

PROVISIONS OF THE MONTREAL PROTOCOL AFFECTING TRADE

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I. Introduction

The Montreal Protocol on Substances That Deplete the Ozone Layer¹ provides for the phase-out, by the year 2000, of CFCs and other chemicals damaging to the ozone layer.² These chemicals are widely used in a number of industries--as refrigerants, solvents, foam blowing substances, aerosols, and fire extinguishers. The phaseout of these substances has serious trade implications for both Parties and non-Parties to the Protocol.

To encourage countries to join the Protocol, and to prevent companies that manufacture or use CFCs from shifting their operations to non-Party countries, the Protocol restricts trade in CFCs and CFC-related products with non-Parties. In addition to restricting trade with non-Parties, the Protocol contains a number of provisions that restrict trade in controlled substances between Parties. Finally, the Protocol contains provisions for financial assistance and transfer of technology to help developing countries meet their obligations under the Protocol.

II. Classes of Countries

The Protocol establishes three classes of countries, each with different obligations, including a number implicating trade. First is the class of ordinary Parties to the convention (more technically, Parties not operating under Article 5).³ These Parties are required to phase out most ozone-depleting substances by 2000. The Protocol places restrictions on their production, consumption, and trade in these substances. The Protocol also provides, to a limited degree, for the transfer of production allowances between Parties and for extra production of controlled substances for use by developing countries.

Second is the class of developing country Parties operating under Article 5. These Parties are subject to all the trade restrictions applicable to Parties *not* operating under Article 5 except that (i) they may defer their phase-out of controlled substances for ten years, provided their consumption of these substances during this period does not exceed 0.3 kilograms per capita, and (ii) they are eligible to receive financial assistance from the Protocol's Interim Multilateral Fund, to cover the incremental costs of their compliance. It

¹16 Sept. 1987, 26 I.L.M. 1541.

²See U.N. ENVIRONMENT PROGRAMME, HANDBOOK FOR THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEplete THE OZONE LAYER at 4-11, U.N. Doc. UNEP/OzL.Pro.3/7 (1991) [hereinafter cited as MONTREAL PROTOCOL HANDBOOK].

³Countries operating under Article 5 are developing countries whose annual consumption of controlled substances does not exceed 0.3 kilograms per capita. Montreal Protocol on Substances That Deplete the Ozone Layer art. 5, para. 1 [hereinafter, cites will be to article and paragraph only].

is anticipated that these costs will be incurred in large part by the importation of substitute chemicals and technology.

The third class consists of all countries which are *not* Parties to the Protocol. Protocol Parties are prohibited from importing controlled substances from and, as of 1 January 1993, exporting controlled substance to non-Parties. In June 1991 the Parties adopted a list of products containing controlled substances. Parties are required to ban import of these products from non-Parties by June 1992. The Parties have until 1 January 1994 to determine whether it is feasible to also ban import from non-Parties of products produced with controlled substances. If the Parties find it is feasible, they are to draw up a list of such products to be followed within one year by a ban. Parties are also required to "discourage" the export to non-Parties of technology for producing or utilizing controlled substances.

III. Trade With Non-Parties

A. Import Restrictions

Parties to the Protocol are prohibited from importing controlled substances from non-Parties.⁴ In June 1991 the Parties adopted a list of products *containing* controlled substances, to be included in an annex to the Protocol.⁵ The annex became effective December 1991, and Parties that did not object to the annex must ban the import of these products from non-Parties by June 1992.⁶ Within five years of entry into force, the Parties are to decide on the feasibility of banning or restricting imports from non-Parties of products *produced with but not containing* controlled substances. If a ban is found to be feasible, it is to be enacted within one year in the same manner as the ban on products containing controlled substances.⁷ Restrictions on importing controlled substances from non-Parties do not apply if the exporting country has submitted data showing it is in full compliance with the Protocol provisions on phaseout of controlled substances and trade with non-Parties and if a meeting of the Parties determines that it is in compliance.⁸

⁴Art. 4, para. 1.

⁵The listed products include automobile and truck airconditioning units, domestic and commercial refrigeration and air conditioning/heat pump equipment, aerosol products (except medical aerosols), portable fire extinguishers, insulation boards, panels, and pipe covers, and pre-polymers. Third Meeting of the Parties to the Montreal Protocol on Substances That Deplete the Ozone Layer, Annex D, U.N. Doc. UNEP/OzL.Pro.3/L.4/Add.4 (1991).

⁶Art. 4, para. 3.

⁷Art. 4, para. 4.

⁸Art. 4, para. 8.

B. Export Restrictions

As of 1 January 1993, Parties operating under Article 5 are prohibited from exporting any controlled substance to a non-Party.⁹ Parties not operating under Article 5 may export controlled substances to non-Parties, but beginning 1 January 1993 such exports must be counted as part of the consumption of the exporting country.¹⁰ In addition to these restrictions, Parties must "discourage"¹¹ the export to any non-Party of technology for producing or utilizing controlled substances.¹² They must also refrain from providing new subsidies, aid, credits, guarantees, or insurance programs for the export to non-Parties of products, equipment, plants, or technology for the production of controlled substances.¹³

C. 1990 London Amendment

As of 1 January 1993, the 1990 Amendment prohibits *all* Parties from exporting the controlled substances listed in Annex A to non-Parties.¹⁴ Export of controlled substances in Annex B are banned one year after entry into force of the Amendment.¹⁵ Similarly, the Amendment applies to substances in Annex B all other trade restrictions that presently apply to substances in Annex A, using entry into force as the base date for Annex B restrictions.¹⁶

D. Conflicts With GATT

On their face, the restrictions on trade with non-Parties are quantitative restrictions, prohibited by Article XI:1. They conflict with the MFN principle of Article I:1, since they

⁹Art. 4, para. 2.

¹⁰Art. 3(c).

¹¹This language has been somewhat strengthened in the London Amendment, which provides that "[e]ach party undertakes *to the fullest practicable extent* to discourage the export to any State not party to this Protocol of technology for producing and for utilizing controlled substances." Amendment to the Montreal Protocol, art. 4, para. 5 in MONTREAL PROTOCOL HANDBOOK, *supra* note 2, at 13 (emphasis added).

¹²Art. 4, para. 5.

¹³The provisions in this paragraph do not apply to products, plants, or technology for containment, recovery, recycling or destruction of controlled substances, for development of alternative substances, or for other emission reduction measures. Art. 4, para. 7.

¹⁴Amendment to the Montreal Protocol, Art. 4 in MONTREAL PROTOCOL HANDBOOK, *supra* note 2, at 13-14.

¹⁵*Id.*

¹⁶*Id.*

discriminate between products of Parties and products of non-Parties, and with the national treatment principle of Article III:4, since they accord to imported products treatment less favorable than that accorded to like products of national origin. Once controlled substances are phased out by the Parties, the ban on import or export of controlled substances from non-Parties may no longer conflict with these provisions of GATT.¹⁷ The restriction on imports of products containing controlled substances, and particularly on products made with controlled substances, however, may continue to run afoul of GATT, if the contracting parties find it is only production process methods that distinguish these products from non-banned products.

Before the restrictions on trade with non-Parties were adopted, negotiators sought and received assurance from a GATT legal expert that the provisions were covered by the exceptions in Article XX(b) and Article XX(g).¹⁸ Because Parties to the Protocol would be operating under a strict regime affecting their economy and trade, the same conditions would not prevail between Parties and non-Parties.¹⁹ Moreover, since the purpose of the restrictions was not to promote trade in controlled substances among Parties or to protect their domestic markets, the restrictions would not constitute a disguised restriction on international trade.²⁰

The recent tuna/dolphin decision raises some questions, however, as to the applicability of the Article XX exceptions to the Montreal Protocol trade restrictions.²¹ The panel finding that Article XX(b) does not apply to protect the life or health of humans,

¹⁷While the obligation to eliminate production and consumption applies to controlled substances and not to products containing or made with controlled substances, domestic regulatory programs are encouraged to reduce production and consumption of such products. *See* GATT, Trade and Environment (factual note by Secretariat), L/6896 (Aug. 1991).

¹⁸The GATT legal expert gave the opinion that such an article on control of trade would be in order in accordance with article 20 paragraph (b) of the GATT concerning the protection of human, animal or plant life or health. He stressed, however, that the judgement as to whether the action proposed satisfied article XX, lay with the GATT contracting parties normally in the context of a complaint brought by one GATT party against another. The members had discussions with the GATT expert during which he said that the greater the number of commodities controlled, the larger the chances of a challenge from some GATT members. He stressed that view was based on practical rather than legal considerations." Report of the Ad Hoc Working Group on the Work of Its Third Session, UNEP/WG.172/2 at 18; BENEDICK, OZONE DIPLOMACY 91 (1991). The recent GATT panel decision regarding U.S. import restrictions on tuna casts doubt on this opinion, however.

¹⁹Personal communication with Robert Reinstein (member of the U.S. Delegation to the Montreal Protocol negotiations).

²⁰*Id.*

²¹*See, e.g.,* OECD, The Applicability of the GATT to Trade and Environment Concerns (paper prepared by the Joint Sessions of Trade and Environment Experts), paras. 76 and 77 COM/ENV/EC/TD(91)66 (1991) [hereinafter cited as OECD paper].

animals, or plants outside the jurisdiction of the importing country should not create a conflict, since ozone depletion poses a threat to life or health within national borders. The panel opinion is not entirely clear, however, and could be read to mean that the actions to protect life or health must themselves be taken within the jurisdiction of the importing country,²² giving rise to possible conflicts regarding actions taken under the Protocol.

Article XX(g) is more problematic, since the exhaustible natural resource to be protected – the ozone layer – lies outside the territory of Parties, and therefore cannot be "consumed" within their jurisdiction.²³ It could be argued however, that this resource is within the jurisdiction of the international community, which has extended that jurisdiction to states that are party to the Protocol.²⁴

The panel's interpretation of "necessary" is also somewhat unclear. The panel decision states that it is the trade measure which must be found necessary, not the life or health standard chosen by the contracting party,²⁵ so the level of protection afforded by the Protocol should not be an issue. Nor should the requirement that the trade measures be "unavoidable," since the panel used as an example of steps that could have been taken to promote international compliance with the MMPA the attempt to negotiate an international agreement. The panel did not say unequivocally, however, that such an attempt would be sufficient to make trade sanctions necessary.²⁶

An alternative reading of the panel's interpretation of "necessary" is that there must be a finding that the trade restriction are "scientifically" necessary to achieve the desired environmental goals. This is a more difficult test, and could pose a particular problem for the global warming convention currently being negotiated, since there is much scientific uncertainty surrounding the issue of global warming.

²²The panel said "[t]hus, the record indicates that the concerns of the drafters of article XX(b) focused on the use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country." GATT, Panel report on *United States-Restrictions on Imports of Tuna*, adopted Sept. 3, 1991, DS21/R at 46.

²³The panel stated that "Article XX(g) was intended to permit contracting parties to take trade measures primarily aimed at rendering effective restrictions on production or consumption within their jurisdiction." *Id.* at 47.

²⁴The panel also expressed concern about the predictability of the restrictions imposed by the MMPA, since they left Mexican authorities uncertain as to whether they were in compliance. There is nothing in the Protocol trade restrictions to suggest they would be considered unpredictable.

²⁵*Id.*

²⁶It should also be noted that the panel seems to have been particularly vexed by the unilateral nature of the U.S. action, and concerned about the consequences of all parties acting in such a fashion. This suggests that a future panel might find an international agreement such as the Protocol less at odds with the intent of GATT.

IV. Trade Among Parties

While Parties may trade controlled substances among themselves, trade is constrained by limitations on levels of production and consumption permitted under the Protocol. For example, Parties which consume their allowance may not import any additional controlled substances unless they export an equal amount.²⁷ Similarly, they may not export controlled substances to Parties which have consumed their allowance.

A. Provisions in Force

Controlled substances are divided into two groups contained in Annex A of the Protocol. Production and consumption allowances are defined by group. Parties may trade controlled substances within these groups, provided their total consumption and production levels for each group do not exceed their allowances. Thus, a Party may decide to use its allowance to produce only a single Group I substance, export the bulk of its production, and import an equal amount of the remaining four substances in Group I for domestic consumption. Similarly, a Party may trade part of its stock of one Group II substance for part of another Party's stock of a different Group II substance. Since different substances, even within the same group, have different degrees of impact on the ozone layer, each substance is assigned an "ozone depleting potential" which is factored into trades.²⁸

Under certain limited circumstances, Parties may transfer their production allowances of Group I substances to other Parties. (Production of substances listed in Group II may not be traded.)²⁹ Production transfers are permitted only for purposes of "industrial rationalization,"³⁰ and both the transferor's and the transferee's "calculated level of production"³¹ must have been below 25 kilotonnes in 1986.³² Parties conducting such transfers may exceed their individual production limits as set out in the Protocol, provided the combined production of the transferor and transferee does not exceed their combined

²⁷Consumption is determined by adding together calculated levels of production and imports and subtracting calculated levels of export. Article 3(c).

²⁸See Montreal Protocol Annexes A and B.

²⁹Art. 2, para. 5.

³⁰"Industrial rationalization" means the transfer of any or all of a country's production allowance for the purpose of achieving economic efficiencies or responding to anticipated shortfalls resulting from plant closure. Art. 1, para. 8.

³¹"Calculated level of production" means the total annual production of each substance multiplied by its ozone depleting potential. Art. 3.

³²*Id.*

production limits.³³ Before a transfer may take place, notification of the transfer must be received by the Protocol secretariat.³⁴

All Parties, regardless of their production levels in 1986, are permitted to exceed their calculated level of production by 10% of their 1986 production for purposes of industrial rationalization or to satisfy the basic domestic needs of Parties operating under Article 5.³⁵

While the transfer provisions permit Parties to aggregate their production allowances, the same is not true for consumption allowances. There is no provision in the Protocol for the transfer of consumption allowances from one Party to another.

B. 1990 London Amendment.

The June 1990 Amendment to the Protocol did away with most restrictions on transfers of production allowances between Parties. When the Amendment enters into force,³⁶ production transfers will be permitted for all controlled substances. Transfers need not be for purposes of industrial rationalization, and there is no limitation on previous production levels for either the transferor or the transferee.³⁷

The Amendment expands the number of groups of controlled substances to five.³⁸ Parties conducting transfers must keep their combined calculated level of production within their combined production limits for each of the five groups.³⁹ Put more simply, they may not transfer substances from one group to another. They may, however, trade production of one substance in a particular group for the production of another substance in the same group, adjusted by its ozone depleting potential.

³³*Id.*

³⁴Art. 2, para. 7.

³⁵Art. 2, paras. 1-4.

³⁶The amendment enters into force on January 1, 1992, provided twenty instruments of ratification have been received by that date, or 90 days after receipt of the twentieth instrument. Amendment to the Montreal Protocol art. 2, U.N. Doc. UNEP/OzL.Pro.2/3 at 39 (1990). As of 18 July 1991, only Canada and New Zealand had ratified. Personal communication with United Nations Treaty Section (July 18, 1991).

³⁷Amendment to the Montreal Protocol, art. 2, para. 5., in MONTREAL PROTOCOL HANDBOOK, *supra* note 2, at 4.

³⁸The amendment retains the original two groups in Annex A intact, and adds an Annex B with three additional groups of substances.

³⁹*Id.*

C. Conflicts With GATT

Although the Protocol restricts trade among the Parties, Parties should not be able to challenge the Protocol provisions that conflict with GATT because, under the "later in time rule," they have waived any rights under GATT that conflict with the Protocol.⁴⁰ Furthermore, because the Protocol's restrictions on trade between Parties generally place burdens on the Parties, and do not offer them trade advantages, it seems unlikely that a non-Party would challenge these provisions.

V. Special Provisions for Developing Countries

A. Deferral of Obligations

The Protocol permits developing countries which consume less than 0.3 kg per capita of controlled substances annually to delay by ten years their compliance with the control measures set out in Article 2.⁴¹

B. Technology Transfer and Financial Assistance

The Protocol commits Parties to facilitate transfer of technology to developing country Parties, but prior to June 1990 (the third meeting of the Parties in London) it contained no mechanism to implement these commitments.⁴² Similarly, the Protocol commits Parties to facilitate the provision of financial and technical assistance to developing countries, but did not specify how such assistance would be provided.⁴³ These matters have been largely resolved in the 1990 London Amendment. The Amendment contain a new Article 10, which establishes a Multilateral Fund to provide financial and technical assistance

⁴⁰See OECD paper, *supra* note 21, at para. 68-69.

⁴¹Art. 5, para. 1.

⁴²"The Parties undertake to facilitate access to environmentally safe alternative substances and technology for Parties that are developing countries and assist them to make expeditious use of such alternatives." Art. 5, para. 2. In Article 10 the Parties agree to promote, in the context of Article 4 of the Convention, technical assistance to facilitate participation in and implementation of the Protocol. They are required to take into account the particular needs of developing countries. Art. 10, para. 1. Article 10 permits any Party or signatory to submit a request to the Secretariat for technical assistance. *Id.* at para. 2.

⁴³"The Parties undertake to facilitate bilaterally or multilaterally the provision of subsidies, aid, credits, guarantees or insurance programmes to Parties that are developing countries for the use of alternative technology and for substitute products." Art. 5, para. 3.

to developing countries and facilitating technology transfer by financing the incremental costs of acquiring technology needed by developing countries to comply with the Protocol.⁴⁴

Interim Multilateral Fund

At the 1990 London meeting the Parties also decided to establish an Interim Multilateral Fund so that it would not be necessary to wait for the Amendment to enter into force for the financial mechanism to begin operation. The \$200 million interim fund is identical in structure to the permanent Multilateral Fund, and is to operate for three years or until the permanent fund becomes operational, when the Amendment enters into force.⁴⁵

⁴⁴The financial mechanism contains a Multilateral Fund which will:

"(a) meet, on a grant or concessional basis as appropriate, and according to criteria to be decided upon by the parties, the agreed incremental costs [to parties operating - under Article 5, paragraph 1 of complying with the Protocol];

(b) finance clearinghouse functions to:

(i) assist parties operating under paragraph 1 of Article 5, through country specific studies and other technical co-operation, to identify their needs for co-operation;

(ii) facilitate technical co-operation to meet those identified needs;

(iii) distribute, as provided for in Article 9, information and relevant materials, and hold workshops, training sessions, and other related activities, for the benefit of parties that are developing countries; and

(iv) facilitate and monitor other multilateral, regional and bilateral co-operation available to parties that are developing countries;

(c) finance secretarial services of the Multilateral Fund and related support costs." Amendment to the Montreal Protocol, Article 10A. The 1990 Amendments also added to the Protocol Article 10A which provides as follows:

"Each Party shall take every practicable step, consistent with the programmes supported by the financial mechanism, to ensure:

(a) That the best available, environmentally safe substitutes and related technologies are expeditiously transferred to Parties operating under paragraph 1 of Article 5; and

(b) That the transfers referred to in subparagraph (a) occur under fair and most favourable conditions." Amendment to the Montreal Protocol art. 10A, in MONTREAL PROTOCOL HANDBOOK, *supra* note 2, at 19.

⁴⁵Report of the Second Meeting of the Parties to the Montreal Protocol on Substances That Deplete the Ozone Layer, Decision II/8, U.N. Doc. UNEP/OzL.Pro./2.3 (1990) [hereinafter cited as Decision II/8]. Only countries operating under Article 5, paragraph 1 of the Protocol are eligible for financial assistance from the

Organizational Structure. The fund is administered by an Executive Committee and staffed by the fund Secretariat. The Executive Committee is to "discharge its tasks and responsibilities...with the cooperation and assistance of the International Bank for Reconstruction and Development (World Bank), the United Nations Environment Programme (UNEP), and the United Nations Development Programme (UNDP), or other appropriate agencies depending on their respective areas of expertise."⁴⁶

Multilateral Fund Financing. The fund is financed for the first three years of its operation with \$2000 million (US) with another \$40 million to be added if India becomes a party to the Protocol.⁴⁷ Contributions to the fund are based on the UN scale of assessments, but countries can be credited up to 20% of their assessment for bilateral assistance.⁴⁸ In some cases, countries will be permitted to make their contributions in kind.⁴⁹ Multilateral Fund resources are to be independent of other World Bank funds allocated for ozone layer protection.⁵⁰ At its third meeting the Executive Committee allocated \$1 million to the World Bank and \$250,000 to UNDP to be used for "effective operational purposes and not for administrative and support activities."⁵¹

Grants, Loans, and In-Kind Support. All technical assistance and pre-investment activities must be provided in the form of grants or, in certain circumstances, in-kind support.⁵² At the request of the recipient country, in-kind support can be provided in the form of expert personnel, technology, technical documentation and training.⁵³ Assistance for investment projects is generally to be provided as a grant, but may take the form of a

fund.

⁴⁶*Id.*

⁴⁷Terms of Reference for the Interim Multilateral Fund, in MONTREAL PROTOCOL HANDBOOK *supra* note 2, at 103. It is expected that if China and/or India become parties to the Protocol, approximately \$40 million will be added to the fund for each country.

⁴⁸*Id.* at 104.

⁴⁹*Id.* The Soviet Union has indicated its intention to provide some in-kind support, see *infra*, note 34.

⁵⁰Draft Report of the Third Meeting of the Executive Committee of the Interim Multilateral Fund for the Implementation of the Montreal Protocol, U.N. Doc. UNEP/OzL.Pro./ExCom/3/18 (1991) at 10.

⁵¹*Id.* at 11.

⁵²*Id.* at 35.

⁵³*Id.* The Soviet Union has indicated its intention to provide in-kind support consisting of technical assistance with halon recycling. Personal communication with EPA staff; see also Report of the Second Meeting of the Executive Committee of the Multilateral Fund Under the Montreal Protocol, U.N. Doc. UNEP/OzL.Pro./ExCom/2/5 (1991) at 5.

highly concessional loan if the payback period is short (i.e. 1-2 years). The Executive Committee must approve any concessional financing.⁵⁴

Incremental Costs. The Parties, at the 1990 London meeting, adopted an indicative list of incremental costs which will be eligible for financing under the Multilateral Fund. These include the cost of converting or retiring production facilities and establishing new facilities for manufacturing substitute chemicals. They also include costs resulting from the elimination of controlled substances in the manufacturing of intermediate goods and in the modification or replacement of end-use equipment.⁵⁵

Assessment. Developing countries have expressed some dissatisfaction that incremental costs do not include the added expense to brand new facilities of using the more expensive substitute technologies. Also, "depreciation" may be deducted from the reimbursement due developing countries when old plants are retired or replaced with new ones.

Implementing the Protocol in developing countries may cost far more than the \$200-240 million committed for the first three years of the fund's operation. The many existing CFC production facilities in developing countries will have to be retooled or replaced. Products made with CFCs will have to be redesigned and their production facilities revamped. Workers and technicians will have to be trained to operate a whole new generation of equipment. These are all potentially very costly undertakings.

Companies developing substitute technologies have expressed a reluctance to license production facilities to developing countries, preferring instead to maintain control over production and sales.⁵⁶ As noted above, some companies fear their intellectual property rights will not be adequately protected. They may also prefer not to share what some think will be a smaller market for CFC substitutes.⁵⁷

Access to the Multilateral Fund may also present problems. Industries seeking financial or technical assistance cannot apply directly to the fund, but must apply through their national governments. The lengthy project development and approval process may

⁵⁴Draft Report of the Executive Committee, *supra* note 45, at 35.

⁵⁵Indicative List of Categories of Incremental Costs, in MONTREAL PROTOCOL HANDBOOK, *supra* note 2, at 96.

⁵⁶At a recent conference to review the progress of technology transfer under the Protocol, the environmental manager of DuPont's fluorochemicals division said developing countries should "either buy from world-class plants or, if they want local manufacture, should have joint ventures." Pool, *A Global Experiment in Technology Transfer*, 351 NATURE 6 (1991).

⁵⁷CFC replacements will probably not fill the entire market niche now occupied by CFCs. For instance, the electronics industry plans to replace CFCs with water based solvents in many of its cleaning processes.

prove too much for companies with limited resources or small, hard to calculate incremental costs or with incremental costs spread out over long periods of time.

The biggest disappointment with the fund, from the developing country perspective, may be its failure to provide technology on preferential terms or to address many of the traditional problems of technology transfer. The bargaining position of most developing country firms remains weak relative to large transnational corporations and transfers may continue to be burdened by restrictive trade practices and hindered by concerns over intellectual property rights. To the extent these issues remain as impediments to technological cooperation and make it difficult for developing countries to meet their obligations under the Protocol, they run counter to the objectives of the Protocol and will interfere with its effective implementation.

C. Conflict With GATT

- For reasons noted above, it seems unlikely that these provisions would give rise to a GATT dispute between Parties to the Protocol. It is, however, possible that these provisions could give rise to conflict with non-Parties. A developing country that receives financial assistance from the Multilateral Fund to aid its industries in converting to non-ozone depleting technologies might be found to be impermissibly subsidizing its industries, making it subject to countervailing duties from non-Parties. It could also be argued that Parties to both agreements that provide assistance to developing countries are providing those countries' products with a benefit not available to all GATT parties, in violation of the MFN principle. If the Protocol provisions for assisting developing countries are found to violate GATT's obligations, it is unclear whether these provisions could be justified under the Article XII and Article XIII exceptions to assist developing countries' balance of payments.

As to possible violations which might be raised by non-Parties, some interesting questions are: first, whether the assistance given to developing country Parties in converting to the use of substitute technologies violates the MFN principle; second, whether this assistance provides impermissible subsidies to these countries; and third, if these are possible violations, whether they are justified under the Article XII and Article XIII exceptions to assist developing countries balance of payments.

V. Conclusion

The trade provisions in the Protocol fall into two categories: those involving trade among parties, which are intended to facilitate implementation; and those involving trade with non-parties, which are intended to discourage non-compliance.

The provisions affecting trade among parties reflect a concern that the Protocol not effect trade between parties any more than necessary. Continuing concern that trade not be unduly restricted led to relaxation of some of the restrictions on trade in controlled substances initially contained in the Protocol.

The Article 4 provisions restricting trade with non-parties are critical to the effective operation of the Protocol. It is likely that without them, many more countries would continue to use CFCs, possibly increasing their production to fill the vacuum created by the Protocol. Continued use by non-parties would also put industries in compliance with the Protocol at a serious competitive disadvantage, since the costs of compliance can be considerable. Whether these or other provisions of the Protocol run afoul of GATT remains to be seen.

