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Breach Avoidance or Treaty Avoidance?: The Problem of Over-compliance and U.S. Ratification of the Basel Convention on Hazardous Wastes

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**Breach Avoidance or Treaty Avoidance?: The Problem of Over-compliance and U.S.
Ratification of the Basel Convention on Hazardous Wastes**

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Breach Avoidance or Treaty Avoidance?: The Problem of Over-compliance and U.S. Ratification of the Basel Convention on Hazardous Wastes

Abstract

Over the past two decades, the failure of the United States to ratify a string of global multilateral environmental agreements has become a significant source of frustration for environmentalists and diplomats. The common perception is that Washington politics is to blame. The problem has even led to scholarly suggestions that any new climate agreement coming out of the Paris negotiations later this year could be entered into by the U.S. as an Executive Agreement rather than a Senate-approved treaty.

Delay has been uniquely serious, however, with respect to the 1989 Basel Convention on Hazardous Wastes. Signed under the elder President Bush and approved by the Senate in 1992, the agreement has remained stuck in legal limbo for almost a quarter of a century – unratified and thus without U.S. membership.

In this article, we dispute the common perception that politics is the sole reason for ratification delays. Rather, a *legal* issue, which has received little attention, has proven to be an equally significant impediment - whether U.S. law provides adequate authority for domestic agencies to carry out treaty obligations. With respect to Basel Convention ratification, it has been commonly believed that further implementing legislation is necessary. Similar assessments of inadequate domestic implementing authority apply to other pending MEAs.

We make two central points in this article. First, with respect to the Basel Convention specifically, a careful review of existing legal authorities reveals that the Executive Branch already has, at this point in time, sufficient authority to implement Convention obligations.

Second, we argue that the Executive Branch needs to reconsider the underlying premises for ratification. Instead of conditioning ratification on the ability to achieve perfect compliance or “over-compliance,” we argue that a more appropriate standard is “substantial compliance.” The relaxed standard would ease ratification not only for Basel but other MEAs as well. It would also ensure that breach avoidance, the purpose of over-compliance, does not simply become treaty avoidance.

Ultimately, the promise that multilateral environmental agreements hold for helping our global environment lies both in the specific rules and obligations that they create for immediate action as well as in their development of institutions and entrenchment of environmental norms and values necessary for long-term behavior change. Effective realization of that promise, however, will require the full commitment of the U.S., which can only come with full membership.

**Breach Avoidance or Treaty Avoidance?: The Problem of Over-Compliance and U.S.
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Breach Avoidance or Treaty Avoidance?: The Problem of Over-compliance and U.S. Ratification of the Basel Convention on Hazardous Wastes

By Tseming Yang¹ and C. Scott Fulton²

Introduction

Since the 1990s, the world has seen the emergence of a set of global multilateral environmental agreements (MEAs) designed to address urgent planetary challenges. They range from the UN Framework Convention on Climate Change and its 1997 Kyoto Protocol, to the 1992 Convention on Biological Diversity, to the most recent chemicals and pesticide focused agreements, the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the 2001 Stockholm Convention on Persistent Organic Pollutants. Even though the United States has been a critical player in shaping these environmental agreements and even an enthusiastic supporter, signing them all, it has failed to ratify most of them. As these global MEAs have attracted widespread participation, gradually achieving near-universal international membership, the U.S. has curiously remained among the few hold-out non-member states to these treaties.

Over the past two decades, the U.S. track-record on environmental treaty ratification has been so poor that it has prompted calls for more concerted efforts at ratification.³ And in fretting about the ratification prospects of a new climate change agreement coming out of the expected Paris climate summit later this year, it has been facetiously suggested that “the U.S. will not ratify any treaty unless it has to do with fish.”⁴

¹ Professor of Law, Santa Clara University School of Law; former Deputy General Counsel (2010-2012), U.S. Environmental Protection Agency. The article benefited greatly from comments by colloquia presentations at the University of San Francisco and at Santa Clara University. I am grateful to David Sloss, Naomi Roht-Arriaza, and Michelle Oberman for comments on prior drafts. Devani Adams provided excellent research and editing assistance; Victoria Loomis, Ashley Albiani, and Michael Kim provided additional research. Librarian Mary Sexton was invaluable in assisting with legislative history.

² President, Environmental Law Institute; former General Counsel (2009-2013), Acting Deputy Administrator (2009), Acting Assistant Administrator for International Affairs (2006-2009), U.S. Environmental Protection Agency.

³ See, e.g., Center for Progressive Reform, *Reclaiming Global Environmental Leadership: Why the United States Should Ratify Ten Pending Environmental Treaties* (2012), available at http://www.progressivereform.org/articles/international_environmental_treaties_1201.pdf; and see John Knox, “The United States, Environmental Agreements, and the Political Question Doctrine,” 40 N.C. J. Int’l L. & Com. Reg. 1 (2015).

⁴ Joshua Keeting, *The U.S. Will Not Ratify any Treaty Unless It Has to Do With Fish*, available at http://www.slate.com/blogs/the_world/2014/08/28/obama_s_new_international_climate_change_strategy_how_do_you_negotiate_treaties.html. At least one scholar has already suggested that the U.S. could bypass the Senate and join an agreement coming out of the Paris negotiation as an Executive Agreement. David A. Wirth, *The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?*, 39 Harv. Envtl. L. Rev. 515, 566 (2015).

Undoubtedly, the question of U.S. participation in MEAs has major implications for ongoing and future environmental treaty negotiations, including the pending climate negotiations. Linger uncertainty about U.S. ability or willingness to join and fulfill its part of internationally negotiated bargains not only undermines U.S. credibility on international environmental cooperation, but it also diminishes the willingness of treaty negotiation partners to accommodate U.S. interests and requests in the design and drafting of agreements.

Within conventional wisdom, the cause of the problem is generally seen as political inertia and Washington dysfunction manifested in the Senate's stalled advice and consent process. Senate approval has traditionally been sought before the State Department takes the formal and final step of treaty ratification, the deposit of an instrument of ratification with the international treaty depositary. In this view, partisan hostility to environmental protection (and climate change) policies mixed with suspicion of multilateralism have stalled the Senate approval processes and thereby prevented ratification of a number of MEAs.⁵

While Senate politics undoubtedly has been a significant impediment, two separate instances show that placing responsibility on politics alone oversimplifies the issues. First is the President's 2013 decision to join the Minamata Mercury Convention, the newest global MEA aimed at the public health and environmental scourge of mercury pollution, as an Executive Agreement, rather than as a Senate-approved treaty. Joining the Minamata Convention not only made the U.S. the first party to the Convention, but also ended a thirteen-year-long period during which the United States failed to join any new global MEA.

While, this instance points out clearly the availability of an alternative path to treaty membership that isn't conditioned on the Senate's approval,⁶ this article focuses on a second instance, the current status of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.⁷ Ratification of the Basel Convention has

⁵ "Under Senate Rules, there is no procedure by which a President can call a vote on a resolution of ratification. Hence a treaty can remain before the Senate indefinitely if the Senate chooses not to act." O. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L. J. 1236, 1313 (2008).

⁶ Formally, the U.S. "accepted" the Mercury Agreement. Under the Vienna Convention on the Law of Treaties, acceptance is an equivalent international act to ratification as a means of establishing a state's "consent to be bound by a treaty." Vienna Convention, art. 16. Acceptance was also based on a determination that U.S. government agencies could fulfill the Convention's commitments via existing legal authorities. Minamata Convention, United States of America Acceptance, ¶ 6, Oct. 2013, <http://perma.cc/F6SH-PT6Y> (indicating domestic implementing measures, as requested by Convention art. 30(4)). For a discussion of the issues presented in the context of the Minamata Convention's, see Tseming Yang, *The Minamata Convention on Mercury and the Future of Multilateral Environmental Agreements*, 45 ENVIRONMENTAL LAW REPORTER 10064 (Jan. 2015). 92 nations signed the Minamata Convention on Mercury at a Diplomatic Conference in Minamata, Japan, on October 11, 2013. Available at http://www.mercuryconvention.org/Portals/11/documents/conventionText/Minamata%20Convention%20on%20Mercury_e.pdf.

⁷ 1673 U.N.T.S. 57 (1989).

been a policy priority under Presidents from both Parties, including the Obama Administration.⁸ It was negotiated and then signed under two Republican Administrations (Ronald Reagan and George H.W. Bush)⁹ and obtained the Senate's advice and consent in 1992 with support from both Republicans and Democrats. Nevertheless, the U.S. has failed to ratify the Convention for almost a quarter of a century, and to this day the U.S. remains a non-member.¹⁰ In other words, even when the Senate advice and consent process has proceeded relatively quickly and without controversy, early ratification has not been assured.

These two treaties illustrate that the commonly held assumption about U.S. non-participation being attributable solely to Senate politics is simply mistaken. While politics is certainly a contributing factor, the saga of the Basel Convention illustrates an equally important legal issue at the heart of the current problem of MEAs in legal limbo – whether U.S. law provides adequate legal authority to domestic agencies to carry out the obligations under the treaty.¹¹ With respect to the Basel Convention, the sufficiency of domestic legal authority to implement its obligations has been questioned since its 1992 submission to the Senate for advice and consent. For other MEAs, implementation authority issues have not taken center-stage yet, since most attention has primarily been focused on the Senate advice and consent process. However, *each of them* is viewed as requiring additional Congressional legislation to allow for implementation.

We make two central points in this article. First, with respect to the Basel Convention specifically, we argue that a careful review of existing legal authorities reveals that the Executive Branch already has, at this point in time, sufficient authority to implement Convention obligations.

Second, we argue that an under-appreciated issue in evaluating environmental treaty obligations and necessary implementation authority is the underlying premise of breach avoidance. In the context of obligations to engage in environmental regulation, whether by

⁸ See, e.g., National Strategy for Electronics Stewardship 29-30 (July 20, 2011) (expressing support for ratification), available at <http://www.epa.gov/epawaste/conservation/materials/ecycling/taskforce/docs/strategy.pdf>. See also U.S. Gov't Accountability Office, GAO-08-1044, Electronic Waste: EPA Needs to Better Control Harmful U.S. Exports through Stronger Enforcement and More Comprehensive Regulation 36 (2008) (Bush Administration support for Basel ratification), available at <http://www.gao.gov/new.items/d081044.pdf>.

⁹ *Message from the President of the United States Transmitting The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, with Annexes, Done at Basel on March 22, 1989 ("President's Transmittal of Basel Convention")*, at v, Treaty Doc. 102-5 (May 17, 1991)

¹⁰ It has been suggested that the Senate provided contingent consent to the Basel Convention. O. Hathaway, *supra* note ___, at 1319 n.244 (2008). Even though the Senate likely considered Administration statements that further legislative steps were necessary at the time in order to ensure full implementation of the Convention, the Senate resolution providing its advice and consent included no textual indication that advice and consent was contingent in any way. Legislative Activities Report of the Committee on Foreign Relations, U.S. Senate (102d Congress, Jan. 3, 1991 – Oct. 8, 1992), S. Rep. 103-35, at 34-36.

¹¹ As a 2008 GAO report put it, "[t]he State Department has advised the Senate that it will not ratify the convention before the enactment of implementing legislation." *Supra* note ___, U.S. GAO, Electronic Waste 36 n.31.

legislative act or subsidiary rules and regulation, that standard is problematic to the extent that it has given rise to expectation of perfect compliance or “over-compliance.” We view perfect compliance and over-compliance as the set of efforts taken that go beyond what reasonably might be done to avoid breach, considering the costs of such efforts and the risk of non-compliance, in order to “guarantee” that there will be no breach. While we do not dismiss concerns about the rule of law, we believe that a more appropriate standard and expectation for MEA ratification purposes is substantial compliance. Application of a relaxed ratification standard presented by a substantial compliance approach would ease the path to membership in the Basel Convention. Our article’s discussion of breach avoidance and substantial compliance is thus relevant for all MEAs, pending and future ones.

Our latter point addresses an important linkage between treaty ratification and compliance, which has received little attention in the legal literature. Ratification has generally been viewed as embodying the political choice of joining a treaty, whereas conventional wisdom has viewed treaty compliance purely as a legal issue. Yet, legal issues (raised by compliance concerns) are commonly part of the ratification decision-process, while compliance processes are also imbued with political and policy considerations. In addition, these issues are also relevant to the broader question of treaty compliance and enforcement -- what countries must do to comply with their environmental treaty commitments and what events constitute non-compliance and could trigger potential enforcement actions.

Our article proceeds in four parts. Part I discusses the background of international trade in hazardous waste, the context of the ratification issue at the interface of international agreements and domestic law, and the significance of ratification. Part II then turns to the specifics of the Basel Convention, first providing the key substantive context of the agreement, especially in regards to its history with respect to the U.S.. Part II also discusses the implementation authority issue that has stymied ratification. This part will also make the case for why there is sufficient implementation authority and U.S. membership in the agreement is appropriate at this time. In addition to EPA authority under Section 3017 of the Resource Conservation and Recovery Act (RCRA), we identify Presidential powers, especially authority delegated as part of the International Emergency Economic Powers Act (IEEPA), as sources for requisite agency actions to fulfill treaty obligations.

Given that reliance on the Presidential authority is untested in this context, and as an exploration of the potential reluctance to rely on such authority, Part III then addresses “substantial compliance” and management of the risk of non-compliance as an alternative to perfect or “over-compliance” as the standard for MEA ratification. It first identifies breach avoidance as the over-riding but largely unexamined legal threshold for U.S. environmental treaty participation and explains that perfect or “over-compliance” has been a standard response. It then explains that such a high bar is inappropriate as an approach to MEAs. Instead, we identify substantial compliance and management of non-compliance risks as a more appropriate and nuanced alternative. Such a standard would enable a relaxed path to

Basel Convention ratification. The final part, Part IV, puts substantial compliance into the context of MEAs generally.

It is worth noting that our article focuses on “traditional” approaches to the implementation authority question, primarily examining Congressional delegations of regulatory authority for tools to carry out treaty mandates. However, there are theories of Executive powers that vest the President with a broad swath of authority with respect to the implementation of international legal obligations or even more generally with respect to the conduct of foreign affairs. Such theories have been in circulation for some time but remained controversial. In theory, they do provide potentially positive answers about Executive authority to implement environmental treaties. In practice, the Executive Branch has shied away from utilizing such expansive authority theories with respect to *environmental* obligations. Our article does not delve into these issues in any detail. Instead, we examine domestic regulatory authority that has not previously been examined in the legal literature as well as an alternative approach.

It is also important to clarify two items of terminology. While the term ratification has at times been used interchangeably to refer to both the international process of depositing the instrument of ratification with the treaty depositary as well as the domestic law process of Senate advice and consent, international law traditionally applies the term only to the international step. This article adopts this nomenclature. Furthermore, while in U.S. parlance the term “treaty” is oftentimes used to designate international agreements approved by the Senate, international law does not recognize the U.S. domestic law distinctions of Senate-approved treaty and Executive Agreement; all such agreements are “treaties” for international law purposes. This article adopts the international law terminology and explicitly refers to Senate-approved treaties to designate this particular domestic law form of international agreement.¹²

I. The Significance of U.S. Ratification of the Basel Convention

This part of the article first addresses the significance of the hazardous waste trade issue and the Basel Convention and then situates the ratification issue in the context of an alternative form of international agreements in domestic law – executive agreements. It then addresses the basic question: why do ratification and membership matter?

A. The Problem of Hazardous Waste Trade and the Basel Convention

The origin of the Basel Convention can be found in highly publicized instances of hazardous waste shipments sent from industrialized countries to the unsuspecting developing

¹² See also J. Knox, “The United States, Environmental Agreements, and the Political Question Doctrine,” 40 N.C. J. Int’l L. & Com. Reg. 1, 2 n. 2 (2015). Vienna Convention on the Law of Treaties art. 2(1)(b) (1970), 1155 U.N.T.S. 331.

world as well as in garbage barges, such as the Khian Sea, that were sent on a journey to nowhere in the 1980s.¹³ Among the most-egregious instances was the 1988 dumping of thousands of drums of Italian hazardous chemical waste in the small port town of Koko, Nigeria. While the wastes were repatriated to Italy after a public outcry, Nigerian workers involved in the waste removal suffered injuries ranging from chemical burns to nausea and partial paralysis.¹⁴

In many respects, the underlying economic pressures leading to exports abroad for cheap dumping were all too obvious. As industrialized countries made advances in regulating pollution and imposed stricter requirements on the management and disposal of hazardous wastes, the cost of waste management and disposal rose correspondingly. The desired environmental outcome would have been a reduction in waste production. An unintended consequence, however, was to increase the incentive to avoid proper waste management and disposal. One cost-avoidance strategy was to push wastes outside of the regulatory system, especially to places that were poor and had more lenient environmental regulations.¹⁵

Of course, disposal in the developing world brought with it threats to public health and the environment. Nevertheless, in an internal 1991 World Bank memo, then-World Bank Chief Economist (and later Treasury Secretary and Harvard University President) Lawrence Summers famously stated:

I think the economic logic behind dumping a load of toxic waste in the lowest-wage country is impeccable and we should face up to that.¹⁶

¹³ Tom Avril, *Years later, City's Ash is Dumped* Since 1986, the burned garbage traveled the globe. A Pa. landfill accepted the last of it, *Philadelphia Inquirer*, Aug. 10, 2002, available at: http://articles.philly.com/2002-08-10/news/25335572_1_mountain-view-reclamation-khian-sea-ash. The Khian Sea incident was notorious enough to be mentioned as one of the reasons for Senate approval of the Basel Convention. 138 Cong. Rec. S12291 (Sen. Pell). For other instances of wandering garbage barges and illicit international hazardous waste shipments, see http://ban.org/about_basel_ban/chronology.html.

¹⁴ Italy Moves to Resolve Problem with Nigeria on Dumping of Toxic Waste, 11 Int'l ENV'T. Rep. (BNA) 379, 379 (July 13, 1988); see also Hilary French, *Vanishing Borders: Protecting the Planet in the Age of Globalization* 73 (2000). For a general overview of that history, see JENNIFER CLAPP, *TOXIC EXPORTS: THE TRANSFER OF HAZARDOUS WASTES FROM RICH TO POOR COUNTRIES* 21-38 (2001). Unfortunately, dumping of hazardous waste from industrialized countries in developing nations has not gone away. The most widely publicized recent incident involved the disposal of petrochemical waste and caustic soda by Dutch company Trafigura in Abidjan, Coite D'Ivoire. See Lydia Polgreen & Marlise Simons, *Global Sludge Ends in Tragedy for Ivory Coast*, N.Y. Times, Oct. 2, 2006, at A1; Todd Pitman, *Hazardous Waste Flows to Poor Nations*, Seattle Times, Oct. 19, 2006, at A10.

¹⁵ For a deeper discussion of the environmental justice implications, see, e.g., Carmen Gonzalez, *Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade*, 78 Denv. Univ. L. Rev. 979 (2001); Ibrahim J. Wani, *Poverty, Governance, the Rule of Law, and International Environmentalism: A Critique of the Basel Convention on Hazardous Wastes*, 1 Kans. J. L. & Pub. Plcy. 37 (1991).

¹⁶ See *Let Them Eat Pollution* (Excerpt From Letter Written By Chief Economist Of World Bank), *The Economist*, at 66 (Feb. 8, 1992).

After all, the economic costs of exporting to and disposing of industrial wastes and other forms of pollution in developing countries would be much lower there due to poverty and lesser economic development, since “the forgone earnings from increased morbidity and mortality” would be much lower.¹⁷ In the public uproar that followed when the internal memo became public, Summers explained that the proposition had only been intended as a rhetorical proposition.

Aside from the morality of valuing the health and life of people in the developing world in this fashion and the broader environmental justice implications, such waste exports also ran directly counter to the polluter-pays principle, which calls for pollution costs to be internalized by the polluter. Allowing for the export and dumping of hazardous wastes to such countries essentially allowed the externalization of the cost of pollution and waste management. It thus not only saddled the developing world with pollution and waste from industrialized countries but also encouraged unsustainable levels of waste generation in the industrialized world through artificially low disposal costs.

As originally conceived, the Basel Convention attempted to focus primarily on the illegal dumping issues that had drawn worldwide attention. Its drafters recognized that waste trade was largely driven by the economics of disposal, where dumping in developing countries could be far cheaper, even with transport costs, than environmentally sound disposal in the country of origin.¹⁸ These considerations became part of its core principles.

The overarching objective of the Basel Convention is to protect human health and the environment from the risk of hazardous wastes by promoting the environmentally sound management of such wastes. The Convention accomplishes this chiefly through two key approaches. First, the Convention promotes transparency in waste trade by imposing prior-informed consent controls on the trade of hazardous waste, such that the importing country can make thoughtful decisions about the advisability of an import.

Second, the Convention also imposes a substantive back-stop, environmental sound management (ESM), on wastes trades if the process-focused prior informed consent (PIC) safeguard fails in preventing waste trades that cannot be properly managed by the destination country. Such trades are impermissible regardless of consent, if the waste cannot be managed in an environmentally sound manner.¹⁹ Together, these two principles have been designed to

¹⁷ *Id.*

¹⁸ See, e.g., Jennifer R. Kitt, Waste Exports to the Developing World: A Global Response, 7 Geo. Int'l Env't'l L. Rev. 485, 488 (1995).

¹⁹ Basel Convention, art. 4.2(e).

ensure not only greater transparency and rationality in the waste trade but also appropriate internalization of environmental harms.²⁰

Over its quarter century of existence, the Basel Convention has become the foremost global institution and focal point for international efforts addressing the environmental and public health problems presented by the international trade and environmentally sound management of hazardous other wastes. Many of its concerns are reflected in newer MEAs governing persistent organic pollutants, chemicals trade, ship breaking, and mercury pollution and have been separately pursued in the ongoing work of the United Nations Human Rights Council's Special Rapporteur on Human Rights and Hazardous Waste.²¹ Current aims and priorities for the Basel Convention include further talks considering the distinction between waste and non-waste and the growing trade in used electronics ("e-waste") posing hazards to health and environment through dumping and unsafe recycling practices in parts of the developing world.²²

The Convention's membership is now nearly universal, counting most recently 181 state parties.²³ However, the United States remains one of a handful of countries that are outside of the treaty.²⁴

B. The Relationship of International Agreements and Domestic Law: Form and Implementation

²⁰ Article 2 defines "environmentally sound management of hazardous wastes or other wastes," as "taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes."

²¹ See <http://www.ohchr.org/EN/Issues/Environment/ToxicWastes/Pages/SRToxicWastesIndex.aspx>.

²² Recently, the Convention's Conference of the Parties adopted a new strategic framework to apply from 2011 to 2021. This framework helps define the fundamental aims and priorities for the Basel Convention. However, additional input has been requested since COP 10 has convened about this framework. *Call for Information and follow-up to the eleventh meeting of the Conference of the Parties to the Basel Convention*, Basel Convention, 2013, <http://www.basel.int/TheConvention/ConferenceoftheParties/Callforinformation/FollowuptoCOP11/tabid/3255/Default.aspx>.

The Basel Convention underwent further talks considering the distinction between waste and non-waste in 2014. With the rapid advancement of consumer technologies (or something to this effect), the Convention has turned to the growing trade in used electronics ("e-waste") and the hazards to health and environment posed by the dumping and unsafe recycling practices in parts of the developing world. Instances of improper recycling have been well-documented in the popular media as well as by NGOs such as the Basel Action Network. See, e.g., http://ban.org/ban_news/2010/100301_indonesia_turns_back.html.

In 2008, the Partnership for Action on Computing Equipment (PACE) started working to increase the management of used and end-of-life computing equipment. The Intersessional Working Group for the Development of Technical Guidelines on E-Wastes has recently met to discuss advances in e-waste. *Milestones*, Basel Convention, 2011, <http://www.basel.int/TheConvention/Overview/Milestones/tabid/2270/Default.aspx>.

²³ *Parties to the Basel Convention*, available at

<http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/1290/Default.aspx#a-note-1>.

²⁴ Other non-member countries are Angola, South Sudan, Sierra Leone, and Tajikistan. *Id.*

The issue of the Basel Convention's ratification difficulties is easiest understood as a result of the dualist system of the U.S. Within dualistic systems, the process by which a state becomes part of an international agreement occurs on two separate legal planes – at the international law level and at the domestic law level. Under international law, the process for entering into an international agreement and thus making its provisions effective is relatively simple. After negotiations have concluded, a state becomes a party to an agreement by expressing its consent to be bound by the agreement's terms, usually through ratification, acceptance, approval or accession.²⁵ Once a state becomes a party through such an act, the obligations of the agreement become binding as an international obligation regardless of conflicting internal laws.²⁶

At the domestic level, the process by which the U.S. becomes a party to an international agreement for purposes of U.S. law raises two sets of issues: the choice of instrument under domestic law (or the form by which the agreement becomes part of U.S. law) and the question of effectuating the agreement's obligations in domestic law.

Traditionally, when the U.S. enters into an international agreements, the agreements pass into the domestic system by one of three paths: 1) as treaties approved through the Senate's advice and consent process, 2) as so-called Sole Executive Agreements concluded by the President under his own authority, or 3) as Congressional-Executive Agreements, concluded with the express authorization or approval of Congress, usually agreements negotiated by the President and then voted on and approved by Congress as if the agreement were an ordinary act of Congress.²⁷ As has been noted, the dividing line between Sole Executive Agreements and Congressional-Executive Agreements has frequently not been clear. Many fall on a continuum with respect to Congressional authorization, and Presidents usually rely on a combination of Constitutional as well as statutorily-delegated authority.

²⁵ Vienna Convention, art. 11 & 16.

²⁶ Vienna Convention, art. 27.

²⁷ The choice of instrument depends of course on the availability of domestic authority to enter into such agreement. The Restatement (3rd) Foreign Relations has described the domestic legal authority to enter into international agreement as follows:

Subject to [constitutional prohibitions]:

- (1) the President, with the advice and consent of the Senate, may make any international agreement of the United States in the form of a treaty;
- (2) the President, with the authorization or approval of Congress, may make an international agreement dealing with any matter that falls within the powers of Congress and of the President under the Constitution;
- (3) the President may make an international agreement as authorized by treaty of the United States;
- (4) the President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution. Rest. (3rd) For. Relations, section 303.

To "the extent that the President's constitutional authority overlaps powers of Congress, he may make sole executive agreements on matters that Congress may regulate by legislation." Rst.3d section 303 cmt. H.

Over the past century, the overwhelming majority of international agreements entered into by the U.S. have been of the Executive Agreement type,²⁸ either sole executive or congressional-executive agreements. There appears to be no strict association of specific treaty subject matter with particular instruments,²⁹ though agreements in some areas have been generally correlated with one instrument or another. For example, other than the World Trade Organization, international trade accords have tended to be concluded as congressional-executive agreements. Environmental agreements have come in both forms, executive agreements as well as Senate-approved treaties. However, with respect to modern multilateral environmental agreements, especially the globally-scoped MEAs of the last few decades, the prevailing Executive Branch practice until the 2013 Minamata Mercury Agreement was to submit them for Senate for advice and consent.³⁰

In the past, there has been debate within scholarly circles about the interchangeability of congressional-executive agreements and Senate-approved treaties.³¹ This article does not attempt to wrestle with the choice of instrument question. We take as given that prevailing Executive Branch practices, which have used both Senate advice and consent as well as Executive Agreement routes, are legitimate. For the Basel Convention, however, the choice of instrument question is largely moot since it already received Senate approval in 1992, generally considered to be the least controversial. With respect to the other unratified global MEAs, the Executive Branch has also made a choice to submit them to the Senate for advice and consent and thus has not otherwise acted on treaty membership in the meantime.

Once the United States has entered into an agreement, the effectuation of the agreement's provision in U.S. domestic law is dependent on whether the particular treaty provision is deemed to be self-executing or non-self-executing. If an agreement's provision is considered to be self-executing, its provisions become effective without the need for further action by Congress. For a self-executing treaty provision creating private rights, such rights would be automatically enforceable in the courts. On the other hand, non-self-executing treaty provisions require further legislative or regulatory actions in order to become effective. To determine whether a treaty provision is self-executing has traditionally required looking to the intent of the drafters, primarily that of the Senate and the Executive Branch.

²⁸ Hathaway, *supra* note ___, at ____.

²⁹ Hathaway, *supra* note ____.

³⁰ Over the course of this country's history, however, environmental agreements have been concluded in all three forms.

³¹ See, e.g., Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1344-48 (2008). In recent years, a prominent set of scholars has sought to challenge interchangeability, arguing that in particular areas, for example when international agreements seek to "regulate matters within Congress' Article I powers," are well suited for Congressional-Executive agreements, whereas in other areas the Senate treaty process is required. See, e.g., John Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 Mich. L. Rev. 757 (2001).

Environmental agreements by and large have not been deemed to be self-executing. That holds true for the unratified global MEAs pending in the Senate, none of which is deemed to be self-executing. Thus, this article's focus, the question of domestic implementation authority, remains relevant for all unratified global MEAs: U.S. participation in each of them will require not only Senate advice and consent but also identification of further legal authority in order to implement the agreement's provisions.

C. The Value of Basel Convention Ratification and Treaty Membership

Why does ratification and membership matter? There are two answers -- one legal and one practical. As a legal matter, the significance of ratification is straight-forward. U.S. signing of a treaty may signify a political commitment to engage its domestic process for treaty ratification and entail some minimal obligations.³² However, it is not bound by the treaty's substantive legal obligations until it has formally ratified, accepted or approved the agreement.³³ Signature alone does not definitively signal an intention to be bound and thus does trigger an obligation to comply with the treaty commitments. Conversely, the U.S. may not take advantage of the privileges of membership.

As a practical matter, however, the issue is less straight-forward. Lack of formal party status has not prevented the United States from being engaged to a limited extent in the Basel Convention (as well as other unratified treaties). The U.S. adheres to the operative substantive requirements of the Basel Conventions because domestic regulatory policies and requirements are generally consistent with those in the Convention.³⁴ U.S. government representatives attend meetings under observer status and may even advance particular policy positions and issues through allied countries that are parties to the agreement. Without membership in the treaty regime, however, the U.S. may not formally participate and vote in the treaty's governance. In fact, U.S. observers have at times been excluded from proceedings, including for reasons of simple politics. As a result, when the treaty regime addresses issues that may affect U.S. foreign policy, environmental, and commercial activities and interests, the United States is unable to protect such interests as effectively as it could if it were a formal member of the agreement system. This is one reason why treaty membership matters.

Furthermore, the Basel Convention bars Convention members from engaging in hazardous waste trade with non-parties such as the U.S., even when doing so could under some

³² Vienna Convention on the Law of Treaties, art. 18 (obligation "to refrain from acts which would defeat the object and purpose of a treaty").

³³ Vienna Convention, art. 16.

³⁴ However, the U.S. is not required to provide financial resources or technical assistance. Furthermore, U.S. responses to issues such as the treaty's take-back requirement for improperly shipped wastes remain generally untested. See, e.g., Elisabeth Rosenthal, *Smuggling Europe's Waste to Poor Countries*, N.Y. Times A1 (Sept. 27, 2009), available at http://www.nytimes.com/2009/09/27/science/earth/27waste.html?pagewanted=all&_r=1.

circumstances be beneficial to the recipient countries and in the interest of the environment,³⁵ However, the potential impediment for U.S. companies posed by the party/non-party trade ban has been quite limited. Article 11 of the Convention provides an exception when there exist bilateral, multilateral, or other regional agreements or arrangements addressing the transboundary movement of hazardous waste.³⁶ In keeping with the Article 11 exception, the U.S. has entered into agreements or arrangements with Mexico and Canada specifically, and OECD member countries generally, which govern the trade of hazardous wastes. These agreements and arrangements have allowed the U.S. to circumvent the trade prohibition in regard to its major trading partners.

U.S. ratification failure has also had a negative reputational impact on the U.S. Near universal international membership in the Basel Convention has created the perception that the U.S. is defying applicable international law and is a legal renegade.³⁷ Strictly speaking, of course, lack of treaty membership in itself makes such treaty commitments and obligations inapplicable. The greater irony, however, lies in the practical reality that the U.S. arguably has one the world's most effective environmental regulatory systems and is among the most progressive and proactive in its environmental regulatory activities.

There are at least three aspects in which of U.S. membership also has had negative impacts on the Convention and the international community: 1) accomplishment of treaty objectives, 2) U.S. engagement in global environmental governance, and 3) development of treaty institutions and global environmental governance structures.

First, lack of U.S. participation not only stymies advancement of treaty objectives but arguably undermines the treaty as a whole. Virtually all international trade in hazardous and some other waste should technically be covered by the Convention's notification and process requirements.³⁸ To avoid disruptions to trades involving the U.S., however, the U.S. and other countries have actively pursued and utilized the exceptions under Article 11 of the Convention.³⁹ In fact, all of the trade in hazardous waste between the U.S. and other OECD

³⁵ Basel Convention, art. 4.5. Such trade bans have become a common device in MEAs. In addition to encouraging membership, trade bans reduce leakage concerns, i.e. ensure that environmental externalities are properly internalized within the treaty regime and minimize free-riding on the treaty system's efforts.

³⁶ Basel Convention, art. 11.

³⁷ While this perception is not well-documented, it is commonly known within diplomatic circles. For a similar perspective of a U.S. academic, see Jeffrey M. Gaba, Exporting Waste: Regulation of the Export of Hazardous Waste from the United States, 36 Wm. & Mary Env'tl. L. & Pol'y Rev. 405 (2012).

³⁸ Since the Convention has almost universal membership, in almost every international trade, the exporter, importer, or both would be covered by Basel requirements.

³⁹ For example, in March 1996, the U.S. Department of State published a Federal Register Notice seeking comment on plans to enter into bilateral agreements with Basel Convention parties in order to enable hazardous waste trade under Article 11. Notice To Seek Public Comment on Entering Into Bilateral Agreements With Parties to the Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal To Allow Those Countries To Export Wastes to the United States Consistent With the Convention, 61 Fed. Reg. 8323 (Mar. 4, 1996). Since the Convention's entry-into-force, the U.S. entered agreements with Malaysia, Agreement Between the

member nations occurs under the auspices of the OECD's March 1992 "Decision of the Council Concerning the Control of Transfrontier Movements of Wastes Destined for Recovery Operations" (OECD Decision).⁴⁰ Hazardous wastes trade with both Canada and Mexico occurs under agreements pre-dating the Basel Convention.⁴¹

Government of America and the Government of Malaysia Concerning the Transboundary Movement of Hazardous Wastes from Malaysia to the United States (1995), available at <http://iea.uoregon.edu/pages/MarineMammals/engine/Documents/1-0775-0779.htm>, Costa Rica, Agreement on the Transboundary Movement of Hazardous Waste from Costa Rica to the United States (1997), available at _____, and the Philippines, Agreement Between the Government of the United States of America and the Government of the Republic of the Philippines Concerning the Transboundary Movement of Hazardous Wastes from the Philippines to the United States (2001), available at _____, governing the import of hazardous waste from these countries to the U.S. for proper processing and disposal (but not export to these countries). See <http://www.epa.gov/wastes/hazard/international/basel3.htm>. Agreements with other countries have also been concluded regarding specific shipments. See Agreement between the Government of India and the Government of the United States of America Concerning the Transboundary Movement of Glass Cullet Containing Mercury from India to the United States of America (October 9, 2002), available at <http://www.state.gov/s/l/38719.htm>.

⁴⁰ Decision C(92)39/FINAL Concerning the Control of Transfrontier Movements of Wastes Destined for Recovery Operations (30 March 1992), available at _____. This decision was amended in June 2001 and February 2002, Decision Of The Council Concerning The Revision Of Decision C(92)39/Final On The Control Of Transboundary Movements Of Wastes Destined For Recovery Operations, C(2001)107/FINAL (May 21, 2002), available at <http://www.epa.gov/osw/hazard/international/5-21-02.pdf>. The OECD Decision arose out of early concerns, predating even the Convention's entry-into-force, that ongoing trade relationships among OECD member nations might be disrupted due to the Convention's party/non-party trade ban

⁴¹ Agreement between the Government of the United States and the Government of Canada Concerning the Transboundary Movement of Hazardous Wastes [US-Canada Hazardous Waste Trade Agreement], Oct. 28, 1986, available at <http://www.epa.gov/osw/hazard/international/canada86and92.pdf>; Agreement of Cooperation Between the United States and the United Mexican States Regarding the Transboundary Shipments of Hazardous Wastes and Hazardous Substances, done on Nov. 12, 1986, available at <http://www.epa.gov/osw/hazard/international/mexico86.pdf>. The U.S. government has characterized the OECD Decision as well as the US-Canada and US-Mexico bilateral agreements as consistent with the requirements of Article 11 of the Convention. See, e.g., 75 Fed. Reg. 1236, 1247 (Jan. 8, 2010). See also *Canada-US Agreement Concerning the Transboundary Movement of Hazardous Waste*, ENV'T CANADA, <http://www.ec.gc.ca/gdd-mw/default.asp?lang=en&n=EB0B92CE-1> (last visited Jan. 21, 2011).

Canada and Mexico appear to be the most significant waste trading partner for the U.S. The Texas Center for Policy Studies reported that U.S. data showed hazardous waste exports to Canada and Mexico as amounting to 248,500 metric tons and 130,000 metric tons in 2002, respectively. Texas Center for Policy Studies, *The Generation and Management of Hazardous Wastes and Trans-boundary Hazardous Waste Shipments between Mexico, Canada, and the United States since NAFTA: A 2004 Update*, v (2004), available at <http://www.texascenter.org/publications/hazwaste04.pdf>. Return flows of hazardous wastes to the U.S. from Canada and Mexico were estimated to be 350,000 and 975,000 metric tons, respectively, in 2002. For 2004, Canada estimated that its hazardous waste generators sent about 340,000 tons of hazardous waste to treatment, storage, and disposal facilities in the US, while US exporter sent about 455,000 tons of hazardous waste north to Canada. WASTE SHIPMENTS BETWEEN THE UNITED STATES AND CANADA at 5, U.S. ENVIRONMENTAL PROTECTION AGENCY (Jan. 2007).

In contrast, trade in municipal solid waste has tilted much more in the direction toward the US. In 2004/2005, approximately 4 million tons of MSW entered the U.S., primarily sent by Toronto to Michigan, whereas only about 12,000 tons of MSW headed into Canada, with about 11,000 tons from the state of Maine to New Brunswick. See WASTE SHIPMENTS BETWEEN THE UNITED STATES AND CANADA, *supra* note _____. The overwhelming amount of household garbage entering Michigan from Canada has been controversial in the past and has drawn

Thus, a substantial amount of international hazardous waste trade now occurs outside of the formal strictures of the Convention, in spite of its objective of addressing international waste trade in a comprehensive global fashion and in spite of its near universal membership. While there appears to be little doubt about the legality of this work-around, these efforts have created a set of incentives where the U.S. arguably has an interest in circumventing the reach of the Convention and limiting its development.

Second, diminished U.S. engagement has contributed to a disconnect between national environmental policy-making and the efforts of international institutions. Not only are U.S. policy-makers substantially less influential or effective in contributing to policy-making in MEAs where the U.S. is not a party, but the converse may be even more important – U.S. environmental policy benefits less from international developments and policy trends. Positive developments and advances in international fora are readily dismissed or discounted because of unfamiliarity and perception of irrelevance due to U.S. non-membership. In fact, attention to the Convention within the federal agencies and among the mainstream environmental organizations is far below what one might expect in comparison to other global MEAs.⁴²

Finally, lack of engagement of the U.S. has held back the development of treaty institutions and global environmental governance structure. In fact, it seems difficult to imagine a robust and durable set of global institutions and governance structures for building consensus and cooperative relationships to solve global environmental problems that do not actively involve a nation as influential as the U.S.

Ultimately, ratification of the Basel Convention, and other MEAs that remain in legal limbo, is critically important not only for reasons of national self-interest but also for the benefit of the global environment and community. Without formal U.S. participation and full engagement, it seems doubtful that treaty objectives as well as environmental institutions and governance structures will be successful in addressing global problems.

II. The Basel Convention on the Control of Transboundary Movement of Hazardous Wastes

Given the significance of Basel Convention ratification, this section provides an overview of key treaty obligations, the context of the ratification issue, and our appraisal of implementation authority. The Convention's tortured history of U.S. ratification efforts uniquely show-cases the legal issues presented by this process, distinct from the politics of

the attention of some Congressional lawmakers. See http://dingell.house.gov/sites/dingell.house.gov/files/documents/108th_Congress/07-25-03.htm. See also James E. McCarthy, CRS Report for Congress: Imports of Canadian Wastes (Feb. 4, 2008).

⁴² That is not to suggest that there has been no engagement, especially in fields such as used electronic waste export. See, e.g., National Strategy for Electronics Stewardship (2011), *supra* note ____.

Senate advice and consent. This section provides an overview of the Convention's key provisions, its history, and analysis of domestic implementation authority.

A. Key Provisions of the Convention

In terms of its coverage, the scope of the Convention is expansive. Wastes that are subject to the Convention's controls include those produced by listed waste streams under Annex I, those with particular hazardous characteristics listed in Annex III, and those designated by national legislation as hazardous.⁴³ In addition, the Convention also covers household garbage and ashes from household garbage incineration in Annex II as "other wastes"⁴⁴ subject to Convention controls. For practical purposes, however, the Convention treats "other wastes" virtually the same as hazardous wastes. Notably, the Convention includes not only material that has been disposed or is destined for disposal as waste, but also those subject to recovery and recycling operations.⁴⁵

The key Convention provisions are found in article 4, 6, 8 and 9. The operationally most visible aspect of the Convention governing waste trade, the prior informed consent (PIC) requirement, is set out in articles 4.1 and 6. Article 4.1 requires that parties exercising their right to prohibit the import of wastes covered by the Convention "shall inform the other Parties." Conversely, Basel parties must not allow the export of Basel wastes when import has been prohibited by the proposed country of destination or where explicit consent for the import has not been obtained.⁴⁶ In other words, affirmative consent is required.

Article 6 then specifies the process of obtaining the requisite consent from the importing country. In particular, Article 6 requires:

- 1) Written notification by the State of export, or by the generator or exporter, to the States concerned of a proposed transboundary movement of hazardous wastes or other wastes.⁴⁷
- 2) Written response by the State of import either providing consent with applicable conditions, denying permission, or requesting additional information.⁴⁸
- 3) The State of export may not allow the generator or exporter to commence the transboundary movement until it has received the importing state's written consent

⁴³ Basel Convention, art. 1.1.

⁴⁴ Basel Convention, art. 1.2.

⁴⁵ Basel Convention, art. 2. However, to avoid regulatory overlap and conflicts, the Convention excepts from coverage radioactive wastes and waste from ships that are covered by other international agreements. Basel Convention, art. 1.3 & 1.4.

⁴⁶ Basel Convention, art. 4.1.

⁴⁷ Basel Convention, art. 6.1.

⁴⁸ Basel Convention, art. 6.2.

as well as confirmation of a contract with the disposer in the importing state specifying the environmentally sound management of the wastes in question.⁴⁹

Exporting countries, with the written consent of other countries concerned, may allow exporters to use a “general” notification process covering up to 12 months for waste shipments having the “same physical and chemical characteristics.”⁵⁰ The process of notification and transmission of information about consent is handled by authorities and contacts designated by each party state.⁵¹

Article 8 & 9 addresses events arising out of the improper handling of wastes. When the transboundary movement of wastes cannot be completed in accordance with the terms of the transaction⁵² or are the result of illegal acts by the exporter,⁵³ the exporting state has a general duty to take back the waste.⁵⁴ Illegal traffic in waste is defined by the Convention to include any transboundary movement that occurred without proper notification or consent, that was the result of fraud or falsification, that failed to conform materially with the transaction requirements, or that resulted in waste dumping contrary to the Convention or general principles of international law.⁵⁵

The Convention also controls trade with non-parties. Under article 4.5 of the Convention, parties are prohibited from engaging in waste trade with non-parties unless they occur under an Article 11 exception.⁵⁶ Article 11 allows for trade with non-parties if it occurs under a prior bilateral, regional, and multilateral agreement or arrangement that is “compatible” with and has provisions that “are not less environmentally sound than” the Convention or pursuant to a subsequent agreement arrangement that does “not derogate” from the Convention’s requirement of environmentally sound management of wastes.⁵⁷

The substantive back-stop to the PIC requirement is found in Article 4.2(e), which calls on parties to “take appropriate measures to . . . not allow the export of hazardous wastes or other wastes to a State . . . if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner.”⁵⁸ A converse obligation applies to the import of waste that cannot be managed in an environmentally sound manner.⁵⁹

⁴⁹ Basel Convention, art. 6.3.

⁵⁰ Basel Convention, art. 6.6.

⁵¹ Basel Convention, art. 5.

⁵² Basel Convention, art. 8.

⁵³ Basel Convention, art. 9.

⁵⁴ Basel Convention, art. 8 & 9.2. Conversely, if illegal acts are attributable to the importer, the importing state has a duty to ensure environmentally sound disposal. Basel Convention, art. 9.3.

⁵⁵ Basel Convention, art. 9.1.

⁵⁶ Basel Convention, art. 4.5.

⁵⁷ Basel Convention, art. 11.

⁵⁸ Basel Convention, art. 4.2(e).

⁵⁹ Basel Convention, art. 4.2(g).

Apart from trade controls, Article 4 requires parties to take appropriate measures to ensure the sound and sustainable management of waste, such as minimizing hazardous waste generation, environmentally sound management of wastes, proper training, and sharing of information.⁶⁰ Parties are also required to take steps to criminalize illegal hazardous waste traffic, to prohibit disposal in Antarctica, and to ensure the proper handling of wastes, including through labeling and manifests, and by requiring that the place of destination manage it in an environmentally sound manner.⁶¹ Finally, parties must report annually on the amounts and types of hazardous wastes exported, destinations, and disposal methods.⁶²

Since the Convention's entry-into-force on May 5, 1992,⁶³ the Convention has seen two significant legal developments. The parties adopted the Ban Amendment in 1994, also referred to as the OECD/Non-OECD Ban, which prohibits the export of hazardous waste from OECD countries to non-OECD countries.⁶⁴ The Amendment was the result of sentiments that the prior notice and consent scheme of the Basel Convention was insufficient in preventing the dumping

⁶⁰ Thus, Parties are to ensure that wastes are only exported when the exporting state does not have "the technical capacity and necessary facilities, capacity, or suitable disposal sites . . . to dispose of the wastes . . . in an environmentally sound and efficient manner," the wastes are needed as "raw material for recycling or recovery industries" in the importing state, or is in accordance with other criteria to be decided by the parties. Basel Convention, art. 4.9. Since the Convention "does not define 'efficient' or 'suitable,'" the United States considers "the cost of disposal, including the comparative cost of environmentally sound disposal outside the United States, as one factor in deciding whether disposal sites in the United States are 'suitable.'" Thus, this provision would be satisfied if "disposal in the importing country would be both environmentally sound and economically efficient." *President's Transmittal of Basel Convention*, supra note ___, at vii, Treaty Doc. 102-5 (May 17, 1991). See also Senate Executive Calendar (August 11, 1992), 102d Congress (1991-92), C.R. S12291; S12292-93.

⁶¹ Basel Convention, art. 4.3, 4.4, 4.6, 4.7.

⁶² Basel Convention, art. 13. With respect to its institutional structure, the Basel Convention also set up several now-familiar treaty bodies and mechanisms, such as the Conference of the Parties as the treaty's governing body, a Secretariat to provide administrative/operational support, a financial mechanism, as well as a dispute settlement provision. Basel Convention, arts. 15 & 16.

In February 2010, the Basel Convention parties agreed to combine the Convention's Secretariat functions with those of the Rotterdam Convention and the Stockholm Convention in order to achieve financial and functional efficiencies. However the Convention's substantive missions and work, including that of the Basel Convention, remains unaffected. The first Executive Secretary of the Joint Secretary was an American, former EPA and UNEP official Jim Willis. History of Joint Managerial Functions for the Secretariats of the Basel, Rotterdam and Stockholm conventions, available at <http://synergies.pops.int/Secretariat/Overview/History/tabid/2690/language/en-US/Default.aspx>.

⁶³ History of the Negotiations of the Basel Convention, available at:

<http://www.basel.int/TheConvention/Overview/History/Overview/tabid/3405/Default.aspx>.

⁶⁴ The amendment prohibits the exports of all hazardous wastes covered by the Convention that are intended for final disposal, reuse, recycling and recovery from countries listed in annex VII to the Convention (Parties and other States which are members of the OECD, EC, Liechtenstein) to all other countries.

<http://www.basel.int/TheConvention/Overview/Milestones/tabid/2270/Default.aspx>

of waste from wealthy countries in the developing world. As of this writing, the Ban amendment has not yet entered into force.⁶⁵

A second important legal development has been the negotiation and adoption of a Liability Protocol in 1999, which establishes a liability and compensation regime for damage resulting from waste trades covered by the Convention, including illegal traffic.⁶⁶ The Liability Protocol also has not yet entered into force.⁶⁷

B. A Brief History

As an international response to hazardous waste dumping instances, the Basel Convention was negotiated over the course of less than 2 years and adopted at a Diplomatic Conference in Basel on March 22, 1989.⁶⁸ The United States deposited its instrument of signature for the agreement a year later, March 22, 1990, the last day that the treaty remained open for signature.⁶⁹ The agreement was transmitted to the Senate for its advice and consent in May 1991.⁷⁰ In the transmittal document and State Department testimony before Congress, the then-Bush Administration indicated that it would seek Congressional legislation before ratification.

The Transmittal package stated that

Before the United States can deposit its instrument of ratification, changes in domestic law will be necessary, [including] . . . [1] creating authority to prohibit shipments when the United States has reason to believe that the wastes will not be handled in an environmentally sound manner, as well as the [2] authority to take charge of wastes found to be illegally transported when the responsible

⁶⁵ So far, it has achieved 81 ratifications toward the $\frac{3}{4}$ acceptance requirement. Available at: <http://www.basel.int/Countries/StatusofRatifications/BanAmendment/tabid/1344/Default.aspx>. However, the European Union has already transposed the Ban amendment into applicable EU directives. See REGULATION (EC) No 1013/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 June 2006 on shipments of waste, art. 36, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02006R1013-20140526&rid=1>.

⁶⁶ Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal Basel (Basel Liability Protocol) (Dec. 10, 1999), available at: <http://archive.basel.int/meetings/cop/cop5/docs/prot-e.pdf>. Article 12 of the Convention called for negotiations of such a protocol.

⁶⁷ As of August 2015, the Protocol only had 13 signatories and 11 parties. <http://www.basel.int/Countries/StatusofRatifications/TheProtocol/tabid/1345/Default.aspx>. The entry-into-force threshold is 20 parties. Basel Liability Protocol, art. 29. As a non-party to the Convention, the U.S. cannot participate in the Liability Protocol. Basel Convention art. 26 & 28. Nevertheless, it actively contributed to the design and drafting of the Liability Protocol.

⁶⁸ See *History of the Negotiations of the Basel Convention*, available at <http://www.basel.int/TheConvention/Overview/History/Overview/tabid/3405/Default.aspx>.

⁶⁹ Basel Convention, art. 21.

⁷⁰ *President's Transmittal of Basel Convention*, supra note ____, at iii.

private parties do not arrange for the environmentally sound disposal of the wastes. Furthermore, current domestic law regulates only transboundary movements of hazardous wastes[, while] the Convention . . . also governs [3] movements of household wastes, ash from the incineration of those wastes, and wastes that are regarded as hazardous under the Convention but not under current U.S. law.⁷¹

Not long after the Basel Convention's entry-into-force, on August 11, 1992, but without enactment of the requested Basel implementing legislation, the Senate provided its advice and consent to the Convention.⁷²

During the same period that the Convention was pending, there was strong Congressional support for environmental multilateralism. For example, in spring 1992, in the run-up to the 1992 Earth Summit in Rio De Janeiro, both Houses of Congress passed Concurrent Resolution 292, expressing Congressional support for U.S. participation and engagement in international cooperative efforts on a broad range of multilateral environmental issues.⁷³ Yet, that enthusiasm was not converted into success on Basel implementing legislation.

Several bills responding to the implementing authority request were introduced in 1991, during the 102d Congress, but unfortunately languished in Congress. These include Congressman Towns' Waste Export and Import Prohibition Act (WEIPA),⁷⁴ Congressman Synar's Waste Export Control Act (WECA),⁷⁵ and the Bush Administration's own legislative proposal, the Hazardous and Additional Waste Export and Import Act of 1991 (HWEI), introduced by Senator Chafee.⁷⁶

Similar legislative proposals did not fare any better in the 103rd Congress. Congressman Towns re-introduced his Waste Export and Import Prohibition Act, H.R. 3706, in November 1993,⁷⁷ and Representative Synar (together with Swift and Porter) re-introduced his Waste Export and Import Control Act, H.R. 3965, in March 1994.⁷⁸ Both bills died in subcommittee.⁷⁹

⁷¹ Id. at x.

⁷² 138 Cong. Rec. S12291 (daily ed. Aug. 11, 1992). The vote of approval took place without any substantive debate and occurred together with several other pending treaties.

⁷³ H.Con.Res. 292, 102d Congr. (1992), available at <http://thomas.loc.gov/cgi-bin/query/D?c102:4:./temp/~c102lsARdI>

⁷⁴ H.R. 2580, 102d Congr. (1991)

⁷⁵ H.R. 2358, 102d Congr. (1991). The bill had also been introduced in 1989, H.R. 2525, 101st Congr. (1989).

⁷⁶ S. 1082, 102d Congr. (1991); H.R. 2398, 102d Congr. (1991). Several other bills were also introduced, including by Congressman Paxon (Foreign Solid Waste Prohibition Act), H.R. 4072, 102d Congr. (1991), Senator Akaka (International Hazardous Waste Disposal and Enforcement Act of 1991), S. 1643, 102d Congr. (1991).

⁷⁷ H.R. 3706, 103d Congr. (1991).

⁷⁸ H.R. 3965, 103d Congr. (1994).

⁷⁹ In February 1994, the then-Clinton Administration released a "Position Statement on Basel Legislation" that outlined the legislative principles for Congress to consider for Basel implementing legislation. 140 Cong. Rec. Extension of Remarks of Rep. Lee Hamilton (Mar. 8, 1992), available at: <http://www.gpo.gov/fdsys/pkg/CREC->

In 1998, in the 105th Congress, Congressional committees again expressed interest in taking up Basel Convention implementing legislation, but sought an Administration draft text. None was ever sent to Congress. Representative Towns of New York re-introduced the Waste Export and Import Prohibition Act in both 1996 and 1997.⁸⁰ Further legislative proposals were introduced in 2006 and 2008, directed at aligning U.S. restrictions on hazardous waste exports to developing countries,⁸¹ but none of those were successful either.

Adoption of the OECD/non-OECD Ban amendment has complicated political support for Basel ratification. Even though the original treaty was relatively uncontroversial, and U.S. participation found support by a broad range of stakeholders,⁸² the same has not been true for the Ban amendment. The most prominent U.S. NGO working on hazardous waste trade issues, the Basel Action Network, has opposed Basel ratification without the Ban amendment.⁸³ Conversely, industry groups have been resolutely opposed to the Ban amendment.⁸⁴ The Senate's 1992 advice and consent only approved the original 1989 treaty.

Since the treaty went into force, U.S. trade in hazardous wastes has largely proceeded under the OECD Decision as well as several bilateral agreements.⁸⁵ These processes are implemented under EPA's RCRA Hazardous Waste Generator regulations.⁸⁶ For imports from non-OECD countries as well as Canada and Mexico, subpart E & F of the regulations apply, requiring EPA to be notified prior of the shipment.⁸⁷ Once the shipment enters the U.S., all federal hazardous waste regulations apply.⁸⁸ Exports to these countries are subject to a prior

[1994-03-08/html/CREC-1994-03-08-pt1-PgE9.htm](http://www.crec.gov/1994-03-08/html/CREC-1994-03-08-pt1-PgE9.htm); Principles for Basel Convention Implementing Legislation, 140 Cong. Rec. E372 (daily ed. Mar. 8, 1994).

⁸⁰ H.R. 3893, 104th Cong. (1996); H.R. 360, 105th Cong. (1997).

⁸¹ H.R. 2491, 109th Cong. (2006); H.Res. 1395, 110th Cong. (2008); S.Res. 663, 110th Cong. (2008).

⁸² See, e.g., Rebecca Kirby, *The Basel Convention and the Need for United States Implementation*, 24 GA. J. INT'L & COMP. L. 281, 302n.87 (1994) (industry representatives voicing support).

⁸³ Basel Action Network, "Why the US Must Ratify the Basel Convention together with the Ban Amendment (or not at all)" (Sept. 2014), available at http://www.ban.org/wp-content/uploads/2014/09/BP2_September2014Final.pdf.

⁸⁴ See, e.g., JENNIFER CLAPP, TOXIC EXPORTS: THE TRANSFER OF HAZARDOUS WASTES FROM RICH TO POOR COUNTRIES 75, 81-90 (2001).

⁸⁵ See, e.g., *Revisions to the Requirements for: Transboundary Shipments of Hazardous Wastes Between OECD Member Countries, Export Shipments of Spent Lead-Acid Batteries, Submitting Exception Reports for Export Shipments of Hazardous Wastes, and Imports of Hazardous Wastes*, 75 Fed. Reg. 1236, 1247 (Jan. 8, 2010). According to EPA, a "review of hazardous waste export notices between 1995–2007 indicate[d] no approved or even proposed exports of RCRA hazardous waste to a non-OECD country." *Id.* An EPA website indicated four notices for shipments of spent lead acid batteries to the Philippines, Ecuador, Panama, and Mexico. See <http://www.epa.gov/epawaste/hazard/international/non-oecd.htm#table> (visited Aug. 19, 2015).

⁸⁶ 40 C.F.R. Part 262, Subpart E, F & H. For a detailed discussion of the requirements, see generally Jeffrey Gaba, *Exporting Waste: Regulation of the Export of Hazardous Wastes from the United States*, 36 Wm. & Mary Envtl. L. & Pol'y Rev. 405 (2012).

⁸⁷ 40 C.F.R. Part 265.12(a).

⁸⁸ See generally "Collection of Materials on Import/Export Regulatory Requirements," Appendix B: Import Diagram, available at <http://www.epa.gov/osw/hazard/international/guide2.htm>.

notification and consent process that tracks the Basel Convention PIC requirement.⁸⁹ For hazardous waste trade with OECD countries other than Mexico and Canada, notification and consent processes occur under Subpart H of the Hazardous Waste Generator regulations,⁹⁰ which also impose similar, but more detailed and stream-lined notification requirements for both imports and exports.⁹¹

C. Domestic Implementation Authority for the Basel Convention

At the time that the Basel Convention was first signed and transmitted to the Senate for its advice and consent, U.S. law had in place already a comprehensive environmental regulatory system, including mechanisms for the environmentally sound management of hazardous wastes. That scheme includes RCRA section 3017 which addresses the export and import of hazardous waste. The Bush Administration also indicated concerns about authority gaps at the time and the need for Congress to expand EPA's regulatory authority, including: 1) "authority to prohibit shipments when the United States has reason to believe that the wastes will not be handled in an environmentally sound manner," 2) take-back authority illegally exported wastes, and 3) authority to cover "household wastes, ash from the incineration of those wastes, and wastes that are regarded as hazardous under the Convention but not under current U.S. law."⁹² Thus, in sharp contrast to the quick process by which the United States became the first state to join the Minamata Convention in 2013, when the United States determined that it had all

⁸⁹ 40 C.F.R. Part 265.52 & 53. See generally "Collection of Materials on Import/Export Regulatory Requirements," Appendix C: Export Diagram, available at <http://www.epa.gov/osw/hazard/international/guide2.htm>.

⁹⁰ 40 C.F.R. Part 262, Subpart H.

⁹¹ See generally "Collection of Materials on Import/Export Regulatory Requirements," Appendix D & E (Import and Export Diagrams), available at <http://www.epa.gov/osw/hazard/international/guide2.htm>.

⁹² *President's Transmittal of Basel Convention*, *supra* note ___, at x. In other contexts, two other issues have also been raised, though they have become moot because of intervening changes. Specifically, concerns were raised with respect to article 4.5's obligation to prohibit waste trade with non-parties absent an article 11 agreement and article 4.6's obligation to prohibit waste exports to the Antarctic. While article 4.5's prohibition on trade with non-parties might have presented a concern early on, near universal ratification of the Basel Convention has left just a handful of countries outside of the Basel Convention system. These include Angola, Fiji, Grenada, Haiti, San Marino, Sierra Leone, Solomon Islands, Tajikistan, Timor-Leste, Tuvalu, and Vanuatu. See *Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, <http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx> (last visited Aug. 25, 2015). There is no known waste trade with these nations, and that is unlikely to change. More importantly, negotiation of an article 11 agreement or arrangement with any of these countries remains a practical option.

With respect to the prohibition of article 4.6 on hazardous waste exports to Antarctica, regulations issued by the National Science Foundation to implement the Antarctic Conservation Act of 1978, 16 U.S.C. §§ 2403, prohibit the release of waste into the Antarctic environment without a permit. 45 C.F.R. 671.4(c). Such a permit can only be issued if the release of wastes "will not pose a substantial hazard to health or the environment and only after careful consideration of the views of interested parties, including EPA. 45 C.F.R. 671.7. Such a permit has not previously been issued and is not likely to be issued. Thus, concerns with respect to waste exports to the Antarctic and waste trade with Basel Convention non-parties have largely become moot over the past couple of decades.

necessary domestic implementing authority, with Basel, the Administration stated that it would hold off depositing the instrument of ratification until such legislation had been enacted.⁹³

As described above, Congress has failed to provide the comprehensive set of additional implementing authority sought by the Bush Administration. Nevertheless, our analysis of existing statutory and Presidential authority indicates that the Basel Convention can be implemented by the United States without additional statutory enactments by Congress.

For length reasons and because the focus of our paper here is on concerns that have held up ratification, we take the President's Transmittal to the Senate and the State Department's C-175 analysis of domestic authority as the starting point for our analysis. The C-175 process is generally designed "to make sure that the making of treaties and other international agreements for the United States is carried out within constitutional and other appropriate limits."⁹⁴ Accordingly, it provides a legal analysis that describes among other things existing legal authorities available for treaty implementation as well as authority gaps. More importantly, it has formed the basis for the Executive Branch's view that authority gaps exist. As we explain below, we believe that those gaps can be filled by existing authority under RCRA, by Congressionally delegated authority in the International Economic Emergency Powers Act, and through the President's inherent Constitutional powers.

1. Preexisting RCRA Authority and Section 3017

Comprehensive EPA regulatory authority under RCRA addresses both core objectives of the Convention. As the nation's cradle-to-grave management system for hazardous substances and waste, existing U.S. law already provides for the environmentally sound management of hazardous wastes. Furthermore, under the Hazardous and Solid Waste Amendments of 1984, RCRA Section 3017's "Export of Hazardous Wastes" article⁹⁵ provides EPA with authority to control hazardous waste exports, the other core objective of the Convention.

Specifically, RCRA Section 3017 prescribes a set of procedural requirements mandating prior notice and consent for the export of hazardous wastes, similar to the requirements of the Convention. The section anticipates future international agreements in the nature of the Basel

⁹³ *President's Transmittal of Basel Convention*, *supra* note ___, at x. If the provisions of a treaty go beyond existing U.S. laws, it has been the practice of the U.S. Department of State to hold treaty ratification until Congress has enacted adequate implementation legislation. See Tseming Yang, The Relationship Between Domestic and International Environmental Law, n.36, in *Martella R. and Grosko B. (Eds.) International Environmental Law: The Practitioner's Guide to the Laws of the Planet* (American Bar Association 2013)

⁹⁴ U.S. Dep't of State, Circular 175 Procedure, <http://www.state.gov/s/l/treaty/c175/>. For a brief description of the C-175 process, see Tseming Yang, The Relationship Between Domestic and International Environmental Law, in *Martella R. and Grosko B. (Eds.) International Environmental Law: The Practitioner's Guide to the Laws of the Planet* (American Bar Association 2014).

⁹⁵ 42 U.S.C. 6938.

Convention, including the possibility of trade controls that would need to supersede processes created under section 3017.⁹⁶

Congress' prescience is specifically expressed by section 3017's articulation of two alternative pathways governing the export of hazardous wastes. The first, default scenario, when there are no applicable international agreements, requires that the importing country be notified of the proposed shipment, that its consent to accept the waste be obtained, and that the shipment conform with the terms of the importing government's consent, including limited or conditional import permission.⁹⁷

In the alternative scenario,⁹⁸ if the United States has entered into an international agreement governing the "notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous wastes," only the requirements of the international agreement apply to the waste shipment.⁹⁹

Substantively, the existing default export notification and consent requirements match Basel Convention requirements, suggesting that export control processes would not need to be changed significantly in the event of ratification. However, even if changes were necessary, ratification of the Basel Convention would trigger subsection (a)(2), requiring that "export [of] any hazardous waste identified or listed under [RCRA] . . . conform[] with the terms of such [an international] agreement."¹⁰⁰ In other words, upon ratification of the Basel Convention, Section 3017 would automatically adopt the notice and consent requirements of the Basel Convention and supplant any inconsistencies in the pre-existing domestic prior informed consent scheme with Basel requirements. The step of depositing the instrument of ratification would in itself create all necessary requirements and powers to regulate the export of RCRA hazardous waste in accordance with Convention requirements.

2. Concerns about Potential Implementing Authority Gaps

⁹⁶ 42 U.S.C. 6938(f).

⁹⁷ 42 U.S.C. 6938(a)(1). Thus Section 3017(a) provides that "no person shall export any [RCRA] hazardous waste . . . unless . . . such person has provided [notification to EPA], . . . the government of the receiving country has consented to accept such hazardous waste, . . . [and] the shipment conforms with the terms of the consent of the government of the receiving country." Under the default scheme, the exporter provides notice to EPA, and the Agency and the State Department are chiefly responsible for the communication with the importing country's government. 42 USC 6938(c)-(e). See also discussion *supra* ____.

⁹⁸ 42 U.S.C. 6938(a)(2) ("no person shall export any hazardous waste . . . unless . . . [the default notification scheme is applied, or] the United States and the government of the receiving country have entered into an agreement as provided for in subsection (f) . . . and the shipment conforms with the terms of such agreement").

⁹⁹ 42 U.S.C. 6938(f). For example, the OECD Decision was deemed to trigger this provision, and EPA regulations have been modified to be consistent. For a detailed description of these regulatory requirements, see Jeffrey M. Gaba, *supra* note ____, at 420-439.

¹⁰⁰ *Id.*

While RCRA and its Section 3017 waste export provision address the Basel Convention's core principles of environmentally sound management and prior-informed-consent and enable EPA to carry out the great bulk of what is required under the Basel Convention, the 1991 Bush Administration's Senate Transmittal Letter also identified three areas where changes in domestic law were deemed to be necessary: 1) authority to prohibit non-ESM compliant exports, 2) take-back authority, and 3) municipal solid wastes (MSW) and non-RCRA hazardous waste coverage authority.¹⁰¹

The first, authority to prohibit non-ESM compliant exports, refers to the Convention's Article 4.2 requirement that parties prohibit the export of "hazardous wastes and other wastes" when there is "reason to believe that the wastes in question will not be managed in an environmentally sound manner," regardless of the consent of the parties involved. The second concern focuses on the Convention's article 9.2 obligation to take-back wastes in the event of illegal traffic. A careful analysis, however, reveals that both requirements are already encompassed within the authorization provided by RCRA Section 3017, and any further changes necessary to implement these requirements would be of a regulatory nature, rather than legislative.

Even though RCRA section 3017's default regulatory scheme conditions exports on the importer's consent and does not explicitly speak to export bans, once an international agreement has been concluded, hazardous waste exports may only proceed if they "conform[] with the terms of [the international] agreement."¹⁰² The control processes of the international agreement govern. Once Basel ratification has occurred, Section 3017 would create authority for EPA to adjust its current regulations and provide for this exception to the PIC requirement as well as other changes necessary to implement the take-back requirement.¹⁰³

Unfortunately, the third issue is more difficult. Because the Convention's scope of wastes covered is not co-extensive with the hazardous wastes regulated by EPA RCRA regulations, adequate federal oversight authority presented a source of implementation concerns.¹⁰⁴ The issue arises with respect to two sets of wastes.

¹⁰¹ *President's Transmittal of Basel Convention*, *supra* note ___, at x.

¹⁰² 42 U.S.C. 6938(a)(2).

¹⁰³ In particular, the take-back requirement could be implemented by EPA through mechanisms similar to those used for implementation of the 1992 OECD Decision governing waste trade among OECD nations, 1992 OECD Decision, *supra* note ___, such as through conditions that are part of the contract governing the international waste trade specifying export party responsibility for take-back and financial assurance requirements. 40 C.F.R. 262.85. For additional discussion of these two issues, see Jeffrey Gaba, *Exporting Waste*, *supra* note ___, at 471, 474.

¹⁰⁴ Generally, waste imports to the United States have not been viewed as a concern. Once within the U.S., their management and disposal would be strictly governed by the same laws and regulations that govern domestically generated hazardous and non-hazardous wastes, regardless of formal U.S. consent or objection, including meeting municipal solid waste landfill requirements established under federal (and applicable state) law. Thus, international imports of waste would not be treated any differently, and would constitute only a small proportion, of the much larger inter-state waste trade within the U.S. See, e.g., James E. McCarthy, CRS Report for Congress:

First, the Convention defines hazardous wastes by reference to its Annexes, which list waste streams, constituent components, and hazard characteristics.¹⁰⁵ However, RCRA regulations explicitly exclude certain wastes, for example coal ash and mining overburden,¹⁰⁶ from RCRA controls. Since the hazardous waste definitions are not co-extensive, there is a small risk that wastes covered as hazardous under the Convention criteria might not be covered by EPA's RCRA regulations or even be explicitly excluded. While the risk would be small, shipment of such materials could trigger the Convention's PIC processes, even though EPA's Section 3017 authority would not apply,¹⁰⁷ presenting the risk of a regulatory authority gap.

Second, a similar problem arises with regard to household wastes and incineration ashes of such wastes. These wastes are designated as "other wastes" by the Convention¹⁰⁸ and subject to virtually identical trade controls.¹⁰⁹ However, neither is currently regulated by RCRA.¹¹⁰ Again, since RCRA Section 3017(a)(2) is specific in its reference to "hazardous waste identified or listed under [RCRA]," the statutory language appears to foreclose reliance on section 3017 as authority for implementing the notification and the PIC process required by the Convention.¹¹¹

Interstate Shipment of Municipal Solid Waste: 2007 Update (June 13, 2007), available at <http://research.policyarchive.org/18953.pdf>.

¹⁰⁵ Basel Convention, art. 1.1(a). The Convention also allows inclusion of wastes as hazardous if national laws designate them as such, independent of the Convention's definition. Basel Convention, art. 1.1(b).

¹⁰⁶ 40 C.F.R. 261.4(b)(3) & (4).

¹⁰⁷ Appendix IX of the Convention (Item B2050 and B2010) actually explicitly excludes coal ashes and certain mining wastes from Basel coverage, unless they "contain Annex I material to an extent causing them to exhibit an Annex III characteristic," which would make it hazardous, and thus subject to control, for Convention purposes. Appendix IX: List B, Basel Convention.

¹⁰⁸ "Other wastes" are defined by Annex II to include household wastes, also referred to as municipal solid wastes (MSW), and the incinerator ashes of such wastes. Basel Convention, art. 1.2, Annex II.

¹⁰⁹ Basel Convention, art. 4 (applying the basic obligations of the Convention to "other wastes" as well as to hazardous wastes).

¹¹⁰ In fact, household wastes are explicitly excluded from the RCRA definition of hazardous wastes, 40 C.F.R. 261.4(b)(1), even if they include hazardous waste, such as paint waste, that has been generated by consumers in their homes, *see generally* "Collection of Materials on Import/Export Regulatory Requirements," Appendix A: List of Excluded and Exempt Materials, available at <http://www.epa.gov/osw/hazard/international/guide2.htm>. Subtitle D of the Solid Waste Disposal Act, 42 U.S.C. 6941 et seq., does provide a role for EPA in promoting the development of state plans to manage solid waste. However EPA currently exercises no direct regulatory or control authority over the management and disposal of municipal solid waste, which have traditionally been dealt with as a concern primarily of state and local governments.

The US-Canada Hazardous Waste Trade Agreement, *supra* note ___, was amended in 1992 to include municipal waste and incineration ashes, though implementation of the agreement with respect to these added wastes has been awaiting domestic regulatory changes.

¹¹¹ It is conceivable that regulatory changes, especially elimination of the household waste exclusion from RCRA coverage under Subpart 261.4(b)(1), could lead to the vast majority of household wastes being captured within the RCRA hazardous waste regulations. However, such a change would have enormous regulatory ripple effects domestically, would likely be infeasible as a political matter and extremely difficult to administer as a practical matter.

As a practical matter, there have not been any significant incidents of illegal municipal waste shipments from the U.S., outside of the waste trade governed by existing Article 11 agreements, since the Basel Convention was adopted. Furthermore, it is unlikely that certain types of wastes that are explicitly excluded from RCRA, such as coal ashes or mining overburden would be the subject of international trade. They are usually produced in very high volume and are of low value. Their bulk characteristics thus make them unlikely to be exported for economic feasibility reasons. Such exports are arguably only a hypothetical risk at this point in time.¹¹² Yet, if an export event were to occur, the possibility of an EPA regulatory gap could arise.

3. Implementing Authority under the International Emergency Economic Powers Act and Presidential Powers

Seeking new legislation from Congress to supplement EPA's regulatory authority to regulate waste exports and imports has been the Executive Branch's preferred course of action since the Convention was submitted to the Senate for advice and consent. As we discuss in part III below, we do not believe that ratification should be held up for the unlikely contingency of such exports.

Assuming that one remains concerned, however, there exist two separate, but related legal bases for executive branch authority to act with respect to MSW and non-RCRA hazardous waste exports: 1) the Commerce Department's Export Administration Regulations, and 2) Presidential Authority under the International Emergency Economic Powers Act. Both approaches are out-of-the-ordinary in their use of Presidential powers and untested. Nevertheless, they suggest an important and reasonable set of legal rationales for executive action to address potential Convention contingencies. We also touch on a set of expansive Presidential authority theories that could support ratification.

Since the beginning, inquiry into Basel Convention implementing authority was never focused exclusively on EPA's statutes. While the relevant non-EPA statutory authority at the time, the Export Administration Act of 1979 (EAA), is no longer in effect, it had previously been explored as a source of implementing authority. As early as October 1980, long before the negotiation of the Basel Convention, the Office of Legal Counsel of the U.S. Department of Justice determined that the then-in-effect Export Administration Act provided "authority for the President to control . . . the export of hazardous wastes."¹¹³ In other words, the Export

¹¹² Recently, the Basel Action Network has reported the discovery of illegal exports of municipal solid waste from Canada to the Philippines. See <http://www.ban.org/2015/05/22/more-canadian-garbage-found-illegally-dumped-in-the-philippines/>. We do not believe that these incidents appreciably alter the analysis presented here, especially given our discussion below of the President's authority under IEEPA as an option for capturing these issues.

¹¹³ Opinion Of The Office Of Legal Counsel, U.S. Department of Justice, *Presidential Authority to Control Export of Hazardous Wastes under the Export Administration Act of 1979*, 1980 OLC LEXIS 91; 4 Op. O.L.C. (Vol. B) 797.

Administration Act of 1979 provided broad authority to regulate hazardous waste exports independent of other authority granted by other Acts of Congress, such as RCRA.¹¹⁴

The EAA was the latest in a long line of export control laws designed to implement both war- and peace-time U.S. foreign policy.¹¹⁵ Originally designed to allow for extensive peace-time export controls following World War II and utilized in the Cold War conflict with the Soviet-bloc countries, the Act was extensively rewritten in 1979.¹¹⁶ Among the most important export control purposes was advancement of U.S. foreign policy¹¹⁷ and national security.¹¹⁸ With respect to foreign policy, Congress stated:

It is the policy of the United States to control the export of goods and substances banned or severely restricted for use in the United States in order to foster public health and safety and to prevent injury to the foreign policy of the United States as well as to the credibility of the United States as a responsible trading partner.¹¹⁹

Under the EAA, the President or the Secretary of Commerce were authorized to

prohibit or curtail the exportation of any goods, technology, or other information subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States, to the extent necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations.¹²⁰

As a practical matter, EAA authority has been exercised by the Commerce Department's Bureau of Industry and Security (BIS) through the Export Administration Regulations (EAR),¹²¹ which

¹¹⁴ A separate Justice Department Office of Legal Counsel Opinion also found that the enactment of federal regulatory schemes addressing hazardous substances, including their export, did not displace the EAA and thus did not "preclude the imposition of export controls pursuant to the EAA." Opinion Of The Office Of Legal Counsel, U.S. Department of Justice, *Limitations on Presidential Authority To Control Export of Certain Hazardous Substances* 5, 4 Op. O.L.C. (Vol. B) 802, 1980 WL 20991.

¹¹⁵ For a general overview of the EAA, see IAN F. FERGUSON, CONG. RESEARCH SERV., RL31832, THE EXPORT ADMINISTRATION ACT: EVOLUTION, PROVISIONS, AND DEBATE (2009), <http://www.fas.org/sgp/crs/secrecy/RL31832.pdf>.

¹¹⁶ Pub. L. No. 96-72, 93 Stat. 503, 50 U.S.C. app. 2401 – 2420.

¹¹⁷ Foreign policy concerns addressed have included "broad issues of regional stability, human rights, anti-terrorism, missile technology, and chemical and biological warfare." Ferguson, *supra* note ___, at 2.

¹¹⁸ Controls are especially designed to "restrict the export of goods and technology, including non-proliferation items, that would make a significant contribution to the military capability of any country that posed a threat to the national security of the United States." Ferguson, *supra* note ___, at 2. That has included restrictions on the export of items with potential military applications, including dual use of civilian technology for military purposes. A third purpose identified in the original 1949 legislation, but less importantly as a contemporary matter, were short supply considerations, controls imposed "to prevent the export of scarce goods that would have a deleterious impact on U.S. industry and national economic performance." *Id.*

¹¹⁹ 50 U.S.C. app. 2402(13).

¹²⁰ 50 U.S.C. app. 2405(a)(1).

¹²¹ 15 C.F.R. ch. VII, subch. C, §§ 730 et seq.

include a licensing system and a control list (the Commerce Control List, often referred to just as the CCL) which designates the items subject to the export regulations.

Unfortunately for the Basel Convention, the EAA had lapsed and thus was not in effect during the initial submission of the Basel Convention to and during pendency in the U.S. Senate in 1991-1992.¹²²

The EAA itself remains lapsed at this time. Most of the authorities granted to the Department of Commerce as well as the regulations originally promulgated to implement the Act, the Export Administration Regulations,¹²³ have been kept in continuous effectiveness through assertion of Presidential power and authority under the International Emergency Economic Powers Act (IEEPA).¹²⁴

As a peace-time extension of the Trading with the Enemy Act (TWEA),¹²⁵ IEEPA provides the President with broad powers to

investigate, . . . regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, . . . transfer, . . . transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.¹²⁶

The grant of authority allows for the use of a wide range of economic sanctions, including restricting trade or financial transactions, to advance national security and foreign policy priorities. Over the years, it has been the legal basis for many of the economic sanctions that the United States has imposed on other countries and has been used to restrict the export of weapons and other national security-sensitive goods as well as dual-use technology, items with both civilian and military applications. As Professor Carter has described it,

¹²² The 1979 Act itself was originally designed to expire by September 30, 1983. Due to congressional wrangling, the statute was extended only intermittently on eight different occasions until, most recently, to August 20, 2001, when the EAA lapsed. Thus, the Act was extended for the original expiration date without a gap to October 31, 1983, Pub. L. 98-108 (1983), when it lapsed. It was then revived by Congress for December 5, 1983 to March 30, 1984 (Pub. L. 98-207 (1983); Pub. L. 98-222)), July 12, 1985 to September 30, 1990 (Pub. L. 99-64, Title I, §120 (1985); Pub. L. 100-418, Title II, Subtitle D, §2431 (1988), March 27, 1993 – June 30, 1994 (Pub. L. 103-10 (1993)), July 5, 1994 – August 20, 1994 (Pub. L. 103-277 (1994)), November 13, 2000 – August 20, 2001 (Pub. L. 106-508 (2000)). The EAA was in effect during various limited periods of time after Senate advice and consent.

¹²³ 15 C.F.R. 742 et seq.

¹²⁴ Pub. L. 95-223, 91 Stat. 1628, 50 U.S.C. 1701 – 1706. It has been widely acknowledged that certain EAA authorities have not been continued via the Presidential Executive Order, including limits on the jurisdiction of federal courts and some enforcement authorities. See Ferguson, *supra* note ___, at 13.

¹²⁵ Act Oct. 6, 1917, ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. §§ 1–44).

¹²⁶ 50 U.S.C. 1702(a)(1).

There is very little that the President is clearly prohibited from doing when imposing economic sanctions under IEEPA. Explicitly included among IEEPA's sweeping powers is the authority to "regulate . . . or prohibit, any . . . importation or exportation . . . in which any foreign country or a national thereof has any interest."¹²⁷

At the present time, IEEPA forms much of the legal basis for the continued application of the export controls under the EARs. While the practice has raised some concerns,¹²⁸ it has largely been accepted as a way of ensuring the availability of export controls. Its latest manifestation came through Executive Order 13222,¹²⁹ issued by President George W. Bush, directing that:

to the extent permitted by law, the provisions of the Export Administration Act of 1979 . . . and the provisions for administration of the Export Administration Act of 1979 . . . shall be carried out under this order so as to continue in full force and effect and amend, as necessary, the export control system heretofore maintained by the Export Administration Regulations issued under the Export Administration Act of 1979.¹³⁰

Under the statute, IEEPA powers must be triggered by the invocation of a national emergency,¹³¹ found to exist because

unrestricted access of foreign parties to U.S. goods and technology . . . , in light of the expiration of the Export Administration Act of 1979, constitute[s] an unusual and extraordinary threat to national security, foreign policy and economy of the United States. [Assertion of IEEPA power is necessary to] exercise the necessary vigilance over exports and activities affecting the national security of the United States [and] to further significantly the foreign policy of the United States . . . and to fulfill its international responsibilities."¹³²

¹²⁷ Barry E. Carter, International Economic Sanctions: Improving the Haphazard U.S. Legal Regime, 75 Cal. L. Rev. 1159, 1240 (1987), citing 50 U.S.C. § 1702(a)(1)(B).

¹²⁸ See, e.g., Joel B. Harris & Jeffrey P. Bialos, The Strange New World Of United States Export Controls under the International Emergency Economic Powers Act, 18 Vand. J. Transnat'l L. 71 (1985).

¹²⁹ 66 Fed. Reg. 44025 (August 22, 2001).

¹³⁰ *Id.* In addition to IEEPA, the Order also invoked the President's authority under the Constitution and other federal laws.

¹³¹ IEEPA section 202(a), 50 USC 1701(a) (declaration of emergency with respect to a "unusual and extraordinary threat, which has its sources in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States").

¹³² 66 Fed. Reg. 44025. Furthermore, IEEPA authorizes the President to "issue such regulations . . . as may be necessary for the exercise of [IEEPA] authorities." IEEPA section 205, 50 U.S.C. 1704. Violations of regulations issued under IEEPA are the subject of both civil and criminal penalties. *Id.* at 206, 50 U.S.C. 1705.

As required by the National Emergencies Act (NEA),¹³³ the President of the United States has annually renewed the initial 2001 declaration of emergency set forth in E.O. 13222 for the last decade.¹³⁴ Most recently, President Obama renewed the declaration on August 7, 2014.

The existing configuration of legal authorities, Export Administration Regulations, Executive Order 13222, and IEEPA, suggest two related approaches for addressing contingencies regarding Basel non-compliant exports of municipal wastes or hazardous wastes not covered under the existing RCRA regulatory scheme:¹³⁵ 1) changes to the Export Administration Regulations, and 2) direct reliance on the President's ability to trigger IEEPA powers to address contingencies.

Under the first approach, Export Administration Regulations exports would be amended to include residual waste categories not covered by the RCRA export regulation scheme and impose Basel requirements regarding notification and import.¹³⁶ Such an approach would be consistent with the purposes of the 1979 Export Administration Act and its regulatory scheme, as continued by Executive Order 13222, since it would "further significantly the foreign policy of the United States" and "fulfill its international responsibilities."¹³⁷

The exercise of such Presidential powers outside of the economic and national security area may seem unusual. Nevertheless, it finds ample precedent in other contexts.¹³⁸ For

¹³³ 50 U.S.C. section 1622(d). Under the NEA, declarations of national emergencies invoking the President's IEEPA powers automatically terminate after one year, unless the President "publishes in the Federal Register and transmit to the Congress a notice stating that such emergency is to continue in effect after such anniversary." *Id.*

¹³⁴ 79 F.R. 46959 (Aug. 11, 2014).

¹³⁵ Since the first option also relies on the President's IEEPA authority, it is strictly-speaking not distinct from option two, though it would utilize a primarily administrative regulatory route.

¹³⁶ Since the EAR is revised and updated on a regular basis by the Department of Commerce, inclusion of such changes in the normal revision process seems plausible. However, section 204(c) of IEEPA, 50 U.S.C. 1703(c), requires the Administration, here through the Secretary of Commerce, to report to Congress any changes with regard to the President's exercise of his IEEPA authorities in a semi-annual report to Congress.

¹³⁷ 50 U.S.C. app. 2405(a)(1) ("further significantly the foreign policy of the United States or . . . fulfill its declared international obligations"); 15 C.F.R. §730.6 ("The export control provisions of the EAR are intended to serve the national security, foreign policy, . . . and other interests of the United States, which in many cases are reflected in international obligations or arrangements."). The legislative history of the 1979 EAA acknowledged the broad scope of the foreign policy category. See H.R. Rep. No. 200, 96th Cong., 1st Sess. 7 (1979) ("The purposes of foreign policy controls are more vague and more diffuse. The purposes can range from changing the human rights policy of another country; to inhibiting another country's capacity to threaten the security of countries friendly to the United States; to associating the United States diplomatically with one group of countries as against another; to disassociating the United States from a repressive regime.")

The phrase "international responsibilities," used in the Executive Order, was the 1949 Act's precursor to the 1979 Act's "declared international obligations" language. Export Control Act of 1949 Section 2, Pub. L. 81-11, section 2 ("aid in fulfilling its international responsibilities"). There is no relevant legislative history or judicial gloss that we have been able to identify, as it appears that the phrase is virtually always referred to in conjunction with the "foreign policy" rationale and may encompass both legal obligations as well as other commitments.

¹³⁸ It appears that prior to the 1979 Act, international environmental, health and safety policies were among the issues of concern within the EAR. See Opinion Of The Office Of Legal Counsel, U.S. Department of Justice, *The*

example, an important foreign policy objective in the exercise of EAA powers has been the furtherance of international human rights priorities. For specially designed implements of torture as well crime control and detection equipment, technology and software export controls have been used to support “U.S. foreign policy to promote the observance of human rights throughout the world.”¹³⁹

Here, ongoing concern about the international trade in hazardous and other wastes as well as commitment to the Basel Convention ought to be similarly sufficient to activate the foreign policy purpose. The President and federal agencies fully supported the Convention, the Senate provided its advice and consent soon after submission, and efforts to seek additional implementing legislation that would facilitate ratification continue to be pursued. Moreover, promoting more effective control of hazardous waste exports and ensuring its environmentally sound management is in itself an important means for the U.S. to advance its international commitment to human rights.¹⁴⁰

Utilizing export controls to address possible contingencies regarding the export of municipal solid waste and hazardous waste not covered by RCRA would also allow the United States to “fulfill its international responsibilities” not to cause transboundary harm through the export of its wastes.¹⁴¹ Such controls would protect countries incapable of managing such wastes in an environmentally sound manner, facilitate deeper and more structured cooperation with the international community, and prevent the possibility of adverse diplomatic

President's Authority to Control the Export of Hazardous Substances, 4 Op. O.L.C. (Vol. B) 568, 1980 WL 20953 (affirming in response to an inquiry by the Department of Commerce that “The Export Administration Act of 1979 continued the President's authority under its predecessor statute to control exports of hazardous substances for foreign policy purposes”). Of course, the EAA by its own terms made public health and safety an important policy consideration for the imposition of export controls. 50 App. U.S.C.A. 2402(13) (“It is the policy of the United States to control the export of goods and substances banned or severely restricted for use in the United States in order to foster public health and safety and to prevent injury to the foreign policy of the United States as well as to the credibility of the United States as a responsible trading partner”).

¹³⁹ 15 C.F.R. 742.7(a) & 742.11(a); *see also* 15 C.F.R. 742.13(a).

¹⁴⁰ The U.N. Human Rights Council recognized this connection in the appointment of the “Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes” and associated resolutions. *See, e.g.*, U.N. Human Rights Council Res. 18/11, Mandate of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, ¶ X, Res. adopted by the Human Rights Council, 18th Sess., Sept. 29, 2011, U.N. Doc. A/HRC/RES/18/11 at XX (Oct. 13, 2011); U.N. Human Rights Council Res. 21/17, Mandate of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, ¶ X, Res. adopted by the Human Rights Council, 21st Sess., Sept. 27, 2012, U.N. Doc. A/HRC/RES/21/17 at XX (Oct. 22, 2012). *See generally* <http://www.ohchr.org/EN/Issues/Environment/ToxicWastes/Pages/SRToxicWastesIndex.aspx>.

¹⁴¹ *See generally* The Trail Smelter Case, (U.S. v. Can.), 3 Rep. Int'l Arb. Awards 1905 (1941); *see also* John Read, The Trail Smelter Dispute, 1 Can. Y.B. Int'l L. 213, 213-17 (1963); Stockholm Declaration Principle 21 (“States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States”); 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, I.C.J.

consequences from illegal waste exports.

The second option for addressing perceived gaps in legal authority regarding MSW and non-RCRA hazardous waste exports would directly invoke the President's IEEPA powers. The broad powers under IEEPA would be sufficient to allow for application of any of the Basel required export controls and processes. However, IEEPA powers would have to be triggered by a Presidential declaration of national emergency regarding an "unusual and extraordinary threat."¹⁴² There are at least two approaches to such a declaration: 1) a blanket national emergency declaration arising out of the present set of circumstances related to hazardous waste trade and the Basel Convention, or 2) an *ad hoc* case-specific emergency declaration triggered in the future by a specific instance or anticipated threat of non-compliance under the Convention with the potential to trigger serious adverse legal, diplomatic, public health and environmental consequences.¹⁴³

Under a blanket approach, the President might deem the existing set of circumstances to constitute a present and ongoing national emergency for at least three reasons.¹⁴⁴ First, with the significant volume of international trade in hazardous and non-hazardous wastes, the danger of uncontrolled hazardous waste trade raises the specter of the type of serious public health risks and environmental contamination that have been encountered in illegal hazardous waste dumping cases such as in Koko, Nigeria or the Trafigura vessel case. Even if any individual waste shipment might not always have serious environmental or public health impacts, the accumulated effects of uncontrolled waste exports arguably pose a serious problem. Furthermore, the effects of uncontrolled waste trade, including contamination and other hazards, could well return to the U.S. as in the form of adulterated food or toxic products.

Second, the failure of Congress to enact additional implementing legislation for more than two decades suggests parallels to the lapse of the Export Administration Act. Just as re-authorization failure of the EAA left a potential legal void potentially jeopardizing national security and foreign policy objectives, U.S. policies on global environmental issues might be jeopardized by the Basel legislation failures. Third, as the Basel Convention has achieved near-universal membership, the U.S. has been left with just a handful of the least-developed and poorest nations in the world outside of the treaty regime.¹⁴⁵ Failure to participate in the leading international forum on the trade and environmentally sound management of hazardous and

¹⁴² 50 U.S.C. 1701(b).

¹⁴³ While IEEPA grants the President the authority to promulgate applicable regulations to exercise IEEPA powers, EPA could presumably be charged with implementation and responding to relevant instances.

¹⁴⁴ IEEPA does not itself define "emergency," and a blanket emergency declaration in this instance would arguably not be much different from the repeated Presidential emergency declarations utilized to keep the Export Administration Regulations in effect. *See generally* Carter, *supra* note ___, at 1234-35. But see House Comm. on International Relations, Trading with the Enemy Act Reform Legislation, H.R. Rep. No. 459, 95th Congr. 1st Sess. 10 (1977) ("[E]mergencies are by their nature rare and brief and . . . not to be equated with normal, ongoing problems").

¹⁴⁵ *See Parties to the Basel Convention*, *supra* note ___[26].

other wastes has undoubtedly diminished the international credibility of the U.S. and impaired its ability to protect national interests in that forum. These environmental, public health, and diplomatic impacts on the U.S. might well be deemed to present an “unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States,” allowing for the declaration of an emergency and export control response.

A blanket emergency declaration is not without its weaknesses. Arguably, IEEPA intervention, and thus any emergency declaration, would only be necessary and thus apply to the uncontrolled export of MSW and non-RCRA hazardous wastes. These categories of wastes, however, do not present nearly as serious of a threat as the RCRA-covered hazardous wastes. Moreover, exports outside of Basel Convention controls and outside of applicable article 11 agreements are not likely to occur. And regardless of membership, the U.S. has been able to participate in Convention activities as an observer and work through its allies to affect Basel programs. The justifications for a blanket national emergency thus seem to be a stretch, even though a systematic and forward-looking approach would be desirable.¹⁴⁶

An *ad hoc* case-specific approach would be more promising. Thus, an emergency declaration and IEEPA powers could be triggered by a specific instance or an anticipated threat of non-compliance under the Convention, especially if there is the potential for adverse legal, diplomatic, or public health and environmental consequences to the U.S. Apart from potential treaty breaches, evolving international expectations and norms suggest the possibility that the unconsented export of hazardous and other wastes to countries without the capacity to ensure environmentally sound disposal could violate the duty to avoid transboundary harm.¹⁴⁷ In fact, to the extent that the Basel prior informed consent processes is a readily available and reasonable means for avoiding potential transboundary harm, compliance failures could not only result in international embarrassment but also serious diplomatic repercussions or legal liability, undermining U.S. foreign policy on environmental issues and impacting the U.S. economy.¹⁴⁸

Apart from Congressional delegations of authority to the President, the scholarly literature has also explored theories of Executive power that might not require further Congressional action here. One particularly attractive theory identifies Executive Branch power

¹⁴⁶ However, the willingness of Basel Action Network to oppose ratification on an “all-or-nothing” basis with respect to the Ban amendment could also be viewed as suggesting that there is no relevant national emergency regarding uncontrolled hazardous waste trade. See Basel Action Network, “Why the US Must Ratify the Basel Convention together with the Ban Amendment (or not at all)”, *supra* note __[80].

¹⁴⁷ See also Stockholm Declaration Principle 21 (“States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States”); 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, I.C.J. A related concern could arise out of potential human rights issues associated with the effects of improper hazardous waste management.

¹⁴⁸ For example, the Canadian government has been the target of significant NGO criticism in the wake of alleged illegal MSW shipments to the Philippines. <http://www.ban.org/2015/05/22/more-canadian-garbage-found-illegally-dumped-in-the-philippines/>.

to implement international treaty commitments under the President’s constitutional authority to “take care that the laws be faithfully executed.”¹⁴⁹ Thus, any additional implementing actions necessitated by Basel Convention requirements could be justified under this power. Since the Senate has already provided its advice and consent and Basel Convention commitments are generally consistent with federal regulatory policies, legitimacy concerns in the assertion of such Presidential powers should be limited.

Nevertheless, such aggressive Presidential authority theories remain controversial. Within the broad scope of many global MEAs, such theories would endow the President with a wide swath regulatory authority that would run counter to widely-held assumptions about the need for Congressional involvement in the domestic implementation of environmental agreements. At a minimum, considering Congress’ traditional dominant role in the design of domestic environmental regulatory schemes, it would seem unwise to proceed in a fashion that excludes or ignores Congress’ role and interest in these issues. These theories thus remain available for exploration, though the availability of the above-discussed Congressionally authorized paths would seem to be preferable options for implementation of the Basel Convention.

Our analysis in this part indicates that there is plenty of operational regulatory authority to implement the provisions of the Basel Convention. The combination of authority under RCRA section 3017, the potentially wide-ranging authority delegated by IEEPA to the President, as well as the President’s own inherent authority thus describe one general answer to the concerns raised with respect to legal authority. No new implementing legislation is necessary, and ratification could go forward without further delay.¹⁵⁰

* * * * *

In sum, there has never been any doubt that most of the obligations of the Convention could be implemented with existing statutory authority, primarily under RCRA. That includes both the Convention’s substantive objective of promoting the environmentally sound management of hazardous wastes as well as the control of hazardous waste exports by prior informed consent processes. Furthermore, RCRA Section 3017 anticipated future international agreements governing hazardous waste trade and authorized such agreements to supersede domestic default export control processes. These authorities and capabilities have not changed since the early 1990s, when the Convention achieved the Senate’s advice and consent.

¹⁴⁹ U.S. Const. art. II, sec. 3. Edward T. Swaine, Taking Care of Treaties, 108 Colum. L. Rev. 331.

¹⁵⁰ There is one further option that could be exercised by the President, based on his foreign affairs powers – negotiation of additional article 11 agreements that would exempt bilateral waste trades from the requirements of the Convention. These types of agreements are already in effect with respect to Mexico, Canada, and other countries. Such an agreement would need to be put in place in advance of a Basel-covered waste shipment, but would have the benefit of replacing Convention requirements for non-RCRA hazardous waste and MSW.

We believe the practical risk of export of non-RCRA hazardous waste and municipal solid wastes to be negligible. However, as we have discussed, any remaining concerns about such wastes falling outside the scope of Section 3017's regulatory control could be addressed in two ways. First, amendment of the Export Administration Regulations could bring the export of such wastes within the control of the federal government. Second, the President could issue a declaration determining the uncontrolled and unregulated export of such wastes to constitute a national emergency warranting the exercise of IEEPA control authority. This could occur either as an ad hoc response to a specific incidence posing diplomatic controversy or international legal responsibility or in a preemptive ex ante manner providing EPA with the authority to prevent such uncontrolled exports from occurring in the first instance.

III. Rethinking Basel Convention Ratification – Substantial Compliance

With a significant panoply of legal authorities available to implement the requirements of the Basel Convention, in existence since the Senate provided its advice and consent in 1992, why then has U.S. ratification been stalled and continues to remain so to the present? After all, (and as we explored in Part II) as early as 1980, the Justice Department's Office of Legal Counsel formally opined, on requests by the Commerce Department and the White House, that then-effective trade control statutes, the Export Administration Act, provided authority for the regulation of hazardous waste exports, suggesting that trade control authority could be utilized for environmental purposes. Moreover, theories of Executive branch authority with respect to foreign relations and treaty implementation have existed for some time, yet they have not been sufficient to prompt action on the Basel Convention.

To the extent that federal agencies have grown accustomed to operating primarily within their own "silos" of jurisdiction and regulatory expertise, opportunities for multi-agency cooperation in the treaty implementation may be easily missed. Political inertia is invariably a contributing cause, as it is a reflection of the realities of federal agencies' limited attention span and resources, as well as pre-occupation with other higher priority matters. Combine that with the prevailing political dysfunction in Congress, the inability to enact major domestic environmental legislation for a quarter of a century now, and general opposition to more environmental regulation, it may not come as a surprise that the federal government has been very cautious about ratification and has chosen to wait for additional Congressional implementing legislation.

However, implicit in the decision to delay ratification pending additional Congressional implementing legislation, there is also an implicit premise that has been largely unquestioned in the MEA context – that the legal standard for ratification decision should be breach avoidance.¹⁵¹ In other words, it has been assumed that ratification requires sufficient domestic

¹⁵¹ Breach may be determined "by comparing the conduct in fact engaged in by the State with the conduct legally prescribed." Report of the International Law Commission, Commentaries to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 56th Sess., Supp. No. 10, at 125, U.N. Doc. A/56/10 (2001)

regulatory authority, such that the Executive Branch can comply perfectly with the agreement's commitments. For MEAs, breach avoidance has oftentimes turned into a reflexive policy response of perfect compliance or, more practically speaking, "over-compliance."

We view reliance on a perfect compliance or over-compliance approach as inappropriate, especially because of their effect with respect to commitments to engage in environmental regulation, usually the most significant obligations within MEAs. It fails to account for the benefits of participation in environmental agreements and the practical reality of treaty compliance, including the real risks and practical consequences of breach. Instead, we propose an alternative: substantial compliance and management of non-compliance risks, which we believe is a more appropriate standard for Basel Convention ratification. Substantial compliance seeks to accomplish the objectives of the treaty through the deployment of best efforts and management of the risk of non-compliance.

A. Three Observations about Non-compliance

Before examining the appropriateness of perfect or over-compliance more carefully, three observations about non-compliance are useful here. First, implementation and compliance with the law is never perfect. This observation should be unsurprising in international law. In conventional wisdom, there is often a wide gulf between the requirements of international law and the actual behavior of states. The perception has given rise to arguments that international law is not law at all.¹⁵² Yet, it is also frequently overlooked that similar non-compliance criticism can be directed at national legal systems, even if not necessarily to the same degree.

Second, non-conformance with legal requirements does not equate with breach. Breach requires not only non-conformance with treaty obligations but also consideration of the context and the extent of non-conformance, for example whether non-conformance is de minimis and/or accompanied by extenuating circumstances or excusing conditions.¹⁵³ In other

[hereinafter Commentary to the Draft Articles on State Responsibility], p. 55. *See also* art. 12 ("There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.") *See also* U.S. Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 29, para. 56 ("incompatibility with the obligations"); Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, Judgment, I.C.J. Reports 1986, p. 64, para. 115, and p. 98, para. 186 (acts "contrary to" or "inconsistent with" a given rule); Bagcikovo-Nagymoaros Project, p. 46, para. 57 ("failure to comply with its treaty obligations"). If obligations "only set[] a minimum standard above which the State is free to act," non-conformance constitutes behavior that falls below the minimum required. Commentary on Draft Articles of State Responsibility, p. 55. Of course, what is required "depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case." Report of the International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Art. 12, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles on State Responsibility].

¹⁵² For a discussion, see Anthony D'Amato, *Is International Law Really "Law?"*, 79 NW. U. L. Rev. 1293 (1985).

¹⁵³ *See generally* Draft Articles of State Responsibility, ch. V.

words, an assertion of breach (or non-compliance) triggers not only an evaluation of non-conformance with treaty requirements but also of the surrounding circumstances, especially potential excuses justifying non-conformance.

In international law, the applicability of excuse doctrines such as force majeure,¹⁵⁴ distress,¹⁵⁵ and necessity¹⁵⁶ is generally very limited.¹⁵⁷ Nevertheless, they indicate that the circumstances surrounding an event of non-conformance do matter. Even if the relevant conditions do not excuse legal responsibility of the consequences, they are bound to affect evaluations of culpability and influence the willingness of other parties and institutions to exercise discretion in decisions to pursue such violation by formal legal action, informal efforts, or not at all.

Third, given the inherent ambiguity and indeterminacy of treaty text and legal language as well as the passage of time and process of change, it is not possible to guarantee compliance as an ex ante matter. Precision and care in the legal drafting process can help minimize some textual ambiguities and uncertainty. But there are at least two sources of ambiguity that are unavoidable.

One source is intentional imprecision, introduced into an agreement as constructive ambiguity allowing disagreements to be “papered over” and enabling the successful conclusion of an otherwise contested agreement. The result is to provide parties with flexibility, sometimes to such an extent that, short of a total lack of effort or patently obvious bad faith, lack of conformity with treaty requirements may be very difficult to identify or assert as a violation and to act on it. Favored qualifiers of this kind include phrases “as appropriate” and “to the extent possible.” For example, the Basel Convention requires that parties “to the extent possible”

Not allow the export of hazardous wastes or other wastes to a State or group of States belonging to an economic and/or political integration organization that are Parties,

¹⁵⁴ Art. 23, Draft Articles on State Responsibility (“occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible . . . to perform the obligation”).

¹⁵⁵ Art. 24, Draft Articles on State Responsibility (“no other reasonable way, in a situation of distress, of saving” lives)

¹⁵⁶ Art. 25, Draft Articles (“only way for State to safeguard an essential interest against a grave and imminent peril”). Other doctrines that excuse non-compliance, though generally not relevant to environmental agreements, are consent (art. 20), self-defense (art. 21), and countermeasures (22).

¹⁵⁷ For example, force majeure provides no help when “the situation . . . is due, either alone or in combination with other factors, to the conduct of the State invoking it . . . or the State has assumed the risk of that situation occurring.” Art. 23, Draft Articles. Distress is inapplicable if the invoking party is responsible for the situation or “the act in question is likely to create a comparable or greater peril.” Art. 24, Draft Articles. Necessity cannot be invoked if “the international obligation in question excludes the possibility of invoking necessity . . . or the State has contributed to the situation of necessity.” Art. 25, Draft Articles.

particularly developing countries, which have prohibited by their legislation all imports.”¹⁵⁸

The second source of ambiguity and uncertainty is the inherent indeterminacy of the law as well as the inevitable change of social conditions brought about by the passage of time.¹⁵⁹ In the world of environmental regulation, the rapidity of environmental change and technological advancements is an important reality that regulators must contend with in their work. Accordingly, the types of compliance actions required by particular legal obligations may change as time passes and conditions change. Compliance is thus not a static one-time act, but rather a dynamic and ongoing process.

B. Breach Avoidance in the Context of Commitments to Regulate the Environment

At first blush, breach avoidance seems entirely unobjectionable and straight-forward to achieve: “simply” conform one’s conduct with the treaty’s requirements. Arguably, that is a key requirement for a serious commitment to the rule of law. From an instrumental perspective, it helps to foster a U.S. reputation for abidance with international legal obligations, valuable especially when the U.S. seeks to hold other nations to the requirements of international law. In fact, concerns about compliance and a desire to avoid breach have been at the core of the U.S. government’s practice of delaying ratification of a number of international environmental agreements,¹⁶⁰ essentially imposing a delay until all necessary legal authority to implement binding treaty commitments have been put in place.¹⁶¹

However, with respect to treaty commitments to engage in environmental regulations, the breach avoidance standard is problematic. Though textual ambiguity and legal indeterminacy always present challenges for compliance, they are especially difficult for breach avoidance because such an effort attempt to predict the circumstances in which non-compliance might occur in the future in order to shape an anticipatory implementation responses. Thus, uncertainty and indeterminacy become serious challenges. A natural response to the desire to eliminate such uncertainty and to insure against inadvertent breach is over-compliance – as a guarantee of breach avoidance. Over-compliance can be a consequence of caution with respect to risks of non-compliance and breach avoidance.

¹⁵⁸ Art. 4(2)(e) Basel Convention

¹⁵⁹ As Edward H. Levi explained with respect to statutory language, “it is only folklore which holds that a statute if clearly written can be completely unambiguous and applied as intended to a specific case. Fortunately or otherwise, ambiguity is inevitable in both statute and constitution as well as with case law.” Edward H. Levi, *An Introduction to Legal Reasoning* 5 (1949). “Change in the rules is the indispensable dynamic quality of law [that] occurs because the scope of a rule of law, and therefore its meaning, depends upon a determination of what facts” are relevant. *Id.* at 2.

¹⁶⁰ See *supra* note ____.

¹⁶¹ See, e.g., “The American Approach to Treaties,” Panel, American Society of International Law Annual Meeting (April 6, 2013), Remarks by Susan Biniaz, Deputy Legal Adviser, US Department of State.

There is also a further issue that contributes to complexity in environmental treaty compliance. Many primary treaty commitments focus on the regulation of private party conduct rather than adjustment of substantive actions of government entities.¹⁶² That is primarily the result of the nature and structure of most environmental problems – their root cause is located in the actions and behaviors of private entities and businesses rather than governmental entities. In contrast to arms control, for example, the bulk of the most significant substantive environment-related commitments effectively require regulation and control of private activity since most environmental degradation arises out of the conduct of private actors rather than governmental actions. When key commitments are designed and framed in terms of countries refraining from environmentally harmful activities or achieving particular environmental outcomes, the structure of many environmental problems usually requires party states to take on commitments to regulate and police the conduct of private entities.

One prominent example is climate change. The Kyoto Protocol limits carbon emissions by requiring that “parties . . . ensure that their aggregate anthropogenic carbon dioxide equivalent emissions . . . do not exceed their assigned [limits].”¹⁶³ Effectively, that requirement imposes a mandate to control the behavior of private actors since the vast bulk of carbon emissions come from the activities of businesses and private individuals and since the implicit expectation is that modern economic activity will not simply come to a stand-still. It is a provision that translates into an obligation to *regulate primarily non-government activities* contributing to carbon dioxide and other greenhouse gas emissions.¹⁶⁴ With respect to the Basel Convention, uncertainty about events triggering compliance requirements as well as the practical availability of legal authority have arguably been the prompts for over-compliance.

Of course, both of these issues are not unique to environmental agreements. However, the issue has become particularly significant for MEAs because of the proliferation of environmental agreements in the last couple of decades. With these agreements, treaty mandates usually call for domestic regulation addressing particular issues.¹⁶⁵

C. The Problem of Perfect or Over-Compliance: The Enemy of the Good . . .

What is wrong with perfect or over-compliance? After all, once a country joins a treaty, implementation of binding commitments becomes legally required. They are no longer just aspirations. Ensuring that all necessary legal authority is in place before legal obligations are triggered seems reasonably prudent. And setting high expectations for implementation and

¹⁶² See generally Yang, International Treaty Enforcement as a Public Good, *supra* note ____.

¹⁶³ Art. 3(1), Kyoto Protocol

¹⁶⁴ In practice, obligations of prevention are frequently articulated as obligations to realize specific outcomes and results. When such an obligation requires controlling the actions of third-party entities and is not solely dependent on the acts of the entity responsible for compliance, it does not functionally differ from an obligation of regulation.

¹⁶⁵ When there are strong countervailing political considerations, over-compliance would not be expected.

compliance would seem consistent with an ex ante good faith posture and commitment to rule of law as well as the shared objectives and interests of the treaty instrument. Over-compliance is arguably a small price to prevent non-compliance.

However, the price of over-compliance in the context of the Basel Convention, and possibly other unratified MEAs, is not small at all. At this point, more than two decades have passed since the Basel Convention's original signature by the U.S. During that time the initial enthusiasm about treaty participation has largely worn off. While some environmental activists and organizations, such as the Basel Action Network, have remained doggedly focused on the Convention and its issues, most of the environmental community and federal government agencies have moved on. Unless international news pick up illegal hazardous waste shipments, such as by the 2006 Trafigura case involving illegal hazardous waste shipments to Nigeria,¹⁶⁶ little attention is trained on these issues. Even though cooperation on waste issues of rising importance, such as electronic waste, is occurring, it is limited in form and scope.

U.S. ratification and full participation could provide substantial benefits to the treaty system and to the U.S. The U.S. would gain full rights of membership, and the Convention would conversely gain the benefits of commitment to all treaty obligations. Full U.S. participation would also strengthen treaty institutions, broaden cooperation, and enhance the effectiveness of international control over the trade in hazardous and non-hazardous waste. Undoubtedly, ratification would prompt greater engagement by domestic stake-holders, including Congress, the U.S. environmental community, and American businesses.

Conversely, the benefits of delaying ratification have been minimal. Much of U.S. regulatory policy with respect to hazardous waste management and exports is already Basel-compliant or -consistent. U.S. garbage barges on a journey to nowhere have not been a serious problem since the 1990s, when the Basel Convention came into existence. While municipal solid waste continues to be exported (and imported), such trade occurs within the scope of agreements that will qualify for the Convention's article 11 exemptions.

A posture of breach avoidance also has arguably been unnecessary to mitigate serious risk arising out of potential non-compliance events. Violations of MEAs are highly unlikely to result in formal legal sanctions because enforcement mechanisms are difficult to trigger, unwieldy, or generally weak in potential impact. In other words, even if a country were to find itself in non-compliance with MEA requirements, it would be unlikely to suffer formal adverse legal effects.¹⁶⁷

¹⁶⁶ BBC News, "Trafigura found guilty of exporting toxic waste," July 23, 2010, available at <http://www.bbc.com/news/world-africa-10735255>.

¹⁶⁷ Of course, in the past several decades, MEAs have been busy creating "non-compliance mechanisms" which bear some resemblance to traditional enforcement processes. Treaties such as CITES, Mar. 3, 1973, 993 U.N.T.S. 243, 12 I.L.M 1088, available at <https://cites.org/eng/disc/text.php>, the Montreal Protocol, Sept. 16, 1987, 15 U.N.T.S. 29, available at <http://ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone->

Of course, planning for non-enforcement as the primary consequence of breach is both inadvisable under many circumstances as well as inappropriate as a matter of commitment to the rule of law and to the treaty. In fact, there may be good reason to be wary of approaches that allow for corner-cutting, potentially undermining the very nature of legal requirements set into treaty language. However, it seems to us that consideration of the risks of such contingencies is part of a proper evaluation of the need for over-compliance, especially when the price of over-compliance is high. Substantial compliance is ultimately not designed to legitimize weak compliance requirements. Instead, it seeks to ensure that compliance is substantively meaningful in advancing treaty objectives, including by capturing the benefits of U.S. participation.

But there is also another consideration. Given the indeterminacy of law, over-compliance as a way to avoid breach can become an exercise in imagination of all possible scenarios, some of them highly unlikely, that might require governmental intervention to ensure compliance. In the end, breach cannot be prevented with absolute certainty because ex ante efforts to guarantee perfect compliance would depend on the impossible proposition that one could determine in advance all of the possible situations in which non-compliance could arise.

layer/5, and even the Basel Convention itself now have them. With only a few exceptions, however, they generally do not provide for the imposition of punitive sanctions.

More common are bilateral dispute settlement processes. These processes allow for individual parties to raise claims of breach similar to how one might bring a claim for a breach of contract. However, such proceedings are rarely triggered. In fact, until the recent Antarctic Whaling case in the International Court of Justice (*New Zealand v. Japan*), related to the interpretation of the scientific whaling exception to the whaling moratorium under the International Convention on the Regulation of Whaling, formal dispute settlement proceedings in MEAs had never before been triggered. There, New Zealand asserted that Japan had violated the commercial whaling ban through the improper use of the scientific whaling exception. See *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Judgment, ICJ, Mar. 31, 2014, available at <http://www.icj-cij.org/docket/files/148/18136.pdf>. Unfortunately, the course of events even in that case are consistent with the fundamental difficulties of prompting dispute settlement proceedings. Japan had asserted the scientific research justification for its whaling activities for almost three decades, ever since the International Whaling Commission's moratorium came into effect. Other prior environmental disputes that have been the subjects of formal dispute settlement processes have generally arisen only in bilateral agreements, such as the *Gabchikovo-Nagymoros* case and the *River Uruguay* case.

For a discussion of the incentive to bring enforcement actions in a bilateral system and the collective action challenges of doing so in a multilateral system, see generally Tseming Yang, *International Treaty Enforcement as a Public Good: The Role of Institutional Deterrent Sanctions in International Environmental Agreements*, 27 MICH. J. INT. L. 1131 (2006). As a corollary, even when a multi- or pluri-lateral agreement authorizes severe sanctions for non-compliance, it is not likely that such sanctions will actually be imposed. The North American Agreement on Environmental Cooperation, the environmental side agreement to NAFTA, is a case in point. In the more than the two decade history of the agreement, the sanctions process has never been triggered.

Is intolerance of any risk of breach essentially a ratification standard that allows the perfect to be the enemy of the merely good enough?¹⁶⁸ That is an important question given that Congressional politics indicates no short-term prospect for passage of further Basel Convention implementing legislation. Should we wait even longer, likely many years or even decades longer, for legislation that will enable over-compliance? If the ultimate objective is to promote the broader aspiration of international cooperation and protection of the global environment, it seems to us that breach avoidance and over-compliance, at least in the Basel Convention context, has come at the expense of the core mission of the Convention as well as the broader needs for institution and capacity-building that advance the rule of law in the international system. Breach avoidance has essentially become a mechanism for treaty avoidance.

D. Substantial Compliance as an Alternative: Best-Efforts, Managing the Risk of Non-compliance, And Broadening the Compliance Perspective

We propose substantial compliance as a more appropriate and credible alternative to the standard of over-compliance or perfect compliance. Beyond the most obvious of what the terms imply and the necessity of substantial compliance being a case-specific evaluation, it is possible to identify three ways in which it re-frames the process of compliance: it requires best efforts, necessitates continuing compliance efforts and management of the risk of non-compliance, and involves a breadth of objectives.

First, with respect to best efforts, substantial compliance naturally requires the undertaking of “all reasonable or necessary measures.” Even when commitments are drafted as requiring the achievement of specific or absolute goals, such as limiting or entirely avoiding the emission of particular pollutants, most treaty obligations are usually not intended to be “strict liability” in nature.¹⁶⁹ With respect to commitments that call for the regulation of private conduct, it is virtually impossible for a regulatory intermediary to guarantee that the ultimate regulated entity will conform to treaty requirements, e.g. engage in no discharge of pollutants.

Moreover, such treaty commitments are based on a fundamentally different conception of the relationship between the treaty and parties. Instead of constructing a hierarchy, where party states are subordinated to the treaty system akin to how a regulated entity is answerable to the regulator, treaty commitments to regulate instead create relationships between treaty

¹⁶⁸ It is important to note that ultimately, it is not the possibility of non-compliant waste shipments that is important to the treaty compliance question. In fact, Convention requirements that parties have in place remedies for non-compliant shipments is based on the premise that non-compliant and even illegal shipments will inevitably occur. Non-compliant waste shipments are of relevance to the ratification question (and treaty compliance generally) only if a party cannot act or respond in the fashion expected of it by the Convention.

¹⁶⁹ As with all treaty obligations, compliance requirements depend ultimately on the specific language and the intent of the parties. However, in general, parties are not deemed to guarantee the obligation’s result. Applicable excuse doctrines, context and circumstances surrounding the actions that failed to accomplish the result, remain broadly relevant in determining breach. Commentary on Draft Articles of State Responsibility, p. 56-57.

and parties that are more similar to those of co-regulators.¹⁷⁰ In such situations, non-compliance by the treaty party (the co-regulator) arising out of uncontrolled actions of a third party, should arguably not be equated with traditionally sanctionable violations of law. Thus, the International Law Commission has suggested that “[o]bligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur.”¹⁷¹ Compliance is best judged by the best-effort standard, and some non-conformance is to be expected and is unavoidable.

Second, substantial compliance requires the continuing engagement of diplomats and regulators, and possibly also national legislators, because compliance is a dynamic and evolving process, rather than a one-time act designed to fulfill treaty commitment “once and for all.” Successful compliance does not automatically or inevitably flow from a particular set of implementing efforts. Instead, diplomats and regulators must be ready to address future unanticipated exigencies, respond to changing circumstances, and accept the unavoidable possibility of occasional non-conformance. As a result, compliance is a continual process of adjustment that manages the gap between expectation and reality, by exerting best efforts in performing treaty commitments and managing the risk of non-compliance.¹⁷²

Third, substantial compliance requires looking beyond breach avoidance as the sole purpose of implementation. Instead, it calls for an overall evaluation of the process of compliance by balancing a variety of considerations. In addition to considering the risk of non-compliance, including its magnitude, temporal proximity, and probability, it also requires diplomats and regulators to consider multiple sets of perspectives on the purposes of the treaty, both its role in advancing specifically articulated treaty objectives as well as broader needs with respect to the global environmental governance and institutions in order to determine what is appropriate and sufficient.¹⁷³ A treaty’s binding legal undertakings are often not the sole *raison d’être* for the creation and implementation of global MEAs. They are equally as much a political endeavor in global institution-building and the development of long-term global cooperative relationships. Thus, substantial compliance provides a broader context for the relationship between treaty systems and party states.

¹⁷⁰ Such considerations are found underlying the system of environmental federalism within the U.S.

¹⁷¹ Commentary on Draft Articles of State Responsibility, p. 62. Reading a guarantee into obligations of result would amount to the application of a strict liability standard. While a form of strict responsibility could provide a strong incentive for a party to do its utmost to avoid breach, parties ordinarily do not intend to hold themselves and each other strictly responsible for the achievement of particular results. Such a construction would also serve as a significant disincentive to joining the treaty in the first place.

¹⁷² For a more general perspective on the role of compliance management in the international law, see Chayes and Chayes, *The New Sovereignty*.

¹⁷³ In other words, articulating breach avoidance as the overriding ratification issues that must be cured by over-compliance masks a policy judgment that subordinates all other policy objective.

It is important to note that substantial compliance is not intended as a substitute for implementation generally or as an excuse for breach when a party is disinterested or opposed to treaty objectives. In most instances, application of a substantial compliance standard should not change the vast bulk of implementation efforts. Implementation efforts should ordinarily match compliance requirements. If there is a short-fall, the gap between obligation and reality should usually be small. However, substantial compliance accepts uncertainty within the process of compliance and allows it to be left unresolved rather than requiring attempts to “eliminate” it through over-compliance. In other words, breach avoidance is simply not the sole objective of implementation.

Substantial compliance with Basel Convention requirements can be accomplished by the Executive Branch with the legal authorities and mechanisms described above. The risk of non-compliance is small. It will also enable achievement of three sets of key objectives: 1) the articulated treaty objectives, 2) the reciprocal expectations of other treaty parties (to fulfill the agreed-to bargain, both the reliance and expectation interest), and 3) other institutional and global environmental interests.

As we have discussed, treaty objectives can be achieved through EPA’s existing regulatory scheme and authorities as well as other Executive Branch powers under the IEEPA. These authorities will allow for the implementation of the Convention’s environmentally sound management and the waste trade requirements likely to be triggered. U.S. membership would also trigger requisite financial and other technical assistance contributions obligations that would support the treaty institution.

Ongoing trade in municipal and hazardous wastes with Canada and Mexico under existing bilateral agreements as well as with other OECD countries under the 1992 OECD Decision is squarely consistent and permissible under the Basel Convention and thus compliant. These agreements have been treated as Article 11 agreements or arrangements and thus exempts the waste from the requirements of the Convention. It is conceivable that other article 11 agreements might be negotiated to cover waste trade with other countries. Furthermore, the bulk character of MSW and many non-RCRA hazardous wastes make their export to countries beyond immediate geographical neighbors economically infeasible and thus a negligible risk. To the extent such export contingencies were to occur, they could trigger available Presidential powers under IEEPA to intervene and halt such exports.

Expectations of other parties with regard to treaty implementation and compliance are likely to be focused primarily on the export-related commitments, especially the prior notice and consent process, as well financial and technical assistance. Because of such attention, the risk of prior informed consent failures and their effects on particular countries would take on increased significance. On the other hand, as discussed above, the risk of Basel-impermissible waste exports is quite low. The environmental and public health risks associated with non-RCRA hazardous wastes and MSW are far smaller than compared to RCRA regulated hazardous wastes. Furthermore, it is widely acknowledged that MEA compliance is far from perfect and that internal capacity and financial constraints can be significant impediments in this regard,

especially for many developing countries. Even if internal conditions may technically not excuse non-compliance,¹⁷⁴ awareness by diplomats and government leaders that domestic constraints, resource availability, and political processes usually impose practical constraint on the conduct of states does affect the real-world response to and diplomacy associated with non-compliance.

Finally, substantial compliance would also advance other interests. As the lone major industrial country hold-out, U.S. ratification would create a genuinely global waste trade agreement that is comprehensive in its scope. That in itself would strengthen the treaty institution as well as global efforts at cooperation.

In the end, substantial compliance is superior to perfect or over-compliance not only in its ability to balance a variety of goals and values. It is also able to align public policy process of weighing various interests more effectively with the underlying needs and practical objectives of treaty-making. In the case of the Basel Convention, substantively compliance would allow for fulfillment of a greater variety of relevant objectives and requirements.

IV. Beyond the Basel Convention

The Basel Convention is relatively unique in its status as an unratified treaty since it already received Senate advice and consent. However, concerns about adequate implementation authority is an unresolved issue for every other US-signed global MEA that remains unratified, such as the Stockholm Convention and the Rotterdam Convention. Can the options available to the Basel Convention be generalized to them?

A. U.S. Implementation of Multilateral Environmental Agreements

The analysis suggests two sets of lessons for other MEAs. First, with respect to finding domestic legal authority to implement MEAs, the analysis needs to look beyond the most obvious areas, the regulatory authorities of the presumptive implementing agency. Even if day-to-day operating responsibilities and practices can create “silos” of information and activities that can be practical impediments to inter-agency cooperation in implementation, treaty obligations are ultimately the responsibility of the U.S. government as a whole. Thus, regulatory authority of other agencies is relevant to the implementation question. Whether, such authority should be used may well raise important policy questions. However, failure to consider authority more broadly provides an incomplete picture to the legal question of implementing authority.

With respect to the Basel Convention, the President’s authority under the International Emergency Economic Powers Act and his inherent constitutional foreign affairs powers, as well as the Commerce Department’s implementing scheme under the EARs, constitute one

¹⁷⁴ See also, Draft Articles of State Responsibility, article 32.

important set of legal authority covering international trade that is potentially available to control waste trade under the Convention. Agreements such as the Stockholm Convention and the Rotterdam Convention, which seek to control international trade in particular chemicals and toxic substances as part of their treaty objectives, could benefit from these authorities.¹⁷⁵ In fact, such regulatory authority is likely to be of value to a broad range of international environmental agreements since many MEAs address the international nature of environmental issues by focusing on the global movement of natural resources, pollutants, chemicals, and information.

A second lesson concerns substantial compliance as a ratification standard. Substantial compliance, as contrasted with the prevailing approach of “over-compliance,” changes the policy calculus in decisions about ratification. Rather than elevating legal considerations of compliance above all else, substantial compliance adopts a more nuanced approach. It requires diplomats and regulators to consider the practical realities of implementation and compliance and expands the scope ratification considerations beyond breach avoidance. Instead, substantial compliance calls for best efforts in implementation, necessitates continuing compliance efforts and management of residual risks of non-compliance, and requires consideration of a range of objectives and interests that are affected by ratification.

Of course, each treaty is different, as is the associated politics and policy calculus. But that is precisely the core recognition of substantial compliance in reframing ratification decisions.

B. A “Thicker” Understanding of the Relationship Between MEAs and National Law

Finally, the article’s discussion provides a “thicker” understanding of the relationship between MEAs and U.S. law. MEAs constitute not only exchanges of legal commitments, but have become new and evolving international institutions. U.S. ratification and membership would advance a dual set of treaty objectives – hazardous waste management norms embodied in the treaty’s legal commitments and development of a set of governance institutions and cooperative relationships within the waste management sector specifically and global environmental issues generally. That is ultimately what is at stake in treaty participation -- not only U.S. compliance with treaty obligations but also the U.S. role and contribution to the development of these international institutions and regulatory schemes.

There is also a converse implication that our analysis has for treaty design – treaty negotiators will need to recognize and address more effectively the reality that legal commitments are part of a process of norm and institutional development. In such a scheme,

¹⁷⁵ While detailed analysis of another environmental agreement is beyond the scope of this article, at least one other convention, the Stockholm Prior Informed Consent Convention, may not require any further legislative authority, beyond reliance on the President’s authority under IEEPA, for implementation.

compliance is part of a dynamic and ongoing process rather than a one-time act. Breaches do not (and should not) always trigger institutional responses seeking punitive sanctions. Government parties are not the primary targets of regulation but rather regulatory intermediaries or co-regulators charged with controlling the behavior of private individuals and businesses. The implementation and development of treaty regimes is thus a continual process of adjustment to the “dialogue” between the treaty and its member parties akin to the norm development process described by Henry Hart and Albert Sacks’ Legal Process.¹⁷⁶ Treaty regimes are thus not finished masterpieces but rather works-in-progress that must be improved and adjusted through an iterative processes of application and revision.

That does not mean that traditional notions about legal norms and enforceability have no place in international agreements or that environmental treaties are doomed to ineffectiveness because of unenforceability of the commitments. Instead, treaty design of legal obligations must take better account of the structure of institutions at the international level. That includes the peculiarities of national implementation processes and how national environmental regulation and management can be enabled more effectively by a treaty’s design and formulation of obligations to solve environmental problems. In other words, diplomats and regulators negotiating MEAs need to gain a better understanding of how environmental commitments are implemented *in practice in various national regulatory systems*. While a detailed discussion of how to design enforceable legal commitments is beyond the scope of this article, an important option is the direct regulation of polluting industries or private individuals involved in undesirable environmental behavior, whether through the creation of international regulatory institutions or by greater reliance on direct national effectiveness of treaty commitments, such as self-execution of treaty provisions.

Conclusion

We firmly believe that there are no remaining legal authority gaps that prevent U.S. implementation of the Basel Convention, and hence U.S. deposit of an instrument of ratification. Our views are based both on an analysis of existing legal authorities as well as rejection of the perfect or over-compliance standard for ratification. These existing legal authorities as well as an alternative “substantial compliance” standard provide an appropriate basis for U.S. participation in the Basel Convention, and possibly in other environmental conventions. Ultimately, full U.S. membership is critical for effective realization of the entire range of benefits that multilateral environmental agreements promise for the planet – through the specific rules and obligations that they create for immediate action as well as their development of institutions and entrenchment of environmental norms and values necessary for long-term behavior change.

¹⁷⁶ Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (eds. William Eskridge, Jr. & Philip P. Frickey) (1994).