commerce must promptly decide whether to certify conduct by foreign nationals that "diminishes the effectiveness" of the Whaling Convention. After certification by the Secretary of Commerce, the Packwood Amendment directs the Secretary of State to reduce the offending nation's fishing allocation within the United States' fishery conservation zone by at least fifty percent.

In 1981, the IWC established a zero quota for harvests of sperm whales, a seriously depleted species. The following year, the IWC mandated a five-year moratorium on commercial whaling from 1985 until 1990. Japan's objection effectively relieved it, as an international legal matter, from compliance with the sperm whale quotas. The potential sanction under United States law in the form of the Pelly and Packwood Amendments nonetheless threatened Japanese whaling for the 1984-85 season. Eventually, after lengthy negotiations the United States and Japan concluded an executive agreement in which Japan agreed to catch no more than 400 sperm whales, considerably more than the IWC's quota, in each of the 1984 and 1985 seasons. Japan also agreed to cease commercial whaling by 1988, three years after the date specified by the IWC. In return, the executive branch promised not to impose sanctions against Japan under the Pelly and Packwood Amendments.

Several environmental organizations sued to compel the Secretary of Commerce to certify Japan pursuant to the Pelly and Packwood Amendments in spite of the bilateral agreement. This case squarely presented the question whether an executive agreement concluded without congressional participation was consistent with a statutory enactment. The Supreme Court, reversing both the district court and the court of appeals, decided that the Secretary of Commerce had no mandatory duty to certify a country in response to IWC quota violations. Although the bulk of the opinion deals with the construction of the Pelly and Packwood Amendments, the chosen interpretation was apparently strongly influenced by the existence of the agreement with Japan as an acceptable, if alternative, means of achieving an approximation of the statutory goal.

In this case, the international agreement in dispute was an executive agreement, entered into on behalf of the United States by the President without consent or input from the Congress. Neither of the applicable legislative enactments authorized the negotiation of the agreement, nor was the particular agreement with Japan endorsed by the Congress either.

58. Packwood Amendment, supra note 47, at § 1821(e)(2)(B).
before or after conclusion of that instrument. Indeed, in July of 1984 Senator Packwood explicitly requested the assurances of the Secretary of Commerce that "any nation which continues whaling after the moratorium takes effect will be certified under" the statutory enactment bearing the Senator's name. Although the question remains the subject of considerable debate, some authority suggests that such an agreement must be consistent with existing legislation. The Court in effect dodged the question by interpreting the conflict out of existence, but simultaneously contorted the statutory framework through an interpretation that was arguably inconsistent with congressional intent.

CONCLUSION

As noted in another context, "[t]he validity and moral authority of a conclusion largely depend on the mode by which it was reached." At least two initiatives would tend to minimize discontinuities between the modes by which conclusions are reached on the international level on the one hand, and in our domestic legal system on the other, while still preserving the integrity of the international obligations of the United States: (1) regularizing public participation in international regulatory processes at the national level by statute; and (2) encouraging greater congressional participation in international agreements not expressly authorized by statute.

Perhaps the most obvious divergences between international and national law involve considerations of process. As more environmental threats governed by domestic regulatory structures are addressed in the international arena, such as the GATT tuna/dolphin dispute, a commensurate increased need arises for improved processes for public participation in international activities undertaken by the United States Government. To ameliorate the effects of resulting discontinuities, multilateral


60. See supra note 26. See also LOCH K. JOHNSON, THE MAKING OF INTERNATIONAL AGREEMENTS 162 (1984) (arguing for congressional input for all international agreements) [hereinafter JOHNSON]; cf. PAIGE, supra note 45, at 91 (describing the broad scope of executive power to make agreements without congressional involvement).

61. See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 149, 171 (1951) (Frankfurter, J., concurring) (stating that the process, in terms of the right to a fair hearing, gives administrative decisions their legitimacy).
fora like GATT might adopt rules of procedure that regularize and greatly expand public access to, and public accountability of, their law-making, law-enforcing, and adjudicatory processes. Without question, improved access and public participation at the international level is the most desirable way to reconcile these disparities, while simultaneously furthering the larger public policy goals of improving the legitimacy and accountability of the international legal system.

A great deal can also be done at the purely national level in the absence of progress at the international level, or until multilaterally agreed-upon measures are implemented. First, the Administrative Procedure Act’s foreign affairs exception should be reevaluated. The underlying justification for that provision is no longer warranted, if ever it was. The foreign affairs exception is an unsophisticated mechanism governing a sphere of the law that has become increasingly nuanced and complex. The enumerated powers of Congress include many environmental concerns. The national legislature has reacted to environmental challenges by establishing a complex web of statutory and regulatory directives. For that reason, this area is fundamentally different from traditional security and foreign affairs concerns, like the conduct of war and the recognition of foreign governments, entrusted by the Constitution to the President. Likewise, international undertakings on environmental matters governed by statute are well within the reach of congressional lawmaking authority. Accordingly, the unusual deference to the executive branch contained in the Administrative Procedure Act’s exception to notice-and-comment rulemaking is not warranted merely because of the international context for decision making.

Second, Congress should replace the sweeping exemption in the Administrative Procedure Act with comprehensive new legislation that articulates how basic principles of American public law will be applied in a foreign affairs context. At a minimum, this legislation should establish standards for distinguishing between those domains, such as war and the recognition of foreign governments, that are appropriate for an exemption like that currently in the Administrative Procedure Act, and those, like environmental problems, that are not. For the latter category, actions of the executive branch taken in a foreign policy context ought to be treated similarly to those that arise in a purely domestic setting. To further this goal, outcome-neutral procedures analogous to notice-and-comment rulemaking and judicial review should be established for

62. See supra note 23 (noting the Administrative Procedure Act exclusion of military and foreign affairs functions from notice and comment requirements).
application to actions taken by the executive branch on behalf of the United States on the international level, such as the negotiation of international agreements.

As in strictly domestic circumstances, these reforms can be expected to assure consistency of executive branch action with domestic statutory and regulatory programs and to reflect the underlying values of our social and legal systems. Processes could be specifically tailored to meet the needs of governmental decision making in national, bilateral, and multilateral contexts. For instance, new legislation might require the publication of interim drafts of proposed international agreements in the Federal Register, with a subsequent opportunity for formal public comment to United States negotiators, unless the President provides compelling reasons, such as overriding national security concerns, to justify a waiver.

The Japan Whaling case demonstrates the disruptive effect international agreements can have on carefully crafted domestic legislative regimes. Existing statutory and regulatory schemes can mesh smoothly with treaties and executive agreements authorized by the Congress through legislative participation in defining the terms of those international instruments. Moreover, congressionally-sanctioned international agreements have the imprimatur of the legislative branch as the law of the land. By contrast, executive agreements not expressly contemplated by statute, even if not strictly inconsistent with existing law, can nonetheless substantially modify or even frustrate the operation of existing legislation and regulation without the participation of the legislative branch.

That an agreement can be given effect without the enactment of subsequent legislation by Congress, as set out in State Department policy, is not by itself sufficient evidence of consistency with congressional intent as expressed in an existing legislative scheme. Nor does that test provide adequate legal justification as a matter of course in the absence of express prior statutory authorization for the choice of an executive agreement instead of either an article II, section 2 treaty or a congres-

65. See supra text accompanying notes 46-59.
66. See JOHNSON, supra note 60, at 160-63 (suggesting that some congressional participation be provided for in the creation of executive agreements).
67. See id. at 9 (noting that the Department of State classifies international agreements, and determines the degree to which the Executive Branch can make agreements, but does not necessarily judge accurately the original congressional grant of statutory authority).
sional-executive mechanism requiring the participation of the legislature. The mere existence of statutory authority in a particular area does not, consequently, imply that an executive agreement that has domestic legal effect and that purports to rely on that authority is consistent with the underlying congressional purpose. Further, reliance on an executive agreement not expressly contemplated by statute could be questionable when implementation is intended to be accomplished by new regulations or rulemakings pursuant to existing statutes. In such a case, the international agreement could compromise the regulatory process, thereby undermining important principles of administrative law like those in the Administrative Procedure Act. Finally, even when both statutory and regulatory authorities are in place, the choice of an executive agreement would be inappropriate because of its tendency through international processes to constrain future legislative and administrative choices.

As State Department policy also recognizes, however, resolution of the historically delicate question of "choice of instrument" is quite sensitive to context and depends in part on the level of congressional interest. In such situations, silence, indifference, or acquiescence by the Congress can carry legal significance. As a result, Congress, whether by inattention or design, can be as much to blame as the Executive for inconsistencies that arise from lawmaking through executive agreements concluded without legislative participation. For example, Senator Packwood appears to have been the only member of Congress to object to the 1984 bilateral whaling agreement with Japan.

Questions about the necessary threshold level of congressional interest can lead to thorny inter-branch disputes on a case-by-case basis. Congress ought to consider addressing this generic question through legislation which articulates the requisite legislative concern in across-the-board fashion for each executive agreement not previously authorized by statute, which is intended to have domestic effect, and which falls within the enumerated powers of the Congress under article I of the Constitution. With a stroke of the pen, Congress could expressly negate any inference that the Executive has carte blanche to negotiate international agreements that the executive branch as a unilateral matter considers consistent with domestic statutory and regulatory requirements.

Legislative participation in formulating and giving domestic legal effect to international agreements within realms of statutory concern will almost by definition tend to assure greater consistency with overall statutory purposes. For instance, the legislation might require the executive branch to transmit interim drafts of this sub-category of executive agreements to relevant congressional committees and establish a process
for regularized consultation with those committees. By providing for predictable legislative input with respect to this subset of executive agreements, such a routine process for congressional consultation would facilitate consistency with, and the continued efficacy of, domestic statutory regimes by the body that created those frameworks in the first place.

The Congress could also enact legislation with instructions to the judiciary that executive agreements on matters within the enumerated powers of Congress must be explicitly authorized by statute to have effect as domestic law. Alternatively, the Executive could itself decide to alter its practice with respect to this sub-category of executive agreements. In any event, greater congressional input into this class of executive agreements can be expected to have the additional, indirect benefit of facilitating greater public input with respect to executive branch decision making on regulatory issues that arise in a foreign policy context.

For this same sub-category of agreements, there should also be an explicit instruction to the courts to decide questions of statutory interpretation notwithstanding the political question doctrine and foreign affairs implications. Further, the legislation should address the current overly broad discretion of the courts, short of a conclusion of nonjusticiability through application of the political question doctrine, haphazardly to take broad account of foreign relations concerns in judicial decisions with few apparent standards. Instead, Congress ought to substitute principles governing the judicial calculus to clarify the legal force of an executive branch action taken in an international context, within the enumerated powers of Congress, intended to have domestic legal effect, and not expressly authorized or participated in by Congress.