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REFORMULATING EXECUTIVE AND LEGISLATIVE RELATIONSHIPS AFTER *REFORMULATED GASOLINE*: WHAT'S BEST FOR TRADE AND THE ENVIRONMENT?

SCOTT DANIEL MCBRIDE*

As the twentieth century draws to a close, two global trends are converging. The first, and more powerful, is the increasing integration of the world economy, and the resulting interdependence of domestic and international policies affecting trade in goods and services The second global trend is the imperative to protect the environment, and the need for national and international policies of environmental preservation to reduce the damages that trade can bring.¹

"All politics is local."²

I. INTRODUCTION

On June 19, 1996 the Office of the United States Trade Representative announced that it would no longer pursue a dispute with the World Trade Organization.³ It agreed to implement a ruling that a U.S. regulation on reformulated gasoline imports was inconsistent with Washington's obligations under the Uruguay Round Agreement and recommended that the Environmental Protection Agency change the current regulations.⁴

On its face, this announcement seemed no different from any other

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¹ C. FORD RUNGE, FREER TRADE, PROTECTED ENVIRONMENT 94 (1994).

² CHRISTOPHER MATTHEWS, HARDBALL 44 (1988).

³ See Office of the U.S. Trade Representative, *United States Invites Public Comment on Next Step in WTO Dispute on EPA Rules for Imported Gasoline* (visited Feb. 10, 1999) <<http://www.ustr.gov/releases/1996/06/96-54.html>> [hereinafter *United States Invites*]. USTR Charlene Barshefsky stated that "WTO's Appellate Body underscored that the WTO Agreements recognize the freedom of its members to protect the environment and conserve natural resources." *Id.*

⁴ See *id.*

routine trade decision passed down from the USTR's office. In truth, however, this short press release symbolized what may very well be a significant policy shift in how the President, trade professionals, and those concerned with environmental issues operate in creating and reacting to American regulatory law.

The announcement was a reaction to a ruling by the World Trade Organization's (WTO) Appellate Body that certain provisions of the 1990 Amendments to the Clean Air Act were protectionist.⁵ Certain regulations implementing the Amendments had been created by the Environmental Protection Agency and approved by Congress, only to be "preempted" by a very young, very powerful international governing body.

Although the WTO decision is not binding on its face, President Clinton, through the Trade Representative, has stated that he will recommend for this "preemption" to occur in the name of foreign relations.⁶ Indeed, over the last decade, the power of administrative agencies to revisit decisions agreed upon by Congress in the name of the President's power of foreign relations has been notably expanded as the world economy has grown more interdependent.⁷ At least one critic argues that "it is necessary to increase formal oversight of the Executive branch," for fear that this growth in power of the Executive Branch will diminish the force and power of elective politics.⁸

Constitutional scholars are not the only parties disturbed by this trend. Many environmentalists argue that the free trade movement

⁵ See *Report of the Appellate Body, United States—Standards for Reformulated and Conventional Gasoline* (visited Oct. 25, 1998) <<http://www.wto.org/wto/ddf/ep/public.html>>. See also *United States v. Venezuela*, 1996 WL 227476 (W.T.O.) [hereinafter *Reformulated Gasoline*].

⁶ See *United States Invites*, *supra* note 3.

⁷ There are several examples of this. Congress has delegated an enormous amount of foreign relations power to the Executive Branch over the past century. See, e.g., The Reciprocal Trade Agreements Act of 1934, 19 U.S.C.A. §§ 1351-1354, 48 Stat. 943 (1934) (delegating tariff-negotiating authority to the Executive Branch); The Trade Act of 1974, 19 U.S.C.A. §§ 2111-2116, 93 Stat. 150 (1979) (introducing the historical "fast-track" provisions that Congress has yet to renew); The International Emergency Economic Powers Act, 50 U.S.C.A. §§ 1701-1706, 91 Stat. 106 (1977) (granting the President the authority to regulate numerous financial and commercial transactions involving foreign parties in cases of perceived threats to national security).

⁸ Aubry D. Smith, *Executive-Branch Rulemaking and Dispute Settlement in the World Trade Organization: A Proposal to Increase Public Participation*, 94 MICH. L. REV. 1267, 1270 (1996).

supports the "race to the bottom" of environmental laws and that governments will lower their environmental standards in order to promote the free flow of goods over international borders.⁹

This Note reviews the *Reformulated Gasoline* decision and the power of the World Trade Organization to influence the creation of future U.S. environmental (and possibly other) laws. It analyzes the actual effect that the increased power of the Executive Branch may have on environmental regulation in the United States, and argues that such a shift in power may actually help strengthen, rather than weaken, environmental laws. It also distinguishes the decision of the Appellate Body from the initial Panel Report.

It is argued that the WTO proved a willingness to respect the Clean Air Act Amendments and would have ruled differently had the EPA initially attempted to treat foreign and domestic refiners in the same manner. This premise is strongly supported by the recent Appeals Board decision in *Shrimp-Turtle*. This Note therefore concludes by supporting the premise that WTO dispute settlements may end up aiding U.S. environmental laws, rather than undermining them.

In spite of a multitude of critics and concerned parties, the best solution to harmonizing free trade with strong environmental laws is to allow more oversight to the Executive Branch. For those who are honestly concerned about *ex parte* communications in matters concerning international affairs and domestic environmental regulation, a simple Executive Order extending notice and comment proceedings for interested international parties is all that is required. Further legislative interference should be discouraged and Congress may be the real source of concern for protecting environmental regulations due to the usage of controversial riders. Thus, this Note concludes by suggesting that an analysis of the decision of the Appellate Body in *Reformulated Gasoline* reveals that fears of the destruction of domestic environmental laws by the WTO through the Executive Branch are unwarranted.

II. THE WORLD TRADE ORGANIZATION

The World Trade Organization came into existence on January 1,

⁹ See generally DANIEL ESTY, GREENING THE GATT (1994) (giving a good overview of the concerns of environmentalists in relation to free trade).

1995,¹⁰ but it actually has a relatively long and complex history. In 1930, following the crash of the stock market and the resulting economic slowdown, Congress passed the Smoot-Hawley Tariff Act.¹¹ The Act was a reflection of one of the most protectionist periods in the history of American trade law.¹² Its purpose was to help domestic manufacturers by decreasing the competition from outside producers through "raising tariffs on dutiable items to an average of 52 percent."¹³ The result was a prime example of retaliation from major trading partners and a strong contribution to the economic crisis that quickly gripped the entire planet.¹⁴

Congress soon realized the truth of the adage that no man (or country, for that matter) is an island, and in 1934 it passed the Reciprocal Trade Agreements Act.¹⁵ The statute granted the President broad powers to liberalize trade between the United States and other nations with bilateral agreements.¹⁶ Some tariffs were cut as much as fifty percent.¹⁷ The United States was moving away from its isolationist temptations and toward a position of leadership in the international economy. It was not until the end of World War II, however, that America would truly become the international powerhouse that it is today.

Following the war, America and the Allied powers found themselves at a crucial point in world history. One of the lessons that history had taught them was that it was extremely important to create institutions that would help manage intercountry economic relations.¹⁸ Without the frustration of high unemployment and poor economies, neither World War I nor II might ever have occurred.¹⁹ Thus, at the Bretton Woods Conference in 1944, the world leaders decided to create an International Bank for Reconstruction and Development (IBRD, popularly known as the World Bank) and International Monetary Fund (IMF) to

¹⁰ See RAJ BHALA, *INTERNATIONAL TRADE LAW* 85, 86 (1996).

¹¹ Smoot-Hawley Tariff Act of 1930, 19 U.S.C.A. § 1526 (1999).

¹² See BHALA, *supra* note 10, at 85.

¹³ ESTY, *supra* note 9, at 243.

¹⁴ See *id.*

¹⁵ The Reciprocal Trade Agreements Act of 1934, 19 USCA § 1351 (1999). See also I. M. DESTLER, *AMERICAN TRADE POLITICS* 317 (1995) ("Through successive extensions and amendments, it also authorized U.S. participation in the first five GATT rounds of multilateral trade negotiations.").

¹⁶ See ESTY, *supra* note 9, at 243-45.

¹⁷ See *id.*

¹⁸ See BHALA, *supra* note 10, at 85-101 (accounting the history of the WTO).

¹⁹ See ESTY, *supra* note 9, at 243-45.

“finance postwar development and reconstruction” and “stabilize exchange rates and official balances of payments.”²⁰ The nations also determined that a new organization to reduce obstacles to trade was necessary, and the United States proposed an International Trade Organization (ITO) in 1945.²¹

In 1947, a proposal known as the Havana Charter was written.²² An interim measure, known as the General Agreement on Tariffs and Trade (GATT), was adopted but it had “no enforcement mechanisms, no codified rules, and no administrative structure to guide its operations.”²³ It was meant only to be a temporary measure that would be replaced by the ITO once the Havana Charter had been ratified by member countries.²⁴ Unfortunately for the international trade movement, the ITO’s biggest supporter, the United States, experienced a change in public support for free trade in the late 1940s and Congress never even voted upon ratifying the GATT.²⁵ Thus, from 1948 until 1995 the GATT was the only international agreement governing the free trade of goods between member countries, and was only in force in the United States through an Executive Order.²⁶

It should be noted that the structure of GATT changed little over

²⁰ *Id.* at 244.

²¹ *See id.*

²² *See* Kenneth W. Dam, *The GATT*, in BHALA, *supra* note 10, at 87-89. After World War II, United States officials attempted to create an International Trade Organization. A final version of charter proposals were written up, and this group of proposals is commonly called the Havana Charter. The Charter contained institutional and substantive provisions not found in the GATT. The GATT went into force on January 1, 1948, while the Havana Charter was never voted upon by Congress. *See* Patrick Low, *Trading Free*, in BHALA, *supra* note 10, at 90-91.

²³ ESTY, *supra* note 9, at 245.

²⁴ *See* Dam, *supra* note 22, at 88.

²⁵ *See* ESTY, *supra* note 9, at 244 (noting that GATT was accepted as an executive agreement “not requiring congressional approval.”). *See also* BHALA, *supra* note 10, at 85-86. The GATT was put into place by a “presidential agreement to and proclamation of the effectiveness of the Protocol of Provisional Application.” *Id.*

²⁶ *See* ESTY, *supra* note 9, at 245 (“Slow postwar growth . . . undermined congressional momentum for a new trade organization. The Truman Administration quietly withdrew the ITO proposal in 1950.”). *See also* Proclamation No. 2761A, 3 C.F.R. 139 (1947) (carrying out the GATT 1947); BHALA, *supra* note 10, at 85 (“President Truman signed GATT 1947 under the authority of the Reciprocal Trade Agreements Act of 1934 that was extended in 1945.”). The United States’ acceptance of GATT can be found in 61 Stat. Pt. 5, A2051 (1947).

the first forty-five years of its existence.²⁷ Nonetheless, there were eight "rounds" of negotiations that led to several historical cuts in tariffs around the globe and, in some respects, a growth in the power of the organization.²⁸ In the most recent "Uruguay Round," over 117 countries agreed to at least seventeen separate accords that covered both tariff and non-tariff barriers to trade.²⁹ The Agreement was given "teeth" when a formal international organization was finally created to enforce both GATT and all of these other agreements.³⁰ This organization, the World Trade Organization (WTO), is the body of international trade dispute that this note will discuss.³¹

In 1994, the House of Representatives and the Senate finally voted to approve GATT 1947, GATT 1994, and the WTO Agreement.³² President Clinton signed the Uruguay Round Agreements Act on December 8, 1994, and it took effect on January 1, 1995.³³

The WTO acts as a source of dispute resolution for countries that have disagreements over the movement and trade laws of goods and services.³⁴ Where the original GATT 1947 did little or nothing to provide mechanisms by which parties could find a proper settlement,³⁵ the WTO provides a forum in which countries make their complaints and agree to

²⁷ See BHALA, *supra* note 10, at 88.

²⁸ See *id.* at 98 (listing the individual rounds: the Annecy Round, the Torquay Round, the Geneva Round, the Dillon Round, the Kennedy Round, the Tokyo Round, and the Uruguay Round of Multilateral Trade Negotiations).

²⁹ See ESTY, *supra* note 9, at 248. Esty notes that there were actually 28 separate accords, but this number varies depending on how the term "agreements" is determined. See also RAJ BHALA AND KEVIN KENNEDY, *WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW* 13-14 (1998).

³⁰ See BHALA, *supra* note 10, at 87.

³¹ See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1125 (1994).

³² See BHALA, *supra* note 10, at 86. See also 140 CONG. REC. H11493-01, H11535 (daily ed. Nov. 29, 1994). The House of Representatives voted to appropriate money for the Uruguay Round Agreement Act on November 29, 1994. See *id.* The Senate voted to ratify the Agreement on December 1, 1994. See 140 CONG. REC. S15365-01, S15378 (daily ed. Dec. 1, 1994).

³³ See The Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 480 (1994). For an exhaustive treatment of the GATT-WTO system, see BHALA & KENNEDY, *supra* note 29.

³⁴ See Smith, *supra* note 8, at 1274.

³⁵ See BEVERLY EARLE SCHAFFER & FILBERTO AUGUST, *INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT* 336 (1996).

the decisions of the panels overseeing the case. In the simplest of terms, WTO is an international legal entity governing the GATT.³⁶

The core principles of GATT are "most favored nation (MFN) treatment, national treatment, and non-discrimination."³⁷ These principles are the pillars by which the WTO makes its decisions in every trade dispute, whether the debate be over GATT terms or other WTO agreements.³⁸

The WTO seeks to restrain individual governments from insulating domestic industries from outside competition, similar to the relationship between the Dormant Commerce Clause and the limitations of individual states in their ability to restrain interstate commerce.³⁹ Just as state

³⁶ See generally Smith, *supra* note 8. The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) is a system whereby WTO members who believe other signatories are violating their GATT responsibilities can request the creation of a Panel. Panels are composed of representatives from various countries and are created specifically to deal with each complaint. If a party is found by the Panel to be in violation of the GATT, that country can appeal to an Appeals Board that is constant and does not fluctuate from case to case. Panels and the Appeals Board cannot "enforce" a decision, but they can permit the party harmed by the violation to suspend concessions to the violating party in the trade of goods or services. See BHALA, *supra* note 10, at 143-145 (explaining the WTO dispute resolution process). See also *Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes*, in INTERNATIONAL TRADE LAW DOCUMENTS SUPPLEMENT 397 (Raj Bhala ed., 1996) [hereinafter DOCUMENTS SUPPLEMENT].

³⁷ Lisa C. Thompson & William J. Thompson, *The ISO 9000 Quality Standards: Will They Constitute a Technical Barrier to Free Trade Under the NAFTA and the WTO?*, 14 ARIZ. J. INT'L & COMP. L. 155, 178 (1997).

³⁸ See Jeffrey Waincymer, *Commentary, Reformulated Gasoline Under Reformulated WTO Dispute Settlement Procedures: Pulling Pandora Out of A Chapeau?*, 18 MICH. J. INT'L L. 141, 147 (1996).

³⁹ See James H. Snelson, *Can GATT Article III Recover From Its Head-On Collision With United States Taxes on Automobiles?*, 5 MINN. J. GLOBAL TRADE 467 (1996). The Commerce Clause of the United States Constitution provides that "[t]he Congress shall have [the power] . . . [t]o regulate [c]ommerce . . . among the several [s]tates." U.S. CONST. art. I, § 8, cl. 1-3. The Dormant Commerce Clause Doctrine basically allows Congress to place limitations on the power of state governments to regulate interstate commerce. For example, in *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), the Supreme Court held that an ordinance making certain requirements of local milk pasteurization within five miles of town was in violation of the Dormant Commerce Clause doctrine. A good number of federal laws are enforced through the Dormant Commerce Clause doctrine. See Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1411-1418 (1994) (explaining the relation between GATT and the

protectionism is discouraged through the Dormant Commerce Clause in order to build a stronger union, the WTO's enforcement of lowering protective or preferential tariffs discourages protectionism by member nations.⁴⁰

One of the most important positive results of the Uruguay Round and the creation of the WTO was:

the introduction of an appellate process. The primary motivation behind the creation of an appellant process was to ensure that there was a proper mechanism for reviewing the findings of panels. This was seen as particularly desirable once the Uruguay Round negotiators had decided on automatic adoption of panel reports. Previously, panel reports were adopted only by consensus; this had led to problems when losing parties at times blocked adoption of reports.⁴¹

Dormant Commerce Clause).

⁴⁰ See Snelson, *supra* note 39, at 467. This analogy has its problems, for states in the union that choose to ignore the decisions of the federal government may suffer consequences relatively more severe than members of the WTO who disobey the international organization's decisions. For example, much of the WTO is enforced through Most Favored Nation (MFN) benefits. See *General Agreement on Tariffs and Trade 1947*, in INTERNATIONAL TRADE LAW DOCUMENTS SUPPLEMENT, *supra* note 34, at 1-2 (laying down the foundation of the GATT-MFN status. In the most basic of terms, Article I states that duties imposed on goods from foreign countries should be equal in amount to the taxes or other burdens placed on domestic "like" goods). See also The Trade Act of 1974, 19 U.S.C.A. § 2136(a) (West 1997) ("Except as otherwise provided . . . any duty or other import restriction or duty-free treatment proclaimed in carrying out any trade agreement . . . shall apply to products of all foreign countries . . ."). Outside of particular exceptions, countries found by WTO Dispute Settlement Panels to be in violation of WTO/GATT provisions, and who thereafter refuse to appropriately alter protectionist laws, may have their status as a MFN revoked by the aggrieved WTO members. These countries will be "subject to higher rates of duty" than those with the status. See BHALA, *supra* note 10, at 192. Obviously, this differs greatly from the enforcement procedures used by the Executive Branch in the United States, but members of the WTO take such economic penalties very seriously. Free, unrestricted trade can help private interests flourish, which in turn benefits public interests. See Joseph F. Francois and Clinton R. Shiells, *The Dynamic Effects of Trade Liberalization: A Survey*, in BHALA, *supra* note 10, at 36-44 (explaining the various benefits of free trade).

⁴¹ Waincymer, *supra* note 38, at 142.

The first decision to come out of this appellate process was *Reformulated Gasoline*,⁴² discussed later in this Note.

III. THE WORLD TRADE ORGANIZATION AND THE ENVIRONMENT

When GATT was first drafted and passed in 1947, the environment was not one of the organization's concerns.⁴³ As the world became more industrialized, critics arose to voice environmental concerns. "The success of post-war economic growth has led people in the industrialized North to focus more on their standard of living and less on absolute wealth maximization."⁴⁴ Eventually, as the environmental movement grew stronger, and smaller, more limited groups started to band together in political force. Air pollution, acid rain, and global warming all became major international issues in the 1980s and 1990s as "environmental issues moved beyond domestic policy."⁴⁵

Today, it is well recognized around the world that the Earth's environmental problems are very real.⁴⁶ It seems only logical that liberal international trade agreements were criticized for their effects on the global environment and that GATT's policies and indifference in the area of environmental protection were the subject of a good amount of environmental criticism:

When nations exchange goods and services, they also trade environmental and health risks Trade and business interests have slowly . . . come to recognize the importance of . . . ways to integrate environmental concerns into trade reform Advocates of more open trade and environmentalists alike share concerns over how [the two] . . . are to be linked [T]he conflict of cultures and collision of interests, far from being over, has really only

⁴² See *Reformulated Gasoline*, *supra* note 5.

⁴³ See Peter Hayes, Book Note, 35 COLUM. J. TRANSNAT'L L. 213 (1997) (reviewing C. FORD RUNGE, *FREER TRADE, PROTECTED ENVIRONMENT* (1994)).

⁴⁴ Hayes, *supra* note 43, at 217.

⁴⁵ RUNGE, *supra* note 1, at 4.

⁴⁶ It is worth noting that even the Vice President of the United States has written a book on the problems facing biodiversity and environmental regulation. See ALBERT GORE, JR., *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* (1992).

begun.⁴⁷

This growing recognition of the problems facing the environment and free trade was mirrored during the Uruguay Round when "participants agreed to include environmental protection as one of the . . . objectives when establishing the World Trade Organization in 1994."⁴⁸

The Preamble to the agreement establishing the WTO reads that parties agree:

[R]elations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.⁴⁹

Although there are several other agreements enforced by the WTO that can be related to environmental protection, this Note focuses only on the significant GATT provisions.⁵⁰

The majority of disputes involving the environment and free trade are tried under Article XX of the GATT, which prohibits "arbitrary or unjustifiable discrimination between countries," but allows countries to

⁴⁷ RUNGE, *supra* note 1, at 5-6.

⁴⁸ Elliot B. Staffin, *Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labeling and Its Role in the "Greening" of World Trade*, 21 COLUM. J. ENVTL. L. 205, 206 (1996). See also Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1143 (1994) [hereinafter Final Act].

⁴⁹ Final Act, *supra* note 48, at 1144.

⁵⁰ These agreements include the following: The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS); the Agreement on Technical Barriers to Trade (TBT); the Agreement on Agriculture; the Agreement on Trade-Related Aspects of Intellectual Property Rights; and the Agreement on Subsidies and Countervailing Measures. See generally DOCUMENTS SUPPLEMENT, *supra* note 36. See also Waincymer, *supra* note 38, at 145.

pass laws that are “necessary to protect human, animal, or plant life or health” and laws that are “related to the conservation of exhaustible natural resources.”⁵¹ A more detailed explanation of Article XX can be found later in this Note.

IV. THE TUNA-DOLPHIN DISPUTE

The first significant, and arguably the most important, Article XX decisions to come out of pre-WTO GATT were the Tuna-Dolphin decisions.⁵² Both cases stemmed from a dispute over the Marine Mammals Protection Act (MMPA), an American law created to protect dolphins and other marine mammals from injurious fishing methods.⁵³ The law fell hardest on Mexican tuna fishermen and Mexico filed a complaint with the GATT Panel, arguing that restrictions set by the Act were in violation of the GATT.⁵⁴

The initial panel was extremely conservative in its review of the MMPA, finding no defense of it under Article XX and, in the process, successfully expressing to environmentalists that the GATT might be indifferent to global environmental concerns.⁵⁵ In November 1991, the U.S. and Mexico jointly agreed to withdraw from the dispute, agreeing instead to a bilateral remedy.⁵⁶

In June 1994, a GATT panel issued another report on the same Act.⁵⁷ The complaint this time was brought by the European Union.⁵⁸ The

⁵¹ General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter Article XX], as presented in ESTY, *supra* note 9, at 47. For the entire text of Article XX, *See infra* note 78 and accompanying text.

⁵² *See* GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, Aug. 16, 1991, 30 I.L.M. 1594, 1598 [hereinafter Tuna/Dolphin I]; United States-Restrictions on Imports of Tuna, June 1994, 33 I.L.M. 839 [hereinafter Tuna/Dolphin II]. These decisions are described in Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268 (1997).

⁵³ Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-62, 1371-84, 1401-07, 1411-18, 1421, 1421a-1421h (1994).

⁵⁴ *See id.* §§ 1361 et seq. *See also* Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AMER. J. INT'L L. 700, 700-04 (1992), reprinted in BHALA, *supra* note 10, at 1187.

⁵⁵ *See* Tuna/Dolphin I, *supra* note 52.

⁵⁶ *See* BHALA, *supra* note 10, at 1195.

⁵⁷ *See* Tuna/Dolphin II, *supra* note 52.

report was never officially adopted, but offers important insights into the interpretation of Article XX.⁵⁹ The panel indicated that it could recognize for Article XX(g) purposes that the MMPA constituted a policy to conserve "exhaustible natural resources"—a welcome change from the previous Panel decision.⁶⁰ Unfortunately, the Panel refused to recognize the Act as being "primarily aimed at" the conservation of the exhaustible natural resources because it forced other contracting parties to change their policies, impairing the right of access to the United States.⁶¹ This case remained the pinnacle GATT environmental case until *Reformulated Gasoline* was decided. This narrow definition of "primarily aimed at"⁶² would rear its uncompromising, ugly head again in the initial WTO Panel *Reformulated Gasoline*⁶³ decision.

⁵⁸ See *id.* See also BHALA *supra* note 10, at 1209.

⁵⁹ Panel reports that are not adopted still can give some insight into the future standards that will be used by Panels. Future panels may refer to the decision as giving guidance in any case. Although GATT Panels are not obligated to follow the precedent of former Panels, as a rule they do just that. In other words, the decisions are dicta, but they are dicta that can be cited by a Panel in the future in making a determination. Therefore, you will find reference to Tuna/Dolphin I in the Tuna/Dolphin II decision. See Tuna/Dolphin II, *supra* note 52.

⁶⁰ See BHALA, *supra* note 10, at 1211, 1215.

⁶¹ See *id.* at 1218. This "primarily aimed at" decision was clearly one of the oddest decisions ever made in the history of statutory interpretation. See *id.* Rather than looking at "primarily aimed at" as basically meaning "the point of the domestic law is to . . . (for example in this case, save dolphins)," the Panel decided that "since a country can restrict production and consumption only when they are under its jurisdiction, measures primarily aimed at accomplishing this task cannot be extrajurisdictional, and thus the exceptions [Article XX] cannot refer to such cases." RUNGE, *supra* note 1, at 78. In the simplest of terms, a Panel made up of trade experts decided that U.S. environmental law, which was really created to save dolphins, did not fit the terms of the Article XX phrase "primarily aimed at" and could not claim a waiver because it changed the behavior of other countries that killed dolphins. See BHALA, *supra* note 10, at 1218. The assumption of the Panel was that every country can do whatever they want with the environment as long as they do not try to change the behavior of other countries in their respective environments. As any school child can tell you, however, the global environment is interdependent, so such rulings would make U.S. laws protecting shifting environmental measures useless. For example, dolphins do not follow country borders. Thus, once a dolphin swam out of U.S. borders, it could be killed and there is nothing the U.S. could do about it. It is clear that the Tuna/Dolphin Panels had little concern or respect for environmental laws.

⁶² BHALA, *supra* note 10, at 1218.

⁶³ See *Reformulated Gasoline*, *supra* note 5.

V. THE REFORMULATED GASOLINE DECISION

In 1990, the Clean Air Act Amendments implemented two gasoline programs.⁶⁴ The first program was established to ensure that pollution levels from gasoline production would not exceed 1990 levels.⁶⁵ The second regulation was concerned with reducing pollution in nine major cities and other areas requested by governors that contained a high amount of air pollution.⁶⁶ Congress ordered the Environmental Protection Agency to establish a "baseline" for each refiner, importer or blender of gasoline.⁶⁷ These "baselines" were certain standards of quality of gasoline that could be allowed into various cities.⁶⁸ The problem lay in the fact that the EPA determined that the methods by which the baselines could be measured would be broken into three separate baselines for domestic refiners, but only one standard baseline for foreign refiners that did not export seventy-five percent of production to the United States.⁶⁹

In practice, "virtually none (of the foreign importers) could have complied with this threshold,"⁷⁰ so they were stuck with only one, somewhat harsh baseline standard determined by EPA. For example, the

⁶⁴ See Clean Air Act, 42 U.S.C. § 7545(k) (1994); Environmental Protection Agency, Regulation of Fuels and Fuel Additives; Standards for Reformulated and Conventional Gasoline, Final Rule, 59 Fed. Reg. 7715, 7789 (1994). The preamble to the Final Rule states the mission of the regulations:

Through the amended Clean Air Act of 1990, Congress mandated that EPA promulgate new regulations requiring that gasoline sold in certain areas be reformulated to reduce vehicle emissions of toxic and ozone-forming compounds. This document finalizes the rules for the certification and enforcement of reformulated gasoline and provisions for unreformulated or conventional gasoline.

Id. at 7716.

⁶⁵ See Waincymer, *supra* note 38, at 146.

⁶⁶ The EPA standards were finalized as the Regulation of Fuels and Fuel Additives—Standards for Reformulated and Conventional Gasoline, 40 C.F.R. § 80.20 (1998) [hereinafter Regulation of Fuels]. The Actual Clean Air Amendments are known as the Air Pollution Control Act (Clean Air Act) Amendments of 1990, 42 U.S.C. §§ 7401-7671 (1994).

⁶⁷ See Maury D. Shenk, *International Decision: United States—Standards for Reformulated and Conventional Gasoline*, 90 AM. J. INT'L L. 669, 670 (1996).

⁶⁸ See Regulation of Fuels, *supra* note 66, at 80.70 (listing all the cities and surrounding counties that are covered by the regulations).

⁶⁹ See Shenk, *supra* note 67, at 670.

⁷⁰ Waincymer, *supra* note 38, at 147.

Venezuelan national oil company, Petroleos de Venezuela, S.A. (PDVSA), was one importer who could not meet the seventy-five percent threshold.⁷¹ Venezuela did not meet the baseline standards applicable to foreign producers and would have lost a great deal of business because of these limiting instructions if it did not take action in response to the environmental law. Thus, Venezuela filed a complaint with GATT.⁷²

Soon after Venezuela filed its complaint, the EPA and the Secretary of State secretly contacted Venezuelan officials and offered to essentially allow that country to operate under the same regulations as U.S. domestic refiners in return for Venezuela's promise not to pursue a complaint that alleged that the Clean Air Act rule violated U.S. obligations under GATT.⁷³ A confidential cable from Secretary of State Warren Christopher to the U.S. Ambassador to Venezuela was leaked and Congress and the general public learned of the proposed compromise.⁷⁴ Thus, on March 23, 1994, when the EPA announced the agreement publicly, it was greeted with a good deal of opposition.⁷⁵ Although the EPA recommended limited individual baselines, "fully equal treatment for foreign refiners was never advocated, on the stated policy basis that there would be general problems with verifying data and particular avoidance problems given the difficulty of identifying and distinguishing between different batches of gasoline."⁷⁶ Congress forced the EPA to abandon the compromise with Venezuela by inserting a "rider" in an EPA appropriations bill that rejected the rule change.⁷⁷

⁷¹ See Smith, *supra* note 8, at 1267 n.3. The olefin content of Venezuelan gasoline was three times higher than the U.S. refinery-industry average. Olefins contribute to ozone formation.

⁷² See *id.* at 1267.

⁷³ See *id.*

⁷⁴ See, e.g., *Lawmaker Rips Gasoline Rules' Delay*, HOUS. CHRON., June 23, 1994, available at 1994 WL 4212640 at *1 (explaining that John Gingell, House Energy and Commerce Committee Chairman, "blasted the administration for backing off a plan to hold foreign refiners to strict standards for the clean gas, and said it appeared the administration cut a deal with Venezuela to avert a trade fight.").

⁷⁵ Notably, the agreement would have "led to a slight increase in pollution levels in the northeastern United States." Smith, *supra* note 8, at 1268.

⁷⁶ Waincymer, *supra* note 38, at 148.

⁷⁷ See Smith, *supra* note 8, at 1267. This entire situation would later haunt the United States in its appeals process at the WTO. During the March announcement, the EPA showed a willingness to provide for conditional, limited foreign baselines. It was therefore impossible to make the claim that there were *no* alternatives available to the

Once it was clear that there would be no further diplomatic discussion between the United States and Venezuela, the South American country was joined by its neighbor, Brazil, in challenging the baseline standards under the new WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.⁷⁸ The European Community and Norway later joined as third parties to the complaint. This was the first WTO dispute resolution to proceed since the WTO's creation.⁷⁹

A. *The Complaints*

Before continuing, it should be clarified that most WTO disputes involving domestic environmental laws center around the aforementioned provision of GATT—Article XX:⁸⁰

ARTICLE XX—GENERAL EXCEPTIONS

Subject 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

....

(b) necessary to protect human, animal or plant life or health;

....

(g) relating to the *conservation of exhaustible natural resources* if such measures are made effective *in conjunction with restrictions on domestic production or*

United States, as may have been possible otherwise. See also H.R. 4624, 103d Cong. (1994) ("None of the funds provided in this Act may be used during fiscal year 1995 to sign, promulgate, implement or enforce the requirement proposed as 'Regulation of Fuels and Fuel Additives: Individual Foreign Refinery Baseline Requirements for Reformulated Gasoline' at Volume 59 of the Federal Register at pages 22800 through 22814"); *Reformulated Gasoline*, *supra* note 5.

⁷⁸ See Shenk, *supra* note 67, at 670.

⁷⁹ See Waincymer, *supra* note 38, at 142.

⁸⁰ See generally Article XX, *supra* note 51. See also DOCUMENTS SUPPLEMENT, *supra* note 36, at 44.

consumption.⁸¹

Most environmental laws naturally impede free trade, as they usually restrict the free movement of goods and services in the name of environmental welfare. In most circumstances, as a document that promotes international free trade, GATT attempts to limit individual Member laws and regulations that restrict the flow of goods and services.⁸² Article XX was created as an exception to this: it allows countries to pass environmental laws to protect their citizens *if certain criteria are met*.⁸³ In the case of *Reformulated Gasoline*, Article XX and this required criteria would be key to the eventual outcome of the Appeals Board decision.⁸⁴

Venezuela and Brazil presented four complaints to the initial Panel in *Reformulated Gasoline*. They complained that: first, the regulations were contrary to the "most favored nation" (MFN) requirement of Article I of GATT; second, the regulations were counter to the National Treatment requirement of Article III of GATT 1994; third, measures were in breach of Article 2 of the Agreement on Technical Barriers of Trade (TBT); and fourth, the provisions of the Clean Air Act were not exempted by Article XX of GATT 1994.⁸⁵

Considering the environmentally-unfriendly decision made by the GATT Panel in the initial Tuna-Dolphin case,⁸⁶ it was no great surprise that the Panel ruled conservatively.

The Panel found the following. First, clean air is an "exhaustible

⁸¹ Article XX, *supra* note 51 (emphasis added). The introduction paragraph is called the "chapeau," as will be discussed later in the text of this Note. Provisions (b) and (g) are the environmental exceptions. Other sections of Article XX not listed here include prison labor, national treasures of artistic, historic and archaeological value, the protection of public morals, and others. See Article XX, *supra* note 51, art. XX(e), (f), (a).

⁸² See ESTY, *supra* note 9, at 47-51 (explaining the creation of Article XX and details about its application).

⁸³ See *id.*

⁸⁴ See *Reformulated Gasoline*, *supra* note 5.

⁸⁵ See Waincymer, *supra* note 38, at 148-49; United States-Standards for Reformulated and Conventional Gasoline, Report of the Panel, Jan. 29, 1996, Law and Practice of the World Trade Organization, Dispute Resolution Binder 1, at 7-9 [hereinafter Panel Report]. For purposes of this Note, the fourth complaint is the only complaint that will be examined thoroughly.

⁸⁶ See Tuna/Dolphin I, *supra* note 51; Tuna/Dolphin II, *supra* note 51.

natural resource” within the meaning of Article XX (g).⁸⁷ Secondly, these provisions did indeed defy Article III:4 because imported and domestic gasoline were ‘like products.’⁸⁸ Under the baseline establishment rules of the Gasoline regulations, imported gasoline was effectively prevented from benefiting from favorable sales conditions that were afforded domestic gasoline by an individual baseline tied to the producer of a product. Thus, imported gasoline was treated “less favorably” than domestic gasoline.⁸⁹

The third decision was that it was not necessary to see if the necessary requirements of Article I:1 or Article 2 of the TBT were met because of the finding on Article III:4.⁹⁰ Finally, the baseline establishment rules found to be inconsistent with Article III:4 could not be justified under Article XX(g) as a measure “relating to” the conservation of exhaustible natural resources.⁹¹

The United States was pleased with the Panel’s conclusion that clean air was a “exhaustible natural resource,” but was nonetheless dissatisfied with the Panel’s other findings. The American government did not disagree that the baseline establishments were contrary to Article I:1, Article III:4, and the TBT agreement.⁹² On appeal, it focused on the defense that its actions fell under the exceptions of Article XX.⁹³

America claimed that the regulations enforcing the Clean Air Amendments were clear examples of laws whose primary purpose was protecting the environment and that these laws were instituted in a

⁸⁷ See Panel Report, *supra* note 85, at 62.

⁸⁸ See *id.* at 52.

⁸⁹ See *id.*

⁹⁰ See *id.* at 53.

⁹¹ See *id.* at 36.

⁹² [T]he United States does not appeal from the findings or rulings made by the Panel on, or in respect of, the consistency of the baseline establishment rules under Article I:1, Article III:1, Article III:4, and Article XXXIII:1(b) of the *General Agreement* and the applicability of Article XX(b) and Article XX(d) of the *General Agreement* and of the *TBT Agreement*.

Reformulated Gasoline, *supra* note 5, at 8.

⁹³ See *id.* (“[I]t is also the view of the United States that the Panel erred in failing to proceed further in its interpretation and application of Article XX(g), and in not finding that the baseline establishment rules satisfy the other requirements of Article XX(g) and the introductory provisions of Article XX.”).

reasonable manner.⁹⁴ The United States justified its distinction between foreign and domestic baselines as necessary because of the difficulties which the EPA would have had to face in verifying the reformulation processes of every foreign gasoline importer.⁹⁵ The U.S. claimed that it would be extremely difficult to verify information and enforce baselines on a fungible commodity such as gasoline.⁹⁶

Environmentalists and investors around the world looked with great interest to the decision of the WTO Appellate Body. First, this was the first appeal to reach the Appellate Body. If the Appellate Body had merely affirmed the decision of the panel without comment, then future disputants may have been dissuaded from bothering to expend energy, time and resources on the appeals process.⁹⁷ Second, because the environmental-trade debate continued to rage even louder and stronger, observers watched with keen interest to see how the Appellate Body would treat domestic environmental laws that had an ancillary effect on trade.⁹⁸ Thankfully, the Appellate Body decision differed in its analysis from the Panel and did indeed uphold the validity of a wide range of domestic environmental laws.

B. *The Appellate Decision*

The Appellate Body agreed with both the Panel and the United States that clean air was an exhaustible natural resource.⁹⁹ However, this was where the similarity in the two rulings ended. The Appellate Body evaluated the Panel's reliance on an earlier GATT decision, *Herring and*

⁹⁴ *See id.*

⁹⁵ *See id.* at 26. *See also* Panel Report, *supra* note 85, at 55. The United States also relied on:

(1) the impossibility of determining the refinery of origin for each imported shipment, (2) the incentive to "game" the system, thereby making it harder on exporters and importers, and (3) the difficulty for the United States to exercise an enforcement jurisdiction with respect to a foreign refinery, since the Gasoline Rule required criminal and civil sanctions in order to be effective.

Id.

⁹⁶ *See Reformulated Gasoline*, *supra* note 5, at 25.

⁹⁷ *See generally* Waincymer, *supra* note 38 (explaining the importance of the first Appellate decision).

⁹⁸ *See generally id.*

⁹⁹ *See Reformulated Gasoline*, *supra* note 5, at 19.

Salmon,¹⁰⁰ in which another GATT Panel determined that under Article XX(g), the phrase “relating to the conservation of exhaustible natural resources” meant that the law had to be *primarily aimed* at the conservation of those resources.¹⁰¹ The Panel determined that the Clean Air provisions at issue in *Reformulated Gasoline* were not primarily aimed at preserving clean air, so Article XX(g) was not applicable.¹⁰²

The Appellate Body recognized the problem with this logic. Using the traditional canons of statutory interpretation, the court noted that Article XX is divided into two sections.¹⁰³ Logically, the first section to be reviewed is the specific listing of exceptions, (a) through (g).¹⁰⁴ If these exceptions are met, any analysis of Article XX still has to look at the introductory “chapeau.”¹⁰⁵ The chapeau states that even if the exceptions are met, an Article XX exception will not be allowed if there are logical alternatives to trade barriers (e.g., negotiations).¹⁰⁶

In the chapeau, it seems clear that the exceptions at issue are not the “legal conclusions” that result from the passage of a law, but the actual measures taken by the agency.¹⁰⁷ For example, in this case the Panel looked at the “less favorable treatment” that resulted from the different baseline standards and said that they were not primarily aimed at improving air standards.¹⁰⁸ In fact, the Appellate Body determined that it was not the specific treatment of the regulations, but the overall focus of the law, or measures, that should have been used to determine the problem that the regulations were drafted to solve.¹⁰⁹ The Appellate Body noted that the Clean Air Act Amendments, and the baseline standards in particular, were created to help the environment.¹¹⁰ One of the effects of specific provisions was to impede trade, but this was not the “primary

¹⁰⁰ See *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, Mar. 22, 1988, WTO B.I.S.D. at para. 4.6 (1988).

¹⁰¹ See Panel Report, *supra* note 85, at 64 (emphasis added).

¹⁰² See *id.* at 44-45.

¹⁰³ See *Reformulated Gasoline*, *supra* note 5, at 21 (describing Article XX's chapeau and separate provisions). The “chapeau” is just another name for the beginning paragraph of the Article and is far broader than the specific provisions that follow it.

¹⁰⁴ See *id.* at 19.

¹⁰⁵ See *id.* “Chapeau” in this case means the introductory paragraph to Article XX.

¹⁰⁶ See *id.* at 25.

¹⁰⁷ *Reformulated Gasoline*, *supra* note 5, at 21.

¹⁰⁸ See Panel Report, *supra* note 85, at 44.

¹⁰⁹ See *Reformulated Gasoline*, *supra* note 5, at 16.

¹¹⁰ See *id.* at 19.

aim” of the measures, and the Appellate Body (rightfully) found that the baseline standards did indeed meet the criteria of general exception under Article XX(g).¹¹¹

The Appellate Body recognized that it could not make assumptions on the interpretation of the underlying purpose of the U.S. regulations, so, citing the Vienna Convention on the Law of Treaties, it stated, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹¹² Without baselines, there would be no way for the environmental standards to be applied in the first place and the Appellate Body acknowledged this.¹¹³ The Appellate Body therefore determined that it was necessary to look at the baseline standards in the most positive of lights. If on its face the law appeared to be primarily intended to protect the environment, then, according to the Appellate Body, that was how the WTO should attempt to view it for purposes of Article XX(g).¹¹⁴

After making the determination that the regulations were “primarily aimed at” protecting the environment, the Appellate Body completed its review of Article XX(g) by applying the phrase “if made effective in conjunction with restrictions on domestic production or consumption.”¹¹⁵ The Appellate Body determined that this phrase was not intended by the framers of Article XX to be a causation, or “empirical effects test.”¹¹⁶ Venezuela and Brazil attempted to argue that under GATT, rules had to not only have a conservation purpose, but also had to have “some positive conservation effect”¹¹⁷ in order to successfully fall under Article XX(g) protection.¹¹⁸ The Appellate Body rejected this argument, noting that determining cause of specific effects (for example, the exact source of the CFCs leading to a hole in the ozone layer) is in most cases extremely difficult, if not impossible.¹¹⁹ In the case of environmental laws, “a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given

¹¹¹ See *id.* at 18-19.

¹¹² *Id.* at 17.

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See *id.* at 21.

¹¹⁷ *Id.* at 20.

¹¹⁸ See *id.*

¹¹⁹ See *id.*

measure may be observable.”¹²⁰ Therefore, it was enough under Article XX(g) that the purpose of the provision be to protect an exhaustible natural resource, as long as domestic and international businesses were both burdened by the standards.¹²¹

As noted above, even if a domestic law meets the criteria of an exception, if it is “arbitrary discrimination,” “unjustifiable discrimination,” or a “disguised restriction,” then it fails the criteria of the chapeau.¹²² The United States believed that its regulations were justifiable and argued that it would have been extremely difficult to verify foreign baselines and to enforce such measures.¹²³ The Panel rebutted that there were established techniques for checking, verifying, assessing and enforcing data related to imported goods.¹²⁴ From this argument came the question of the honesty of the United State’s claims. Logically, the Appellate Body asked if the United States had pursued the possibility of entering into “cooperative arrangements with the governments of Venezuela and Brazil or, if it had, not to the point where it encountered governments that were unwilling to cooperate.”¹²⁵ Apparently, the standards had been created with the assumption that the task of enforcement of foreign refiners was too difficult to allow individual countries to create their own credible baselines.

The United States found itself in an awkward situation. It claimed that it was too difficult to come to an agreement with other countries and discrimination was necessary, while a few months earlier the EPA stated, following the secret talks with Venezuela, that baseline “discrimination” was not necessary to meet the objectives of the Clean Air Act Amendments.¹²⁶

The very purpose of the World Trade Organization is to facilitate a type of “economic harmonization” among participating nations, promoting the free flow of goods and services across national borders. The United States could have invited comment from foreign businesses and other nation states affected by the standards, but it did not do so. Thus, the provisions violated the chapeau requirements and constituted

¹²⁰ *Id.*

¹²¹ *See id.*

¹²² *See id.* at 24.

¹²³ *See id.* at 25.

¹²⁴ *See id.* at 27.

¹²⁵ *Id.*

¹²⁶ *See Smith, supra* note 8, at 1269.

"unjustifiable discrimination" and a "disguised restriction on international trade."¹²⁷ On April 26, 1996, the Appellate Body recommended that the Dispute Settlement Body request that the United States bring the baseline establishment rules into conformity with the GATT¹²⁸ and less than a month later, United States Trade Representative Charlene Barshefsky announced in a press release that the United States would accept the WTO's interpretation of the U.S. regulations, and recommend the implementation of less discriminatory reformulated gasoline standards.¹²⁹

VI. POSSIBLE RESULTS OF THE *REFORMULATED GASOLINE* DECISION

The outcome of *Reformulated Gasoline* generates at least two concerns. First, there are those who fear that by allowing Venezuela (and other) refiners to enter the market with substantially less security that certain environmental standards are being met, America might be joining the environmental "race to the bottom."¹³⁰ The United States' quick acceptance of the decision certainly appears to indicate an intent to continue this trend.

A more frequent concern is that the free trade movement will put pressure on countries with high environmental standards to reduce the

¹²⁷ See *Reformulated Gasoline*, *supra* note 5, at 28. Some critics were disturbed by this ruling. Where the Appellate Body appeared to soften its stance on what was classified under XX(g), it also "revived the argument that a country must seek international agreements or arrangements with foreign entities," which panels since *Tuna/Dolphin I* did not choose to raise. See Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 ENV'T L. 841, 862 (1996). Although Mr. Wold is correct in asserting that no other Panel had chosen to raise this issue, the reasoning for this seems simple—no other Panel decision was open enough to environmental regulations to get this far into the analysis. It seems apparent that if *Tuna Dolphin II* or the original Panel decision had determined XX(g) was met, since the GATT/WTO is premised on nondiscrimination principles and respect for individual country sovereignty when necessary, inevitably the underlying harmonization effect of rules and standards would have led to a requirement of open communication between WTO signatories.

¹²⁸ See *Reformulated Gasoline*, *supra* note 5, at 29.

¹²⁹ See *United States Invites*, *supra* note 3. The agency's proposed and final rules revising the imported gasoline requirements can be found in the Federal Register at 62 Fed. Reg. 24,776 (1997), and 62 Fed. Reg. 45,533 (1997), respectively.

¹³⁰ See, e.g., Eleanor M. Fox, *Globalization and Its Challenges for Law and Society*, 29 LOY. U. CHI. L.J. 891, 895 (1998) (describing Ralph Nader's fear that free trade will lead to a race to the bottom in both environmental and labor standards).

rigor of their environmental requirements.¹³¹ This differs from the “race to the bottom” in that, instead of countries willingly lowering environmental standards to draw business in, countries that try to do the right thing will actually be punished and unwillingly forced into the “race.” The first concern is that countries will want to lower standards; the second concern is that they will *have* to do so in order to survive economically.

The argument makes a good deal of sense. Imagine that the United States passes certain clean air provisions with which only the largest of manufacturers can afford to comply. Suppose Canada, on the other hand, decides to make its laws extremely lax. A smaller international business may decide to open up its factory in Canada because the costs of compliance to the clean air provisions in the United States are too expensive.

In order to show how volatile the situation can be, imagine that smaller American domestic industries decide that they will close their businesses and move to Canada as well, again because the costs of compliance are too high. Members of Congress will eventually react as constituents lose their jobs, and the environmental law will most likely be repealed. This is an extreme case, obviously, and there is significant data to show that spending on pollution control is so small that it would never be the only cause to leave the country and move elsewhere.¹³² Nonetheless, it is a genuine concern and one might be able to imagine that regulations requiring certain standards of gasoline might eventually be lowered to attract certain businesses in the same way.

Certain environmentalists fear that other countries will lower their standards and, in the name of free trade, that the United States will follow suit. Although few critics doubt that “trade liberalization can lead to positive scale effects in augmenting growth and the financial resources

¹³¹ See Schoenbaum, *supra* note 54, at 268 (describing the Tuna/Dolphin case). See also David S. Ardia, *Does the Emperor Have No Clothes? Enforcement of International Laws Protecting the Marine Environment*, 19 MICH. J. INT’L L. 497, 503 (1998) (“Due to the operation of competitive international markets, the existence of less protective environmental regimes may undermine the willingness of a State to enact comparatively stricter environmental standards.”).

¹³² See ESTY, *supra* note 9, at 159. Environmental laws were centralized in the federal government under the EPA in reaction to the perceived “race to the bottom” that was occurring among states. See *id.* at 161. The key case that verified the power of the federal government to regulate the environment was *Pike v. Bruce Church*, 397 U.S. 137 (1970).

that can be used to tackle environmental problems"¹³³ the concern is that if the free trade movement is pushed above all other concerns, our environmental laws will be watered down in order to meet WTO standards.¹³⁴ GATT is quick to acknowledge when environmental standards are "too high" to be a burden on trade, but no comparable measure of "too low" exists for those countries that ignore environmental laws, reduce manufacturing costs, and therefore are able to practice what one might call unfair trade practices because other countries are attempting to be responsible. The urge, under a free trade regime, may be to cut our own standards rather than force others to strengthen their own laws.¹³⁵

Elected officials have to answer to their constituents, and if constituents are injured because of environmental laws, chances are that government will react by lowering standards. Daniel Esty notes that during the debate over the Clean Air Act Amendments "U.S. companies argued that the added regulations would be extremely costly and seriously disadvantage them in international markets."¹³⁶ Esty calls this weakening of support for environmental regulations through economic pressure "political drag."¹³⁷

Environmental laws can end up far less popular with the American public than they were initially. For example, a log export ban in the Pacific Northwest that was accompanied by a spotted owl reservation led

¹³³ Candice Stevens, *The Organization for Economic Cooperation and Development and the Re-emergence of the Trade and Environment Debate*, in *TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY* 83, 91 (1993).

¹³⁴ See Shannon Hudnall, *Towards a Greener International Trade System: Multilateral Environmental Agreements and the World Trade Organization*, 29 *COLUM. J.L. & SOC. PROBS.* 175, 202-209 (1996) (noting that even multilateral environmental treaties and agreements might be at risk under the WTO analysis of Tuna/Dolphin I & II).

¹³⁵ See ESTY, *supra* note 9, at 232. See also David Wirth, *International Trade Agreements: Vehicles for Regulatory Reform?*, 1997 *U. CHIC. LEGAL F.* 331, 334 (1997) ("One regime—the environment—is designed to facilitate the implementation of affirmative governmental measures, and the other—trade—is intended to ensure the absence of such measures.").

¹³⁶ See ESTY, *supra* note 9, at 23 n.11 (referring to the article *Politics in the Air*, *NAT'L J.*, May 6, 1989, at 1098). Similar arguments were made in opposition to President Clinton's 1993 proposal for a BTU tax. See *id.* (referring to the article, *Merits of Increased U.S. Energy Taxes at Issue*, *OIL & GAS J.*, Feb. 1, 1993, at 15). See also BOB WOODWARD, *THE AGENDA* 218 (1994) ("In the Congressional negotiations, so many exceptions and exemptions had been given away—for aluminum, the airlines and other industries—that the whole principle of a broad energy tax had been subverted.").

¹³⁷ ESTY, *supra* note 9, at 23.

to a decline in domestic harvesting.¹³⁸ The result was higher domestic log prices and lumber prices, not to mention a threat to local employment.¹³⁹ These negative effects on the community explain why local interests sometimes vilify environmental legislation and lobby Congress to carve out exceptions. Considering this reasoning, it seems not unrealistic to expect that a “race to the bottom” might exist, not because outside economies are pressuring us, but because environmental laws, unfortunately, can become very unpopular in certain geographic regions.¹⁴⁰

VII. THE WEAKENING OF CONGRESSIONAL OVERSIGHT

While many environmentalists may look at the result of WTO decisions and complain about the overall pro-trade, anti-environmental stance of Panel rulings, there are scholars who claim that the problem is much greater than bad environmental decisions.¹⁴¹ They claim that the very process by which the Executive Branch negotiates deals with other countries and recommends changes to domestic regulations is flawed.¹⁴² It is argued that as the United States participates ever more frequently in the WTO, foreign policy and domestic policy will increasingly blend in many areas, placing the delicate balance of power between the Executive and Legislative Branches at risk.¹⁴³

It is no great secret that the WTO is much less tolerant of non-tariff barriers than was the original GATT agreement.¹⁴⁴ *Reformulated Gasoline*

¹³⁸ See Ed Barbier, *The Environmental Effects of Trade in the Forestry Sector*, in THE ENVIRONMENTAL EFFECTS OF TRADE 55, 88 (Organisation for Economic Co-operation and Development ed., 1994).

¹³⁹ See *id.* at 88-89.

¹⁴⁰ Such unpopularity is not limited to geographic bias. Imagine if Congress passed a law raising the price of all gasoline by 20 cents a gallon in response to poor air quality. There would be certain consumers that would call for fewer restrictions on environmental control merely because their pocketbook was affected, placing their desire for profit and income maximization over health and safety concerns.

¹⁴¹ See generally Smith, *supra* note 8; Wirth, *supra* note 135.

¹⁴² See Smith, *supra* note 8, at 1270; Wirth *supra* note 135, at 363.

¹⁴³ See Smith, *supra* note 8, at 1270-1280; Wirth, *supra* note 135, at 363.

¹⁴⁴ See Smith, *supra* note 8, at 1272. See ROBERT GILPIN, THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS 204-209, in BHALA, *supra* note 10, at 261-265 (covering the fall of Tariffs and the rise of Non-Tariff Barriers to trade, including export subsidies, credit guarantees and tax incentives to particular industries). Gilpin notes that the original GATT said nothing about Non-Tariff Barriers, and it wasn't until the Kennedy,

is a good example of this, as the reformulated gasoline standards were by no means tariff-related and yet the Appellate Body still found discrimination.¹⁴⁵ The United States eventually changed its domestic regulations to conform to the WTO ruling,¹⁴⁶ a decision that critics fear will lead to the undermining of many other laws that have been created through years of Congressional oversight, debate and lobbying.¹⁴⁷

A. *A Congressional Oversight Loophole*

The Uruguay Round Agreements Act¹⁴⁸ contains provisions that enable Congress to control the Executive Branch's role in settling trade disputes through an adjudicative process.¹⁴⁹ Thus, in *Reformulated Gasoline*, when the Office of the Trade Representative chose to appeal the decision to the WTO Appellate Body, it was required to "give notice to the appropriate congressional committees of the nature of the dispute, the composition of the panel, and set forth a notice in the Federal Register raising the major issues."¹⁵⁰ Thus, the Legislative Branch holds a "check" over the Executive Branch whenever the President wishes to pursue formal action in the World Trade Organization.

The key word in all of this process is the term "formal." Nothing prohibits the President, through the USTR, the Secretary of State or other executive officers from making Congress aware of informal, *ex parte* communications and negotiations.¹⁵¹ This means that if the USTR fears

Tokyo and Uruguay Rounds that Members decided to deal with the issue. *See id.*

¹⁴⁵ *See Reformulated Gasoline*, *supra* note 5, at 25.

¹⁴⁶ *See* EPA Proposed and Final Rules, *supra* note 129.

¹⁴⁷ *See* Smith, *supra* note 8, at 1270; Wirth, *supra* note 135, at 363.

¹⁴⁸ Pub. L. 103-465, 108 Stat. 4809 (1994).

¹⁴⁹ *See* Smith, *supra* note 8, at 1276-1279.

¹⁵⁰ *Id.* at 1277.

¹⁵¹ *See id.* at 1270. *See also* 5 U.S.C. § 553(a)(1) (1994) ("exempting rulemaking from the public-notice-and-comment requirements of the Administrative Procedures Act . . . to the extent that there is involved . . . [a] foreign affairs function of the United States."). Currently, the interpretation of the APA's foreign-affairs exception applies when agencies issue, modify, or rescind rules in order to implement an international agreement. *See, e.g.,* International Board of Teamsters v. Pennsylvania, 17 F.3d 1478, 1486 (D.C. Cir. 1994) (holding that a rule modification pursuant to a mutual understanding with Mexico was within the foreign-affairs exception of § 553). The Courts have chosen to be very deferential to the power of the Executive Branch in making foreign policy. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

that a country will file a complaint with the WTO, it can secretly contact the complaining Member and informally decide to “reform” U.S. domestic regulations so that they conform to the desires of the affected country.¹⁵² As noted earlier, this is what happened when the EPA and Secretary of State met with Venezuela and came to an agreement to modify the regulations.¹⁵³

This loophole in Congressional oversight ignores the growing power of the Executive Branch. At various times over the past century, Congress has intentionally delegated a good deal of foreign policy power to the President in matters of trade negotiation.¹⁵⁴ As WTO decisions grow in number and frequency, it seems likely that many U.S. regulations will come under fire by affected international industries and countries. Under this perception, as the President secretly negotiates with affected countries in these circumstances, Congress will find itself even less involved in foreign policy matters, involved in this process only at the very end—such as when the EPA requests appropriations.¹⁵⁵

As mentioned earlier in this Note, after the initial EPA-Venezuela agreement that modified U.S. regulations, Congress refused to comply with the agreement and denied appropriations to implement the regulations

¹⁵² See Smith, *supra* note 8, at 1270.

¹⁵³ See *supra* notes 71-75 and accompanying text.

¹⁵⁴ Since the early 1970s, Congress has granted the power of “fast track” negotiation to the President. This trade tool has historically allowed the President to introduce legislation with no permissible amendments “contrary to ordinary procedure in Congress.” Wirth, *supra* note 135, at 353. Congress recently rejected President Clinton’s request for the “fast track” ability, severely restraining his trade negotiation power. See 143 CONG. REC. S12520-03 (daily ed. Nov. 13, 1997), 143 CONG. REC. S12631-01 (daily ed. Nov. 13, 1997) and 143 CONG. REC. S12456-01 (daily ed. Nov. 10, 1997) (containing speeches given by Senators Dorgan, Snowe, and Ford on why they supported the defeat of the fast track legislation). In actuality, President Clinton and former House Majority Leader Newt Gingrich chose to pull the legislation when it was clear there were not enough votes. See also 143 CONG. REC. E2338-01 (daily ed. Nov. 12, 1997), 143 CONG. REC. E2372-03 (daily ed. Nov. 13, 1997), and 143 CONG. REC. E2345-03 (daily ed. Nov. 13, 1997) (giving similar explanations, but by House members Marcy Kaptur, Jerry F. Costello, and Ron Paul).

¹⁵⁵ See Smith, *supra* note 8, at 1278. See also Uruguay Round Trade Agreement, Statement of Administrative Action, H.R. Doc. No. 103-316 (1994), in BHALA, *supra* note 10, at 129 (“If there is a conflict between U.S. law and any of the Uruguay Round agreements, section 102(a) of the implementing bill makes clear that U.S. law will take precedence.”).

through a rider.¹⁵⁶ This may have been an effective way of dealing with "watered-down U.S. law" caused by foreign interference in this particular situation, but critics argue that as the WTO continues to force the modification of U.S. laws, it will be less and less of a reality to expect Congress to intervene "every time international negotiations lead to rule changes."¹⁵⁷ Thus, it is argued that in effect the executive body will eventually succeed in extending its power to alter U.S. domestic laws in response to international pressure, a process referred to by one critic as the "erosion of democracy."¹⁵⁸

VIII. THE CONSEQUENCES OF INVOLVING THE CONGRESS EVEN MORE

In comparing the fear of the "race to the bottom" of environmental standards with the fear that democratic checks and balances are being compromised through the growth of the Executive Branch, one cannot help but realize that a great number of critics are uncomfortable with the growing presence and power of the WTO. With the growing interdependence of the global market, it appears that the Executive Branch is extending its reach (and will continue to do so) into territory traditionally supervised by, or of no concern to, the Legislative Branch.¹⁵⁹ Many environmentalists fear extension of this phenomenon to the realm of environmental regulation, claiming it may lead us to the environmental "bottom."¹⁶⁰

It appears that after the *Reformulated Gasoline* decision, from an environmentalist's perspective, this movement toward one global standard and a stronger presidency may help strengthen environmental laws rather than weaken them. Indeed, if any change is to be made in the United

¹⁵⁶ See *supra* note 75 and accompanying text.

¹⁵⁷ Smith, *supra* note 8, at 1278.

¹⁵⁸ See *id.* at 1285. One of the specific suggestions that Smith makes to stop this "erosion of democracy" is to expand the applications of the Trade Act of 1974 which currently requires the U.S. Trade Representative to consult private-sector representatives representing both trade and non-trade interests while negotiating settlements. This Note will not discuss this suggestion, as it does not include congressional oversight in its applications.

¹⁵⁹ See Wirth, *supra* note 135, at 363 ("[T]here is a considerable risk that the Executive branch will act unilaterally with few, if any, restrictions . . . in areas of domestic jurisdiction that happen to fall within the purview of international trade agreements.").

¹⁶⁰ See Fox, *supra* note 130, at 895. See also ESTY, *supra* note 9, at 159.

States' governance structure that will help guarantee a positive future for both the economy and the environment, it is the granting of more power, not less, to the executive office.¹⁶¹

Members of Congress are better at dealing with domestic issues than international issues. Tip O'Neill will be remembered for many things, but arguably first among them will be the phrase "[a]ll politics is local."¹⁶² Members of the House of Representatives are elected every two years and represent smaller geographic areas than either Senators or the President. Therefore, in theory, Representatives are expected to be focused on the problems facing local communities and must constantly be responsive to those problems or face removal from office. Senators tend to be less affected by this policy of placing geographic area concerns ahead of the concerns of the entire country, but the trend is still far more prevalent in either House of the Legislative Branch than in the Oval Office.¹⁶³

The President holds much trade policy-making authority largely because of this "local politics" tendency. Congress tends to be more protectionist because until recently, voting for a free trade measure could be political suicide for those members who represent constituents who live in areas adversely affected by businesses moving overseas.¹⁶⁴

The President is in a unique position to determine what is best for

¹⁶¹ Please note that this Note only supports increased strength of the Executive Branch for regulations related to the environment. Other regulations regulated by administrative agencies, such as employment and medical issues, are not addressed because the majority of environmental issues are unique because short-term exceptions and developments are more likely to have long-term, irreversible effects.

¹⁶² MATTHEWS, *supra* note 2, at 44.

¹⁶³ See I. M. DESTLER, *AMERICAN TRADE POLITICS* 5 (1995).

Congress is a decentralized, undisciplined institution, particularly susceptible to pressure from organized interests. So if it "does what comes naturally," if the politics of benefit seeking and log-rolling goes unimpeded, the result will be a high level of trade barriers, to the benefit of certain groups and the detriment of the nation as a whole. For a politician who must respond to concentrated interests, a vote for lowering trade barriers is therefore, as one formal official put it, an "unnatural act."

Id.

¹⁶⁴ See BHALA, *supra* note 10, at 311 ("Major international trade legislation since World War II evince a shift in power from the Congress to the Executive branch."). See also *Starkist Foods, Inc. v. United States*, 275 F.2d 472 (C.C.P.A. 1959) (giving a detailed description of the various powers held by the Legislative and Executive Branches in regulating and enforcing U.S. foreign policy).

the country overall in issues involving trade, because while one area of the country may be economically depressed by the export of business overseas, other American communities may discover a major boom thanks to the same trade agreements.¹⁶⁵

America is both the world's top importer and top exporter.¹⁶⁶ It should come as no surprise that the United States has used the GATT dispute settlement to its benefit "more than any other trading partner."¹⁶⁷ Considering the historical movement of the world toward free trade and America's historical support of this movement, it is irrationally paranoid to claim that we should now suddenly fear the WTO and the power it will have over domestic policy.¹⁶⁸ The WTO has no power unless the Executive Branch and the Legislative Branch choose together to allow such power to be enforced.¹⁶⁹

A. *The Effects of Special Interests*

In response to the fear of the uncontrolled growth of the Executive Branch discussed earlier,¹⁷⁰ some critics propose more congressional oversight.¹⁷¹ Such oversight would most likely involve congressional committees, private sector advisory committees, and the involvement of the general public in a fashion similar to the system already set up with adjudication oversight.¹⁷² It is argued that by implementing such a

¹⁶⁵ See BHALA, *supra* note 10, at 311.

¹⁶⁶ See World Trade Growth Accelerated in 1997, Despite Turmoil in Some Asian Financial Markets (visited Nov. 20, 1998) <<http://www.wto.org/wto/intltrad/internat.html>> (showing that the United States is now ranked first among both importers (899.2 C.I.F.) and exporters (688.9 F.O.B.)).

¹⁶⁷ Smith, *supra* note 8, at 1278. See also Gary Horlick, *Dispute Resolution Mechanism: Will the United States Play by the Rules?*, J. WORLD TRADE, Vol. 29, No. 2, 1995, at 163.

¹⁶⁸ The Judicial Branch has traditionally given great deference to the President in most areas of foreign policy. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). See also *United States v. Yoshida International, Inc.*, 526 F.2d 560 (C.C.P.A. 1975) (reaffirming *Curtiss-Wright* and reemphasizing the need for a strong Executive Branch in foreign policy).

¹⁶⁹ See Smith, *supra* note 8, at 1279 ("Congress can control the impact of WTO law merely by refusing to modify laws to comply with the agreement.").

¹⁷⁰ See *supra* notes 141-158 and accompanying text.

¹⁷¹ See Smith, *supra* note 8, at 1281-1287.

¹⁷² See *id.*

program, many of the agreements that administrative agencies would otherwise change without the notice of Congress would be "democratized."¹⁷³ More lawmakers would therefore be aware of important regulatory decisions and more voices would be included in the process of changing domestic laws to meet WTO standards.¹⁷⁴ Although in theory it sounds nice for the sake of democracy, this is not necessarily a worthwhile ambition. In fact, such legislative interference could help destroy the movement toward a less-protectionist world.

James Madison was a fan of the separation of powers of government and of larger government overall.¹⁷⁵ He feared that the greatest enemy to a strong government was the domination by economic and ideological factions.¹⁷⁶ By dividing the federal government into three branches, then dividing the most powerful branch, Congress, into two parts, the Framers hoped to dilute the effects of regional factions around the country.¹⁷⁷ Federal representatives would therefore be free as much as possible from the power of factionalism and, it was hoped, do what was best for the country.¹⁷⁸ Madison, however, could not predict that the world would change as much as it has.

Today, communications between states, and individuals, is instantaneous; transportation can bring us anywhere in a matter of hours; and special interests govern the outcome of political elections like never before. In the 1996 election alone, over \$660 million was spent on electing members to Congress.¹⁷⁹ Members of the House and Senate are forced to run lavish campaigns with exorbitant amounts of money to pay for the publicity—money that is usually donated for a cost or with conditions attached. Many argue that "the unequal deployment of resources in electoral campaigns causes the wrong people to get elected, distorting the true preferences of voters."¹⁸⁰

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See FEDERALIST NO. 10, at 77-78 (James Madison) (Clinton Rossiter, ed., 1961).

¹⁷⁶ See *id.*

¹⁷⁷ See Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 335 (1990).

¹⁷⁸ See *id.*

¹⁷⁹ See Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 663 (1997).

¹⁸⁰ *Id.* at 676. See generally Daniel H. Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989) (discussing the influence of campaign money on the candidates elected).

Once officials are in office, they still are not free of the grip of interest group politics. Both the House and Senate are constantly lobbied to support certain measures, to create certain measures or to destroy certain measures—all in a single day's work.¹⁸¹ In the House, there are more occasions for lobbyists to contact members directly than in the Senate,¹⁸² but the influence of lobbying groups is nonetheless felt in both. The President is arguably more removed from the influence of lobbying groups, which can be a good thing, but this isolation can also remove him from the opinions and wishes of the population.¹⁸³

The Legislative Branch tends to be more protectionist and more easily influenced by local and special interests than the office of the President. This is one reason the President has traditionally been granted so much authority in making trade decisions.¹⁸⁴ To include further congressional oversight into this process would seem only to slow down the trade process and perhaps make the President victim to the individual wants and desires of committee members.¹⁸⁵ This is in addition to the

¹⁸¹ See generally JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH* 176 (1987) (explaining the influence of lobbyists on the passage of legislation).

¹⁸² See ROGER H. DAVIDSON & WALTER J. OLESZEK, *CONGRESS AND ITS MEMBERS* 283 (1990).

¹⁸³ See HAROLD SEIDMAN & ROBERT GILMOUR, *POLITICS, POSITION, AND POWER* 38 (1986) ("The structure, procedure, and culture of Congress tends to obscure the general interest, encourage particularism, and create an environment in which organized interest groups and special pleaders can be assured a sympathetic response."). This is not to say that the President is not also subject to lobbying. See EDWARD V. SHNEIER & BERTRAM GROSS, *LEGISLATIVE STRATEGY* 218 (1993) ("MCs and leaders of private organizations will often call upon a president or write him beseeching letters in an effort to obtain the decision they prefer."). The primary difference lies in the fact that the President is removed from regional concerns to the point that any decision that she makes will be placed under the media spotlight and, unlike members of Congress, she cannot defend her decision by stating that she was doing what was best for her particular geographic area. The whole nation is her area!

¹⁸⁴ See DESTLER, *supra* note 163, at 262 (arguing that fast-track should be narrowed in its scope, but remains an effective vehicle for pushing various trade agreements). Destler believes that congressional oversight may need to be enacted in certain areas of trade negotiation, but, unlike Smith, appears to acknowledge that the execution of "fast track" law is important to assure that Congress does not interfere once a deal has been negotiated. See *id.* at 264.

¹⁸⁵ This preference for a centralized policy maker is similar to the argument over the comparative advantages and disadvantages of centralized decision making in enforcing and regulating environmental laws. In short, the environmental movement is often confronted by "industrial firms, developers, unions and others with incentive to avoid

pragmatic argument that one focus is better than over 535 different

environmental controls.” Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, in FOUNDATIONS OF ENVIRONMENTAL LAW AND POLICY 163, 164 (Richard L. Revesz et al. eds., 1997). Such interest groups can afford to spend enormous amounts of money on the formation of convincing arguments to keep environmental regulations low. *See id.* Although there are many environmental lobbying groups around the country, few have the individual resources necessary to adequately defend the interest of the environment against such forces. *See id.* The technical complexity of environmental issues usually “exacerbates this disparity by placing a premium on access to scarce and expensive scientific, economic, and other technical information and analytical skill.” *Id.* By having the environmental regulatory power centralized in Washington, the government makes it easier for environmental interests to organize and convey their concerns effectively. *See id.*

At one time, industry lobbyists were torn between lobbying state government and the federal government, but now such businesses take a more concentrated aim toward Congress—appealing to the short term sensibilities of Congressional representatives and the constituents who vote for those members of the House or Senate. Senator Fulbright once noted that “congressmen are acutely sensitive to the influence of private pressure and to excesses and inadequacies of a public opinion that is all too often ignorant of the needs, the dangers, and the opportunities in our foreign relations.” CHARLES W. KEGLEY, JR. & EUGENE R. WITTKOPF, *AMERICAN FOREIGN POLICY: PATTERNS AND PROCESS* 403-04 (1982).

One cannot go far on Capitol Hill without seeing a lobbyist or two communicating with members of Congress. *See generally* RICHARD E. COHEN, *WASHINGTON AT WORK: BACKROOMS AND CLEAN AIR* (1992) (detailing the intimate relationships that lobbyists and Congressmen have with each other). This publication is of particular interest to this Note as it covers the politics that went into the writing of the Clean Air Act Amendments of 1990. For example, “[i]ncluded [in discussions with House members] were top officials from Exxon and Mobil, plus lobbyists from Amoco and the Washington-based American Petroleum Institute.” *Id.* at 160.

Of course the argument can be made that a conservative like Representative Tom DeLay may very well become President and undue years of good works. Such an argument makes two large assumptions. First, it assumes that the President is deaf to the concerns of constituents, when in fact, the President is still subject to popular opinion, but on a national scale. Therefore, if the public is frustrated with environmental interference, the President may be forced to weaken existing laws.

The second, even larger assumption is that Congress is powerless, which is far from the truth. Indeed, the entire debate over the President’s negotiation powers somehow undermining environmental laws ignores the realities that Congress still must vote to accept any change in regulations proposed by the Executive Branch. *See, e.g., supra* notes 73-77 and accompanying text (explaining how the EPA regulations originally agreed upon with Venezuela were barred from financial appropriation by the House of Representatives).

perspectives. This is no way to conduct foreign policy.¹⁸⁶

B. *Weakening of the Environment?*

It is certainly a valid concern that domestic regulation could possibly suffer at the hands of the President and administrative agencies if there were no safeguards.¹⁸⁷ When making this argument, however, it is important to recognize that special and local interests do not just convince members of Congress to weaken trade laws—they do the same for environmental laws as well.

A recent example of such influence straight from the Republican Congress is House Majority Whip Tom DeLay. "In the past two years, he has tried to repeal the Clean Air Act, fought to cut the EPA's budget by a third, and invited corporate lobbyists and contributors to pen legislation exempting their industries from environmental laws."¹⁸⁸ It should come as no surprise that Mr. DeLay's Congressional District is home to "a Monsanto chemical plant, a BASF chemical plant, a mercury-contaminated Superfund site, and a Dow Chemical plant that is the largest industrial complex in North America."¹⁸⁹

¹⁸⁶ See 143 CONG. REC. S12520-03 (daily ed. Nov. 13, 1997). This speech is the perfect example of a typical, rhetorical speech given by a Senator in opposition to certain United States policies. Senator Dorgan states in the middle of his speech that there is a "flood of unfairly traded Canadian grain that is undercutting our farmers' interests." *Id.* at S12521-03. Of course the problems of American grain farmers are important, but imagine if every single Senator and Representative decided to choose his or her own interest group that did not like a certain trade policy and represent that position on the floors of Congress. Protectionism hurts the economy, but sounds wonderful in soundbites. Factionalism would take over foreign relations and nothing effective would occur, just as Madison feared.

¹⁸⁷ See Wirth, *supra* note 135, at 334. See also Smith, *supra* note 8, at 1285-1286.

¹⁸⁸ Jan Reid, *Poison and Pork*, MOTHER JONES, Sept.-Oct. 1996, at 40. The BASF company is located in Houston, Texas, and gave over \$51,000 to the Republican Party over the past year. See Center for Responsive Politics, *Individual Donors Name Search: BASF* (visited Mar. 28, 1999) <<http://www.crp.org/indivs/cgi-win/indivs.exe>>. Dow is also in Houston, Texas, and gave over \$198,000 to the Republican Party over the past year. See *id.* Monsanto gave at least \$25,000 to the Republican National Committee over the past year. See *id.*

¹⁸⁹ See Reid, *supra* note 188, at 40. Tom DeLay raised over \$1,202,379 for his race in the 22d District in Texas. See Center for Responsive Politics (visited Mar. 28, 1999) <<http://www.crp.org/politicians/index/h4TX22023.htm>>. It should come as no surprise that the industry that contributed most to his campaign was Oil & Gas, shelling out over

Obviously not all members of the House of Representatives are as anti-environmental regulation as Mr. DeLay, but recent actions by the Congress seem to indicate that he is far from alone. A good example is illustrated by the Emergency Salvage Timber Rider, a legislative modification which was passed in 1995.¹⁹⁰ It allowed for the "cutting of millions of board feet of additional timber in areas that had been declared off-limits" by previous statutes.¹⁹¹ There had been little debate or discussion on the rider and the circumstances were such that the President was in a rush to pass the actual Rescissions Act in order to aid Oklahoma City bombing victims.¹⁹² The result was a law that may have some very negative, long-term effects on the last ten percent of old growth left in the United States, not to mention the habitats of several species of wildlife.¹⁹³ Congressional oversight is not always a good idea, especially in attempting to carve out exceptions to environmental legislation.¹⁹⁴

IX. ENVIRONMENTAL CONCERNS

While our system of government was founded upon the art of compromise and discussion, in no small part thanks to the efforts of James

\$64,650. *See id.*

¹⁹⁰ Emergency Supplemental Appropriations for Additional Disaster Assistance 1995, Pub. L. No. 104-19, 109 Stat. 194 (codified as amended in scattered sections of 25, 12, 16, 18, 20, 23, 26, 28, 36, and 42 U.S.C.)

¹⁹¹ *See* Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Alter of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 466 (1997).

¹⁹² *See* The Emergency Salvage Timber Rider, 16 U.S.C. § 1611 (1995). *See also* *Backdoor Tactics to Forest Management: The Emergency Salvage Timber Rider of H.R. 1944*, 16 J. ENERGY NAT. RESOURCES & ENVTL. L. 216 (indicating that H.R. 1944 contained "a rider permitting expeditious timber sales of salvage and green timber from federal lands without substantial compliance with federal environmental statutes, while simultaneously limiting judicial review of such sales.") [hereinafter *Backdoor Tactics*].

¹⁹³ *See Backdoor Tactics*, *supra* note 192, at 216.

¹⁹⁴ It would be unfair to the 104th Congress to ignore two Acts that arguably strengthened environmental laws. The Safe Drinking Water Act Amendments of 1996, 42 USC § 300f (1994 & Supp. 1996) and the Food Quality Protection Act of 1996, 21 USC § 301 (1994 & Supp. 1996). Although this session of Congress was particularly "anti-environment" in the beginning, many members came to realize that these laws were important to constituents. These laws were passed in the final weeks before recess. *See* Robert V. Percival, *Regulatory Evolution and the Future of Regulatory Policy*, U. CHI. LEGAL F. 159, 169 (1997).

Madison¹⁹⁵ and his fear of factionalism, environmental issues cannot always be compromised. The environment is not limitless and problems of pollution often are not restricted to our nation's borders. "The Earth's assimilative capacity can be reached over time either because pollutants cumulate or because emissions levels rise beyond the capacity of the relevant ecosystem to process waste."¹⁹⁶ All environmentalists agree that as the world's economy continues to grow and the planet becomes more and more industrialized, our laws will have to adapt and adjust to the problems of international pollution, waste and destruction.¹⁹⁷

The World Trade Organization/GATT has proven to be the prime supporter of free trade and at least two scholars argue that the environmental movement should have a similar organization in place to guarantee the enforceability of international environmental laws.¹⁹⁸ Although the arguments for the formation of such an organization are strong from an environmental perspective, the likelihood of the American government willingly giving up sovereignty to an international organization that has the *public* good in mind, (as opposed to the furtherance of *private* interests through free trade) seems small. One need only look at recent congressional comments on the United Nations to recognize that we are nowhere near the creation of such an organization that could call the United States a member.¹⁹⁹

¹⁹⁵ See MADISON, *supra* note 175, at 82 ("However small the Republic may be the representatives must be raised to a certain number in order to guard against the cabals of a few.").

¹⁹⁶ ESTY, *supra* note 9, at 11.

¹⁹⁷ See, e.g., *id.* at 17-21 (explaining the problems and realities of "ecological interdependence").

¹⁹⁸ See RUNGE, *supra* note 1, at 100-08. See also ESTY, *supra* note 9, at 58-59, 230-31.

¹⁹⁹ See 143 CONG. REC. S9755-01 (daily ed. Sept. 23, 1997) (statement of Senator Gregg) (noting that despite the fact that the United States owes about \$1 billion in arrears, Congress would refuse to pay it because the institution is "rampant with mismanagement and inefficiencies."). See also Carla Anne Robbins, *House Abortion Foe Threatens Powerful Interests by Thwarting U.S. Payments to the U.N. and I.M.F.*, WALL ST. J., Dec. 10, 1997, at A24 (reporting that Representative Chris Smith and the abortion lobby succeeded in stopping the U.S. Congress from voting to repay nearly \$1 billion in back dues to the United Nations and \$3.5 billion to the International Monetary Fund); Richard E. Cohen, *Feuding over Family Planning*, NAT'L J., Nov. 29, 1997, at A1 (quoting Presidential press secretary Mike McMurry, calling it "utterly boneheaded for Congress to fail to meet our commitments that the United States has at the U.N."); 19 U.S.C.A. § 3535 (1994) (providing that Congress will analyze the U.S. involvement in the WTO every five years and that Congress can end United States involvement in the WTO

In the absence of a centralized environmental organization, diverse institutions are given the task of attempting to meet international environmental problems through limited means. There are several UN agencies dealing with assorted environmental problems; the World Bank has recently taken on various environmental challenges; there are secretariats to several environmental treaties and conventions that oversee environmental issues; and one must not forget the dozens of committees, panels, and interest groups that have been created with the sole purpose of fighting environmental destruction.²⁰⁰ The fact is that over 190 countries are trying to implement their own individual environmental laws—some extremely liberal by United States standards, some far more conservative.²⁰¹ Many developing countries claim the United States too often attempts to “bully” them into environmental laws that their economies cannot sustain, a procedure referred to as “ecoimperialism.”²⁰² These countries claim that this prevents them from being able to develop to the level that United States has achieved through over one hundred years of development.²⁰³ The result of all of these organizations, treaties, and claims is “treaty congestion,” making “systematic analysis of risks across problems and other aspects of coordination nearly impossible.”²⁰⁴

The logical question that must then be asked is how to guarantee strong environmental laws without causing international discord (which often leads to weaker laws in the long run). The answer may turn out to be through the World Trade Organization. Although it was not written to be an environmental enforcement organization, as times change, so does public opinion, and the WTO has the amazing power to directly and indirectly affect foreign investment. In a post-cold-war world, economic force influences domestic policy a good deal more than military force.²⁰⁵

through a joint resolution—reflecting the concern many members have about international agreements).

²⁰⁰ See ESTY, *supra* note 9, at 78.

²⁰¹ See *id.*

²⁰² See *id.* at 25.

²⁰³ The United States has the world's largest economy, which means it also carries a great deal of the burden in regulating the balance between economic prosperity and environmental destruction. See generally LESTER BROWN, *STATE OF THE WORLD 1997* 7-10, 132-150 (1997).

²⁰⁴ ESTY, *supra* note 9, at 78.

²⁰⁵ See Arthur E. Appleton, *Telecommunications Trade: Reach Out and Touch Someone?*, 19 U. PA. J. INT'L ECON. L. 209, 209-212 (1998). “More recently, the application of military pressure has given way to the utilization of economic pressure as a means of

The appeals decision in *Reformulated Gasoline*²⁰⁶ appears to be a strong indication that the dispute resolution process at the WTO may be the perfect forum in which to further the environmental movement.

X. REFORMULATED GASOLINE REVISITED

An analysis of the differences between the *Tuna-Dolphin* Panel²⁰⁷ decisions on the one hand, and the *Reformulated Gasoline* Panel²⁰⁸ and Appellate Board²⁰⁹ decisions on the other, reveals the environmentally enlightened approach taken by the WTO. In the initial Tuna-Dolphin dispute, the GATT Panel found that the embargo "was not justified as relating to the conservation of exhaustible natural resources."²¹⁰ In fact, it stated that the Marine Mammal Protection Act (MMPA) was "not primarily aimed at the conservation of dolphins"²¹¹ and was therefore a violation of Article XX(g). The decision was "read as undermining the fabric of all international environmental efforts and making more difficult the already-challenging task of getting broad adherence to global environment programs."²¹² It is exactly this free-trade, anti-environmentalist attitude that so many environmental activists fear. Indeed, it is this attitude that some believe will lead the WTO into chipping away at the various administrative regulations that protect the daily lives of Americans in all areas of regulatory life—from the environment to our health-care system to various labor programs.²¹³

Ignoring the means by which the United States applied the MMPA,²¹⁴ it is clear from the history of the legislation that the law was

achieving policy objectives. The use of legal instruments to preserve the results achieved has also become common and accepted." *Id.* at 212. See also Anne Q. Connaughton, *Factoring U.S. Export Controls and Sanctions Into International Trade Decisions*, 27 STETSON L. REV. 1211, 1219 (1998) (noting that it is economic sanctions, not military action, that have become Congress's tool of "first" resort in foreign policy).

²⁰⁶ *Reformulated Gasoline*, *supra* note 5.

²⁰⁷ See *Tuna/Dolphin I*, *supra* note 52; *Tuna/Dolphin II*, *supra* note 52.

²⁰⁸ See Panel Report, *supra* note 85.

²⁰⁹ See *Reformulated Gasoline*, *supra* note 5.

²¹⁰ RUNGE, *supra* note 1, at 73.

²¹¹ *Id.* at 133.

²¹² ESTY, *supra* note 9, at 30.

²¹³ See, e.g., Smith, *supra* note 8.

²¹⁴ The Marine Mammal Protection Act of 1972, 16 U.S.C.A. §§ 1411-18, 1421, 1421a-1421h, 111 Stat. 1027 (1997).

passed with the primary purpose of protecting dolphins.²¹⁵ The Panel ignored the realities of the situation and looked for underlying purposes that were not there in defining the exceptions available in Article XX(g).²¹⁶ Three years later, the Panel in the *Reformulated Gasoline* case made the exact same mistake and environmentalists threw up their hands in disgust.²¹⁷

If the Appellate Body had agreed with the Panel in this assessment, then this Note would not be drawing the optimistic conclusions that follow. However, as explained earlier, the Appellate Body proved to be extremely understanding, insightful, and very aware of the realities of the environmental movement. The findings of the Appellate Body may prove to be the best thing that has happened to the environment in a very long while.

The Appellate Body found that the Panel erred in its decision and that the Clean Air Amendments were indeed "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."²¹⁸ Although in the end the effect was the same as the Panel's ruling, this was because of the chapeau requirement that the United States attempt to find some way to logically harmonize trade standards. Simply put, the WTO required that the United States take the rest of the world into consideration when enforcing a measure that would affect the rest of the world!

If the United States had *attempted* in good faith to find an

²¹⁵ See 16 U.S.C. § 1361(4) ("negotiations should be undertaken immediately to encourage the development of international arrangements for . . . conservation of . . . all marine mammals").

²¹⁶ See RUNGE, *supra* note 1, at 73.

²¹⁷ See Panel Report, *supra* note 85, at 6.40.

The Panel saw no direct connection between less favourable treatment of imported gasoline that was chemically identical to domestic gasoline, and the U.S. objective of improving air quality in the United States. . . . Accordingly, it could not be said that the baseline establishment methods that afforded less favourable treatment to imported gasoline were primarily aimed at the conservation of natural resources.

Id. See also Waincymer, *supra* note 38, at 155.

²¹⁸ *Reformulated Gasoline*, *supra* note 5, at 15. "The United States must have been aware that for these established techniques and procedures to work, cooperative arrangements with both foreign refiners and the foreign governments concerned would have been necessary and appropriate". *Id.* at 31.

alternative route to the protectionist provisions, the Appellate Body seemed to indicate that the Amendments would have met the requirements of both XX(g) and the chapeau.²¹⁹ How amazingly wonderful for global environmentalists.²²⁰ As noted earlier, one of the chief arguments for those who support strong environmental laws is that environmental problems do not end at any natural or artificial boundary.²²¹ Environmental law and the environmental movement are, by their nature, international and not constricted to nation-state boundaries. A strong environmental law that has taken only U.S. interests into consideration may appear to be beneficial in the short term, but may doom the environment in the long run if businesses choose to merely invest in other countries that have weaker environmental laws—the proverbial “race to the bottom.”

On the other hand, if the U.S. attempts to enforce environmental restrictions on other countries abroad, the result might be weakened relations between the two countries and assuredly, U.S. businesses who wish to take advantage of the growing markets overseas will show their frustration with both their votes and their checkbooks. The urge to ignore the views of other countries *or* to be “ecoimperialists” is strong, especially considering that the United States is currently the only so-called superpower on Earth.²²² History has shown that neither protectionism (e.g., the Smoot-Hawley Act and the consequences that followed)²²³ nor forced morality (e.g., colonialism) will reap any long-term benefits. The movement toward sustainable development is founded upon similar philosophies.²²⁴

After the *Reformulated Gasoline* decision, environmentalists may

²¹⁹ See *id.* (noting that the United States “had not pursued the possibility of entering into cooperative arrangements with the governments of Venezuela and Brazil or, if it had, not to the point where it encountered governments that were unwilling to cooperate.”).

²²⁰ See ESTY, *supra* note 9, at 114-130 (suggesting a different test by which WTO panels can apply Article XX). It is possible that with the new, respectful attitude that the Appellate Board took in *Reformulated Gasoline* such a reformation of the test may not be necessary.

²²¹ See *supra* notes 197-198 and accompanying text.

²²² See 143 CONG. REC. E2372-03 (1997), 143 CONG. REC. E-2338-01 (1997) and 143 CONG. REC. E-2346-03 (1997) (statements by Representatives Jerry F. Costello, Marcy Kaptur, and Tim Roemer that they rejected the “fast-track” legislation because it did not respect environmental and human rights in other countries).

²²³ See *supra* notes 11-14 and accompanying text.

²²⁴ See Wirth, *supra* note 135, at 183.

find the WTO to be the best friend they have ever had. Indeed, the WTO seems finally to be recognizing the significance of the environmental movement, in no small part due to an increased awareness of ecological problems around the world. For example, in 1997, the WTO Secretariat organized a symposium with non-governmental organizations (NGOs) on Trade, Environment and Sustainable Development.²²⁵ At the event, business leaders met with organizations that represented various environmental and international factions.²²⁶ One need only visit the WTO website to see that the Committee on Trade and Environment (CTE) that was established by the WTO General Council in January 1995 has made an effort to address the traditional trade and environmental issues.²²⁷ It therefore should come as no surprise that the Appellate Body was willing to recognize an environmental law as exempted from normal WTO restrictions, as long as the “violating” nation-state was willing to consider the resources and possible effect such practical limitations would have on other countries.

It does not seem so absurd to assume that had the EPA contacted Venezuela and every other major gasoline exporter and offered to discuss possible baseline standards in a diplomatic fashion, the agency’s actions would have satisfied the Appeal Board’s criteria, even if Venezuela had completely rejected the idea.

A. *Executive Branch Strengths and Limitations*

The point in noting the apparent shift in the WTO toward a recognition of the viability of domestic environmental laws and the effects of special and local interests on the Congress is to damage, if not kill, two underlying assumptions made by those who fear this trend of the growing power of the Executive Branch. First, this does not mean that the EPA is going to necessarily “race to the bottom” and leave our environmental laws hollow and pitiful because the WTO says it should. The WTO gets all of its power from its participating nation-states who desire private investment opportunities, of course, but also from nation-states who resent commands from outside nations or organizations that tell them how to

²²⁵ See *Background to WTO Work on Trade and Environment* (visited Mar. 28, 1999) <<http://www.wto.org/wto/environ/backgrou.htm>>.

²²⁶ See *id.*

²²⁷ See *id.* at <<http://www.wto.org/environ/environm.htm>>.

protect the welfare of their citizens. After the *Reformulated Gasoline* decision, it may be safe to say that the WTO will allow any environmental exception as long as it appears to deal logically with an environmental issue within the coverage of Article XX, the government can show that it made a good faith effort to inform affected trade partners about the potential constraints, and the government is allowed to prove that it pursued the possibility of alternative multilateral or mutual agreements before the law was passed (if such alternatives were rationally possible).²²⁸

Secondly, one must look seriously at the logic of those who wish for more public oversight of the actions of administrative agencies in pre-dispute discussions and who suggest consultation with various congressional committees in a similar fashion to one of the steps currently available for adjudicated settlements.²²⁹ The assumption is that "more is better" in shaping public policy, but as indicated earlier, this is not always the case.²³⁰ In the matters of trade, it makes sense that "deals through democracy" might ruin any chance for meaningful trade relations. Thus, the President has a great deal of independence in this area under the Constitution.²³¹

In the matter of the environment, the same argument can be made. By allowing the EPA, a member of the Executive Branch, to initially alter administrative regulations without the delay and other problems that further legislative process would bring, in order to comply with standards considered acceptable by the WTO, we will find ourselves in a situation that improves, strengthens, and gives credibility to environmental laws.

²²⁸ Undoubtedly, the WTO will be extremely strict in applying these criteria, as past cases have shown that Article XX is to be translated narrowly. Therefore, it must be shown that the United States truly did attempt to deal with Venezuela and found that a reasonable agreement was not possible between the two countries that would consider the integrity of the environmental provision.

²²⁹ See Smith, *supra* note 8, at 1284.

²³⁰ See *supra* notes 159-186 and accompanying text.

²³¹ See U.S. CONST. art. II, § 2 (designating the President the "Commander in Chief of the Army and Navy of the United States" and specifying that, subject to the approval of the Navy, the President has the power "to make Treaties" and "appoint Ambassadors."). See also U.S. CONST. art II, § 3 (stipulating that the President "shall receive Ambassadors and other public Ministers.").

XI. CURRENT CONGRESSIONAL CHECKS AND BALANCES AND PROPOSED CHANGES

As noted earlier, the Hill is run in large amount by the local and special interests of the American populace.²³² As a rule, Senators do not write legislation. They leave such responsibilities to staff members or outside lobbying organizations.²³³ These interests also watch the actions of the President and the various administrative agencies under his care carefully.²³⁴ Therefore, if new environmental law standards are introduced to Congress, chances are extremely good that someone will be aware of the change and notify some Senator or House member. If the change is significant enough, then the legislative body might merely choose not to allow funding for the change in the law.²³⁵

Critics argue that Congress cannot be expected to be aware every time such changes are made and that as the WTO's influence continues to grow, more such changes will occur,²³⁶ weakening the power of congressional oversight. Although this may be true, Congress still has an obligation to its citizens to pay attention to the decisions made by administrative agencies.²³⁷

Certainly, there appears to be a disproportion of knowledge and comprehension available to administrative agencies that Capitol Hill

²³² See *supra* notes 175-186 and accompanying text.

²³³ In response to Smith's claim that congressional oversight would be more democratic, many laws are drafted with little public purview and many committee meetings are held privately. For example, in the case of the 1990 Clean Air Amendments, "virtually the entire clean-air bill was drafted behind closed doors—in the Senate, in the House and in the conference committee." COHEN, *supra* note 185, at 172. Further legislative oversight does not necessarily mean a more democratic process.

²³⁴ See COHEN, *supra* note 185, at 172.

²³⁵ See U.S. CONST. art I, § 8 (assigning Congress the power to provide for the common defense, "to regulate Commerce with foreign Nations, . . . to define and punish Piracies and Felonies committed on the high Seas. . . to declare War . . . to raise and support Armies . . . to provide and maintain a Navy; [and] to make Rules for the Government and Regulations of the land and naval Forces."). See also U.S. CONST., Art. 2, § 2 (the Senate must give its advice and consent to all treaties and ambassadorial appointments).

²³⁶ See Smith, *supra* note 8, at 1279.

²³⁷ Most administrative agencies are created by Congress, which delegates some lawmaking authority to those agencies. Senators and Representatives take an oath of allegiance to "be bound by Oath or Affirmation to support this Constitution. . . . I will well and faithfully discharge the duties of the office on which I am about to enter." *Oath of Office*, in CONGRESS A TO Z 278 (Congressional Quarterly, Inc.) (1993).

cannot expect to achieve. Obviously, those who choose to work for the EPA may have more of a vested interest and knowledge of environmental issues than most congressional staff members. After all, one would assume that the ecologists, scientists, engineers and attorneys who create EPA standards have a great deal of knowledge in this area.²³⁸ Nonetheless, all of this must be considered with the fact that congressional staff members are assisted by dozens of environmental and trade lobbying organizations that are more than willing to even the playing field.²³⁹

If the EPA, which has been granted its power by Congress, chooses to have secret discussions, comes to an agreed settlement with foreign nations and introduce these changed standards to Congress for appropriate funding, it has fulfilled the role for which it was created.²⁴⁰ If Congress believes that the standards set forth are inappropriate, it can choose to reverse the agency's action through legislation, summon the appropriate EPA authorities and demand an explanation, or simply refuse funding and the EPA will have no recourse but to work under the stipulations that Congress believes appropriate to create agreeable regulations.²⁴¹ Congress already retains a great deal of influence over administrative decisions; it seems illogical and counterproductive in this era of "cutting back" the government that we strive to actually increase the complexity and extent of legislative oversight.

²³⁸ The debate over the powers of administrative agencies is not a new one. Indeed, it is one of the cornerstones of administrative law. In *Crowell v. Benson*, 285 US 22 (1932), the Supreme Court recognized the importance of administrative agencies and noted the necessity of deference to the decisions of experienced administrative judges/committees in cases involving public (versus private) rights. Obviously, coupled with the Court's traditional deference to the President in matters of foreign policy, one cannot help but wonder if it has acquired a wisdom particular to the Judicial Branch over the years that recognizes such a thing as too much oversight.

²³⁹ See COHEN, *supra* note 185, at 1.

²⁴⁰ See Environmental Protection Agency Purpose and Functions, 40 C.F.R. § 1.3 (1999) ("The U.S. Environmental Protection Agency permits coordinated and effective governmental action to assure the protection of the environment by abating and controlling pollution on a systematic basis. . . . EPA reinforces efforts among other Federal Agencies with respect to the impact of their operations on the environment").

²⁴¹ "WTO Panel Reports have no force under U.S. law. In particular, federal agencies are not bound by any finding or recommendations included in WTO Panel Reports, and such reports do not provide legal authority for federal agencies to change their regulations or procedures." Wirth, *supra* note 135, at 358 n.82 (quoting Mickey Kantor, United States Trade Representative (Jan 18, 1996)).

A. An Administrative Procedural Solution to Ex Parte Communications

Of course, it would be foolish to ignore the disturbing private talks of the EPA with the Venezuelan government and the underlying potential of such discussions. The Administrative Procedure Act (APA), which pertains to the Environmental Protection Agency, prohibits *ex parte* communications informal adjudications and rulemaking, but the same requirements do not apply to informal rulemaking.²⁴² Section 307 of the Clean Air Act establishes the informal rulemaking procedures under the Act. The specified procedures state nothing about *ex parte* communications.²⁴³ In this absence of direction, the legislative and judicial procedures governing APA rulemaking apply.

The appeals court in *Sierra Club v. Costle* noted that “[i]f Congress wanted to forbid or limit *ex parte* contact in every case of informal rulemaking, it certainly had a perfect opportunity when it enacted the Government in the Sunshine Act.”²⁴⁴ Arguably, a court cannot impose further procedural restrictions on agencies beyond what has been expressly allowed by the statute or is specifically required by the Constitution, leaving a great amount of responsibility in the hands of the agencies to determine how to best regulate *ex parte* communications.²⁴⁵ The courts have also proven extremely deferential in informal rulemaking that may involve foreign affairs functions.²⁴⁶

Because the current Congress has at times proven to be hostile to many agencies, in particular those regulating the environment,²⁴⁷ opening up the debate over EPA procedures on the floor of the House and Senate would not likely result in any legislative decision beneficial to the environment. However, to allow the EPA to constantly hold

²⁴² See Administrative Procedure Act, 5 U.S.C. § 551(14) (1994) (defining *ex parte* communication). See also Wirth, *supra* note 135, at 358-60.

²⁴³ See 42 U.S.C. § 7607 (1994) (laying out administrative procedures and judicial review under the Clean Air Act). See also Wirth, *supra* note 135, at 358.

²⁴⁴ *Sierra Club v. Costle*, 657 F.2d 298, 401 (D.C. Cir. 1981).

²⁴⁵ See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 543 (1978) (holding that administrative agencies “should be free to fashion their own rules of procedures” and allowing judicial interference only if “constitutional constraints” or “extremely compelling circumstances” exist).

²⁴⁶ See, e.g., *International Board of Teamsters v. Pennsylvania*, 17 F.3d 1478, 1486 (D.C. Cir. 1994).

²⁴⁷ See Zellmer, *supra* note 191, at 463-64.

environmental standard negotiations behind closed doors leads one to "assume that such discussions have the adversarial qualities characteristic of 'settlement' negotiations . . . [that] might well subvert the integrity of the notice-and-comment rulemaking process."²⁴⁸ At least two authors address similar fears that this could lead to future domestic environmental laws that are compromised before a case is ever filed before the WTO.²⁴⁹

The solution to this problem may lie in the hands of the President himself. The Judicial Branch may be formally barred from creating further administrative procedures beyond those granted by statute or the Administrative Procedure Act,²⁵⁰ but the President has the ability through the power of Executive Orders to require stronger procedures or more detailed decisions from administrative bodies.²⁵¹ The EPA and the Clean Air Act Amendments are already bound by APA "notice and comment" requirements when proposing changes in the rules.²⁵² The WTO *Reformulated Gasoline* decision indicated that the Appellate Body was discouraged, not by the EPA's recommendations, but by its unwillingness to seriously consider discussing domestic potential regulations with foreign governments and companies that would have adverse affects on those international parties.²⁵³

In theory, it is possible that affected parties could have submitted concerns with the EPA during the required thirty-day comment period required by the APA.²⁵⁴ However, in the reality of international affairs,

²⁴⁸ Wirth, *supra* note 135, at 358.

²⁴⁹ See *id.* at 363. "[S]uch 'internalization' may be unhealthy for the democratic decision making process." *Id.* See also Smith, *supra* note 8, at 1280 ("The erosion of democracy resulting from the Executive Branch's dual role as advocate for the United States in WTO negotiated settlements and domestic lawmaker presents a dilemma . . . [and] is an unsatisfactory way to make domestic policy.").

²⁵⁰ 5 U.S.C. §§ 551, 553, 556, 557 (1994). See also *Vermont Yankee*, 435 U.S. at 555 (stating that the court's role in reviewing sufficiency of agency consideration is limited).

²⁵¹ See, e.g., Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (1987) (requiring federal agencies to preempt state rulemaking only after notice and comment opportunity to all affected states); Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994) (requiring each federal agency to identify and address the environmental impact of its programs, policies, and activities on minorities and low income populations).

²⁵² See Administrative Procedure Act, 5 U.S.C. § 553 (1994) (specifying rulemaking procedures which include notice and comment procedures); Registration of Fuels and Fuel Additives, Base Fuel Specifications, 40 C.F.R. § 79.55 (requiring the publishing of notice of base fuel changes in the Federal Register).

²⁵³ See *Reformulated Gasoline*, *supra* note 5, at 26-29.

²⁵⁴ See 5 U.S.C. § 553(d). "The required publication or service of a substance rule shall

affected parties may never have easy access to copies of the *Federal Register* or other resources necessary to effectively convey complaints in the traditional thirty to sixty-day window.

The Executive Branch is left with only two alternatives if it wants to avoid the possibility of a complaint being filed with the WTO and being assured of a losing argument. One alternative would permit the EPA to communicate, often secretly, with foreign officials, as it did in the Venezuela scenario—a situation that can lead to a great deal of political debate, distrust, and criticism. Alternatively, the President can issue an Executive Order specifying requirements of administrative agencies that distinguish between foreign governments or manufacturers and domestic parties. In the furtherance of the President's power to shape foreign policy, agencies could be required to send notice directly to international parties potentially affected by the regulation, requesting comments and input.²⁵⁵ Such an Executive Order would most likely require an extended time period for external comment considering the realities of international communications and the high probability of meetings between concerned foreign government officials and individuals.²⁵⁶

be made not less than 30 days before its effective date." *Id.*

²⁵⁵ The majority of WTO members have embassies in Washington, D.C., and law firms that represent them as counsel in the United States. Contacting countries does not mean that contact need be overseas—notice could be given to representatives in the United States.

²⁵⁶ Clearly, contacting countries individually might prove expensive or burdensome. One wonders if mere publication in the *Federal Register* would suffice. Poorer countries that lack the resources to review the *Federal Register* on a regular basis may argue that this alternative is insufficient. The problem with individual contacts would be the concern that some party might be missed, and as a result, demand compensation or retribution. There is also, of course, the concern of cost, although one letter per party does not seem cost-prohibitive.

There are those who argue that Congress is the only appropriate body to make these decisions. See Wirth, *supra* note 135, at 363 (stating that Congress is the "forum for settling such trade disputes . . . to guarantee adequate public access to domestic decisionmaking processes in areas affected by the actions of multilateral trade bodies, and to counterbalance to the considerable aggrandizement of unilateral Executive Branch power otherwise fostered by the domestic implant of international trade agreements").

While it is true that the EPA is not currently bound by the Sunshine Act of 1976, 5 U.S.C. § 552(b), to report *ex parte* communication before formal notice and comment procedures commence, there are alternatives to further Congressional oversight. If the President wishes to respect the WTO's policy of harmonization and foster an atmosphere of open communications in sensitive areas such as this (where foreign policy influences domestic actions, thereby calling into question separation of powers issues), then an

To best illustrate this possible change in administrative procedures, it might be helpful to imagine how such a system would have been utilized in the *Reformulated Gasoline* case. The EPA could have sent individual companies notice that it was intending to make rules involving reformulated gasoline baseline standards immediately, and then followed the notice by extending the comment period for any concerns or discussions that may ensue from interested foreign parties, such as Venezuela. All discussions and meetings that did not pertain to national security could be included in the record, meeting concerns of *ex parte* communications and preventing the tide of criticism that actually occurred in this scenario.

Such an alternative would appear to further the concerns of the WTO for international harmonization and respect. It would respect the integrity of the administrative state and administrative process. It would most likely satisfy the concerns of critics of closed-door negotiations, and most importantly, it would avoid the risks that come with further Congressional oversight.²⁵⁷

Executive Order such as proposed above would be ideal. The Order could specify that any contacts made with foreign parties during the enlarged notice and comment time period would be subject to procedures similar to those mapped out by the District Court in *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977) ("If *ex parte* contacts nonetheless occur, we think that any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon."). The need for secrecy in situations such as this would be slim, as the EPA could be honest about its respect for the WTO, but its even stronger interest in creating a law "primarily aimed at conserving an exhaustible natural resource." See Article XX, *supra* note 51.

Further, David Wirth himself states that "so far as can be determined from the dockets for both rulemakings, . . . relevant conversations between EPA employees and Venezuelan governmental authorities appear in the record." Wirth, *supra* note 135, at 357 n.79. He does note that it was unclear if oral communications between staffers of other agencies and Venezuelan authorities were on the record, and it appears that these communications are the sources of Wirth's own unease. See *id.*

²⁵⁷ Smith does propose that "the head of the relevant department or agency be provided an opportunity for public comment by publishing in the Federal Register the proposed modification and an explanation for the modification." Smith, *supra* note 8, at 1291. This requirement actually already exists under the APA's notice and comment regulations. Smith suggests "an amendment to the URAA to extend rulemaking negotiation settlements to the procedures that currently apply to rulemaking pursuant to WTO adjudicative rulings." See *id.* Under the proposed Executive Order above, Congress need not act to extend the procedural restrictions to be applied by the

B. *Congress is Free to Amend Legislation or Attach Riders*

In addition to its power to refuse to appropriate funding to implement certain standards, Congress is always free to pass new amendments to various environmental laws if it fears that somehow the laws are being compromised. Of course, if Congress is worried that international businesses will somehow benefit at the expense of certain domestic industries or communities, Senators or Representatives can always write in exceptions that name no specific business, but in actuality are extremely protectionist.²⁵⁸ In this way, the legislature could circumvent the fear that the President would order the EPA to refuse to enforce the exceptions. The interesting thing about this scenario would be the perception of the environmentalist who fears the "race to the bottom." On the one hand, Congress may disagree with the EPA's policies and chooses to clearly state the United States' position on environmental laws, while on the other hand the laws may be weakened anyway thanks to all of the various exceptions listed in the amendments.

When the EPA attempted to change the baseline standards for reformulated gasoline refiners after meeting secretly with Venezuela, Congress successfully refused to fund the new measures through a rider.²⁵⁹ Riders are provisions, sometimes symbolic but often substantive, that members of Congress tack on to appropriations bills before a final vote is taken.²⁶⁰ In some ways, riders are an environmentalist's worst nightmare because they can lead to significant policy changes without "public input or legislative accountability."²⁶¹ In the environmental context, laws that are short-term solutions to environmental problems, or apparent minor exceptions to environmental regulations, can have particularly destructive long term effects.²⁶²

administrative agency. This is the traditional responsibility of the Executive Branch and further Congressional interference would do little but add to the difficulties of making foreign policy and environmental regulations.

²⁵⁸ See, e.g., COHEN, *supra* note 185, at 159 (recognizing that Representative Henry Waxman was successful in carving out an exception to the Clean Air Act Amendments for California—allowing the state to set separate motor vehicle standards).

²⁵⁹ See Smith, *supra* note 8, at 1268.

²⁶⁰ See Zellmer, *supra* note 191, at 457.

²⁶¹ *Id.* at 457.

²⁶² See *id.* at 457-61.

C. *The Danger of Riders*

Appropriation riders can have deadly effects on the environment. Historically, members of Congress have come dangerously close to destroying years of scientific research, judicial decision-making and legislative precedent by attaching riders during the appropriations process.²⁶³ In fact, "[r]epublican leaders in the 104th Congress made strenuous efforts to dismantle decades of environmental law. When their proposals to change the law were unsuccessful in regular legislative channels, riders were attached to appropriations bills."²⁶⁴

The 104th Congress attached more than fifty environmental riders to spending bills when all was said and done, although many of these were not enacted.²⁶⁵

While some critics fear that the executive body is placing the balance of powers at risk through *ex parte* communications about changing domestic regulations with WTO Members,²⁶⁶ there are others who believe that the real danger to the system of checks and balances is the use of riders by Congress.²⁶⁷ In effect, by avoiding the political

²⁶³ See *id.* at 463-64.

²⁶⁴ *Id.* at 464.

²⁶⁵ See *id.* Zellmer's best example is the Rescissions Act of 1995. See Emergency Supplemental Appropriation for Additional Disaster Assistance 1995, *supra* note 190. The Act was signed into law by President Clinton in order to make emergency supplemental appropriations for the victims of the Oklahoma bombing tragedy. Representative Charles H. Taylor (R-NC) and Senator Slade Gorton (R-WA) took advantage of the situation and attached the Emergency Salvage Timber Rider in the appropriations committees of both houses. See Emergency Salvage Timber Rider, *supra* note 192. It was supposed to help provide funding for the Act, create jobs for those dependent on federal timber and help protect the forest from insect infestation and forest fires. It is questionable if any of these goals were met and the negative effects of the rider have been extreme. See Zellmer, *supra* note 191, at 465-466. "The effects of the bill have been dramatic, causing the cutting of millions of board feet of additional timber in areas that had been declared off-limits, and using methods that but for the rider would have been prohibited by a variety of environmental statute." *Id.* Although environmentalism is popular in America, it is not the timber or the endangered species that eventually vote for elected officials. On the other hand, if the riders had been independent bills they probably would not have been passed. See *id.* at 491 ("This is bad policy. . . . Such change would not be sustained in the heat of open debate.").

²⁶⁶ See, e.g., Smith, *supra* note 8, at 1270; Wirth, *supra* note 135, at 357-59.

²⁶⁷ See Zellmer, *supra* note 191, at 457 (arguing that riders underpin the democratic

process of traditional congressional deliberation and by forcing the President to pass a law because of the underlying, perhaps unrelated, scheme of the bill, Congress actually intrudes into traditional executive territory.²⁶⁸

Riders often mirror the interests of the constituents of the Representative or Senator who introduced them,²⁶⁹ which may be fine for the short term goals of one particular area of the country, but may seriously place the long-term health of the environment at risk.²⁷⁰ Such riders clearly have a place in the case of actual regional emergencies,²⁷¹ but it appears that in other cases such provisions are abuses of process and violate a rational understanding of the system of checks and balances.²⁷²

Therefore, one might argue that in order to protect the environment, as well as retain the system of checks and balances put in place by the Founders, Congress should be forbidden from using riders in all cases except actual emergencies. One critic recommends a Constitutional amendment to prohibit substantive legislation by appropriation²⁷³ and several states follow this model.²⁷⁴ It is not the purpose of this Note to expound on possible alternatives to the current system of riders, only to identify that a problem exists and to suggest that perhaps it is Congress, and not the Executive Branch, that is excessively intruding into Constitutional functions of another branch of government and placing the environment at risk in the process.

XII. THE *SHRIMP-TURTLE* DECISION

No analysis of *Reformulated Gasoline*²⁷⁵ and free trade/environmental tensions can be complete without a reference to the ruling

process and undermine the process of regulation formulation).

²⁶⁸ See *id.* at 521 ("Appropriations riders often fly in the face of the Executive's constitutional responsibilities to veto objectional laws and to enforce laws that are enacted"). See *id.* at 520 ("Excessive rider-tacking has seriously eroded the integrity of the tripartite, republican democracy established by the Framers, who envisioned the legislature not only as a representational body, but also as a deliberative body.").

²⁶⁹ See *id.* at 495.

²⁷⁰ See *id.* at 472-492.

²⁷¹ See *id.* at 535.

²⁷² See *id.* at 518-534.

²⁷³ See *id.* at 534.

²⁷⁴ See *id.* at 534, nn. 268, 439.

²⁷⁵ See *Reformulated Gasoline*, *supra* note 5.

of the WTO Appellate Body in *Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp-Turtle)*.²⁷⁶ The decision affirmed the premise of this Note that the WTO is conscious of the environmental needs of Member countries and is willing to accept environmental regulations under the Article XX list of exceptions, as long as the rational concerns of international importers are honestly taken into consideration.

Shrimp-Turtle involved regulations issued in 1987 by the United States pursuant to the Endangered Species Act of 1973.²⁷⁷ These regulations required all U.S. shrimp trawl vessels to use approved Turtle Excluder Devices (TEDs) or two-time restrictions in specific areas where sea turtles were at risk due to the harvesting of shrimp.²⁷⁸ One particular provision of those regulations, section 609,²⁷⁹ called upon the development of bilateral or multilateral agreements to protect sea turtles, and created a certification program through which countries that did not use approved shrimp harvesting methods could not trade with the United States.²⁸⁰

Malaysia, Thailand and Pakistan all requested the formation of a Dispute Settlement Body to examine the U.S. shrimp prohibitions as a violation of GATT Article XII.²⁸¹ The United States argued that the environmental provisions were clearly within the scope of Article XX(g), but nonetheless the WTO Panel found the shrimp-turtle laws to be inconsistent with the country's obligations under GATT.²⁸² The U.S. filed an appeal, and on October 12, 1998, the Appellate Body issued its own ruling.²⁸³ For purposes of this Note, the Appellate body decision is important because it not only used the analysis described by *Reformulated Gasoline*, but it actually signaled on several occasions that the chapeau/section (g) analysis used by the Appeals Body in *Reformulated Gasoline*²⁸⁴ is the proper standard for future Panels to follow.²⁸⁵

²⁷⁶ See *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, (Apr. 6, 1998) [hereinafter *Shrimp-Turtle*].

²⁷⁷ See *id.* para. 2. See also Endangered Species Act of 1973, Pub. L. No. 93-205, 16 U.S.C. 1531 et. seq.

²⁷⁸ See *Shrimp-Turtle*, *supra* note 276, para. 2.

²⁷⁹ See 52 Fed. Reg. 24,244 (1987).

²⁸⁰ See *Shrimp-Turtle*, *supra* note 276, para. 3.

²⁸¹ See *id.* para. 7.

²⁸² See *id.*

²⁸³ See *id.* para. 187.

²⁸⁴ See *supra* notes 122-127 and accompanying text.

²⁸⁵ See *Shrimp-Turtle*, *supra* note 276, para. 118.

The Appellate Body began its analysis by reversing the Panel's legal conclusion "that the United States measure at issue 'is not within the scope of measures permitted under the chapeau of Article XX.'"²⁸⁶ Citing *Reformulated Gasoline*, the Appellate Body stated that the proper sequence of interpreting Article XX is to first apply one of the listed exceptions, and then to apply the general chapeau clause afterward.²⁸⁷ This sequence, which was not followed by the Panel,²⁸⁸ is extremely important, because to start with a broad analysis first would basically exclude all environmental laws, since by their very nature such laws discriminate against fair trade.²⁸⁹ Every law claiming to be an Article XX exception will be different, and therefore a logical analysis demands that the specific analysis come first.²⁹⁰ This is the first legacy of *Reformulated Gasoline*.

Next, the Appellate Body found that "the sea turtles here involved constitute 'exhaustible natural resources' for purposes of Article XX(g) of the GATT 1994"²⁹¹ and that "Section 609 is a measure 'relating to' the conservation of an exhaustible natural resource within the meaning of Article XX(g)."²⁹² It also found that "Section 609 is a measure made effective in conjunction with the restrictions on domestic harvesting of shrimp, as required by Article XX(g)."²⁹³ In making these determinations, the Appellate Body referred to *Reformulated Gasoline* as the decision by which the proper standards were instituted.²⁹⁴

Turning next to the chapeau analysis, the Appellate Body found that section 609, in effect, established "a rigid and unbending standard by which United States officials determine[d] whether or not countries will be certified."²⁹⁵ The United States did not allow certification for those who used TEDs that were comparatively effective, but not exactly like the U.S. method,²⁹⁶ nor did it bother to negotiate with *all* Members that export

²⁸⁶ *Id.* para. 123.

²⁸⁷ *See id.* paras. 118-22.

²⁸⁸ *See id.*

²⁸⁹ *See id.* para. 120.

²⁹⁰ *See id.*

²⁹¹ *Id.* para. 134.

²⁹² *Id.* para. 142.

²⁹³ *Id.* para. 145.

²⁹⁴ *See id.* paras. 136, 141, 143.

²⁹⁵ *Id.* para. 163.

²⁹⁶ *See id.* para. 165.

shrimp to the United States.²⁹⁷ It also failed to follow the directive of section 609 to develop bilateral and multilateral agreements²⁹⁸ and in effect "require[d] other Members to adopt essentially the same comprehensive regulatory program . . . without taking into consideration different conditions which may occur in the territories of those other members."²⁹⁹ All of these factors led to the determination by the Appellate Body that the effect of section 609 was unjustifiably discriminatory³⁰⁰ and that the discrimination was "arbitrary" for purposes of the Article XX chapeau.³⁰¹

Just as in *Reformulated Gasoline*, the *Shrimp-Turtle* Appellate Body appeared willing to allow a U.S. environmental law to claim an exception under Article XX, but only if it showed a willingness to notify and take into consideration affected Member countries. In both cases, the United States failed the chapeau requirements of Article XX, not because the laws were environmental and therefore protectionist in nature, but because the government showed an unwillingness to communicate with other members of the global community. This represents neither an extremist free trade perspective nor an extremist environmental perspective, but speaks to the credibility of the WTO Appellate Body, in that it logically took into consideration the interests of both the environment *and* free trade.

XIII. CONCLUSION

A strong economy must promote free trade. A strong environment needs to have the support of laws that are internationally harmonized and consistent. The movements for free trade and environmental protection come from extremely different paradigms—one based upon the idea of unlimited ideas and resources, where less governance is the best governance,³⁰² the other based upon an opposite foundation that resources are limited and government regulation is a necessity.³⁰³ Nonetheless, for

²⁹⁷ See *id.* para. 172.

²⁹⁸ See *id.*

²⁹⁹ *Id.* para. 164.

³⁰⁰ See *id.* paras. 172, 176.

³⁰¹ See *id.* para. 184.

³⁰² See Wirth, *supra* note 135, at 334; ESTY, *supra* note 9, at 36-39 (explaining the different views of the world from the eyes of free trade supporters and environmentalists).

³⁰³ See Esty, *supra* note 9, at 36-39.

both to exist and be effective in the future, the Executive Branch must be allowed a good deal of freedom in negotiating the standards by which both areas of regulation are applied.

Free trade is not free if it is weighted with exceptions. Environmental laws cannot be protective if every other business is exempted. These are areas in which Madison's ideas of a large government composed of various factions and governed by compromise falls short. Some things cannot be compromised.

As shown by this Note, there are critics who fear that the movement toward free trade will lead to a weakening of domestic environmental laws. There are also scholars who object to Presidential/Executive power infringing on traditional legislative functions of domestic regulation, in the name of foreign affairs responsibilities. These critics recommend further legislative oversight and further institutional safeguards to hinder this growth of executive power.

As revealed in this Note, local interests and industry lobbyists help guarantee that Congress will often sacrifice long-term environmental protection laws that are good for the entire nation, in order to protect short-term, regional goals. The same happens when free trade laws that might promote business closure in certain regions are introduced. Such facts suggest that any increase in legislative interference in the passage of environmental and trade measures should be discouraged and rejected.

For those concerned about *ex parte* communications involving the "watering down" or "undermining" of U.S. laws between the EPA or USTR and other countries, again, there is no need for further legislation. Instead, an Executive Order, such as that suggested here, that extends "comment" procedures and increases "notice" requirements for international parties potentially affected by U.S. regulations would be more than sufficient. In this manner, U.S. communications would no longer be *ex parte*, but in the public record, and foreign policy discussions involving domestic regulations could still prove effective.

All of these debates and discussions center around a genuine fear of the power of the World Trade Organization and its ability, through the Executive Branch, to find domestic environmental laws to be direct violations of free trade responsibilities. As this note summarized, there are still plenty of safeguards in place to protect U.S. law if the legislators are doing their job and choose to control appropriations or place riders on bills to prevent a change in domestic law. However, as the *Reformulated Gasoline* decision shows, there is probably little to fear and the WTO may prove to be more of an aid than a detriment to the protection of the

environment in the long run.

The *Reformulated Gasoline* decision revealed that the WTO was more than willing to allow a country to pass strong environmental regulations and laws, as long as those environmental laws were universally upheld to all parties—domestic and international alike. The decision noted the importance of communication between countries, and would have allowed the Venezuelan/gasoline standards as acceptable restrictions on trade under GATT Article XX, if the United States had shown an attempt to communicate with affected international parties. As it is, the United States never indicated that it was willing to consider the discussion of a solution just as effective, but less painful to international gasoline providers until after regulations were already in place. The *Shrimp-Turtle* decision further supported this interpretation, noting the importance of communication between Member nations.

The free trade and environmental movements often work in opposite directions. However, as the WTO showed in *Reformulated Gasoline*, if countries communicate between themselves and work together, it is possible to have environmental laws that coincide nicely with free trade initiatives. In the end, the problems do not lie in the goals of the various movements, nor in the ideology and views of the WTO Appellate Body. The true enemies to the environmental and free trade movements are those who choose short-term regional interests over the long-term good of humanity and the world.