THE CASE FOR U.S. RATIFICATION OF THE BASEL CONVENTION ON HAZARDOUS WASTES

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Over the past two decades, the failure of the United States to ratify a string of global multilateral environmental agreements (MEAs) has become a significant source of frustration for environmentalists and diplomats. 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.

The common perception is that Washington politics is to blame. Our Article, however, explains that instead a legal issue, which has received little attention, has proven to be the more 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.

Based on a careful review of existing legal authorities, our Article argues that the executive branch already has, at this point in time, sufficient authority to implement Convention obligations. Given the negative consequences of ongoing delay and the closing time window for avoiding ratification complications associated with the Ban Amendment, the Convention's controversial amendment that has yet to enter into force, we believe that ratification of the Convention can and should move forward without delay.

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INTRODUCTION

Until recently, the United States' track-record on environmental treaty ratification has been so poor that it prompted calls for more concerted efforts at ratification.[1] In fretting initially

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1 *See, e.g.*, CTR. FOR PROGRESSIVE REFORM, RECLAIMING GLOBAL

about the ratification prospects of the Paris Agreement, it has been facetiously suggested that "the U.S. will not ratify any treaty unless it has to do with fish."[2] The successful conclusion and acceptance of the 2015 Paris climate change negotiations[3] and the U.S.'s early membership in the 2013 Minamata Convention on Mercury[4] have now put the question of how the U.S. participates in multilateral environmental agreements (MEAs), especially in light of past congressional hostility, at the forefront of public attention..

The question is not new. Since the 1990s, the world has seen the emergence of a set of global MEAs designed to address urgent planetary challenges. The U.S. has been a critical player in shaping many of these agreements, oftentimes even an enthusiastic supporter. But as these global MEAs have attracted widespread participation and gradually achieved near-universal international membership, the United States has curiously remained among the

ENVIRONMENTAL LEADERSHIP: WHY THE UNITED STATES SHOULD RATIFY TEN PENDING ENVIRONMENTAL TREATIES (2012), http://www.progressivereform.org /articles/international_environmental_treaties_1201.pdf; *see generally* John Knox, *The United States, Environmental Agreements, and the Political Question Doctrine*, 40 N.C. J. INT'L L. & COM. REG. 1 (2015).

2 *See* Joshua Keating, *The U.S. Will Not Ratify any Treaty Unless It Has to Do With Fish*, SLATE (Aug. 28, 2014, 9:00 AM), 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 United States could bypass the Senate and join an agreement coming out of the Paris negotiation as an Executive Agreement. *See* 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).

3 *See* Press Release, The White House, U.S. Leadership and the Historic Paris Agreement to Combat Climate Change (Dec. 12, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/12/12/us-leadership-and-historic-paris-agreement-combat-climate-change; *see also Status of Ratifications – Paris Agreement*, U.N FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/paris_agreement/items/9444.php (noting U.S. acceptance on Sept. 3, 2016).

4 In 2013, President Obama decided to join the Minamata Convention on Mercury through an Executive Agreement rather than as a Senate-approved treaty. Joining the Minamata Convention not only made the United States 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. *See* Press Release, U.S. Dep't of State, United States Joins Minamata Convention on Mercury (Nov. 6, 2013), http://www.state.gov/r/pa/prs/ps/2013/11/217295.htm (on file with author); *see generally* Tseming Yang, *The Minamata Convention on Mercury and the Future of Multilateral Environmental Agreements*, 45 ENVTL. L. REP. 10064 (2015).

few non-members in a number of these treaties, failing to take the critical ratification step after signing them.

There is some urgency to resolve the issues with respect to at least one MEA: the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (the "Convention").[5] In 1990, the U.S. became a signatory to the Basel Convention, and shortly thereafter in 1992, the Senate provided advice and consent. Despite Senate approval, the Convention has languished for almost a quarter century pending ratification. Thus, the U.S. remains a non-member to the Convention.[6]

The reasons for remaining dormant are often attributed to political inertia and Washington's dysfunction, particularly partisan hostility to environmental protection issues. However, this conventional take on the problem oversimplifies it. The Basel Convention was negotiated and then signed under two Republican administrations (those of Ronald Reagan and George H.W. Bush).[7] The Senate's advice and consent in 1992 came with bipartisan support.[8] Ratification of the Convention has been a policy priority under presidents from both parties, including under the Obama administration.[9]

While politics may have contributed to the delay, the saga of

5 *See* Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57 [hereinafter Basel Convention].

6 *See infra* Section I(C).

7 *See* 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, S. TREATY DOC. NO. 102-5, at v (1991) [hereinafter President's Transmittal of the Basel Convention].

8 *See* 138 CONG. REC. S12291 (daily ed. Aug. 11, 1992) (displaying approval by unanimous consent).

9 *See, e.g.*, WHITE HOUSE COUNCIL ON ENVTL. QUALITY, NATIONAL STRATEGY FOR ELECTRONICS STEWARDSHIP 29–30 (2011), http://www.epa.gov/epawaste/conserve/materials/ecycling/taskforce/docs/strategy.pdf (expressing support for ratification); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-1044, ELECTRONIC WASTE: EPA NEEDS TO BETTER CONTROL HARMFUL U.S. EXPORTS THROUGH STRONGER ENFORCEMENT AND MORE COMPREHENSIVE REGULATION 36 (2008), http://www.gao.gov/new.items/d081044.pdf. (highlighting Bush administration support for Basel ratification). Of course, as of the final editing of this Article, the Trump Administration's position on the Basel Convention is not yet clear. Despite this uncertainty, the discussions and arguments of this Article are applicable to any administration.

the Basel Convention illustrates an equally important issue of law at the heart of the current problem of the MEAs in legal limbo: whether U.S. law provides adequate legal authority to domestic agencies to carry out the obligations under the treaty.[10] With respect to the Basel Convention, the sufficiency of domestic legal authority to implement its obligations has been questioned since its submission to the Senate for advice and consent. For other pre-2013 MEAs, implementation authority issues have not taken center-stage yet, since most attention has been focused primarily on the Senate advice and consent process. However, each of these MEAs is viewed as requiring additional legislation to allow for implementation.

Apart from preventing the U.S. from fully participating in the most important global organization on waste trade and management, the U.S.'s ratification failure also has significant implications for ongoing and future global environmental treaty negotiations. Together with the failure to ratify a number of other environmental treaties, this stance undermines U.S. credibility on international environmental cooperation and diminishes the willingness of treaty negotiation partners to accommodate U.S. interests and requests in the design and drafting of future agreements. In that context, the U.S. decision to join the 2015 Paris Agreement and the 2013 Minamata Convention on Mercury represented a positive shift in the U.S.'s engagement with MEAs.

The advent of a new President has undoubtedly injected uncertainty into the future direction of U.S. foreign policy on environmental treaties, especially with respect to climate change.[11] Nevertheless, the fundamental environmental policy and legal considerations with respect to ratification of the Basel Convention and other pending MEAs remain unchanged. That will be especially true if the Trump Administration settles into a foreign policy that tracks those of his Republican predecessors. In other words, the time is still ripe for action on the Basel Convention.

Our Article's central point argues that, based on a careful

10 As a 2008 a 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." U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 9, at 36 n.31.

11 *See, e.g.*, Coral Davenport & Alissa J. Rubin, *Trump Signs Executive Order on Climate Change*, N.Y. TIMES (Mar. 28, 2017), https://www.nytimes.com/2017/03/28/climate/trump-executive-order-climate-change.html.

review of existing legal authorities and the requirements for treaty implementation, the executive branch already has sufficient authority to comply with Convention obligations. Thus, ratification of the Convention can and should move forward without delay.

Our Article proceeds in four parts. Part I discusses the background of international trade in hazardous waste; the scope and operation of the Basel Convention; and the Convention's significant developments since its entry into force, including the history of U.S. ratification efforts. Part II then turns to the problem of implementation authority standing in the way of U.S. ratification of the Convention. The Article first sets out the legal prerequisites for joining an international agreement. It then explains the prevailing official stance on available domestic implementation authority, such as the Environmental Protection Agency's (EPA) authority under Section 3017 of the Resource Conservation and Recovery Act (RCRA), as well as concerns about authority gaps for Convention implementation. The last Section examines how several factors—the legal manifestation of political inertia and agency caution in the treaty ratification context, breach avoidance, and over-compliance—have contributed to the delay in U.S. ratification of the Convention.

Part III then makes the case for ratification at this point in time, rather than further delay to await legislation. First, the Article explores legal authorities outside of the EPA's statutes, especially in the International Emergency Economic Powers Act (IEEPA), and how they could be tapped to fill potential implementation authority gaps. The second Section explains the negative consequences of ongoing delay as well as the closing window for avoiding ratification complications associated with the Ban Amendment, the Convention's controversial amendment that has yet to enter into force. Finally, the Article posits that ratification is now possible based on the newly identified IEEPA legal authorities and a "substantial compliance" standard, which is a more appropriate and nuanced alternative to the current standard of over-compliance. The final part, Part IV, briefly puts the issues into the context of MEAs generally.

Before embarking on our substantive discussion, two items of terminology deserve specific clarification. 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. Similarly, U.S. parlance uses the term "treaty" to designate primarily international agreements approved by the Senate, as opposed to executive agreements. International law does not recognize the U.S. domestic law distinctions of Senate-approved treaty and executive agreement; instead, all international agreements are "treaties" for international law purposes. In both situations, 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 BASEL CONVENTION AND ITS CONTEXT

This part of the Article reviews the significance of the hazardous waste trade issue, the Convention's substance, and then the tortured history of U.S. ratification efforts.

A. *The Problem of the International Trade in Hazardous Wastes*

The Basel Convention originated in the 1980s scandals of illicit hazardous waste shipped to unsuspecting developing countries and garbage barges, such as in the Khian Sea,[13] wandering the oceans aimlessly. 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 including chemical burns, nausea, and partial paralysis.[14]

12 *See* Vienna Convention on the Law of Treaties, art. 2(1)(b), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; Knox, *supra* note 1, at 2 n.2.

13 *See* Tom Avril, *Years Later, City's Ash Is Dumped*, PHILLY.COM (Aug. 10, 2002), 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. *See* 138 CONG. REC. S12291 (daily ed. Aug. 11, 1992) (statement of Sen. Pell). For other instances of these types of scandals, see *About the Basel Ban*, BASEL ACTION NETWORK, http://ban.org/about_basel_ban/chronology.html (last visited Sept. 16, 2016); and see generally *History of the Negotiation of the Basel Convention*, BASEL CONVENTION, http://www.basel.int/TheConvention/Overview/History/Overview/tabid/3405/Default.aspx (last visited Oct. 30, 2016).

14 *See Italy Moves to Resolve Problem with Nigeria on Dumping of Toxic Waste*, 11 INT'L ENV'T. REP. 379, 379 (1988); HILARY FRENCH, VANISHING BORDERS: PROTECTING THE PLANET IN THE AGE OF GLOBALIZATION 73 (2000).

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 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] After all, the economic costs of exporting industrial wastes and other forms of pollution to developing countries for disposal would be much lower, 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 to be rhetorical.

Aside from the morality of valuing the health and life of

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 the Dutch company Trafigura in Abidjan, Cote d'Ivoire. *See* Todd Pitman, *Hazardous Waste Flows to Poor Nations*, SEATTLE TIMES, Oct. 19, 2006, at A10; Lydia Polgreen & Marlise Simons, *Global Sludge Ends in Tragedy for Ivory Coast*, N.Y. TIMES, Oct. 2, 2006, at A1.

15 For a deeper discussion of the environmental justice implications, see, for example, 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. POL'Y. 37 (1991).

16 *See Let Them Eat Pollution*, THE ECONOMIST, Feb. 8, 1992, at 66 (excerpt from letter written by Lawrence Summers).

17 See *id.*

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,[18] which calls for pollution costs to be internalized by the polluter. Allowing for the export of hazardous wastes to countries with lower environmental standards 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, because dumping in developing countries could be far cheaper, even with transport costs, than environmentally sound disposal in the country of origin.[19]

In keeping with the impetus for the Convention, its stated objective is to protect human health and the environment by promoting the environmentally sound management of such wastes.[20] It targets this goal chiefly through two approaches. First, the Convention encourages transparency in waste trade by imposing prior-informed consent (PIC) requirements on the trade of hazardous waste. The PIC requirements ensure that the importing country can make thoughtful decisions about the advisability of an import. Second, the Convention imposes environmentally sound management (ESM) requirements as a substantive backstop on waste trades, in case the process-focused PIC requirements fail in preventing waste trades that cannot be managed properly by the destination country. Waste trades are impermissible regardless of consent if the waste cannot be managed "in an environmentally sound manner."[21] Together, these two approaches have been designed to ensure not only greater

18 *See, e.g.*, U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, princ. 16, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992).

19 *See, e.g.*, Jennifer R. Kitt, *Waste Exports to the Developing World: A Global Response*, 7 GEO. INT'L ENVTL. L. REV. 485, 488 (1995).

20 *See* Basel Convention, *supra* note 5, at 126–28; *Overview*, BASEL CONVENTION, http://www.basel.int/theconvention/overview/tabid/1271/default.aspx (last visited Sept. 16, 2016).

21 *See* Basel Convention, *supra* note 5, at 132.

transparency and rationality in the waste trade but also appropriate internalization of environmental harms.[22]

Over its quarter century of existence, the Basel Convention has become the focal point for international efforts addressing the environmental and public health problems presented by the international waste trades and improving environmentally sound management of wastes. Many of its concerns are also 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.[23] Current aims and priorities of the Basel Convention include further discussions considering the distinction between waste and non-waste (and the appropriate scope of the Convention's coverage), and the growing trade in used electronics ("e-waste"), which poses hazards to health and the environment through dumping and unsafe recycling practices in parts of the developing world.[24] The Convention's membership is now nearly universal, counting most recently 184 state parties.[25] However, the United States remains one of a handful of countries that are outside of the treaty.[26]

22 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." *Id.* at 130.

23 *See The Mandate of the Special Rapporteur*, OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, *http*://www.ohchr.org/EN/Issues/Environment/ToxicWastes/Pages/SRToxicWastesIndex.aspx (last visited Sept. 17, 2016).

24 *See, e.g.*, Basel Convention, Conference of the Parties, Tenth Meeting, Strategic Framework for the Implementation of the Basel Convention for 2012–2021 (Oct. 17, 2011), http://www.basel.int/Implementation/StrategicFramework/Decisions/tabid/3808/Default.aspx; Basel Convention, Conference of the Parties, Eighth Meeting, Nairobi Declaration on the Environmentally Sound Management of Electrical and Electronic Waste (Nov. 27, 2006), http://www.basel.int/Portals/4/Basel%20Convention/docs/meetings/cop/cop8/NairobiDeclaration.pdf; *E-Waste: Overview*, BASEL CONVENTION, http://www.basel.int/Implementation/Ewaste/Overview/tabid/4063/Default.aspx (last visited Oct. 29, 2016).

25 *See Parties to the Basel Convention*, BASEL CONVENTION, http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/1290/Default.aspx#a-note-1 (last visited Sept. 17, 2016).

26 Other non-member countries are Angola, Fiji, Grenada, Haiti, San Marino, Sierra Leone, Solomon Islands, South Sudan, Timor-Leste, Tuvalu, and Vanuatu. *See id.* Haiti, like the United States, is a signatory to the Convention

B. *The Convention's Scope and Operation*

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.[27] In addition, Annex II covers household garbage and ashes from household garbage incineration as "other wastes"[28] 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 material subject to recovery and recycling operations.[29]

The key Convention provisions are found in Articles 4, 6, 8, and 9. The operationally most visible aspect of the Convention governing waste trade, the 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."[30] Conversely, parties must not allow the export of Basel wastes when import has been prohibited by the proposed country of destination or explicit consent for the import has not been obtained.[31] In other words, affirmative consent is required. Article 6 articulates specific requirements for the PIC process, which include a written notification to the import state and any transit states of the proposed waste shipment and a written response by the import State either providing its consent (with applicable conditions), denying permission, or requesting additional information.[32] Article 6 also imposes a prohibition on the export until the importing state's written consent and the export contract's specification of environmentally sound waste management are confirmed.[33] Exporting countries, with the written

but has not ratified it. *See id.*

27 *See* Basel Convention, *supra* note 5, at 129.

28 *See id.*

29 *See id.* at 133. 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. *See id.* at 129.

30 *See id.* at 131

31 *See id.*

32 *See id.* at 134.

33 *See id.*

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."[34] The transmission of information about the consent is handled by authorities and contacts designated by each party state.[35]

Articles 8 and 9 address consequences triggered by the improper handling of wastes. When the transboundary movement of wastes cannot be completed in accordance with the terms of the transaction[36] or is the result of illegal acts by the exporter,[37] the exporting state has a general duty to take back the waste.[38]

Article 4.2(e) provides a substantive backstop to the PIC requirements. Anticipating that not all importing states will be able to make effective use of notifications to protect themselves against inappropriate waste shipments, the Convention calls on exporting parties to "take appropriate measures to . . . not allow the export of hazardous wastes or other wastes to a State . . . if [they have] reason to believe that the wastes in question will not be managed in an environmentally sound manner."[39] A converse obligation applies to the import of waste that cannot be managed in an environmentally sound manner.[40]

The Convention also controls trade with non-parties. Under Article 4.5, parties are prohibited from engaging in waste trade with non-parties unless an Article 11 exception applies.[41] Article 11 allows for trade with non-parties if the trade occurs under a prior bilateral, regional, or multilateral agreement or arrangement that is "compatible" with and has provisions that "are not less environmentally sound than" the Convention, or under a

34 *Id.* at 135.

35 *See id.* at 134.

36 *See id.* at 136.

37 *See id.* at 136–37.

38 *See id.* Conversely, if illegal acts are attributable to the importer, the importing state has a duty to ensure environmentally sound disposal. *See id.* at 137. 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. *See id.* at 136–37.

39 *Id.* at 131–32.

40 *See id.* at 132.

41 *See id.* at 132.

subsequent agreement or arrangement that does "not derogate" from the Convention's requirement of environmentally sound management of wastes.[42]

Apart from trade controls, Article 4 places additional obligations on parties, such as requirements to take appropriate measures to ensure the sound and sustainable management of waste, to prohibit disposal in Antarctica, and to take steps to criminalize illegal hazardous waste traffic.[43] Finally, parties must report annually on the amounts and types of hazardous wastes exported, destinations, and disposal methods.[44]

C. *U.S. Ratification Efforts and Developments Since 1992*

The Basel Convention was negotiated over the course of less than two years and adopted at a diplomatic conference in Basel on March 22, 1989.[45] The United States deposited its instrument of signature for the agreement a year later on March 22, 1990, the last day that the treaty remained open for signature.[46] The agreement was transmitted to the Senate for its advice and consent in May 1991.[47] In the transmittal document and State Department testimony before Congress, the Bush administration indicated that it would seek legislation before ratification. Specifically, such legislation would need to expand EPA regulatory authority to include "authority to prohibit shipments when the United States

42 *Id.* at 138–39.

43 *See id.* at 132–33. 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 the trade is "in accordance with other criteria to be decided by the parties." *Id.* at 133. 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.'" S. TREATY DOC. NO. 102-5, at vii (1991). Thus, this provision would be satisfied if "disposal in the importing country would be both environmentally sound and economically efficient." *Id.; see* 138 CONG. REC. S12291, S12291–93 (daily ed. Aug. 11, 1992).

44 *See* Basel Convention, *supra* note 5, at 139–43.

45 *See History of the Negotiations of the Basel Convention*, BASEL CONVENTION, http://www.basel.int/TheConvention/Overview/History/Overview/tabid/3405/Default.aspx (last visited Apr. 10. 2017).

46 *See* Basel Convention, *supra* note 5, at 146.

47 President's Transmittal of the Basel Convention, *supra* note 7, at iii.

has reason to believe that the wastes will not be handled in an environmentally sound manner," take-back authority for illegally exported wastes, and 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."[48] The Senate provided its advice and consent to the Convention in August 1992, but Congress did not enact the requested Basel implementing legislation.[49]

The submission of the Convention to the Senate came at a time when environmental multilateralism still had strong congressional support. 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.[50] Yet, that enthusiasm could not be converted into success in Basel implementing legislation.

Beginning in 1991, a series of bills was introduced in the 102nd, 103rd, 105th, 109th, and 110th Congresses addressing the Executive Branch's request for additional implementing authority. In the 102nd Congress, these included Representative Edolphus

48 The Transmittal package indicated specifically: "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 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." *Id.* at x.

49 *See* 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.

It has been suggested that the Senate provided contingent consent to the Basel Convention. *See* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1319 n.244 (2008). Even though the Senate must have been cognizant of 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. *See* COMMITTEE ON FOREIGN RELATIONS, LEGISLATIVE ACTIVITIES REPORT, S. REP. NO. 103-35, at 34–36 (1993).

50 *See* H.R. Con. Res. 292, 102d Cong. (1992).

Towns' Waste Export and Import Prohibition Act (WEIPA),[51] Representative Mike Synar's Waste Export Control Act (WECA),[52] and the Bush administration's own legislative proposal, the Hazardous and Additional Waste Export and Import Act of 1991 (HWEI), introduced by Senator John Chafee.[53] None of these bills made it to a floor vote. Similar legislative proposals in the 103rd Congress did not fare any better.[54] 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.[55] Further legislative proposals were introduced in 2006 and 2008 to align U.S. restrictions on hazardous waste exports to developing countries,[56] but none of those were successful either.

Since the Convention's entry-into-force on May 5, 1992,[57] U.S. trade in hazardous wastes has largely proceeded under the OECD Decision, an arrangement among the countries of the Organization for Economic Cooperation and Development, as well as several bilateral agreements.[58] The U.S. government has

51 *See* H.R. 2580, 102d Cong. (1991).

52 *See* H.R. 2358, 102d Cong. (1991). The bill had also been introduced in 1989. *See* H.R. 2525, 101st Cong. (1989).

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

54 Congressman Towns re-introduced his Waste Export and Import Prohibition Act in November 1993, H.R. 3706, 103d Cong. (1993), and Representative Synar (together with Swift and Porter) re-introduced his Waste Export and Import Control Act in March 1994, H.R. 3965, 103d Cong. (1994). Both bills died in subcommittee. In February 1994, the Clinton administration released a "Position Statement on Basel Legislation" that outlined the legislative principles for Congress to consider for Basel implementing legislation. *See* Principles for Basel Convention Implementing Legislation, 140 CONG. REC. E372 (daily ed. Mar. 8, 1994) (remarks of Rep. Lee Hamilton on the position statement), http://www.gpo.gov/fdsys/pkg/CREC-1994-03-08/html/CREC-1994-03-08-pt1-PgE9.htm.

55 Representative Towns of New York re-introduced the Waste Export and Import Prohibition Act in both 1996 and 1997. *See* H.R. 3893, 104th Cong. (1996); H.R. 360, 105th Cong. (1997).

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

57 *See* BASEL CONVENTION, *supra* note 45.

58 *See, e.g.*, Revisions to the Requirements for: Transboundary Shipments of Hazardous Wastes Between OECD Member Countries, Export Shipments of Spent Lead-Acid Batteries, 75 Fed. Reg. 1236, 1247 (Jan. 8, 2010); *see also*

characterized the OECD Decision and the U.S.-Canada and U.S.-Mexico bilateral agreements as consistent with the requirements of Article 11 of the Convention.[59] These control processes for waste trade are implemented by EPA's Hazardous Waste Generator regulations under the RCRA.[60] For imports from non-OECD countries as well as Canada and Mexico, subparts E and F of the regulations apply, requiring EPA to be notified prior to the shipment's arrival.[61] Once the shipment enters the U.S., all federal hazardous waste regulations apply.[62] Exports to these countries are

OECD Decision Concerning the Control of Transfrontier Movements of Wastes Destined for Recovery Operations, C(92)39/FINAL (Mar. 30, 1992) [hereinafter OECD Decision], https://www.regulations.gov/document?D=EPA-HQ-RCRA-2015-0147-0013. This decision was amended in June 2001 and February 2002. *See* 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), http://www.oecd.org/env/waste/30654501.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. Hazardous wastes trade with both Canada and Mexico occurs under agreements pre-dating the Basel Convention. *See* Agreement between the Government of the United States and the Government of Canada Concerning the Transboundary Movement of Hazardous Wastes, U.S.-Can., Oct. 28, 1986 [hereinafter U.S.-Canada Hazardous Waste Trade Agreement], https://www.epa.gov/sites/production/files/2015-12/documents/canada86and92.pdf; Agreement of Cooperation Between the United States and the United Mexican States Regarding the Transboundary Shipments of Hazardous Wastes and Hazardous Substances, U.S.-Mex., Nov. 12, 1986 [hereinafter U.S.-Mexico Hazardous Waste Trade Agreement], https://www.epa.gov/sites/production/files/2015-12/documents/mexico86.pdf.

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." 75 Fed. Reg. 1236, 1247 (Jan. 8, 2010). An EPA website indicated four notices for shipments of spent lead acid batteries to the Philippines, Ecuador, Panama, and Mexico. *See Proposed Hazardous Waste Exports to Non-OECD Countries*, ENVTL. PROT. AGENCY, https://archive.epa.gov/epawaste/hazard/web/html/non-oecd.html (last updated Apr. 4, 2016).

59 *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 updated July 12, 2013).

60 *See* 40 C.F.R. pt. 262, subpts. 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).

61 *See* 40 C.F.R. pt. 265.12(a).

62 *See generally* ENVTL. PROT. AGENCY, COLLECTION OF MATERIALS ON

subject to a prior notification and consent process that tracks the Basel Convention PIC requirement.[63] 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,[64] which also impose similar but more detailed and streamlined notification requirements for both imports and exports.[65]

Two significant legal developments have occurred over the life of the Basel Convention. First, the parties adopted the Ban Amendment in 1995, which is also referred to as the OECD/Non-OECD Ban. The Ban Amendment prohibits the export of hazardous waste from OECD countries to non-OECD countries.[66] It was the result of the sentiment that the prior notice and consent scheme of the Basel Convention was insufficient in preventing the dumping of waste from wealthy countries in the developing world. However, the adoption of the OECD/non-OECD Ban Amendment has been politically controversial, especially within the U.S. Even though the original treaty found support from a broad range of American stakeholders at the time,[67] the most prominent U.S. environmental advocacy group working on international hazardous waste trade issues, the Basel Action Network, has opposed Basel ratification without the Ban Amendment.[68] Conversely, industry

IMPORT/EXPORT REGULATORY REQUIREMENTS app. B , https://archive.epa.gov/epawaste/hazard/web/pdf/appxb.pdf.

63 *See* 40 C.F.R. § 262.52–.53; *see generally* ENVTL. PROT. AGENCY, COLLECTION OF MATERIALS ON IMPORT/EXPORT REGULATORY REQUIREMENTS app. C, https://archive.epa.gov/epawaste/hazard/web/pdf/appxc.pdf.

64 *See* 40 C.F.R. pt. 262, subpt. H.

65 *See generally* ENVTL. PROT. AGENCY, COLLECTION OF MATERIALS ON IMPORT/EXPORT REGULATORY REQUIREMENTS app. D, E , https://archive.epa.gov/epawaste/hazard/web/html/guide2.html.

66 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." *Milestones*, BASEL CONVENTION, http://www.basel.int/TheConvention/Overview/Milestones/tabid/2270/Default.aspx (last visited Sept. 10, 2016).

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

68 *Why the US Must Ratify the Basel Convention Together with the Ban Amendment (or not at all)*, BASEL ACTION NETWORK (Sept. 2014), http://www.ban.org/wp-content/uploads/2014/09/BP2_September2014Final.pdf.

groups have been resolutely opposed to the Ban Amendment.[69]

As of February 2016, 85 nations have accepted the Ban Amendment, and it has not yet entered into force.[70] Unfortunately, textual ambiguity and the early adoption of the Ban Amendment rendered the question of when the ban will be in place more difficult than many had expected. With the Convention's requirement that three-fourths of the Convention parties ratify or accept any amendment in order for it to enter into force, the threshold could have been met in 1995 with 66 parties of the total 87 member countries at the time.[71] However, the growth of the number of Convention parties over time (183 as of February 2016) prompted a debate over the appropriate interpretation of Article 17.5, the entry into force provision for amendments, and whether the requisite three-fourths entry-into-force threshold had increased correspondingly.[72]

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

70 *See Status of Ratifications: Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, BASEL CONVENTION, http://www.basel.int/Countries/StatusofRatifications/BanAmendment/tabid/1344/ (last visited Feb. 23, 2016). However, the European Union has already transposed the Ban Amendment into applicable EU directives. *See* Council Regulation 1013/2006/EC on Shipments of Waste, art. 36 (June 14, 2006), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02006R1013-20140526&rid=1.

71 Basel Convention, *supra* note 5, at art. 17.5.

72 The text of the Convention allows for at least three possible interpretations: (1) the "current time" approach requiring ratification of the amendment by three-fourths of the parties to the Convention at the time the last party joined the Convention; (2) a "fixed time" approach requiring ratification of the amendment by three-fourths of the parties that were parties at the time the Ban Amendment was adopted on September 22, 1995; and (3) a "present and voting" approach requiring three-fourths of the parties that were present and voting at the time the amendment was adopted (i.e., parties present and voting at COP-3, when the Amendment was approved). *Id.*; *see* Anne Daniel, *Transboundary Movements of Hazardous Waste*, 18 Y.B. INT'L ENVTL. L. 258, 258 (2007) (noting an additional fixed time approach that requires ratification of the amendment by three-fourths of the number of that states that were parties at the time the Ban Amendment was adopted).

The initial predominantly accepted reading of Article 17.5 was the "present and voting" interpretation, though it appears to play little of a role now. *See* DAVID HUNTER, JAMES SALZMAN, & DURWOOD ZAELKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 970 (2015); *The Basel Ban Amendment: Entry into Force = Now!*, BASEL ACTION NETWORK (Sept. 2007), http://archive.ban.org/library/BP4_09_07.pdf. In 2004, an opinion of the U.N. Legal Affairs office weighed in favor of the so-called "current-time" approach, stating that the entry-into-force provision "required ratification [or acceptance] of

To settle the issue, the Parties adopted Resolution BC 10/3 in 2011, which approved the so-called "fixed time" approach, requiring ratification by 66 of the 87 countries that were parties in 1995.[73] As of February 2016, for our original analysis, only 56 of

the Ban by three-quarters of the parties *at the time of the last ratification*." HUNTER, *supra*, at 970; *see* Letter by Ralph Zacklin, Assistant Secretary-General, Office of Legal Affairs, to Ms. Sachiko Kuwabar-Yamamoto, Executive Secretary, Secretariat of Basel Convention (May 5, 2004), http://archive.basel.int/legalmatters/ban-opinion-e.pdf; *Amendments: History*, BASEL CONVENTION, http://www.basel.int/TheConvention/Overview/Amendments/Background/tabid/2760/Default.aspx (last visited Apr. 10, 2017). Under the current-time approach, the threshold, currently at 138, keeps moving up if more states join the Convention.

For comparison purposes, the table below provides analyses of each approach and the number of Amendment ratifications still needed for entry-into-force as of February 2016.

Interpretation	Total Parties* (under approach)	Target (3/4 of total parties)	Ban Ratifications (from pool of total parties)	Ratifications Still Needed (to enter into force)
Current Time	183	138	85	53
Fixed Time	87	66	56	10
Present & Voting	81	61	55	6

** The E.U. is not counted as an additional party (even though it was present and voting at COP-3) in accordance with paragraph 3 of Article 25 of the Convention.*

Data for the table comes from *Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, BASEL CONVENTION, http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx (last visited Feb. 24, 2016) (providing total number of parties under the current time approach); Letter from Gabriele Goettsche-Wanli, Chief, Treaty Section, Office of Legal Affairs, to Jim Willis, Executive Secretary, Secretariat of the Basel Convention (March 26, 2013) (providing total number of parties under the fixed time approach), http://www.basel.int/Portals/4/Download.aspx?d=UNEP-CHW-BAN-OLA-DepositaryLetter19032013.English.pdf; Rep. of the Third Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and the Disposal, U.N. Doc. UNEP/CHW.3/34 (1995), http://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx (providing total number of parties under the present and voting approach); and *Status of Ratifications*, *supra* note 70 (providing list of Ban Amendment ratifications).

73 BC 10/3 provides "that the meaning of paragraph 5 of Article 17 of the Basel Convention should be interpreted to mean that the acceptance of three-fourths of those parties *that were parties at the time of the adoption of the amendment* is required for the entry into force of such amendment . . . ." BC-10/3: Indonesian-Swiss Country-led Initiative to Improve the Effectiveness of the

the original 87 Convention parties had ratified or accepted the Ban Amendment, representing a shortfall of 10 acceptances. During the publication process (as of October 2016), two additional states, Antigua and Barbuda as well as South Africa, ratified the Ban Amendment, bringing the ratification total to 58 and thus only 8 short of the necessary 66.[74]

A second important legal development has been the negotiation and adoption of a Liability Protocol in 1999, which established a liability and compensation regime for damage resulting from waste trades covered by the Convention, including illegal trafficking of waste.[75] The Liability Protocol has not yet entered into force either.[76]

In February 2010, parties to the Basel Convention 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 three Conventions' articles were not amended for this purpose, thus leaving their substantive missions unaffected. The first Executive Secretary of the Joint Secretariat was a former EPA and United Nations Environment Programme (UNEP) official, Jim Willis.[77]

Basel Convention, U.N. Doc. UNEP/CHW.10/20 (2011) (emphasis added), http://archive.basel.int/meetings/cop/cop10/documents/28e.pdf#page=31. The UN Legal Affairs Office, the depositary organization for the Basel Convention and the Ban Amendment, appears to have accepted the resolution of the Parties to adopt the fixed time approach. *See* Letter from Gabriele Goettsche-Wanli, *supra* note 72.

74 *See Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, BASEL CONVENTION, http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx (last visited Oct. 23, 2016).

75 *See* Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, Basel, Switz., Dec. 10, 1999, UN Doc. UNEP/CHW.1 WG/1/9/2 [hereinafter Basel Liability Protocol]. Article 12 of the Convention called for negotiations of such a protocol. *See* Basel Convention, *supra* note 5, at 139.

76 As of August 2015, the Protocol only had 13 signatories and 11 parties. *See The Protocol*, BASEL CONVENTION, http://www.basel.int/Countries/StatusofRatifications/TheProtocol/tabid/1345/Default.aspx (last visited Sept. 19, 2016). The entry-into-force threshold is 20 parties. *See* Basel Liability Protocol, *supra* note 73, art. 29, at 20. As a non-party to the Convention, the United States cannot participate in the Liability Protocol. *See* Basel Liability Protocol, *supra* note 5, art. 26 & art. 28, at 148. It is commonly known that the United States actively contributed to the design and drafting of the Liability Protocol, primarily to protect its interests should it decide to join the Protocol at a point in the future.

77 *History of Joint Managerial Functions for the Secretariats of the Basel,*

II. THE IMPLEMENTATION AUTHORITY PROBLEM

With the failure of Congress to act on the Bush administration's request for further implementing legislation before ratification, U.S. engagement with the Convention has found itself in a legal limbo. Since 1992, the Executive Branch has held further ratification steps in abeyance. However, there have also been implicit premises about breach avoidance and over-compliance that have made MEA ratification processes more difficult than they should be. To discuss these issues, we begin by reviewing the relationship of international agreements and the domestic law of the U.S.

A. *The Legal Prerequisites for Joining an International Agreement*

The difficulty of U.S. ratification of the Basel Convention 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.[78] Once a state becomes a party through such an act, the obligations of the agreement become binding as an international obligation regardless of conflicting domestic laws.[79]

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 appropriate domestic legal authority (or, put in other words, 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 international agreements, they pass into the domestic system by one of three

Rotterdam and Stockholm Conventions, SYNERGIES, http://synergies.pops.int/Secretariat/Overview/History/tabid/2690/language/en-US/Default.aspx.

78 *See* Vienna Convention, *supra* note 12, at 335–36.

79 *See id.* at 339.

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 by Congress (usually negotiated by the president and then voted on and approved by Congress as if the agreement were an ordinary act of Congress).[80] As has been noted, the dividing line between sole executive agreements and congressional-executive agreements is often unclear. Many agreements fall on a continuum with respect to congressional authorization, and presidents usually rely on a combination of constitutional and statutorily delegated authorities.

Over the past century, the overwhelming majority of international agreements entered into by the U.S. have been of the executive agreement type,[81] either sole executive or congressional-executive agreements. There appears to be no strict association of treaty subject matter with particular instruments of adoption,[82] 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

80 The Restatement (3rd) of 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. (THIRD) OF FOR. RELATIONS § 303. For additional discussion of the three paths, see Knox, *supra* note 1, at 939–44. 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." REST. (THIRD) OF FOR. RELATIONS § 303 cmt. H.

81 *See* Hathaway, *supra* note 49, at 1240.

82 *See id.* at 1239.

multilateral environmental agreements, especially the globally-scoped MEAs of the last few decades, the prevailing Executive Branch practice until the 2013 Minamata Convention on Mercury[83] was to submit MEAs to the Senate for advice and consent.[84]

In the past, there have been debates within scholarly circles about the interchangeability of congressional-executive agreements and Senate-approved treaties.[85] This Article does not attempt to wrestle with the choice-of-instrument question. For the Basel Convention, the choice-of-instrument question is largely moot, since the Convention already received Senate approval in 1992, and Senate-approved treaties are generally considered to be the least controversial. With respect to the other unratified global MEAs, the Executive Branch has also chosen to submit to the Senate for advice and consent and thus, just as for the Basel Convention, has held any ratification steps in abeyance in the

83 Formally, the U.S. "accepted" the Minamata Convention. 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, *supra* note 12, at 336. Acceptance of the Minamata Convention was based on a determination that U.S. government agencies could fulfill the Convention's commitments via existing legal authorities. *See* John F. Kerry, Sec'y of State, Acceptance on Behalf of the United States of America, ¶ 6, (Oct. 18, 2013) (indicating domestic implementing measures, as requested by Minamata Convention on Mercury Article 30(4)), http://www.mercuryconvention.org/Portals/11/documents/submissions/US%20declaration.pdf. For further discussion of the issues presented in the context of the Minamata Convention, see Tseming Yang, *The Minamata Convention on Mercury and the Future of Multilateral Environmental Agreements*, 45 ENVTL. L. REP. 10064 (2015). Ninety-two nations signed the Convention at a diplomatic conference in Minamata, Japan, on October 11, 2013. *See* Conference of Plenipotentiaries on the Minamata Convention on Mercury, Oct. 10 & 11, 2013, UNEP(DTIE)/Hg/CONF/4 [hereinafter Minamata Convention on Mercury]; *New Global Treaty Cuts Mercury Emissions and Releases, Sets up Controls on Products, Mines and Industrial Plants*, MINAMATA CONVENTION, http://mercuryconvention.org/News/Newglobaltreatycutsmercuryemissions/tabid/3470/Default.aspx.

84 Over the course of U.S. history, however, environmental agreements have been concluded in all three forms.

85 *See, e.g.*, Hathaway, *supra* note 49, at 1344–48. In recent years, a prominent set of scholars has sought to challenge interchangeability, arguing that particular areas—for example, international agreements seeking 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).

meantime.

Once the United States has entered into an agreement, the effectuation of the agreement's provisions in U.S. domestic law is dependent on whether each provision is deemed to be self-executing or non-self-executing. If a provision is considered to be self-executing, it becomes effective without the need for any 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 to become effective. To determine whether a treaty provision is self-executing has traditionally required looking to the intent of the drafters, primarily the intent of the Senate and of the Executive Branch. Environmental agreements by and large have not been deemed to be self-executing. That holds true for the pre-2013 unratified global MEAs pending in the Senate, none of which is deemed to be self-executing. In other words, the question of domestic implementation authority remains relevant for all of the 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 to implement the agreement's provisions.

B. *The Prevailing Stance on Domestic Implementation Authority*

At the time that the Basel Convention was first signed and transmitted to the Senate for its advice and consent, a comprehensive system for the environmentally sound management of hazardous wastes was already in place in the U.S. That scheme includes explicit authority that addresses the export and import of hazardous waste: Section 3017 of the RCRA.

However, at the time, the Bush administration raised concerns about gaps in EPA's authority with respect to requiring the environmentally sound handling of waste exports, the authority to take back illegally exported wastes, and the authority to cover municipal solid waste (MSW), MSW ashes, and hazardous wastes not covered by the RCRA.[86] The administration also indicated that

86 *See* S. TREATY DOC. NO. 102-5, at x (1991). 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

it would hold off depositing the instrument of ratification until such legislation had been enacted.[87] Such a stance remains consistent with the general practice of the U.S. Department of State to suspend the ratification process when the provisions of a treaty are deemed to go beyond existing U.S. laws, until Congress has enacted adequate implementation legislation.[88]

As described above, Congress has failed to provide a comprehensive set of additional implementing authority sought by the Executive Branch. However, 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. Because the focus of our paper here is on concerns that have held up ratification, we take President Bush's 1991 Transmittal to the Senate and the State Department's Submittal Letter to the President as the starting point for our analysis.

The State Department's position would have been based on the C-175 analysis of domestic authority. 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."[89] Accordingly,

concern early on, near universal ratification of the Basel Convention has left just a handful of countries outside of the Basel Convention system. *See Parties to the Basel Convention*, *supra* note 25. 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. *See* 45 C.F.R. § 671.4(c) (1993). 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. *See id.* at § 671.7. Such a permit has not previously been issued is 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.

87 *See* S. TREATY DOC. NO. 102-5, at x (1991).

88 *See* Tseming Yang, *The Relationship Between Domestic and International Environmental Law*, *in* INTERNATIONAL ENVIRONMENTAL LAW: THE PRACTITIONER'S GUIDE TO THE LAWS OF THE PLANET 16 & n.35 (Roger R. Martella, Jr. & J. Brett Grosko eds., 2014).

89 *Circular 175 Procedure*, U.S. DEP'T OF STATE, http://www.state.gov/s/l/treaty/c175/ (last visited Apr. 10, 2017); *see* Yang, *supra* note 88, at 15–16

it provides an 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 the RCRA, congressionally delegated authority under the International Economic Emergency Powers Act, and the president's inherent constitutional powers.

1. *Preexisting RCRA Authority and Section 3017*

Comprehensive EPA regulatory authority under the RCRA addresses both of the core principles of the Convention: environmentally sound management and prior informed consent. As the RCRA established a cradle-to-grave management system for hazardous substances and waste,[90] existing U.S. law 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" article provides EPA with the authority to control hazardous waste exports, which is a core objective of the Convention.[91]

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 Convention, including the possibility of trade controls that would need to supersede processes created under the explicit text of Section 3017.[92] Congress' prescience is specifically expressed in Section 3017's articulation of two alternative pathways governing the export of hazardous wastes. Addressing the default scenario where there are no

(including a brief description of the C-175 process).

90 Subtitle C of RCRA directs EPA to establish a comprehensive management system to ensure that hazardous solid wastes, as defined under EPA regulations, are managed safely from the point of generation, through transportation and treatment, and finally, to recycling, storage or disposal. *See* Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6921–6939e (2012). The program has become known as one of "cradle-to-grave" management. *See generally Learn the Basics of Hazardous Waste: EPA's Cradle-to-Grave Hazardous Waste Management Program*, EPA, https://www.epa.gov/hw/learn-basics-hazardous-waste#cradle (last visited Aug. 4, 2016).

91 *See* 42 U.S.C. § 6938.

92 *See id.* at § 6938(f).

applicable international agreements, the first pathway 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.[93] In the alternative scenario, [94] 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.[95]

The default export notification and consent requirements substantively match Basel Convention requirements, suggesting that existing U.S. 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) of RCRA Section 3017, requiring that "export [of] any hazardous waste identified or listed under [RCRA] . . . conform[] with the terms of such [an international] agreement."[96] In other words, upon ratification of the Basel Convention, Section 3017 would automatically adopt the notice and consent requirements of the Basel Convention. Any inconsistencies in the pre-existing domestic prior informed consent scheme would automatically be supplanted by the Basel requirements. The step of depositing the instrument of ratification would in itself create all necessary authorities to regulate the export of RCRA hazardous wastes in accordance with Convention

93 *See id.* at § 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. *See id.* § 6938(c)–(e);.

94 *See id.* § 6938(a)(2) ("[N]o 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.").

95 *See id.* at § 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 Gaba, *supra* note 60, at 420–39.

96 *See* 42 U.S.C. § 6938(f).

requirements.

2. *Concerns About Potential Implementing Authority Gaps*

While the RCRA and its Section 3017 waste export provision address the Basel Convention's core principles and enable EPA to carry out the great bulk of what is required under the Basel Convention, three authority gaps remained, according to the 1991 Bush Administration Transmittal Letter.[97]

The first gap exists in the authority to prohibit non-ESM-compliant exports. The Convention's Article 4.2 requires 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 gap relates to the obligation imposed by Article 9.2 to take back wastes in the event of illegal trafficking. A careful analysis, however, reveals that both requirements are already encompassed within the authorities provided by RCRA Section 3017, and any further changes necessary to implement these requirements would be of a regulatory nature rather than a legislative nature.

Even though RCRA Section 3017's default regulatory scheme conditions exports on the importer's consent and does not explicitly address 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."[98] Once Basel ratification has occurred, RCRA Section 3017 will create authority for EPA to adjust its current regulations, and provide for this exception to the PIC requirement and other changes necessary to implement the take-back requirement.[99]

Unfortunately, the third gap is more difficult. The Convention's coverage of hazardous wastes is not co-extensive with the coverage under EPA's RCRA regulations, leading to

97 *See* S. TREATY DOC. NO. 102-5, at x (1991).

98 42 U.S.C. § 6938(a)(2).

99 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, see OECD Decision, *supra* note 58, such as through conditions of the contract governing the international waste trade specifying export party responsibility for take-back and financial assurance requirements. *See* 40 C.F.R. § 262.85 (2010). For additional discussion of these two issues, see Gaba, *supra* note 60, at 471, 474.

implementation concerns related to inadequate federal oversight authority.[100] The issue arises with respect to two sets of wastes. First, the Convention defines hazardous wastes by reference to its Annexes, which list waste streams, constituent components, and hazard characteristics.[101] However, RCRA regulations explicitly exclude certain wastes, such as coal ash and mining overburden,[102] from RCRA controls. Since the scope of hazardous waste is not co-extensive, there is a small risk that wastes defined as hazardous under the Convention 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,[103] which poses the risk of creating a gap in regulatory authority. 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 Convention,[104] and are subject to virtually identical trade controls.[105] However, neither is currently regulated by the RCRA.[106] Again, since RCRA Section

100 Generally, waste imports to the United States have not been viewed as a concern. Once within the United States, 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 United States. *See, e.g.*, JAMES E. MCCARTHY, CONG. RESEARCH SERV., RL34043, INTERSTATE SHIPMENT OF MUNICIPAL SOLID WASTE: 2007 UPDATE (2007).

101 *See* Basel Convention, art. 1, *supra* note 5, at 129. The Convention also allows inclusion of wastes as hazardous if national laws designate them as such, independent of the Convention's definition. *See id.*

102 *See* 40 C.F.R. § 261.4(b)(3) & (4).

103 Annex IX of the Convention (Items B2050 and B2010) 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 the wastes hazardous, and thus subject to control, for Convention purposes. Basel Convention, *supra* note 5, at 74.

104 "Other wastes" are defined by Annex II to include household wastes, also referred to as municipal solid wastes or MSW, and the incinerator ashes of such wastes. *See id.* at 49.

105 *See id.* at 14 (applying the basic obligations of the Convention to "other wastes" as well as to hazardous wastes).

106 In fact, household wastes are explicitly excluded from the RCRA definition of hazardous wastes, see 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

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 PIC process required by the Convention.[107]

There are two responses to such concerns. First, most of the ongoing trades involving municipal hazardous wastes have been with Canada and Mexico under existing bilateral agreements. Municipal hazardous trades with other OECD countries have been conducted under the 1992 OECD Decision. Such waste trades are permissible under Article 11 of the Basel Convention. Treated as Article 11 agreements or arrangements, they are compliant with the Convention because the terms of the article exempts them from the Convention. It is conceivable that Article 11 agreements could be negotiated to cover waste trade, including MSW and non-RCRA hazardous wastes, with other countries. Such agreements would need to be put in place in advance of a Basel-covered waste shipment, but they would have the benefit of replacing the Convention's requirements for non-RCRA hazardous waste and MSW.

Secondly, international trade of MSW and non-RCRA hazardous wastes has seen no significant incidents of illegal municipal waste shipments from the U.S. since the Basel Convention was adopted. In fact, it is unlikely that certain types of wastes that are explicitly excluded from RCRA, such as coal ashes

their homes. *See generally Collection of Materials on Import/Export Regulatory Requirements, Appendix A: List of Excluded and Exempt Materials*, ENVTL. PROT. AGENCY, https://archive.epa.gov/epawaste/hazard/web/pdf/appxa.pdf. Subtitle D of the Solid Waste Disposal Act, 42 U.S.C. § 6941, 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 has traditionally been dealt with as concerns primarily of state and local governments. The U.S.-Canada Hazardous Waste Trade Agreement, *supra* note 59, 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.

107 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 would be extremely difficult to administer as a practical matter.

or mining overburden, would be the subject of international trade. They are usually produced in very high volume and are of low value. These characteristics of MSW and many non-RCRA hazardous wastes usually make their export to countries beyond immediate geographical neighbors, which are already covered by Article 11 agreements, economically infeasible. Therefore, such exports are arguably only a hypothetical risk at this point.[108] Yet, if such an export were to occur, the possibility of an EPA regulatory gap could arise.

C. *Residual Risks, Breach Avoidance, and the Problem of Over-Compliance*

It must strike one as curious that a small residual risk—the possibility of MSW and non-RCRA hazardous wastes, such as mining overburden, going to non-Article 11 states—is responsible for an ongoing ratification delay that has lasted already more than two decades. An obvious explanation is the contribution of political inertia, federal agencies' limited attention span and resources, and their preoccupation 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 the general opposition to more environmental regulation, and it may not come as a surprise that the relevant federal agencies have cautiously chosen to shun explicit endorsement of additional legislation for implementing the Convention.

In fact, political inertia and federal agencies' risk aversion have had a legal manifestation in the MEA ratification context. It is a largely unquestioned premise that the legal standard for ratification decisions should be breach avoidance.[109] While this standard is premised upon the self-evident expectation that

108 Recently, the Basel Action Network has reported the discovery of illegal exports of municipal solid waste from Canada to the Philippines. *See More Canadian Garbage Found Illegally Dumped in the Phillipines*, BASEL ACTION NETWORK (May 22, 2015), 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.

109 *See, e.g.*, Susan Biniaz, Deputy Legal Adviser, U.S. Dep't of State, Remarks at the American Society of International Law Annual Meeting's Panel on the American Approach to Treaties (Apr. 6, 2013).

ratification requires sufficient domestic regulatory authority for the Executive Branch to comply with the agreement's commitments, the logical end of breach avoidance is the assumption that compliance should be *perfect*. In other words, breach avoidance can be viewed as requiring mitigation of both significant and minimal risks of non-compliance, both currently existing and prospective. For MEAs generally and the Basel Convention specifically, breach avoidance has arguably turned into a reflexive policy of perfect compliance or, more practically speaking, over-compliance.

Pursuing perfect or over-compliance at the cost of delaying ratification arguably minimizes the risk of post-ratification breach. It is also consistent with an *ex ante* good faith commitment to the Convention, and it promotes a U.S. reputation of abidance with international legal obligations. These qualities are valuable, especially when the U.S. seeks to hold other nations accountable with respect to international law.

Yet, an overly cautious approach to implementing the Basel Convention has resulted in a near quarter-century-long delay in ratification and the attendant adverse consequences described earlier. It has also provided very few benefits. Most of U.S. regulatory policy on hazardous waste management and exports is already Basel-compliant or -consistent. Furthermore, the risks that have been mitigated by a posture of breach avoidance, including those related to the export of municipal solid waste and non-RCRA hazardous waste, have been relatively insignificant. Illegal U.S. garbage exports have not been a serious problem since the 1990s, when the Basel Convention came into existence. While municipal solid wastes continue to be exported and imported, such trades occur within the scope of agreements that qualify for the Convention's Article 11 exemptions.

Moreover, consistent with the prevailing approach in other MEAs, the Basel Convention has no formal enforcement mechanism and no provisions for formal legal sanctions for non-compliance.[110] Compliance oversight under the Convention,

110 In the past several decades, MEAs have been busy creating "non-compliance mechanisms" which bear some resemblance to traditional enforcement processes. Treaties such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243, 12 I.L.M 1088, https://cites.org/eng/disc/text.php; the Montreal Protocol, Sept. 16, 1987, 15 U.N.T.S. 29, http://ozone.unep.org/en/handbook-montreal-protocol-

pursuant to the Implementation and Compliance Committee's mandate, is based on a facilitative model designed to prevent non-compliance and assist parties with their obligations in a non-confrontational manner.[111] In other words, even if the U.S. were to find itself in non-compliance with MEA requirements, it would be unlikely to suffer serious adverse legal repercussions. In any event, the substantive obligations under the Basel Convention are not likely to be construed to impose strict liability for non-conformity,[112] and the Convention provides the parties with

substances-deplete-ozone-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, 2014 I.C.J. 14 (Mar. 31), http://www.icj-cij.org/docket/files/148/18136.pdf. Unfortunately, the course of events even in that case is 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. 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 two-decade history of the agreement, the sanctions process has never been triggered.

111 *See Mandate*, BASEL CONVENTION, http://www.basel.int/TheConvention/ImplementationComplianceCommittee/Mandate/tabid/2296/Default.aspx (last visited Sept. 18, 2016).

112 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. Excuse doctrines, context, and circumstances surrounding the actions that failed to accomplish the result remain broadly relevant in determining breach. *See* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 56–57

significant discretion in implementation.[113]

Of course, planning for non-enforcement as the primary consequence of breach is both inadvisable and inappropriate as a matter of commitment to the rule of law and to the treaty. 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. More importantly, given the indeterminacy of law and the unpredictability of the future, over-compliance can become an obsession with the purely hypothetical. In the end, breach cannot be prevented with absolute certainty because *ex ante* efforts to guarantee perfect compliance are premised on an impossible proposition that one could determine in advance all of the possible situations in which non-compliance could arise.

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 are 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.

If the ultimate objective of joining an environmental treaty such as the Basel Convention is to promote international cooperation in environmental protection, it seems that breach avoidance and over-compliance have come at a high price indeed: suspension and arguably even abandonment of the core mission of the Convention. Breach avoidance has essentially become a mechanism for treaty avoidance.

(2001), http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/9_6_2001.pdf&lang=EF. This is especially applicable to the Basel Convention's obligations with respect to the prevention of certain waste movements. 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." *Id.* at 62.

113 *See, e.g.*, Basel Convention, *supra* note 5, at art. 4(2) ("Protocol on Liability and Compensation").

III. MAKING THE CASE FOR RATIFICATION . . . NOW

In this Part, we make an affirmative case for ratification based on the sufficiency of available implementation authority, the high cost of continuing inaction, and timing considerations with respect to the Ban Amendment. Currently, there is plenty of non-EPA regulatory authority to implement the provisions of the Basel Convention, as well as compelling reasons to do so without any further delay.

A. *Reconsidering the Authority Gaps*

Our review of other non-EPA statutory schemes indicates that there exist two separate but related legal bases for executive branch to control waste exports: the Commerce Department's Export Administration Regulations (EARs) and presidential authority under the International Emergency Economic Powers Act (IEEPA). Both approaches are out-of-the-ordinary and untested in their use of presidential powers. 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.

1. *The International Emergency Economic Powers Act and Presidential Powers*

Since the beginning of the ratification process, inquiry into the authority for implementing the Basel Convention 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."[114] In other words, the Export Administration Act of 1979 provided broad authority to regulate hazardous waste exports independent of other authority granted by other Acts of

114 Presidential Authority to Control Export of Hazardous Wastes under the Export Administration Act of 1979, 4 Op. O.L.C. 797, 797 (1980).

Congress, such as the RCRA.[115]

The EAA was the latest in a long line of export control laws designed to implement both war-time and peace-time U.S. foreign policy.[116] 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.[117] Among the most important export control purposes was advancement of U.S. foreign policy[118] and national security.[119] 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.[120]

Under the EAA, the president and 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

115 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." Limitations on Presidential Authority to Control Export of Certain Hazardous Substances, 4 Op. O.L.C. 802, 808 (1980).

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

117 *See* Export Administration Act, Pub. L. No. 96-72, 93 Stat. 503 (1979) (codified as amended at 50 U.S.C. app. §§ 2401–2420 (2012).

118 Foreign policy concerns addressed have included "broad issues of regional stability, human rights, anti-terrorism, missile technology, and chemical and biological warfare." Fergusson, *supra* note 116, at 2.

119 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." Fergusson, *supra* note 116, 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 set of purposes identified in the original 1949 legislation, but less important 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.*

120 50 U.S.C. app. § 2402(13) (1982).

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."[121] As a practical matter, this authority has been exercised by the Commerce Department's Bureau of Industry and Security (BIS) through the Export Administration Regulations (EARs).[122] These regulations include a licensing system and a control list (the Commerce Control List, or CCL), which designates the items subject to the export regulations.[123] Unfortunately for the Basel Convention, the EAA had lapsed and thus was not in effect during the initial submission of the Basel Convention or during its pendency in the U.S. Senate in 1991–92.[124] Most of the authorities granted to the Department of Commerce, as well as the Export Administration Regulations,[125] have been kept in continuous effectiveness through assertion of presidential power and authority under the International Emergency Economic Powers Act (IEEPA).[126]

As a peace-time extension of the Trading with the Enemy Act (TWEA),[127] the 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

121 50 U.S.C. § 4605(a)(1) (LexisNexis, LEXIS through Pub. L. No. 114-219).

122 15 C.F.R. §§ 730–4 (2016).

123 *See id.*

124 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, most recently until August 20, 2001, when it lapsed. 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 subsequently revived by Congress for December 5, 1983 to March 30, 1984 (Pub. L. 98-207 (1983); Pub. L. 98-222 (1984)), 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 to June 30, 1994 (Pub. L. 103-10 (1993)), July 5, 1994 to August 20, 1994 (Pub. L. 103-277 (1994)), and November 13, 2000 to August 20, 2001 (Pub. L. 106-508 (2000)). The EAA was in effect during various limited periods of time after Senate advice and consent.

125 *See* 15 C.F.R. §742.

126 *See* Pub. L. 95-223, 91 Stat. 1628 (1977) (codified as amended at 50 U.S.C. §§ 1701–1706 (1994). 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 116, at 13.

127 *See* Trading with the Enemy Act, 50 U.S.C. app. §§ 1–44 (1917).

> 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.[128]

The IEEPA 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.[129] As Professor Carter has described it,

> 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."[130]

At the present time, the 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,[131] it has largely been accepted as a way of ensuring the availability of export controls. Its latest manifestation came through Executive

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128 50 U.S.C. § 1702(a)(1).

129 IEEPA is the statutory basis for every current OFAC (Office of Foreign Assets Control) sanctions program (aside from Cuba where TWEA remains the statutory basis). *See* Court E. Golumbic & Robert S. Ruff III, *Leveraging the Three Core Competencies: How OFAC Licensing Optimizes Holistic Sanctions*, 38 N.C. J. INT'L L. & COM. REG. 729, 747 (2013). Since IEEPA's inception, there have been at least thirty-two declared national emergencies. *See id*. Between 1977 and 2001, one practitioner's survey counted at least eighty-four Executive Orders that have initiated the powers conferred under the IEEPA. *See* James J. Savage, *Executive Use of the International Emergency Economic Powers Act - Evolution Through the Terrorist Taliban Sanctions*, CURRENTS: INT'L TRADE L.J. 28, 32 (2001). For a history of IEEPA, analysis of case law defining presidential authority, and an overview of its implementation, see *id.*

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

131 *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).

Order 13222,[132] 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.[133]

Under the statute, IEEPA powers must be triggered by the invocation of a national emergency,[134] which is 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.[135]

As required by the National Emergencies Act (NEA),[136] the president of the United States has annually renewed the initial 2001 declaration of emergency set forth in E.O. 13222.[137] Most

132 *See* Continuation of Export Control Regulations, 66 Fed. Reg. 44025 (Aug. 22, 2001).

133 *Id*. In addition to IEEPA, the Order also invoked the president's authority under the constitution and other federal laws.

134 *See* IEEPA § 202(a), 50 U.S.C. § 1701(a) (declaration of emergency with respect to an "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").

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

136 *See* 50 U.S.C § 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*.

137 *See* 79 Fed. Reg. 46959 (Aug. 11, 2014).

recently, President Obama renewed the declaration on August 4, 2016.[138]

2. *Filling the Authority Gaps*

The existing configuration of legal authorities, Export Administration Regulations (EARs), Executive Order 13222, and IEEPA, suggest two related approaches for addressing the contingencies regarding Basel non-compliant exports of municipal wastes or hazardous wastes not covered under the existing RCRA regulatory scheme:[139] changes to the EARs and reliance on the president's ability to trigger IEEPA powers.

Under the first approach, EARs would be amended to include the categories of residual waste not covered by the RCRA export regulation scheme and impose Basel requirements regarding notification and import.[140] 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."[141]

138 *See Notice—Continuation of the National Emergency with Respect to Export Control Regulations*, WHITE HOUSE OFFICE OF THE PRESS SECRETARY, (Aug. 4, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/08/04/notice-continuation-national-emergency-respect-export-control.

139 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.

140 Since the EARs are 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 semi-annually report to Congress any changes with regard to the president's exercise of his IEEPA authorities.

141 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. 96-200 (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

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.[142] For example, an important foreign policy objective in the exercise of EAA powers has been the furtherance of international human rights priorities. Specifically, export controls have been imposed on "specially designed implements of torture," crime control and detection equipment, and related technology and software in order to support "U.S. foreign policy to promote the observance of human rights throughout the world."[143] Here, the 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 its submission, and efforts to seek additional implementing legislation that would facilitate ratification continue to be made. 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.[144] Utilizing export controls to address the contingencies

obligations" language. *See* Export Control Act of 1949, Pub. L. No. 81-11 § 2 (1950) ("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.

142 It appears that prior to the 1979 Act, international environmental, health and safety policies were among the issues of concern within the EAR. *See* U.S. Department of Justice, Opinion of the Office of Legal Counsel, The President's Authority to Control the Export of Hazardous Substances, 4 Op. O.L.C. 568 (Vol. B), 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. *See* 50 U.S.C. app. § 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.").

143 15 C.F.R. §§ 742.7(a), 742.11(a) (2010); *see* 15 C.F.R. § 742.13(a)(2009).

144 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

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.[145] The 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 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 the IEEPA would be sufficient to authorize the 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 of an "unusual and extraordinary threat."[146] There are at least two possible approaches to such a declaration. The first one involves a blanket national emergency declaration arising out of the present set of circumstances related to hazardous waste trade and the Basel Convention. The second approach would look to 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.[147]

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and wastes" and associated resolutions. *See, e.g.*, Human Rights Council Res. 18/11, U.N. Doc. A/HRC/RES/18/11 at 1 (Oct. 13, 2011); Human Rights Council Res. 21/17, U.N. Doc. A/HRC/RES/21/17 at 1–2 (Oct. 22, 2012); *see generally Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes*, U.N. OFFICE OF THE HIGH COMM'R, http://www.ohchr.org/EN/Issues/Environment/ToxicWastes/Pages/SRToxicWastesIndex.aspx (last visited Oct. 9, 2016).

145 *See generally* The Trail Smelter Case (U.S. v. Can.), Arbitral Award, 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 (1963); Stockholm Declaration Principle 21, *in* Report of the United Nations Conference on the Human Environment, UN Doc.A/CONF.48/14, at 2 and Corr.1 (1972) ("States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States"); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1.C.J. Reports 1996, p. 226.

146 50 U.S.C. § 1701(b).

147 While IEEPA grants the president the authority to promulgate applicable regulations to exercise IEEPA powers, EPA could presumably be charged with

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.[148] First, the significant volume of uncontrolled international trade in hazardous and non-hazardous wastes raises the specter of serious public health risks and environmental contamination. Illegal hazardous waste dumping cases such as in Koko, Nigeria the Trafigura vessel case have presented these types of risks.[149] Even if 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. in the form of adulterated food or toxic products.

Second, the failure of Congress to enact additional implementing legislation for more than two decades parallels 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.[150] The failure to participate in the leading international forum on the trade and environmentally sound management of hazardous and 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

implementation and responding to relevant instances.

148 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 130, at 1234–35. *But see* House Comm. on Int'l Relations, Trading with the Enemy Act Reform Legislation, H.R. Rep. No. 95-459 (1977) ("[E]mergencies are by their nature rare and brief, and are not to be equated with normal, ongoing problems.").

149 *See* note 14, *supra*.

150 *See* Parties to the Basel Convention, *supra* note 29.

national security, foreign policy, or economy of the United States," allowing for the declaration of an emergency export control response.

A blanket emergency declaration is not without its weaknesses. Arguably, IEEPA intervention and any emergency declaration would only be necessary for, 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.[151]

An ad hoc case-specific approach would be more promising. Under this approach, 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 United States. 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.[152] In fact, to the extent that the Basel Convention's prior informed consent process is a readily available and reasonable means for avoiding potential transboundary harm, compliance failures could result not only in international embarrassment but also serious diplomatic repercussions or legal

151 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 Why the US Must Ratify the Basel Convention together with the Ban Amendment (or not at all)*, *supra* note 68.

152 *See* Stockholm Declaration Principle 21, *supra* note 145 ("States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States"); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1.C.J. Reports 1996, p. 226. A related concern could arise out of potential human rights issues associated with the effects of improper hazardous waste management.

liability. Compliance failures could thus undermine U.S. foreign policy on environmental issues and impact the U.S. economy.[153]

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 in implementing MEAs. In circulation for some time already, such theories of executive powers 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 do provide potentially positive answers about executive authority to implement environmental treaties. One particularly attractive theory identifies executive branch power to implement international treaty commitments under the president's constitutional authority to "take care that the laws be faithfully executed."[154] Thus, any additional implementing actions necessitated by the Basel Convention's 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 existing federal regulatory policies, assertion of such presidential powers in the Basel context could arguably be viewed as unremarkable or as a legitimate effort to advance substantive environmental policies already approved by the appropriate constitutional process.

In practice, however, such expansive views of presidential authority have remained quite controversial, and the executive branch has shied away from utilizing such theories with respect to environmental obligations, in contrast to traditional national security matters. Such theories would imply a wide swath domestic regulatory authority that would run counter to common assumptions about the need for congressional involvement in the domestic implementation of international environmental treaties, as well as purely domestic environmental regulatory matters. Considering Congress' traditionally dominant role in the design of

153 For example, the Canadian government has been the target of significant NGO criticism in the wake of alleged illegal MSW shipments to the Philippines. *More Canadian Garbage Found Illegally Dumped in the Philippines*, BASEL ACTION NETWORK (May 22, 2015), http://www.ban.org/2015/05/22/more-canadian-garbage-found-illegally-dumped-in-the-philippines/.

154 U.S. Const. art. II, § 3; *see generally* Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331.

domestic environmental regulatory schemes, a cautious approach seems wise. More importantly, broad theories of presidential authority also suggest that reliance on IEEPA authority, as discussed above, does not, in comparison, represent an extraordinary reach with respect to presidential powers.

B. *The Cost of Further Ratification Delay*

Given the availability of additional legal authority to implement the Convention, there is one further question worth addressing: what is the harm in additional ratification delay? The question has particular significance in that the U.S. is already pursuing all of its international hazardous waste trade and management policy objectives outside of the Basel Convention. There are two responses, one legal and one practical. As a legal matter, the significance of ratification is straight-forward. Even though, as a non-party, the U.S. is not bound by the treaty's substantive legal obligations,[155] it cannot take advantage of the privileges of membership. As a practical matter, however, the issue is less straight-forward. The lack of formal party status has not prevented the United States from being engaged to a limited extent in the Basel Convention. The U.S. adheres to the operative substantive requirements of the Basel Convention because domestic regulatory policies and requirements are generally consistent with those in the Convention.[156] 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.

However, there are at least three other serious concerns associated with the U.S. ratification failure. First, without formal membership, U.S. observers have been and may continue to be excluded from proceedings, whether for reasons of simple politics or for no reason at all. Thus, when the Basel Convention parties

155 Vienna Convention on the Law of Treaties, art. 16. However, U.S. signature of the Basel Convention does entail the minimal obligation "to refrain from acts which would defeat the object and purpose of a treaty." Vienna Convention on the Law of Treaties, art. 18.

156 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), http://www.nytimes.com/2009/09/27/science/earth/27waste.html?pagewanted=all&_r=1.

take up important international waste policies that may impact U.S. environmental and other foreign policy interests, non-membership could be a disadvantage. The U.S. might be unable either to protect such interests as effectively as it could if it were a formal member of the agreement system or to use the Convention to advance its environmental policy priorities affirmatively.

Second, apart from national self-interest, U.S. ratification is equally important for the Basel system itself. Without formal U.S. participation and full engagement, it seems doubtful that the Convention can be truly successful in addressing hazardous waste issues globally and comprehensively. At best, it is difficult to imagine a robust and durable global institution that can effectively facilitate international cooperation on waste trade and management without the formal membership of a nation as influential as the United States. At worst, the lack of U.S. membership may be undermining the entire treaty system. The latter is arguably visible in the U.S. approach to ongoing international waste trade, which it pursues entirely outside of the Basel system.

In order to avoid disruptions to its waste trading activities, the U.S. has actively utilized the Article 11 exemption of the Convention.[157] Even though the U.S. is not itself bound by the Convention's trade prohibitions, any trading partner that is a Basel Convention party would be. Since the Convention has almost universal membership, as a practical matter every international waste trade triggers Basel requirements, either through the

157 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. has entered agreements with Malaysia, Costa Rica, and the Philippines 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 Text of the Bilateral Agreements or Arrangements in Force as Transmitted to the Secretariat*, BASEL CONVENTION, http://www.basel.int/Countries/Agreements/BilateralAgreements/tabid/1517/Default.aspx. 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, U.S.-India, Oct. 9, 2002, http://www.state.gov/s/l/38719.htm.

exporter, importer, or both. The use of Article 11 to circumvent the non-party trading prohibition has allowed the U.S. to carve out a significant amount of the global hazardous waste trade from Convention coverage.[158] The result has been a dynamic where the

158 Thus, all of U.S. trade in hazardous waste with other OECD member nations occurs pursuant to the OECD's March 1992 Decision of the Council Concerning the Control of Transfrontier Movements of Wastes Destined for Recovery Operations, Organization for Economic Cooperation and Development (Mar. 30, 1992). *See* The OECD Control System for Transfrontier Movements of Wastes Destined for Recovery Operations Guidance Manual, Organization for Economic Cooperation and Development [OECD], General Distribution OCDE/GD(95)26 (1995), at 7, 43–74, http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(95)26&docLanguage=En. This decision was amended in June 2001 and February 2002. *See* Organization for Economic Cooperation and Development [OECD], Decision C(2001)107/FINAL Concerning The Revision Of Decision, C(92)39/Final On The Control Of Transboundary Movements Of Wastes Destined For Recovery Operations (May 21, 2002), http://www.epa.gov/osw/hazard/international/5-21-02.pdf; *see also* U.S.-Canada Hazardous Waste Trade Agreement, *supra* note 58; U.S.-Mexico Hazardous Waste Trade Agreement, *supra* note 58.

Comprehensive data on the United States' role in hazardous waste trade is challenging to obtain. However, information from federal agency reports indicates that the U.S. plays a significant part. During 2005–2010, the U.S., EU, and Japan were the three largest traders in solid and hazardous waste, accounting for more than half of global trade. United States International Trade Commission, Environmental and Related Services, Inv. No. 332-533 USITC Pub. 4389 at 4-17, 4-18 (Mar. 2013), https://www.usitc.gov/publications/332/pub4389.pdf. This data captures solid and hazardous waste categorized under the Harmonized System Code HS 3825.

Regarding hazardous waste imports, a recent U.S. EPA Office of Inspector General report states that the EPA does not have accurate data on hazardous waste imports. EPA Does Not Effectively Control or Monitor Imports of Hazardous Waste, U.S. Envtl. Prot. Agency OIG Rep. #15-P-0172 at 7 (July 6, 2015), http://www.epa.gov/sites/production/files/2015-09/documents/20150706-15-p-0172.pdf. While noting discrepancies, the report confirms that the U.S. imports a substantial amount of hazardous waste; in 2011, the U.S. imported 69,000 tons from Canada; 9,000 tons from Mexico; 2,000 tons from Japan, Malaysia, and the Phillipines; and 300 tons from Belgium, France, and the UK. *See id.* at cover page. Information on U.S. hazardous waste exports is less forthcoming. The only apparent online information from EPA is a table on proposed exports to non-OECD countries. *See Proposed Hazardous Waste Exports to Non-OECD Countries*, ENVTL. PROT. AGENCY, http://www.epa.gov/epawaste/hazard/international/non-oecd.htm (last modified Sept. 22, 2011).

The incomplete picture on U.S. hazardous waste trade could be due, in part, to the self-regulating nature of the U.S. system. Generators of solid waste are required to determine whether their waste meets the definition of hazardous waste under the rules and thus, are subject to hazardous waste export regulations. *See* 40 C.F.R. § 262.11. In addition, the export notice and consent system is largely a paper-based one, though EPA has recently proposed to amend

U.S. arguably has an interest in circumventing the reach of the Convention and limiting its development so as not to disrupt its existing waste trade.[159]

Why would it matter to the U.S. whether the Basel Convention remains a robust international forum for the advancement of international policies on hazardous and other wastes? One reason is that the U.S. was fully engaged in the creation of the Basel Convention, investing significant time and effort. The last four presidents, in their support of ratification, have recognized the Convention's continuing importance to U.S. international cooperation and policy on hazardous waste.[160] Furthermore, given that the world has congregated around the Basel Convention (and now also its chemical convention sisters) as the global platform to advance international waste policy, it is difficult to imagine how the U.S. could effectively create a credible alternative forum or process to advance its own policies. If the Basel Convention is the only train going out of town, it would seem that the U.S. practically has no choice but to get on if it does not want to be left behind on global processes addressing international waste policy issues.

Finally, diminished U.S. engagement has significantly contributed to a disconnect between national environmental policy-making and the efforts of international institutions. The

RCRA regulations to allow electronic submission of data (with the aim of improving compliance). *See* Hazardous Waste Export-Import Revisions, 80 Fed. Reg. 63283 (Oct. 19, 2015). Finally, it is very probable that a large number of hazardous waste exports go unreported. An EPA official reported that many exporters simply do not give notice because there is a lack of enforcement. F. James Handley, *Hazardous Waste Exports: A Leak in the System of International Legal Controls*, 19 E.L.R. 10171, 10175 (1989). And of course, no matter how comprehensive, data will not capture all that is illegal in trade.

159 Timing matters because further delay will continue to entrench U.S. programs and policies, such as the existing Article 11 agreements, to keep international waste trade outside of the Convention's scope. For example, since Article 11 agreements constitute exceptions to the Convention obligations, U.S. ratification in itself will not abrogate their effect. The continued passage of time and ongoing reliance will create that much more inertia to change.

160 *See Why Hasn't the United States Ratified the Basel Convention?*, ENVTL. PROT. AGENCY, https://www.epa.gov/hwgenerators/frequent-questions-international-agreements-transboundary-shipments-waste#basel (last visited Aug. 8, 2016) (stating that "[t]he United States supports ratification of the Convention, but to date no implementing legislation has been enacted"); *see also* CTR. FOR PROGRESSIVE REFORM, *supra* note 1, at 13 (stating that every president since George H.W. Bush has supported the Basel Convention).

influence of U.S. policy-makers with respect to international waste policy has undoubtedly diminished. Non-membership has also created the perception that the U.S. is defying applicable international law.[161] U.S. environmental policy, including waste policy, is largely disengaged from the Basel Convention. Whether that is the result of unfamiliarity with the treaty systems or due to the perception that the work of the treaty systems is irrelevant to a non-member such as the U.S.,[162] such a disconnect does not bode well for the long-term success of the Basel Convention as the preeminent institution for the management of hazardous waste. Ultimately, lack of U.S. engagement will leave both the U.S. and the Basel Convention system worse off.

There is a final reason for the U.S. to consider ratification as soon as possible: the 1995 Basel Ban Amendment. Since the Senate's 1992 advice and consent to the Basel Convention occurred prior to the adoption of the Ban Amendment, and thus could encompass only the original 1989 Convention terms, entry-into-force of the amendment is certain to complicate U.S. ratification both politically and legally. The U.S. would face a choice of seeking to ratify the Convention with or without the Amendment. Independent of the question of whether the Ban Amendment is in fact desirable as a matter of sound environmental policy, either choice would likely arouse significant political

161 While this perception is not well-documented, it is commonly known within diplomatic circles. For a similar perspective from a U.S. academic, see Gaba, *supra* note 60. 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 of the world's most effective environmental regulatory systems and is among the most progressive and proactive in its environmental regulatory activities.

162 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. At this point, more than two decades have passed since the Basel Convention's original signature by the United States. During that time the initial enthusiasm about treaty participation has largely faded. 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 to other concerns. Little attention is trained on these issues, unless international news outlets cover illegal hazardous waste shipments, such as the 2006 Trafigura case involving illegal hazardous waste shipments to Nigeria. *See Trafigura Found Guilty of Exporting Toxic Waste*, BBC NEWS (July 23, 2010), http://www.bbc.com/news/world-africa-10735255. Even though cooperation is occurring on waste issues of rising importance, such as electronic waste, it is limited in form and scope.

controversy and legal questions. Such a choice would surely invite the U.S. Senate's re-examination of the treaty, especially in regards to its consultative role and the question of whether the U.S. could or should accept the Amendment without its submission to the Senate for additional advice and consent. A decision to ratify the Convention and simultaneously accept the Ban Amendment would also be certain to trigger significant industry opposition to Basel ratification in its entirety, as industry has made known its intense hostility to the Amendment.[163] As a legal matter, the now-familiar question of domestic implementation authority for the Ban Amendment would also arise.[164]

Conversely, a decision by the U.S. to ratify the Convention together with an affirmative decision not to accept the Ban Amendment would trigger concerns from environmental groups such as the Basel Action Network, which has consistently called for ratification only on the condition of acceptance of the Ban Amendment. While such a step likely bears less potential for conflict with Congress, it raises the legal question of whether the U.S. could join the Convention without also accepting the Ban Amendment after it has entered into force.[165] Ratification of the

163 Since exports to major U.S. trading partners—Canada, Mexico, and other OECD countries—would not be affected by the OECD/Non-OECD trade ban, it is not clear how significant the economic impact of the Ban Amendment would be on U.S. waste exports. *See* discussion in last two paragraphs of Section V(B)(2), *supra.*

164 While we have not performed the requisite legal analysis here, it is possible that IEEPA authority could allow for implementation of the Amendment. *See generally* discussion in Sections III(A)(1) & (2).

165 Since Article 26 of the Convention does not permit any reservations, the United States would not have the option of entering a reservation in regards to the Amendment. However, Professor John Knox has privately suggested that Article 17 of the Vienna Convention on the Law of Treaties, allowing for partial acceptance of a treaty "if the treaty so permits," could allow the U.S. to join the un-amended Convention. Given the likelihood that some parties may not accept the Ban Amendment for a considerable period of time following its entry into force, the un-amended Convention would continue in effect among them. It might thus be argued that the Vienna Convention's Article 17 would contemplate the continued effectiveness of a version of the treaty that does not include the Ban Amendment, suggesting that U.S. ratification of just the original 1989 treaty ought to be permissible. The difficulty with this argument arises out of the relationship with the parties that have already accepted the Ban Amendment. Would it be reasonable to infer intent in the amended Convention to allow for new parties that do not accept the Amendment? While, per Article 17, the question could be readily disposed of by an affirmative resolution of the parties, it is not clear how likely such a resolution would be.

Convention prior to the Amendment's entry-into-force would allow the U.S. to side-step the question of its position on the ban, leaving the issue of definitive resolution for a later time.[166]

To be sure, neither of the two paths encounters obstacles that could not be resolved, given the time and willingness to find a political solution. However, additional delay would likely be introduced into the ratification process. At the same time, as described previously, the window to side-step the Ban Amendment issue may be closing soon. With the 2011 adoption of the "fixed-time" interpretation by the Convention's parties,[167] entry-into-force will require only 66 parties, just ten more than the current 56. There is no easy way to predict when that threshold will be reached, but the simple numerical difference suggests that such time may not be too far off. In light of this as well as other considerations discussed above, continued ratification delay would seem undesirable.

C. *The Possibility and Imperative of Expeditious Ratification*

There has never been any doubt that most of the Convention's obligations can be implemented with existing statutory authority, primarily under the RCRA. That includes both the Convention's substantive objective of promoting the environmentally sound management of hazardous wastes as well as the procedural control of hazardous waste exports with prior informed consent requirements. 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.

With respect to residual risks associated with the export of municipal solid wastes and non-RCRA hazardous wastes, there are at least two possible answers. First, there are regulatory solutions, relying on the president's legal authorities under the IEEPA. Such authority can be tapped to plug the remaining EPA authority gaps, either by amendment of the Export Administration Regulations or

166 Once the United States is a party to the Convention, Basel Convention Article 17 would, consistent with default principles of treaty law, condition subsequent amendments to the Convention on explicit acceptance by the U.S.

167 *See* BC-10/3, *supra* note 73.

by issuance of presidential declarations that uncontrolled and unregulated export of certain wastes constitutes a national emergency warranting the exercise of IEEPA control authority. The latter path could be triggered either as an ad hoc response to a specific incident creating 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.

A second option takes more direct aim at the over-compliance approach to residual risks of non-compliance. While a policy of breach avoidance and over-compliance might have been justifiable in times when environmental legislation was readily obtained, this approach to ratification decisions is out of place under the recent history of political dysfunction with respect to environmental regulation. The contemporary Congress failed to enact any major domestic environmental legislation for a quarter of a century, a streak that was broken just last year with the enactment of TSCA reform legislation.[168] With the miniscule prospect of new environmental legislation in the near future and a ratification delay that has already stretched more than two decades, pursuing a perfect compliance or over-compliance objective seems inappropriate.

Instead, we believe that the ratification decision should focus on the United States' ability to meet reasonably expected contingencies and the availability of reasonable responses, a standard that we describe as substantial compliance.[169] A substantial compliance standard accepts the prospect of uncertainty within the process of compliance and allows it to be resolved at a later time. This approach requires the continuing engagement of diplomats and regulators in implementation and compliance as a dynamic and evolving process, rather than a one-time act designed to fulfill treaty commitment "once and for all." It also mirrors the reality of regulatory programs much more closely with respect to

168 *See* Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. 114-182 (June 22, 2016), 130 Stat. 448.

169 It is important to note that substantial compliance is not intended as a substitute for appropriate 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 shortfall, the gap between obligation and reality should usually be small.

the inevitability of unanticipated exigencies, changing circumstances, and unavoidable possibility of occasional and unintended non-conformity. It thus requires 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.[170]

By either using the potentially wide-ranging authority delegated by the IEEPA to the president or adopting a substantial compliance approach, no new implementing legislation is necessary for the Convention's ratification. Ratification could and should go forward expeditiously and without further delay. With the Senate's advice and consent already provided in 1992, all that remains now to complete ratification is for the U.S. to formally deposit an instrument of ratification.

Continued non-membership in the Basel Convention fails to advance U.S. policy interests in the proper supervision of global hazardous waste trade and proper waste management abroad. It also potentially undermines the Convention's ability to achieve its long-term policy objectives. Possibly most critical of all, further delay may cost the U.S. the opportunity to ratify the Convention before entry-into-force of the Ban Amendment, adding a significant layer of complications to the ratification process. In other words, the best time for completing the ratification process is now.

CONCLUSION

Because the Basel Convention has already received the Senate's advice and consent, it is unique in its status among the unratified environmental treaties. However, the concern about inadequate implementation authority is a common unresolved issue for every other MEA that has been signed but not ratified by the U.S., such as the Stockholm Convention and the Rotterdam Convention.[171] Can our analysis of the Basel Convention be generalized to these MEAs? Our discussion in this Article suggests

170 For a more general perspective on the role of compliance management in the international law, see ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995).

171 For a list of several MEAs that are signed but unratified, see CTR. FOR PROGRESSIVE REFORM, *supra* note 1.

at least two lessons of broader applicability.

First, with respect to identifying domestic legal authority to implement MEAs, ratification efforts need to look beyond the most obvious areas, such as the regulatory authorities of the presumptive implementing agency or agencies. Day-to-day operating responsibilities and practices within federal agencies can create "silos" of information, jurisdiction, and regulatory expertise that can be practical impediments to inter-agency cooperation in implementation—but treaty obligations are ultimately the responsibility of the U.S. government as a whole. Thus, regulatory authority of other agencies is directly relevant to the implementation question. Whether such authority should be used may well raise important policy questions. However, the failure to consider regulatory authority more broadly provides an incomplete answer to the legal question of implementing authority.

With respect to the Basel Convention, the president's authority under the IEEPA and his inherent constitutional foreign affairs powers, as well as the Commerce Department's implementing scheme under the EARs, constitute one important set of legal authorities covering international trade that are 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.[172] In fact, such regulatory authorities are likely to be valuable to a broad range of international environmental agreements because many MEAs address the international nature of environmental issues by focusing on the global movement of natural resources, pollutants, chemicals, and information.

The second lesson relates to substantial compliance as a ratification standard. Substantial compliance, as contrasted with the prevailing approach of "over-compliance," focuses on the United States' ability to meet reasonably expected contingencies and the availability of reasonable responses. The standard accepts uncertainty within the process of compliance and allows it to be

172 While detailed analysis of another environmental agreement is beyond the scope of this Article, in our view, 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.

resolved at a later time, rather than attempting to "eliminate" all risks through over-compliance at the outset. Its application calls for an overall evaluation of the process of compliance, especially the purposes of the treaty and the objectives of membership, rather than viewing breach avoidance as the sole purpose of implementing a treaty.[173] In other words, substantial compliance is designed to ensure that compliance is substantively meaningful in advancing treaty objectives, including by capturing the benefits of U.S. participation.

An important substantive step is to alter the calculus of ratification decisions. 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 of ratification considerations beyond breach avoidance. In effect, substantial compliance calls for best efforts in implementation. It presumes the necessity of continuing compliance efforts and the management of residual risks of non-compliance within a context where U.S. participation is designed to achieve a range of objectives. Of course, each treaty is different, as is the associated politics and policy calculus. But ensuring that the ratification process properly considers the policies and objectives of a treaty is precisely at the core of reframing ratification decisions in terms of substantial compliance.

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Based on our analysis of existing legal authorities, we firmly believe that there are no remaining legal authority gaps that prevent U.S. implementation of the Basel Convention and U.S. deposit of an instrument of ratification. Our conclusion is reinforced by our view that the prevailing ratification standard of perfect or over-compliance does a poor job of advancing environmental policy objectives, and that the alternative "substantial compliance" standard provides a more appropriate perspective on resolving the ratification question. With more than two decades in legal limbo already, the time for U.S. ratification is now.

173 Focusing on breach avoidance as the overriding ratification issue that must be cured by over-compliance masks a policy judgment that subordinates all other policy objectives.