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A Matchmaker's Challenge: Marrying International Law and American Environmental Law

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I. INTRODUCTION

It is now axiomatic that environmental law is among the most rapidly growing, innovative areas of the international legal system. Recent compendia identify hundreds of international agreements dealing, directly or indirectly, with environmental concerns.¹ Multilateral negotiations addressing depletion of the stratospheric ozone layer,² international trade in toxic wastes,³ and the integrity of the global climate⁴ have attracted enormous attention from governments...
and the public in the United States and abroad. Resulting legal instruments, such as the 1987 Montreal Protocol on Substances That Deplete the Ozone Layer\(^5\) and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,\(^6\) have generated considerable optimism about the potential for international law effectively to mitigate global environmental risks.

Multilateral discussions now often supplant national statutory and regulatory schemes crafted in the late 1970s and early 1980s as the preferred fora for federal policy-making on such environmental hazards as stratospheric ozone depletion\(^7\) and exports of hazardous wastes.\(^8\) Tackling international environmental problems like ozone destruction and overseas shipment of wastes 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 lauded.\(^9\) Less well appreciated is the potential for tension and even clashes between the procedure and substance of international and domestic legal frameworks. Considera-

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ble differences exist between the international and national legal orders. Many bedrock principles of domestic environmental and administrative law—including notice to the public, an opportunity to be heard, and judicial review to assure reasoned 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 decision-making processes and placed in a legal context that barely acknowledges the existence of individuals. In other circumstances, the power of an individual state to take measures to preserve natural resources within its own jurisdiction or shared resources of the global commons may be constrained.

The relationship between the international and domestic law of the environment, moreover, is a microcosm for exploring considerably larger questions of separation of powers, the role of foreign relations in domestic law, the accountability of public processes, and the role of the public in establishing governmental policy on the national and international levels. Indeed, the potential legal costs accompanying these shifts from the national to the international arena in environmental law-making cut to the very core of the constitutional structure of our government and the nature of our representative democracy.

In exploring this relatively uncharted area of the law, this Article evaluates the relationship between international agreements and domestic public law in the context of environmental decision-making. First, relevant procedural and substantive doctrines of international and domestic law are examined to clarify the nature of the interactions between the two legal systems. Then, several case studies of serious discontinuities between international developments and domestic public law are analyzed. Finally, after the examination of these generic doctrines and concrete examples, recommendations are made for narrowing these divergences and encouraging smoother relationships between the international and national legal regimes.

II. TWO LARGELY INDEPENDENT LEGAL SYSTEMS

The simultaneous treatment of issues on the international and domestic levels, and the necessity for domestic implementation of commitments assumed on the international level, engages both legal systems. While the juncture between the two can be smooth, interactions on occasion are uneasy. Instances in which one legal system
does not fully reflect developments in the other can create significant discontinuities in both procedure and substance.

A. **Trends in International Environmental 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.

10. For the sake of precision, the generic term "international agreement" as used in this Article encompasses all instruments binding under international law. The term "treaty" is limited to those international agreements for which the Senate's advice and consent to ratification is necessary or has been given under U.S. Const. art. II, § 2. See Restatement (Third) of the Foreign Relations Law of the United States §§ 301 & 303 cmt. a (1987) [hereinafter Restatement]. Cf. infra note 48 (identifying and contrasting executive agreements).


12. See, e.g., Developments in the Law, supra note 11, at 1521. The development of customary norms is generally slower than multilateral "legislative" mechanisms, the resulting standards are not necessarily precisely crafted to respond to the underlying problem, and customary legal principles ordinarily respond sluggishly if at all to new scientific evidence. For example, in the famous Trail Smelter case between the United States and Canada, an international arbitral tribunal articulated the following rule of customary international law:

[U]nder the principles of international law . . . no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence. Trail Smelter Case (U.S. v. Canada), 3 R.I.A.A. 1905, 1965 (1938-41). This principle has also been increasingly widely accepted as a statement of customary international law generally applicable to case of pollution, including media other than air. See, e.g., 2 Restatement, supra note 10, § 601 reporters' note 1; International Law Association, Report of the Sixtieth Conference Held at Montreal 161, 165 (1983) (resolution concerning legal aspects of the conservation of the environment); Günther Handl, International Liability of States for Marine Pollution, 21 Can. Y.B. Int'l L. 85, 90 n.25 (1983). However, given the posture of the international arbitration, the legal force of this principle is not entirely without question. See, e.g., Frederic L. Kirgis, Jr., Technological Challenge to the Shared Environment: United States Practice, 66 Am. J. Int'l L. 290, 293 (1972) (noting that "Canada did not actively contest its responsibility for the conduct of the smelter"). Moreover, despite its extensive endorsement and the lip service paid to it, this standard is probably more often honored in the breach than in the observance, particularly in the area of air pollution. Otherwise, all that would be necessary to breathe clean air would be to walk to a national border.
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, the 1985 Helsinki Protocol on Reduction of Sulfur Emissions or Their Transboundary Fluxes by at Least Thirty Per Cent\(^\text{13}\) requires each state party to accomplish a uniform percentage cutback in pollution, measured from an agreed base year, by a firm deadline. The 1988 Sofia Protocol Concerning the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes\(^\text{14}\) 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\(^\text{15}\) mandates detailed procedures governing the export of municipal trash and toxic detritus. The subjects of these agreements, such as acid rain\(^\text{16}\) and international traffic in hazardous wastes,\(^\text{17}\) 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 multilateral instruments are formulated do not. Because until relatively recently only states were considered subjects of international law,\(^\text{18}\) multilateral bodies are pri-
arily organizations of states represented by their governments.\textsuperscript{19} 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 processes of the United States.\textsuperscript{20} Public scrutiny of and access to international processes may be difficult or even non-existent. Although some scientists, businesspeople, 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 remains very uneven and has not been standardized.\textsuperscript{21} Although some documents may circu-


\bibitem{21} The United Nations (UN) Charter explicitly addresses participation by private entities, including so-called "non-governmental organizations" (NGOs), as observers in the work of the Organization. U.N. Charter art. 71 ("The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence."). Signed June 26, 1945, entered into force Oct. 24, 1945, 59 Stat. 1031, T.S. No. 933, 3 Bevans 1153 (1969). The UN's Economic and Social Council (ECOSOC) has established a formal system for interacting with NGOs awarded consultative status with that body. See E.S.C. Res. 1296, 44 U.N. ESCOR Supp. (No. 1) at 21, U.N. Doc. E/4548 (1968).

Category I organizations are concerned with most of the activities of the Council and can demonstrate to the satisfaction of the Council that they have marked and sustained contributions to make to the achievement of the objectives of the United Nations [with respect to international economic, social, cultural, educational, health, scientific, technological and related matters and to questions of human rights], and are closely involved with the economic and social life of the peoples of the areas they represent and whose membership, which should be considerable, is broadly representative of major segments of population in a large number of countries.

\textsuperscript{16}
late informally, distribution of proposals for and drafts of multilateral agreements and other important instruments may also be confined to governments.\textsuperscript{22}

\begin{itemize}
  \item \textbf{competence or interest in only some of ECOSOC's activities.} ECOSOC also maintains a "Roster" of other organizations that "can make occasional and useful contributions to the work of the Council or its subsidiary bodies or other United Nations bodies within their competence." Id. ¶ 19. As of early 1992, forty-one and 352 NGOs had been granted Category I and Category II consultative status, respectively, and an additional 223 were included on the "Roster." Depending on their classification, NGOs with consultative status may be entitled to send representatives to meetings, to submit written statements to the Council, to make oral statements at meetings of the Council and its subsidiary bodies, and to request inclusion of items on the Council's provisional agenda. See generally R. Sybesma-KnoJ, The Status of Observers in the United Nations 295-318 (1981). Specialized agencies and other organs in the UN system also have their own approaches to participation by non-governmental observers. For example, the United Nations Environment Program (UNEP) has routinely accredited non-governmental observers to multilateral negotiations. See, e.g., Peter Sand, Protecting the Ozone Layer: The Vienna Convention is Adopted, 27 Env't, June 1985, at 19, 42 (exhortation to NGOs by Chief of Environmental Law Unit and Deputy Director of Environmental Management Service of UNEP to participate in drafting and enforcement processes for framework convention on protection of stratospheric ozone layer). The Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, art. XI(7), 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243; reprinted in Int'l Env't Rep. (BNA) 21:2101; 12 I.L.M. 1035 (1973), specifically provides for participation by non-voting observers in meetings of the parties to that agreement.

By contrast, industry and trade unions have institutionalized advisory roles in the Organization for Economic Cooperation and Development (OECD), but there is no similar formal opportunity for involvement of representatives of public interest environmental organizations in their own right. NGOs are not customarily admitted as observers to meetings held under the auspices of the General Agreement on Tariffs and Trade (GATT). See Rules of Procedure for Sessions of the Contracting Parties, rules 8 & 9, reprinted in General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents 10 (12th Supp. 1964) (limiting observers to governments and intergovernmental organizations) [hereinafter BISD]. Substantive international law in particular areas may also create entry points to assure some accountability to the public. For instance, the widely accepted methodology of environmental impact assessment—the international analog of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1988)—includes public participation as a component of a larger framework designed to assure the soundness of decision-making processes that may have adverse environmental impacts. See generally David A. Wirth, International Technology Transfer and Environmental Impact Assessment, in Transferring Hazardous Technologies and Substances: The International Legal Challenge 83 (Günther Handl & Robert Lutz ed. 1989). Private sector representatives may be included on official United States delegations to multilateral conferences, in which case, however, they are representatives of the government and may be bound by governmental instructions. See generally John McDonald, How to Be a Delegate (1984). Other formal and informal channels for input at the national level may also exist. See, e.g., Trade Act of 1974 § 135, 19 U.S.C. § 2155 (1988) (directing trade negotiators to consult with private sector representatives and establishing Advisory Committee for Trade Policy and Negotiations).

22. See, e.g., World Bank, Directive on Disclosure of Information (1989) (establishing exclusive list of releasable documents and categorically excluding key documents, such as president's reports and memoranda, supervision reports, and project completion reports, from release regardless of information contained therein); John H. Jackson, World Trade and the Law of GATT 901-12 (1969) (reviewing documentation policies of GATT and noting
Measures taken to arrest the depletion of the stratospheric ozone layer illustrate the major differences between the international legal order and the domestic law of the environment. The Clean Air Act formerly directed the Environmental Protection Agency (EPA) to respond by regulation if there was reason to believe that human activities damaging the ozone layer might endanger health and environment. Acting pursuant to this mandate and in response to considerable public concern, in 1978 EPA, through a notice-and-comment rulemaking proceeding, prohibited nonessential uses of ozone-destroying chlorofluorocarbons (CFCs) such as spray aerosol propellants.

In the mid-1980s it became apparent that this limited ban on a small number of CFC uses was insufficient to address grave threats to the integrity of the stratospheric ozone layer, which by then was seriously disrupted by a continent-sized "hole" over Antarctica. After being prodded with a lawsuit, the Executive Branch took up the issue again, but this time in a multilateral arena, the United Nations Environment Program (UNEP). The resulting Montreal Protocol


26. 40 C.F.R. pt. 762. A number of other countries, including Canada and the Nordic nations, enacted similar controls on nonessential aerosol uses of CFCs. By contrast, the European Community (EC) established a limit, considerably above then-existing levels, on total CFC production. See Thomas Stoel, Alan S. Miller & Breek Milroy, Fluorocarbon Regulation: An International Comparison (1980).


29. Negotiations had been proceeding since the early 1980s on a "framework" multilateral convention establishing an institutional basis for global cooperation and an ancillary
on Substances That Deplete the Ozone Layer, which sets out a precise numerical reduction schedule for chemicals that may deplete the ozone layer with firm deadlines, is now widely regarded as an effective, potentially global solution to the problem of ozone depletion.

Substantial differences in process accompanied this transition to an international forum for crafting legal requirements for reductions in emissions of ozone-depleting chemicals. EPA implemented the Protocol through a domestic rulemaking, much as it had the 1978 spray propellant ban. The new regulatory proceeding, however, was significantly different from, and much more constrained than, the earlier one. This time many important issues in the rulemaking had already been decided in the multilateral negotiations sponsored by UNEP. As


31. 40 C.F.R. pt. 82.

As a substantive matter, moreover, EPA interpreted the Montreal Protocol as both a floor and a ceiling. The international commitments in the Protocol precluded weaker regulation of the eight enumerated ozone-depleting chemicals, and strategic and prudential considerations inherent in international bargaining counseled against more stringent controls.\footnote{In responding to the argument of some commentators that the Clean Air Act contained more demanding requirements for the regulation of ozone-depleting chemicals than the Montreal Protocol, the Agency made the following assertion:

EPA . . . believes that in deciding whether and how to regulate under section 157(b) it may consider other countries' effect on stratospheric ozone and the effect of United States action on other countries' willingness to take regulatory action. There is no dispute that the cause and effects of ozone depletion are global in nature. Ozone-depleting emissions from all nations mix in the atmosphere and threaten the stratosphere above every nation. Thus, in order to assess the risk of ozone depletion and the need for regulatory action, EPA must consider other nations' actions affecting the stratosphere. A logical next step in this analysis is what effect United States action could have on other nations' actions now and in the future. . .

. . . . . EPA judged that the obvious need for broad international adherence to the Protocol counseled against the United States' deviating from the Protocol, because any significant deviation could lessen other countries' motivation to participate. To the extent the Protocol's existing control requirements were later found more or less stringent than necessary to protect stratospheric ozone, EPA noted that key provisions in the agreement afford the Parties the opportunity to review and revise those requirements. . . . Industry commenters also generally agreed with EPA's concern that deviating from the Protocol risked undermining it. They recognized that implementation of less stringent controls than the Protocol required would be unacceptable, and shared EPA's concern that implementation of more stringent controls would yield little, if any, additional stratospheric protection, while possibly reducing other countries' incentive to join the Protocol. 53 Fed. Reg. 30,566, 30,569, 30,573-74 (1988) (final regulation implementing Montreal Protocol). This position of the Executive Branch has now been reversed by the Congress, which has enacted legislation regulating ozone-depleting chemicals more stringently than the Montreal Protocol by requiring the following: (1) a larger number of intermediate reduction steps; (2) a phase-out in some alternatives to substances controlled in the Montreal Protocol; (3) the introduction of a recycling program; and (4) an additional requirement, not found in the Montreal Protocol, specifying that substitutes for substances controlled by the Montreal Protocol must be environmentally benign. Clean Air Act §§ 601-618, 42 U.S.C. §§ 7671-7671q.}

B. The Domestic Law of Foreign Relations

An international agreement, including an environmental pact, is both binding under international law and, like a statute, "the supreme Law of the Land." Customary international law is likewise "part of our law." Although the responsibilities of the United States remain intact on the international plane, a number of doctrines may nonetheless vitiate the force of international legal requirements within the United States. Congress may enact legislation that supersedes commitments in an international agreement or that violates customary international law. The courts may invalidate international agreements on domestic legal grounds. As a matter of domestic law, the Executive Branch may take actions inconsistent with customary international legal standards.

At least one supplementary principle operates to ameliorate discon-

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37. See Restatement, supra note 10, § 115(2), cmt. c & reporters' note 1; Henkin, supra note 35, at 163-64.

38. See, e.g., 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 executive agreement as inconsistent with statute); Swearingen v. United States, 565 F. Supp. 1019 (D. Colo. 1983) (same); Restatement, supra note 10, § 115 reporters' note 5; Henkin, supra note 35, at 184-87. Although possible as a matter of principle, the number of instances in which courts have invalidated international agreements is very small.

tinuities that might otherwise be created by these doctrines. When it is possible to reconcile a statute and international law, whether originating in agreement or custom, domestic law is construed so as not to conflict with the international duty. Congress is thus presumed to act consistently with international law and the international legal responsibilities of the United States.

Although an international agreement and Congressional legislation are of equal legal authority, the formulation of international commitments differs considerably from domestic statutory enactments. The President, as the "sole organ of the nation in its external relations," has the exclusive power to "make Treaties"—in effect, simultaneously to define both the national law and the international legal obligations of the United States. The Constitution requires the advice and consent of the Senate, by a two-thirds majority, to ratification of concluded international agreements.

The President negotiates the treaty for the United States and then presents it as a concluded agreement to the Senate for its post hoc advice and consent to subsequent ratification. Besides determining the content of the agreement in the first instance, the President's agreement to a prohibition on reservations in the agreement may further dilute Congressional input into the ratification of a multilateral treaty. Even if the Senate can attach

40. See Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); Chew Heong v. United States, 112 U.S. 536, 539-40 (1884) (interpreting statute to avoid conflict with earlier treaty); United States v. Palestine Liberation Organization, 695 F. Supp. 1456, 1468-71 (S.D.N.Y. 1988) (same); 1 Restatement, supra note 10, § 114 & reporters' note 1 (citing additional cases construing statutes to avoid conflict with earlier treaty provisions); Henkin, supra note 35, at 163-64.

41. Additionally, the rule probably also reflects the courts' deference to the political branches in foreign affairs. See generally Jonathan I. Charney, Judicial Deference in Foreign Relations, in Foreign Affairs and the U.S. Constitution 98 (Louis Henkin, Michael J. Glennon & William D. Rogers ed. 1990); Thomas M. Franck, Courts and Foreign Policy, Foreign Pol'y, Summer 1991, at 66.


44. U.S. Const. art. II, § 2. For article II, section 2 treaties, the President enters into international commitments provisionally, conditional upon subsequent ratification after Senate advice and consent. See Restatement, supra note 10, § 303 cmt. d; Henkin, supra note 35, at 133-36.

45. There may nonetheless be a great deal of interaction between the legislature and the Executive Branch during negotiations. For instance, in the stratospheric ozone example, there were a number of Congressional hearings, resolutions, and bills introduced designed to influence the progress of the negotiations. See generally Benedick, supra note 30; Roan, supra note 30.

46. See, e.g., Montreal Protocol, supra note 5, art. 18 (no reservations permitted); Basel Convention, supra note 6, art. 26 (same).
reservations, those qualifications may not have much effect in the con­
text of a multilateral treaty if other treaty partners object to them.\footnote{47} The Executive Branch also enters into a distinct and very large cat­
egory of “executive agreements”\footnote{48} on behalf of the United States that,
unlike treaties concluded under article II, section 2 of the Constitu­
tion, do not require subsequent Congressional endorsement.\footnote{49} A sub­
set of executive agreements, so-called “sole” agreements undertaken
by the President in reliance on his own constitutional authority,\footnote{50} does not require legislative participation either as a precondition to
negotiation or subsequent to conclusion. As a matter of practice, the
Executive Branch also enters into some executive agreements that rely
on existing statutory authority but are neither expressly authorized by
statute nor approved by the Congress after the fact.\footnote{51} In contrast to a

\footnote{47} The Senate ordinarily has wide discretion to give or withhold its consent to ratification
subject to conditions or reservations. See Restatement, supra note 10, § 303 cmt. d; Henkin
supra note 35, at 133-36. For the effect of reservations to a multilateral agreement as a matter
of international law, see Vienna Convention on the Law of Treaties, May 22, 1969, arts. 19-23,
I.L.M. 679 (1969). This instrument, although not in force for the United States, has been
accepted by the Executive Branch as a codification of customary international law regarding
international agreements. See S. Exec. Doc. L, supra, at 1; Restatement, supra note 10, pt. III,
introductory note.

\footnote{48} See supra note 10. So-called “executive agreements,” entered into by the President
without the necessity for Senate 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. See Restatement, supra note 10, § 303 (1987); 11
F.A.M. § 721.2; Henkin, supra note 35, at 173-87. See, e.g., Resource Conservation and
Recovery Act of 1976, § 3017(f), 42 U.S.C. § 6938(f) (authorizing bilateral executive
agreements on export of hazardous wastes waiving otherwise applicable statutory provisions
for notice and prior consent to government of country of export); Agreement Concerning the

\footnote{49} Between 1949 and 1990, 683 international agreements were concluded as treaties in the
constitutional sense. By contrast, during the same period 12,122 executive agreements—
early eighteen times as many instruments—were entered into. Treaty Affairs Staff, Office of
the Legal Adviser, U.S. Dep’t of State, Treaties and Other International Agreements
Concluded During the Year (1991).

\footnote{50} See Restatement, supra note 10, § 303(4) cmt. g; Henkin, supra note 35, at 176-84.
Among the President’s plenary powers that may support a “sole” executive agreement are his
role as commander-in-chief, U.S. Const. art II, § 2, cl. 1, his prerogative to appoint
ambassadors, id. art. II, § 2, cl. 2, his mandate to receive ambassadors, id. art. II, § 3, his
responsibility to “take Care that the Laws be faithfully executed,” id., and the vesting of the
executive power in him, id., art II, § 2, cl. 1.

\footnote{51} See, e.g., infra notes 82-94 and accompanying text (discussing multilateral executive
agreements on air pollution). According to State Department policy, a choice between
concluding an international agreement as, on the one hand, a treaty in the Constitutional sense
and, on the other, an executive agreement is determined by consideration of the following eight
factors:

(1) the extent to which the agreement involves commitments or risks affecting the
treaty in the constitutional sense, which has the same legal force as a statute, the domestic legal effect of an executive agreement not expressly authorized by statute or treaty and concluded without Congressional participation can be somewhat cloudy.\textsuperscript{52}

The implementation of international obligations can also differ from domestic law-making activities. Treaties that are not “self-executing” may require, in addition to Senate advice and consent to ratification, the adoption of implementing legislation to effectuate their purposes as a matter of domestic law.\textsuperscript{53} International negotiations or the implementation of actions taken on the international level, such as the stratospheric ozone example, may also involve subjects governed by domestic administrative law. In these cases, section 4(a)(1) of the Administrative Procedure Act (APA), which exempts “a military or foreign affairs function of the United States” from notice-and-comment rulemaking, may apply.\textsuperscript{54}

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 as to similar agreements; (5) the preference of the Congress as 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 as to similar agreements.

11 F.A.M. § 721.3, reprinted in 1 Glennon & Franck, supra note 34, at 205. State Department policy also counsels “the utmost care . . . to avoid any invasion or compromise of the constitutional powers of the Senate, the Congress as a whole, or the President.” Id. Cf., Case-Zablocki Act, 1 U.S.C. § 112b (instructing Secretary of State to “transmit to the Congress the text of any international agreement . . . , other than a treaty, to which the United States is a party” after conclusion).

52. See supra note 38.

53. See, e.g., Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1828); Comm. of United States Citizens in Nicaragua v. Reagan, 859 F.2d 929, 937-38 (D.C. Cir. 1988); United States v. Postal, 589 F.2d 862 (5th Cir. 1979), cert. denied, 444 U.S. 832 (1979); Restatement, supra note 10, § 111, cmt. h. & reporters’ note 5; Henkin, supra note 35, at 156-62. In these instances, the implementing legislation, and not the treaty, is given effect as domestic law. Whether an international agreement creates a cause of action for private parties is a related but distinct question. See Restatement, supra note 10, § 111 cmt. h. This issue is analogous to the existence of express or implied private rights of action under a regulatory statute. See generally William H. Timbers & David A. Wirth, Private Rights of Action and Judicial Review in Federal Environmental Law, 70 Cornell L. Rev. 403 (1985).

54. 5 U.S.C. § 553(a)(1). More than 130 states incorporate section 553 by reference. William D. Araiza, Note, Notice-and-Comment Rights for Administrative Decisions Affecting International Trade: Heightened Need, No Response, 99 Yale L.J. 669, 681 (1989). That a matter that would otherwise be covered by section 553 is taken up in an international forum does not necessarily mean that the exception applies. The exemption “is not to be loosely interpreted to mean any function extending beyond the borders of the United States, but only those ‘affairs’ which so affect relations with other Governments, that, for example, public rulemaking provisions would clearly provoke definitely undesirable international
Lastly, questions of justiciability may mean that some legal issues evade adjudication or judicial enforcement. The "political question" doctrine, which precludes judicial review of certain actions of the political branches, has particular vitality in the area of foreign relations. In practice, given the preeminence of the President in matters of foreign relations, application of the doctrine often implies deference to the Executive Branch.

Not only does resolution of [questions touching foreign relations] frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.

III. DISCONTINUITIES BETWEEN THE INTERNATIONAL AND DOMESTIC LEGAL SYSTEMS

The international legal system, like national law, is constantly changing. International responsibilities of the United States may be affected by orders and judgments of the International Court of Justice, decisions of international arbitral tribunals, binding international agreements, the evolution of customary standards and norms, and other multilateral instruments. Difficulties can nevertheless

57. See, e.g., Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993; Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 14, 149 (order and judgment concluding that support of military actions by Nicaraguan "contras" violated international obligations of United States arising from both customary law and international agreement).


While not creating formal international legal obligations, these precatory instruments nonetheless establish widely accepted standards for desirable or sound state practice. See, e.g., Pierre-Marie Dupuy, Soft Law and the International Law of the Environment, 12 Mich. J. Int’l L. 420 (1991); Pierre-Marie Dupuy, Remarks, 82 Proc. Am. Soc’y Int’l L. 381 (1988). A number of these “soft” undertakings have nevertheless matured, through widespread acceptance, into binding customary law. For example, Principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment, following the maxim sic utere tuo ut alienum non laedas, sets out the basic principle that

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

arise at the interface between international and national law. These interstices in the legal framework fall into at least two generic categories. First, developments on the international level may diverge from existing domestic legislative and regulatory schemes. Second, the implementation of international duties at the national level may encounter legal complications. This section examines case studies of each type of discontinuity.

A. Executive Agreements Affecting Domestic Environmental Regimes

The principle that an international agreement and a statute should be reconciled whenever possible finds its most frequent application where there is an apparent conflict between an earlier international agreement and a later statute. However, two recent cases—both of which interpret environmental statutory schemes—suggest that courts may construe the requirements of existing domestic law in light of a subsequent international agreement. This approach can on occasion disrupt existing legislative and regulatory structures in unpredictable and arguably unintended ways when, as in each of these cases, international obligations are contained in an executive agreement entered into based on the Executive Branch's unilateral interpretation of a statute and without Congressional approval or participation.

In *Japan Whaling Association v. American Cetacean Society*, the Supreme Court construed the Packwood Amendment to the Magnuson Fishery Conservation and Management Act and the Pelly Amendment to the Fishermen's Protective Act of 1967 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 that created the International Whaling Com-
mission (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. 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 completion of this investigation, the Secretary must promptly decide whether to certify conduct by foreign nationals that "diminishes the effectiveness" of the Whaling Convention. After certification by the Secretary, 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. During the next year, the Commission ordered a five-year moratorium on commercial whaling to begin in the 1985-86 season and to continue until 1990. Japan filed timely objections that effectively relieved it, as an international legal matter, from compliance with the sperm whale quotas for 1982 through 1984. Nonetheless, the potential sanction under the Pelly and Packwood Amendments by the United States threatened Japanese whaling for the 1984-85 season. After extensive negotiations, the United States and Japan concluded an executive agreement in which Japan agreed to catch no more than 400 sperm whales 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 United States agreed not to certify Japan under the Pelly and Packwood Amendments.

Suit was brought by several environmental organizations to compel the Secretary of Commerce to certify Japan. The Supreme Court, reversing both the District Court and the Court of Appeals, decided that the Secretary had no mandatory duty to certify in response to IWC quota violations. Although the bulk of the opinion deals with...
the construction of the Pelly and Packwood Amendments, it is clear that the chosen interpretation was strongly influenced by the existence of the agreement with Japan as an acceptable, if alternative, means of achieving the statutory goal.\textsuperscript{65}

The international agreement at issue in this case 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 before or after its conclusion.\textsuperscript{66} Although the question remains the subject of considerable debate,\textsuperscript{67} some authority suggests that such an agreement must be consistent with existing legislation.\textsuperscript{68} The Court avoided this problem by interpreting the conflict out of existence, but simultaneously contorted the statutory framework.\textsuperscript{69}

\textsuperscript{65} In enacting these Amendments, Congress' primary goal was to protect and conserve whales and other endangered species. The Secretary furthered this objective by entering into the agreement with Japan, calling for that nation's acceptance of the worldwide moratorium on commercial whaling and the withdrawal of its objection to the IWC zero sperm whale quota, in exchange for a transition period of limited additional whaling. . . .

We conclude, therefore, that the Secretary's decision to secure the certainty of Japan's future compliance with the IWC's program through the 1984 executive agreement, rather than rely on the possibility that certification and imposition of economic sanctions would produce the same or better result, is a reasonable construction of the Pelly and Packwood Amendments.


\textsuperscript{66} Indeed, in July 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. Letter from Senator Bob Packwood to Malcolm Baldrige, Secretary of Commerce (June 28, 1984), quoted in Brief for Respondents at 17-18, Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986) (Nos. 85-954 & 85-955).

\textsuperscript{67} See, e.g., Restatement, supra note 10, § 115 reporters' note 5; Henkin, supra note 35, at 186, 432-33 n.42.


\textsuperscript{69} Significantly, the Court rejected arguments that the domestic legal effect of the executive agreement with Japan was a nonjusticiable "political question," that plaintiffs were not entitled
Greenpeace USA v. Stone\textsuperscript{70} is among the most recent cases addressing environmental effects outside the United States under the National Environmental Policy Act of 1969 (NEPA).\textsuperscript{71} The court in that case made clear that its conclusion that NEPA did not apply was to relief because of the absence of a private right of action, and that the challenged governmental action was unreviewable under the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706. Japan Whaling, 478 U.S. 221, 229-30 n.4 (1986). See supra notes 54 & 55 (discussing private rights of action and political question doctrine). Accordingly, the Court based its conclusion that the executive agreement was an acceptable alternative to the statutory procedure as an adjudication on the merits of the legal relationship between the statute and the agreement.

70. 748 F. Supp. 749 (D. Hawaii 1990), appeal dismissed as moot, 924 F.2d 175 (9th Cir. 1991).

strongly influenced by an agreement that the court found had been made between President Bush and Chancellor Kohl of Germany.

This case concerned a plan of the United States Army and the Department of Defense, together with the German Army, to remove obsolete chemical weapons from a storage site in Clausen, Germany. The weapons were to be transported by rail and ship to Johnston Atoll, a United States Territory in the Pacific Ocean, pursuant to a Congressional mandate directing the destruction of the entire United States chemical weapons inventory by 1997. Environmental Impact Statements (EISs) required by NEPA had been prepared for the federal actions on Johnston Atoll. Plaintiffs challenged the Government's failure to prepare a comprehensive EIS covering all aspects of the transportation and disposal of the European stockpile, including transit through Germany and transport over the ocean.

Relying on the political question doctrine, the court denied plaintiffs' motion for a temporary restraining order enjoining the removal of the stockpile from Germany. In both that decision and an opinion denying plaintiffs' further motion for a preliminary injunction, the District Court gave substantial weight to foreign policy concerns. In particular, the court emphasized the significance of what it characterized as an agreement between President Bush, through Secretary of State Baker, and Chancellor Kohl, according to which the United States pledged to remove the stockpile by December 1990. The court explicitly articulated the crucial importance of this purported agreement to its reasoning.

Like the agreement in Japan Whaling, the Bush-Kohl arrangement in the Greenpeace case was concluded without Congressional participation. Indeed, by comparison with the instrument in Japan Whaling, this "agreement" was never reduced to a single written instrument and was closer to a unilateral statement of purpose. If

73. Greenpeace, 748 F. Supp. 749 (D. Hawaii 1990), appeal dismissed as moot, 924 F.2d 175 (9th Cir. 1991).
74. The existence of this agreement played an important part of this court's denial of plaintiffs' application for a temporary restraining order. It is an important consideration in determining whether defendants complied with NEPA under the specific facts of this case and therefore, plaintiffs strongly contest it.

75. See Affidavit of James F. Dobbins, Jr., Principal Deputy Assistant Secretary of State for
so, that undertaking would not even rise to the level of an interna-
tional agreement in the legal sense.\textsuperscript{76}

NEPA is the “basic national charter for protection of the environ-
ment.”\textsuperscript{77} A cornerstone of NEPA law is the necessity to
provide opportunities for public input, including notice of a pro­
posed action, an opportunity to comment on a draft EIS, and the need­
ess for Executive Branch agencies preparing EISs to respond to public com­
ments.\textsuperscript{78} As a general matter, these requirements apply as well to
international agreements.\textsuperscript{79} Accordingly, if the Bush-Kohl arrange­
ment is an international agreement, as the court seemed to accept in
its opinion, that agreement might well have been subject to NEPA

\textsuperscript{76} See Case-Zablocki Act, 1 U.S.C. § 112b(a) (instructing Secretary of State to “transmit
to the Congress the text of any international agreement (including the text of any oral interna­tional agreement, which agreement shall be reduced to writing), other than a treaty, to
which the United States is a party as soon as practicable after such agreement has entered into
force with respect to the United States but in no event later than sixty days thereafter”); 22
C.F.R. § 181.2 (State Department regulations establishing criteria for determining whether
undertaking intended to be binding and therefore international agreement and noting that
form of undertaking is relevant but not decisive to determination of intent); Restatement,
supra note 10, § 301 cmt. e & reporters’ note 2 (non-binding "gentlemen's agreements" are not
international agreements).

\textsuperscript{77} 40 C.F.R. § 1500.1 (Council on Environmental Quality implementing regulations).

\textsuperscript{78} See, e.g., 40 C.F.R. § 1500.2(d) (statement of federal policy to “[e]ncourage and
facilitate public involvement in decisions which affect the quality of the human environment”); id. § 1501.7 (necessity as part of scoping process to “[i]nvite the participation of . . . interested
persons (including those who might not be in accord with the action on environmental
grounds”); id. § 1503.1 (necessity, with respect to draft EIS, to “[r]equest comments from the
public, affirmatively soliciting comments from those persons or organization who may be
interested or affected”); id. § 1506.6 (instructions to agencies requiring public involvement in
NEPA process); Exec. Order No. 11,514, 3 C.F.R. 902 (1970) (directing federal agencies to
“[d]evelop procedures to ensure the fullest practicable provision of timely information and
understanding of Federal plans and programs with environmental impact in order to obtain
the views of interested parties”); Colony Fed. Sav. & Loan v. Harris, 482 F. Supp. 296, 304
(W.D. Pa. 1980) (“Citizen participation is a vital ingredient in the success of NEPA. . . . An
opportunity for local citizens or other interested parties to participate in the preparation of the
environmental analysis is mandatory under NEPA.”) (emphasis in original); Burkey v. Ellis,
483 F. Supp. 897, 916 (N.D. Ala. 1979) (“[NEPA] and the [Council on Environmental
Quality] Guidelines promulgated under it are designed to encourage public participation in the
decision-making process.”).

\textsuperscript{79} See 22 C.F.R. § 161.5 (State Department regulations implementing NEPA, expressly
contemplating application to international agreements); 40 C.F.R. § 1508.18(b)(1) (Council on
Environmental Quality’s definition of “major Federal action,” including “treaties and
international conventions or agreements”). But see Public Citizen v. Office of the United
(LEXIS, Genfed library, Dist file) (dismissing complaint alleging application of NEPA to
Uruguay Round of Trade Negotiations in GATT and North American Free Trade Agreement
on standing and ripeness grounds).
and its implementing regulations, including provisions for full disclosure and public participation. The court did not discuss whether NEPA applied to the creation of the Bush-Kohl arrangement instead of its implementation, thereby excluding the statute’s application at both stages. If, on the other hand, that arrangement did not rise to the level of an international agreement, the implications are even more profound. Then the court’s opinion strongly suggests that the routine, day-to-day conduct of foreign relations by the Executive Branch—often undertaken in secrecy without notice to, input from, or scrutiny by the Congress or the public—may frustrate or attenuate otherwise dispositive statutory directives.

The United Nations Economic Commission for Europe (ECE), has been working for more than a decade on questions of air pollution, especially acid rain as a regional problem in Europe. After negotiations sponsored under the ECE’s auspices, a Convention on Long-Range Transboundary Air Pollution (LRTAP) was concluded in 1979. An ancillary Protocol Concerning the Control of Emissions of Nitrogen Oxides (NOx) or Their Transboundary Fluxes, designed to address one of the principal precursors of acid rain, was signed in Sofia in 1988. Another Protocol Concerning the Control of Emissions of Volatile Organic Compounds (VOCs) or Their Trans-


82. Members of ECE, which was established in 1947, include all European states, the United States, and Canada. See generally Amasa S. Bishop & Robert D. Munro, The UN Regional Economic Commissions and Environmental Problems, 26 Int’l Organization 348, 358-68 (1972); Gunnar Myrdal, Twenty Years of the United Nations Economic Commission for Europe, 22 Int’l Organization 617 (1968).


84. See supra note 14. The NOx Protocol entered into force on February 14, 1991. The United States is not party to an earlier protocol to LRTAP, concluded in 1985 in Helsinki, concerning sulfur emissions. See supra note 13 and accompanying text.
boundary Fluxes, intended to control one of the main causes of photochemical smog pollution, was signed in Geneva late last year.\textsuperscript{85} 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 cooperation, consultation, and exchange of information on air pollution. By contrast, the NO\textsubscript{x} Protocol states an overall obligation to level off emissions at 1987 levels by 1994, and enumerates precise engineering requirements for mobile and stationary sources of nitrogen oxide pollutants. Likewise, the VOC Protocol contains overall emissions targets and timetables, supplemented by detailed technological requirements.

In structure and level of detail, the LRTAP Convention and the NO\textsubscript{x} and VOC Protocols are very much analogs, in the field of acid rain and tropospheric air pollution, to the Vienna Convention\textsuperscript{86} and Montreal Protocol\textsuperscript{87} on stratospheric ozone depletion. The United States, as a domestic legal matter, entered into both the Vienna Convention and the Montreal Protocol as treaties within the meaning of the Constitution after Senate advice and consent to ratification. The LRTAP Convention and the NO\textsubscript{x} and VOC Protocols, however, were undertaken as executive agreements without Congressional participation. Likewise, after the enactment of the acid rain provisions of the Clean Air Act Amendments of 1990,\textsuperscript{88} the United States concluded a new pact with Canada on acid rain as an executive agreement.\textsuperscript{89} However, unlike its practice in the preparations leading to the Montreal Protocol,\textsuperscript{90} the Executive Branch gave no public notice in the Federal Register of, and did not solicit comment on, any of these agreements. Despite the lack of formal notice, the Executive Branch has informally consulted with interested members of Congress and the public with respect to these air pollution pacts concluded as executive agreements.

\begin{itemize}
\item \textsuperscript{85} November 19, 1991 [hereinafter VOC Protocol].
\item \textsuperscript{86} See supra note 29.
\item \textsuperscript{87} See supra note 5.
\item \textsuperscript{90} See supra note 32.
\end{itemize}
These agreements may nonetheless have serious domestic legal implications, notwithstanding the prior existence of statutory and regulatory mechanisms for domestic implementation. The Executive Branch appears to have chosen the instrument of an executive agreement instead of an article II, section 2 treaty in each case because the implementing authority, both statutory and regulatory, necessary to fulfill the obligations in the agreement was already in place as a matter of domestic law. The Clean Air Act does not expressly authorize or anticipate international agreements on air pollution issues such as those covered by these bilateral and regional agreements addressing acid rain, nitrogen oxides, and volatile organic compounds. Anomalously, the two stratospheric ozone agreements, which, in contrast to the ECE air pollution agreements and the acid rain pact with Canada, were expressly authorized by statute, were concluded as article II, section 2 treaties, notwithstanding that no new implementing legislation was required.

"Locking in" the status quo at the international level through unilateral action by the Executive Branch may constrain future legislative or administrative action in a manner arguably inconsistent with Congressional intent. Both statutory and constitutional avenues for petitioning the Executive for regulatory modifications may be compromised. The lack of formal notice may deprive the public of an opportunity to comment on a policy-making juncture at least as important as many administrative regulations.

91. See supra notes 48 & 51. The United States accepted the NO\textsubscript{A} Protocol on July 13, 1989. The United States signed the VOC Protocol on November 19, 1991. At the time of these agreements, the technology-based standards for nitrogen oxides and volatile organic compounds in those agreements had been implemented domestically through notice-and-comment rulemaking proceedings pursuant to general statutory mandates then contained in the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1986), administered by EPA. See Clean Air Act § 307(d), 42 U.S.C. § 7607(d) (rulemaking). Those requirements were confirmed and augmented in the acid rain program mandated by the Clean Air Act Amendments of 1990 § 407, Pub. L. No. 101-549, 104 Stat. 2399, 2613 (1990), 42 U.S.C. § 7651.

92. cf. Clean Air Act § 617, 42 U.S.C. § 7671p (directing and authorizing President to enter into international agreements "to develop standards and resolutions which protect the stratosphere" from ozone depletion); Clean Air Act § 156, 42 U.S.C. 7456 (repealed 1990) (same).

93. See supra notes 5 & 29.


95. See, e.g., Clean Air Act § 126(b), 42 U.S.C. § 7426(b) (authorizing state or political subdivision to petition EPA to abate interstate air pollution). Cf. Toxic Substances Control Act § 21, 15 U.S.C. § 2620 (citizens' petitions) [hereinafter TSCA].

96. Cf. U.S. Const. amend. I ("Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances.").
B. Recent Developments on Trade

A number of recent examples of significant discontinuities have arisen between international trade regimes and national environmental legal requirements. Indeed, an unexpected and vociferous public debate has erupted over the application of existing international trade agreements to environmental matters and the contents of proposed trade pacts. While it is too early to identify all of the nuances that may arise, the examples discussed in this section suggest that the interface between international trade law and the domestic law of the environment will continue to generate significant legal questions.

The General Agreement on Tariffs and Trade (GATT), the prin-
Principal multilateral instrument governing international trade relations among states, explicitly exempts from its coverage measures "necessary to protect human, animal or plant life or health." Partially as a result of a bitter dispute between the United States and the European Community (EC) over the use of hormones to promote growth in cattle, the ongoing revisions to the GATT known as the Uruguay Round of Trade Negotiations explicitly treat certain measures to protect public health, such as limitations on pesticide residues in food,

(reiterating Congressional prerogative to modify fast track resolution at any time if Executive Branch ignores environmental objectives in North American Free Trade Agreement negotiations).

99. GATT, supra note 98, art. XX(b) (exception "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."). Cf. id. art. XX(g) (exempting measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption"). A GATT Working Group on Environmental Measures in International Trade, which was established in 1971 but never met, has now been convened. The agenda of the Group includes examining trade provisions contained in existing multilateral environmental agreements such as the Montreal Protocol, the Basel Convention, and CITES. See GATT Focus, Oct. 1991, at 1. See also GATT, Trade and the Environment, in International Trade (1990-91) (1992) (in press).

Presumably, the application of the trade measures identified in these environmental agreements as between contracting parties to GATT that are not also parties to the agreement in question could violate the GATT. Cf. GATT, supra note 98, art. XXV(5) (authorizing waiver of obligations by two-thirds vote comprising more than half total number of contracting parties). See also Economic Declaration: Building World Partnership ¶ 15, reprinted in 27 Weekly Comp. Pres. Doc. 968 (July 22, 1991) (statement of Group of Seven major industrialized nations asserting the need for GATT "to define how trade measures can properly be used for environmental purposes"); BISD, supra note 21, at 402 (36th Supp. 1990) (GATT Council decision establishing the Working Group on the Export of Domestically Prohibited Goods and Other Hazardous Substances).

100. This continuing dispute began in December of 1985 when the Council of Ministers of the European Community (EC) enacted a ban, to be effective January 1, 1988, on the use of growth hormones in the breeding of cattle and on the sale of beef treated with growth hormones. The United States, threatening retaliatory action, strongly objected to the ban as a non-tariff barrier to trade unsupported by scientific evidence. Despite the Community's postponement of the date of the ban on sales until January 1, 1989, the United States and the EC were unable to resolve the dispute. Shortly after the ban went into effect at the beginning of 1989, the United States imposed a 100% tariff on a variety of European foodstuffs. Neither side, however, has requested the establishment of a dispute settlement panel pursuant to the GATT. See generally Steven J. Rothberg, From Beer to BST: Circumventing the GATT Standards Code's Prohibition on Unnecessary Obstacles to Trade, 75 Minn. L. Rev. 505 (1990); Michael B. Froman, The United States-Europe Community Hormone Treated Beef Conflict, 30 Harv. Int'l L.J. 549 (1989); Adrián Rafael Halpern, The U.S.-EC Beef Controversy and the Standards Code: Implications for the Application of Health Regulations to Agricultural Trade, 14 N.C.J. Int'l L. & Com. Reg. 135 (1989).

as potential trade barriers. Under the rubric of "harmonization" of "sanitary and phytosanitary measures," the Uruguay Round would explicitly subordinate this category of regulatory activity to the GATT international trade regime.¹⁰² Moreover, domestic regulatory

¹⁰². Draft Final Act, supra note 22, § L, pt. C (draft including proposed decision by contracting parties on the application of sanitary and phytosanitary measures). See generally Peter Saravic & Hans Van Houtte, eds. Legal Issues in International Trade 128-44 (1990) (discussing harmonization). For instance, such measures must be "based on scientific principles and . . . not maintained against available scientific evidence." Id. ¶ 6. It is, however, axiomatic that many such actions under United States law are justified despite the fact that they may involve considerable scientific uncertainty and that scientists may not be in agreement:

Where a statute is precautionary in nature, the evidence difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge, the regulations designed to protect the public health, and the decision that of an expert administrator, we will not demand rigorous step-by-step proof of cause and effect. Such proof may be impossible to obtain if the precautionary purpose of the statute is to be served.

Ethyl Corp. v. EPA, 541 F.2d 1, 28 (D.C. Cir. 1976) (en banc). See also Reserve Mining Co. v. EPA, 514 F.2d 492, 528 (8th Cir. 1975) (en banc) ("In the context of [the Federal Water Pollution Control Act], we believe that Congress used the term 'endangering' in a precautionary or preventive sense, and, therefore, evidence of potential harm as well as actual harm comes within the purview of that term."). See generally Talbot Page, A Generic View of Toxic Chemicals and Similar Risks, 7 Ecology L.Q. 207 (1978). Moreover, the multidisciplinary process of choosing regulatory measures—"risk management"—is distinct from the strictly scientific basis for regulatory action—"risk assessment."

Risk management, which is carried out by regulatory agencies under various legislative mandates, is an agency decision-making process that entails consideration of political, social, economic, and engineering information with risk-related [scientific] information to develop, analyze, and compare regulatory options and to select the appropriate regulatory response to a potential chronic health hazard. The selection process necessarily requires the use of value judgments on such issues as the acceptability of risk and the reasonableness of the costs of control.

National Research Council, Risk Assessment in the Federal Government: Managing the Process 18-19 (1983). In the determination of risk, national standards are to "take[ ] into account risk assessment techniques developed by the relevant international organizations." Draft Final Act, supra note 22, § L, pt. C, para. 16. Further, there is a presumption in favor of the adoption on the national level of substantive "international standards, guidelines or recommendations." Id. ¶¶ 9-11. However, a large number of these international standards for issues like pesticide residues in food are less stringent than international standards, such as those established in the Codex Alimentarius. Standards set by international bodies, like maximum limits for pesticide residues established in the Codex Alimentarius, are not necessarily as stringent as domestic regulatory requirements in the United States. See, e.g., Gen. Accounting Office, International Food Safety: Comparison of U.S. and Codex Pesticides Standards 4 (1991) ("Among the pesticides studied that EPA has rated as probable carcinogens, the United States has lower MRLs [maximum residue levels] in 55 percent of the cases; the Codex, in only 27 percent"). See generally Food and Agriculture Organization of the United Nations & World Health Organization, Codex Alimentarius Commission: Procedural Manual (7th ed. 1989). Moreover, the Uruguay Round draft text would require central governments in federal states like the United States to preempt standards of subsidiary governmental units. Draft Final Act, supra note 22, § L, pt. C, ¶ 45. Cf. id. pt. G (draft agreement on technical barriers to trade).

An earlier proposal, supported by the United States, would have made any pesticide tolerances
activity on issues like pesticide residues would be subject to international scrutiny through compulsory adjudicatory or “dispute settlement” mechanisms under the GATT.\textsuperscript{103} As the current United States statutory scheme for controlling contaminants in food does not anticipate an international review procedure, it is far from clear what effect this new development will have on domestic law and regulation in this area.\textsuperscript{104}

\textsuperscript{103} GATT, supra note 98, art. XXIII (nullification or impairment); GATT, Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, BISD, supra note 21, at 210 (26th Supp. 1980) [hereinafter 1979 Understanding]; GATT, Ministerial Declaration on Dispute Settlement Procedures, BISD, supra note 21, at 13 (29th Supp. 1983); GATT, Decision on Improvements to the GATT Dispute Settlement Rules and Procedures, BISD, supra note 21, at 61 (36th Supp. 1990). The GATT’s dispute settlement mechanisms first encourage contracting parties to the agreement to settle differences through consultation and negotiation. GATT, supra note 98, art. XXII (consultation). If that mechanism is unsuccessful, an aggrieved party may submit a complaint to the GATT Council, which can appoint a panel of experts to hear the dispute. The panel’s report, which may find that the agreement has been “nullified or impaired,” must be accepted by the Council to have legal force. See generally William J. Davey, Dispute Settlement in GATT, 11 Fordham Int’l L.J. 51 (1988) (summary of GATT dispute settlement mechanisms) [hereinafter Davey, Dispute Settlement in GATT]; William J. Davey, Remarks, 84 Proc. Am. Soc’y Int’l L. 135 (1990) (describing recent changes in GATT dispute settlement procedures). GATT panels may also award compensation to, and authorize retaliatory countermeasures by, injured states. GATT, supra note 98, art. XXIII; GATT Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, BISD, supra note 21, at 210, Annex, ¶ 4 (26th Supp. 1980). Retaliation has only once been authorized by a GATT dispute settlement panel. Davey, Dispute Settlement in GATT, supra, at 60. Unless adopted by the GATT Council, which ordinarily operates by consensus, the report has no legal force. Accordingly, a “losing” state may unilaterally block an effective finding of nullification or impairment. See id. However, further strengthening of the GATT’s dispute settlement procedures has been a priority in the Uruguay Round. See GATT, Ministerial Declaration on the Uruguay Round, BISD, supra note 21, at 19 (26th Supp. 1987). In particular, the Draft Final Act specifies that panel reports shall be adopted by the GATT Council within sixty days of issuance. See Draft Final Act, supra note 22, § 51 14.4 (draft understanding on rules and procedures governing the settlement of disputes under articles XXII and XXIII of the GATT). A standing appellate body, whose reports must be adopted by the Council within thirty days of issuance unless rejected by consensus, is also created. Id. ¶¶ 15.1-14.

\textsuperscript{104} If anything, the North American Free Trade Agreement, a proposed regional pact with Mexico and Canada, may have even more profound environmental impacts. See generally 56 Fed. Reg. 32,454 (1991) (notice of North American Free Trade Agreement); Office of the United States Trade Representative, Review of U.S.-Mexico Environmental Issues (1992); Response of the Administration to Issues Raised in Connection with the Negotiation of a North American Free Trade Agreement (May 1, 1991) (transmission of President to Congress); Environmental Protection Agency & Secretaría de Desarrollo Urbano y Ecología, Integrated Environmental Plan for the Mexican-U.S. Border Area (First Stage, 1992-1994) (1992). There is a principled theoretical approach that provides a basis for reconciling these clashes between environment and trade policies. A 1972 OECD recommendation articulates the so-called “Polluter-Pays Principle,” intended as an international minimum standard
The Mexican Tuna dispute in GATT initially arose over the killing of dolphin incidental to fishing for yellow fin tuna with "purse-seine" nets. The Marine Mammal Protection Act (MMPA)\(^{105}\) directs the Secretary of the Treasury to ban the importation of yellowfin tuna requiring the internalization of environmental costs for the express purpose of eliminating trade distortions arising from disparate domestic environmental policies. Recommendation on Guiding Principles Concerning International Economic Aspects of Environmental Policies, O.E.C.D. Doc. C(72)128, reprinted in OECD and the Environment, supra note 58, at 23 [hereinafter 1972 Recommendation]. See also Recommendation on the Implementation of the Polluter-Pays Principle, O.E.C.D. Doc. C(74)223, reprinted in OECD and the Environment, supra note 58, at 26. Accordingly, failure to implement the Polluter-Pays Principle can be characterized as "pollution subsidy" that creates unfair trade advantages for industries in those states with environmental policies below the international minimum standard. The GATT for some time has addressed the elimination of subsidies that produce trade distortions. See, e.g., GATT, supra note 98, arts. VI, XVI (subsidies and countervailing duties); GATT, Agreement on the Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, BISD, supra note 21, at 56 (26th Supp. 1980) (GATT Subsidies Code). See also Ministerial Declaration on the Uruguay Round, BISD, supra note 21, at 19 (33rd Supp. 1987) (agricultural subsidies); Draft Final Act, supra note 22, § I (subsidies and countervailing duties). Nonetheless, although the GATT permits application of the Polluter-Pays Principle as a domestic environmental measure, the agreement does not authorize the enforcement of that standard with respect to imported goods through at-the-border measures like fees to offset the costs to domestic industries of pollution control measures. See GATT, United States—Taxes on Petroleum and Certain Imported Substances, BISD, supra note 21, at 136 ¶¶ 5.2.3-7 (34th Supp. 1988), reprinted in 27 I.L.M. 1596 (1988). Cf. 1972 Recommendation, Annex ¶ 13 ("[e]ffective implementation of the [Polluter-Pays Principle] will make it unnecessary and undesirable to resort to" at-the-border measures). Consequently, because its jurisdiction is circumscribed by the subject matter of the underlying review of administrative action, can only result in a decision that an environmental measure is either valid or not justified based on the trade rules articulated in the agreement. As the agreement is currently structured, that process cannot serve as a forum for determining whether a state has failed to take minimum environmental measures. Cf. APA § 10(e), 5 U.S.C. § 706(1) (directing reviewing court to "compel agency action unlawfully withheld or unreasonably delayed"). See generally United States-Canada Free-Trade Agreement: Hearing Before the Sub-Comm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 2d Sess. (1988) (addressing constitutionality of panel dispute mechanism in article 1904 of United States-Canada Free-Trade Agreement, 27 I.L.M. 281 (1988), that displaces domestic judicial review). See also 19 U.S.C. § 1516a(g) (limiting domestic judicial review of determination of binational dispute settlement panel in antidumping and countervailing duty cases under United States-Canada Free-Trade Agreement); Exec. Order No. 12,662 § 3, 19 U.S.C. § 2112 note (acceptance by President of decisions of binational dispute settlement panels in antidumping and countervailing duty cases under United States-Canada Free-Trade Agreement). Revision of the GATT’s approach to subsidies to address the elimination of such “pollution subsidies,” while not a panacea, would go a long way toward resolving conflicts between environmental and trade policies. See generally Arden-Clarke, The General Agreement on Tariffs and Trade, Environmental Protection and Sustainable Development (WWF Discussion Paper June 1991); Patterson, supra note 97.

caught by foreign nations unless the Secretary of Commerce makes a finding that the incidental take of marine mammals is comparable to that of United States vessels. Ruling on a motion for a preliminary injunction made by a number of environmental organizations, the District Court for the Northern District of California in August 1990 enjoined Executive Branch officials from permitting further tuna imports into the United States because the required finding had not been made. The Ninth Circuit affirmed the District Court’s order, which affected tuna imports from Mexico and several other countries.

Mexico then requested the GATT Council to establish a dispute settlement panel to adjudicate the validity under the GATT of the MMPA ban. The three-member dispute settlement panel noted that discrimination by importing states based on the methods by which foreign goods are produced, as opposed to characteristics of the foreign goods themselves, is not warranted by the GATT. Consequently, the GATT requires competitive treatment of imported products as such without regard to the environmental policies of the country of export. Further, the exceptions in the GATT for trade measures directed at the protection of animal life or health or the conservation of natural resources must be narrowly construed. In light of that interpretation, the drafting history of the agreement, and the broader implications for international trade, the panel concluded that trade measures to protect resources outside the jurisdiction of a contracting party are not permissible. Further, the United States had failed to demonstrate that the import restriction was primarily aimed at conservation, or that measures less burdensome to international trade such were unavailable. Despite the decision in its favor, Mexico

106. Earth Island Inst. v. Mosbacher, 746 F. Supp. 964 (N.D. Cal. 1990), aff’d, 929 F.2d 1449 (9th Cir. 1991). This case arose after the Executive Branch had failed to respond to three statutory directives mandating a ban on imported fish: the original 1972 MMPA and amendments enacted in 1984 and 1988. 746 F. Supp. at 967-68.

107. Earth Island Inst. v. Mosbacher, 929 F.2d 1449 (9th Cir. 1991). The Ninth Circuit had previously granted a stay pending appeal with respect to imports from Mexico. Id. at 1452 n.3. The Court of Appeals then affirmed a second order of the District Court, issued after a conclusion that the federal defendants’ finding that Mexico satisfied the statutory standard of the MMPA was illegal. Id. at 1451-52. The District Court, on plaintiffs’ motion, extended the ban to intermediary nations that purchase yellowfin tuna abroad and export it to the United States. Earth Island Inst. v. Mosbacher, No. C-88-1380 (N.D. Cal. Feb. 3, 1992).


109. See supra note 99.

110. Mexican Tuna case, supra note 108, ¶¶ 5.24-26 & 5.31-32.

111. Id. ¶¶ 5.27-28 & 5.33. The panel concluded that the Dolphin Protection Consumer
postponed presentation to the GATT Council of the panel opinion.\textsuperscript{112}

The result in this case has significant implications for national environmental measures that affect international trade taken by individual states or groups of states,\textsuperscript{113} and particularly those aimed at protecting resources of the global commons.\textsuperscript{114}

Information Act, 16 U.S.C. § 1385, a labelling statute enacted in December 1990 that was also challenged by Mexico, did not contravene the GATT because that legislation applies equally to imported products from all countries. Id. ¶¶ 5.43-44. Likewise, the panel found that the Pelly Amendment to the Fishermen's Protective Act of 1967, 22 U.S.C. § 1978, which authorizes the extension of the MMPA ban to all fish products from the offending nations, was not a violation of the GATT because of that statute's discretionary character, which discretion had not been exercised in the case before the panel. Id. ¶¶ 5.20-21.


114. Besides the MMPA, supra note 105, the ruling in the Mexican Tuna case could affect the validity under international law of a number of United States statutes, including the Packwood and Pelly Amendments, supra notes 61 & 62, at issue in Japan Whaling; the Endangered Species Act of 1973 (prohibiting trade in endangered species); the African Elephant Conservation Act, 16 U.S.C. § 420 (prohibiting ivory imports from countries with inadequate elephant conservation programs); and regulations, 40 C.F.R. pt. 82, promulgated under the Clean Air Act §§ 601-618, 42 U.S.C. §§ 7671-7671q (restricting imports and exports.
In contrast to the opportunities for public input into the legislative, administrative, and judicial fora in which this dispute was treated on the domestic level, but consistent with standard GATT procedures,115 the documents and oral proceedings in the case were not accessible to the public. Dispute settlement in GATT does not allow for participation by private parties as intervenors or amici.116 However, in the Mexican Tuna case, ten other GATT parties and the European Economic Community made written submissions to the panel,117 all of which were critical of the MMPA ban and most of which argued that that action is inconsistent with the GATT.

In the mid-1980s EPA, acting on evidence that the fumigant ethylene dibromide (EDB) causes cancer, genetic mutations, and adverse reproductive effects in human beings, banned that pesticide for use on domestic produce.118 By contrast, in response to assertions from the Department of State that the ban would damage the economies of friendly exporting countries, EPA promulgated a tolerance permitting that continued to allow residues of thirty parts per billion (ppb) of EDB in imported mangoes.119 The District of Columbia Circuit, con-

115. See 1979 Understanding, supra note 103, Annex ¶ 6(iv) ("Written memoranda submitted to the panel have been considered confidential, but are made available to the parties to the dispute."). See also Draft Final Act, supra note 22, § 8 ¶¶ 12.1-2 (draft understanding on rules and procedures governing the settlement of disputes under articles XXII and XXIII of the GATT specifying that "written memoranda submitted to the panel shall be considered confidential").


117. See 1979 Understanding, supra note 103, ¶ 15 ("Any contracting party having a substantial interest in the matter before a panel, and having notified this to the Council, should have an opportunity to be heard by the panel.").

118. See Federal Insecticide, Fungicide, and Rodenticide Act §§ 2, 6(b) & (c), 7 U.S.C. §§ 136a, 136d(b) & (c) (registration and cancellation and suspension of registration) [hereinafter FIFRA].

119. 51 Fed. Reg. 5682 (1986). This interim tolerance, which initially was to have expired on September 30, 1986, was subsequently extended through September 30, 1987. 51 Fed. Reg. 34,369 (1986). EPA had earlier promulgated an interim tolerance that expired on September 1, 1985. 50 Fed. Reg. 2547 (1985). From that date until the revived tolerance of February 1986 took effect, imported mangoes with any residue of EDB were prohibited from entering interstate commerce in the United States. See Federal Food, Drug, and Cosmetic Act §§ 403 & 409, 21 U.S.C. §§ 346a & 348 (establishment of pesticide tolerances for agricultural raw commodities and processed foods) [hereinafter FFDCA]. EPA must set tolerances, or allowable residue limits, at the same time it registers a pesticide under FIFRA § 2, 7 U.S.C.
cluding that EPA's reliance solely on concerns of foreign affairs in the establishment of a pesticide residue limitation was arbitrary and capricious, granted a petition for review and set aside the mango tolerance. 120 On remand, EPA claimed that the continued tolerance for imported mangoes was justified by ongoing cooperative efforts with food-exporting nations to assure that fruit and vegetables enter the United States free of pests such as the Mediterranean fruitfly, diseases, and unsafe levels of pesticides. Moreover, mango-producing nations were channelling export revenues into the search for alternatives for EDB. Accordingly, EPA concluded that revoking the EDB tolerance would pose greater risks to the food supply than continuing that requirement. After EPA provided assurances with respect to the limited term of the standard for imported mangoes, the court approved the tolerance. 121

Another recent case raises similar questions as to the propriety of considering international trade factors in the context of regulatory regimes designed to protect health and the environment. In February 1990, after the development of testing methods that could detect them for the first time, residues of the fungicide N-(3,5-dichlorophenyl)-1,2-dimethylcyclopropane-1,2-dicarboximide, marketed under the trade name "procymidone," were discovered on wines imported from Europe. Procymidone, manufactured by the Japanese chemical corporation Sumitomo and classified by EPA as a "probable human carcinogen," is widely used in wine-producing regions of Europe to control the grape disease botrytis. Because that disease is not found in America, the pesticide procymidone was neither registered for use in the United States nor was a residue limitation established for the chemical. 122 Accordingly, products containing any residues of procymidone were prohibited from entering interstate commerce in the United States. Because of the potentially serious and unprecedented trade disruption, 123 EPA expedited the tolerance-setting proceeding


122. See supra note 119 (pesticide registration and tolerance-setting).

123. The United States imports approximately $1 billion worth of wine per year, with EC...
and relied on less extensive data than it ordinarily would. Although EPA asserted that the tolerance it set was fully protective of public health, "EPA . . . candidly acknowledged that the potential trade implications posed by the procymidone situation were considered by EPA in evaluating Sumitomo's petition. EPA took into account potential impacts on both foreign and U.S. economies and the public health of U.S. consumers."124

Relying on the Toxic Substance Control Act (TSCA),125 EPA in July 1989 published a final rule banning the manufacture, importation, processing, and distribution in commerce of most asbestos-containing products.126 The regulation was subsequently successfully challenged on domestic statutory grounds.127 A Canadian mining company and a number of Canadian trade unions were among the petitioners contesting the validity of the regulation.128 The Govern-

124. 56 Fed. Reg. 19,518, 19,519 (1991) (final rule establishing tolerance for procymidone on wine grapes). At an earlier stage of the proceeding, EPA warned that it would have to take into consideration whether international reaction to import detentions potentially could result in other trade disruptions which have wider impacts on the adequacy and affordability of the food supply. EPA will also have to consider whether the United States foreign policy efforts to obtain compliance by other countries with [United States statutory] requirements applicable to foods imported to the United States will be undermined if EPA fails to take extraordinary action in this instance.

55 Fed. Reg. at 39,177 (1990) (advance notice of proposed rulemaking). Moreover, notwithstanding an acknowledgment that the standards of the Codex Alimentarius are less protective of public health than EPA's, EPA proposed to rely "in appropriate circumstances" on maximum residue limitations established in the Codex Alimentarius on an interim basis until a final tolerance was established. Id. at 39,178. See supra note 102 (discussing Codex).


126. 54 Fed. Reg. 29,460 (1989). According to that notice, [i]t is well-recognized that asbestos is a human carcinogen and is one of the most hazardous substances to which humans are exposed in both occupational and non-occupational settings. As OSHA [the Occupational Safety and Health Administration] stated . . . , "OSHA is aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans than has asbestos exposure." There is wide agreement that all types of asbestos fibers are associated with pulmonary fibrosis (asbestosis), lung cancer, and mesothelioma. Gastrointestinal cancer and other cancers at extrathoracic sites, as well as other lung disorders and diseases, have also been associated with asbestos exposure, although the consistency and magnitude of the excess risks of these diseases are not as great as for lung cancer and mesothelioma. All of these asbestos-related diseases are life-threatening or disabling and cause substantial pain and suffering.

Id. at 29,468-69.


128. 947 F.2d at 1208 n.3.
ment of Canada took the further extraordinary step of filing an amicus brief in this proceeding asserting that, because it was not supported by sufficient scientific evidence, the EPA rule was an import prohibition in violation of the GATT and the United States-Canada Free-Trade Agreement and an unnecessary obstacle to trade within the meaning of the Agreement on Technical Barriers to Trade concluded during the Tokyo Round of Trade Negotiations in GATT. Although Canada's brief did not address the question of remedy as a domestic legal matter, that document strongly implied that the asserted violation of international law was relevant to, if not dispositive of, the regulation's validity under TSCA's statutory scheme.

The Fifth Circuit concluded that the Canadian private party petitioners lacked standing because of the statute's primarily domestic focus. To the extent that the Government of Canada relied on arguments raised by those petitioners or identified new issues, the court disregarded the Canadian Government's brief. The court further noted that the GATT and the United States-Canada Free-Trade Agreement were alternative fora for resolving trade disputes arising out of obligations in international agreements. However, the fact that Canada would itself raise the legal implications of an international trade agreement in a domestic legal dispute in a United States court, together with the Fifth Circuit's equivocal resolution of the issue, suggests that similar arguments will be asserted in the future.

IV. STRENGTHENING THE NEXUS BETWEEN INTERNATIONAL AND DOMESTIC LAW

This uneasy interface between international and national law has potentially far-reaching, but as yet largely unappreciated, implications. Consider an example that illustrates some possible ramification.
tions. Assume that the contracting parties to the GATT have accepted the current text on sanitary and phytosanitary standards from the Uruguay Round of Trade Negotiations. Assume further that, in response to new scientific evidence of the high risk of cancer associated with this product, the pesticide Zap-Em is removed from the market pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). EPA cancels Zap-Em's registration and bans its residues on domestic and imported foodstuffs by revoking the existing tolerance for the product. Ruritania, also a party to the GATT, initiates a dispute settlement proceeding in that body, alleging that the prohibition on residues of Zap-Em in Ruritanian food exported to the United States is stricter than relevant international standards and, to the extent the ban is more stringent than those requirements, is scientifically unjustified and, therefore, a violation of the GATT. A panel established in accordance with the GATT's dispute settlement provisions finds that EPA's ban on Zap-Em constitutes a non-tariff barrier to trade in violation of that agreement.

The Executive Branch is now presented with the unfortunate choice between lifting the ban or continuing to violate international law. If the former is chosen, the resulting tolerance-setting proceeding could raise unique questions because of its unusual impact on foreign policy. In a subsequent lawsuit challenging the new tolerance, the Executive Branch might assert application of the political question doctrine, as it does in many cases touching on foreign affairs, to preclude judicial review. Even if the case were held to be justiciable, the foreign affairs context of the rulemaking might counsel particular deference to the Executive Branch.

Solely due to the foreign affairs context of the later rulemaking, the procedural guarantees accompanying this second tolerance-setting

136. See supra note 101.
137. See supra note 118, §§ 136-136y.
138. See supra note 118, § 136d(b).
139. FFDCA §§ 408 & 409, 21 U.S.C. §§ 346a & 348 (establishment of pesticide tolerances for agricultural raw commodities and processed foods).
140. See supra notes 97 & 103.
142. See supra note 55.
143. See supra notes 42 & 56 and accompanying text.
proceeding are entirely different from the process that established the tolerance for Zap-Em in effect before the ban. Although perhaps a particularly virulent example, this hypothetical scenario illustrates the profound discontinuities that can arise when issues ordinarily governed by domestic statutory structures emerge in an international context. At least two initiatives would tend to minimize these divergences between the international and national legal systems while preserving the integrity of the international obligations of the United States: (1) encouraging greater Congressional participation in international agreements not expressly authorized by statute; and (2) regularizing public participation in international regulatory processes at the national and international levels.

A. Congressional Participation in International Agreements Not Expressly Contemplated by Statute

The Japan Whaling and Greenpeace cases demonstrate the disruptive effect international agreements can have on 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,\(^{144}\) can nonetheless 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 the Congress,” as set out in State Department policy,\(^{145}\) is not by itself necessarily 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 authoriza-

\(^{144}\) Cf. Restatement, supra note 10, § 115 reporters’ note 5 (sole executive agreement inconsistent with state or federal law). See also Trade Agreements Act of 1979 § 3(a), 19 U.S.C. § 2504(a) (specifying that “[n]o provision of any trade agreement approved by Congress . . ., nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States shall be given effect under the laws of the United States”); United States-Canada Free-Trade Agreement Implementation Act of 1988 § 102(a), 19 U.S.C. § 2112 note (same); United States-Israel Free Trade Area Implementation Act of 1985, § 5, 19 U.S.C. § 2112 note (same).

\(^{145}\) See supra note 51.
tion for the choice of an executive agreement instead of either an article II, section 2 treaty or a Congressional-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 APA. 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.

However, as State Department policy also recognizes, 146 resolution of the historically delicate question of "choice of instrument" is quite sensitive to context. In such situations, silence, indifference, or acquiescence by the Congress can carry legal significance. 147 To overcome potentially difficult questions concerning the necessary threshold level of Congressional interest and thorny interbranch disputes that can arise on a case-by-case basis, 148 Congress ought to consider enacting legislation that would articulate the requisite legislative concern for each executive agreement not previously authorized by statute that falls within the enumerated powers of the Congress and that is intended to have domestic legal effect. Legislative participation in formulating and giving domestic legal effect to international agreements within realms of statutory concern will almost by definition

146. Id.

147. See, e.g., Dames & Moore v. Regan, 453 U.S. 654, 663, 669 (1981) (describing "only one more episode in the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution, under which we all live and which no one disputes embodies some sort of system of checks and balances" and noting that "when the President acts in the absence of congressional authorization he may enter 'a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain'") (quoting Jackson, J. concurring in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952)).

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. 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 in this with respect to this sub-category of executive agreements.

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


150. By enacting subsequent legislation that supersedes as a matter of domestic law an earlier executive agreement on subject matter within its enumerated powers, Congress can go considerably farther than this proposal. See Restatement, supra note 10, § 115(1)(a). Of course, this situation is distinct from a “sole” executive agreement concluded entirely within the President's plenary powers connected with foreign relations, such as the recognition of foreign governments. See supra note 50. Despite some superficial similarities, this suggestion is entirely distinct from the so-called “Bricker Amendment” dispute in the early 1950s. See generally Duane Tananbaum, The Bricker Amendment Controversy: A Test of Eisenhower's Political Leadership (1988). Senator Bricker proposed a constitutional amendment, and the various forms of the Bricker Amendment generally applied to all international agreements, including article II, section 2 treaties. This suggestion, by contrast, calls for a statute that would regulate the domestic legal effect of only those executive agreements falling within the realm of the Congress's constitutionally enumerated powers. Those executive agreements purely within the President's exclusive plenary powers concerning foreign relations, and in particular “sole” executive agreements on matters like the recognition of foreign governments, would not be covered. See, e.g., United States v. Pink, 315 U.S. 203 (1942) (domestic legal effect of executive agreement recognizing government of Soviet Union); United States v. Belmont, 301 U.S. 324 (1937) (same).

domestic legal effect, and not expressly authorized or participated in by the Congress.\footnote{FOIA, by prescribing standards for Executive Branch action arguably within the President's own plenary powers, goes considerably farther than this proposal. The statute authorizes withholding documents that are specifically authorized to be classified pursuant to executive order and are "in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552b(e)(1)(B). Executive orders establishing the classification system, the asserted legal authority for which are the President's own constitutional powers, predate FOIA. The legislation is nevertheless a constitutional exercise of legislative power, and the courts will order the release of information improperly classified. See, e.g., Donovan v. Fed. Bureau of Investigation, 806 F.2d 55 (2d Cir. 1986); Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978).}

B. \textit{Regularized Public Participation on the National and International Levels}

Perhaps the most obvious divergences between international and national law involve considerations of process. For example, if the Uruguay Round proposals on harmonization of sanitary and phytosanitary standards are adopted, GATT dispute settlement mechanisms will become a forum in which United States regulations on pesticide residues could be challenged as a matter of international law. However, unlike domestic legislative, administrative, and judicial processes, those mechanisms are secret and inaccessible to the public.\footnote{See supra notes 115 & 116 and accompanying text.} In the Mexican Tuna case the Executive Branch—in secret and with no formal opportunity for Congressional or public input—was responsible for vigorously defending a policy it reluctantly adopted only after flouting three statutory directives and resisting a court order.\footnote{See supra notes 106 & 107.} Such "cognitive dissonance" may be an endemic artifact of our domestic constitutional structure of separation of powers, in which the President both carries out the law and serves as the "sole organ of the nation in its external relations."\footnote{See supra note 42 and accompanying text.} The posture of the Mexican Tuna case and the Uruguay Round, which would give foreign governments the authority to challenge United States pesticide residue limitations, nevertheless throws the closed nature of GATT dispute settlement into sharp relief and pointedly demonstrates the failure of that procedure to insure even a modicum of accountability to the public.

As more environmental threats that are governed by or overlap with domestic regulatory structures are addressed in the international arena, there is a commensurately increasing need for improved processes for public participation on the international level. To ame-
liorate the effects of resulting discontinuities, multilateral 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. However, much can also be done at the purely national level in the absence of progress on the international level or until multilaterally agreed-upon measures are implemented.

First, the APA’s foreign affairs exception should be reevaluated. The underlying justification for that provision is no longer warranted, if it ever was. The foreign affairs exception is a crude and unsophisticated mechanism governing a sphere of the law that has become increasingly nuanced and complex. Environment, like foreign trade, clearly falls within the enumerated powers of the Congress. The national legislature has reacted to both issues with complex webs of statutory and regulatory directives. For that reason, both areas are 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 both environmental and foreign trade matters governed by statute are well within the reach of Congressional law-making authority. Accordingly, the unusual deference to the Executive Branch contained in the APA exception merely because of the international context for decision-making is not warranted.

156. See, e.g., Sands, supra note 18 (arguing for creation and regularization of mechanisms for public participation international law-making and -enforcement); David A. Wirth, Legitimacy, Accountability, and Partnership: A Model for Advocacy on Third World Environmental Issues, 100 Yale L.J. 2645 (1991) (same).

157. See supra note 55 and accompanying text. The Administrative Conference of the United States has recommended eliminating the foreign affairs exception and replacing it with narrower exemptions. 1 C.F.R. § 305.73-5. See also Arthur Earl Bonfield, Military and Foreign Affairs Function Rule-Making Under the APA, 71 Mich. L. Rev. 221 (1972) (advocating repeal of exception); Franck, Public Participation in the Foreign Policy Process, in The Constitution and the Conduct of Foreign Policy 66, 75 (p. Wilcox & R. Frank ed. 1976) (“Total exemption of foreign affairs functions from administrative process is not justified. Many aspects of these functions are analogous to domestic issues now subject to process; the fact that they take on an international dimension does not necessarily or even probably mean that all forms of administrative process should be excluded.”); Araiza, supra note 54 (advocating statutorily mandated notice-and-comment rulemaking in international trade context).

Second, Congress should replace the sweeping APA exemption 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 recognition of foreign governments—that are appropriate for an exemption like that currently in the APA and those—like environment—that are not. For the latter category, outcome-neutral procedures analogous to notice-and-comment rulemaking and judicial review under the APA should be established, with processes tailored to meet the needs of governmental decision-making in national, bilateral, and multilateral contexts. For instance, the legislation might require publication of interim drafts of 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.

V. CONCLUSION

Employing international processes to address international environmental risks is obviously sensible, desirable, and in some cases necessary. Improving the efficacy and accountability of multilateral mechanisms to make them responsive to serious global threats, like stratospheric ozone depletion and greenhouse warming, should be a top priority from both legal and policy perspectives. At least for now, however, there is also a risk that critical principles of separation of powers, public participation, and democratic decision-making will be compromised merely because an environmental issue has been removed to an international forum. These fundamentals, which are essential to the integrity of our governmental structure, are by no means confined to environmental law. Although the international environment is probably the best example of the discontinuities between international and domestic law, virtually any area of Congressional power and action can engage these crucial questions.

International initiatives can be effective, efficient, and in some cases indispensable vehicles for furthering environmental and other national and international goals. But that is not a sufficient justification for subverting our democratic principles and fundamental governmental structure by shielding unilateral, often secret action by the Executive Branch (where only one official, the President, is directly

accountable to the public) from Congressional, public, and judicial review. Legal processes for otherwise desirable international environmental undertakings should be altered to ensure that Executive Branch activities on the international level are accountable to the Congress and to the public at large, as measured against the same basic principles that apply to legislative or administrative actions.

Through its own inattention, by Executive Branch design, or both, the Congress has been marginalized in the negotiation and implementation of many international environmental agreements. Areas within the enumerated powers of Congress, of which environment is clearly one, should not be usurped by the Executive Branch merely because they arise in an international context. Those matters, like environment, governed by domestic statutes are clearly distinguishable from those within the Executive's plenary powers. Our constitutional system of separation of powers anticipates and can accommodate a larger role for the legislature in the category of international concerns that simultaneously fall within the plenary powers of the Congress. Moreover, greater involvement of the legislature will tend to produce significant incidental benefits. As a legal and practical matter, greater opportunities for Congressional input will ameliorate or eliminate discontinuities between the international and domestic legal systems. Over time, a higher level of legislative participation might even encourage greater public accountability of international processes generally.