The Relationship Between Domestic and International Environmental Law

(Forthcoming (in shortened form) *in* Martella R and Grosko B *(eds.) International Environmental Law: The Practitioner's Guide to the Laws of the Planet* (American Bar Association 2013).)

Tseming Yang
Professor of Law
Santa Clara University Law School
500 El Camino Real
Santa Clara, CA 95053
tyang@scu.edu
1 (408) 551-6037

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Chapter 2: The Relationship Between Domestic and International Environmental Law

By Tseming Yang[1]

The connections between domestic and international law have proliferated in the last few decades as a directed result of the explosive growth of international environmental law. Yet, most environmental lawyers remain relatively unaware of its effects even though it is increasingly affecting the practice of environmental law itself.[2] Where most of the rest of this book provides background on the specific substantive content of global environmental laws, both international as well as the environmental law systems of other countries, this chapter will address the relationship between the international and the domestic system, primarily the US. This chapter will address three related questions: 1) What is international environmental law?, 2) what is its relationship to U.S. domestic law?, and 3) how is it implemented and applied?

I. What is International Environmental Law?

The most common answer to this question refers to the sources of international law set out in article 38 of the Statute of the International Court of Justice. Under article 38, that includes:

a. international conventions,
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. [3]

The three primary sources, treaties, customary law, and general principles will be explored below.

A. Environmental Treaties

[1] Professor of Law, Santa Clara University School of Law; Deputy General Counse, US Environmental Protection Agency (2010-2012); Chief of Party and Director, US-China Partnership for Environmental Law (2007-2010). I am grateful to Charles Lane and Devani Adams for excellent research assistance and to David Gravallese, John Knox, and Charles DiLeva for valuable comments on earlier drafts.

[2] For a general discussion, see Tseming Yang, The Emerging Practice of Global Environmental Law, 1 Transnational Environmental Law 53 (2012).

[3] Contrary to the common law, judicial decisions or "case law" usually cannot in themselves create binding law or be binding authority within international law. However, judicial decisions can provide assistance in determining the specific contours and content of customary legal rules. Article 38(d).

The rapid growth of international environmental law in the past four decades has been driven primarily by the proliferation of environmental treaties, the predominant source of new international environmental law. In their substantive scope, they have covered the gamut of environmental and natural resource issues, including climate change,[4] ozone depletion,[5] biodiversity conservation,[6] hazardous waste trade,[7] trade in endangered species,[8] migratory species conservation,[9] chemicals management,[10] desertification,[11] marine pollution,[12] and whaling.[13] Their participation levels range from multilateral agreements that have universal or near universal membership to regional[14] or bilateral agreements.[15] Details about the substantive content of these agreements is left to subsequent chapters. This section will address the nature, creation and structure of environmental agreements.

1. The Nature of Environmental Treaties

The Vienna Convention defines treaties as "an international agreement concluded between States in written form and governed by international law."[16] In practical terms, it means an agreement between states that satisfies criteria set out in the Vienna Convention.

A treaty creates binding legal commitments based on the State parties' expression of a desire to be bound by the terms of their agreement. However, while the Vienna Convention on the Law of Treaties governs the formation of treaties within international law, the status of a treaty within a country's national legal system,

[4] UN Framework Convention on Climate Change, 1771 U.N.T.S. 107 (1992); Kyoto Protocol, 37 ILM 22 (1997).
[5] Vienna Convention on the Protection of the Ozone Layer, 1513 U.N.T.S. 293 (1985); Montreal Protocol on Ozone Depleting Substances, 1522 U.N.T.S 3 (1987).
[6] Convention on Biological Diversity, 1760 U.N.T.S. 79 (1992); Cartagena Biosafety Protocol, 39.I.L.M. 1027 (2000); Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arisong from their Utilization (2010), available at http://www.cbd.int/abs/text/default.shtml.
[7] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1673 U.N.T.S. 57 (1989).
[8] Convention to Regulate International Trade in Endangered Species of Flora and Fauna, 993 U.N.T.S. 243, 12 I.L.M. 1085 (1973).
[9] Convention on the Conservation of Migratory Species of Wild Animals, 19 I.L.M. 15 (1979).
[10] Stockholm Convention on Persistent Organic Pollutants, 40 I.L.M. 532 (2001); Rotterdam Convention on Prior Informed Consent, 38 I.L.M. 1 (1999).
[11] UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly Africa, 1954 U.N.T.S. 3 (1994).
[12] MARPOL, 2 I.L.M. 1319 (1973); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 11 I.L.M. 1294 (1972).
[13] International Convention for the Regulation of Whaling, 161 U.N.T.S. 72, 10 U.S.T. 952 (1946).
[14] North American Agreement on Environmental Cooperation, 32 I.L.M. 1993).
[15] Boundary Waters Treaty, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448
[16] Vienna Convention on the Law of Treaties Article 2.1 (a), (May 23, 19. 69, 1155 U.N.T.S. 331).

including the authority of officials to negotiate and enter into a treaty on behalf of a State, is determined by each State's own national requirements and processes.

Environmental treaties increasingly exhibit characteristics of both contract and legislation.[17] As agreements between state sovereigns, they are much like ordinary contracts between individuals. They are evidence of consent to be bound by the agreement's terms, and their applicability and legal effect depends on and is limited by that consent. Not surprisingly, many of the rules governing the creation, interpretation, and other aspects of treaties parallel contract law principles.

The contract characteristic of treaties is a useful way for understanding the core principles of the Vienna Convention on the Law of Treaties, which governs the creation, application and interpretation of treaties.[18] In short, it is essentially a road-map to the birth, life, and death of a treaty that spells out how and what the requirements are for the formation of treaties, their application and interpretation during their life-time existence, the process for change, and the process of termination and thus death.

2. The Formation of Environmental Treaties

The process of treaty-making has no formally set requirement, though treaties governed by the Vienna Convention on the Law of Treaties must be in writing and concluded between States.[19] Nevertheless, contemporary treaty-making practices follows a common pattern that includes: 1) environmental problem identification, including determination of needs and negotiation goals, 2) negotiation of the treaty provisions, 3) adoption and signature of the treaty instrument, and 4) ratification.[20]

Identification of the problem, needs assessment and formulation of treaty objectives is necessary for optimal design of solutions. It requires assessment of the state of scientific understanding as well as the structure of the problem, including causes and interrelationship to other issues. Treaty negotiation may then proceed in a variety of ways, ranging from informal processes to formal large-scale UN-style conferences governed by a "standardized negotiation process." Such formal negotiations are commonly associated with modern multilateral environmental agreements such as the Framework Convention on Climate Change.

The concluding step of a negotiation is adoption of the draft agreement, indicating that the negotiating parties "agree on the final form and content of the agreement," and authentication, usually by signature, confirming that "the text of the treaty is authentic and definitive."[21] Adoption and authentication do not, however,

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[17] *See, e.g.,* Tseming Yang, *The Challenge of Treaty Structure: The Case of NAFTA and the Environment*, 100 Proc. Ann. M. Am. Soc. Int. L. 32-37 (2006).

[18] While the United States is not a party to the Vienna Convention, the Convention is widely viewed as a codification of customary international law principles governing the law of treaties. As a practical matter, the Vienna Convention is routinely consulted and referred to in treaty interpretation.

[19] Vienna Convention Article 2(1)(a).

[20] David Hunter, James Salzman, Durwood Zaelke, International Environmental Law and Policy 288-300 (2011).

[21] Mark W. Janis, International Law 21 (2012.); see also Vienna Convention on the Law of Treaties, article 9 & 10.

make the treaty binding on the parties. They obligate a state to "refrain from acts which would defeat the "object and intent of the treaty."[22]

Definitive consent to be bound by a treaty can be expressed by a variety of affirmative showings, including signature, exchange of instruments, deposit of instruments of ratification, acceptance, or approval, and by accession.[23] The most common method has been by ratification. A state that did not participate in the negotiations or sign the agreement may join the agreement at a later time by accession, usually requiring the State to deposit an instrument declaring "an intent to be bound by the treaty."[24]

Legal obligations for party states are triggered by the entry-into-force provision. In modern multilateral environmental agreements, entry into force is often conditioned on a minimum number (or critical mass) of state ratifications or fulfillment of other conditions.[25] Satisfaction of the entry-into-force conditions then triggers legal effectiveness.

3. The Structure of Modern Environmental Agreements

Just as contracts frequently contain standard terms, so do environmental treaties. Some of the common elements shared by modern environmental agreements are subject matter specific while others are more generic to treaties. Types of common elements include the following:[26]

Core (Primary) Substantive Commitments. These are treaty obligations that one might characterize as the core commitments primarily relied on to accomplish the treaty's purpose. Within the Montreal Protocol, the core commitments are to limit and reduce the production of CFCs as well as regulate its international trade. Within CITES, core commitments focus on the control of the international trade in endangered species through specific licensing requirements.

Treaty-specific (Secondary) Support Mechanisms and Commitments. Modern environmental agreements usually incorporate a number of supporting mechanisms and commitments that enhance the effectiveness of the core commitments. Such treaty-specific supporting (or secondary) provisions facilitate implementation by creating flexibility for the parties in achieving the core commitments, easing administration and compliance monitoring, and preventing unintended consequences such as leakage concerns, among others. For example, reliance on a basket approach in the Montreal Protocol (centered on a covered substance's ozone depletion potential) and in the Kyoto Protocol (focused on the GHG's global warming potential) or the creation of market-based mechanisms to facilitate achievement of the Kyoto GHG emission reduction targets helped create flexibility for the member states.

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[22] Vienna Convention Article 18.
[23] See Vienna Convention Article 11 -16.
[24] Supra Hunter, at 300.
[25] Vienna Convention article 24.
[26] *See* David Caron, "Analyzing and Understanding Treaties in the Area of International Environmental Law" (1998) (on file with author).

Generic (Tertiary) Support Mechanisms and Commitments. There is also a set of generic support mechanisms and commitments emerging in treaty-making that generally contribute to the accomplishment environmental goals. Their general functions and purposes are non-specific to the particular agreement, though their operational implementation is likely to be tailored to the particular treaty objectives and core commitments. They are are utilized in some version or another across many environmental agreements. Examples are provisions setting up financial assistance for implementation in the developing world, scientific and technical research, information exchange, dispute settlement, and implementation reporting and compliance monitoring.

Organizational Entities and Structures. Environmental agreements routinely commit states to particular actions. But increasingly, they also create institutional structures and bodies that can give the treaty regime a life of its own. These bodies are especially important in multilateral agreements and have come to resemble bureaucratic institutions not unlike administrative agencies in national systems of governance.

At their simplest, treaties provide for governing councils, usually referred to as the Conference of the Parties, and administrative support bodies, a Secretariat. Technically complex agreements, as most MEAs now are, also include entities providing scientific and technical expertise, administering financial assistance, policing compliance, and providing other useful functions. In some instances, these bodies, usually the COP, are provided with some limited law-making authority to modify treaty rules or requirements.

There has also been a trend to task some institutional bodies, such as the Kyoto Protocol's Clean Development Mechanism, directly with the implementation and application of treaty rules to the activities of both public and private entities. The result has been the emergence of new forms of international administrative entities that exercise authority and implement treaty provisions much like, to some extent in place of or in addition to, national regulatory authorities.

Mechanisms for Changing and Updating Treaties. Because scientific understanding of environmental problems continues to evolve and the causes and pressures on the environmental problem may change over time, provisions allowing for modification and updating of treaty provisions have become increasingly sophisticated. Traditional rules of treaty amendment require the same process of adoption and ratification as the original treaty itself, posing issues of delay and free rider dilemma. As a response, modern environmental agreements have introduced simplified change processes, tacit amendment procedures, and non-consensus-based decision-making procedures, [27] especially technical changes.

Non-Compliance Mechanisms. Traditionally, other than the Convention on Trade in Endangered Species (CITES), environmental treaties had no compliance or enforcement mechanisms. To the extent that dispute settlement provisions were present, providing for mediation, conciliation, or arbitration of disagreements, they

[27] Montreal Protocol article 2(9).

were rarely, if ever used. The realization that responses to non-compliance with treaty commitments implicate communal interests of member states were first formally recognized only with the establishment of a non-compliance mechanisms by CITES and the Montreal Protocol. Since then, the trend has been to include implementation reporting and compliance monitoring provisions[28] as well as formal processes that allow for responses to specific events or allegations of non-compliance.[29]

Scope, Function, and Objectives and Other Standard Treaty Terms. Components of treaties setting out preambular material, treaty objectives and principles, or closing provisions are the most generic, equivalent to standard contract terms. While some may provide interpretive context and articulate treaty purposes, they are also provide an indication of the agreement's specific subject matter focus, overall objectives, and value considerations. For example, the UNFCCC has preambular materials and articles setting out the Convention's objectives as well as underlying principles. In addition, treaties usually contain standard terms specifying qualifications for membership, entry into force, depositaries, and amendment provisions.

B. Customary International Law

Customary international law is the set of rules of state practice that are consistently and uniformly followed by states based on a sense of legal obligation. They are essentially created by state practice coupled with states' belief that the associated behavior is legally required.[30]

Customary international law is an expansive and difficult to ascertain source of international law. Many of these rules have developed in areas of international relations where states have had extensive and frequent interactions over the centuries, such as immunities enjoyed by diplomats as well as navigation and other maritime matters. In the international environmental law context, the rule of greatest consensus is the obligation of a state not to allow its territory to be used to cause harm to the territory of another state.[31]

Formally, customary International Law has two components: 1) State Practice and 2) Opinio Juris. Under the first element, state practice must be wide-spread and virtually uniform in conformance with the rule. The second element requires a belief that the state practice is legally compelled. Thus the behavior must have been engaged in due to a sense of legal obligation – as opposed to a sense of moral obligation or convenience.[32]

The challenging nature of this definition is apparent even to beginning law students. Not only does it call for an empirical assessment of the practices of states,

[28] *See, e.g.,* UNFCCC arts. 9 & 10; Kyoto Protocol art. 15; CBD art. 26.
[29] *See, e.g.,* Kyoto Protocol article 18; Rotterdam Convention article 17; Stockholm Convention article 17; London Protocol article 11.
[30] Supra note 2 at 310.
[31] Trail Smelter; Stockholm Principle 21.
[32] Janis, supra, at 46-48 (4th ed 2003). See also American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States, Section 102 (2) (1987).

which may not always be publicly known, but it also involves determining the motivations for engaging in particular practices.[33] Given the significant variance in practices from State to State as well their political motivations and goals, extrapolating customary legal rules would seem extremely difficult.[34] How does one ultimately distinguish customary rules of law from rules of convenience, courtesy, comity, or just plain custom?[35]

Moreover, the definition has been criticized for embodying serious potential for inconsistent findings since they are practically based on one's "more or less subjective weighing of the evidence."[36] In the end, these issues illustrate that international law is quite unlike domestic law -- not created by a central authority but rather representative of the consent by those governed by it. And the ambiguities of law are ultimately the result of the ambiguity and diversity of state consent. As a practical matter, then, judicial decisions and the writings of scholars thus become critical guides to the status and contours of customary law rules.[37]

One rule of customary law that enjoys consensus recognition is the duty to avoid transboundary harm, first explicitly articulated in the 1941 *Trail Smelter* arbitration.[38] Faced with the first formal international dispute raising transboundary air pollution, the Trail Smelter Tribunal used "general principles of international law on State liability for cross-border damage" to settle the issue of transboundary harm that arose from the smelter.[39] Pursuant to the tribunal's arbitral decision, the US was awarded $350,000 in compensatory damages for the harm done, and the Smelter was required to spend millions to change operations and ensure that it would mitigate harm to American citizens across the border. *Trail Smelter* is commonly seen as a precursor to Principle 21 of the Stockholm Declaration, which stated that sovereign states may not allow their territory to be used to cause harm to the environment of other States or the global commons.[40]

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[33] However, in democratic and transparent governments, it has become easier to observe the public as well as internal justifications provided in compliance with particular international legal rules.

[34] Janis at 53.

[35] There is also the additional problem of the persistent objector – when a state objects to an emerging customary international law rule by attempting to block uniformity of state practice, including by consistently rejecting it or acting explicitly in contravention. Id at 54.

[36] Id.

[37] One special category of CIL norms are peremptory norms of international law. These norms are accepted by the international community as ones from which no derogation is permitted. They are universally applicable and cannot be changed, including by treaty. In their extraordinary nature, they are rare and reserved for rules where there is overwhelming consensus about their validity, such as prohibitions on slave-trading and piracy.

[38] For background on Trail Smelter, see Rebecca M. Bratspies and Russell A Miller, *Transboundary Harm in International Law: Lessons from the Trail Smelter*, available at http://www.cambridge.org/servlet/file/store6/item2363260/version1/item_9780521856430_excerpt.pdf .

[39] *Id.* at 3.

[40] The rule has also been recognized by the International Court of Justice in the Nuclear Test Cases, Rio Declaration Principle 2, and numerous international environmental agreements and non-binding instruments.

Most recently, the International Court of Justice affirmed its recognition of the transboundary harm rule in Argentina v. Uruguay. In that same case, the ICJ went on to recognize the emergence of a customary legal obligation to perform transboundary environmental impact assessments in the situation of a shared watercourse.[41] In the case, Argentina had taken issue with Uruguay's decision to allow one of the world's largest pulp mills to be built on the banks of the Uruguay River, which forms the boundary between the two countries.

In deciding for Argentina, the International Court of Justice stated that the parties had an obligation under customary international law "to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control."[42] The Court also recognized that where there are shared natural resources, environmental impact assessments are now considered an international requirement where industrial activity poses a great risk to the environment in a "transboundary context."[43]

C. General Principles of Law

Article 38 of the International Court of Justice Statute cites "general principles of law recognized by civilized nations" as a third source of international law. According to the Third Restatement of The Law of Foreign Relations, this source of law encompasses general principles of laws "common to the major legal systems [and] . . may be invoked as supplementary rules of law where appropriate."[44] They are derived from the "rules accepted as domestic law of all civilized nations"[45] and understood as gap fillers for international law where treaty and custom are silent. General principles of law are found by comparative law analysis and an examination of fundamental principles.[46]

The emergence of global principles of environmental law arguably holds the greatest significance to this category of international environmental law. As global environmental law principles are finding a common expression in national legal systems across the world, whether by transplantation, convergence or harmonization, they are likely to serve as the source for the rise of new international environmental law norms.

The duty to conduct environmental impact assessments appears to be one possible example.[47] Environmental impact assessment requirements are arguably the

[41] Cymie R. Payne, *Pulp Mills on the River Uruguay*: The International Court of Justice Recognizes Environmental Impact Assessment as a Duty under International Law, available at http://www.asil.org/insights100422.cfm.

[42] Id. See also Pulp Mills on The River Uruguay (Argentina v. Uruguay) ICJ, available at http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=135&code=au&p3=4.

[43] Id.

[44] Restatement (Third) of the Foreign Relations Law of The United State Section 102(4) (1987).

[45] Hunter et al., supra, at 312, (citing Ian Brownlie, Principles of Public International Law 16 (2008).

[46] Janis 56-57.

[47] This provides an alternative view on the International Court of Justice's reference to transboundary environmental impact assessments in Argentina v. Uruguay. Rather than compelled as a prerequisite for avoiding transboundary harm, overwhelming adoption of EIA legal principles across the world suggests that it has joined as a general principle of the law of civilized nations.

most widely adopted environmental law norms internationally, and they are now present in virtually every country's environmental regulatory system. As a principle, it can be found in many international environmental law instruments. In fact, its international transboundary equivalent is the focus of the Espoo Convention.[48]

D. The Role of Soft International Environmental Law

One of the most important developments in international environmental law in recent decades has been the growth of soft law. Soft law has traditionally been used to describe norms that are "not yet law" or "not quite law." They are principles that are not considered to be law either because they are not intended to be, nor viewed as legally binding, or because they are unenforceable. Their legal significance derives largely from the aspirational values and objectives they articulate and that animate a lot international environmental cooperation as well as their ability influence behavior. Some of these some soft norms have evolved into binding international norms. One can thus see them as intermediate manifestations of what could eventually become customary law or as norms that could eventually be adopted in environmental agreements as binding treaty commitments.

II. Relationship to US Domestic Law?

Given the broad and growing scope of international environmental law, how then does it connect with domestic law? With respect to treaties, domestic legal processes are relevant in the treaty-making process, in the incorporation of treaties into the US law, and the domestic application/implementation of treaty commitments. With respect to customary law, the rules are deemed to be part of the common law.

A. General Relationship

The US system is traditionally referred to as a "dualist" system. In dualist systems , international and domestic laws are seen as operating in separate spheres. National legal systems are "separate and discrete"[49] from the international one and "international law is generally not thought to be able to make itself effective in a domestic legal order [but rather] depends on the constitutional rules of the municipal system itself" for proper application.[50]

The competing approach to dualism is "monism." The monist approach "views the international legal order and all national legal orders as component parts of a single

[48] See http://www.unece.org/env/eia/eia.html. The Espoo Convention was adopted in 1991 and entered into force on September 10, 1997. While it is not a "global convention", it is noteworthy in that It "sets out the obligations of Parties to assess the environmental impact at an early stage of planning" and includes member state obligations to "notify and consult each other on all major projects under consideration that are likely to have a significant adverse environmental impact across boundaries."
[49] Mark W. Janis, International Law 87 (2012).
[50] Id.

'universal legal order' in which international law has a certain supremacy."[51] Theoretically, when a monist state ratifies an international treaty it immediately incorporates the treaty into national law.[52] Customary rules of international law are also treated as part of national law.[53] This single unified system is binding on a state's legislature, courts and individuals.[54]

The differences between dualist and monist systems become clearer when obligations under international and national laws conflict.[55] A dualist system would treat national sources of law as superior to international sources of law.[56] A monist system would treat national sources as subordinate to international sources.[57] Moreover, a monist system might allow international sources to override national ones. This means that a municipal court could invalidate a national law that contradicts an international law, or an individual could invoke rights under international law, just as if it were national law.[58]

In practice, the general consensus is that the relationship between international and national law is predominantly dualist.[59] That is, "[m]ost states and most courts…presumptively view national and international legal systems as discrete entities and routinely discuss in a dualist fashion the incorporation of rules from one system to the other."[60]

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[51] Id. at 88 (citing H. Kelsen, PRINCIPLES OF INTERNATIONAL LAW 553-588 (2d ed. Tucker 1966)).

[52] David Sloss, *Domestic Application of Treaties*, *in* THE OXFORD GUIDE TO TREATIES 375 (Duncan B. Hollis ed., Oxford University Press 2012).

[53] J.G. Starke, STARKE'S INTERNATIONAL LAW at 65, 74, 76 (11th ed. 1994).

[54] *Id*. at 65.

[55] *Id*. at 66.

[56] Janis, *supra*, at 88.

[57] Starke, *supra,* at 77 (discussing for example, "article 25 of the Basic Law for the Federal Republic of Germany which lays down that the general rules of public international law shall form part of federal law, and shall take precedence over the laws of and create rights and duties directly for the inhabitants of the federal territory.")

[58] Id.

[59] Janis, *supra* note 1 at 88.

[60] Id. Like most other relationships, the one between international law and national law is complex. Generally speaking, it is rare to see a legal system that is purely monist or dualist; most countries take a mixed approach. A dualist state may allow domestic courts to apply customary international law in judicial decisions – a monist norm, while a monist state may require formal treaty-approval processes – a dualist norm. Therefore, it is necessary for the practitioner to consider the source of international law to determine its place in the state's domestic legal system.

Additionally, a practitioner may consider that the relationship between international law and national law often reflects a state's political history. For example, "countries that have experienced dictatorships or foreign occupation often generally reveal greater receptivity to international law, often incorporating or referring to specific international texts in their post-repression constitutions." Dinah Shelton, Ed., International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion 2 (New York: Oxford University Press 2011). In contrast, "[c]ountries that have not had such experiences, like France and the United States…appear less likely to adhere to international agreements or to incorporate and apply customary international law in judicial decisions." Id.

Notably, membership in the European Union (EU) creates a unique situation for a state's domestic legal system since "member states must now implement and apply the legal norms issued by EU institutions and also the international commitments undertaken at the regional level." Id.at 6.

Within the U.S., dualism is manifested through domestic processes such as Senate advice and consent or the enactment of Congressional legislation to implement a treaty. Upon approval by the Senate, the President then usually deposits an instrument of ratification, an international step signifying ratification that is distinct from the domestic process and which then makes treaty membership effective as an international matter.

Conversely, international law has traditionally not concerned itself with a state's internal laws, and internal matters including domestic laws do not usually affect international treaty obligations.[61] Yet, the practical connection between international and domestic affairs in international environmental law has grown significantly over the decades. Because most of environmental degradation is the result of private activity rather than direct government actions, the affirmative regulatory engagement and assistance of national and sub-national governments are usually critical in accomplishing a treaty's environmental protection objectives. In other words, member states have a relationship with the treaty system that is much more like that of a co-regulator or regulatory delegatee, much like what is seen in the US environmental federalism structure, than of a "regulated entity," as may be more common in the fields of arms control, humans rights, or trade regulation.

B. Types of International Agreements in US Law

Apart from international agreements that have been approved by the U.S. Senate via the treaty clause and that have co-equal status to Congressional statutes, there are two other broad categories of international agreements. First, Congressional-Executive Agreements require approval only by a simple majority of both houses of Congress.[62] Such agreements have been utilized most frequently with respect to international trade agreements, though some of these agreements have also included environmental issues, such as the North American Agreement on Environmental Cooperation. They are usually negotiated by the Executive branch, oftentimes with negotiation parameters provided by Congress through special legislation. The final agreement is enacted by Congress as if it were ordinary domestic legislation.

A second category of agreements are sole executive agreements. They may be entered into by the President pursuant to his own constitutionally enumerated powers, such as his position as Commander and Chief of the armed forces and his foreign affairs power, or as authorized by Congress. Such executive agreements are usually not subject to formal congressional approval, though informal consultations occur in the due course of ordinary executive-congressional interactions and congressional oversight.

With these considerations in mind, the following list reflects general categories of monist and dualist countries:
Dualist: Australia; Canada; Colombia; India; Israel; Italy; New Zealand; Nigeria; South Africa; United Kingdom; United States, Vietnam.
Monist: Argentina; Brazil; Chile; China; Costa Rica; France; Germany; Japan; Kenya; South Korea; Netherlands; Russia; South Africa; Spain; Thailand.

[61] *See, e.g.,* Vienna Convention art. 27.

[62] Frederic L. Kirgis, International Agreements and U.S. Law, http://www.asil.org/insigh10.cfm

C. Oversight and Control over Treaty-making Process

Oversight over the treaty-making process occurs both at the Congressional level as well as within the Executive branch itself. Within the U.S. system, the President may be formally in charge of treaty negotiations. As a practical matter, however, treaty-making is a collaborative process involving usually the Senate and oftentimes also the House of Representatives.

The Constitution requires Senate advice and consent by two-thirds of the Senators for treaties to be approved.[63] Moreover, Congress is constitutionally assigned authority over foreign commerce and may exercise its oversight, appropriations, and other authorities to ensure its involvement in foreign policy processes.[64] In fact, consultation and consideration of interests by Congress occurs on a regular basis before and during the negotiation process, especially when it is expected that Congress will ultimately need to enact legislation to implement a treaty domestically.

Within the Executive branch, oversight and control over treaty-making processes is largely vested in the State Department. Such oversight and control occurs primarily through the Circular 175 Procedure (hereinafter C-175), which applies to both internal State Department as well as inter-agency coordination of negotiation of international agreements.[65] The State Department describes the procedure as intended "to confirm that the making of treaties and other international agreements by the United States is carried out within constitutional and other legal limitations, with due consideration of the agreement's foreign policy implications."[66] As a practical matter, it also ensures that agencies and officials of the federal government do not make legal commitments on behalf of the US government internationally, whether by informal memoranda of understandings or formal contracts, without involvement of the State Department.

The substance of the C-175 is designed to inform and address considerations ranging from "[t]he policy benefits to the United States, as well as potential risks;" to "[t]he environmental impact that may arise as a result of the agreement.[67] The State Department's Office of the Legal Adviser provides an analysis of international and domestic law issues, including "the Constitutional powers relied upon, that accompanies the C-175."[68]

Within the US government, participation in negotiations for a multilateral environmental agreement may not commence absent authority provided through the C-175 process. Such C-175 authority may also provide authority to sign the resulting agreement.[69]

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[63] U.S. Const. art II, § 2, cl. 2.
[64] See Richard F. Grimmett, Foreign Policy Roles of the President and Congress, available at http://fpc.state.gov/6172.htm.
[65] Case-Zablocki Act (1972), 1 U.S.C. 112b.
[66] http://www.state.gov/s/l/treaty/c175/
[67] Id.
[68] Id.
[69] http://www.state.gov/e/oes/rls/rpts/175/1265.htm

III. How is International Environmental Law Implemented and Applied?

Before official ratification of an international agreement occurs, and thus before the US becomes a party, the question of domestic implementation must be resolved.

A. Congressional Implementing Legislation

It has been the general treaty practice for the US to ratify international agreements, including environmental agreements, only when it is in a position to implement the obligations under such agreements (such as by having in place necessary domestic legal authorities).[70] Oftentimes, this has meant that Congress had to enact legislative authority or appropriate funding for EPA or other federal agencies to fulfill new treaty commitments. On some occasions, new treaty obligations can be implemented with existing statutory authority.

At times, existing legislation or constitutional authority already vests a particular federal agency or the President with all the necessary powers to carry out US obligations under the new treaty. However, in either situation, whether implementation occurs through existing or new Congressional authority, implementing agencies are likely to have to promulgate new regulations or revise their existing ones.

B. Self-Executing and Non-Self-Executing Agreements

While national implementation through legislatively delegated authority is the most common path for environmental agreements, when a treaty is deemed self-executing, it can be judicially enforced and thus become legally effective upon ratification. Professor Fred Kirgis has described whether a treaty is self-executing or not as a question focusing primarily on the

> *intent--or lack thereof*--that the provision become effective as judicially-enforceable domestic law without implementing legislation. For the most part, the more specific the provision is and the more it reads like an act of Congress, the more likely it is to be treated as self-executing.[71]

Given the need for treaty mandates to be tailored to the circumstances of specific sectors of the economy, whether industry, agriculture, or natural resources, as well as integrated into existing regulatory scheme so as to ensure effective implementation, environmental agreements have generally been interpreted as non-self-executing.

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[70] See, e..g., "The American Approach to Treaties," Panel, American Society of International Law Annual Meeting (April 6, 2013), Remarks by Susan Biniaz, Deputy Legal Adviser, US Department of State (stating that if provisions of a treaty go beyond existing US laws, US joining the treaty would need to await additional Congressional implementing legislation).

[71] Frederic L. Kirgis, *supra* note 58 (emphasis added). The inquiry into intent usually focuses on the participants in the treaty creation and ratification process.

However, this has also led to delay in the ability of the United States to ratify and participate in international environmental agreements.[72]

Once a treaty or agreement has passed through the necessary channels of ratification and implementing authority is in place, then the President must issue a proclamation that the treaty has entered into force.[73] The President's proclamation puts the domestic legal community on notice and triggers the implementation process.[74]

C. Adjustments of International Agreements and Domestic Linkage

The growing influence of environmental agreements on domestic regulatory systems is also casting a spotlight on processes used to change and adjust international agreements. Ordinarily, amendments of environmental agreements require the same adoption and ratification process as the underlying agreement. Increasingly, however, environmental agreements are including processes to allow for the revision or modification of a treaty in a simplified or expedited manner, such as tacit amendment procedures.[75]

At the same time, it has become more common for US environmental statutes to directly incorporate or reference international treaty requirements. The Marine Protection, Research, and Sanctuaries Act (MPRSA) specifically requires application of standards and criteria that are binding under London Convention.[76] Likewise, Title VI of the Clean Air Act makes its provisions contingent on being "consistent with the Montreal Protocol" and sets out that in the event of conflict, "the more stringent provision shall govern."[77]

Tighter linkage of parts of domestic regulatory schemes to their international counterparts has ultimately furthered integration and effectiveness of US regulatory efforts with respect to its international commitments. Unfortunately, tighter linkage has also raised concerns about the alleged loss of sovereignty due to a perceived delegation of legislative and regulatory authority to international organizations. [78]

D. The Growing Practice of International Environmental Law

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[72] In the most extreme of examples, the Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal received Senate advice and consent in 1993, but the United States has not yet ratified the agreement because of its position that implementing legislation is necessary. As of this writing, Congress has yet to act on proposed implementing legislation.

[73] Treaties and Other International Agreements: The Role of the United States Senate, A Study Prepared for the Committee on Foreign Relations United States Senate, 106th Congress 2d Session, SPRT 106-71, 12 (2001). Available at http://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf.

[74] Id

[75] Modern agreements have sought to introduce innovations that have departed from the traditional rule of unanimous consent, such as article 2(9) of the Montreal Protocol.

[76] Marine Protection, Research, and Sanctuaries Act of 1972, section 102(a), 33 U.S.C. 1412(a).

[77] Clean Air Act section 614.

[78] NRDC v. EPA, 464 F.3d 1.

The practice of international environmental law used to be almost exclusively confined to international lawyers providing legal counsel, support for treaty negotiations, participation in international organizations, and representation of the US before international tribunals. However, as the field has matured and implementation processes have become more important, so has the range of lawyers who are engaged in this field and the scope of the legal practice.[79]

International environmental law is now practiced not only as a specialty in the State Department's Legal Adviser's Office, but also as a subject matter by lawyers in the Environmental Protection Agency, the Interior Department, the National Oceanographic and Atmospheric Administration, the Coast Guard, the Justice Department, and the Department of Defense. Their work addresses the promulgation of regulations, legislative drafting of implementing treaty commitments, and other domestic legal work. It includes interpretation of relevant treaty provisions that arise in civil and criminal enforcement actions designed to implement treaty requirements and scrutinizing treaty commitments to determine compliance. Finally, the practice can involve providing technical assistance and capacity-building in other countries to help promote compliance.

Lawyers in the environmental NGO community and the commercial bar have also become more engaged in this field. For example, NGO lawyers have raised environment and human rights issues in Alien Tort Act claims in US courts or in petitions to international human rights tribunals, such as the Inter-American Commission on Human Rights. They have filed submissions under article 14 of the North American Agreement on Environmental Cooperation regarding a NAFTA party's failure to effectively enforce its environmental laws. The commercial bar has filed investor claims related to environmental regulatory issues under chapter 11 of NAFTA and represented corporate clients' interests by influencing the internal processes of international organizations. Further, private lawyers (and consultants) are assisting their clients with navigating international administrative regulatory schemes and processes, such as the Clean Development Mechanism.

Undoubtedly, many of these practice areas are still small compared to traditional and more established areas of environmental regulation and litigation. As globalization continues to shrink the planet, link communities and environments, grow economic activities and ecological pressures on the earth, however, the need for regulatory approaches and legal solutions that integrate or harmonize national, sub-national, and international efforts will only grow. And with this trend, the volume and scope of this part of environmental law practice will grow as well.

III. Contemporary Issues

As international environmental law has gained prominence, a serious contemporary challenge remains the difficult political climate in the United States for

[79] *See, e.g.,* Tseming Yang, The Emerging Practice of Global Environmental Law, 1 Transnational Environmental Law 53 (2012).

the ratification of environmental treaties. Among the major multilateral environmental agreements that the United States has signed, but not ratified are the 1989 Basel Convention on the Transboundary Movement of Hazardous Wastes, 1992 the Convention on Biological Diversity, the 1997 Kyoto Protocol to the UN Framework Convention on Climate Change, the 1997 Protocol to the London Convention, the 1998 Rotterdam Convention on Prior Informed Consent, and the 2001 Stockholm Convention Persistent Organic Pollutants.

Political opposition to ratification of international agreements is not unique to the environmental area, nor is opposition to new environmental legislation.[80] But these domestic political challenges do undermine the ability of the United States to effectively engage or play a leadership role within these multilateral environmental regimes -- simply because the US is a non-party. Even though ordinarily permitted to participate as an observer, the U.S. has no vote or formal voice in treaty proceedings. The ability of its representative to fully protect US interests and concerns, including of US civil society organizations as well as industry, is undoubtedly greatly weakened.

A separate issue of contemporary significance has been the extraterritorial application of US environmental laws. When such instances have arisen, they have on occasion given rise to international disputes such as the Tuna-Dolphin GATT case and other trade and environment matters before the WTO dispute resolution mechanisms, particularly those trade law challenges to fisheries and wildlife-related legislation.

Unilateral, extraterritorial action remains tempting because of the opportunity to recruit the weight of the United States economic and military power for environmental purposes. In contrast, treaty-making entails significant resource and personnel demands, faces challenges in terms of consensus-building, requires time to negotiate, and oftentimes leads ultimately to an agreement of limited effectiveness. Until these issues are better addressed, unilateral, extraterritorial application of US law is likely to remain an option of interest for environmentalists.

[80] The UN Convention on the Law of the Seas has been languishing for decades in spite of consistent Executive Branch support for ratification. And no comprehensive environmental legislation has been enacted since the 1990 Clean Air Act Amendments.

The Economist

Saturday, February 8, 1992

LET THEM EAT POLLUTION. (EXCERPT FROM LETTER WRITTEN BY CHIEF ECONOMIST OF **WORLD BANK**)

Copyright Economist Newspaper Ltd. (UK) 1992

LAWRENCE SUMMERS, chief economist of the **World Bank**, sent a memorandum to some colleagues on December 12th. The Economist has a copy. Some of the memo has caused a fuss within the Bank:

Just between you and me, shouldn't the **World Bank** be encouraging more migration of the dirty industries to the LDCS? I can think of three reasons:

(1) The measurement of the costs of health-impairing pollution depends on the forgone earnings from increased morbidity and mortality. From this point of view a given amount of health-impairing pollution should be done in the country with the lowest cost, which will be the country with the lowest wages. 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.

(2) The costs of pollution are likely to be non-linear as the initial increments of pollution probably have very low cost. I've always thought that under-populated countries in Africa are vastly under-polluted; their air quality is probably vastly inefficiently low [sic] compared to Los Angeles or Mexico City. Only the lamentable Facts that so much pollution is generated by non-tradable industries (transport, electrical generation) and that the unit transport costs of solid waste are so high prevent world-welfare-enhancing trade in air pollution and waste.

(3) The demand for a clean environment for aesthetic and health reasons is likely to have very high income-elasticity. The concern over an agent that causes a one-in-a million change in the odds of prostate cancer is obviously going to be much higher in a country where people survive to get prostate cancer than in a country where under-5 mortality is 200 per thousand. Also, much of the concern over industrial atmospheric discharge is about visibility-impairing particulates. These discharges may have very little direct health impact. Clearly trade in goods that embody aesthetic pollution concerns could be welfare-enhancing. While production is mobile the consumption of pretty air is a non-tradable. The problem with the arguments against all of these proposals for more pollution in LDCS (intrinsic rights to certain goods, moral reasons, social concerns, lack of adequate markets, etc) could be turned around and used more or less effectively against every Bank proposal for liberalisation.

The language is crass, even for an internal memo. But look at it another way: Mr Summers is asking questions that the **World Bank** would rather ignore-and, on the economics, his points are hard to answer. The Bank should make this debate public.

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

TSEMING YANG* AND C. SCOTT FULTON†

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

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

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

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

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.