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Department of Foreign Affairs and International Trade

POLICY STAFF PAPER

NO. 93/15

Stacking the Deck: Compliance and Dispute Settlement in International Environmental Agreements

by

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(December 1993)

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STACKING THE DECK: COMPLIANCE AND DISPUTE SETTLEMENT IN INTERNATIONAL ENVIRONMENTAL AGREEMENTS

43-267-057

STACKING THE DECK: COMPLIANCE AND DISPUTE SETTLEMENT IN INTERNATIONAL ENVIRONMENTAL AGREEMENTS

Executive Summary

This Paper explores what is arguably the critical interface between international environmental agreements (IEAs) and their trade counterparts. The Paper recognizes that there is increasing pressure to incorporate trade measures into more IEAs as a primary means of making environmental commitments operational and to provide discipline on signatories and non-signatories alike. A strong case can be made about the importance of disciplining States whose activity might otherwise undermine the efforts of the international community to deal effectively with environmental issues affecting the global commons.

Yet the Paper suggests that it is important for Canadian policy makers responsible for international environmental and trade issues to stand back and take stock together. Much of Canada's prosperity and many of our jobs depend on trade. The use of trade measures to achieve environmental ends must be carefully weighed in the balance of overall Canadian interests.

In this regard, the Paper reviews the obligations of several key international environmental agreements and finds that they are characterized by a considerable degree of ambiguity and/or potential loopholes. This is not surprising given the relatively recent acceptance internationally that the environment is an area of critical importance requiring a much more extensive network of obligations and commitments than previously recognized. This policy area is currently very much on a learning curve, both in terms of developing an international consensus on how best to proceed and on working out the detailed language required to reflect accurately that consensus. Much progress has been made in recent years, but clearly much work still lies ahead to provide the desired degree of precision.

The Paper goes on to explore the scope of the mechanisms incorporated in IEAs for resolving disputes, an important feature given the possibility of disagreements over the substantive obligations of the environmental agreements. More than one-third of existing IEAs contain dispute settlement provisions. Such mechanisms are, appropriately, becoming a normal part of IEAs. Yet the analysis in this Paper suggests that the dispute settlement provisions in IEAs remain very underdeveloped compared to the counterpart provisions found in trade agreements.

Special attention is given to sanctions as a central part of an effective dispute settlement system. The Paper identifies several preconditions that should be met when developing a credible sanctions mechanism, the most critical of which are the avoidance of unilateralism and the importance of attracting the broadest possible international support. The inclusion of trade sanctions in environmental agreements as the "weapon of choice" is questioned. In fact, the menu of possible sanctions is quite extensive. Other options include aid conditionality, financial assistance, the payment of fines, technology transfer commitments, and the suspension of specific rights and obligations under a particular IEA.

With regard to IEAs, the combination of trade sanctions, loosely drafted obligations, and, in particular, the lack of effective dispute settlement mechanisms would create an environment in which the economic power of the few could prevail over a rules-based system, the latter being the bed-rock of Canadian foreign policy. The "power" approach stacks the deck against Canadian interests. To the extent that trade sanctions are envisaged, it does not appear appropriate for Canada to exchange the reasonably well developed and effective dispute settlement mechanisms found in modern trade agreements for the lesser discipline of their environmental counterparts until such time as the latter become more sophisticated and effective.

Thus, the Paper concludes that, if the provisions of a specific IEA are to override those of the GATT and other trade agreements, Canada should seek the emergence of an international consensus based on several criteria. A "trumping" IEA should be open to all countries on equal terms and should enjoy the support of a substantial qualified majority of the world's economies. Furthermore, the obligations of the agreement should be well-defined and no less onerous on Parties in practice than the standard expected of non-Parties. Most critically, such an IEA must feature a well-constructed dispute settlement mechanism. Finally, a trumping IEA should provide for a range of sanctions, with a strong Canadian preference for including trade sanctions as an instrument of last resort with the right to opt for a different but equally effective tool.

Résumé

Le présent document explore ce qui est, pourrait-on dire, l'interface critique entre les accords environnementaux internationaux (AEI) et leurs équivalents commerciaux. On le reconnaît dans ce document, des pressions croissantes sont exercées en vue d'intégrer des mesures commerciales dans un plus grand nombre d'AEI, moyen le plus sûr de garantir le respect des engagements environnementaux et de contraindre les signataires aussi bien que les non signataires à s'y conformer. Il faut insister sur l'importance de discipliner les États dont les activités pourraient autrement miner les efforts déployés par la communauté internationale pour s'attaquer efficacement aux questions environnementales qui touchent les biens communs.

On suggère ici toutefois que les décideurs canadiens responsables des questions internationales de commerce et d'environnement devraient prendre du recul pour faire le point ensemble. Le Canada doit l'essentiel de sa prospérité et de nombreux emplois au pays aux échanges commerciaux. Si l'on tient compte de l'ensemble des intérêts canadiens, il convient d'évaluer soigneusement l'usage des mesures commerciales à des fins environnementales.

À cet égard, le document examine les obligations de plusieurs AEI de premier plan et constate qu'ils comportent un nombre considérable d'ambiguïtés et (ou) d'échappatoires. Il n'y a là rien de surprenant puisque ce n'est que récemment que la communauté internationale, reconnaissant l'importance stratégique de l'environnement, a jugé nécessaire d'établir un réseau d'obligations et d'engagements beaucoup plus vaste que celui qui avait été envisagé. Ce champ d'action est encore en phase exploratoire; il faut d'une part parvenir à un consensus international sur la meilleure façon de procéder et, d'autre part, mettre au point les modalités d'un discours qui traduise avec exactitude ce consensus. S'il est vrai que de grands progrès ont été accomplis récemment, il nous reste, à l'évidence, beaucoup à faire pour atteindre le degré de précision désiré.

On explore ensuite la portée des mécanismes inclus dans les AEI concernant le règlement des différends, élément essentiel si l'on tient compte des possibilités de désaccords au sujet des obligations de fond que comportent les accords environnementaux. Plus d'un tiers des AEI existants contiennent des dispositions relatives au règlement des différends. Les mécanismes en question deviennent, à juste titre, une composante normale des AEI. Pourtant, d'après l'analyse effectuée dans le document, les dispositions des AEI concernant le règlement des différends demeurent très insuffisantes, comparées à celles que l'on trouve dans les accords commerciaux.

On accorde une attention toute particulière aux sanctions, considérées comme élément fondamental d'un système efficace de règlement des différends. Le document énumère plusieurs conditions préalables à l'élaboration d'un mécanisme crédible d'imposition de sanctions, les plus cruciales étant d'éviter les mesures unilatérales et de rallier le plus grand nombre de pays possible. Le fait de vouloir assortir les accords sur l'environnement de sanctions commerciales comme «arme de choix» est contesté. En fait, la liste des sanctions éventuelles est très longue. Il existe aussi d'autres options, dont l'aide conditionnelle, l'aide financière, le paiement d'amendes, les engagements relatifs au transfert de technologie et la suspension de certains droits et obligations aux termes d'un AEI particulier.

Quant aux AEI, l'agencement de sanctions commerciales et d'obligations peu rigoureuses et, en particulier, l'absence de mécanismes efficaces de règlement de différends pourraient créer un cadre au sein duquel le pouvoir économique de quelques-uns pourrait prévaloir sur un système fondé sur le droit, lequel est le fondement de la politique étrangère du Canada. L'approche inspirée par le «pouvoir économique» modifie les règles du jeu et va à l'encontre des intérêts canadiens. Dans la mesure où les sanctions commerciales sont envisagées, il ne serait guère sage que le Canada favorise le remplacement des mécanismes de règlement des différends, efficaces et assez rigoureux, que comportent les accords commerciaux modernes par ceux, moins contraignants, des accords environnementaux jusqu'à ce que ces derniers deviennent plus sophistiqués et efficaces.

En conclusion, pour que les dispositions d'un AEI prévalent sur celles du GATT et d'autres accords commerciaux, le Canada devra rechercher un consensus international fondé sur plusieurs critères. Un AEI «prévalant» devrait être accessible à tous les pays dans les mêmes conditions et obtenir l'appui d'une majorité qualifiée d'économies mondiales. En outre, les obligations de l'accord devraient être clairement définies et pas moins contraignantes, en pratique, pour les parties que les normes exigées des non signataires. De plus, il est essentiel qu'un AEI de ce type soit assorti d'un mécanisme de règlement des différends bien conçu. Enfin, un AEI «prévalant» devrait comporter une série de sanctions, le Canada préférant nettement que l'on ait recours à des sanctions commerciales en dernier ressort et que l'on puisse opter pour un autre instrument tout aussi efficace.

"Let me tell you, if you think these issues are gonna go away, you've got another think comin'."

U.S. Trade Representative Mickey Kantor (August 1993)

I. Introduction[1]

The "greening" of the public policy debate over the last ten years or so has been remarkable. The appeal of environmentalism cannot be underestimated. It reflects concerns, often well-founded, close to the everyday life of voters. It is easily packaged for emotional public debate, and yet addresses significant, very real-world problems at the heart of economic and social development. The combination of political sex appeal and substantive merit is powerful.

As public concern about environmental conditions increases, so has the response of governments. While much of the focus remains domestic (and properly so), governments are also faced with growing demands for solutions related to global commons issues (e.g., climate change, ozone layer depletion), transboundary pollution impacts (e.g., North American air quality), and the spectre of companies flocking to "pollution havens" in other countries (the on-going NAFTA debate about Mexican environmental standards is illustrative).

In order to foreclose unilateral action on the part of one or a very limited number of governments and in recognition that effective, long-term responses depend on mutually reinforcing cooperation, countries have increasingly turned to the negotiation of international environmental agreements (IEAs) as the bedrock upon which they can and should make progress. A fairly comprehensive 1991 list of treaties and other agreements in the field of the environment reveals that 24 were negotiated from as early as 1921 through the 1950s; another 26 in the 1960s; 46 more in the 1970s; and 56 in the 1980s.[2] Moreover, the importance of these agreements appears to have increased qualitatively as well. The key instruments related to ozone depletion and the transboundary movement of hazardous wastes date from the most recent period. The Canada-U.S. Air Quality Agreement, the 1992 Earth Summit conventions on Climate Change and Biodiversity, the 1993 North American Agreement on Environmental Cooperation, and the possibility of a Global Forests Convention and a regime covering the effective management of straddling fish stocks: all this recent and future activity attests to the growing range and complexity of the issues in play and of the rules of the game under development.

[1] The writer was a member of Canada's NAFTA negotiating team and the lead negotiator for Canada of the North American Agreement on Environmental Cooperation.

[2] Annex III, GATT document L/6896 (September 1991). A U.S. government report identified 170 multilateral (global and regional) and bilateral environmental agreements, two-thirds having been signed since 1972. See United States International Trade Commission, International Agreements to Protect the Environment and Wildlife, USITC Publication 2351 (January 1991), p. vii.

More is now expected of such IEAs. Negotiators carry a heavier burden and must be aware of and endeavour to reconcile a broader range of interests. For example, there are powerful voices that emphasize the need to discipline states that are not signatories of certain IEAs, especially those dealing with issues affecting the global commons. Indeed, a strong case can be made about the importance of disciplining "rogue" States, whose activity might otherwise undermine the efforts of the international community. In this regard, the denial of certain benefits (e.g., technical assistance) might be sufficient. In other instances, trade measures have been suggested. Only approximately 20 existing IEAs include trade provisions, about half related directly to the protection of flora and fauna.[3] Of these, only three provide for differences in the trade measures affecting Parties and non-Parties (more restrictive measures against the latter are found in the Montreal Protocol on Ozone Depleting Substances and the Basel Convention on the Transboundary Movement of Hazardous Wastes, as well as pursuant to several Resolutions adopted by members of the Endangered Species Convention - CITES). Nonetheless, there is increasing pressure to incorporate trade measures into more IEAs as a primary means of making the environmental commitments operational and to provide discipline on signatories and non-signatories alike.

Yet, there is presently enough experience with this particular trade and environment linkage to permit us to stand back for a moment and take stock. It would be useful to reflect on the key issues in play. First, it is worthwhile to underline again that, for a trading nation such as Canada that depends much more on our major markets than they depend on ours, the use of trade measures to achieve other ends must be carefully weighed in the balance of overall Canadian interests.

Second, a country may not associate itself with a particular IEA for any number of reasons: there may be an intent to "free-ride" off the commitment of others for commercial or economic advantage; there may be a sincere disagreement as to the proposed allocation of responsibilities for fixing a specific problem; the issue in play might legitimately be a lower priority for some countries than for others; and/or a non-signatory may find the scientific evidence in play to be unconvincing.[4] Although this range of reasons need not freeze the international community (or a significant proportion thereof) into obligatory passivity, it should, at least, make us cautious about rushing off too quickly to discipline non-signatories on issues for which the driving force may be as much political as environmental/technical.

[3] GATT, International Trade 90-91, Vol. I (Geneva 1992), pp. 24-5.

[4] Ibid., p. 35.

Third, where discipline is deemed necessary against both signatories and non-signatories, there is no clear rationale for choosing trade as the instrument of choice, although clearly it is the weapon first thought of in most instances (all too often, in particular, by those who wield the biggest sticks).

Fourth, balance and equity suggest that sanctions against non-Parties are most convincingly justified when the IEA in question has attracted the support of a broad range of countries, where it contains obligations that are precise and no less onerous than the policy discipline aimed at non-Parties, and when signatories accept to discipline their own actions in practice with regard to the obligations of an agreement. In this regard, the development of effective compliance provisions, including a dispute settlement mechanism are critical.

Fifth, governments need to reconcile environmental objectives (as incorporated in a specific IEA) with trade obligations and objectives (as enshrined in the General Agreement on Tariffs and Trade in the first instance). How do we achieve a reasonable and responsible balance? Exemptions to GATT disciplines (or those contained in other comprehensive trade agreements) should not be created lightly. Neither should a rogue non-signatory nor a delinquent Party to a broadly based IEA be able to hide easily behind trade agreement cover.

In this Paper, I explore several of these issues further. The primary focus is on the nature of the discipline placed on Parties to IEAs. The inter-action with non-Parties is introduced largely as an illustrative counterpoint to help us to explore this central theme. Part 2 contains a brief summary of the nature and extent of the obligations contained in several international environmental agreements that include trade measures, pointing out ambiguities in or exceptions to these obligations. Part 3 focuses on the dispute settlement mechanism found in these same IEAs. Part 4 comprises a review of the sanctions issue, including lessons from the recently concluded North American Agreement on Environmental Cooperation. Finally, Part 5 identifies a number of guideposts derived from this inquiry.

2. THE INSTRUMENTS AND THE OBLIGATIONS

2.1 The Montreal Protocol

The first concrete example relates to an important global commons issues: the production and consumption of chemical substances that cause the deterioration of the ozone layer, thereby threatening human health and the environment as a result of increasing levels of ultra-violet solar radiation that reaches the Earth's surface. In this

regard, scientific research has focussed on a range of substances, including chlorofluorocarbons (CFCs), halons, hydrochlorofluorocarbons, and other chemicals.

The international community moved slowly at first to meet the challenge, but with an increasing sense of urgency and some creativity. The first significant multilateral legal instrument established was the Vienna Convention for the Protection of the Ozone Layer, concluded in 1985 with entry into force in September 1988. As of mid 1993, 125 countries had ratified the Vienna Convention.[5] The emphasis of the Convention is on encouraging research and exchanging scientific, socio-economic, commercial and legal information relevant to overarching obligations to protect human health and the environment against adverse effects resulting from the depletion of the ozone layer. Indeed, during their first meeting (or Conference) held in 1989, member countries identified the Convention as the "most appropriate instrument for harmonizing the policies and strategies on research" related to the ozone layer.[6]

The Convention has two other important features. First, it serves as an umbrella agreement pursuant to which governments may adopt more detailed protocols to implement measures aimed at controlling or reducing activities that have affected or are likely to affect the ozone layer negatively. Second, the Convention contains dispute settlement provisions that apply to the enforcement of such protocols, as well as of the Convention proper.

The first, and to date the only, protocol established pursuant to the Convention is the well-known Montreal Protocol on Substances that Deplete the Ozone Layer, concluded in 1987, with entry into force in January 1989. As of mid 1993, 122 countries had ratified the basic Protocol drafted in the Montreal meeting. The Protocol as drafted in 1987 established a schedule for the phase-out of a limited list of CFCs and halon gases. Since that time, there have been five meetings of member countries, during two of which in particular (London in 1990 and Copenhagen in 1992) decisions were taken which significantly expanded the list of "controlled substances" scheduled for phase-out, accelerated the pace of substance elimination (especially as a result of the Copenhagen meeting), provided further precision with respect to several key terms and concepts, established a number of institutions and rules of procedure governing the operation of the Protocol, fleshed out what to do in cases of non-compliance with the Protocol's obligations, and established a Multilateral

[5] The Convention is reproduced in Ozone Secretariat, Handbook for the Montreal Protocol on Substances that Deplete the Ozone Layer, 3rd edition (August 1993), Annex XX, pp. 128-49, and Annex XXI, pp. 150-59).

[6] See Decision 3, in Handbook, p.136, note 11.

Fund aimed at assisting developing countries in meeting the phase-out and other related obligations of the Protocol.[7]

Accelerations (called "adjustments") of the phase-out schedules for substances previously listed in the Protocol took effect almost immediately following approval in the London and Copenhagen Meetings of Parties, for those countries that had already accepted the former version of the schedules. On the other hand, amendments of the schedules in those same two Meetings which expanded the list of substances have required formal ratification. The relevant London Amendment (which included several other fully halogenated CFCs, carbon tetrachloride, and methyl chloroform) achieved minimum adherences and entered into force in August 1992 (65 countries had ratified by mid 1993). The relevant Copenhagen Amendment (which included hydrochloroflurocarbons, hydrobromofluorocarbons, and methyl bromide) is scheduled to enter into force in January 1994 if there are at least twenty states which have ratified this latest amendment by that time.

One of the more controversial features of the Montreal Protocol is the different treatment meted out to non-Parties. Put simply, the Protocol as drafted finds non-Parties guilty by the mere fact of being a non-Party (the purest form of expedited dispute settlement!) and obliges Parties to ban two-way trade with non-Parties in many of the controlled substances.[8] Moreover, provision is made to ban imports of products containing certain controlled substances. The first stage in this process was reached in June 1991 with the adoption of a list of products containing certain CFCs and halon gases, the importation of which from non-Parties could be prohibited. The products include air conditioning units, refrigerators and other related home appliances, most aerosol products and some additional goods.[9] The Protocol anticipates a further broadening of this kind of prohibition by 1996 and 1998. Parties may also determine[10] the feasibility of banning or restricting imports from non-Parties of goods produced with, but not containing certain controlled substances identified in the Protocol, although the recent Fifth Meeting of Parties in Bangkok decided that it is not feasible to impose a ban or restriction on the importation of such goods produced with certain CFCs and halons under the Protocol "at this time". Finally,

[7] See the Decisions made in all four Meetings of the Parties, Handbook, pp. 29-57.

[8] The dates range from a January 1990 start-up of the ban on imports of certain CFCs and halons from non-Parties, to January 1995 for two-way trade in hydrobromofluorocarbons.

[9] Annex D to the Protocol, Handbook, p. 28.

[10] See Articles 4.4, 4.4bis, 4.4ter.

Parties are to discourage the export to a non-Party of technology for producing and for utilizing most of the controlled substances.

Member countries have softened somewhat the application of these prohibitions. Pursuant to Article 4.8, Parties in the 1992 Meeting agreed to waive the above restrictions for Colombia, as that country had submitted data indicating that it was in full compliance with the appropriate limits on production and consumption of controlled substances. Furthermore, in another 1992 decision the Parties demonstrated further flexibility by determining that non-Parties which had, by March 1993, provided notification, with supporting data, of compliance with the Protocol's obligations were deemed to be in compliance with the Protocol until the next full Meeting of Parties.[11] Regardless of this flexibility, the provisions against non-Parties are, as written, stern. The importance of preventing free-riders from undermining disciplines that are central to protecting the global commons justifies such a discriminatory use of trade measures in the view of many observers.

Yet, what have Parties agreed to do and how is compliance ensured? As suggested above, the key undertakings are to phase-out the consumption and production of ozone-depleting substances: halon gases by 1994; CFCs, carbon tetrachloride, methyl chloroform and hydrobromofluorocarbons by 1996; and hydrochlorofluorocarbons by 2030. The commitments, however, are subject to a number of potentially important caveats. Among the more interesting, we find that:

- Parties can continue to consume recycled or used controlled substances, as these amounts are excluded from consumption and production targets, as are amounts used entirely as feedstock in the manufacture of other chemicals.[12]

- The phase-out is not absolute for Parties which are developing countries meeting certain criteria - for example, LDCs may continue to produce halon gases up to 15 percent of 1986 levels indefinitely in order to "satisfy ... basic domestic needs".[13]

[11] See Decisions IV/17B and IV/17C, Handbook, pp. 37-8. In the November 1993 Bangkok Meeting, the Parties decided to extend this grace period for one more year for just four non-Parties: Turkey, Poland, Malta, and Jordan.

[12] See Articles 1.5 and 1.6 plus Decision IV/24, Handbook, pp. 5, 32. Note that recycled material is excluded from the control structure because it can be re-introduced without the release of harmful material to the environment, while chemicals used as feedstock are, it is felt, completely used or contained in the production process and therefore do not affect the environment. Nonetheless, the point is that trade in these contexts is not permitted with non-Parties, except as agreed pursuant to Article 4.8.

[13] Article 2B.2.

- Moreover, two-thirds of the Parties present and voting in an annual Meeting can permit "the level of production or consumption that is necessary to satisfy uses agreed by them to be essential".[14] This provision was added in 1990 in London for halon gases, but was extended to many other controlled substances two years later in the face of growing industry concerns about the viability of identifying suitable substitute chemicals. A work programme is underway to identify specific essential uses. While this mechanism has not been used yet, it clearly allows Parties a procedure for justifying non-compliance with the original intent of the Protocol, while continuing to ban trade with non-Parties.[15]

- LDCs which are Parties (all except Bahrain, Malta, Singapore and the United Arab Emirates) are entitled to delay for ten years compliance with the phase-out schedule.[16]

- These same LDCs can claim an exemption from implementing any or all phase-out obligations if technical assistance financing (including through the Multilateral Fund established under the Protocol) and actual technology transfer "under fair and most favourable conditions" are felt by an LDC to be "inadequate". This unilateral decision will stand in practice unless overturned in a Meeting of the Parties by a triple majority mechanism requiring a two-thirds vote overall, representing at least a majority of eligible LDCs and of other Parties. Not an easy threshold to overcome.[17]

2.2 The Basel Convention

Over the last 30 years, billions of tonnes of hazardous wastes have been dumped or otherwise disposed of in landfills. Industrialized countries account for 95 percent of the global production of such wastes. The transboundary movement of

[14] Articles 2A.4, 2B.2, 2C.3, 2D.2, 2E.3, 2G.1

[15] The agreed definition of "essential" is not narrowly drafted - see Decision IV/24, Handbook, pp. 35-6. In the November 1993 Bangkok Meeting, the Parties decided that there was no justification for granting halon production/consumption exemptions for 1994.

[16] Article 5.1; Decisions I/12E and III/3(d), Handbook, pp. 38-9.

[17] Articles 5.6, 5.9, 10 and 10A.

this material is estimated in the millions of tonnes, with many developing countries and non-governmental groups urging a ban on such exports to LDCs.[18]

In light of the risk of damage to human health and the environment posed by hazardous and certain other wastes, 116 countries negotiated the 1989 Basel Convention to regulate the transboundary movement and subsequent disposal of such material. The Convention entered into force in 1992, with the first meeting of the governing body (the Conference of the Parties) occurring in December of that year. At that time, only 35 countries had actually ratified the Convention, including Canada, France, the Nordics, and several developing countries such as Mexico, but excluding most of the major generators of hazardous wastes: the U.S., Germany, Italy, Japan, Russia and the U.K.[19]

Parties to the Convention undertake obligations, many of which, regrettably, are ambiguous and open to varying interpretations and, potentially, de facto rule-making.

The Convention lists several categories of hazardous wastes (Annexes I and III), but also allows any Party to expand that list unilaterally in keeping with local law.[20] This is fine, it can be argued, in terms of ensuring that each country can define its own level of protection. But it also has the potential indirect result of unilaterally limiting exports to another country that may be prepared to accept such wastes for disposal, recovery or recycling.

For their part, "other" wastes are listed separately (Annex II) and currently comprise two categories: wastes collected from households, and residues arising from their incineration. It is not clear whether household wastes could include newspapers, cans and bottles destined for increasingly important commercial recycling through a parallel collection system (e.g., residential "blue boxes"). Many officials familiar with the still incipient Basel practice state that Basel is not intended to cover this material. Support for this view can be found in a 1992 OECD Decision on wastes destined for recovery, which makes an apparently sharp distinction between household waste (on the amber list subject to special transboundary movement controls) and a range of non-hazardous wastes on a "green" list (including newspapers

[18] For example, between 1986 and 1988, 3.5 million tonnes of hazardous wastes were shipped to developing countries - see UNEP/CHW.1/24, paragraph 8.

[19] The U.S. implementing legislation has been stuck in Congress.

[20] Article 1(1)(b), in UNEP/IG.80/3 of March 22, 1989.

and other paper products) subject only to normal commercial transaction controls if any.[21]

Yet, the scope of this obligation is less clear that it appears at first, providing room for "creative" interpretations and consequent disputes. The OECD Council Decision was concluded pursuant to Article 11 of Basel and thus is relevant for understanding the issue of "other" wastes in that context.[22] The Decision states that even if wastes are "green-listed", an OECD country can nonetheless control trade in such materials "as if these wastes had been assigned" to the more restrictive lists, if a Member country believes such action to be necessary to protect human health and the environment. Moreover, the OECD Decision also recognizes that all household wastes (not just those that are hazardous) will be subject to the more restrictive amber regime.[23] A Member country can claim that the importance of recycling used newspapers and other paper products to protect the environment (whose environment is not specified) is sufficient to merit the amber regime, which includes the right of the exporting country to prohibit or otherwise restrict the export of the waste in question.[24]

Moreover, Parties to Basel have provisionally approved technical guidelines on wastes collected from households which clearly cover reusable material such as bottles and cans, and recyclable material such as paper, and refer to segregating recoverable from hazardous wastes, including through "separate"/"sophisticated" collection and recovery programmes. [25] This could well be interpreted to include the increasingly important newspaper recycling business (to the degree it depends on a distinct household collection programme) within the scope of Basel's controls.

There are other ambiguities. Each Party must take "appropriate" measures to ensure the availability of "adequate" disposal facilities.[26] An exporting State must not allow the export of hazardous or other wastes "if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner" in the

[21] OECD, C(92) 39/FINAL, adopted March 30, 1992 - see Annex 1, Section II(2) and Appendices 3 and 4.

[22] See also UNEP/CHW.1/24, Annex II, Decision I/9, pp. 27-8 for a related decision by the Parties to Basel.

[23] OECD, C(92) 39/FINAL, Annex 1, Section II (6), and Appendix 4, 3rd footnote.

[24] Ibid., Annex 1, Section IV, Case (1)(c) and Case (2) (d).

[25] See "Framework Document and Technical Guidelines", Na. 93-7758/190793, p. 51, paragraphs 4-5, 8-9.

[26] Article 4(2)(b).

importing State (Article 4(e)).[27] And how is a Party to interpret the critical concept of "environmentally sound manner"? The Convention provides no clear guidance, opening the door to differing interpretations (including those pursued by special interest groups) and disputes.[28] Criteria approved provisionally by the Parties in December 1992 are little better. They are impregnated with disputable concepts such as "adequate" standards, "appropriate" monitoring of disposal sites, "appropriate" action when "unacceptable" emissions result from handling wastes, and "capable" and "adequately" trained site operators.[29]

A Party must also take "such steps as are necessary" to prevent pollution due to hazardous and other waste management, and must reduce the transboundary movement of waste "to the minimum consistent with the environmentally sound and efficient management of such wastes".[30] There is no guidance on what is meant by "minimum", "efficient" or "necessary", and, as indicated above, precious little with regard to "environmentally sound management".

Under Article 4(4), each Party must take "appropriate" legal, administrative and other action to implement and enforce the Convention, including punishing misconduct. Again, there is little indication what this obligation might entail.

In contrast, the trade in wastes of a Party with a non-Party is subject to an obligation which appears reasonably definitive on the surface. Pursuant to Article 4(5), wastes covered by Basel shall not be exported to nor imported from a non-Party. A Party normally may not ship wastes as defined in Basel to a non-Party even if the latter has state-of-the-art disposal facilities.[31] But even here there is disturbing ambiguity. As noted above, the exporting State can extend the scope of "wastes" beyond those listed in the Convention, quite apart from the uncertainty surrounding

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[27] Moreover, pursuant to Article 4(8): "Each Party shall require that hazardous wastes or other wastes, to be exported, are managed in an environmentally sound manner in the State of import or elsewhere."

[28] Article 2(8) tries unsuccessfully to define the phrase through vague references to "all practicable steps" and to protecting human health and the environment "against the adverse effects which may result".

[29] See "Framework Document and Technical Guidelines", p. 5, paragraph 9. See also the interesting comments made by several developing countries, the Nordics and the Greenpeace observer pushing for a mandatory ban on all hazardous waste exports to LDCs even for recycling purposes and even if the importing country wanted to engage in this business and possessed the proper disposal facilities (in UNEP/CHW.1/24, Annex IV). Sending this kind of market signal could make it less likely that certain developing countries attract world class disposal facilities.

[30] Articles 4(2)(c) and (d).

[31] Although, pursuant to Article 11, a Party "may" enter into a bilateral or other arrangement with a non-Party that would allow such trade, as long as the arrangement is fully consistent with the environmentally sound management (whatever that is!) required by Basel. However, nothing obliges a Party to enter into such an arrangement.

the definition of household wastes also outlined previously. The fact is that Basel not only treats non-Parties on a discriminatory manner (which might be defendable), but it also fails to provide specific enough guidance to prevent a Party from distorting the Convention's provisions well beyond the likely intent of negotiators in a manner potentially detrimental to non-Parties and other Parties alike.

2.3 The Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES)

CITES is a primary international instrument for protecting flora and fauna from possible extinction. It tries to do so by providing for the monitoring and regulating of cross-border trade. CITES was done in 1973, entering into force two years later. Currently, there are 115 Parties to this Convention, making it by far the most important of all international wildlife treaties. CITES covers over 20,000 species of plants and more than 500 animal species.[32]

Briefly, the CITES control system is as follows. The Convention divides controlled fauna and flora into three categories (each with a specific detailed Appendix):

- species threatened with extinction (trade in these species and their recognizable parts or derivatives is authorized only under exceptional circumstances);
- species that may become endangered unless trade is regulated; and
- species that an individual Party identifies as being subject to regulation within its own jurisdiction for the purpose of preventing or restricting exploitation, and needing the cooperation of other Parties through the control of trade.

Species are added to one Appendix or another through a regular amending procedure, usually undertaken at a conference of the Parties held every two years or so. More generally, the Parties are obligated to establish a trade control system based on permits and certificates, to implement appropriate domestic enforcement measures (including penalties for trade in or possession of specimens traded in violation of the Convention), and to provide regular detailed reports to the CITES Secretariat on cross-border traffic in endangered species and on legislative, regulatory and other measures taken to enforce the provisions of the Convention.[33]

[32] USITC, International Agreements, p. 5-29

[33] See CITES, Articles VI and VII.

The use of detailed lists of endangered species provides considerable precision as to the scope of the obligations under CITES. Moreover, over the years the Parties have gradually increased the precision of a number of important definitions. For example, pursuant to Article VII specimens of an animal species bred in captivity or a plant species artifically propagated for commercial purposes shall be deemed to be specimens included in Appendix II even if listed in Appendix I (and thus only the authorization of the exporting State can normally be required by the importing State). The key terms were well defined during the Parties' second Conference in 1979, while the procedures for identifying and registering bona fide commercial captive-breeding operations have been considerably tightened, establishing an active role for the Secretariat and other Parties.[34] Nontheless, ambiguities remain. Even more importantly, several provisions, though reasonably clear, can and have given rise to disputes. A few examples should suffice.

Trade in species threatened with extinction (listed in Appendix I of CITES) may occur only if the designated authorities of both the exporting and importing states specify that trading the specimen in question "will not be detrimental to the survival of that species".[35] Disagreements can arise in this regard. One recent high profile case relates to the decision taken by Parties in 1989 (not unanimous) to move the African elephant from the regulated list (Appendix II) to the list covering species threatened with extinction (Appendix I). This change led to a ban by most CITES members on imports of African elephant ivory over the objections of several African countries. These included Zimbabwe, which claimed, with some justification, that its practice of controlled harvesting actually had co-existed with an increase in its elephant population and, therefore, that regulated trade in ivory should continue as it was not detrimental to the survival of its African elephant population. The 1989 Conference of Parties established a Panel of Experts to undertake a case-by-case review, but its recommendations were not to be binding. Parties would simply "take into account the report of the Panel".[36] A more formal review mechanism leading to the resolution of the dispute based on the Panel's factual findings and recommendations would have been helpful in managing this matter.

A different problem arises with regard to regulated species (i.e., those listed in Appendix II). For a specimen in this category, the exporting country's authorities have the primary responsibility. They can issue an export permit if satisfied, inter alia, that

[34] Resolutions Conf. 2.12, 6.21 and 8.15. Other useful definitional work includes Resolutions Conf. 2.14, 3.15, 4.10, 4.11, 5.10, 5.16 and 8.17.

[35] CITES, Article III.

[36] Resolution Conf. 7.9.

such trade will not be detrimental to the survival of a particular species. The importing country must normally accept the presentation of a duly issued export permit as sufficient evidence that the transaction is consistent with the obligations of the Convention. A problem here is that an importing country might believe that an exporting country is unduly limiting exports needed for a local processing industry (to take one example). The exporting country authorities might draw on Article IV(3) which mandates limitations "in order to maintain that species throughout its range at a level consistent with its role in the ecosystems in which it occurs and well above the level at which that species might become eligible for inclusion in Appendix I..." (emphasis added). There is scope for disagreement here, given the ambiguity of the key concepts.[37]

To take one final example of a potential problem, Article XIV provides very broad, ill-defined authority that essentially allows any Party to unilaterally adopt stricter domestic measures than allowed under the Convention to regulate the "trade, taking, possession, or transport of species" whether or not listed in one of the three Appendices. To the degree that this provision is aimed at strengthening the domestic regime on domestic species it is likely unobjectionable in practice. Implicitly, however, this provision also includes the extraordinary authority to implement a complete prohibition of imports of a species, its parts and derivatives orginating in another Party - i.e., the authority to act extraterritorially. Presumably, a country so exercising its right under this provision would justify its action by claiming that the species in question was in some way endangered in another Party.[38] At present, the resolution of a dispute arising in this regard would have to be addressed elsewhere, likely under a trade agreement such as the GATT, because the CITES, as we shall see below, does not have a well-elaborated dispute settlement system.

With respect to non-Parties, differences in treatment have gradually entered the CITES system. Pursuant to Article XIV, stricter trade measures (if a member State believes that trade threatens the survival of a species) are encouraged, "particularly when... trade with a non-Party is involved...". Parties may allow imports from a non-

[37] The reverse problem is now subject to tighter international review. The Animals Committee of CITES was empowered in 1992 to monitor whether exports of specimens of a particular animal species are becoming detrimental to that species' survival. If so, the Committee can recommend corrective measures which, if not implemented, can lead to the suspension of trade with that Party in the affected species. See Resolution Conf. 8.9.

[38] A close reading of CITES can lead to an even more puzzling scenario. Article XV provides for amending the lists of endangered species, basically by a two-thirds vote. Theoretically, a Party could seek, in response to a domestic lobby, to shift a species found in another country from Appendix II to Appendix I, which would provide the importing authority with greater scope for trade restrictive action. The proposing Party, however, could fail to achieve the required support from other member countries, and yet still choose to prohibit imports of specimens of the species in question by exercising its right under Article XIV. See also Resolution Conf. 6.7 (July 1987).

Party of captive-bred and artifically propagated specimens of Appendix I species only after receiving favourable advice from the Secretariat (the latter's role is less sweeping with regard to such trade among Parties).[39]

In closing this section, it is worth noting that member countries recognize that, quite apart from possible differences in interpretation, there are real enforcement problems associated with CITES. For example, a recent U.S. publication reproduced the following refreshingly straight-forward evaluation of the U.S. Fish and Wildlife Service:

> "Computerized cargo is of such volume into the United States that only a very small percentage of containers entering the United States is inspected for violations. We suspect large amounts of illegal trade goes undetected."[40]

Technically, this puts the U.S. in violation of its obligations to penalize trade in or possession of specimens of endangered species.[41] The U.S. is by no means alone in this regard. The periodic Conferences of the Parties regularly approve resolutions that refer to serious, widespread difficulties related to compliance matters.

3. DISPUTE SETTLEMENT: ON GEESE AND GANDERS

More than one-third of existing international environmental agreements contain dispute settlement provisions.[42] Such mechanisms are becoming a normal part of IEAs. This is entirely appropriate and necessary. Yet compared to trade agreements, the dispute settlement provisions in IEAs remain underdeveloped. Given the much longer history of negotiating trade agreements, this difference is understandable, but nonetheless serious.

3.1 The Montreal Protocol

The possible exceptions to disciplines listed in Part 2.1 above not only highlight cracks in the control system not open to non-Parties. Several could also lead to disputes among Parties. This consideration leads to the second stage in this

[39] Resolutions Conf. 2.6 and 8.8 respectively. Other examples are found in Resolutions Conf. 4.15 and 5.16(j).

[40] Cited in USITC, International Agreements, p. 5-29.

[41] CITES, Article VIII.

[42] OECD, COM/ENV/TD(93)118, 15 November 1993, paragraph 1.

commentary on the Montreal Protocol. There may well be disputes about exemptions, about outright cheating, about Parties who might attempt to meet their consumption reduction targets by putting a more than proportional burden on imports (from other Parties) compared to domestic production, and so forth.

The ultimate test of fairness in terms of the letter of an international agreement is two-fold. First, whether the disciplines are as tight on Parties as they are on non-Parties. We have seen that, to some degree, this is not so and that, in any event, the Protocol places Parties acting jointly in the position of deciding whether to accept a non-Party's good faith efforts. Second, fairness rests in the discipline wielded by member countries against a wayward Party.

In this latter regard, the Protocol and the Vienna Convention leave much to be desired. Under the Convention, the Party complained against can effectively block all progress. First comes negotiation among interested parties, then the use of good offices or third party mediation. A member State may agree to binding arbitration or resolution by the International Court of Justice, but only if it chooses to do so. Even if a member State declares upon ratifying the Convention that it will accept arbitration if challenged, the language contains the caveat "for a dispute not resolved" through negotiation, good offices or mediation. Any party to a dispute can simply claim that one of these processes has not finished (there are no time limits established).[43] And even if Parties go to "binding" arbitration, any controversy as regards the interpretation or manner of implementation of the arbitral tribunal's award may only be submitted back to the tribunal. That is, at the end of the day, the arbitral process has no teeth. Nor does the last option under the Convention: the establishment of a conciliation commission charged with making recommendations "which the parties shall consider in good faith". Hardly a weighty stick.[44]

The Montreal Protocol dispute settlement provision is Article 8, which is just over three lines long. Clearly, the successful disciplining of Parties was not foremost in the minds of the negotiators in 1987. Over the next several years, considerable thought was given to how to structure an appropriate dispute resolution system, culminating with some modest success in 1992 in Copenhagen. The agreed non-compliance procedure establishes an Implementation Committee of ten Parties whose main task is to seek "amicable" solutions to disputes. However, the Committee must

[43] Note that the 1991 Protocol on Environmental Protection to the Antarctic Treaty usefully tightens its proceedings by giving Parties to a dispute 12 months to resolve it by consultation, failing which any single party can refer the issue to an arbitral tribunal. The problem of enforcing a tribunal's findings remains. See Protocol Articles 18-20 and the relevant appendix.

[44] Vienna Convention, Article 11; Decision I/7, Handbook, pp. 138-40.

report to the Meeting of Parties, including with any appropriate recommendations.[45] The Parties "may ... decide upon and call for steps to bring about full compliance ...."[46] None of these procedures have any time limits established. Despite the formal voting requirements, the tradition in the Meeting of Parties is to decide everything by consensus. This de facto rule does not facilitate the search for discipline on the Parties.

But what if a Meeting of the Parties does decide to act? What measures might be taken? In Copenhagen, Parties agreed to a carrot and stick approach. Appropriate technical or other assistance could be offered on the one hand. On the other, Parties could issue "cautions", or suspend specific rights and privileges under the Protocol including financial, technical, and institutional benefits, as well as the right to partial exemptions from production and consumption targets and trade-related privileges - the latter left undefined but presumably covering such items as the non-inclusion of recycled imports and exports when calculating domestic "consumption" for purposes of reaching reduction targets.[47] One aspect seems clear. Parties whose rights and privileges might be suspended (and the prospect in practice is very remote), nonetheless remain Parties, and not subject to the trade restrictions imposed on non-Parties pursuant to Article 4. In contrast, non-Parties are presumed guilty and have their trade with Parties unilaterally determined by the terms of the Protocol.

3.2 The Basel Convention

As discussed in Part 2, many of Basel's obligations are unclearly drafted. For a non-Party, of course, Basel represents a kind of automatic dispute settlement system whereby, ambiguities in drafting aside, a non-Party is, in a sense, presumed guilty by the mere fact of being a non-Party. Such a country is thus condemned to a trade ban in hazardous and certain other wastes regardless of how responsible a non-Party might be in practice with respect to the handling of such wastes and of its economic interests in the matter.

Parties are not subject to an equally definitive dispute settlement process. Pursuant to Article 16(1), the Basel Secretariat can prepare reports, including on the implementation of obligations. Presumably, a report could include commentary critical

[45] Approval requires a simple majority vote of those present and voting - see Rule 26.6(b) of the Rules of Procedure, in Handbook, p. 165.

[46] This requires a two-thirds majority of those present and voting - see Rule 40.1 of the Rules of Procedures, in Handbook, p. 167.

[47] Various Decisions, Handbook, pp. 46-9, Annexes VII and VIII of Handbook, pp.81-3.

of a Party's enforcement of the Convention's obligations. Such a report, if published or otherwise made available, could increase the public pressure on a government to mend its ways.

However, if a Party believes that another country is acting in breach of its obligations, and that the public spotlight provided by a Secretariat report is insufficient, it can also attempt to settle the matter through negotiation.[48] If this fails and if all the parties to the dispute agree, then the matter can be submitted to the International Court of Justice or to arbitration. Note that the Party complained against must agree to pursue either of these options and thus retains a veto, in practice, over the process. But even if all those concerned agree to submit the dispute to arbitration, the process remains the hostage of the country complained against. The finding or award of an ad hoc arbitral tribunal is supposed to be "final and binding" under Basel. Nonetheless, there is no mechanism for ensuring that the award will, in fact, be implemented. There is no sanction to discipline a Party that fails to act on the award. Any dispute on the award's interpretation or execution may merely be referred back to the original ad hoc arbitral tribunal or to another tribunal constituted for such purpose.[49] The Party complained against can simply dig in and frustrate further action, while the complaining Party is not authorized under the Convention (much less under the GATT) to impose a sanction.

Thus, we could face the anomalous situation in which a highly responsible non-Party functioning on a best practice basis is faced with a trade ban on certain materials justified under Basel by a Party than unilaterally expands the scope of the Convention to cover waste or scrap material about which there is no consensus internationally as to its hazardous nature. On the other hand, this same Party may be challenged by another signatory about the former's failure to manage the same material in an environmentally sound manner and that Party could, with impunity, refuse arbitration or refuse to implement properly an adverse arbitral ruling. For its part, the 1992 OECD Council Decision on the transfrontier movement of wastes destined for recovery operations contains no dispute settlement provisions.[50]

[48] See Articles 19 and 20(1).

[49] See Articles 20(2) and (3), and Annex VI of the Basel Convention. Note that Article 20(3) also allows a Party to declare in advance that it accepts the arbitration and/or ICJ alternatives in relation to any other Party accepting the same obligations. The ultimate problem remains on how to ensure the implementation of any award.

[50] Apart from a shadowy reference to cooperation found in Annex 1, Section VI(4).

3.3 CITES

As discussed in Part 2.3, a comprehensive CITES mechanism for resolving differences effectively is necessary. Current provisions are inadequate. The Convention's Secretariat, if satisfied that an endangered species is threatened by trade in specimens of that species or that the provisions of the Convention are not being effectively implemented, must notify a designated authority of the country in question. In response, that Party must provide relevant information and may hold an inquiry ("expressly authorized by the Party"). The information provided and the results of any inquiry must be reviewed by the next Conference of Parties to CITES which may make recommendations for further action.[51] The information produced by this process would usually become public, generating pressure for remedial action.

Overall, a negotiated outcome is clearly preferred. There are notification and consultation commitments. The CITES Secretariat has a "good offices" role in trying to solve problems.[52] If a solution is not found (as defined by either Party to the dispute), the Parties may, by mutual consent, submit the dispute to arbitration. In such a case, the arbitral decision is to be binding (but there is no follow-up mechanism to ensure that it is).[53]

A 1992 Resolution of the Parties highlights the importance of establishing a comprehensive dispute settlement mechanism. In order to ensure that trade in Appendix II fauna does not become detrimental to the survival of a particular species, the Animals Committee of CITES is directed to monitor such trade and make corrective recommendations. The Secretariat communicates these to the Party concerned, which must "satisfy" the Secretariat within a specific time period that it has taken action to implement the recommendations. If the Secretariat is not satisfied, it refers the matter to the Standing Committee of the Parties (comprising a representative number of signatories) which may recommend to other Parties that they take "strict measures, including as appropriate suspension of trade in the affected species..." with the Party complained against. In one sense, this Resolution is a hopeful sign that signatories have begun to flesh out what is, in practice, a more elaborate dispute settlement process. Yet critical procedural balances are missing

[51] CITES, Article XIII.

[52] For example, see respectively Conf. 6.7 (July 1987) and Resolution Conf. 7.5 (October 1989).

[53] CITES, Article XVIII. This Article, entitled "Resolution of Disputes", comprises two brief paragraphs covering just seven lines of text.

(e.g., the method of choosing members of the Animals Committee, the lack of rules of procedure, etc.). More work in this regard is required.[54]

4. SANCTIONS: ON LIMITATIONS AND OPTIONS

Sanctions have long been part of the foreign policy environment. Questions related to their effectiveness and appropriateness are not well-understood (there is a surprisingly limited literature on the subject). For all players, especially small and medium-sized countries, the use of sanctions merits close attention because such mechanisms can be abused by major powers acting unilaterally for geo-political reasons or in response to domestic special interest groups (e.g., representing environmental, commercial, ethnic, human rights, or other concerns). Yet a dispute settlement system without provision for sanctions at the end of the road is widely perceived (probably correctly) as lacking credibility.

Ideally, a sanctions provision will do its job without ever being used - the deterrence effect will be sufficient. The sanction need not be unleashed. Nonetheless, the achievement of this happy scenario requires a credible sanction - one that could work to change the behaviour of another, recalcitrant country if ever used.

A recent Policy Staff Paper identified several preconditions that should be met when developing a credible sanctions mechanism.[55] First, unilateralism undermines the cooperative work that must lie at the heart of civilized international behaviour. Unilateralism reflects failure; a serious break-down in the system of international relations. Second, and flowing from the first precondition, we should work to develop a sanctions mechanism that attracts the broadest possible international support. Moreover, such broad consensus is likely necessary if countries are to perceive sanctions as potentially effective. Third, the burden of sanctions among countries taking such a measure should be equitably distributed. Fourth, the level of the sanction should be adapted to the nature and extent of the fault. Proportionality is important. Fifth, the impact of sanctions on the target country should be carefully evaluated. Will the sanction induce improved behaviour or simply encourage greater recalcitrance? This in turn will depend in part on the level of behaviour of the countries imposing the sanction (e.g., are signatories to an Agreement living up to its

[54] Resolution Conf. 8.9.

[55] Jean Prévost, Pour des sanctions efficaces et appropriées, Document du Groupe des Politiques, No. 93/4 (mars 1993), pp. 3-4, 49-54.

obligations?). Finally, sanctions should be seen as only part of the solution. Sanctions alone are unlikely to change State behaviour.

Having recognized the limited utility of sanctions in practice as well as the importance of sanctions as a signal that governments are serious about certain international obligations, there are many options that governments can marshall. Here there is an interesting question. Much of the debate on the enforcement of environmental agreements has focussed on the use of trade sanctions. For example, the U.S. vigorously sought the inclusion of trade sanctions in the recent NAFTA side agreement negotiations to provide the ultimate discipline on Mexican, U.S. and Canadian commitments to effectively enforce domestic environmental and labour law.[56] The fact that the use of trade sanctions invariably favours the largest, but least trade dependent economy (the U.S. in the NAFTA case) was not lost on the Canadian negotiators.

Yet the menu of possible sanctions is, in fact, quite extensive. A recent study provides a list of diplomatic, political, cultural, financial, commercial and technical assistance-related options covering a full three pages.[57]

In a decision taken in the 1992 Meeting of the Parties of the Montreal Protocol, a useful fleshing out occurred of measures that might be taken (by Parties as a group - not unilaterally) when a country has not been complying with its obligations under the Protocol.[58] Options identified include positive actions, such as technology transfer, financial assistance, and assistance to facilitate data collection and reporting - all with a view to encouraging non-complying Parties (especially LDCs) to meet the challenges in reducing consumption of ozone depleting substances. On the "disciplinary" side, a Meeting of the Parties could issue formal cautions (presumably with accompanying publicity). In addition, they could suspend specific rights and obligations under the Protocol, including the right to vote, the right to exclude the use of recycled or used substances for the purpose of calculating consumption reductions, the right of a Party to transfer to another Party a portion of its calculated level of production of ozone depleting substances, or the right of an LDC Party to concessional financing to meet compliance adjustment costs under the Protocol's Multilateral Fund.

[56] See the "North American Agreement on Environmental Cooperation", Final Draft, September 13, 1993.

[57] Prévost, Pour des sanctions, pp. 36-8.

[58] See Decisions IV/5 and Annex VII, Handbook, pp. 48-9, 83.

For its part, the North American Agreement on Environmental Cooperation introduces the concept of fines (euphemistically called "monetary enforcement assessments") as the primary penalty waiting at the end of a carefully crafted dispute settlement mechanism meant to address a Party's persistent pattern to effectively enforce its environmental law.[59] In face of a U.S. or Mexican failure to pay such a monetary assessment, another Party may ultimately suspend NAFTA (i.e., trade-related) benefits no greater than the level of the assessment. This twist was not acceptable to Canada for cases when Canadian practice might be found wanting. Instead, Canada agreed to have the fine (a maximum of U.S. $20 million) made enforceable by the three country Commission through the appropriate domestic court in Canada on a summary proceedings basis not subject to domestic review or appeal.[60] When pressed, creative, non trade-related solutions can be found.

The trade and environment debate over recent years is gradually obliging policy makers to review more carefully the range of positive and disciplinary measures that can be brought into play to strengthen the seriousness with which countries enter into binding international environmental commitments. Clearly, the menu of mechanisms is broader than the narrow focus on trade (and especially trade in goods) initially suggested. This is not to say that trade sanctions should not be contemplated in any circumstance. However, for a trade dependent, medium-sized economy such as Canada, it is somewhat reassuring that the international debate on sanctions is gradually widening to focus on a menu of options. Nonetheless, the necessary link to a well constructed, effective dispute settlement mechanism is still insufficiently understood, much less accepted.

5. AFTERTHOUGHTS

One critical litmus test of how the environmental and trade communities have begun to bridge their initial differences is the degree to which both groups can work together to ensure the ultimate compatibility of evolving IEA sanctions with rights and obligations found in other kinds of international agreements. In the case of trade in goods, this means the General Agreement on Tariffs and Trade in the first instance.

[59] See "North American Agreement", Part Five, and particularly Articles 34-36 and Annexes 36A and 36B. Of course, the environmental side agreement does not address the matter of sanctions against non-Parties.

[60] Ibid., Annex 36A. Note that the Maastricht Treaty provides (in Article 171(2)) for fines to be imposed by the European Commission if Member States fail to implement judgements of the European Court of Justice. This provision applies, inter alia, to environmental laws and regulations at the Community level.

Environmentalists, and many others, have legitimate concern. As the comprehensiveness of IEAs continues to evolve, it is disturbing that a non-Party to a particular IEA (the "rogue" State issue) or a Party "in bad standing" might successfully use GATT cover to fight the imposition of a trade sanction currently or eventually deemed necessary under an IEA to ensure that governments do not undermine global commons and other environmental commitments.

On the other hand, many trade policy specialists have a fundamental concern that the possible combination of trade sanctions with loosely drafted obligations and, in particular, the lack of effective compliance provisions including a dispute settlement mechanism creates an environment in which the market and economic power of the few may well prevail over a rules-based system, the latter being the bed-rock of Canadian foreign policy. The "power" approach stacks the deck against Canadian interests.

Many observers are understandably hesitant to exchange the reasonably well developed and effective dispute settlement mechanisms found in modern trade agreements for the lesser discipline of their environmental counterparts until the latter become more sophisticated and effective. This concern is especially important if the policy intent is to ensure that disputes over measures taken to underpin a Party's compliance with an environmental obligation normally be adjudicated under an IEA rather than under a trade agreement. There is considerable merit in such an approach: there should be a presumption that a measure (even a trade measure) taken pursuant to an IEA is used to pursue a legitimate environmental objective under the same agreement and, therefore, that disputes in this regard should be resolved by mechanisms established in the IEA. Moreover, a broader range of sanctions could be marshalled under an IEA than under a trade agreement. The key, nonetheless, is whether there is an effective dispute settlement mechanism in place to adjudicate reasonably clear rights and obligations. These issues were directly addressed, with positive results, in the North American Agreement on Environmental Cooperation.

Work is also actively underway internationally (especially in GATT and OECD working parties) to explore the issue of consistency between trade and environmental agreements, as well as other aspects of the trade and environment debate. A few voices state that the GATT as it stands is already sufficiently flexible to accommodate "legitimate" environmental enforcement matters. Nonetheless, most participants accept that some change is likely required, focussing on two approaches:

- the use of the GATT Article XXV:5 right to seek a waiver from certain obligations under the General Agreement (e.g., permitting the use of a discriminatory trade measure against a non-Party to an IEA); or

- any one or combination of adjustments to the general exceptions provision of GATT (Article XX) to accommodate necessary trade measures.[61]

Without engaging in the waiver versus amendment debate in any detail, one particularly innovative technique could be to build further on the so-called "trumping treaty clause" developed by the NAFTA negotiators.[62] Although this trilateral provision clearly does not apply to non-Parties to the NAFTA, it does establish the broad precedence of several IEAs in the case of a conflict between the specific trade obligations of a listed IEA and the NAFTA obligations of Canada, the U.S. and Mexico.[63] This approach has the merit of ensuring a sense of permanency and stability about the exemption created coupled with a review of each IEA when presented for inclusion in the list of exempted agreements.

The criteria to apply in this vetting process lie at the heart of the matter. In light of the concerns raised throughout this Paper, I would suggest that a good candidate IEA for inclusion in a "trumping treaty" provision for global commons or other environmental issues of broad interest should contain several key characteristics. Such an IEA should:

- be open to all countries on equal terms through an accession provision;

- enjoy the support of at least two-thirds of the world's economies responsible for two-thirds of the production and consumption of the substance or good disciplined in the agreement (e.g., Parties to the Montreal Protocol account for more than 90% of world consumption and 99% of world production of halons and certain CFCs);

- contain clearly defined obligations that are at least as onerous on Parties in practice as the standard expected of non-Parties if they were to seek accession;

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[61] Note that the Agreement to establish the World Trade Organization is scheduled to enter into force in July 1995 and will cover, inter alia, both goods and services. Article IX of this Agreement provides for a waiver if approved by three-fourths of the Members. This is a higher threshold than the current GATT rule requiring the approval of two-thirds of the votes cast. Article X provides for amendments that shall take effect for the Members that have accepted them upon acceptance by two-thirds of the Members. This tracks the current GATT amending formula.

[62] See Article 104 of the NAFTA.

[63] The IEAs are the Montreal Protocol, the Basel Convention and CITES. Note that the "trumping" feature relates to mandatory trade provisions requiring a Party to take a certain course of action, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations (e.g., seeking arbitration on questions of science related to environmentally sound practice), the alternative that is least inconsistent with the NAFTA shall be chosen.

- feature effective compliance provisions, including a well-constructed dispute settlement mechanism that can, as required, resolve differences in interpretation and discipline a Party found to be acting in a manner inconsistent with its obligations;[64] and

- provide for a range of sanctions against signatories, with a strong preference for including trade sanctions as an instrument of last resort with the right to opt for a different but equally effective tool.

The above criteria are not easy to meet. But then an exemption from normal trade disciplines is not a light matter. The trade policy community must accept that the use of trade sanctions cannot be dismissed out of hand and that we need a practical end to the rather fruitless debate about how broadly based must a broadly based IEA be to qualify for an exemption. Yet, the environmental community has done no-one a service by rushing forward to seek exemptions without first submitting their own handiwork to hard, cold review. The fact is that the clarity and completeness of environmental agreements still fall considerably short of the increasing degree of commitment and sophistication evidenced in trade agreements over the past 20 years. This gap presumably can narrow with time. The final conclusion of this Paper is that both communities must work even more closely together to achieve greater policy coherence by developing high quality international environmental agreements that meet the criteria suggested above.

[64] Again, this feature is critical if the IEA is to be more fully "trumping", i.e., so that a dispute involving a trade measure taken against a Party might normally be heard under an IEA, rather than under a trade agreement (which is still the case with NAFTA Article 104).

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