

NRDC v. EPA: Testing the Waters of the Constitutionality of Delegation to International Organizations

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The Montreal Protocol on Substances that Deplete the Ozone Layer successfully halted the destruction of the earth's ozone layer by banning the production of most ozone-depleting chemicals. Some of these chemicals, however, are not yet replaceable and have been deemed "essential" and qualify for "critical use exemptions." One such chemical is methyl bromide, an important product for agriculture. Each year, countries requiring methyl bromide for agricultural purposes must submit a critical use nomination to the signatory parties of the Protocol. The parties as a whole then approve a certain quantity of methyl bromide use for each nominating country.

This Note evaluates the litigation that arose out of the United States' first methyl bromide critical use petition and exemption. The EPA violated specific terms of a Decision of the Montreal Protocol Parties by allowing farmers to use more methyl bromide than allowed by the Protocol signatories. The Natural Resources Defense Council sued the EPA, claiming that the United States violated international law by violating the treaty. The EPA argued that the document detailing the methyl bromide critical use exemption process is not part of the Protocol, and thus should not be taken into consideration by the court. The D.C.

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Circuit Court of Appeals agreed with the EPA, holding that the matter is a political issue, and thus not within its realm of interpretation.

The decision, Natural Resources Defense Council v. Environmental Protection Agency (NRDC v. EPA), is particularly notable in two respects. First, the court admitted that the United States used more methyl bromide than allowed by the Protocol Parties. Second, the court considered the possibility that a multilateral treaty can be unconstitutional by virtue of excessive delegation to an international organization. The NRDC v. EPA decision marked the first time that a court has examined the constitutionality of international delegations of legislative power, even though it has been a topic of academic debate for years. This Note argues that the court's finding of nonjusticiability was the best decision under the circumstances, but that the EPA, which is charged with protecting the environment, did not conduct itself reasonably in its interpretation of the critical use exemption. However, the relevant portions of the Montreal Protocol and the accompanying portions of the Clean Air Act should be left as they are, eliminating any temptation of a future court to find the Protocol's structure and procedures unconstitutional, however unlikely that outcome may be.

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INTRODUCTION

The Montreal Protocol on Substances that Deplete the Ozone Layer¹ (Montreal Protocol or Protocol) has been called one of the most successful multilateral treaties of all time. The flexibility, strength, and forward-looking nature of the Protocol effectively halted the production and release of most chemicals that destroy the ozone layer. The Protocol dealt with one of the most alarming environmental concerns of the 1980s and represents a bold response to human destruction of the environment. As one of the original signatories, the United States was deeply involved in negotiating the treaty and took a bold leadership role in stewarding the treaty to its conclusion. However, after nearly twenty years of successful involvement in the international enactment and enforcement of the Protocol, the United States is no longer upholding the spirit of the treaty, as reflected in the August 2006 D.C. Circuit decision *Natural Resources Defense Council v. Environmental Protection Agency (NRDC v. EPA)*.²

While the purpose of the Montreal Protocol is to eliminate the production and consumption of ozone-depleting chemicals, some substances that deplete the ozone layer are still in use for various reasons. One such substance is methyl bromide, widely used in food storage and agricultural applications. Although the Protocol required a complete phaseout of its use by 2005, the Protocol Parties (Parties) incorporated a “critical use exemption” for methyl bromide into Article 2H of the Protocol in its 1997 Montreal meeting.³ At that time, effective substitutes for methyl bromide were not available. Indeed, they are still not available.

The critical use exemption has well-defined boundaries as reflected in a “Decision” of the Parties.⁴ (The Parties incorporate many such substantive Decisions into their official meeting document each year, agreed upon by consensus or two-thirds vote.⁵) The Decision accompanying the critical use exemption amendment in Article 2H explains the parameters of the methyl bromide critical use exemption.

1. Montreal Protocol on Substances that Deplete the Ozone Layer, *done Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 1522 U.N.T.S. 3* (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol].

2. *Natural Res. Def. Council v. EPA*, 464 F.3d 1 (D.C. Cir. 2006).

3. Meeting of the Parties to the Montreal Protocol, Montreal, Can., Sept. 15–17, 1997, *Report of the Ninth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, Annex III at 2, U.N. DOC. UNEP/OzL.Pro.9/12 (Sept. 25, 1997) [hereinafter 1997 Montreal Report].

4. *Id.* at 26–27 (Decision IX/6).

5. U.N. ENVIRONMENT PROGRAMME, HANDBOOK FOR THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEPLETE THE OZONE LAYER 464–65 (7th ed. 2006) (Rule 40.1 of the “Rules of procedure for meetings of the Conference of the Parties to the Vienna Convention and Meetings of the Parties to the Montreal Protocol.”).

For instance, the Parties will grant an exemption to produce or import methyl bromide only if “[m]ethyl bromide is not available in sufficient quantity and quality from existing stocks.”⁶

In 2004 the Environmental Protection Agency (EPA) promulgated a Final Rule governing the United States’ methyl bromide critical use exemption.⁷ The rule clearly violated the Protocol’s intent by allowing noncritical users to access the U.S. methyl bromide stockpile. In response, the Natural Resources Defense Council (NRDC) brought suit against the EPA for failure to comply with Protocol Decisions.⁸ The D.C. Circuit Court of Appeals initially dismissed the matter for lack of standing,⁹ but later granted NRDC’s petition for rehearing. On rehearing, the court found that while NRDC did have standing, the issue was noncognizable as a political matter.¹⁰

Part I of this Note documents the history of the Protocol, the critical use exemption process, and the EPA’s procedures for incorporating the U.S. critical use exemption into domestic law. Part II examines the *NRDC v. EPA* lawsuit and the legal arguments that NRDC made. Part III analyzes the underlying interaction between domestic and international law, the debate surrounding the constitutionality of international legislative organizations, and takes a close look at a particular U.S. critical use nomination application. The Conclusion suggests three paths that the United States could take in resolving the problem presented in *NRDC v. EPA* and concludes that the Protocol and U.S. law should remain as they are.

I. THE MONTREAL PROTOCOL AND METHYL BROMIDE

The earth’s stratospheric ozone layer is essential to life as we know it, and has been a matter of public concern since the early twentieth century.¹¹ Ozone is a simple molecule composed of three atoms of oxygen that forms in the stratosphere when oxygen reacts with solar ultraviolet

6. *1997 Montreal Report*, *supra* note 3, at 27.

7. 40 C.F.R. pt. 82 (2005); Protection of Stratospheric Ozone: Process for Exempting Critical Uses From the Phaseout of Methyl Bromide, 69 Fed. Reg. 76,982 (Dec. 23, 2004) (final rule).

8. Natural Res. Def. Council v. EPA, 464 F.3d 1, 5 (D.C. Cir. 2006).

9. Natural Res. Def. Council v. EPA, 440 F.3d 476 (D.C. Cir.), *reh’g granted and withdrawn*, 464 F.3d 1 (D.C. Cir. 2006).

10. *NRDC v. EPA*, 464 F.3d 1.

11. See, e.g., E.B. White, *The Talk of the Town*, NEW YORKER, Jan. 20, 1934, at 5 (“[I]n the upper reaches of the stratosphere there is a little wall of ozone an eighth of an inch thick, and it is all that separates us from destruction by the sun . . . [I]f this slender sheath should ever fold up (these balloonists should really be more careful!) we would all be wiped out instantly.”).

light.¹² Ozone absorbs most of the harmful forms of ultraviolet radiation before they reach Earth, thereby protecting organisms from burns, DNA damage, and skin cancer.¹³

In 1974 F. Sherwood Rowland and Mario Molina, atmospheric chemists at the University of California, Irvine, reported that the class of man-made chemicals known as chlorofluorocarbons (CFCs) could significantly harm the ozone layer.¹⁴ They discovered that when one CFC molecule is broken apart by ultraviolet radiation, an extremely reactive component is formed which ultimately destroys millions of molecules of ozone.¹⁵ CFCs' volatility and chemical stability make them attractive propellants and refrigerants. Yet, these same characteristics also allow the CFCs to evaporate into the stratosphere, where their relative stability allows them to catalyze the chemical process that breaks ozone apart.¹⁶

The public reaction to this finding and its alarming implications was tremendous.¹⁷ Public and scientific concern provided the impetus needed for the international community to converge and address the human-caused destruction of the ozone layer. The U.S. scientific community, in particular, pounced upon this new area of research.¹⁸ However, atmospheric ozone research is extraordinarily difficult to conduct due to the ozone layer's seasonal fluctuations and differential concentrations depending upon altitude and latitude.¹⁹ Complicated models, encompassing interacting chemical, physical, and atmospheric processes, were necessary to understand and predict ozone layer activity. As might be expected, early models predicted very different effects of CFC-ozone

12. ANN M. MIDDLEBROOK & MARGARET A. TOLBERT, STRATOSPHERIC OZONE DEPLETION 7 (2000).

13. See U.S. National Library of Medicine, MedlinePlus, Ozone, <http://www.nlm.nih.gov/medlineplus/ozone.html> (last visited Oct. 3, 2007).

14. Mario J. Molina & F.S. Rowland, *Stratospheric Sink for Chlorofluoromethanes: Chlorine Atom-catalyzed Destruction of Ozone*, 249 NATURE 810 (1974). Molina, Rowland, and Paul Crutzen won the Nobel Prize in Chemistry in 1995 for their ozone discoveries. Nobelprize.org, The Nobel Prize in Chemistry 1995, http://nobelprize.org/nobel_prizes/chemistry/laureates/1995/index.html (last visited Oct. 18, 2007).

15. Molina & Rowland, *supra* note 14, at 810-12; F. Sherwood Rowland, *Stratospheric Ozone Depletion by Chlorofluorocarbons (Nobel Lecture)*, 35 ANGEWANDTE CHEMIE INT'L EDITION IN ENG. 1787, 1789 (1996). Molina and Rowland's research built off of the discovery by Richard Stolarski and Ralph Cicerone that gas phase chlorine oxides catalyze a chain reaction with stratospheric ozone, transforming the ozone into oxygen. Their research, however, did not tie the source of stratospheric chlorine oxide to CFCs. R.S. Stolarski & R.J. Cicerone, *Stratospheric Chlorine: A Possible Sink for Ozone*, 52 CAN. J. CHEM. 1610 (1974).

16. Molina & Rowland, *supra* note 14, at 810.

17. See, e.g., *Death to Ozone*, TIME, Oct. 7, 1974; *What the Ozone Controversy is All About*, U.S. NEWS & WORLD REPORT, Jan. 20, 1975, at 76; Linda Greenhouse, *Aerosol Feels the Ozone Effect*, N.Y. TIMES, June 22, 1975, at A3.

18. RICHARD ELLIOT BENEDICK, OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET 11 (enlarged ed. 1998).

19. *Id.* at 11-12.

layer phenomena,²⁰ undermining the overall credibility of the studies.²¹ For instance, the scientists found no evidence of present-day ozone loss or of increased radiation reaching the earth's surface.²² While a 1985 British discovery of an unusually large seasonal ozone hole over Antarctica was cause for great concern, it was not clear that CFCs were responsible.²³

Out of these discouraging inconsistencies, however, came an international cooperative effort to better understand how human activities threaten the ozone layer.²⁴ A major report produced under the auspices of the World Meteorological Organization demonstrated evidence of increasing accumulation of CFCs in the stratosphere and predicted a 9 percent reduction of the ozone layer after 2050.²⁵ It also reported the discovery that bromine-containing compounds, like methyl bromide, affect the ozone layer.²⁶

Despite the ongoing scientific uncertainty, the Britons' Antarctica revelation may have provided the fear factor needed to move international negotiations along.²⁷ According to Ambassador Richard Benedick, the principal U.S. negotiator of the Montreal Protocol: "All of these possible effects [upon the ozone layer] were known to the negotiators of the Montreal Protocol, and they were never seriously contested. It was generally accepted that changes in the ozone layer would pose serious risks to human health and the environment."²⁸

The public was similarly concerned about the ozone layer. As early as 1977, Congress amended the Clear Air Act to authorize the EPA to

20. See, e.g., COMM. ON CHEMISTRY AND PHYSICS OF OZONE DEPLETION & COMM. ON BIOLOGICAL EFFECTS OF INCREASED SOLAR ULTRAVIOLET RADIATION, NATIONAL RESEARCH COUNCIL, CAUSES AND EFFECTS OF STRATOSPHERIC OZONE REDUCTION: AN UPDATE 19-21 (1982).

21. BENEDICK, *supra* note 18, at 13-14 (comparing wildly varying year-to-year ozone depletion prediction results generated by the National Research Council and World Meteorological Organization).

22. *Id.* at 15, 18 (citing ALAN S. MILLER & IRVING M. MINTZER, WORLD RESOURCES INST., THE SKY IS THE LIMIT: STRATEGIES FOR PROTECTING THE OZONE LAYER 24 (1986), available at http://pdf.wri.org/skyisthelimit_bw.pdf).

23. J.C. Farman, B.G. Gardiner & J.D. Shanklin, *Large Losses of Total Ozone in Antarctica Reveal Seasonal ClO_x/NO_x Interaction*, 315 NATURE 207 (1985).

24. This effort was coordinated by NASA and sponsored by, among others, the National Oceanic and Atmospheric Administration (NOAA), the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP). BENEDICK, *supra* note 18, at 14.

25. WORLD METEOROLOGICAL ORGANIZATION, ATMOSPHERIC OZONE 1985: ASSESSMENT OF OUR UNDERSTANDING OF THE PROCESSES CONTROLLING ITS PRESENT DISTRIBUTION AND CHANGE 786-87 (1985).

26. *Id.* at ch. 12.

27. BENEDICK, *supra* note 18, at 18-20.

28. *Id.* at 22.

regulate substances that affect the ozone layer.²⁹ The public's interest in the subject ensured media coverage of ozone issues, and the United States, Canada, and European countries banned or limited CFC use in nonessential aerosol sprays in the late 1970s and early 1980s.³⁰ Most of the anti-CFC activism took place in the United States, with scientific warnings, environmental group activism, and voluntary public rejection of the use of CFC aerosols occurring prior to any sort of ban.³¹

Following a series of informal international meetings conducted under the umbrella of the United Nations Environmental Programme (UNEP), forty-three nations convened in Vienna in 1985 to produce the Vienna Convention for the Protection of the Ozone Layer.³² Twenty nations signed the convention, creating an obligation upon the signatories to protect the ozone layer and cooperate in research and monitoring efforts.³³ While this document did not specifically name or regulate any ozone-depleting substances, the Vienna Convention laid the foundation for a future protocol to regulate substances.³⁴

Following intense negotiations over the next year and a half, the Vienna Convention signatories and several new participants reconvened in Montreal in 1987 to produce the Montreal Protocol on Substances that Deplete the Ozone Layer.³⁵ The nations agreed to freeze production of identified ozone-depleting substances at 1986 levels and commence a tiered phaseout of these substances in 1993.³⁶ Trade restrictions on the controlled substances with nonsignatory parties included a ban on imports (including products that contain or are produced with the substances) and penalties for exports.³⁷ In addition, developing countries received a ten-year grace period from compliance in the name of economic fairness and as an incentive to sign the Protocol.³⁸ The resulting Protocol represented and still represents one of the most innovative,

29. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 729 (codified at 42 U.S.C. § 7457(b) (1982)) (repealed 1990). The ozone protection provisions of the Clean Air Act are currently codified at 42 U.S.C. §§ 7671-7671q (2006).

30. BENEDICK, *supra* note 18, at 24-25, 27-28.

31. *Id.* at 24-29 (explaining that public anti-CFC activism failed to catch on in Europe due to other environmental concerns there); *see also, e.g.*, Walter Sullivan, *Halt Urged in Buying Sprays that Might Harm Ozone*, N.Y. TIMES, Oct. 31, 1975, at 29; Walter Sullivan, *Ten States Urging Action on Ozone*, N.Y. TIMES, Dec. 24, 1974, at 24; Greenhouse, *supra* note 17.

32. Vienna Convention for the Protection of the Ozone Layer, *opened for signature* Mar. 22, 1985, S. TREATY DOC. NO. 99-9, 1513 U.N.T.S. 293 (entered into force Sept. 22, 1988).

33. United Nations, Multilateral Treaties Deposited with the Secretary General, Vienna Convention for the Protection of the Ozone Layer, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXVII/treaty11.asp> (last visited Oct. 3, 2007).

34. Vienna Convention for the Protection of the Ozone Layer, *supra* note 32, art. 2.

35. Montreal Protocol, *supra* note 1.

36. *Id.* art. 2.

37. *Id.* art. 4.

38. *Id.* art. 5.

flexible, and successful multilateral environmental treaties ever negotiated. Ambassador Benedick reflects that “it was deliberately designed to be reopened and adjusted as needed.... This flexibility—a streamlined process for modifying the protocol—was a major innovation.”³⁹ Congress incorporated the Protocol into domestic law via the 1990 Amendments to the Clean Air Act.⁴⁰

The Protocol’s flexibility stems from its amendment and adjustment process. By two-thirds majority vote, the Parties may adjust the list of ozone-depleting substances and add control measures to these substances.⁴¹ These adjustments and amendments are binding upon all Parties and, as incorporated into the Clean Air Act, legally binding in U.S. domestic law.⁴² The Clean Air Act incorporates this idea of an evolving Protocol in several ways. For example, any substance that is identified in the Protocol as an ozone-depleting substance will also be recognized in the Clean Air Act as an ozone-depleting substance.⁴³ Also, any exemptions that the EPA may adopt for essential and critical use of methyl bromide must be consistent with the Protocol.⁴⁴

Results from the annual “Meetings of the Parties” reflect the success born from the Protocol’s flexibility. For instance, the Second Meeting of the Parties in London in 1990 resulted in the London Amendment and London Adjustment, which added three substances to the controlled substances list, improved the incentives for developing countries to participate, introduced a class of substances (HCFCs) for monitoring but not control, and hastened the phaseout date of some ozone-depleting substances.⁴⁵ Methyl bromide’s inclusion on the list of ozone-depleters further demonstrates the Protocol’s evolutionary nature. First introduced

39. BENEDICK, *supra* note 18, at 99.

40. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, 2648 (codified at 42 U.S.C. §§ 7671–7671q (2006)). The Clean Air Act actually *required* the United States to negotiate a multilateral treaty for the purpose of protecting the ozone layer. 42 U.S.C. § 7456 (1988). This portion of the Clean Air Act was repealed in 1990, reworded slightly, and recodified at 42 U.S.C. § 7671p(a) (2006) (“the President... shall negotiate multilateral treaties, conventions, resolutions, or other agreements, and formulate, present, or support proposals at the United Nations and other appropriate international forums and shall report to the Congress periodically on efforts to arrive at such agreements [regarding protection of the ozone layer]”).

41. Montreal Protocol, *supra* note 1, art. 2 ¶ 9.

42. 42 U.S.C. § 7671(9) (“The terms ‘Montreal Protocol’ and ‘the Protocol’ mean the Montreal Protocol on Substances that Deplete the Ozone Layer, a protocol to the Vienna Convention for the Protection of the Ozone Layer, including adjustments adopted by Parties thereto and amendments that have entered into force.”).

43. *Id.* § 7671a(c)(1).

44. See, e.g., *id.* § 7671c(d).

45. Meeting of the Parties to the Montreal Protocol, London, Eng., June 27–29, 1990, *Report of the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, Annex I & II, U.N. Doc. UNEP/OzL.Pro.2/3 (June 29, 1997).

in 1992, the Protocol was amended or adjusted three times to bring the methyl bromide provisions to their present form.

A. *The History of Methyl Bromide's Control under the Montreal Protocol*

Methyl bromide is a colorless odorless gas used in the agricultural industry as a fumigant by millers and food exporters and as a pre- and post-harvest pesticide by farmers who grow seedlings, flowers, and various nuts, fruits, and vegetables such as walnuts, strawberries, and tomatoes. Soil pretreatment via direct methyl bromide injection sterilizes the soil and leaves behind no toxic residue—all excess chemical simply evaporates into the atmosphere. (However, direct human contact with the gas can cause severe lung damage and neurological damage.⁴⁶) Like CFCs, the very properties that make methyl bromide an excellent choice for agricultural use also make it a terrible chemical for the ozone layer. Its volatile nature allows it to reach the stratosphere, and as a bromine-containing chemical, it catalyzes a potent ozone-destroying chain reaction.⁴⁷

When the destructive effects of methyl bromide were recognized in the 1980s, there were five major producers of methyl bromide: Great Lakes Chemical and Ethyl Corp. of the United States, Rhone Poulenc and Elf-Atochem of France, and Dead Sea Bromide of Israel.⁴⁸ Prior to the Fourth Meeting of the Parties held in Copenhagen in 1992,⁴⁹ Dead Sea Bromide worked behind the scenes to prevent the listing of methyl bromide as a controlled substance. The company cultivated a relationship with Kenya, South Africa, and other African nations, encouraging them to assert the indispensable nature of methyl bromide to their agricultural economies.⁵⁰ Meanwhile, the G.H.W. Bush Administration succumbed to the influence of the agricultural lobby and U.S. methyl bromide

46. See U.S. Environmental Protection Agency, Technology Transfer Network Air Toxics Web Site, Methyl Bromide (Bromomethane), <http://www.epa.gov/ttn/uatw/hlthef/methylbr.html> (last visited Oct. 4, 2007); see also "Brom-O-Gas" Material Safety Data Sheet (commercial 98 percent methyl bromide pesticide product), available at <http://www.e1.greatlakes.com/common/msdspdf/00079.pdf>.

47. For a description of the various chemical reactions involving the breakdown of methyl bromide and subsequent reaction of reactive intermediates with ozone, see WORLD METEOROLOGICAL ORGANIZATION, SCIENTIFIC ASSESSMENT OF OZONE DEPLETION: 2006, at 2.19, 2.21 ("Global Ozone Research and Monitoring Project—Report No. 50") and references therein.

48. BENEDICK, *supra* note 18, at 229–30.

49. Meeting of the Parties to the Montreal Protocol, Copenhagen, Den., Nov. 23–25, 1992, *Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, U.N. DOC. UNEP/OzL.Pro.4/15 (Nov. 25, 1992) [hereinafter 1992 Copenhagen Report].

50. BENEDICK, *supra* note 18, at 207, 208.

producers and actively opposed the official pro-methyl-bromide-regulation stance of the U.S. State Department at the 1992 Copenhagen Meeting of the Parties.⁵¹

Methyl bromide control ended up being the biggest dispute at the Copenhagen meeting. The Ozone Scientific Assessment Panel posited in its report that methyl bromide “could have accounted for between 5 and 10 per cent of the observed ozone loss during the previous 10 to 20 years.”⁵² Meanwhile, the Open-Ended Working Group of the Parties to the Montreal Protocol concluded that methyl bromide was doing “undoubted damage” to the ozone layer, but acknowledged that it was “undoubtedly needed” by the food industry.⁵³ In the end, the Parties did four things at Copenhagen: (1) they amended the Protocol to add methyl bromide as a controlled substance; (2) they added Article 2H to the Protocol, which froze methyl bromide consumption in 1995 at 1991 levels (excluding food quarantine and preshipment uses);⁵⁴ (3) they decided that the Scientific Assessment Panel⁵⁵ and the Technology and Economic Assessment Panel (TEAP)⁵⁶ should further evaluate methyl bromide’s ozone depleting potential and identify potential replacements by 1994 (for the 1995 Meeting of the Parties);⁵⁷ and (4) they resolved to create a methyl bromide phaseout schedule at the Seventh Meeting of the Parties in 1995.⁵⁸ In response to the Copenhagen meeting results, the methyl bromide industry sprang into action, becoming an enduring presence at all relevant scientific and economic assessment panel meetings and

51. *Id.* at 208.

52. *1992 Copenhagen Report*, *supra* note 49, at 5.

53. *Id.* at 8. Nearly all of the developing (“Article 5”) Parties and even some of the non-Article 5 Parties at the 1992 Open Ended Working Group meeting were opposed to regulation of methyl bromide. STEPHEN O. ANDERSEN & K. MADHAVA SARMA, *PROTECTING THE OZONE LAYER: THE UNITED NATIONS HISTORY* 136–37 (2002).

54. *1992 Copenhagen Report*, *supra* note 49, Annex III (adding Article 2H and Annex E to the Protocol).

55. The Scientific Assessment Panel is composed of scientists for the purpose of evaluating the science of the ozone layer. This body’s publications are peer reviewed. U.N. Environment Programme, Ozone Secretariat, Scientific Assessment Panel, <http://ozone.unep.org/AssessmentPanels/SAP/index.shtml> (last visited Oct. 4, 2007).

56. The Technology and Economic Assessment Panel (TEAP) is composed of a panel of experts who provide technical information to requesting Parties about alternatives to ozone depleting substances. U.N. Environment Programme, Ozone Secretariat, About TEAP, http://ozone.unep.org/teap/about_TEAP.shtml (last visited Oct. 4, 2007). The Panel has a number of subsidiary bodies, including the Methyl Bromide Technical Options Committee (MBTOC). These committees produce recommendations to the Parties as a whole for each individual Party’s “essential use nomination” for use of an ozone depleting substance. See, e.g., U.N. Environment Programme, Ozone Secretariat, Methyl Bromide Technical Options Committee (MBTOC) Reports, <http://ozone.unep.org/teap/Reports/MBTOC/index.shtml> (last visited Oct. 4, 2007).

57. *1992 Copenhagen Report*, *supra* note 49, at 21 (Decision IV/23).

58. *Id.* at 74.

becoming adept at “portraying the indispensability of their product and the perils of replacing it” in developing countries.⁵⁹ Despite industry pressure, however, the Technology and Economic Assessment Panel concluded in its 1994 report that further methyl bromide control was both economically and technically feasible.⁶⁰ The Panel supported its conclusion in part by pointing to the significant successes by the United States, Canada, and the European Union in developing methyl bromide replacements and in setting their own phaseout schedules.⁶¹ On the scientific front, the Scientific Assessment Panel concluded in its 1994 report that further controls on methyl bromide by industrialized countries would greatly benefit the ozone layer and would be more cost effective than additional controls on other substances.⁶² The Panels found that further action would be beneficial—compared with the Copenhagen agreement to merely *cap* emissions at 1991 levels, the complete *elimination* of anthropogenic methyl bromide emissions by the year 2001 would result in 13 percent less ozone loss over the next fifty years.⁶³

By the time of the 1995 Seventh Meeting of the Parties in Vienna, the scientific and economic assessments and research realities were aligned such that the Parties had little choice but to move forward with a phaseout schedule. The Vienna Adjustment to the Protocol incorporated a tiered methyl bromide phaseout schedule, despite industry-cultivated objections from African countries such as Kenya and South Africa.⁶⁴ These countries finally relented upon pressure from Latin America countries; the United States proposed a “critical use exemption” should the gloomy agricultural predictions turn out to be true.

The Parties adopted a tiered phaseout plan similar to the phaseout procedure used for CFCs,⁶⁵ which was further amended to its present accelerated form at the Ninth Meeting of the Parties in Montreal in 1997.⁶⁶ Under this plan, methyl bromide reduction was scheduled to take

59. BENEDICK, *supra* note 18, at 230.

60. See U.N. ENVIRONMENT PROGRAMME, 1994 REPORT OF THE METHYL BROMIDE TECHNICAL OPTIONS COMMITTEE 3 (1994); OPEN-ENDED WORKING GROUP OF THE PARTIES TO THE MONTREAL PROTOCOL, EXECUTIVE SUMMARY TO THE 1994 TEAP (1994), available at http://ozone.unep.org/Meeting_Documents/oewg/10oewg/10oewg-3.e.pdf.

61. See BENEDICK, *supra* note 18, at 230.

62. *Id.* at 288.

63. Meeting of the Parties to the Montreal Protocol, Vienna, Austria, Dec. 5–7, 1995, *Report of the Seventh Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, 8 (¶ 21), U.N. DOC. UNEP/OzL.Pro.7/12 (Dec. 27, 1995) [hereinafter 1995 Vienna Report].

64. *Id.* at 48–49, 50 (¶¶ 96, 109); BENEDICK, *supra* note 18, at 298.

65. 1995 Vienna Report, *supra* note 63, at 60–61.

66. 1997 Montreal Report, *supra* note 3, Annex III at 1–2. A Canadian agricultural representative, Linda Dunn, credits the accelerated phaseout schedule adopted by the Parties in 1997, in part, to a “Methyl Bromide Alternatives Expo” just prior to the Meeting of the Parties

place in steps of 25 percent by 1999, 50 percent by 2001, 70 percent by 2003 and complete phaseout in 2005.⁶⁷ Article 2H incorporated the proposed “critical use exemption” for continued methyl bromide use beyond 2005 with this minimalist language: “This paragraph will apply save to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be critical uses.”⁶⁸

B. The Critical Use Exemption

The criteria and procedures for assessing how the “nominating Party” and the Parties as a whole approve each country’s methyl bromide critical use exemption are outlined in “Decision IX/6” (hereinafter Methyl Bromide Decision) of the official 1997 meeting report from Montreal.⁶⁹ The Methyl Bromide Decision explains (1) what a critical use of methyl bromide is, (2) when production and consumption of critical use methyl bromide is permitted, and (3) how a critical use exemption application is to be evaluated by signatory Parties. First, methyl bromide use is “critical” when “lack of availability . . . would result in a significant market disruption” and when “[t]here are no technically and economically feasible alternatives or substitutes available.” Second, consumption and production of methyl bromide is permitted only (a) when “[a]ll technically and economically feasible steps have been taken to minimize the critical use”; (b) when methyl bromide “is not available in sufficient quantity and quality from existing stocks”; and (c) when the Party demonstrates that it is making an “appropriate effort” to avoid use of methyl bromide through use of substitutes or is engaging in substitute research. Third, a Party’s request for a critical use exemption is evaluated by the Technology and Economic Assessment Panel based upon the above criteria. The Panel then makes a recommendation to the Parties for each country’s critical use exemption amount.⁷⁰

Congress incorporated the Article 2H methyl bromide phaseout schedule and corresponding critical use exemption into the Clean Air Act

in Montreal, which demonstrated the vast amount of research already accomplished in the area of methyl bromide alternatives development. ANDERSEN & SARMA, *supra* note 53, at 192–93.

67. Montreal Protocol, *supra* note 1, art. 2H. These reductions are based upon each country’s 1991 baseline level of production. *Id.* In the United States, the level was set to 25,528 metric tons. Final Opening Brief for Petitioner at 8 n.17, Natural Res. Def. Council v. EPA, 464 F.3d 1 (D.C. Cir. 2006) (No. 04-1438).

68. Montreal Protocol, *supra* note 1, art. 2H ¶ 5.

69. 1997 Montreal Report, *supra* note 3, at 26–27.

70. *Id.*

in 1998.⁷¹ Under this legislation, the EPA “may exempt the production, importation, and consumption of methyl bromide for critical uses” “consistent with the Montreal Protocol.”⁷² Furthermore, the EPA Administrator “shall promulgate rules for reductions in, and terminate the production, importation, and consumption of, methyl bromide under a schedule that is in accordance with, but not more stringent than, the phaseout schedule of the Montreal Protocol Treaty as in effect on October 21, 1998.”⁷³ Though Congress made this amendment to the Clean Air Act in response to the 1997 Article 2H Montreal Adjustment, the criteria and procedure outlined in the Methyl Bromide Decision were not incorporated into U.S. law. The legal status of the Methyl Bromide Decision is of central importance in *NRDC v. EPA*. NRDC and EPA both agreed, however, that because the Decision did not alter the actual language of the Protocol, it does not constitute an adjustment or amendment to the Protocol.⁷⁴

C. EPA’s Preparation for the 2005 Methyl Bromide Phaseout

In anticipation of the 2005 complete methyl bromide phaseout, the EPA began preparing in 2002 for the United States’ first methyl bromide critical use exemption request.⁷⁵ As the first step in this process, the EPA solicited applications for exemption from methyl bromide users and information on methyl bromide alternatives from interested parties.⁷⁶ Since the United States was going to bring a consolidated request for exemption to the Protocol Parties, applicants for exemption were encouraged to consolidate their requests with others in “similar circumstances.”⁷⁷ The EPA directed applicants to an International Index and a U.S. Index of methyl bromide alternatives listed by crop, and required applicants to provide “technical, regulatory, and economic” justification for their inability to adopt these alternatives.⁷⁸

The United States submitted its 2005 final nomination to the Ozone Secretariat in 2003, requesting an exemption of 9,921 metric tons for

71. Omnibus Consolidated and Emergency Supplement Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-36, 2681-37 (codified at 42 U.S.C. § 7671c(d)(6), (h)).

72. *Id.* § 7671c(d)(6).

73. *Id.* § 7671c(h).

74. Natural Res. Def. Council v. EPA, 464 F.3d 1, 5 (D.C. Cir. 2006) (“EPA and NRDC agree that the decisions are not ‘adjustments’ to the Protocol. But they disagree on the legal consequences of the decisions.”).

75. Protection of Stratospheric Ozone: Process for Exempting Critical Uses of Methyl Bromide, 67 Fed. Reg. 31,798 (May 10, 2002) (notice of solicitation of applications and information on alternatives).

76. *Id.* at 31,798–99.

77. *Id.*

78. *Id.* at 31,799.

sixteen uses.⁷⁹ This request represented 39 percent of the baseline 1991 consumption level (even though signatories were already required to use no more than 30 percent of 1991 levels in 2003) and 15 percent more methyl bromide than actually used in 2003.⁸⁰ After consideration by the Methyl Bromide Technical Options Committee (MBTOC, a subcommittee commissioned by the Technology and Economic Assessment Panel), and TEAP itself, the committees forwarded the United States' critical use nomination to the full Fifteenth Meeting of the Parties in Nairobi in 2003.⁸¹ The Parties were unable to come to a decision regarding the critical use exemption request, and therefore called an "extraordinary meeting" to make a final determination of the issue.⁸²

At this First Extraordinary Meeting of the Parties, the Parties approved the United States for 7,659 metric tons of new production of methyl bromide (30 percent of 1991 baseline) and use of 1,283 tons from existing stocks for sixteen uses in "Decision Ex.I/3" (hereinafter the "CUE Decision").⁸³ Similar to the Methyl Bromide Decision, the legal status of the CUE Decision is of central importance to the *NRDC v. EPA* holding. The United States received by far the largest exemption in the world; Italy received the second largest exemption with 2,133 metric tons for uses similar to that of the United States.⁸⁴

United States critical use exemptions are worked out on a yearly basis by the EPA and Protocol Parties.⁸⁵ The U.S. agricultural industry has long grumbled about this burdensome application process and argues that the process forces users to request more methyl bromide than they

79. Final Opening Brief for Petitioner, *supra* note 67, at 8; U.S. Dep't of State, 2003 Nomination for a Critical Use Exemption for Methyl Bromide from the United States of America, Executive Summary 4, available at http://www.epa.gov/ozone/mbr/cue/MeBr_exec_summary.pdf.

80. *Id.*

81. Natural Res. Def. Council v. EPA, 464 F.3d 1, 4 (D.C. Cir. 2006).

82. Meeting of the Parties to the Montreal Protocol, Nairobi, Kenya, Nov. 10–14, 2003, *Report of the Fifteenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, 5–14, 77–78, U.N. DOC. UNEP/OzL.Pro.15/9 (Nov. 11, 2003).

83. *NRDC v. EPA*, 464 F.3d at 5; Meeting of the Parties to the Montreal Protocol, Montreal, Can., Mar. 24–26, 2004, *Report of the First Extraordinary Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, 14–15, 26, U.N. DOC. UNEP/OzL.Pro.ExMP/1/3 (Mar. 27, 2004) [hereinafter 2004 Montreal Report].

84. See *Review the [sic] Methyl Bromide Critical Use Exemption Process Under the Montreal Protocol: Hearing Before the Subcomm. on Conservation, Credit, Rural Development, and Research of the H. Comm. on Agriculture*, 109th Cong. 29, 34 (2005) [hereinafter 2005 Hearing] (statement and testimony of Michelle Castellano, on behalf of the California Cut Flower Association and other nursery organizations).

85. Though industry groups have long requested two-year applications, the critical use exemption application through 2009 remains an annual process. See Protection of Stratospheric Ozone: Request for Critical Use Exemption Applications for the Years 2008 and 2009, 71 Fed. Reg. 24,698 (Apr. 26, 2006).

actually need.⁸⁶ Many members of Congress have complained on behalf of their constituents that the critical use exemption approval process is unfair and secretive. In a 2006 congressional hearing held by the House Committee for Government Reform, Representative Darrell Issa of California opened the hearing with his statement that “[t]he [critical use exemption] process is lengthy, unpredictable, expensive, and anything but transparent—and I want to emphasize, anything but transparent.”⁸⁷ In a 2005 hearing, Representatives Tim Holden of Pennsylvania and Frank Lucas of Oklahoma accused the Methyl Bromide Technical Options Committee of being unfair to the United States.⁸⁸ Members of the agricultural industry seem to agree with this accusation, as is overwhelmingly apparent from their testimony year after year in congressional hearings on this topic.⁸⁹

D. Incorporation of the Methyl Bromide CUE into EPA Regulations

In response to the Protocol Parties’ 2005 CUE Decision, the EPA proposed regulations through the notice-and-comment rulemaking process in order to authorize the 7,659 metric ton critical use exemption.⁹⁰ The proposed rules amended the methyl bromide phaseout regulations already in place, and “provide[d] the framework for an exemption permitted under the Montreal Protocol.”⁹¹ In accordance with the Methyl Bromide Decision, the EPA sought comment on alternatives to methyl bromide, emission reduction technologies, and other research and data

86. See, e.g., *2005 Hearing*, *supra* note 84, at 44 (prepared statement of Rodger Wasson, President, California Strawberry Commission) (“A multiyear critical use process would enable growers to better plan their transition to alternatives . . . [The phaseout process] encourages growers to continue using as much methyl bromide as allowed since availability for future fumigation seasons is not certain. It is a matter of use it or lose it.”).

87. *Methyl Bromide: Are U.S. Interests Being Served by the Critical Use Exemption Process?: Hearing Before the Subcomm. on Energy and Resources of the H. Comm. on Government Reform*, 109th Cong. 2 (2006).

88. *2005 Hearing*, *supra* note 84, at 2 (opening statement of Okla. Rep. Frank Lucas) (“Based on the reports that we have heard from recent meetings in Nairobi and Prague, it would seem that the process has, thus far, been neither credible or perhaps, not fair.”). Lucas went on to express concern with the EPA and State Department’s representation of the agricultural industry at the international level.

89. See, e.g., *The Status of Methyl Bromide Under the Clean Air Act and the Montreal Protocol: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 108th Cong. (2003); *Methyl Bromide: Update on Achieving the Requirements of the Clean Air Act and the Montreal Protocol: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 108th Cong. (2004); *2005 Hearing*, *supra* note 84.

90. Protection of Stratospheric Ozone: Process for Exempting Critical Uses From the Phaseout of Methyl Bromide, 69 Fed. Reg. 52,366 [hereinafter EPA Proposed Rules] (proposed Aug. 25, 2004).

91. *Id.* at 52,366.

with regard to criteria listed in the Methyl Bromide Decision.⁹² Interestingly, the proposed rule printed in the Federal Register allowed *noncritical use* from existing stockpiles:

[S]ome entities in the U.S. did not apply for a critical use exemption because they intend to meet their small, limited needs through existing U.S. inventories of methyl bromide. EPA therefore would set aside an amount . . . from the existing stockpile to meet the needs of end users who did not apply for an exemption but who are still using methyl bromide during their transition to alternatives.⁹³

The EPA's allowance of admitted noncritical uses was contrary to the plain language of the Methyl Bromide Decision.⁹⁴ The EPA received twenty-four comments in favor of unlimited access to methyl bromide stocks for noncritical uses and one comment in opposition, from NRDC.⁹⁵ NRDC opposed the practice on the grounds that it violates the Methyl Bromide Decision and the CUE Decision, and that "there is no authority for the many other proposed deductions from existing stocks."⁹⁶ The EPA addressed and brushed aside NRDC's opposition in the Final Rule, stating that "[n]othing in the Protocol or the [Clean Air Act] mandates that EPA limit drawdown from stocks for such uses."⁹⁷ Ultimately, the final rule granted use of the full amount authorized by the Protocol Parties at the First Extraordinary Meeting *plus* use of additional amounts for noncritical uses from the U.S. methyl bromide stockpile.⁹⁸

II. *NRDC V. EPA*

NRDC filed suit against the EPA in the D.C. Circuit Court of Appeals on the grounds that the Final Rule violated the Montreal Protocol's Methyl Bromide Decision and CUE Decision. Specifically, NRDC accused the EPA of: failure to disclose the amount of existing U.S. methyl bromide stocks; failure to offset new production of methyl bromide by these existing stocks; failure to reserve existing stocks for

92. *Id.* at 52,373.

93. *Id.* at 52,374.

94. See *supra* notes 69–70 and accompanying text.

95. Protection of Stratospheric Ozone: Process for Exempting Critical Uses From the Phaseout of Methyl Bromide, 69 Fed. Reg. 76,982, 76,988 (Dec. 23, 2004) (final rule) (codified at 40 C.F.R. pt. 82).

96. Comment from David Doniger, Natural Resources Defense Council, to EPA at 6 (Oct. 21, 2004) (in response to request for comments in EPA Proposed Rules, 69 Fed. Reg. 52,366 (proposed Aug. 25, 2004)), available at <http://www.regulations.gov> (follow "Search for Documents" hyperlink; then search for Document ID "EPA-HQ-OAR-2002-0018-0002").

97. Protection of Stratospheric Ozone, 69 Fed. Reg. at 76,988.

98. *Id.* at 76,989.

critical uses only; and failure to approve the technically and economically feasible minimum amount of methyl bromide use.⁹⁹

NRDC's first and second allegations addressed EPA's decision to allow new production of methyl bromide despite the existence of stock amounts possibly in excess of the total amount approved in the CUE Decision.¹⁰⁰ NRDC read the CUE Decision to prohibit new methyl bromide production if existing stocks were available, especially since the Methyl Bromide Decision is incorporated into the CUE Decision¹⁰¹:

[E]ach Party which has an agreed critical use should ensure that the criteria . . . of decision IX/6 [Methyl Bromide Decision] are applied when licensing, permitting or authorizing use of methyl bromide and that such procedure take into account available stocks.¹⁰²

In turn, the Methyl Bromide Decision states that "production and consumption, if any, of methyl bromide for critical uses should be permitted only if . . . [m]ethyl bromide is not available in sufficient quantity and quality from existing stocks of banked or recycled methyl bromide."¹⁰³ Together, NRDC argued, the Decisions make clear that the United States must use existing stocks of methyl bromide for its critical uses. Furthermore, NRDC argued that it was EPA's burden to demonstrate that it construed the Decisions' language reasonably, which NRDC did not believe that the EPA had done in the Final Rule.¹⁰⁴

99. Natural Res. Def. Council v. EPA, 464 F.3d 1, 5 (D.C. Cir. 2006); *see also* Final Opening Brief for Petitioner, *supra* note 67; Final Reply Brief for Petitioner, *NRDC v. EPA*, 464 F.3d 1 (No. 04-1438); Supplemental Brief for Petitioner, *NRDC v. EPA*, 464 F.3d 1 (No. 04-1438).

100. Final Opening Brief for Petitioner, *supra* note 67, at 17. This dispute involved a background issue of methyl bromide stocks disclosure. Prior to the notice of proposed rulemaking, EPA determined the amount of "existing stock" in the United States through requests to relevant businesses. EPA Proposed Rules, 69 Fed. Reg. 52,366, 52,375 (proposed Aug. 25, 2004). Each business claimed its response as confidential business information, which meant that EPA could choose to not disclose the information until completing a review of these claims following regulations. *Id.*; Final Brief for the Respondent at 36, *NRDC v. EPA*, 464 F.3d 1 (No. 04-1438). In its Final Rule, EPA acknowledged that it did not believe that the aggregate amount of methyl bromide stocks qualified as confidential business information, but that it was prohibited from disclosing the amount "due to the filing of complaints seeking to enjoin the Agency from its release," also known as reverse-FOIA (Freedom of Information Act) litigation. Protection of Stratospheric Ozone, 69 Fed. Reg. at 76,990. On September 7, 2006, a week after the D.C. Circuit rendered its decision in *NRDC v. EPA*, 464 F.3d 1, EPA disclosed the known existing stock amounts, which decreased from 16,400 to 7,700 metric tons between 2003 and 2006. *See* U.S. Environmental Protection Agency, Ozone Layer Depletion Regulatory Programs: Fact Sheet—EPA Release of Aggregated 2006 Methyl Bromide Inventory Data, http://www.epa.gov/spdpublic/mbr/MeBr_FactSheet2007.html (last visited Oct. 4, 2007).

101. Final Reply Brief for Petitioner, *supra* note 99, at 1–2.

102. *Id.* at 4 (quoting the CUE Decision (Decision Ex.I/3)).

103. *Id.* at 3–4 (quoting the Methyl Bromide Decision (Decision IX/6)).

104. *Id.* at 2.

In response, the EPA argued that it made a reasonable construction of the Decisions based upon the Parties' past construction of similar Decisions.¹⁰⁵ The EPA pointed to an unrelated CFC Decision made by the Parties at the Sixteenth Meeting of the Parties, and maintained that "the Parties found that it was reasonable for countries that obtain exemptions to maintain stockpiles that are sufficiently large to sustain operations for an entire year."¹⁰⁶ But these "stockpiles" refer to CFCs used for personal metered-dose asthma inhalers, and that Decision is not even remotely related to methyl bromide.¹⁰⁷ In the alternative, the EPA argued that the Decisions' use of the phrase "should ensure" is permissive and therefore negates NRDC's argument that the United States must use existing methyl bromide stocks for critical uses.¹⁰⁸

NRDC's third contention was that the EPA impermissibly allowed noncritical users to use the existing stock of methyl bromide against the implicit (but obvious) requirements of the Protocol. NRDC found "facially absurd" EPA's assertion that absent language to the contrary, noncritical users could use stocks.¹⁰⁹ Finally, NRDC argued that the EPA should have conducted a new study to determine the "minimum amount feasible." The EPA's prior response to this assertion in the Final Rule was simply that no new information was available since the initial feasibility study.¹¹⁰

NRDC's arguments presume that the Montreal Protocol Parties' Decisions are legally binding. The EPA and intervenor Methyl Bromide Industry Panel of the American Chemistry Council both argued, however, that the Methyl Bromide Decision and the CUE Decision have limited authority under the Protocol or Clean Air Act.¹¹¹ The Protocol is "silent on the issue of whether decisions made outside of the amendment and adjustment process are meant to be binding."¹¹² The Methyl Bromide Industry Panel argued that this silence in itself means that Decisions are nonbinding upon the parties since "treaty parties must be clear regarding

105. Final Brief for the Respondent, *supra* note 100, at 21–26.

106. *Id.* at 22 (citing Decision XVI/12).

107. Meeting of the Parties to the Montreal Protocol, Prague, Czech Rep., Nov. 22–26, 2004, *Report of the Sixteenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, 52, U.N. DOC. UNEP/OzL.Pro.16/17 (Dec. 16, 2004) (Decision XVI/12).

108. Final Brief for the Respondent, *supra* note 100, at 25.

109. Final Reply Brief for Petitioner, *supra* note 99, at 2.

110. Protection of Stratospheric Ozone: Process for Exempting Critical Uses From the Phaseout of Methyl Bromide, 69 Fed. Reg. 76,982, 76,989 (Dec. 23, 2004) (final rule) (codified at 40 C.F.R. pt. 82).

111. Supplemental Brief for the Respondent at 5, *Natural Res. Def. Council v. EPA*, 464 F.3d 1 (D.C. Cir. 2006) (No. 04-1438); Supplemental Brief for Intervenor at 8, *NRDC v. EPA*, 464 F.3d 1 (No. 04-1438).

112. Supplemental Brief for Intervenor, *supra* note 111, at 8.

their mutual commitments.”¹¹³ The EPA conceded that parts of the Decisions “are cognizable to the limited extent that they either are consensus decisions interpreting or applying a term in the Protocol.”¹¹⁴ However, the EPA argued that any purported prohibition on the use of existing methyl bromide stocks for noncritical uses derived from the CUE Decision falls outside of the scope of Article 2H “and the treaty in general.” The EPA came to this conclusion on the grounds that the purpose of the Protocol is to “address[] stratospheric ozone depletion by phasing out production and import, not by controlling use.”¹¹⁵

A. The D.C. Circuit’s First Decision: NRDC Does Not Have Standing

The D.C. Circuit initially dismissed NRDC’s case for lack of standing since the organization was unable to “establish that at least one of its members has standing in his own right.”¹¹⁶ Both NRDC and the court relied upon an affidavit by an EPA expert who predicted an additional ten deaths, 2,000 nonfatal skin cancer victims, and 700 cataract cases as a result of the additional methyl bromide released under the Final Rule.¹¹⁷ The court found the underlying assumptions of the expert’s findings questionable, and even if correct, too minuscule to find standing for even one member of NRDC’s large membership. The court likened NRDC’s assertion of standing to “saying that any citizen has standing to sue the National Aeronautics and Space Administration because it currently does not do enough to prevent meteorites from falling to Earth.”¹¹⁸ It also found baseless NRDC’s assertion that its members’ apprehensions were objective, given the low probability of harm due to additional exposure to ultraviolet radiation.¹¹⁹

B. The D.C. Circuit’s Second Decision: Nonjusticiable as a Political Matter

Upon petitions for and against rehearing, the D.C. Circuit decided to reconsider the standing issue.¹²⁰ The EPA expert originally built a quantitative model expressing annualized probability of harm to NRDC’s members. The court allowed the expert to further explain his affidavit in

113. *Id.*

114. Supplemental Brief for the Respondent, *supra* note 111, at 5–6.

115. *Id.* at 8.

116. Natural Res. Def. Council v. EPA, 440 F.3d 476, 480 (D.C. Cir.), *reh’g granted and withdrawn*, 464 F.3d 1 (D.C. Cir. 2006).

117. *Id.* at 481.

118. *Id.* at 484 (quoting *Baur v. Veneman*, 352 F.3d 625, 651 n.3 (2d Cir. 2003) (Pooler, J., dissenting)).

119. *Id.*

120. Natural Res. Def. Council v. EPA, 464 F.3d 1, 3 (D.C. Cir. 2006).

terms of lifetime risk since the court misperceived his conclusions in the first decision.¹²¹ The EPA's own estimation was that an individual's chance of developing a nonfatal skin cancer due to additional methyl bromide release resulting from the Final Rule is about one in 200,000 over one's lifetime. The court found this probability sufficient for standing since it could be estimated that two to four of NRDC's members would develop skin cancer as a result of the Final Rule.¹²²

Although NRDC finally jumped the standing hurdle, the court never reached the merits of the claim (even while acknowledging the validity of NRDC's complaint¹²³). Instead, it found the issue nonjusticiable, holding that under both the Montreal Protocol and the Clean Air Act, the methyl bromide critical use exemption process is a political process, and thus not cognizable in the U.S. court system.¹²⁴

The court went beyond this narrow holding to also discuss the potential constitutional issue of legislative delegation to an international organization. As discussed further in Part III, the court cited an article by Professor Julian Ku,¹²⁵ which argues that such modern treatymaking can be unconstitutional under the nondelegation doctrine.¹²⁶ Noting that the issues presented by the interaction between the Montreal Protocol and the Clean Air Act are unique and unsettled (and a matter of first impression),¹²⁷ the court echoed Ku's article when it stated that "Congress either has delegated lawmaking authority to an international body or authorized amendments to a treaty without presidential signature or Senate ratification, in violation of Article II of the Constitution."¹²⁸

The court's justification for its finding that this case is a political matter lay in the details of the Protocol itself. The Protocol does not include any language about the legally binding nature of the critical use exemptions in domestic courts.¹²⁹ In fact it does not mention "any specific

121. *Id.* at 7 & n.6.

122. *Id.* at 7.

123. *Id.* at 11 (noting the inconsistency of EPA's Final Rule with Decision IX/6 and Decision Ex.I/3).

124. *Id.* at 9 ("It is far more plausible to interpret the Clean Air Act and Montreal Protocol as creating an ongoing international political commitment rather than a delegation of lawmaking authority to annual meetings of the Parties.").

125. Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 77-78 (2000).

126. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."). This section has been interpreted to mean that only Congress may legislate, i.e., the executive and judicial branches may not legislate, and Congress may not delegate its legislative powers to any other body. Professor Ku is careful to point out that his interpretation is likely to receive little academic support. Ku, *supra* note 125, at 73.

127. Natural Res. Def. Council v. EPA, 464 F.3d 1, 9 (D.C. Cir. 2006).

128. *Id.* at 8.

129. *Id.* at 9.

conditions accompanying the critical-use exemption.”¹³⁰ The court found that while courts may interpret ambiguous treaty terms, the Methyl Bromide Decision and CUE Decision are neither part of the treaty nor ambiguous; rather, each fills a gap left in the Protocol.¹³¹ The Methyl Bromide Decision fills a gap by explaining how the critical use exemption works, and the CUE Decision fills a second gap by dictating the United States’ actual critical use exemption quantity. Notably, neither of the Decisions have been incorporated into domestic law. These gap fillers, in the court’s opinion, constitute the product of an “agreement to agree” between the United States and the Protocol Parties, which is not enforceable in contract.¹³² Under a contractual view of international law, an agreement to agree is not enforceable in domestic courts.¹³³

III. ANALYSIS

NRDC v. EPA challenges the United States’ first application for a methyl bromide critical use exemption under the terms of the Montreal Protocol. Even though the United States just submitted its fifth application for its 2009 critical use exemption to the Parties for consideration before the Nineteenth Meeting of the Parties in 2008, not much has changed since the first 2005 application. The analysis in this Note is therefore still relevant to current U.S. practice.¹³⁴ For the past five years the United States has requested nearly the same exemption amount as approved the previous year, and the Protocol Parties consistently approve 90 to 95 percent of the request.¹³⁵ Under both the 2006 and the current 2007 final rules pertaining to the EPA’s approval of methyl bromide use in the United States, the EPA continued to assert that “EPA does not believe the language in the Protocol or subsequent Decisions of the Parties indicates that inventory should be reserved for critical users.”¹³⁶ Given the United States’ powerful economic and political

130. *Id.*

131. *Id.*

132. *Id.* at 9–10 (citing 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 3:5, at 223–24 & n.17 (4th ed. 1990)).

133. *Id.*

134. For access to the entire 2009 application, see U.S. EPA, United States Nomination for Critical Use Exemptions from the 2009 Phaseout of Methyl Bromide, http://www.epa.gov/ozone/mbr/2009_nomination.html (last visited Oct. 4, 2007).

135. *See id.*

136. Protection of Stratospheric Ozone: The 2007 Critical Use Exemption from the Phaseout of Methyl Bromide, 71 Fed. Reg. 75,386, 75,399 (Dec. 14, 2006) (final rule) (codified at 40 C.F.R. pt. 82); *accord* Protection of Stratospheric Ozone: The 2006 Critical Use Exemption From the Phaseout of Methyl Bromide, 71 Fed. Reg. 5,985, 6,002 (Feb. 6, 2006) (final rule) (“Decision Ex. II/1 does not require that individual Parties prohibit use of inventory by users whose uses fall outside the categories of agreed critical uses. Nothing in the Protocol or [Clean Air Act] mandates that EPA limit drawdown from existing inventory for such uses.”).

status, it is perhaps not surprising that the Protocol Parties have failed to use the Protocol's sanctioning provisions against the United States for this continuing practice of using more methyl bromide than approved by the international organization.

The D.C. Circuit deemed the CUE Decision a political matter and entertained the idea that if the Decisions had legal effect, the CUE process would be unconstitutional. Given this remarkable suggestion, it is important to understand several things. First, what makes a treaty domestically enforceable? Next, when a treaty is unclear, how is it to be interpreted and applied domestically? And finally, what roles do the Executive and Congress play in treaty interpretation, particularly if the treaty's terms are incorporated into domestic law? The answers to these questions are controversial. This Part provides a basic background on the interaction between international treaties and domestic law, but a full treatment of the subject matter is outside the scope of this Note. Next, this Part asks whether or not the court's suggestion about the unconstitutionality of the Protocol is reasonable. The analysis closes by examining a representative portion of a U.S. critical use exemption application and asks whether or not the United States is behaving fairly within the international forum.

A. Treaties and Domestic Law

The Constitution authorizes the power of treaties in Article VI, section 2: "all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land".¹³⁷ Competing theories of "monism" and "dualism" in treaty interpretation structure how a country approaches domestic enforcement of a treaty.¹³⁸ Under the monism theory, international law is superior to domestic law and the legislative, executive, and judicial branches are all bound in their capacities to abide by it.¹³⁹ Under this theory, all treaties are "self-executing," which means that the treaty creates domestic law, recognizable by courts, without being adopted by the domestic legislative body.¹⁴⁰ Under the competing dualism theory, international and domestic law are separate, and "a state is responsible to other states for carrying out mutual obligations, but each state determines the means and form by which it carries out those duties."¹⁴¹ A dualist state recognizes the binding

137. U.S. CONST. art. VI, § 2.

138. George Slyz, *International Law in National Courts*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 71, 72–73 (Thomas M. Franck & Gregory H. Fox eds., 1996).

139. *Id.* at 73.

140. JOHN M. ROGERS, INTERNATIONAL LAW AND UNITED STATES LAW 77 (1999).

141. Slyz, *supra* note 138, at 73.

nature of a treaty only after incorporating it into its domestic law.¹⁴² In reality, most countries, including the United States, employ a blend of the monist and dualist approaches to treaties.¹⁴³ The United States recognizes a treaty as self-executing when “the treaty was intended, as a matter of international law, to stipulate the immediate creation of rights cognizable in domestic courts.”¹⁴⁴ As a matter of practice, the Senate often declares a treaty non-self-executing as a condition of its consent.¹⁴⁵

When the U.S. Senate gave its consent to the Montreal Protocol no mention was made of the self-executing nature of the treaty.¹⁴⁶ The Montreal Protocol was incorporated by reference into the Clean Air Act via the normal legislative process requiring approval of the House of Representatives and the Senate, followed by presentment to the President, subject to veto.¹⁴⁷

B. “New International Law”

Multilateral treaties like the Montreal Protocol are not what the Constitution’s Framers envisioned when they contemplated treaty law. Their vision of treaties was limited to sovereign-to-sovereign agreements created between two countries and premised upon each country’s absolute sovereignty.¹⁴⁸ “New international law” is characterized by the shift from nation-state administration of international law to administration by international organizations, like the United Nations or the World Trade Organization.¹⁴⁹ Multilateral treaties are now commonplace and created through a process of “international legislation,” often affecting a sovereign nation’s relationship with its own citizens.¹⁵⁰ Some international organizations now seem to consist of lawmakers who regulate private action within member states rather than regulating only state-to-state interactions.¹⁵¹

142. *Id.*

143. *Id.* at 75. The concept of a self-executing treaty is not addressed in the U.S. Constitution and was not contemplated by the Constitutional Framers. Chief Justice John Marshall first advanced the idea in *Foster v. Neilson*, 27 U.S. 253, 314 (1829). Slyz, *supra* note 138, at 81.

144. ROGERS, *supra* note 140, at 77.

145. Slyz, *supra* note 138, at 88.

146. See S. Res. 312, 100th Cong., 134 CONG. REC. S2109 (Mar. 14, 1988) (enacted).

147. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, 2648 (codified at 42 U.S.C. §§ 7671–7671q (2006)).

148. Ku, *supra* note 125, at 79–80.

149. *Id.* at 71, 79, 84. Professor Ku argues that some aspects of modern international law are unconstitutional and that the courts can better promote political accountability through a formalist rather than functionalist approach to interpreting the constitutionality of international delegations. *Id.* at 77.

150. *Id.* at 79, 84.

151. *Id.* at 85.

This delegation of legislative power to international organizations may reasonably be construed as an encroachment upon sovereignty. Professor Ku argues that the organizational structure of organizations such as the United Nations and the World Trade Organization “circumvents th[e] basic constitutional design” since “the Constitution plainly intended the creation of international obligations to be exercised by one, or both, of the federal political branches.”¹⁵²

The Montreal Protocol fits squarely into the “new international law” category as a multilateral treaty meant to impose obligations upon signatory nations’ private producers of ozone-destroying substances. The Protocol in effect forces *all* nations to protect the environment and global public health: through trade restrictions, even nonsignatory nations are punished for failing to be involved or failing to comply with the Protocol.¹⁵³

C. Delegation of Legislative Authority to an International Organization

The constitutionality of international delegations is an unsettled issue—until *NRDC v. EPA*, it had never even been addressed in a court opinion. The lack of case law is due in part to courts’ reluctance to hear foreign policy matters on their merits. Foreign policy is the classic nonjusticiable political issue;¹⁵⁴ throughout U.S. history, courts have deferred to the executive and legislative branches to work through foreign issues so that the United States may speak consistently and with one voice without judicial interference.¹⁵⁵ However, when terms of an international treaty have been incorporated into domestic law, as is the case with the Montreal Protocol, the treaty’s interpretation falls within the realm of judicial authority.

As mentioned above, *NRDC v. EPA* hints at the issue of whether Congress violated the nondelegation doctrine by allowing the Parties to

152. *Id.* at 99, 100. But see Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1497 n.15 (2004) (listing scholars who find nothing “unduly problematic about international delegations”).

153. See *supra* note 38 and accompanying text.

154. A court may only consider “cases” and “controversies,” U.S. CONST. art. III, § 2, and may therefore not issue advisory opinions or involve itself in political matters. See *Baker v. Carr*, 369 U.S. 186, 216 (1962) (holding that a political question demonstrates, among other things, a “lack of judicially discoverable and manageable standards for resolving it” or has the “potentiality of embarrassment from multifarious pronouncements by various departments on one question”). Matters of an advisory or political nature are “nonjusticiable.”

155. See *Baker*, 369 U.S. at 211 (“many such [foreign relations] questions uniquely demand single-voiced statement of the Government’s views”). See generally THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992) (acknowledging yet challenging the historic judicial role in foreign affairs).

determine the United States' critical use exemption. The nondelegation doctrine is derived from Article I, section 1 of the Constitution, and means that "Congress may not constitutionally delegate its legislative power to another Branch of government."¹⁵⁶ The doctrine is rooted in the constitutional value of the separation of powers between the three branches of government.¹⁵⁷ However, not since the famous 1935 "sick chicken" case of *A.L.A. Schechter Poultry Corp. v. United States* has the Supreme Court struck down a statute on nondelegation grounds,¹⁵⁸ the 1999 Supreme Court decision in *Whitman v. American Trucking Ass'n*s seems to have put the issue of nondelegation in the domestic context to rest.¹⁵⁹

In reality, Congress has extremely broad authority to delegate legislative interpretation authority to domestic executive branch agencies, so long as that authority is statutorily confined and conveys an "intelligible principle" for the agency to follow.¹⁶⁰ This delegation to an agency such as the EPA is considered valid for several policy reasons. Agencies are able to better acquaint themselves with and become experts in the intricacies of issues of national importance. More importantly, agencies retain their accountability to the public via the political process. Congress, the federal judiciary, and the President all have broad oversight and review authority over agencies. Congress may require periodic reports on an agency's process and hold hearings or conduct an investigation when an issue of concern arises. The Administrative Procedure Act prescribes agency procedures and provides a judicial remedy to those harmed by arbitrary agency action.¹⁶¹ And since the Reagan era, the President has also held agencies to a high standard of accountability via the stringent procedures outlined in Executive Orders 12,291 (Reagan), 12,866 (Clinton), and 13,422 (G.W. Bush).¹⁶²

These political controls are typically not present in lawmaking delegation to an international organization. One of the main arguments

156. *Touby v. United States*, 500 U.S. 160, 165 (1991).

157. *Id.*; see also *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

158. 295 U.S. 495 (1935) (overturning the National Industrial Recovery Act (NIRA) on grounds that subdelegation of legislative functions by the President to industry groups was too broad a delegation and that NIRA imposed no constraints on the delegation).

159. 531 U.S. 457, 458 (2001); see also *Swaine*, *supra* note 152, at 1544 (noting that the nondelegation doctrine "plainly lacks vitality").

160. *Am. Trucking*, 531 U.S. at 458 (holding that so long as Congress states an "intelligible principle" in its delegation to an agency, the delegation is constitutional).

161. Administrative Procedure Act, codified in scattered sections of 5 U.S.C. (2006).

162. Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007); Exec. Order No. 12,866, 3 C.F.R. § 638 (1993–2000), reprinted as amended in 5 U.S.C. § 601 (2000); Exec. Order No. 12,291, 3 C.F.R. § 128 (1981–1993). For a discussion of these executive orders see Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 701 (2007).

against international delegation is lack of accountability.¹⁶³ While delegation to domestic agencies has many checks built in to the system, this is not necessarily true with delegations to international organizations. An international organization charged with solving a problem of worldwide significance has little incentive to respond to the well-reasoned voice of any one nation's local populace.¹⁶⁴ For instance, U.S. strawberry growers have less influence with the Montreal Protocol Parties than with a domestic agency such as the EPA. An international organization's lack of accountability to (or immunity from persuasion by) special interest groups understandably causes frustration on the part of affected parties who are accustomed to their positions of power within the U.S. political system.¹⁶⁵

In an article referenced in the *NRDC v. EPA* decision,¹⁶⁶ Professor Edward Swaine summarizes the controversy surrounding the so-called delegation of legislative power to international organizations, and makes it clear that even if the academics' arguments are persuasive, the courts are highly unlikely to ever invoke the nondelegation doctrine in the foreign affairs context.¹⁶⁷ Courts are reluctant to become involved with matters of foreign policy where it is important that the nation speak with one voice. When the court deems an issue "political," as is frequently the case in treaty matters,¹⁶⁸ it is unconstitutional for the court to further involve itself in the matter.¹⁶⁹ Because the President negotiates, signs, and

163. See Ku, *supra* note 125, at 121–26.

164. See *id.* at 124 (arguing that without executive oversight, international organizations are not held accountable to private parties); cf. John O. McGinnis, *The Political Economy of Global Multilateralism*, 1 CHI. J. INT'L L. 381, 385 (2000) (noting that international organizations with complex rules and plenary power may be vulnerable to special-interest capture).

165. For instance, the United States' cut flower industry was very upset that Italy's cut flower industry received a methyl bromide critical use exemption while the United States did not. There is also much concern within the strawberry industry about the economic advantage that Mexico and China have as "developing nations," since their methyl bromide phaseout is not required to be complete until 2015. *2005 Hearing*, *supra* note 84.

166. Natural Res. Def. Council v. EPA, 464 F.3d 1, 9 (D.C. Cir. 2006).

167. Swaine, *supra* note 152, at 1551 ("asking the courts to revert to a more stringent approach [to constitutional delegation concerns]—in the international context to boot—is likely to encounter fatal resistance").

168. David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1441 (1999).

169. U.S. CONST. art. III, § 2, cl. 1 (the "case or controversy" clause); *Baker v. Carr*, 369 U.S. 186, 217 (1962) (articulating a six-part test to determine, case-by-case, whether or not a question is political and therefore nonjusticiable). After *Baker v. Carr*, the Court has found only two questions nonjusticiable as a political matter in the forty years since the decision. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 269–70 (2002). In the aftermath of the Supreme Court's 2000 decision in *Bush v. Gore*, 531 U.S. 98 (2000), Professor Rachel Barkow calls for a return to "judicial modesty" via a revival of the political question doctrine. *Id.* at 319. But see

most frequently must interpret the treaty, the courts are understandably deferential to an executive branch interpretation.¹⁷⁰ The political question doctrine is a difficult issue, and “[v]ery significant questions remain today as to the proper respect U.S. courts should extend to the President’s treaty interpretations.”¹⁷¹

In *NRDC v. EPA* the D.C. Circuit found NRDC’s claims nonjusticiable, holding that it is “far more plausible to interpret the Clean Air Act and Montreal Protocol as creating an ongoing international political commitment rather than a delegation of lawmaking authority to annual meetings of the Parties.”¹⁷² The court pointed to the obvious fact that the Decisions that prescribe the critical use exemption process are not within the Protocol itself. Furthermore, the Protocol is silent regarding the domestically binding nature of critical use exemption implementation. But does this mean that the court could not look at the Decisions themselves in interpreting the treaty? The Supreme Court has stated that “[i]n interpreting a treaty it is proper, of course, to refer to the records of its drafting and negotiation.”¹⁷³ A court may also “look beyond the written words to the . . . practical construction adopted by the parties.”¹⁷⁴ But as with any statutory construction, “the analysis must begin, however, with the text of the treaty.”¹⁷⁵

Article 2H of the Montreal Protocol simply states that the methyl bromide ban “will apply save to the extent that the Parties *decide to permit* the level of production or consumption that is necessary to satisfy uses *agreed by them* to be critical uses.”¹⁷⁶ The phrases “decide to permit” and “agreed by them” anticipate future action requiring a course of negotiations left to the reader’s imagination. How will the Parties decide to permit methyl bromide consumption? By what criteria do they “agree” that methyl bromide use is critical? The Decisions contain the answers to these questions, of course, but a Decision can be changed at any time by two-thirds vote of the Parties without releasing an opposing

Bederman, *supra* note 168 (arguing that courts give too much deference to the executive branch in treaty matters).

170. Bederman, *supra* note 168, at 1462–63.

171. *Id.* at 1462.

172. Natural Res. Def. Council v. EPA, 464 F.3d 1, 9 (D.C. Cir. 2006).

173. *Air France v. Saks*, 470 U.S. 392, 400 (1985) (interpreting the meaning of the word “accident” in the Warsaw Convention); *see also De Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) (“It is a general principle of construction, with respect to treaties, that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them.”).

174. *Air France*, 470 U.S. at 396 (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431–32 (1943)).

175. *Id.* at 396–97 (citing *Maximov v. United States*, 373 U.S. 49, 53–54 (1963)).

176. Montreal Protocol, *supra* note 1, art. 2H(5) (emphasis added).

nation's obligations under the Protocol.¹⁷⁷ If the court were to deem these Decisions "law," the annual Decision-making process would constitute an outright alteration of U.S. law without U.S. consent—a fine example of the delegation problem that Professor Ku protests. (It should be noted that the Methyl Bromide Decision and CUE Decision were adopted by consensus of the Parties.¹⁷⁸) When the D.C. Circuit found the Article 2H language to be an "agreement to agree" it avoided a "significant constitutional problem[]"¹⁷⁹ and gave the United States more flexibility to maneuver in the international arena. Unfortunately, it also gave the EPA more flexibility to ignore the crystal-clear intent of the Montreal Protocol Parties.

The court's determination that the 2005 critical use exemption process is a political matter is reasonable. But the decision does not resolve the issue of the constitutionality of certain multilateral treaty procedures. If Congress were to respond to *NRDC v. EPA* by incorporating the Methyl Bromide Decision by reference into the Clean Air Act, expressly allowing the Parties to determine the United States' critical use exemption, would the court hold this portion of the Act unconstitutional on nondelegation grounds? According to Professor Swaine, probably not.¹⁸⁰ After all, the last time the D.C. Circuit tried to utilize the nondelegation doctrine to strike down a domestic statute—the Clean Air Act—the Supreme Court overruled the nondelegation doctrine portion of the decision 9–0.¹⁸¹ In the foreign affairs context, "[t]he nondelegation doctrine becomes still feebler, if that is possible."¹⁸² The Executive Branch has always been given special deference in the arena of foreign affairs, allowing the President more freedom to negotiate.¹⁸³ There is a dearth of caselaw regarding delegation to international organizations, a situation that is not likely to change.

177. An "amendment" to the Protocol requires that each nation ratify the treaty in order to be subject to that amendment. An adjustment, however, is binding upon signatories without ratification. The Clean Air Act binds the United States to adjustments—an arguably unconstitutional portion of the law.

178. *1997 Montreal Report*, supra note 3, at 24 (¶ 97); *2004 Montreal Report*, supra note 83, at 13 (¶ 80) (the report does not expressly state that the CUE Decision was adopted by consensus, but there is no mention of a vote).

179. Natural Res. Def. Council v. EPA, 464 F.3d 1, 8 (D.C. Cir. 2006).

180. Swaine, *supra* note 152, at 1551.

181. Am. Trucking Ass'n v. EPA, 175 F.3d 1027 (D.C. Cir. 1999), *overruled on delegation issue sub nom.* Whitman v. Am. Trucking Ass'n, 531 U.S. 457 (2001).

182. Swaine, *supra* note 152, at 1546.

183. See *id.* (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), a case now considered to represent the outer bounds of judicial deference to presidential autonomy).

D. Analyzing a United States Critical Use Exemption Application

Careful examination of a U.S. methyl bromide critical use exemption nomination application is useful in assessing the fairness of U.S. action before the Protocol Parties. An application is enormous—the 2009 application (prepared in 2006) was about 700 pages in length¹⁸⁴—and very detailed. The application is broken down by methyl bromide use area (e.g., Strawberries, Commodities, Forest Seedlings) since method of application, economic impact, and other factors can vary widely from one use to another. The U.S. Department of State submits the application to the Montreal Protocol Secretariat for review by the Methyl Bromide Technical Options Committee.¹⁸⁵ MBTOC evaluates the nomination based upon the criteria established in the Methyl Bromide Decision. The committee may ask clarifying questions of the nominating party before making and forwarding its recommendation to TEAP. TEAP then develops a recommendation for an open ended working group, which in turn sends a final recommendation to all of the Parties for consideration at the annual Meeting of the Parties. The Parties approve a certain exemption amount via Decision.¹⁸⁶

The 2009 “Commodities” nomination is representative of the various critical use exemption application sections.¹⁸⁷ This application addresses use of methyl bromide for post-harvest pest control for walnuts, pistachios, dried fruits (prunes, raisins and figs), dates, and dried beans.¹⁸⁸ Each country must justify its request for methyl bromide use by explaining why specific alternative pest control treatments are not economically or technically feasible.¹⁸⁹ Then the applicant must explain what it is doing to eliminate methyl bromide use.¹⁹⁰ In the 2009 Commodities nomination, the EPA proffered both economic and technical justifications for farmers’ inability to use alternative treatments such as sulfuryl fluoride, phosphine, heat treatment or cold treatment.

184. See U.S. Environmental Protection Agency, Ozone Layer Depletion Regulatory Programs: U.S. Nomination for Methyl Bromide Critical Use Exemptions from the 2009 Phaseout of Methyl Bromide, http://www.epa.gov/spdpublic/mbr/2009_nomination.html (last visited Oct. 28, 2007).

185. See, e.g., Letter from Claudia A. McMurray, Deputy Assistant Sec'y for the Env't, U.S. Dept. of State, to Marco Gonzales, Executive Sec'y, Secretariat for the Montreal Protocol (Jan. 31, 2005), available at <http://www.epa.gov/ozone/mbr/CUN2005/CoverletterUSGMB2005.pdf>.

186. TECHNOLOGY AND ECONOMIC ASSESSMENT PANEL & METHYL BROMIDE TECHNICAL OPTIONS COMM., HANDBOOK ON CRITICAL USE NOMINATIONS FOR METHYL BROMIDE 9–11 (2003), available at <http://ozone.unep.org/MBTOC-CriticalUsesHandbook.pdf>.

187. U.S. Dep’t of State, Methyl Bromide Critical Use Renomination Nomination for Structures, Commodities or Objects (Dec. 21, 2006) [hereinafter 2009 Commodities Nomination], available at http://www.epa.gov/spdpublic/mbr/cun2009/cun2009_Commodities.pdf.

188. *Id.* at 1.

189. See, e.g., *id.* at 11–14, 17–20.

190. See, e.g., *id.* at 21–24.

For instance, a phosphine fumigation treatment for walnuts requires three to ten days.¹⁹¹ When compared to twenty-four-hour methyl bromide treatment in a fast-paced peak harvest environment, alternative treatment can have a significant impact on ability to produce a high volume of commodity.¹⁹² California prune producers¹⁹³ and dried fruit producers claim that switching to phosphine fumigation treatment would add an extra eighty-four days to its annual cycle.¹⁹⁴ In the economic evaluation portion of the application, the unavailability of methyl bromide eliminates eighty-four production days, thus lowering production volumes and altering the profit margin for the dried fruit industry from the present day profit of 5 percent down to a 16.8 percent loss.¹⁹⁵ Overall, the nomination justifies methyl bromide use on the grounds that alternatives are expensive, are not amenable to the fast-paced harvest schedule, and their use would require large capital expenditures (e.g., facility upgrades).

The 2009 Commodities nomination refers to a number of alternatives to methyl bromide currently in use and also to ongoing research in the pursuit of the elimination of methyl bromide use.¹⁹⁶ These efforts include, *inter alia*, integrated pest management techniques, use of low-volatility pesticides where possible, use of alternative fumigants, research on new techniques, and annual joint EPA–Department of Agriculture meetings on methyl bromide alternatives.¹⁹⁷ The numbers and justifications seem reasonable, but when comparing the 2006 through 2009 nomination applications, it becomes clear that the United States relies upon the exact same language and scientific research year after year to justify its annual requests despite a purported massive research effort.¹⁹⁸ Of the twenty-four scientific articles referenced in the 2009

191. *Id.* at 11.

192. Integrated pest management techniques have been incorporated into post-harvest practices, yet the nomination makes clear that consumers have no tolerance for any pest presence in food, requiring a 100 percent pest kill using fumigation. *Id.* at 10.

193. California produces 99 percent of the domestic and 70 percent of the world prune supply. *Id.* at 19.

194. *Id.*

195. *Id.* at 20.

196. *Id.* at 10–14, 22–24.

197. *Id.*

198. Compare 2009 Commodities Nomination, *supra* note 187, with U.S. Dep’t of State, Methyl Bromide Critical Use Nomination for Post Harvest Use for Commodities (Jan. 24, 2006) (2008 Commodities Nomination), available at http://www.epa.gov/ozone/mbr/CUN2008/CUN2008_Commodities.pdf; U.S. Dep’t of State, Methyl Bromide Critical Use Nomination for Post Harvest Use for Commodities (Jan. 31, 2005) (2007 Commodities Nomination), available at <http://www.epa.gov/ozone/mbr/CUN2005/CUN2005CommoditiesUSA.pdf>; and U.S. Dep’t of State, Methyl Bromide Critical Use Nomination for Post Harvest Use for Commodities (undated) [hereinafter 2006 Commodities Nomination], available at http://www.epa.gov/ozone/mbr/2004_USCommodities.pdf.

application, one-third were published prior to 1997 (some were published in the 1980s) and half were published prior to 2002.¹⁹⁹ Only four references were published in 2005 or later. Comparison of the 2006 and 2009 Commodities application reveals only three new studies exploring the phaseout of methyl bromide: use of electromagnetic energy, vacuum techniques, and sulfuryl fluoride/propylene oxide combinations.²⁰⁰ The application is internally inconsistent: it claims that research into alternatives development is moving forward, yet year after year the United States fails to cite to any progress.

There are several explanations for the internal inconsistency of the application. One is that the United States can simply get away with a sloppy application that does not accurately reflect current research and scientific reality. Or perhaps no research progress has been made in the past ten years despite federally funded programs designed for this purpose. Most likely, however, is the possibility that the United States is overstating its dependence on methyl bromide in order to gain an economic advantage. How else can the United States lower its methyl bromide production levels ten percent year after year with no demonstrated improvement in alternatives research and availability? It seems that the United States is not playing fair in the international forum.

CONCLUSION

There are many ways to address the EPA's refusal to comply with the Montreal Protocol critical use exemption procedures, but three stand out as the most logical approaches. First, Congress could amend the Clean Air Act to incorporate Montreal Protocol Decisions by reference. This approach would constitute a blatant delegation of legislative authority to an international organization outside of formal treaty ratification procedures. It therefore presents the risk of a court making a precedent-setting determination that certain international decisionmaking procedures are unconstitutional. Such a result would limit the United States' ability to engage in environmental treatymaking using the techniques that have been the key to the Protocol's success. A second approach is to adjust Article 2H of the Montreal Protocol so that it is more specific about critical use exemption procedures or domestic enforceability. This approach is problematic in two ways. First, it is obviously difficult to obtain a two-thirds vote to pass a treaty adjustment, and second, it is still vulnerable to a strong view of the nondelegation argument against multilateral treatymaking. Even if the Protocol were to outline specific procedures for determining the critical use exemption, it

199. 2009 Commodities Nomination, *supra* note 187, at 25–26.

200. *Compare id.* at 22, with 2006 Commodities Nomination, *supra* note 198.

would still be impractical to incorporate each country's annual critical use exemption into the Protocol. The EPA argues that it follows the Methyl Bromide Decision; the problem is that it does not follow the annual CUE Decision. There is simply no practical way to incorporate the annual CUE Decision into the Protocol.²⁰¹

A holding that participation in international treatymaking organizations is an unconstitutional delegation of legislative power would greatly impair the United States' ability to engage in flexible multilateral cooperative decisionmaking through innovative (and usually effective) processes. This Note's conclusion is that the Protocol and Clean Air Act should be left as they are—the critical use exemption process belongs in the realm of the nonjusticiable political issue. Stronger congressional oversight, continuing pressure by groups such as NRDC, and media scrutiny represent better solutions to international decisionmaking than the disastrous consequences of a Supreme Court holding (however unlikely) that Congress may not delegate decisionmaking authority to an international organization. Recent shifts in public, political, and judicial awareness of the environmental consequences of global warming indicate that the United States may be on the verge of a major shift toward environmental responsibility.²⁰² If so, it is possible that the EPA will no longer be able to bow to agricultural interests through the methyl bromide critical use exemption process.

201. Even if the Parties were to incorporate the critical use exemption amounts into the Protocol via amendment, the United States would not be subject to the new requirements until the Senate ratified the "new" treaty. By the time the Senate ratified the treaty, that particular exemption amount would likely no longer be applicable. An alternative approach would be to alter the Protocol using the adjustment process since under the Clean Air Act, the United States follows adjustments made to the Protocol. *See supra* note 42 and accompanying text. But the Act's recognition of adjustments is subject to the same constitutional criticism as that expressed by the D.C. Circuit in *NRDC v. EPA*. *See supra* note 177.

202. *See, e.g.*, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (holding that EPA may regulate greenhouse gases such as carbon dioxide as pollutants); Green Mountain Chrysler Dodge Plymouth Jeep v. Crombie, 508 F. Supp. 2d 295 (D. Vt. 2007) (holding that Vermont's vehicular greenhouse gas emissions regulations, which are based upon the California state standard and stricter than the federal standard, are not preempted by the federal standard); Editorial, *Climate of Change*, ST. LOUIS POST-DISPATCH, Oct. 24, 2007, at B8 (praising the Kansas Department of Health and Environment for its denial of a coal plant permit due to greenhouse gas emissions—the first such denial in the United States); Nobelprize.org, The Nobel Peace Prize 2007, http://nobelprize.org/nobel_prizes/peace/laureates/2007/ (former Vice President Al Gore and the Intergovernmental Panel on Climate Change shared the 2007 Nobel Peace Prize "for their efforts to build up and disseminate greater knowledge about man-made climate change, and to lay the foundations for the measures that are needed to counteract such change.") (last visited Oct. 28, 2007).