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**NORTH-SOUTH EQUITY IN THE MONTREAL PROTOCOL:  
LESSONS FROM A FEMINIST LEGAL ANALYSIS**

BY

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THESIS

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**NORTH-SOUTH EQUITY IN THE MONTREAL PROTOCOL:  
LESSONS FROM A FEMINIST LEGAL ANALYSIS**

**ABSTRACT**

This paper is an analysis of North-South equity in an international environmental agreement, The Montreal Protocol on Substances that Deplete the Ozone Layer, in force Sept. 16, 1987 (26 I.L.M. 1541). The author creates a model which applies selected feminist equality principles to evaluate North-South relations in the Montreal Protocol. The model applies the principles to four key aspects of international environmental agreements and thereby draws out lessons for North-South relations in future multilateral agreements.

There is a recognized need for new legal and institutional forms to deal with the challenges faced by the global environment; yet, few initiatives have had significant success. The Montreal Protocol is one of the few.

The Montreal Protocol is a multilateral environmental agreement which has succeeded in reducing the global rate of ozone depletion. It contains a schedule for control and phase-out of ozone-depleting substances. It has trade sanctions against non-parties. It has incentives for developing countries to participate. The incentives include technology transfer, a 10-year delay in phase-out for developing countries, and financial grants under the Multilateral Fund.

The Protocol contains innovative features relating to North-South (industrialized country v. developing country) equity which are an important factor in its success. When the North-South relationship under the Protocol is examined from an equality rights perspective, an analogy emerges: the power differential between men and women is analogous to that between "North" and "South". Thus, the application of feminist legal principles should produce insights of interest to negotiators of multilateral environmental agreements.

The four feminist legal principles applied here are: 1) "cooperative inclusiveness," 2) "contextual analysis" 3) "results-orientation" and 4) "amelioration of disadvantage". These principles are applied to four key aspects of the Montreal Protocol 1) the roles and responsibilities of the parties; 2) the standards used for evaluation; 3) the strengthening and extension of the law and 4) dispute resolution. These four aspects were identified by the Legal Experts Group of the World Commission on Environment and Development as requiring change in the interests of sustainable development.

"Cooperative inclusiveness" was key to the evolution of the Montreal Protocol. Participation of the South was essential to the protection of the ozone layer. If the large populations of the South were to increase their use of ozone-destroying chemicals, controls in the North would be useless. The South agreed to participate in the Montreal Protocol only when aid became available from the Multilateral Fund.. The South sees the Protocol as a development agreement as well as an environmental agreement.

In terms of the roles and responsibilities of the parties, the Protocol treats the North and South as 'the same' in terms of decision-making while simultaneously recognizing the North-South difference in capacity to implement the control measures. It includes the South in setting standards, monitoring compliance and resolving disputes under the agreement.

The new North-South roles under the Montreal Protocol require the development of new standards by which North and South are measured and the parties are treated. An equitable standard would not be solely Northern but would incorporate values and abilities of the South as well. The Montreal Protocol begins this redefinition within the context of ozone depletion.

The Montreal Protocol is strongly "results-oriented" in attaining the global phase-out of ODS and therefore in ensuring each country's capacity to implement the agreement. The reduction of the capacity gap between the North and South was a necessary practical act. The results-orientation of the agreement as a whole promotes the need for contextual analysis to create the appropriate mechanisms.

The role of the South under the Montreal Protocol reflects a "contextual analysis." This analysis takes into account the different attitudes of the North and South to the Protocol. Historically, the South was not responsible for ozone depletion since it had emitted only a very small percentage of global emissions of ozone-destroying substances. This fact

is a result of their relative economic disadvantage: less industrial development. The South thought that the North made the problem and they should pay to fix it.

The Montreal Protocol strengthens and extends the reach of its provisions by integrating aid and trade incentives into its structure. This contextualized approach recognizes the importance of aid and trade to the desired result of healing the ozone layer. However, feminist legal theory would go further in its contextual analysis. Contextual analysis indicates that the inequitable terms of trade continue to affect the South's capacity to implement agreements and emphasizes the need to insert environmental provisions into trade law to address present and future environment and equity issues.

Whereas the Protocol uses trade sanctions as an incentive to join, it does not make use of trade or criminal sanctions for non-compliance by parties. Countries not in compliance are nudged to comply through meetings and support. Informal mediation is relied upon to renegotiate the control schedule and interpretations of the agreement. According to feminist legal principles inclusive, contextual, results-oriented and ameliorative dispute resolution structures are needed to enforce the new roles and standards. The very lack of formal compliance provisions, often seen as a flaw in the agreement, may be the necessary creative space for institutional structures to evolve which are more consistent with North-South equity.

In its dispute resolution and in the very fabric of the agreement the Protocol is "ameliorative." The Protocol promotes each country's capacity to reach the mutual goal of

global phase-out of ozone-destroying substances through 1) the delay in application of the global standards to the South, 2) the provision of technical and financial assistance through the MLF and 3) the flexible implementation of the country programs. The diversity in methods of implementation and the special funds available promote the building of capacity in the South.

The paper concludes that the Montreal Protocol embodies some principles in its North-South relations which parallel feminist legal principles. It is highly inclusive and result-oriented although the results are somewhat difficult to measure due to national diversity. The protocol reflects a contextual analysis and integrates trade and aid provisions into its structure. It ameliorates the capacity of the South to implement the agreement. Most important, it has successfully operated to date.

The challenge to the Montreal Protocol is the general North-South inequity. The limited aid to the South under the terms of the Multilateral Fund does not address the profound disadvantage of the South vis a vis the North in other areas. Some critics in the South see the Protocol, in spite of all its innovative features, as an example of piecemeal law reform which inadvertently harms rather than helps the overall equality status of the South. They fear that the very success of the Protocol could encourage the North to segment more environmental issues separating them from the basic equity issue of an adequate standard of living.

The participation of the majority of the world population is essential to stable environmental protection. Thus, the South's search for development will continue to impact on future multilateral agreements such as those on climate change and biodiversity. The deteriorating government budgets in the North and resulting reduction in available aid funds are increasing the relative poverty of the South and heightening tensions around the multilateral negotiating tables.

The main lesson from a feminist legal analysis may be that the Montreal Protocol has served an important evolutionary and educational purpose, now we must go beyond it consistent with the principles of inclusiveness, results-orientation, contextual analysis and amelioration of disadvantage.

## CHAPTER ONE: INTRODUCTION

"Major changes are occurring in the atmosphere, in soils, in waters, among plants and animals and the rate of change is outstripping the ability of scientific disciplines and our current capabilities to assess and advise. As a result, our legal regimes are being rapidly outdistanced by the accelerating pace and expanding scale of impacts on the environmental base of development".<sup>1</sup>

The World Commission on Environment and Development points out that vastly increased human numbers<sup>2</sup> and their activities now have the power to alter planetary systems. Action is needed to protect global resources and prevent further degradation.<sup>3</sup> Although the ecological situation is urgent,<sup>4</sup> the environmental legal institutions and instruments are, as yet, insufficient to address the issues.<sup>5</sup> In fact, it is not clear that the present international legal system is sufficiently developed to resolve the disputes that arise over environmental issues or to provide a constructive, forward-looking framework for environmental protection.<sup>6</sup>

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<sup>1</sup> World Commission on Environment and Development, hereinafter in footnotes WCED, Our Common Future, Oxford University Press, Oxford, 1987, at 330, a.k.a. Brundtland Commission or Report.

<sup>2</sup> WCED *ibid.* Also see "The Population Debate", Earth Words, Vol 5, No 4, Winter 1993 (Pam Foster and Susan Tanner, uncredited contributors).

<sup>3</sup> Smith, Douglas, A., "The Implementation of Canadian Policies to Protect the Ozone Layer", Getting it Green: Case Studies in Environmental Regulation, Doern, Bruce, Ed. Policy Study 12, C.D. Howe Institute, 1990, Ottawa at 111.

<sup>4</sup> UNEP, The World Environment 1972-1992: Two Decades of Challenge, Mostafa K. Tolba, Osama A. El-Kholy Eds., Chapman and Hall, London, 1992.

<sup>5</sup> Springer, A.L., The International Law of Pollution: Protecting the Global Environment in a World of Sovereign States, Westport, Ch.2, "International Environmental Law".

<sup>6</sup> Johnston, Douglas, M. "Systemic Environmental Damage: The Challenge to International Law and Organization", 1985, 12 Syr J of Int'l Law and Comm 255, at 256.



International environmental law is in a state of flux. It is replete with gaps in coverage and contradictory and overlapping laws. The fundamental principles that underlie the law are not easy to discern.<sup>7</sup> As a relatively new area of law, the boundaries of environmental law are not well-defined. There is confusion as to its relationship with other areas of law as varied as the Law of the Sea, Outer Space, International Trade, Arms Control and Human Rights, including equality rights.<sup>8</sup> Various attempts at coordinating and organizing this vast and growing body of environmental law are in process. Before the United Nations Conference on Environment and Development (UNCED), there were more than 870 international environmental instruments<sup>9</sup> and many have been added since.<sup>10</sup>

International environmental law is faced with challenges not only in substance, but also in the very nature and form of its framework and institutions. There is a recognized need<sup>11</sup> for new legal and institutional forms to deal with the challenges faced by the global environment yet there are few initiatives which have had significant success. The Montreal

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<sup>7</sup> Williams, Sharon, "Public International Law Governing Transboundary Pollution" (1984), 3 U of Queensland Law Journal 112. at 113

<sup>8</sup> Johnston, supra note 6, at 264.

<sup>9</sup> Brown Weiss, Edith, "Global Environmental Change and International Law: The Introductory Framework", Environmental Change and International Law: New Challenges and Dimensions (1992) The United Nations University, Tokyo.

<sup>10</sup> Including Agenda 21, the Rio Declaration, the Climate Change Convention, the Biodiversity Convention and the Forest Principles

<sup>11</sup> WCED, supra note 1, at 330.

Protocol on Substances that Deplete the Ozone Layer is one of the few.<sup>12</sup> The Montreal Protocol has succeeded in controlling a wide range of ozone-depleting substances and reduced the rate at which the ozone layer is depleting.<sup>13</sup> The Protocol has a large membership of over 122 countries, including major parties from both the developed and developing world.<sup>14</sup>

## Organization of Thesis

This thesis is organized into nine chapters grouped into two sections. Chapter One, the Introduction, states the thesis of the paper, defines some terms and describes the organization of the thesis.

Section One consists of three background chapters: Chapters Two to Five. Chapter Two discusses North-South equity in general and with regard to the Protocol. Historically, and currently, the South is relatively disadvantaged compared to the North and the two have differences in perspective as to the main purpose of the agreement. As we shall see, the South tends to see the Montreal Protocol as a development agreement; whereas, the North sees it as an environmental one.

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<sup>12</sup> Hereinafter *The Montreal Protocol*, in force Sept. 16, 1987, 26 I.L.M. 1541; *Montreal Protocol Handbook*, UNEP.

<sup>13</sup> The 1994 Science, Environmental Effects, Technology and Economic Assessments Committee Synthesis Report presented to the Eleventh Open-Ended Working group of the Parties to the Montreal Protocol, May 1995. UNEP/OzL.Pro/WG.1/11/3.

<sup>14</sup> The producer nations were among the founding signatories. The status of ratification of the 1987 Montreal Protocol and the 1990 and 1992 amendments, in *Montreal Protocol Handbook* at 63.

Chapter Three describes the objectives and structure of the Montreal Protocol. It is noted that the Protocol has different control deadlines for the South than for the North. Further, the Multilateral Fund is established to assist Southern countries with funding and technology transfer.

Chapter Four describes the feminist equality rights lens used to analyze the North-South features. An analogy is made between the power differential between men and women and that between the "North" and "South". Benchmark principles from feminist scholarship are applied to the relations between the donor countries (North) and the recipient countries (South).

Section Two consists of Chapters Five to Eight, each of which discuss an aspect of the Montreal Protocol from an equality rights perspective. The chapters are organized according to the four key areas identified by the World Commission on Environment and Development which are essential to achieving sustainable development: 1) the roles and responsibilities of states; 2) the norms and standards used for interstate behaviour; 3) the strengthening and extension of the law and 4) dispute resolution.

Thus, Chapter Five applies feminist legal principles to the Montreal Protocol in relation to new roles and responsibilities of the parties. It examines whether the new role for the South is consistent with feminist principles of inclusive cooperation, contextualization, results orientation and amelioration of disadvantage.

Chapter Six discusses the need to develop new norms and standards by which both North and South are measured under the Protocol. As the respective roles change, the standards used to implement them must also change. The new standard must not be exclusively that of the North but should incorporate values and abilities of the South as well.

Chapter Seven examines how the Montreal Protocol strengthens and extends the reach of its provisions by integrating aid and trade incentives into its structure. Chapter Eight discusses the compliance provisions in the Montreal Protocol and the new dispute resolution structures to enforce the new roles and standards. In Conclusion, Chapter Nine, summarizes the findings and the application of lessons learned to future multilateral agreements.

#### Thesis Statement

The Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) is considered a ground-breaking agreement in scope and effect.<sup>15</sup> It is being used as a model in forthcoming agreements on climate change and biodiversity.<sup>16</sup>

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<sup>15</sup> Gallagher, Anne, "The "New" Montreal Protocol and the Future of International Law For Protection of the Global Environment", Houston Journal of International Law, 14:267, 1991, at 269; R.E. Benedick and R. Pronove, "Atmosphere and Outer Space" in The Effectiveness of Environmental Agreements, Peter H. Sand ed., Grotius, Cambridge, 1992, pp 137-8; James Maxwell and Sanford Weiner "Green Consciousness or Dollar Diplomacy?" International Environmental Affairs, Vol. 1, No. 1, Winter, 1993.

<sup>16</sup> Bryk, Dale, "The Montreal Protocol and Recent Developments to Protect the Ozone Layer", Harvard Environmental Law Review 15:275, at 297; Mintz, Joel, "Comment: Progress Toward a Healthy Sky: An Assessment of the London Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer", Yale Journal of International Law 16:571, 1991 at 582.

Among its innovative features is a new approach to North-South relations.<sup>17</sup> A major issue in all multilateral environmental agreements is how the industrialized countries of the "North" can obtain the active participation of developing countries of the "South" and how to ensure that the South will be willing and able to implement the agreed controls.<sup>18</sup> With the majority of the world's population living in the South, the potential negative environmental impact of these nations is huge.

The necessity of involving the South in global environmental controls requires North-South cooperation to a level uncommon in international relations. This paper explores the power relationships between the developed North and the developing South, from the perspective of feminist equality theory. The purpose is to better understand the principles that allow the North and South to work together effectively.

An analogy is made between the North-South relationships and the relative power relationships between men and women. The parallels which emerge from the process provide a new way of understanding the Montreal Protocol. The feminist legal analysis seeks to assist in:

- a) understanding the advances made by this agreement, and
- b) drawing lessons for future environmental agreements.

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<sup>17</sup> Brandt Report: Report of The Independent Commission on International Development Issues, popularly known by the name of its chair, Willy Brandt (winner of the Nobel Peace Prize), produced North-South: A Program for Survival (Cambridge, Mass: MIT Press, 1980).

<sup>18</sup> Najam, Adil, "An Environmental Negotiation Strategy for the South" International Environmental Affairs, Vol. 7, no. 3, Summer, 1995.

The four feminist legal principles chosen as benchmarks for understanding relationships to the Montreal Protocol are: 1) cooperative inclusiveness, 2) contextual analysis, 3) results-orientation, and 4) action to reduce the power gap. These principles tend to be frequently identified by leading feminist legal academics as key factors in post modern equality theory.<sup>19</sup> These principles are applied to the four key aspects of environmental agreements which were identified by an international panel of legal experts for the World Commission on Environment and Development. The panel stated that it is necessary to:

- \* recognize and respect the reciprocal rights and responsibilities of individuals and states,
- \* establish and apply new norms for state and interstate behaviour,
- \* strengthen and extend the application of existing laws and international agreements, and
- \* reinforce existing methods and develop new procedures for avoiding and resolving disputes.<sup>20</sup>

This thesis does not undertake an exhaustive compilation of feminist equality theory or attempt to arrive at a comprehensive theory. It merely extracts insights about relationships between advantaged and disadvantaged parties who are engaged in a cooperative project for application to North-South relations in environmental agreements.

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<sup>19</sup> Lynn Smith, "What is Feminist Legal Research?" in W. Tomm, ed., The Effects of Feminist Approaches on Research Methodologies, Wilfrid Laurier University Press, 1989 at 91.

<sup>20</sup> Report of The Experts Group on Environmental Law, WCED, supra note 1, at 330.

Nor is this paper an exhaustive analysis of the Montreal Protocol in all its aspects. There has been a wide range of academic comment on the Protocol and a wide variety of suggestions for improvement of the agreement. I deal here only with selected issues relevant to issues of North-South equity.

## Definition of Terms

### a) Environment

Usage of the term "Environment" has evolved from meaning that which is around human beings, as in the phrase "Man and his Environment", to a concept which places humanity within the web of life and only one part of it.<sup>21</sup> However, a discussion of law tends to focus on the human aspects of environment as stated clearly in the Stockholm Declaration:

"Man is both creature of and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth."<sup>22</sup>

Current Canadian legislation does not offer useful definitions for this paper. In the Canadian Environmental Protection Act<sup>23</sup> humans are not directly mentioned and

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<sup>21</sup> World Women's Congress for a Healthy Planet, Nov. 8-12, 1991, Women's Action Agenda 21, WEDO, New York, 1992, Preamble.

<sup>22</sup> The Declaration of the United Nations on the Human Environment, (Stockholm Declaration) June 5-16, 1972, United Nations Environment Program (UNEP), New York, Art. 1.

<sup>23</sup> Hereinafter CEPA, R.S., 1985, c. 16, s. 1. The components of the Earth includes: (a) air, land and water, (b) all layers of the atmosphere, (c) all organic and inorganic matter and living organisms, and (d) the interacting

"environment" is defined as the "components of the Earth". Further, there are no environmental rights in the Canadian constitution per se.<sup>24</sup>

The terms "environment" and "ecosystem" are sometimes used interchangeably, although ecosystem has a more precise definition in international law. "Ecosystem" is defined in the Convention on Biological Diversity as:<sup>25</sup> "a dynamic complex of plant, animal and micro-organism communities together with their nonliving environment, interacting as a functional unit."

In this paper, "environment" is used to refer to humanity's biological survival as opposed to economic survival. As such, it is often cited as one of the three factors in sustainable development.

## b) Sustainable Development

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natural systems that include components referred to in paragraphs (a) to (c).

<sup>24</sup> "The Constitution, Federal-Provincial Relations, Harmonization and CEPA: Issues for the Five Year Review of the Canadian Environmental Protection Act" Karen Clark and Barbara Rutherford in Reforming the Canadian Environmental Protection Act, Mausberg, Muldoon and Winfield Eds. 1994 Canadian Environmental Network, Ottawa, 1994. Contrast to the Peruvian Constitution (1978, art 12) provides for an environment "ecologically balanced and adequate for the development of life and the preservation of the countryside and nature".

<sup>25</sup> The Convention on Biological Diversity, Ainus 4, UNCED, 1992)



"Sustainable Development" is a broader concept than environment. It integrates environment, and development. The precursor to "sustainable development" was "eco-development norms."<sup>26</sup> The name distinguished ecologically sensitive development from conventional international economic development projects. The fact that the norms were not widely used was attributed to states' unwillingness to do the fundamental rethinking of the development process which eco-development required.<sup>27</sup>

In 1972, The Stockholm Declaration specifically recognized the link between environment and development. Equity is inherent in their use of the term "development." The Declaration states that the ultimate purpose of development is to provide increasing opportunities to all people for a better life, therefore, it is essential to provide a more equitable distribution of income and wealth, to expand and improve facilities for education, health, nutrition, housing and social welfare, and to safeguard the environment.<sup>28</sup>

In 1987, the World Commission on Environment and Development (WCED) Report, defines "sustainable development" as "development that meets the needs for the present

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<sup>26</sup> Lynton Caldwell, cited by Paul Muldoon (1985) "The International Law of Eco-development: Emerging Norms for Development Assistance Agencies" 22 Texas International Law Journal 1, at 16. The norms provided an integrated legal framework to guide the behaviour of states and other international actors in the new development process. They norms included a duty to 1) integrate environmental management into development policies, 2) improve environmental capabilities, and 3) assess environmental impacts of development projects.

<sup>27</sup> Paul Muldoon, *ibid.*

<sup>28</sup> Stockholm Declaration, *supra* note 22, Preamble.

without compromising the ability of future generations to meet their own needs".<sup>29</sup> Intergenerational equity is new to international law and so needed to be specified. The WCED<sup>30</sup> also stated that sustainable development can not be reached while separating economic development issues from environment and equality issues.

In 1992, "sustainable development" was popularized by the United Nations Conference on Environment and Development (UNCED).<sup>31</sup> Part of its popularity stems from the fact that it has proven to be a remarkably flexible concept, capable of many differing interpretations.<sup>32</sup>

The Canadian Bar Association<sup>33</sup> points out that sustainable development, requires a change in thinking from the traditional approach that natural resources are common property subject to opportunistic exploitation. The new view is more that resources - air, water, land, forests, wildlife - are now subject to a public trust to ensure access and enjoyment for future generations.<sup>34</sup> Industry tends to emphasize the economic development aspects: how to profit

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<sup>29</sup> WCED, supra note 1, at 8.

<sup>30</sup> WCED, supra note 1, at 3, term attributed to Maurice Strong.

<sup>31</sup> UNCED, held in June 1992, Rio de Janeiro, Brazil.

<sup>32</sup> D. Runnalls, "Trade and Sustainable Development: Friends or Enemies?" in Growth, Trade and Environmental Values (1994) Schrecker and Dalglish Eds., Westminster Institute for Ethics and Human Values, London, Ontario, at 61.

<sup>33</sup> Canadian Bar Association (CBA), Sustainable Development in Canada: Options for Law Reform, (1990) CBA, Ottawa, at 2.

<sup>34</sup> Brown Weiss, Edith, In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity, The United Nations University, Tokyo, 1989.

sustainably. Feminist scholars declare an exploitative attitude to be the root of the problem and emphasize social equity and ecological health rather than economic growth.<sup>35</sup>

Developing countries, resist a strictly environmental emphasis. The South fears that the North may use environmentalism, in the form of trade restrictions, as one more tool to oppress the South - leaving it undeveloped and poor. This is sometimes called "eco-colonialism." Addressing this issue, Herman Daly<sup>36</sup> distinguishes between development and growth: when something grows, it gets quantitatively bigger; when it develops, it gets qualitatively better, or at least different. He advocates growth and development for developing countries and development (but not through growth) for industrialized countries.<sup>37</sup>

This paper uses "sustainable development" to refer to the integration of environment, economy and equity (North-South and intergenerational) with no one factor overbalancing the others.

### c) Equality

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<sup>35</sup> D. Runnalls, *supra* note 33; and, International Indigenous Women's Caucus (1991) WEDO, *supra* note 21.

<sup>36</sup> Herman Daly and Robert Goodland, An Ecological-Economic Assessment of Deregulation of International Commerce Under GATT (1992) Environmental Department, The World Bank, Washington.

<sup>37</sup> Also see Friends of the Earth (FOE) Netherlands, Action Plan Sustainable Netherlands, Eds. Buitencamp, Venner + Wams, Amsterdam, 1993. FOE has developed a model which divides world resources by world population to arrive at an individual quotient.

Definitions of "equality", or "equity", abound. There is no single agreed meaning<sup>38</sup>. The definition of "equality" preferred in this paper is that of Catherine MacKinnon: "a chance at productive lives of reasonable physical security, self-expression, individuation, and minimal respect and dignity".<sup>39</sup>

The principles used in this thesis derive from a post-modern definition of equality rights drawn from feminist academic writings.<sup>40</sup> The author will not explore the debate on the exact definition of equality rights<sup>41</sup> but has chosen four main principles, as benchmark criteria, which have some practicality in making the analogy to North-South relations.

The post-modern analysis of equality is the third stage of evolution in equality theory.<sup>42</sup> The first stage, that likes should be treated alike, holds that men and women, black

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<sup>38</sup> Bayevsky, Ann, F. "Defining Equality Rights Under the Charter" in Equality and Judicial Neutrality, Mahoney and Martin Eds., Carswell, Toronto, 1987, at 106; The danger in using Canada as an example of liberal, free and democratic society stems from differences between liberal societies such as between the economic position of women in countries of continental Europe which have family policies and those of North America, Australia and Britain which do not.

<sup>39</sup> C. MacKinnon, 1989, Toward a Feminist Theory of the State, (Cambridge, Mass.: Harvard University Press) at. 32

<sup>40</sup> See Human Rights in the 21st Century, Mahoney and Mahoney, Eds. Kulwer Academic Publishers, Netherlands, 1993 and Righting the Balance: Canada's New Equality Rights, Smith et al, The Canadian Human Rights Reporter Inc., Saskatoon, 1986, and Canadian Journal of Women and the Law, Ottawa.

<sup>41</sup> For example: the debate between liberal and CLS scholars (Bunch, Charlotte "Feminist Visions of Human Rights in the 21st Century" in Human Rights in the 21st Century, K.E. Mahoney + P. Mahoney Eds., 1993 Kulwer, Netherlands, 967) and between feminist scholars (e.g. Pearlman, Lynne "Through Jewish Lesbian Eyes: Rethinking Clara Brett Martin" (1992), 5 CJWL 317.

<sup>42</sup> L. Smith, *supra* note 19.

and white are alike in their humanity and should be treated the same. The second stage revolves around the areas in which women, or other disadvantaged groups, are different and do sometimes need to be treated differently to be equal. The third stage holds that the current legal system is inherently biased (sexist, racist and classist) in form and content and in need of reconstruction with a new unbiased standard. This last stage is also called "post-liberal".

A post-modern feminist legal analysis questions fundamental assumptions of law as a necessary first step in changing the law. Among other things, feminist legal theory attempts to: 1) include all parties in cooperation; 2) place disadvantage in its systemic context; 3) focus on results; and, 4) ameliorate disadvantage.

### Analytic Model

Table 1 summarizes the dimensions that will be used in this analysis, and integrates them into a proposed model for evaluating environmental agreements. Each of the sixteen coordinates of this framework is examined from two perspectives: 1) whether the target element upholds equality principles and 2) whether it resolves the challenges of applying feminist legal principles. Once the chart is filled in (see Chapter Nine) lessons can be drawn for future multilateral agreements.

**Table 1: ANALYTICAL FRAMEWORK**

<p><b>ELEMENTS OF AGREEMENT</b></p> <p><b>FEMINIST LEGAL PRINCIPLES</b></p>	<p><b>ROLES &amp; RESPONSIBILITIES</b></p>	<p><b>STANDARDS</b></p>	<p><b>STRENGTHENING &amp; EXTENDING THE LAW</b></p>	<p><b>DISPUTE RESOLUTION</b></p>
<p><b>INCLUSIVENESS</b></p>	<p>*****</p> <p>**</p>			
<p><b>RESULTS ORIENTATION</b></p>		<p>*****</p> <p>**</p>		
<p><b>CONTEXTUALIZATION</b></p>			<p>*****</p> <p>***</p>	
<p><b>AMELIORATIVE ACTION</b></p>				<p>*****</p> <p>***</p>

**SECTION I: NORTH-SOUTH EQUITY, THE MONTREAL PROTOCOL AND FEMINIST LEGAL PRINCIPLES**

**CHAPTER TWO: NORTH-SOUTH EQUITY**

"Poverty is a major cause and effect of global environmental problems. It is therefore futile to attempt to deal with environmental problems without a broader perspective that encompasses the factors underlying world poverty and international equality."<sup>43</sup>

Global environmental action requires that all nations from the North and the South work cooperatively together. Yet, as the World Commission on Environment and Development points out, developing countries need a significant increase in financial support from international sources for environmental restoration, protection, and improvement and to help them through the necessary transition to sustainable development."<sup>44</sup>

In recognition of the new global realities, international environment and human rights law are experiencing a convergence in legal theory toward a human right to environment and the emergence of a new global ethic based on the common interest of humankind. However, neither of these intellectual trends has become reflected in economic realities.

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<sup>43</sup> WCED. *supra* note 1 at 3 and Principle 2: "All human beings have the fundamental right to an environment adequate for their health and well-being", Annex 1, at 349.

<sup>44</sup> WCED, *ibid*, at 8 defined as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs." (Intergenerational equity) in Annex I: Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development Adopted by the WCED Experts Group on Environmental Law.

Meanwhile, North-South multilateral negotiations are becoming increasingly adversarial. As the South becomes relatively poorer despite aid programs, continued Northern promises of development aid ring hollow. The tension between North and South is further aggravated by reductions by donor countries in already small aid budgets.

If development aid is no longer a viable solution to international economic inequity in general, it presents a challenge to liberal economic theory. No longer do both the dominant and dominated groups believe that the existing order, with some marginal changes, is satisfactory. Nor do they, any longer, believe that things pretty much have to be the way they are.<sup>45</sup> As the roles and relationships of the parties shift, along with the changing underlying assumptions, a new North-South relationship will be a major factor in future multilateral environmental agreements.<sup>46</sup>

### Human Right to Environment

The evolution of a right to environment reflects a global change in consciousness toward equality rights for all world citizens from North and South. Both Human Rights and Environmental Law find authority in the accepted sources of international law<sup>47</sup> and both have

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<sup>45</sup> A. Gramsci on hegemony, cited by R. Gordon, "New Developments in Legal Theory," The Politics of Law, D. Kairys, ed., (1982). Also note that some Asian countries have changed from the South to the North.

<sup>46</sup> J. K. Parikh (1995) "Joint Implementation and North-South Cooperation for Climate Change" in International Environmental Affairs, Vol. 7, No. 1, Winter, 1995.

<sup>47</sup> The Statute of the International Court of Justice, Art. 38(1) (cited by Williams, supra note 7): 1) international conventions; 2) International custom as evidence of a general practice accepted as law;



origins in United Nations instruments. The Charter of the United Nations lists as two of its purposes the principle of equal rights of peoples and the promotion and encouragement of respect for human rights and fundamental freedoms.<sup>48</sup> The Universal Declaration of Human Rights begins its preamble with the recognition of "the inherent dignity and the equal and inalienable rights of all members of the human family" and affirms the member states belief in the "equal rights of men and women."<sup>49</sup> This theme is reiterated in subsequent human rights documents such as the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (1996).<sup>50</sup> Since these covenants, many other equality rights documents have been formulated in various contexts including employment, remuneration, education, race, sex, religion, children and disability.<sup>51</sup>

In 1972, the Stockholm Declaration from the United Nations Conference on the Human Environment reiterates the human dignity theme and extends it to the environment.

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3) the general principles of law recognized by civilized nations; 4) the teachings of the most highly qualified publicists of the various nations (subsidiary means). They also share the phenomena of national laws becoming incorporated into international law by custom or statute: Estrin and Swaigen, Environment on Trial, CELRF, Toronto, 1978.

<sup>48</sup> Bayevsky, Anne (1986) "The Principle of Equality or Non-discrimination in International Law: Implications for Equality Rights in Canada" in Smith et al. Righting the Balance: Canada's New Equality Rights, The Canadian Human Rights Reporter Inc., Saskatoon, 117, at 118.

<sup>49</sup> Hereinafter Universal Declaration, (1948) UN, General Assembly Resolution 217 A (III), Dec. 10.

<sup>50</sup> United Nations, both adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) New York, Dec. 16, 1966. The Economic, Social and Cultural Covenant came into force Jan. 3, 1976, the Civil and Political Rights Covenant on Mar, 23, 1976.

<sup>51</sup> UN, Human Rights: A Compilation of International Instruments, UN, New York, 1984. Also, Trindade, Cancado, "Environmental Protection and the Absence of Restrictions on Human Rights", K.E. Mahoney and P. Mahoney (Eds.), Human Rights in the Twenty-first Century, at 562.

Further, it specifies that inequalities, such as racism, "discrimination, colonial and other forms of oppression and foreign domination", must be eliminated to allow a life of dignity and well-being.<sup>52</sup> Ten years later, in 1982, the intrinsic rights of nature were recognized in the World Charter for Nature which says that every form of life is unique, warranting respect regardless of its worth to men, and, to accord other organism such recognition, humanity must be guided by a moral code of action.<sup>53</sup> In 1992, the Rio Declaration<sup>54</sup> proclaimed that human beings lie at the centre of concerns for sustainable development and that they are entitled to a healthy and productive life in harmony with nature.

Prominent human rights scholars such as Alexandre Kiss,<sup>55</sup> argue that the right to protection of the environment is a fundamental right whose enjoyment must be guaranteed to every individual. Kiss regards the right to protection of the environment to be at, one and the same time, an economic, social and cultural right. Further, he says, it brings a new temporal dimension to human rights - the concern for future generations.<sup>56</sup> The environmental rights proponents are criticized by those who say that there cannot be a "right"

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<sup>52</sup> Stockholm Declaration (1972) supra note 22, Principle 1: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated."

<sup>53</sup> World Charter for Nature (1982) UN General Assembly Resolution 7 (XXXVII), New York, New York, Principle 1.

<sup>54</sup> Rio Declaration (1991) UNCED, UN, New York, Principles 1-3.

<sup>55</sup> Kiss, Alexandre, "Concept and Possible Implication of the Right to Environment," (1993) Human Rights in the 21st Century, Mahoney and Mahoney (Eds.) Kulwer, Netherlands, 551, at 559.

<sup>56</sup> A. Kiss, *ibid*, at 553 ; C. Trindade, supra note 51.

to environment because it is too difficult to define and there can not be any certainty in the law. Kiss<sup>57</sup> responds that this degree of uncertainty is not fatal. There are many concepts applied by the courts which are not rigorously defined but are honed to a more precise definition through the normal development of the law.

Maguelonne Déjeant-Pons agrees with Kiss and states that "the right to environment will unquestionably be one of the major rights of the twenty-first century, since the most fundamental human right of all, the right of existence, is under threat."<sup>58</sup> None the less, it will be a challenge to provide a right to environment to each global citizen in a context of scarcity (real or fabricated). As we enter this new era of limitation - limits to growth, limited carrying capacity of the Earth - we face a social, legal and spiritual challenge of unprecedented dimension.<sup>59</sup>

### Erosion of Sovereignty

The Montreal Protocol is part of an international trend to multilateral agreements. Environmental issues such as ozone depletion in the stratosphere cannot be dealt with in the

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<sup>57</sup> A. Kiss, *ibid*, at 554.

<sup>58</sup> Déjeant-Pons, Maguelonne, "The Right to Environment in Regional Human Rights Systems" (1993) Human Rights in the 21st Century, Mahoney and Mahoney (Eds.) Kulwer, Netherlands, at 595.

<sup>59</sup> Tanner, Susan, "Introduction to Section IV(c): The Right to Environment" (1993) Human Rights in the Twenty-First Century: A Global Challenge, Mahoney & Mahoney (Eds.) Kulwer, Netherlands. Some argue that the scarcity is manufactured by the wealthy to justify their unequal share.

traditional manner of relations between sovereign states. However, the South sees in global cooperation a related erosion of sovereignty which dampens their ardour for participation.

Historically, the power of the state was considered absolute within its border and it could not be deemed subordinate to external authority, including the rule of a body of international law.<sup>60</sup> In this century, the concept of "relative sovereignty" evolved which provides that a state may not claim more liberty and independence than is compatible with the necessary organization of humanity, with the independence of other states, and with the ties that bind states together.<sup>61</sup> This relative view means that state sovereignty is limited by the Charter of the United Nations and principles of international law.<sup>62</sup>

In this vein, human rights treaties now incorporate obligations of an objective character aimed at safeguarding the rights of human beings and not the reciprocal rights of states, on the basis of a superior general public interest.<sup>63</sup> Activities within the national boundaries, such as the treatment by the state of its own nationals, has become a matter of

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<sup>60</sup> Smith, Douglas State Responsibility and the Maritime Environment (1988) Oxford Univ. Press, Oxford c. 5) State sovereignty is based on the definition of "state" as a community of individuals under one "sovereign" law-giving authority be it monarch or elected government. A modification of this absolute power emerged in the 'consent theory' which asserts that only consent, express or implied, could subordinate sovereign prerogative to international rules of order. The Schooner Exchange v. McFaddon.

<sup>61</sup> D. Smith, *ibid*.

<sup>62</sup> However, these principles themselves are unenforceable due to the lack of compulsory jurisdiction of the International Court, as demonstrated by France in the Nuclear Test Ban case.

<sup>63</sup> Trindade, *supra* note 51, at 561-2;

international concern.<sup>64</sup> This evolving standard is building international consensus toward an enforcement mechanism which does not respect national boundaries.<sup>65</sup>

Similarly, scholars such as Edith Brown Weiss<sup>66</sup> point out that global environmental change has altered attitudes to the traditional international legal system by causing states to realize that they are locked together in shared use of a common global environment.<sup>67</sup> One example of states voluntarily giving up sovereignty for a higher purpose is the International Covenant on Whales/Ivory.<sup>68</sup> Still, this is a situational and limited occasion, not a situation where an existing moral standard exists and is applied automatically as situations arise.

To environmentalists this evolving global standard is a positive trend imposing the requisite global responsibility on humankind. However, the trend to erosion of sovereignty is not so well-regarded in the South in a context of economic inequality of states where globalism could be used as a weapon against the economic interests of the South.

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<sup>64</sup> An example is the power conferred on the European Human Rights Court to consider individual complaints by citizens against their own government under the European Convention. Jackson, John H., "World Trade Rules and Environmental Policies: Congruence or Conflict?" Wash + Lee Law Rev, vol 49:1227.

<sup>65</sup> Trindade, supra note 51. Amnesty International has played an important role in this with its continual and rigorous exposure of human rights abuses from around the world.

<sup>66</sup> Brown-Weiss, Edith (Global Environmental Change) supra note 9, at 3 and Stockholm Declaration, principle 18. Also measures have been included in a number of treaties in the common interest of humankind (list in Trindade, *ibid*, p. 567).

<sup>67</sup> H. Daly and R. Goodland, supra note 35 argue that GATT reduces the sovereignty of nations, while creating lax circumstances for transnational corporations (TNCs) which control 70% of world trade.

<sup>68</sup> P. Sands and A. Bedecarre, "Convention on International Trade in Endangered Species: The Role of Public Interest Non-Governmental Organizations in Ensuring the Effective Enforcement of the Ivory Trade Ban" (1990) 17 Environmental Affairs 799.

## Conflicting North-South Perspectives

The global standard "in the interest of humankind," ironically is not accompanied with the resources to make a decent quality of life a reality in the South. In fact, the prevailing economic system seems to be going in the other direction. Thus, the South sees erosion of sovereignty as part of a New International Environmental Order which will allow the North to use environmental issues as a tool to keep the South undeveloped.<sup>69</sup> To the South, Globalism can have a sinister connotation. Vandana Shiva<sup>70</sup> describes how the concept can be used to transform the environmental crisis from being a reason for change into a reason for strengthening the status quo. The status quo, she says, is an extension of colonial raiding of Southern resources.

Tariq Banuri says this resistance to global environmentalism is based on fear of the emergence of a new imperialism, of new conditionalities, and of new obstacles to the alleviation of poverty and oppression. It is not due to lack of environmental consciousness. He points out that a Gallup Poll, done just before UNCED in 1992, found no significant differences between North and South on the level of environmental concern.<sup>71</sup> In fact, he quotes Martinez-Alier as arguing that there are ecological roots and ecological contents in

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<sup>69</sup> Najam Adil, *supra* note 16, at 249.

<sup>70</sup> Shiva, Vandana "The Greening of the Global Reach" in *Global Ecology* (1993) Wolfgang Sachs (Ed.) Zed/Fernwood, Halifax, at 149.

<sup>71</sup> Banuri, Tariq "The Landscape of Diplomatic Conflicts", *Global Ecology* (1993) Wolfgang Sachs (Ed.) Zed/Fernwood, Halifax, at 49.

social movements by the poor populations, and finally that ecology is potentially a stronger force in the South than in the North. Thus, he says, the dialogue degenerated into unconnected monologues: "One side intent upon saving the planet for everyone, and the other equally determined not to be sacrificed in the process of collective salvation".<sup>72</sup>

Many writers have noted that the conversation about sustainable development seldom includes much discussion on the need for restraining consumption in the North and in the elite sections of the South.<sup>73</sup> The prevailing vision of development is based on the ability to access biomass either through political means or through better management and technology. This requires a biomass rich 'hinterland' that can be exploited.<sup>74</sup> As Anil Agarwal and Sunita Narain point out, "Economists will have to redefine poverty not as a shortage of cash but as a shortage of biomass resources to meet basic survival needs."<sup>75</sup>

One commentator describes the major problem of the 21st century as: "the fundamental conflict between global ecologism and universal humanism."<sup>76</sup> Guy Beney

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<sup>72</sup> Ibid, at 54.

<sup>73</sup> Banuri, *ibid*, at 54; Rees, William E. "Pressing Global Limits: Trade as the Appropriation of Carrying Capacity" (1994) at 55 and Runnalls, David "Trade and Sustainable Development: Friends or Enemies?" at 57 both in Growth, Trade and Environmental Values, Ted Schrecker and Jean Daigleish (Eds.) Westminster Institute for Ethics and Human Values, London, Ontario.

<sup>74</sup> Banuri, *ibid*, at 54.

<sup>75</sup> Agarwal, Anil and Sunita Narain "Towards Green Villages", Global Ecology, (1993) Wolfgang Sachs (ed.) Zed/Fernwood, Halifax, at 242.

<sup>76</sup> Beney, Guy, "'Gaia': The Globitarian Temptation", Global Ecology, (1993) Wolfgang Sachs (ed.) Zed/Fernwood, Halifax, 179 at 180.

continues to say that the conflict is even deeper between two radically opposed interpretations of both the universe and of man. He points out that the real issues between men (including competition, dominance, inertia, transition of paradigm) remain unspoken.

Further, the value of the environmental space provided by the South is seldom mentioned. J. K. Parikh argues, in relation to Climate Change, that developing countries have provided environmental space to the industrialized countries at no cost for decades, and will continue to do so for many decades into the future before the regional emissions balance is altered. Annually this environmental subsidy is estimated to be around \$70 billion (U.S.). Therefore, it is reasonable to ask to reverse this and expect some North to South flows to compensate a small portion of this subsidy.<sup>77</sup>

Accounting for the historic resource subsidy from the South to the North was a major preoccupation of the judges panel of the World Women's Congress in Miami, in 1991.<sup>78</sup> The Women's Action Agenda specifically supports the South's position on points such as eliminating the international debt<sup>79</sup> and the need for the North to drastically reduce its

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<sup>77</sup> Parikh, J. K. "Joint Implementation and North-South Cooperation for Climate Change" (1995) International Environmental Affairs Vol. 1, No. 1, Winter, at 22; Khor, Martin "South-North Resource Flows and Their Implication for Sustainable Development" (1994) Environment and Development Report, Third World Network, Penang.

<sup>78</sup> WEDO Official Report: World Women's Congress for a Healthy Planet (1992) supra note 21.

<sup>79</sup> UNICEF publications (1992) show that about 40% of the government spending in the developing world is devoted to the military and the servicing of debt. The net financial transfer between industrialized and developing nations over the last decade is billions of dollars from the poor to the banking systems of the rich nations.



disproportionate consumption of the world's resources. The Action Plan suggests a system of historical audits (1945+) calculating who benefitted from the natural resources of each state and assessing that benefit at an equitable cost against the debt of developed nations.

The difference analysis of the North and the South as to the systemic context in which the Montreal Protocol is found links to their difference in perspective on the Protocol. The issues that industrialized countries tend to see the Montreal Protocol as primarily an environmental agreement, whereas, the South sees it as an environment and development agreement remains unresolved.

Since the ozone layer depletion was caused by chemicals used by industrialized countries and significantly less by developing countries, the South took the position that the industrialized world made the problem and they should clean it up. In 1986, the base year for ODS consumption calculations, the developing world accounted for only approximately 15 per cent of world consumption of CFCs. The South's per capita consumption was 10 times less than the industrialized nations.<sup>80</sup>

Vandana Shiva comments that the financial resources that go into the Montreal Protocol Multilateral Fund, for transfer to the South are in effect subsidies for Dupont and others, not for the Third World.<sup>81</sup> Further, Northern companies abuse the system as well.

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<sup>80</sup> National Aeronautics and Space Administration (NASA) Press Release 92-159, 29 September 1992.

<sup>81</sup> Vandana Shiva, "A Common Future or Environmental Apartheid" (1992) The Observer of Business and Politics, New Delhi, Feb. 20, at 152. The funds tend to go through Southern governments to Northern companies

Northern business sells obsolete technology under the rubric of "transfer of technology". Northern banks, including the multilateral development banks earn interest on loans and credits given for the transfer of environmentally unsound technology and the resultant financial debts give the North more political and economic control over the Third World through IMF conditionalities and structural adjustment loans which push the Third World further into borrowing and debt. Then, pollution in the Third World is used as a reason for control through green "conditionalities".<sup>82</sup>

Equality rights jurisprudence on systemic disadvantage applied to the relationships between the rich North and poor South, suggests the need to recognize the important effects of the structural economic inequality in the world trade system and integrate environmental values into that system. Morris Miller, former Canadian Executive Director at the World Bank comments that: "there is now a widespread realization that the prevailing systemic arrangements are inimical to environmental objectives and action."<sup>83</sup>

Throughout the history of international environmental negotiations, including the Montreal Protocol, the principle and unchanged interest of the South has remained development. Its principle fear has been that the North is using environmental issues as a tool for further exploitation and oppression.

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who sell the new technology.

<sup>82</sup> V. Shiva, *ibid.*

<sup>83</sup> Miller, Morris (1991) Debt and the Environment: Converging Crises, New York, United Nations Publications at 141.

## CHAPTER THREE: THE MONTREAL PROTOCOL

"...with this agreement the worlds of science and public affairs have taken a step closer together (to) a union which must guide the affairs of the world into the next century"<sup>84</sup>

"...while imperfect, the agreement represents a heartening step forward."<sup>85</sup>

The Montreal Protocol is the implementing protocol under the 1985 Vienna Convention for the Protection of the Ozone Layer (Vienna Convention).<sup>86</sup> The Vienna Convention is a framework agreement that called on its signatories "to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer. They are to do this by:

- \* adopting agreed measures to control human activities found to have adverse effects;
- \* cooperating in scientific research and systematic observations;
- \* exchanging information in the legal, scientific, and technical fields; and,
- \* taking into account the needs of developing countries."<sup>87</sup>

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<sup>84</sup> Mostafa Tolba (1987) Address of the UNEP Executive Director (Sept.)

<sup>85</sup> J. A. Mintz, *supra* note 14, at 571.

<sup>86</sup> Vienna Convention (1985) 26 I.L.M. 1529, entered into force Sept. 22, 1988.

<sup>87</sup> Vienna Convention, *ibid*, Arts. 2-4; also see R.E. Benedick and R. Pronove, The Effectiveness of International Environmental Agreements, (1992) P. Sand (Ed.) Grotius, Cambridge, England.,

The Montreal Protocol, a "landmark step in the international environmental regime"<sup>88</sup> and a model for future multilateral agreements,<sup>89</sup> is an example of the international community moving with relative speed to action on a complex problem.<sup>90</sup> To do so, the international community had to overcome (i) a series of complex debates over development strategies and the respective responsibilities of the industrialized and developing world; (ii) the power of industrial groups' concerns; and (iii) a widespread lack of political will to give environmental protection a high priority.<sup>91</sup>

## Ozone Depletion

### a) The Science

Ozone in the stratosphere screens the earth's surface from ultraviolet (UV) radiation. While small amounts of UV radiation are essential for life, excessive amounts threaten the health of the planet.<sup>92</sup>

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<sup>88</sup> Gallagher, Anne, *supra* note 13, at 269; Elizabeth Barratt-Brown, "Building a Monitoring and Compliance Regime Under the Montreal Protocol," 16 Yale Journal of International Law 519 (1991), at 530.

<sup>89</sup> D. Bryk, *supra* note 14, at 297.

<sup>90</sup> D. Bryk, *ibid*, at 276-7. The ozone issue presents an example of where the international community recognized the need to move, based on scientific evidence, even before the problem was fully understood. The rapid speed with which agreements were made, the large number of Parties involved, and the unique ongoing approach are marks of progress.

<sup>91</sup> Montreal Protocol, *supra* note 12; Bryk, *supra* note 14, at 279.

<sup>92</sup> M. Tolba, (1992) *supra* note 4, at 33; Robin Round, "At the Crossroads - The Multilateral Fund of the Montreal Protocol" (1992) Friends of the Earth International, Amsterdam, at 5.

The catalytic reaction that destroys stratospheric ozone was described in 1974 in an important article by scientists Molina and Rowland.<sup>93</sup> They discovered that the ozone molecule is unstable and will degrade by reacting with a variety of substances that enter the atmosphere from natural or industrial sources.<sup>94</sup>

Then, reports of an ozone "hole" over the Antarctic in 1985<sup>95</sup> strengthened calls by scientists and environmentalists for action on the issue.<sup>96</sup> These calls culminated in the Report of the Ad Hoc working Group of Legal and Technical Experts for the Elaboration of a Global Framework Convention for the Protection of the Ozone Layer.<sup>97</sup>

The stratospheric chemistry of ozone and its interaction with other gases is complex. Although the ozone layer is also depleted by natural causes, these were balanced in the past by the ozone-creating processes in the atmosphere. The hope is that the layer will regenerate naturally once the overload of synthetic ozone depleting substances (ODS) is stopped.

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<sup>93</sup> Mario Molina and F. Sherry Rowland, "Stratospheric Sink for Chlorofluoromethanes: Chlorine Atom Catalyzed Destruction of Ozone," Nature 249 (1974) No. 5460, at 10-12.

<sup>94</sup> Environment Canada, How CFCs Eat up the Ozone Layer, Ottawa; and Primer, 1993, Ottawa.

<sup>95</sup> NASA Ozone Trends Panel Report, March, 1988, Florida; World Meteorological Organization (NASA/UNEP/WMO) Study (1985).

<sup>96</sup> Shea, "Protecting Life On Earth: Steps to Save the Ozone Layer," World Watch Paper 87, (1988); UNEP, Towards an Ozone Convention: A Look at Some Issues, U.N. Doc. EP/WG.69/5 (1981); "NRDC Sues to Require EPA to Issue Rules Limiting Emissions of Chlorofluorocarbons," 15 Env't Rep. (BNA) 1384 (Dec. 14, 1984).

<sup>97</sup> UNEP, U.N. Doc, EP/WG.78/8 (1983)

## b) Health and Environmental Effects

Depletion of the ozone layer adversely affects human health<sup>98</sup> and primary resources such as forest and agricultural production.<sup>99</sup>

The human health effects include increased rates of skin cancer, blindness through cataracts and damaged immune systems. It is estimated that a 10 percent reduction in stratospheric ozone would result in a 26% increase in non-melanoma skin cancers. A sustained 10 percent thinning of the Ozone layer is also expected to result in nearly two million new cases of cataracts per year globally. The threat to the body's immune system may well be the most serious effect of ozone depletion in that it increases the body's susceptibility to infectious diseases, including AIDS.<sup>100</sup>

Ozone depletion also indirectly affects human health through the impact of ultraviolet radiation (particularly UV-B) on global ecosystems. Animal and plant life are vulnerable to increased ultraviolet exposure resulting in stunted growth or lower yields. It is estimated that a one per cent increases in UV-B can result in a one percent reduction in world food

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<sup>98</sup> A Primer on Ozone Depletion, (hereinafter Primer) Environment Canada, Ottawa, 1993, researched by Friends of the Earth Canada; Sun Facts, Sun Awareness Committee, Canadian Dermatology Association, Vancouver, 1991; Healing The Sky: Strategies for Health and Ozone Layer Protection (hereinafter Healing), Friends of the Earth Canada (FoE) and the Canadian Nurses Association, Ottawa, 1993; Rivers, J. "The Canadian Sun Awareness Program" in Proceedings of the Symposium on Ultraviolet Radiation-related Diseases, Mar. 24-26, 1992.

<sup>99</sup> Healing, *ibid*; Greenpeace International, Effects of Ozone Depletion on Agriculture, June 1992, Toronto.

<sup>100</sup> Healing; Primer, *ibid*.

production.<sup>101</sup> UV-B radiation significantly affects the productivity of phytoplankton, the single-celled organisms at the base of the food chain.<sup>102</sup> Although most animals have greater protection from UV-B than humans because of their heavy coats and skin pigmentation, some can be affected by skin and eye tumours similar to those in humans. Marine animals in their developmental stage are also being threatened.<sup>103</sup>

### Objectives of the Montreal Protocol

The Montreal Protocol is the basic international instrument for "achieving the harmonization of policies, strategies and measures for minimizing the release of substances causing or likely to cause modifications of the ozone layer."<sup>104</sup> The objectives of the Protocol are "to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination on the basis of developments in scientific knowledge, taking into account technical and

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<sup>101</sup> Healing, *ibid*, p. 2.

<sup>102</sup> Primer, *ibid*, at 41; Smith, R. C. et. al "Ozone Depletion: Ultraviolet Radiation and Phytoplankton Biology in Antarctic Waters," Science, Vol. 255, Feb., 1992; Environment Canada, "Scientists Study UV Impacts on Aquatic Ecosystems" in National Water Research Institute Digest, Issue #11, Spring-summer, 1992, Ottawa, 1992.

<sup>103</sup> Primer, *ibid*.

<sup>104</sup> UNEP/OzL.Conv.2/3, p.4.

**economic considerations and bearing in mind the developmental needs of developing countries.**"<sup>105</sup>

Although the original wording included the phrase "equitably control", it was not clear what equitably meant. At the London meeting, the South insisted on the addition of the phrase bolded above to stress the development needs of the South at the same time as the Multilateral Fund was established. This reflects the interventions of China and India.

The Montreal Protocol is global in scope both in terms of the number of parties and in terms of the nature of stratospheric ozone as a common asset of humankind which is outside the borders of all countries.

The Vienna Convention commits parties to cooperate in research and development and transfer of technology and knowledge "taking into account in particular the needs of the developing countries."<sup>106</sup> These promises took shape in the Montreal Protocol which provides for:

- \* research, development, public awareness and information exchange in Article 9;
- \* a ten-year grace period for the implementation of control measures by developing countries in Article 5;
- \* a special financial mechanism to assist developing countries in Article 10; and

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<sup>105</sup> Montreal Protocol, *supra* note 12, preamble, bold indicates change by 'London Amendments'(in force 1992)

<sup>106</sup> Vienna Convention, *supra* note 86, Art.4.



\* the transfer of technology to developing countries "under fair and most favourable conditions" in Article 10A.

Reports of the annual Meetings of the Parties to the Montreal Protocol and the biennial Conferences of the Parties to the Vienna Convention indicate there has been considerable progress in achieving the objectives of the agreements. There has been intensive expanded international cooperation in research and monitoring, strengthening of the control measures, and the Multilateral Fund has been providing funding and technology transfer to developing countries.<sup>107</sup> Between 1986 and 1992, there was 40 per cent reduction in the use of ODS due primarily to the implementation of control measures in developed nations. World production in 1992 was estimated at 519,00 tonnes annually and decreasing rapidly.<sup>108</sup> More recently, in 1994, scientists have again reported a reduced rate of thinning of the ozone layer.<sup>109</sup>

### The Multilateral Fund

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<sup>107</sup> Benedick and Pronove, *supra* note 87, at 137-8.

<sup>108</sup> E. Barratt-Brown, *supra* note 88, at 287.

<sup>109</sup> Scientific Report presented at the 1994 Nairobi meeting of the parties, UNEP; also E. Barratt-Brown, *supra* note 88, at 287.

Participation by developing countries<sup>110</sup> is essential to the success of the agreement. Although there were some developing countries which signed the Convention initially, the most populous developing countries, China and India,<sup>111</sup> refused to sign until funding was provided in the Multilateral Fund. They took the position that it was up to industrialized countries to repair the damage they had done to the ozone layer with their synthetic chemicals. Furthermore, the South said it had other priorities for the few resources available to them - adequate food and water for example.

The London Amendments (in force 1992) to the Protocol specifically addressed this issue and stated in the Preamble an acknowledgement that special provision is necessary to meet the needs of developing countries including the provision of additional financial resources and access to relevant technologies. The Second Meeting of the Parties in London was very significant from the point of view of the participation of developing countries.<sup>112</sup> The revised Montreal Protocol establishes the Multilateral Fund of \$240 million (made permanent in Copenhagen) to assist developing countries to meet the requirements of the Protocol. It explicitly recognizes that "developing the capacity to fulfil the obligations (of developing countries)...to comply with the control measures ...and their implementation by

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<sup>110</sup> Classified as 'Article 5' countries under the Montreal Protocol according to their level of consumption of ozone-depleting substances.

<sup>111</sup> Respectively, 1/5 and 1/7 of the world population.

<sup>112</sup> The second meeting of the Parties to the Montreal Protocol, June 26-29, 1990 (London Report)/UNEP/OzL Pro.2/3. Eighty million US dollars was earmarked for equal distribution to India and China who had refused to join until funding was available.

those same Parties will depend on the effective implementation of the financial cooperation as provided by Article 10 and transfer of technology as provided by Article 10A."<sup>113</sup>

The Multilateral Fund is mandated to, and does, provide information, financial and technical cooperation, including the transfer of technologies to developing countries in order to enable their compliance with the control measures of the Montreal Protocol. Article 10A (London amendment) specifies that the technology transferred should be the best available environmentally safe substitutes and that the transfers should occur under fair and most favourable conditions. This was in response to developing country concern about incidents of unethical dumping of obsolete technology in developing countries. Further, the democratic governance structure of the Executive Committee of the Multilateral Fund in Art. 10.5 gives equal representation to both donor and recipient countries in the Fund's decision-making process.<sup>114</sup>

## Participation, Roles and Responsibilities

### a) Nation States

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<sup>113</sup> Ibid, Art. 5.

<sup>114</sup> Art. 10 s.5; Crossroads, supra note 91 at 3.

Participation is high in both the Vienna Convention and Montreal Protocol.<sup>115</sup> No reservations are permissible although there is a procedure for withdrawal.<sup>116</sup> Participation includes the major producers and users of ozone depleting substances (ODS): the United States, the European Community, Japan, USSR, Argentina, Australia, Brazil, Canada, China, India, Mexico, and Venezuela.<sup>117</sup>

As mentioned above financial and technical assistance was provided under the Multilateral Fund to encourage the participation of developing countries, particularly those with large rapidly expanding markets for ODS. The 10 year delay in application of the controls to the South served the same end. Another favourable factor influencing the participation of developing countries was the adoption by the second Meeting of Parties in 1990 of balanced voting procedures for major revisions and decisions under the Protocol, requiring a two thirds majority of parties, as well as separate simple majorities among industrialized and developing countries.<sup>118</sup> This was facilitated by financial assistance given to developing countries to participate in the process, including attendance at working party and intercessional meetings.<sup>119</sup>

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<sup>115</sup> As of August, 1993, the Vienna Convention had 125 States Parties, The Montreal Protocol had 122 States Parties and there were 66 ratifications to the London Amendments.

<sup>116</sup> Montreal Protocol, *supra* note 12, Arts. 18 and 19.

<sup>117</sup> E. Barratt-Brown, *supra* note 88, at 523. Countries are listed in descending order of percentage emissions.

<sup>118</sup> Art. 2, s.9(c).

<sup>119</sup> Benedick and Pronove, *supra* note 87. It is also interesting that governments who were not yet parties participated on an equal basis in the process of revising the original Protocol.

A developing country, as defined under Article 5 of the Protocol, has an annual calculated level of consumption of the controlled substance of less than 0.3 kilograms per capita on the date of entry into force of the Protocol for it. This definition allows many developing countries to increase already low consumption rates up to the 0.3 kg/capita level without penalty. Article 5 also allows developing countries to delay compliance with the control measures by 10 years. Further, in Articles 2.3 and 2.4, CFC producers are permitted to exceed the set limits by up to 15 per cent to "satisfy the basic needs of the Parties operating under Article 5".

The main aid donors are the United States, the United Kingdom, Japan and Germany. They initially favoured channelling finances through existing bilateral programmes or established instruments such as the World Bank. Furthermore, the United States opposed "additional" funding over and above normal aid quotas. When the Protocol was amended in London, June 1990, developing country parties (including Mexico and Venezuela) as well as countries that were not parties at the time (India and China) proposed that the new fund would be financed by an enforceable system of payments by developed countries and that the technologies transferred would be based on the principles of "free access and non-profit" to technology. Although the parties in London agreed to the idea of a multilateral fund it was without enforceable payments and not clearly "free access". Thus we see that there is a partial recognition of the different situations of developed and developing countries in the text of the agreement.

## b) Implementing Agencies

Implementing agencies attend all the various meetings under the Vienna Convention and the Montreal Protocol and implement the decisions of the Parties. There are three implementing agencies named in the agreement<sup>120</sup>: the International Bank for Reconstruction and Development (World Bank); United Nations Environment Program (UNEP); and the United Nations Development Program (UNDP). A fourth agency, United Nations Industrial Development Organization (UNIDO), was added under the provision "or other appropriate agencies."

UNEP, established in 1972 as a result of the first United Nations conference on the Environment in Stockholm, has been a driving force in creating the Vienna Convention and the Protocol,<sup>121</sup> and has been active in assisting countries to develop country programs under the Multilateral Fund. The Ozone Secretariat is housed within UNEP. UNDP deals with development assistance in a manner seen as democratic by the South - involving both lenders and recipients in the decision-making process. The World Bank, the world's prime development lender, is managed by the lenders and is therefore not considered democratic by developing countries. Within the Bank there is the Global Environmental Facility (GEF) which deals primarily with environmental projects. One serious problem with the Bank is the environmental devastation that the major loans from other parts of the Bank create. In

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<sup>120</sup> Art. 10, s. 5.

<sup>121</sup> E. Barratt-Brown, *supra* note 88, at 524.

fact, the World Bank is accused of being a larger part of the problem than of the solution.<sup>122</sup>

### c) Industry and ENGOs

Non-state actors, such as industry and environmental non-governmental organizations (ENGOs), may be represented at the Protocol meetings as observers, with the consent of the parties, or as members of national delegations.

Both industry and ENGO's were important in the history of the Montreal Protocol.<sup>123</sup> Although the Alliance for Responsible CFC Policy originally stated that the use of CFCs posed no significant immediate threat to health or the environment, they supported the U.S. ratification of the Vienna and Montreal agreements as anticipatory responses to a possible problem for which only global controls would be effective.<sup>124</sup> When Dupont (the world's largest producer of CFC's) announced it would accelerate research into substitutes and phase out all production of CFC's and halons before the turn of the century, environmentalists around the world launched a push for a complete ban on CFC's, halons, methyl chloroform, and carbon tetrachloride.<sup>125</sup> The American Natural Resources Defence Council (NRDC) had been very successful in influencing the US and, thereby, the international agenda. Friends

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<sup>122</sup> Vandana Shiva (1992) supra note 1.

<sup>123</sup> E. Barratt-Brown, supra note 88, and conversations of author with ENGOs and delegates, 1994.

<sup>124</sup> M. Somerset "An Attempt to Stop the Sky From Falling: The Montreal Protocol to Protect Against Atmospheric Ozone Reduction," Syracuse Journal of International Law and Commerce, Vol. 15 (1989), 391-429, at 409. The alliance, formed in 1980, included all five major producers and many users of Chlorofluorocarbons.

<sup>125</sup> E. Barratt-Brown, supra note 88, at 525.

of the Earth (FoE) and Greenpeace affiliates succeeded in enlisting the support of Great Britain, which had been the leading opponent of controls. Similarly, Greens in West Germany made it politically expedient in that country (a major CFC producer) to announce a 95% unilateral reduction and to use its position as head of the European Community to tighten the requirements for the European Bloc.<sup>126</sup>

More recently, Friends of the Earth has operated a joint ozone project with the Indian Centre for Science and Environment to ensure Southern NGO's have a voice at the meetings. Similarly, Greenpeace includes in its delegation representatives from Southern countries.

## Standards

Standards are needed to measure the performance of each state party in meeting the requirements of the control schedule. The Montreal Protocol's approach of setting goals and deadlines but allowing states the flexibility of choosing their own means of phase-out allows for diversity among states.<sup>127</sup> However, this flexible implementation complicates the process of establishing common standards of evaluation.<sup>128</sup>

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<sup>126</sup> E. Barratt-Brown, *ibid*, at 528-9.

<sup>127</sup> M. Somerset, *supra* note 124, at 400. Incentives are positive (aid) and negative (trade sanctions).

<sup>128</sup> Arts. 5 (developing countries); Flexibility was further increased by special exemptions for planned economies: Art. 2.6 (Russia exemption).



The standards must also undergo continuous improvement. Since scientific knowledge in this area has been rapidly increasing an ongoing review and amendment process was created. As the ozone-destroying effect of more substances becomes known they may be added, as controlled substances, under the Montreal Protocol. Or, as the impact of certain ODS becomes more clear the existing controls can be tightened. As controls are tightened or new substances added, standards must be revised.

The Parties agreed that each country's reduction obligation would be determined by a formula based on 1986 consumption figures. Developing countries with a low per capita use of CFC's and other ODS were granted a 10 year delay in meeting the reduction goals<sup>129</sup> and qualify for funding (grants) from the Multilateral Fund.<sup>130</sup>

Developing countries prepare a country program, in conjunction with the implementing agencies, before specific projects are submitted to the Multilateral Fund. Rather than one standard application form, programs and projects are tailored to each country. Standards for country programs and for the quality of projects presented are evolving in practice.

## Strengthening and Extending the Law

### a) Moral Suasion

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<sup>129</sup> Art. 5 and 2-2H.

<sup>130</sup> Art. 10 + 10A.

Moral suasion, while not a sufficient factor has been a significant factor as there has been a recognition of the planetary dangers of ozone depletion and the need for a global response. Although the science was uncertain at the beginning, increasing scientific information about the threat to the species has helped in improving the agreement.<sup>131</sup>

#### b) Control Schedule, Trade Sanctions and Aid Incentives

The drafters set out to encourage a global switch from ozone depleting substances (ODS) to substitutes by foreclosing as many markets as possible for ODS through trade sanctions on non-parties.<sup>132</sup> The trade provision allows trade in restricted chemicals among parties but limits trade with non-parties.<sup>133</sup> This operates as encouragement to join since trade in ODS is substantial. Trade restrictions originally only applied to the raw chemicals. Soon they will apply to products containing controlled chemicals and the parties are considering an extension to products made with controlled chemicals.<sup>134</sup> The aid incentives to join have been discussed above under the Multilateral Fund.<sup>135</sup>

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<sup>131</sup> The control schedule has been regularly strengthened. For example, the 1987 agreement would have reduced CFCs by 50% and frozen halons at 1986 levels. The London Amendments phased out both these substances and two more (Methyl Chloride + Carbon tetrachloride) by 2000.

<sup>132</sup> Arts. 2-2H and 6. Also, E. Barratt-Brown, *supra* note 88, at 532.

<sup>133</sup> Arts. 2.5 and 4..

<sup>134</sup> Copenhagen Amendment to Art.4.3 re products containing ODS and Copenhagen Amendment to 4.4 specifying that within 5 years of the effective date the parties will consider banning import of products mad with ODS.

<sup>135</sup> Arts, 5, 10 and 10A.

### c) Reporting, Monitoring and Information Exchange

Compliance with obligations in general is monitored through consultations among the parties and with the Secretariat, through the Executive Committee of the Multilateral Fund and through the deliberations of the annual Meeting of Parties. Compliance with Articles 2 and 4 is monitored and measured through the specific reporting requirements of Article 7.

Article 8 provided that the Parties were, at their first meeting to make procedures and institutional mechanisms for determining non-compliance with the provisions of the Protocol.<sup>136</sup> At the 1989 Meeting of Parties, the Parties established an Ad hoc Working Group of Legal Experts on Non-Compliance charged with elaborating the procedures on non-compliance. At the second Meeting of the Parties a non-compliance procedure was adopted,<sup>137</sup> the committee's mandate was extended and it was asked to review data submitted by the Parties, and report cases of non-compliance to the Meeting. The Third Meeting asked the committee to draw up an indicative list of measures which could be taken in respect to non-compliance bearing in mind the need to provide all assistance possible to countries (particularly developing countries) to enable them to comply with the Protocol.

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<sup>136</sup> Benedick as cited by Barratt-Brown, *supra* note 88, at 543. The European Community and developing countries resisted the efforts of the US and Scandinavia to adopt a tougher measure and extend trade sanctions to non-complying parties.

<sup>137</sup> Montreal Protocol Handbook, p. 48 re committee and p. 47 re procedure.

Parties provide annual statistical data to the Secretariat on production, import and export of controlled substances, including imports and exports to Parties and non-Parties.<sup>138</sup> There have been some problems regarding the completeness of data provided, both by industrialized and developing countries.<sup>139</sup> Developing countries experiencing serious reporting problems were invited at the 1991 Meeting<sup>140</sup> to ask for assistance from the secretariat.

Research cooperation and information exchange support countries' ability to implement the terms of the Protocol. They also serve as an informal monitoring mechanism.

#### Dispute settlement

Once a state is a party to the Montreal Protocol, there are no explicit penalties for non-compliance. There are no trade sanctions against parties as there are against non-parties.

There is no oversight by a global environmental organization or international court. The effectiveness of the International Court of Justice is limited by the fact that states must consent to being bound by the decision of any international body. Should they consent to jurisdiction but not obey the decision, there is no world enforcement mechanism to enforce

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<sup>138</sup> Montreal Protocol, Art.7 regarding report, Art. 9 regarding information.

<sup>139</sup> UNEP/OzL.Pro,3/L.4/Add.1. At the third Meeting of Parties to the Montreal Protocol (June 92) only 31 of 71 Parties had report complete data for 1986 which is the base year for calculating required phase downs of the original list of controlled substance, as cited by Benedick and Pronove supra note 86, at 140.

<sup>140</sup> Helsinki, 1989, Decision III/7.

decisions made.<sup>141</sup> The lack of compulsory jurisdiction of the International Court of Justice renders it unused by many states. As there is no binding court of general jurisdiction, treaties and conventions, must set up their own dispute resolution provisions.

Article II of the Vienna Convention provides that disputes between parties should be resolved by negotiation or, if this proves unfeasible, through the good offices or mediation of a neutral third party. The article further provides that a Party, at the time of its ratification of accession, may declare in writing that, for a dispute not resolved in mediation, it would accept one or both of the following: arbitration in accordance with procedures adopted by the Conference of Parties, or submission of the dispute to the International Court of Justice. Or, parties could submit to a conciliation commission, created by the parties to the dispute, the recommendations of which "the parties shall consider in good faith". While the Vienna Convention dispute settlement section applies to the Montreal Protocol as well, it has not been used per se.

In sum, the Montreal Protocol has reduced the rate of destruction of the stratospheric ozone layer. Its control schedule has been updated successfully, international cooperation in research and monitoring is taking place and the Multilateral Fund is providing funding and technical cooperation to developing countries. The trade sanctions successfully encouraged

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<sup>141</sup> Although the United Nations actions in Iraq in 1992 may be a sign of the evolution of a central enforcement power out of the United Nations Security Council, this power has not yet been used specifically for environmental purposes. Regarding the International Court, also see A. Kiss, "The Role of the Universal Declaration of Human Rights in the Development of International Law" (1988) United Nations, Bulletin of Human Rights, Special Issue, at 47.

countries to join. Whereas the flexible implementation allows diversity among nations it also creates problems of reporting standards and monitoring, discussed *infra*. Internal compliance mechanisms are still in evolution and do not include recourse to an international court of binding jurisdiction.

## CHAPTER FOUR: FEMINIST LEGAL PRINCIPLES

"The problem of survival of inequality of the sexes stands in complex relation to the problem of survival. Inequality in the division of labour assures replication of the model of aggression. Pathological aggression accounts for inequality. If these connections are ever to be unpacked, if we are serious about survival, we need a radically more serious approach to equality."<sup>142</sup>

This chapter outlines the feminist legal principles which will be applied to the Montreal Protocol and explains the basis of the analogy between the disadvantage of women relative to men and the disadvantage of the South relative to the North.

### Evolving Equality Theory

Current equality theory, including feminist theory, has been described as a "confused amalgam of different ideological biases and beliefs".<sup>143</sup> Colleen Sheppard attributes this to the transition in ideology from liberalism to post-liberal thought. Three stages of evolution in feminist equality theory are described by Lynn Smith:<sup>144</sup> 1) Treating Likes Alike; 2) Recognizing Difference with Special Rules; and 3) Focus on Effects/Results.

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<sup>142</sup> Scales, Ann (1986) "The Emergence of a Feminist Jurisprudence: An Essay," 95 Yale Law Journal 1373, at 1382.

<sup>143</sup> Sheppard, Colleen, "Equality, Ideology and Oppression: Women and the Canadian Charter of Rights and Freedoms" (1986) in Charterwatch: Reflections on Equality Toronto, Carswell, at 195.

<sup>144</sup> L. Smith, (1989) supra note 30, "What is Feminist Legal Research?" at 71.

The first phase of feminist analysis, "treating likes alike," is that of ensuring formal equality of the disadvantaged group. This classic principle that likes should be treated alike, is a basic tenet of Western philosophy.<sup>145</sup> The goal is to have the same rules apply to everyone and to have the rules enforced the same way for everyone. This first stage is consistent with classical liberalism in that it seeks to maximize the individual opportunity and social, cultural and economic background is considered irrelevant. The overall objectivity and general principles of the legal system are accepted and analysis consists in finding those exceptional areas where the law singles out women for disadvantageous treatment.<sup>146</sup>

The content of this principle - who is alike and who isn't - has been given by the courts on a case by case basis. The cases are inconsistent.<sup>147</sup> Even where the language has been neutral judges have had difficulty deciding in favour of equality. The long struggles by women to obtain admission to the legal profession<sup>148</sup> and to be recognized as "persons" for the purpose of being appointed to the Senate,<sup>149</sup> are situations where gender neutral

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<sup>145</sup> Aristotle, Ethica Nichomacea, V.3.1131a-1131b cited in Peter Westen "The Empty Idea of Equality" (1982) 95 Harvard Law Review 537, at 543. Westen argues that the principle 'likes should be treated alike' is empty of content. For equality to have meaning it must incorporate some external values as to what people and treatments are alike.

<sup>146</sup> L. Smith, *supra* note 19, at 75.

<sup>147</sup> For example, in R. v Drybones the Supreme Court decided that Mister Drybones should be treated no more harshly than others (non-Indians) under the law. In contrast, in Attorney General of Canada v. Lavell, the same court decided that aboriginal women were not like aboriginal men for the purposes of maintaining their status upon marriage to a non-aboriginal.

<sup>148</sup> M. J. Mossman, "Feminism and Legal Method: The Difference It Makes," (1987), 3 Wisconsin Women's Law Journal 147; 13 Australian Journal of Law and Society 30.

<sup>149</sup> British Privy Council, Reference re Meaning of the Word "Persons" in s. 24 of the B.N.A Act, 1928, S.C.R. 276.



language had been interpreted in a discriminatory way. Although it was ultimately recognized that women were the "same" as men in their ability to participate in public life, there is nothing in legal logic itself which explains the turnaround of the judges. Thus "the conclusion becomes inescapable that what had changed was not...the modes of reasoning appropriate to lawyers, but the conception of women and women's position in public life held by the judges."<sup>150</sup>

The variability of judicial interpretation is also found in jurisprudence as to what is "justifiable discrimination"<sup>151</sup> toward a reasonable objective. International human rights law, like Canadian law, assumes that distinctions may be justifiable in certain circumstances. A distinction is discriminatory if it (a) has no objective and reasonable justification, or pursues no legitimate aim, or (b) if there is no reasonable relationship of proportionality between that aim and the means employed to attain it. Yet, what is considered a reasonable objective varies with social attitudes. Historically, protecting women from the vulgarities of the public forum was considered a valid objective even where it resulted in disadvantage for women. The notion of valid objective was employed by the Court in Bliss v. Attorney General of

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<sup>150</sup> Mossman, Mary Jane, *supra* note 147, citing Sachs and Hoff Wilson 1978:41. Also, Andrews et al. v. Ontario (Minister of Health), unreported, Ontario Supreme Court, March 7, 1988, held that lesbian partners are not spouses for the purposes of OHIP, even though the plaintiffs had lived together for nine years, were raising two children and had conventionally commingled estates. Judge McRae ruled that lesbian couples are not similarly situated to heterosexual couples because they do not have the same procreative capacities or family responsibilities. Feminist critics observe that as a member of the elite male power structure, the judge could not have ruled otherwise without ruling against his own interests in the sexual/ reproductive control of women, Eaton, M. and C. Petersen, "Andrews v. Ontario: Case Comment", 2 CJWL 416.

<sup>151</sup> Bayevsky, Anne (1986) "The Principle of Equality or Non-discrimination in International Law: Implications for Equality Rights in Canada" in Smith et al. Righting the Balance: Canada's New Equality Rights, The Canadian Human Rights Reporter Inc., Saskatoon, 117-143, at 122.

Canada<sup>152</sup> to deny regular unemployment benefits to a pregnant woman who was willing and able to work. The court concluded that the challenged section formed an integral part of a legislative scheme which in its course provided benefits to (some) pregnant women and if inequality was created it was due to nature not the legislation.

Bliss is an excellent example of formal theory of equality focussing only on the even-handedness of the application of legal rules and treating as legally irrelevant the experience of the class of victimized individuals. Internationally, Professor Cook examines similarly mixed results and concludes that the International Human Rights Tribunal has not fully recognized women's human rights and that "is due in part to the entrenched perceptions of women's role in society that may cause courts to view discrimination merely as differential treatment based on 'objective and reasonable criteria'."<sup>153</sup>

Catherine MacKinnon notes that under the difference theory when the question is asked "What are women equal to?" It is answered "Equal to men to the extent that they are like men."<sup>154</sup> Pregnant women are then unavoidably found to be different from men and thus presumptively inferior.

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<sup>152</sup> Bliss v A.G. of Canada (1979) 1 S.C.R. 183, re Unemployment Insurance Act, 1970-71-72, c. 48.

<sup>153</sup> Cook, Rebecca, "International Human Rights Law Concerning Women: Case Notes and Comments," 23 Vanderbilt Journal of Transnational Law 779, 1990, at 780.

<sup>154</sup> MacKinnon, Catherine, (1987) "Difference and Dominance: On Sex Discrimination" in Feminism Unmodified, Harv. Univ. Press, Boston. Also see Re Blainey and the Ontario Hockey Association, (1986), 54 O.R. (2d) 513, 26 D.L.R. (4th) 728 (Ont. C.A.) where a female athlete is allowed to play on a boys hockey team; however, such a case does nothing to address social and political causes like lack of funding for women's sports.

The second stage in equality rights definition, "differently equal," is sometimes characterized as "extended liberalism."<sup>155</sup> Under extended liberalism, rules or systems which have the effect of keeping women in a particular role or of denying them physical protection may be questioned. Examples of this phase of analysis include reforms to the rape or sexual assault provisions of the criminal code.<sup>156</sup> In this stage, one explores the implications of differences between men and women. It becomes clear that it makes no sense that women should be penalized for perpetuating the species and rearing the next generation.<sup>157</sup> To place value on this difference, special rules were made. The special protection rule, an exception to the "equal = same" rule, emerged to shore up the sameness theory which was not working well. It goes beyond formal equality to a concern with substantive equality; nevertheless, there is still a basic acceptance of the "general principles" of the legal system.

Colleen Sheppard concludes that even this modified liberalism is inadequate. She criticises the focus on procedural rather than on substantive equality: "It implicitly accepts the dominant world view as universal; and it only helps those members of an oppressed group

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<sup>155</sup> L. Smith, *supra* note 19, at 80.

<sup>156</sup> Boyle, Christine "Sexual Assault and the Feminist Judge" (1985), 1 Can. Journal of Women and the Law 93; Morgenthaler v. The Queen (1988) 1 S. C. R. 30.

<sup>157</sup> MacKinnon, Catherine (1986) "Making Sex Equality Real" Righting the Balance: Canada's New Equality Rights, Smith et. al. (ed.), The Canadian Human Rights Reporter, Saskatoon, at 39: "It began to strike some that there are problems with an equality principle that has apoplexy when confronted with a distinction between two groups of people, when that distinction, as in the case with pregnancy, has been at one group's systematic expense." citing GE Electric Co. v Gilbert, 429 U.S. 124, at 135 (1976); Geduldig v Aiello, 417 U.S. at 496-7 (1974; Newport News Shipbuilding and Dry Dock Company v Equal Employment Opportunity Commission, 51 U.S.L.W. 4837 (1983), and Bliss v A.G. of Canada (1979) 1 S.C.R. 183.

that can emulate and adopt the standards, values, and characteristics of those who dominate in society."<sup>158</sup>

The third stage of feminist theory,<sup>159</sup> "equality of result," is less focused on equal opportunity and treatment and more focussed on equality of outcome. If women are people deserving of equal respect and dignity why are they not treated that way? This requires examination of inequalities of condition rooted in social and historical imbalances.<sup>160</sup> Third stage equality theory postulates that inequality is a question of the systematic relegation of an entire group of people to a condition of inferiority and attributing it to their nature.<sup>161</sup>

Phase three begins with a scepticism about the neutrality and universalizability of the existing legal system. It questions our laws and practices in fundamental ways, as well as the reasoning process by which we understand and apply them. It does so from the premise that the existing system does not embody women's perspective.<sup>162</sup> In fact, that the use of the male as the standard person and the male point of view as the correct perspective makes the

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<sup>158</sup> C. Sheppard, *ibid*, at 223.

<sup>159</sup> L. Smith, *supra* note 19, at 85.

<sup>160</sup> Although feminist equality theory is sometimes considered as a branch of CLS, women's issues are often ignored within CLS as they are in the liberal system of law which CLS criticises.

<sup>161</sup> MacKinnon, *supra* note 157, at 40+41.

<sup>162</sup> MacKinnon, Catherine (1982) "Toward Feminist Jurisprudence" 34 *Stanford Law Review* 703, at 721; and Mossman, (1986) *supra* note 148. Also C. MacKinnon (1986) "Making Sex Equality Real" *supra* note 157; and, (1987) "Difference and Dominance: On Sex Discrimination," *supra* note 156.

law inherently unfair to women in ways that are not immediately visible to those who have been trained in that system.

Sheppard identifies three central features of liberal thought: 1) it is individualistic; 2) it contemplates a non-interventionist state and 3) it has faith in the neutrality of the "rule of Law".<sup>163</sup> In contrast, post-liberal theorists question the basic liberal precepts such as the autonomy of individuals, the free operation of the market and the neutrality of the rule of law.<sup>164</sup> They argue that there is no logical reason that many decisions should go either way except for the values of the decision-makers. An upper-middle-class white male will most likely apply the bias of his class, race and sex in his decisions. Thus, law can be seen as a mask for exploitation and injustice because of its (false) appearance of neutrality.

This post-modern phase then attempts to integrate the first (identical treatment) and second (differential treatment) phases of analysis into a new reconstructed (post-liberal) body of law. Thus, feminists reject the allegation that they are trying to have it both ways - to be treated both the same and different from men. They say that if the legal system had been created by women to consider women's needs as human needs, with men as necessary appendages to "human" (women's) lives, it would look very different from the current model.

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<sup>163</sup> Sheppard, *supra* 143, at 223. Western liberalism is seen as viewing the world in terms of a series of dualities which conflict such as individualism and altruism, or autonomy and community. Liberalism is thought to privilege one side of each duality, e.g., individual autonomy over community. As individualism minimizes the importance of interdependence and relationships, liberal legal systems have difficulty dealing with group rights.

<sup>164</sup> J. S. Russell, "Critical Legal Studies," 18 *Ottawa Law Review* 1 (1986); Altman, Andrew (1990) *Critical Legal Studies*, Princeton, Princeton University Press, at 3.

The third stage, then, requires the development of a new standard of human person which is actually inclusive of both male and female.

Angela Miles describes this break with the current norm as being quite complicated.<sup>165</sup> She points out that new laws, if they are not to reinforce the differences and disadvantages that they purport to redress, must also radically revalue female activities and concerns as they break with the male norm. For example, to alleviate women's subordination, legal reform which recognizes women's special role in reproduction must also recognize the enormous economic contribution of this work. That is, to make women's human centred activities - which are often burdensome yet unrewarded - a central social priority and responsibility. Miles elaborates this point in saying:

"In the struggle for legal reform, as elsewhere, a synthesis of the principles of equality and specificity is thus essential to feminist politics. An effective struggle for equality requires a break with the notion of male as the norm - a break which can only be achieved if female specificity is recognized and revalued. Surpassing the male norm in turn makes it possible to take women's struggle for legal reform and equality beyond the strategy of assimilation to reflect alternative human values and affirm a new society."<sup>166</sup>

Just as a new standard would create a different substantive law, the methodology would also be different. This method, for example, is interdisciplinary and recognizes the effect of the social and economic context of women's lives. This method examines all areas of law and questions their assumptions on the basis that women's subordination did not

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<sup>165</sup> A. Miles, *supra* note 168, at 66-7.

<sup>166</sup> A. Miles, *ibid.*

happen by chance and disadvantage is systematically reinforced in all aspects of the legal system. Further, there is the difficulty of trying to universalize the experiences of white women to all women regardless of differences of race, class, physical ability, or sexual orientation. Thus we see that the very idea of universality is questioned.

### Evolution of the North-South Analogy

This thesis makes an analogy between the relationship of women to men and the relationship of the South to the North because of their similar relative economic, social, political, and legal disadvantage. Southern equality rights find authority in United Nations human rights instruments, the Stockholm Declaration, Sustainable Development literature and the international instruments resulting from UNCED.<sup>167</sup>

As feminist legal theory has its historical origins in human rights law it recognizes the equal and inalienable rights of all members of the human family<sup>168</sup> (including economic and social rights ) which are found in the UN instruments.<sup>169</sup> Visionary feminist theorists see

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<sup>167</sup> Reference re the Validity of s. 32 and 34 of the Workers Compensation Act 1983 (Nfld) (1989), 56 D.L.R. (4th) 765; 1 S.C.R. 922 (Can.) and R. v. Turpin, supra note 176.

<sup>168</sup> The Universal Declaration of Human Rights, supra note 4.

<sup>169</sup> Bruce Feldthusen "The Gender Wars: 'Where the Boys Are'" (1990), 4 CJWL 66 states "Feminists are asking men to see the world from a perspective other than their own, and in addition, to make room for women and others who can. At this stage it is unclear how many men can comprehend the demand, let alone implement it."

interconnections among all forms of "oppression"<sup>170</sup> and the need to balance competition with cooperation and to limit dominant exploitative behaviours. Global environmental documents agree on the need to address exploitation. The Stockholm Declaration came into being precisely to counter existing exploitative development in the South. It takes a specific stand against racism, colonialism and other forms of oppression and foreign domination. The document speaks in terms of cooperation and assistance, equity for future generations, integrated, coordinated approaches and maximum social, economic and environmental benefits for all.<sup>171</sup>

In international human rights scholarship, there has been discussion of the indivisible nature of equality and the linkages between different grounds of discrimination.<sup>172</sup> The Stockholm Declaration, incorporates some words which reflect a concern with addressing patterns of oppression and seems to link different categories of oppression such as colonialism and racism.<sup>173</sup> The popular definitions of the terms 'North' and 'South' add

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<sup>170</sup> Jacqueline Pearce, (1989) "Approaches in Environmentalism and Feminism," Undercurrents Vol. 1, No. 1, at 2.

<sup>171</sup> Chronologically the relevant provision of the document are: 24; 9+20; 2; 13; and 5+15.

<sup>172</sup> Professor Trindade, *supra* note 51, at 563, notes that the General Assembly has implied a global analysis when they 1) proclaimed the indivisibility of all human rights in the 1968 Teheran Conference on Human Rights, 2) stated that human rights issues are to be examined globally in Resolution 32/130, adopted by the U.N. General Assembly in 1977 and 3) stated that protection of one category of rights should not exempt States from safeguarding the other rights. (UNGA Res. 41/117 (1986))

<sup>173</sup> Stockholm Declaration, *supra* note 20, Principle 15 states that all planning projects designed for colonialist or racist domination must be abandoned. Sexism is not mentioned except perhaps as "other forms of oppression".



credence to this analogy. The Brandt Report<sup>174</sup> generally defined them as synonymous with rich and poor, developed and developing and pointed out that the South's solidarity in global negotiations stems from the awareness of being dependent on the North and unequal with it.<sup>175</sup>

The analogy builds on the work of Canadian scholars who note the trend to linking the various grounds of discrimination in the Canadian Charter of Rights and Freedoms.<sup>176</sup> Although the fact that a series of grounds appear in the same section does not necessarily link them in other respects,<sup>177</sup> in practice, the jurisprudence of equality is often applied to the various grounds as if they were related. For example, one of the key cases on equality rights in Canada, the Re Andrews case<sup>178</sup>, was not fought on any of the grounds specifically mentioned in the Charter. It was decided on the basis of analogy to the specified grounds. The feminist organization LEAF was granted leave to intervene due to their interest in the evolution of the jurisprudence on equality.

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<sup>174</sup> The Independent (Brandt) Commission on International Development Issues, (1989) North-South: A Program for Survival Cambridge, Mass: MIT Press.

<sup>175</sup> Najam, Adil, *supra* note 18, at 252.

<sup>176</sup> Constitution Act 1982, Canadian Constitution Part 1, s. 15(1) which provides that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. "

<sup>177</sup> Black, William (1986) "A Walk Through the Charter" in Smith et al. Righting the Balance: Canada's New Equality Rights, The Canadian Human Rights Reporter Inc., Saskatoon, at 56 notes that it "seems that section 15 sets out a series of related equality rights rather than a single right although the exact number of rights and the relationship between the different concepts is still a matter of conjecture."

<sup>178</sup> Re Andrews (1989) *supra* note 175.

In fact, Lynn Smith argues that a new paradigm is created by the Charter. She adds the factors of : 1) the non-exhaustive list of protected grounds in s.15; 2) section 15's broadly worded equality guarantees; 3) its express recognition of the legitimacy of affirmative action programs in section 15(2); and 4) its recognition, in other parts of the Charter, of rights pertaining to groups as well as individuals. This cumulative total adds up to a result which is more than a change of one system of rules to another. Instead it manifests a paradigm shift.<sup>179</sup> The new approach or paradigm is that: the analysis necessary to solve inequality problems relating to each of those groups is a model for the solution of all inequality problems.

The Supreme Court also dealt with analogous grounds in Reference re Sections 32 and 34 of the Workers Compensation Act 1983 (Nfld.) where it specified that the "enumerated" and "analogous" grounds are the only grounds for relief under s. 15. Similarly, in Turpin the court reaffirmed a broad and purposive approach to interpreting equality under the Charter.<sup>180</sup>

The operation of the male-female, North-South analogy encounters some challenges as does the application of these principles to situations of gender relations. It is important to acknowledge that applying this feminist legal analysis to environmental law is not without

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<sup>179</sup> Smith, Lynn (1986) "A New Paradigm for Equality Rights", Righting the Balance: Canada's New Equality Rights, Saskatoon, The Canadian Human Rights Reporter, 354, at 355. Paradigm shifts "occur when there is a shift in which the world becomes perceived in a different way, so that new problems and methods must replace old ones."

<sup>180</sup> Ref. re Validity (1989), 56 D.L.R. (4th) 765; 1 S.C.R. 922 (Can.); R. v. Turpin supra note 176.

limitations. These challenges include issues such as the difficulty of developing appropriate tests and the proper timing of state intervention which are discussed in Section II. It is important to note here the need to guard against piecemeal change that inadvertently hurts rather than helps women. For example, a law requiring exactly the same financial responsibility for child support would be unjust if the mother earns much less than the father. It would be a much higher proportion of her income. Even a well-intentioned financial reform becomes unjust if the economic context of the parties is not taken into account. The danger of piecemeal change which may inadvertently hurt, rather than help, the disadvantaged group has been raised in the context of the Montreal Protocol. Some say that the very success of the agreement contributes to the complacency of the North and less likelihood that the larger economic injustice will be taken into account.

## Feminist Legal Principles and the North-South Analogy

### a) Inclusive Cooperation

As noted above, the South generally feels excluded, economically exploited, and undervalued by the North. The Montreal Protocol will be examined for the extent to which it reflects the feminist legal principle of inclusive cooperation. The test would be whether the disadvantaged party(ies) actually does participate in a given situation (agreement) and what factors encourage or discourage that participation.

## b) Focus on Outcomes or Results

Secondly, the Montreal Protocol will be examined for the extent that it is results-oriented. In human rights law, nationally and internationally, the focus is not only on formal equality but also the resulting effect on the disadvantaged group.<sup>181</sup> Formal equality ensures that the rules for the two groups appear to be the same. As discussed above however, since formal equality guarantees do not translate to equality for women in their daily lives, feminist equality theory insists on a shift from focus on formal procedural guarantees to a focus on outcomes or effects.

The Supreme Court provides examples of consideration of the social power of groups and focus on equal results in Brooks v. Canada Safeway Ltd. and Janzen v. Platy Enterprises Ltd.<sup>182</sup> In his judgement for the court in Brooks, Justice Dickson, noted the remedial function of anti-discrimination provisions and found that the effect of denying short and long-term benefits to pregnant women was to inappropriately put the major cost of procreation on women. He also found that a benefits package which denied pregnancy had incorrectly adopted a standard of maleness as the norm. In Janzen, Chief Justice Dickson, for the court, noted that sexual harassment involves the use of a position of power to import sexual requirements which negatively alters the work conditions of employees forced to contend with

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<sup>181</sup> A. Bayevsky, *supra* note 48. For example, 'preferences' may be found discriminatory (even in the absence of discriminatory intention) if they have the effect of impairing equality.

<sup>182</sup> Brooks v. Can. Safeway Ltd. (1989), 1 S.C.R. 1219, Janzen v. Platy Ent. Ltd. (1987) 3 D.L.R. (4th) 32, (1989) 1 S.C.R. 1252.

sexual demands.<sup>183</sup> He further notes that women's lesser power to men can be perpetuated through the difference in economic power of the sexes.

Formal equality between North and South may be necessary but is not sufficient in legal feminist analysis. While one may wish to ensure that the theoretical rules for the two groups are the same, it is necessary to examine what happens in actual fact. In this analogy, the facts to examine would be the relative poverty between the North and South, or their specific ability to implement a particular agreement. The WCED report notes that the current international economic system tends to decrease inequality in the world and increase the numbers of poor and hungry. This comment indicates a focus on results - substantive equality - and a willingness to question the very basis of law and legal reasoning.

#### b) Contextual Critique

Thirdly, the Montreal Protocol will be examined for evidence of a contextual analysis of the disadvantage of the South. Feminist equality theory shares with Critical Legal Studies a scepticism of the neutrality of the law. Thus feminist legal theory calls for an analysis of the historical social and economic context of systemic inequalities.<sup>184</sup>

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<sup>183</sup> Dickson in Janzen, *ibid*, at 1281.

<sup>184</sup> Greschner, Donna "Judicial Approaches to Equality and Critical Legal Studies," Equality and Critical Legal Studies, M. J. Mossman, "Feminism and Legal Method," *supra* note 148.

The Supreme Court has attempted to examine the relative position of women in their social, political and legal context and link that analysis to the issue at hand.<sup>185</sup> In its interpretation of Canada's new Charter of Rights and Freedoms,<sup>186</sup> the Supreme Court made some important statements about the nature of equality. In the Andrews case,<sup>187</sup> the analysis in Justice McIntyre's dissent, which was supported by other members of the court, points out that equality is relative and is discerned through comparison with the condition of others in the social and political setting.<sup>188</sup>

Justice Wilson, agreeing with Justice McIntyre's interpretation of s. 15, goes further to provide a test to establish what would be an analogous ground to those enumerated under the Charter. She states that the determination must be made in the context of "the place of the group in the entire social, political and legal fabric of our society". Thus non-citizens are an analogous category (to the enumerated grounds) because, relative to citizens, they lack political power. She specifies that s. 15 is designed to protect those groups who suffer social,

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<sup>185</sup> In the Andrews, (infra note 173) Brooks and Janzen (note 182) series.

<sup>186</sup> However, the majority of the judges who were on the court at that time (1980's) are now no longer there and it remains to be seen if the post-liberal reasoning will survive as anything more than a limited extension of liberalism.

<sup>187</sup> Re Andrews and the Law Society of British Columbia et. al. (1986) 27 D.L.R. (4th) 600; (1989) 1 S.C.R. 143.

<sup>188</sup> In Re Andrews, *ibid*, at 164 Justice McIntyre also stated that: 1) there is no fixed rule or formula (p. 168); 2) any equality provision should be interpreted in a broad and generous manner (p. 175); 3) the law should not, because of irrelevant personal differences, have a more burdensome impact on one individual or group than on another (p. 171) and 4) recourse to the Charter should be only available to those of a "discrete and insular" minority (p. 183).

political and legal disadvantage in society.<sup>189</sup> Justice Wilson further elaborates in R. v. Turpin<sup>190</sup> that one must examine the social, political and legal position of the group in question outside of the particular law in question. Also in Turpin, Justice Wilson notes a number of indicia of discrimination: stereotyping, historical disadvantage, and vulnerability to political or social prejudice.

If one examines the position of women in the social, political and legal fabric of our Canadian society, we see that they are systematically disadvantaged. For example, Mary Jane Mossman (1989) analyzed the existing legal system in its application to women<sup>191</sup> and concluded that the law maintains the status quo which is male-biased. This highlights the need to develop a new human dignity standard that recognizes the characteristics and contributions of both sexes. This new standard would reflect alternative human values and affirm a new society.<sup>192</sup>

Feminist contextual analysis requires the development of a new standard which does not reinforce the differences and disadvantages that it purports to redress but, instead, recognizes the characteristics and contributions of both North and South. This would mean

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<sup>189</sup> Re Andrews, *ibid*, Madame Justice Wilson at 152-5. Section 15 provides rights "without discrimination and, in particular without discrimination based on race, national or ethnic origin, colour, religion, sex age, or mental or physical disability." Constitution Act, 1982.

<sup>190</sup> R. v. Turpin 1 S.C.R. 1296 at 1333.

<sup>191</sup> M. J. Mossman, *ibid*.

<sup>192</sup> Angela Miles (1985) "Feminism, Equality, and Liberation" 1 Canadian Journal of Women and the Law 42, at 67.

that one must radically revalue the South's activities and concerns as they break with the Northern norm. The female-South parallel is not perfect here because the South is not physiologically different from the North as women are from men in relation to reproduction. However, an analogy could be made to the resources, particularly biological resources of the Rainforest, which still remain in the South, and which, produce oxygen for the North. Such an invaluable environmental asset or environmental space is not valued in conventional economics. Legal reform which recognizes the South's special role in environment protection would also recognize the enormous economic contribution of protecting this biodiversity and value it as a central priority. Southern specificity would have to be recognized and revalued.

If one examines the social, political and legal fabric of global society, using such sources as the Human Development Index published by UNEP, it is clear that "developing" countries are at a disadvantage. Like women, they are not a numerical minority, but suffer lack of political and economic power. Historically, under colonialism "developing countries" were not considered able to rule themselves. Now, like women in Canada, developing countries have formal legal equality but less access to economic resources within a system that operates according to norms and standards which continue to place them at a disadvantage. The WCED could be said to take a contextual legal analysis when it speaks in terms of disadvantaged Third World countries and advantaged First World countries and notes that "old" existing approaches to environment and development are not able to address this global crisis and more rapid change is needed.<sup>193</sup>

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<sup>193</sup> WCED, *supra* note 1.



Justice Wilson's <sup>194</sup> indicia of discrimination: stereotyping, historical disadvantage, and vulnerability to political or social prejudice also apply to North-South relations. Stereotyping is brought into play against developing countries when they are characterized as inefficient or lazy and therefore not deserving of wealth, or even subsistence. The cooperative sharing of wealth, as is found in some Southern communities is not valued. Under the liberal ideal, wealth goes only to the smart and the quick which may not be the main value in other societies. The South is vulnerable to political and social prejudice as states who depend on world peace and fair terms of trade. Their rights are infringed when toxic waste is dumped on them or population programs are implemented inappropriately. The industrialized North with its greater military power could use coercion to gain its ends.

The nature of feminist legal analysis leads to a redefinition of both the substantive law and also the legal method at the same time. To question both at the same time implies a long struggle and an iterative process of development of the new norms. The analogy to North-South relations implies reform the content and structure of international environmental law and institutions.

Feminist legal theory also questions the idea of universality.<sup>195</sup> The theory identifies the need to ensure that diversity within categories be respected. For example, Black women

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<sup>194</sup> B. Wilson in R. v. Turpin, supra note 176.

<sup>195</sup> K. Crenshaw, "Whose Story is it Anyway? Feminist and Antiracist Appropriations of Anita Hill" Toni Morrison, ed., Race-ing Justice, En-gendering Power (Pantheon: 1992) at 402. supra note; Pearlman, supra note 40.

are not only a subcategory of women in general since the experience of Black women is very different from that of white women precisely because they are experiencing discrimination on two grounds at the same time.<sup>196</sup> It is necessary to avoid universalizing the experiences of white women to all women regardless of differences of race, class, ability, or sexual orientation. The Montreal Protocol recognized this same difficulty in generalizing among Southern countries. There is a wide variety of climates, social and economic realities among Southern states and any new norm would need to take this diversity into account.

#### d) Amelioration of Disadvantage

Lastly, the Montreal Protocol will be examined for the extent to which it reduces the gap between the privileged North and the disadvantaged South. Feminist legal theory indicates that reducing the gap, or amelioration of disadvantage necessarily involves both redistribution of social resources to women and redistribution of social and individual responsibility and labour to men. Miles points out that the new framework should be careful not to entrench reproduction and support activity as female; but instead, break down sexual divisions.<sup>197</sup> Amelioration of disadvantage of the South necessarily involves a redistribution of resources to the South and redistribution of responsibility and labour to the North. The new framework would have to be careful not to entrench certain economic or ecological support activities as Southern; but instead, break down North-South divisions. Without a

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<sup>196</sup> K. Crenshaw, *ibid*, at 402.

<sup>197</sup> A. Miles, *supra* note 160.

cohesive framework in which to locate these new perspectives (such as sustainable development), piecemeal changes may very well reinforce rather than redress inequalities..

It is very difficult to derive and articulate "tests" which will neatly solve feminist legal equality problems<sup>198</sup> or North-South equity problems which will neatly apply to restructuring society and redistributing global resources to meet human needs more successfully than has previously been the case. Catherine MacKinnon's test<sup>199</sup> is difficult enough when applied to men and women within one society. Modified for North-South issues it reads: "Does the legal policy or practice in question contribute to the maintenance of a subordinate or a deprived position because of developing country status." If the answer to the question is "no" then the policy or practice in question is ameliorative of disadvantage.

Finally, the principle of amelioration of disadvantage could be considered "affirmative action." If so, what are the limits to its use? Anne Bayefsky provides a list of conditions for human rights affirmative action plans drawn from international jurisprudence. Affirmative action measures must be: 1) applied with the consent of the members of the group; 2) undertaken with the sole purpose of achieving equality; 3) temporary and discontinued when the goal is achieved so as not to result in the maintenance of unequal or separate standards.<sup>200</sup>

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<sup>198</sup> L. Smith, (1989) "What is Feminist Legal Research?" supra note 19; and, M. J. Mossman (1994) "The Paradox of Feminist Engagement with Law" in Feminist Issues: Race, Class and Sexuality, Prentice Hall, Toronto.

<sup>199</sup> MacKinnon, Catherine (1989) Toward a Feminist Theory of the State, supra note 39, at 248.

<sup>200</sup> A. Bayevsky, supra note 48 at 136.

**SECTION II: FEMINIST LEGAL PRINCIPLES AND ROLES, STANDARDS, STRENGTHENING AND DISPUTE RESOLUTION IN THE MONTREAL PROTOCOL**

**CHAPTER FIVE: ROLES AND RESPONSIBILITIES**

"The time has come to break out of past patterns. Attempts to maintain social and ecological stability through old approaches to development and environmental protection will increase instability. Security must be sought through change."<sup>201</sup>

The roles and responsibilities of states and individual is the first key aspect of environmental agreements identified by the WCED Legal Experts Group as needing reform. The Montreal Protocol questions whether all states should have exactly the same roles and responsibilities under the agreement.

Including the South

a) Redefining North-South

The Montreal protocol redefines North-South roles and responsibilities. Both the Vienna Convention and Montreal Protocol reflect the basic assumption of international law that each state regardless of size and wealth is formally equal with one vote.

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<sup>201</sup> WCED, *supra* note 1, at 309; Also, the final sentence of Our Common Future (at 343) is "We are unanimous in our conviction that the security, well-being, and very survival of the planet depend on such changes, now." (1987)

Yet, the Montreal Protocol also goes further. Without the full participation of the large developing nations in the provisions of the Protocol, the gains made by industrialized, developed countries in the protection of the ozone layer would be lost. It is estimated that the unconstrained demand for CFCs in refrigeration in India and China alone, estimated at 381,300 tonnes by 2010, could easily eclipse world production and offset the efforts of the remaining Protocol Parties to eliminate CFCs. Drafters set out to attract a minimum of 11 countries and 2/3 global consumption.<sup>202</sup>

Thus, special provisions were needed to encourage developing countries to participate<sup>203</sup> These special provisions however, do not take away decision-making power from developing countries under the Protocol or the Fund. Given the paternalistic reputation of the World Bank, it is particularly significant that the Multilateral Fund includes developing countries as equal partners in decision-making although different in their access to resources and capacity to implement the Protocol.

Thus, the Montreal Protocol seems to have overcome the difficulty of reconciling a vision of the developing countries as both in need of technical assistance and also as independent and equal decision-makers.<sup>204</sup>

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<sup>202</sup> E. Barratt-Brown, *supra* note 88, at 530.

<sup>203</sup> The history is provided in Gallagher, *supra* note 13. Provisions include: a time lag in applying control measures; financial assistance to participate in meetings; technology and financial transfers; and an equally balanced executive committee of the Multilateral Fund.

<sup>204</sup> Smith, *supra* note 19.

Cooperation is discussed here, with inclusiveness, to highlight the fact that the economic context is full of competition and some balance is needed if global environmental agreements are to be forged. Feminist theory stresses that competition, and its concern with dominance, is inappropriately applied to all areas of our society.<sup>205</sup> It tends to leave the disadvantaged, such as women and children, vulnerable.

The Montreal Protocol tends to operate as a small cooperative island in a sea of trade competition. Frequently the cooperation is disturbed by the context such as when a new chemical is being considered for control measures. Then the underlying cooperative ethic must be invoked.<sup>206</sup> This is often done by Environmental Groups in attendance at the meetings.

#### b) Non-state Participants

Feminist theory describes a need for a change in values from the ideal of rugged individualism toward a community-oriented approach which recognizes a web of duties and

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<sup>205</sup> Dawson, B. ed., Women, Law and Social Change 2ed. Captus Press: 1993 at 75; 1993 at 112: "Case Study: R. v. West ;"Note: Early Equality Litigation" at 279.

<sup>206</sup> The Methyl Bromide issue has brought factors of trade competition to the fore. There had been a lull in this preoccupation once the large alternative producers settled their mode of participation. Maxwell, James H. and Sanford L Weiner "Green Consciousness or Dollar Diplomacy? The British Response to the Threat of Ozone Depletion, International Environmental Affairs at 19, Vol. 5, No. 1, Winter, 1993.

responsibilities between individuals.<sup>207</sup> The Montreal Protocol is an example of successful international cooperation of governments, experts, UN agencies, industry and ENGOs.

Southern governments used to object to the participation of ENGOs on the basis that they were Northern in their thinking. Now, with the participation of Southern ENGOs (who have the same development and environment agenda), states are more willing to see them as sources of political, practical and scientific information for the South.<sup>208</sup>

However, the Montreal Protocol does not challenge the assumption that only state parties can vote under the Protocol. Non-state parties can attend at the pleasure of the state parties. In the participation of non-state parties, the Montreal Protocol is ahead of some (trade organizations) and behind other international bodies (human rights and labour).<sup>209</sup> The participation of environmental groups and industry at the meetings could be terminated at any time.

Commentators have noted the value of participation by environmental non-governmental organizations (ENGOs) in the process. One goes so far as to suggest that they "should be incorporated in any governing body or any committee that might set policy for

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<sup>207</sup> Sheppard, *supra* note 127.

<sup>208</sup> Both FoE and Greenpeace have participation of southern members now and are building in both perspective in their policies. See Friends of the Earth's Final Report to the CIDA Environment and Development Support Program. unpublished, 1995.

<sup>209</sup> Ministers Statement CSD, April 1993; A. Kiss, *supra* note 110; E. Brown Weiss, *supra* note 9, at 12.

the agreement. Additionally, they should be members of committees monitoring compliance. Finally, they should be empowered to bring complaints against states failing to live up to their obligations.<sup>210</sup>

### c) Accepting Diversity

The Montreal Protocol's system is inclusive also in its tolerance of diversity even among members of a group. Individually designed national ozone programs allow for diversity among Southern countries. Special exemptions such as the 'Russia exemption' (of production facilities already approved for planned economies) indicate a tolerance of diversity among the industrialized countries.

There is criticism that these special provisions slow down progress in reaching the ultimate phase-out. This may be correct if one assumes that all countries could be made to comply completely. However, since there are no world "Eco-police" or environmental enforcement agencies, the voluntary commitment to comply is necessary in international agreements. Special provisions that encourage more states to participate actually aid progress within limits. The limit is that the special provisions not weaken the agreement so that it is ineffective in addressing the problem.

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<sup>210</sup> E. Barratt-Brown, *supra* note 88, at 564-5.



## Results and Redefinitions

The results orientation of the entire Protocol supports the redefinition of roles and responsibilities. The impact of the agreement on the ozone layer is measured and the process is changed to produce the correct effect.

In fact, continual improvement is built right into the Protocol. Controls are reviewed and changed regularly. In Article 6, the Parties agreed<sup>211</sup> to assess and review control measures every four years. In practice, it has been done continually and resulting in earlier deadlines and expanded coverage of the control measures. Since the Montreal Protocol was signed, there have been great advances in the knowledge about ozone depletion and discoveries that more substances are ozone-depleting. Consequently, the controls in the agreement have been successfully updated.<sup>212</sup>

The results orientation of the agreement promotes this review as the status of the ozone layer is continually monitored. Other more procedural provisions of the agreement, such as the compliance provisions, are also in a continual state of evolution.<sup>213</sup> This continual improvement is consistent with feminist legal theory which requires an iterative process.

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<sup>211</sup> Montreal Protocol, *supra* note 12, Art 6.

<sup>212</sup> See particularly the London and Copenhagen Amendments.

<sup>213</sup> See Chapter Nine.

Once roles, responsibilities and standards are changed methods of compliance may need to change as well.

### Southern Contextual Analysis

The new roles and responsibilities evolve from a contextual analysis. Provisions such as the time lag in the application of the control schedule to the South and the technology assistance, funding and the democratic management of the Multilateral Fund are all provisions which recognize the differences of the South. The use of historic emissions of states to calculate eligibility, as Article 5 countries, under the MLF is another use of contextual analysis.

Much of the contextual analysis was provided by the South to the North but the results demonstrate at least a partial acceptance by the North.<sup>214</sup> China and India refused to participate unless the vague promises of Arts 5 and 10 were made real.<sup>215</sup> Developing countries were very clear that they had more urgent problems to address than ozone. Knowing that many of their people would starve long before they would have the opportunity

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<sup>214</sup> Although the North is unwilling to go on record as admitting liability.

<sup>215</sup> E. Barratt-Brown, *supra* note 88. At the first meeting of the parties (Helsinki, 1989) there was a call for the development of a financial mechanism to assist Article 5 countries to cover the costs of implementing the Protocol. When the protocol was amended in London, June 1990, developing country parties, including Mexico and Venezuela, as well as (then) non-party countries such as India and China, proposed the establishment of a new fund to meet the incremental costs of developing country compliance financed by an enforceable system of payments by developed countries. The technologies transferred would be on the principle of free access and non-profit.

to die of skin cancer from ultraviolet radiation, the South was not interested in investing scarce resources in ozone protection. Nor were they interested in committing themselves to controls which were likely to hamper their growing industries and burden their fragile economies.

The South obtained an aid fund (without compulsory contributions) and technology (without free access). There was no overt recognition of the value of the environmental space (in this case in the stratosphere) provided by the South. The Montreal Protocol is a U.N. voluntary fund and therefore vulnerable to government budget cuts. To date, it is one of the best paid up voluntary funds in the system.<sup>216</sup>

#### Roles and the Capacity Gap

The Multilateral Fund manifests acceptance of the need to ameliorate the position of the South to allow them to meet the terms of the agreement, technically and financially. As discussed in Chapter Three, developing countries can apply for grants to cover the incremental cost of transfers to non-ODS technology and for technical assistance.

An example of the need for shared information and technical assistance has arisen in relation to new advances in alternative technology. Due to the South's lack of resources, they

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<sup>216</sup> Executive Director UNEP, Elizabeth Dowdeswell, commenting at the spring 1994 meeting of the Open-ended Working Group.

do not always have access to the most recent information. This makes them vulnerable to dumping of obsolete technology and unprincipled marketing of useless chemicals. One frequently-used alternative to the use of Methyl Bromide is integrated pest management. Integrated pest management would actually be cheaper for the farmer but requires expertise. There is no market-based economic incentive to provide that expertise. There is, however, a financial motive to market pesticides.

The implementing agencies and ENGOs have been making some effort to provide up to date information to the South. However, the agencies have been experiencing budget cuts. Meanwhile, large pesticide companies send their agents out on tax-deductible marketing trips around the continent. It is further suspected that some industrial representatives offer selected Southern countries economic incentives to resist controls at the Protocol meetings.

In sum, the Montreal Protocol applies three out of four of the feminist legal principles to a high degree in regard to roles and responsibilities of the parties. It is very "inclusive" as all parties are equal decision-makers. Its implementation process is sensitive to diversity among member states. The provisions for continual improvement and review of controls indicate "results-orientation." The need to "ameliorate" the contextual disadvantage of the South is recognized through the control delay and the MLF fund. However, the principle of "contextualization" is not so well-applied. There is no overt credit given for the environmental space contributed by the South and the South is still vulnerable to predatory trade.

## CHAPTER SIX: NEW STANDARDS

"This (equality) requires a revolutionary shift of perspective which is still in the process of being articulated and which will require a long term struggle and major social restructuring to achieve. But, it is essential".<sup>217</sup>

This chapter will discuss the second issue identified by the World Commission on Environment and Development: the need to develop new norms and standards for the behaviour of the states. First, we will examine the resistance to any change in standards which one habitually encounters when attempting social change. Then we will apply the four feminist principles to the development of a new standard.

### Resistance to new norms

The experience of feminists with equality rights theory reveals resistance to social change - particularly to profound change such as equality rights. Thus, there is a need to be aware of, and to establish support structures to fight strong internal and external resistance to change.<sup>218</sup> The external sources - those who oppose social change towards equality and the redistribution of resources are often easier to identify than the internal sources.

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<sup>217</sup> A. Miles, *supra* note 158, at 67.

<sup>218</sup> Mossman, M. J., *supra* note 136; Faludi, Susan, Backlash, the Undeclared War Against American Women, Crown Publishers, New York, 1991.

#### a) External Resistance

The continued development of a new framework for environmental cooperation and new standards and norms of behaviour between parties will encounter resistance from those who have vested interests in the existing system. These may be industrialists who have products threatened by these new norms or politicians who do not want to give up power that they currently exert. For example, the Methyl Bromide Coalition (pesticide producers) is currently attending the Executive Committee and Meeting of Parties to oppose a freeze on Methyl Bromide use in Article 5 countries.

Those who deal primarily in short-term thinking - the next election or the next profit statement - will seek to sabotage the process. Profound change with social, political, and economic implications is a long-term project.

#### b) Internal Sources of Resistance

The internal limits are more difficult to identify. There are a number of sources of internal resistance to women's equality even among feminists. It is emotionally costly to go against established legal precedent; to contradict long held assumptions about the differences between the sexes which were previously thought not to require legal proof; to acknowledge that actors in the legal system are products of the status quo and cannot be completely neutral in the application of the law; to admit, even to oneself, that the laws are not neutral. It stretches the limits of our imagination to construct a new legal theory to include the reality of women's lives and not merely a romantic vision of women's place in society; a rigorous

assessment of the legitimate differences between men and women; and, a critique of those specious differences which serve to maintain the status quo.

Similarly, with international environmental law it is difficult to go against commonly accepted assumptions and to admit, even to oneself, that the current legal system is not protecting the environment. One might expect that in the international context, the contingency of law would be much more obvious since one is dealing regularly with different national legal systems. However, there appear to still be norms and standards of behaviour in international law which have already become invisible to the parties and discourage consistent application of the new norms and standards that come out of environmental agreements. When one encounters the contradictions between the environmental agreement's emphasis on cooperation and the trade agreement's emphasis on competition, it is difficult to step back and imagine a new economic system that reconciles the two.

In the general international context of free trade (survival of the fittest), it is difficult for delegates to make themselves vulnerable by admitting weaknesses and asking for help. The G77 delegates regularly meet as a group to discuss their policy and observers are not welcome. It is particularly difficult for countries to disagree with large donor countries such as the United States or the World Bank for fear that their comments in this fora will affect their relationships in other fora.<sup>219</sup>

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<sup>219</sup> Author's conversations with delegates (1994-5). See appendix for notes from one occasion of structured interviews.

Scales<sup>220</sup> suggests that we must start taking the psychological into account in any new equality theory because the new equality law must focus on the real issues - domination, and disempowerment - rather than being distracted into itemization of differences between the sexes. Further, if all sorts of disadvantage are linked, how does one apply this domination analysis more broadly within environmental agreements?

Although the Universal Declaration of Human Rights is background to the Montreal Protocol, the Protocol does not articulate sensitivity to equality rights such as race or sex equality. It is not mentioned that women, as a group, have a particular role in protecting their families from ultraviolet radiation.<sup>221</sup> Nor are women consulted on issues of particular importance to them - such as refrigerators. There are science and technical committees but no consumer panels or surveys.

Although the Stockholm Declaration overtly makes the connection between sustainability and the elimination of racism, colonialism and other forms of oppression, there is no articulated link of all these issues in the Protocol. Thus the subtle forms of discrimination - how the meeting is run, who is recognized to speak, who is invited to lunch - covert racism or sexism - are not "called" with the frequency necessary to change practice.

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<sup>220</sup> Scales, *supra* note 125, at 1379 because the goal of discerning domination requires that the law recognize the psychological substructures of gender. For example, feminist jurisprudence requires legal decision-makers to re-examine any doctrine that is justified by an ethic of individual autonomy.

<sup>221</sup> Friends of the Earth Canada's leading program is ozone depletion and over 60% of its members were women in 1994. Women still play the major role in family health in Canada.



Nor are the indirect effects of discrimination recognized within the meetings of Protocol. For example - many of the ENGO representatives tend to be women. Sexism may affect perceptions of the role of ENGO's. Racism may affect the amount of funds going to Africa.

Internal resistance to change is further complicated by the immensity of the task when not only the substance of the law, but the inherent bias of the legal system as a whole, is under debate. Just as the objectivity of judges is questioned on the domestic front,<sup>222</sup> on the international front, the benevolence of the trade and aid systems is under attack. Without an alternative value framework it is difficult to articulate the specific issues. Otherwise, piecemeal reforms may very well reinforce rather than redress inequalities. This implies a revaluing of the contributions and concerns of developing countries.

## Principles in Developing a New Standard

### a) Inclusive Standards

If we apply feminist legal analysis to North-South relations under the Montreal Protocol the question arises whether current norms and standards are compatible with the new roles and relationships. We note that the states participating are all bound to the same

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<sup>222</sup> J. S. Russell, *supra* note 129.

standards - albeit at a different time. The flexible implementation allows different methods but all to the same goal.

#### b) Results-oriented Standards

A focus on results would link the contextual analysis to the issue at hand: meeting measurable global targets.<sup>223</sup> The entire Montreal Protocol is results oriented. Its purpose is a measurable reduction in emissions and an increase in ozone in the stratosphere. The standards established are directed to that goal.

A feminist legal analysis of results requires a baseline assessment of the economic and social reality of the disadvantaged group's position in society - not just an examination of the laws on the books.<sup>224</sup>

The difficulty here is how to circumscribe which factors in the context are relevant; that is, how far equality analysis requires one to go in socioeconomic analysis. The aid funds are linked to the specific topic of addressing ozone depletion -not the general problem of national capacity to provide well being for its population. Rather than attempt reform of the

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<sup>223</sup> Ironically, the MLF example, has already catalyzed reform of the World Bank's Global Environment Facility (GEF).

<sup>224</sup> Smith, 1995, at 355 suggests that one of the consequences of the new equality rights paradigm under the Charter is that the actual and potential effects of legislation, regulations policies, or procedures must be examined, rather than merely their wording or what their purpose was.

entire existing lending system, the Protocol sidestepped it in establishing its own aid fund for its specific purpose.

The issue arises at the meetings in the discussions on incremental cost under the MLF. It was originally agreed that incremental cost of technology transfer to non ODS would be reimbursed under the MLF. Although a general definition of incremental cost was agreed, now, differences of interpretations have come up. India argues that the projected lost profit (if it had not changed technology but used its 10 year delay to its utmost) should be included in incremental cost paid to Southern countries. The North argues that to expand production to exploit the 10 year lag is contrary to the spirit of the agreement and damaging to the ozone layer.

The incremental cost debate demonstrates the different perspectives of North and South to the Protocol. The South sees its development as an integral part of the agreement, and if it is not appropriately taken into account, faith is broken with them. The North tends to be focussed on the environmental issues alone. In terms of the baseline differences between the two groups, economic indicators show that the standard-of-living gap is growing larger, not smaller.<sup>225</sup> It is difficult to determine, however, exactly what role, if any, the Protocol plays in that phenomena.

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<sup>225</sup> UNDP Human Development Index, *supra* note 255.

However unjust the situation of disadvantage, one must guard against the pitfall of focussing negatively on the "privileged enemy," (men or the North) rather than on the inappropriate framework. Southern leaders at meetings of the Montreal Protocol<sup>226</sup> have been known to fall into this trap. The disadvantage of this negative focus is addressed by Adil Najam's suggested negotiating strategy for the South. He says the first step is to "Stop feeling angry at the North and sorry for yourself"<sup>227</sup> and instead to focus on interests and redefine the agenda.

### c) Contextual Standards

To determine the effect of a law requires an inquiry into the context in which that law operates.<sup>228</sup> The provisions of the Montreal Protocol imply a contextual analysis and examine the relative position of South in their social, political and legal context and link that analysis to the ozone issue. The Montreal Protocol demonstrates a contextual analysis when it recognizes the difference in resources and capacity between the North and South and provides funds to ensure that developing countries can participate. It attempts to bridge the capacity gap between North and South with the later deadline for controls, funding and technology transfer yet keep the South to the same general standard.

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<sup>226</sup> Kamal Nath, Indian Minister of Environment, press release in Nairobi, October, 1994.

<sup>227</sup> Najam, Adil, *supra* note 16, at 262.

<sup>228</sup> Special measures or affirmative action may be found to be consistent with equality or non-discrimination. see Action Travail des Femmes v. Canadian National Railway Co. et al 40 D.L.R (4th) 7.

Contextual standards require analysis of the relative social, political and legal position of developing countries and link that to their performance in reducing ozone-depleting substances. Ideally, this would involve a formal assessment of the extent to which each country suffers from ozone depletion, from the economic system of which CFC's are a part or the from broader issues of capacity to implement any environmental agreement.

An analysis of each country's capacity is done in the course of development of country programs under the Multilateral Fund. The implementing agencies began this process with very little guidance from the parties. Thus, it is possible that the biases of the individuals and agencies were replicated in the production of the plans.

Feminist theory applied to the Montreal Protocol would require the parties to examine current standards for Northern bias. Some commentators claim that the current standard is that of the developed world and therefore Northern biased.

The term "development" is used in the Stockholm document synonymously with "progress" in obtaining all the good things of life.<sup>229</sup> The benefit of development is the opportunity to enhance one's quality of life.<sup>230</sup> There seems to be an assumption that the

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<sup>229</sup> Stockholm, *supra* note 20, at 3.

<sup>230</sup> Others say the whole concept of development is a western concept imposed on the rest of the world: Raimon Ranikkar, (1992) CBC Ideas Transcript, Ottawa. Similarly, the Universal Declaration of Human Rights has been criticized as being "western" and therefore a form of domination over the rest of the world. It could be argued that to impose liberalism, in the form of "rights" discourse, is oppressive. See M. Conley, Human Rights and the United Nations Human Rights Forum, fall/winter 1994, Canadian Human Rights Commission, Ottawa, at 6.

developing world wants to become like the developed world including the same "western" values and level of consumption.<sup>231</sup> Yet, there are studies that show that after basic needs are met, westernized 'Northerners' are no more happy (for all their goods) than 'Southerners'.<sup>232</sup>

If everything is measured against the current developed- world material standard of living, developing countries will be found to be different, and inferior, by definition. The application to developing countries of norms and standards developed for industrialized countries is akin to applying male standards to females and needs to be further examined and deconstructed.

For example, it may be an example of western dominance that the meetings tend to be run along protestant work ethic lines and when the pressure is on, the language tends to be English. At one stage of the London negotiations, time constraints produced the following situation:

"Toward the end of the working group session, the speed of meeting and the decision to conduct the final hours of the session in English resulted in much animosity and ill will. Several delegations left in protest. The situation seemed indicative of the general attitude that only key - that is, industrialized countries' - delegations were in fact needed to forge the agreement. Many countries felt that their input was not

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<sup>231</sup> The developing countries resist northern environmental concerns in saying "We will refine the definition (from quantity of goods to quality of life) AFTER we have all the same material goods that you have in the west." Observations of the author attending meetings 1992-5.

<sup>232</sup> Ed Diener, (1995) "Psychological and Subjective indicators of Well-being", unpublished paper for the National Round Table on the Environment and the Economy, London, Ont. Also, (1995) "Who is Happy?", David Myers and Ed Diener, 6 Psychological Science 10.

essential and that the powerful nations assumed the others would simply accept the end result."<sup>233</sup>

An unbiased new standard would reflect a commonality of both industrialized and developing country values and institutions. It would take into account the capacity of Southern enforcement systems, their social structures, and anything else that affected their ability to meet the terms of the Protocol.

A new standard would also value the environmental space provided to the North by the South. It would involve a revaluing of contributions and responsibilities. There may be a credit for past use of Southern resources as discussed in Chapter Two. As well, this new common standard could not threaten the carrying capacity of the globe. Since the globe is not big enough to give everyone a Northern standard of living, the new standard would reallocate funds, responsibility and labour between the North and South to allow the survival of the planet.

#### d) Ameliorative Standards

Feminist Legal theory requires that the norms and standards be ameliorative. The test is:<sup>234</sup> does a practice participate in the subordination of Southern economies, or is it no part

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<sup>233</sup> D. Bryk, *supra* note 14, at 284

<sup>234</sup> MacKinnon, Catherine (1989) Toward a Feminist Theory of the State, Harvard University Press, Cambridge, Mass. at 248.

of it? That is, even if the Montreal Protocol is not overtly detrimental to the South does it, in practice, reinforce the control by the North of Southern economies?

Under the Protocol, standards allow for capacity-building. Firstly, the general standards provide a lag time for developing countries to develop capacity to meet them. Secondly, the country programs are diverse and designed with each country's capacity in mind. However, one problem with the diverse country standards is the lack of comparability and therefore difficulty in monitoring.

The financial and technical assistance under the Multilateral Fund is ameliorative in that it operates against the lesser capacity to implement the Protocol in Southern countries. As MacKinnon's equality test requires, the North-South gap is reduced to some extent by grants under the Fund. Thus, the Protocol works against domination by the North. However, such a small Fund cannot meet the need for ozone related projects. Such limited resources cannot address adequately the general lack of capacity which still affects the South's ability to implement the Protocol.

At the same time, the Fund operates in a market context where the North, in the form of governments or of transnational corporations (TNCs) continues to dominate economically. Thus, it could also be argued that the Montreal Protocol operates to reinforce control by the North of Southern economies. The money provided by the Fund is really just cycled through the developing countries to the large transnational corporations selling alternative chemicals



and technology. Further, the very success of the Protocol allows the North to address ozone depletion, while leaving the developing countries in a state of poverty on other fronts. Thus, the Protocol could be an example of piecemeal change which inadvertently harms rather than helps the general equality of the disadvantaged group, the South.

Reducing the gap as proposed by MacKinnon can be construed as affirmative action. The special provisions for the South could be considered positive discrimination to compensate some past disadvantage. Affirmative action in international jurisprudence may be acceptable if they are: 1) applied with the consent of the members of the group; 2) undertaken with the sole purpose of achieving equality; 3) temporary and discontinued when the goal is achieved so as not to result in the maintenance of unequal or separate standards.<sup>235</sup>

There is little doubt that the Montreal Protocol meets the first condition. It has applied its special measures with the consent of all the parties, North and South. The Montreal Protocol also meet the second condition to some extent. The special provisions were undertaken with the purpose of achieving equality in the implementation of the Protocol. However, it is not clear whether the North undertook the Fund solely to promote equality. It is likely that they were aware of the potential profit for their corporations in selling alternatives to the South.<sup>236</sup>

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<sup>235</sup> A. Bayevsky, *supra* note 48, at 127.

<sup>236</sup> E. Barratt-Brown, *supra* note 88; W. Maxwell, *supra* note 214.

The Protocol meets the third condition because the Protocol and its Multilateral Fund are time limited. They are terminated once the goal is reached (the South either successfully meets the control schedule or changes categories by reaching high industrialized emission rates and losing their privileged status). In the Montreal Protocol, the specific goal is protection of the ozone layer and that is limited and measurable. The consumption rates of CFC's as an indicator is measurable. Thus, the international human rights criteria for affirmative action are met by the Montreal Protocol specifically because it does not try to ameliorate the general disadvantage of the South but restricts itself to the specific task of ozone depletion.

The South may argue that a future standard should take into account development, the general well-being of the South. That would require agreement by North and South as to the appropriate level of development for everyone. Proposals for such standards do exist. Friends of the Earth Netherlands has produced a plan for a sustainable society which is gaining respect in Europe.<sup>237</sup>

Due to the limited carrying capacity of the globe, a common standard of equality for North and South will necessitate a lower standard, in material respects, than the current Northern one. There is understandably a resistance in the North to accept a reduced material standard of living or the redistribution of power that would imply.

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<sup>237</sup> Friends of the Earth Netherlands (FoE Netherlands or Milieu Defensie), Action Plan Sustainable Netherlands, Eds. Buitenkamp, Venner, Wams, Amsterdam, 1992 (Dutch), 1993 (English); Wuppertal Institute, Towards a Sustainable Europe, FoE Publications, Luton, UK, 1994.

Furthermore this new standard must be dynamic and shift as knowledge increases. As new information becomes available about the experience implementing new standards, they will likely need to be revised. This implies the need for an iterative process.

The Montreal Protocol contains inclusive, contextual, results-oriented and ameliorative norms and standards which are still evolving. The special provisions for the South go beyond formal equality to recognize the historical and present context of the disadvantage of the South, facilitate their involvement in setting new standards and develop capacity in the process. Yet there is no credit for environmental space contributed by the South. Next is the development of a common standard for North and South, incorporating more of the abilities and values of developing countries, to arrive at a standard which is neither "Northern" or "Southern" and remains within the carrying capacity of the globe.

## CHAPTER SEVEN: STRENGTHENING AND EXTENDING THE LAW

"We came to see it (development) not in its restricted context of economic growth in developing countries. We came to see that a new development path was required, one that sustained human progress not just in a few places for a few years, but for the entire planet into the distant future. Thus 'sustainable development' becomes a goal not just for the 'developing' nations, but for industrialized ones as well."<sup>238</sup>

The WCED identifies the need for strengthening and extending the reach of environmental law. Traditionally, in international law, environmental law has been kept separate from economic areas such as trade law. This segmentation has allowed the different areas of law to develop different and sometimes conflicting rules. Extending the reach of environmental law involves the integration of equality and trade concepts into environmental law and vice versa.

The Montreal Protocol challenges the view that environmental agreements are simply that - relating only to the environment. The Montreal Protocol is unusual in that it extends beyond the borders of pure environmental law and uses trade sanctions and financial aid incentives to reach its environmental goal. Subsequent analysis of the Montreal Protocol attributes to these very controversial measures a great deal of the success of the agreement.<sup>239</sup>

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<sup>238</sup> WCED, *supra* note 1, at 4.

<sup>239</sup> E. Barratt-Brown, *supra* note 88.

Feminist legal theory stresses the need to ensure that legal and institutional reforms are not marginalized but instead are enforced and integrated with all the relevant socio-economic systems.<sup>240</sup> Similarly, the World Commission specifies<sup>241</sup> the need for broader ratification and application of environmental laws, updating of existing conventions, and new global and regional conventions aimed at promoting cooperation and coordination in the field of environment and development. Further, the need to integrate equality and environment with other relevant social and economic policies is clearly mentioned in the Stockholm report.<sup>242</sup>

Strengthening the law involves the need for political will to go beyond declarations and actually implement the agreement. Even in face of high sounding declarations, many international laws have faced a certain failure of will to implement.<sup>243</sup> For example, there were many declarations of principle made at UNCED but no concrete global measures established. Agenda 21 is a long and complicated document which does not include targets, timetables or enforcement. The Forest Convention failed and was replaced by a declaration

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<sup>240</sup> R. Gordon, *supra* note 45; Freeman, Michael (1980) "Violence Against Women: Does the Legal System Provide Solutions or Itself Contribute to the Problem?", 3 C.J.W.L. 377.

<sup>241</sup> WCED, *supra* note 1, at 333.

<sup>242</sup> Stockholm Report, *supra* note 22, Article 20 mentions political and economic issues such as nuclear arms and colonialism.

<sup>243</sup> UNDP, (1991) The Human Development Report, at 26, Oxford University Press, Oxford/New York shows women to be relatively disadvantaged in every country of the world. Preamble Of Women's Convention states: "... despite the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Human Rights and other instruments of the United Nations and the specialized agencies and despite the progress made in the matter of equality of rights, there continues to exist considerable discrimination against women."

of Forest principles. The Climate Change and biodiversity Conventions were signed only as framework conventions.<sup>244</sup>

The obvious lesson that can be learned from the success of the Protocol, is the same one that feminists in Canada have learned: change requires more than exhortations to voluntary action. Action to strengthen the law includes: defined roles and responsibilities, standards for measurement of the variance from the goal, incentives to participate and sanctions for non-participation, as well as compliance processes and dispute resolution mechanisms (Chapter 8). Extending the law requires a contextual analysis which guides the direction and extent of extension.

#### Inclusion, Strengthening and Extending

The Montreal Protocol is in itself recognition that declarations alone, such as the Vienna Convention, are not enough. There is a need for an implementing Protocol with broad participation.

Generally in international law, states join conventions voluntarily.<sup>245</sup> There is no global government to force a state to protect human rights or the ozone layer. There may be

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<sup>244</sup> UN, New York, 1992. The future of Agenda 21 is in the hands of the Commission for Sustainable Development (CSD). However, the CSD has also already been criticized for institutional inertia.

<sup>245</sup> Half of the countries of the world have not chosen to become parties to the two basic Human Rights Covenants. See Human Rights: A Compilation of International Instruments, United Nations, New York for various rates of ratification for a wide range of agreements.

no financial incentives for a state to become a party as with the Declaration on the Elimination of Discrimination Against Women (Women's Convention)<sup>246</sup> which very few nations have ratified in its entirety.

In contrast, The Montreal Protocol has had great success in the scope of countries participating. This is attributed to the combination of positive incentives for developing countries and negative trade sanctions against non-parties. The Protocol is described aptly by M. Somerset as having three components that are key to its success: "a rigid reduction schedule, a flexible implementation process, and a series of incentives for countries to become party to the agreement."<sup>247</sup>

The Montreal Protocol requires that Parties conform with the provisions of the treaty. Any special conditions are decided by the parties as a group and are judged not to be inconsistent with the ultimate goal of ozone layer protection. There are no unilateral reservations allowed.

### Results, Strengthening and Extending

The creators of the Protocol could be said to be very results-oriented. They ignored the conventional wisdom and made the Protocol a binding agreement with goals, timetables,

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<sup>246</sup> UN Res. 2263 (XXII); proclaimed by the General Assembly of the United Nations on Nov. 7, 1967.

<sup>247</sup> Somerset, *supra* note 124, at 400.

incentives to participate and a range of compliance mechanisms.<sup>248</sup> In the Montreal Protocol, the parties decided what was necessary to make it work and did what was necessary despite concerns that the trade sanctions might be considered unfair trade practice or non tariff barriers or that traditional aid programs might be duplicated in part by the Multilateral Fund.

State intervention, however, does not always produce the desired result. Determining the appropriate timing of state intervention is one of the challenges of applying feminist equality theory. In feminist legal theory there is a view that intervention by a male-dominated state is not necessarily going to be an improvement. On the other hand, there are situations which require the intervention of the state for the good of society.<sup>249</sup>

To determine when state intervention is going to be an improvement is also an issue under discussion in many environmental fora. Environmentalists tend to argue for intervention by some international body to insert some value other than the interests of large corporations into the global discussion. Industry tends to try to block regulation and argues for the discipline of the market; however, the market does not have a good environmental

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<sup>248</sup> Although there are sanctions against non parties, there are no trade sanctions against parties who may not be in compliance or who deliberately threaten the health of the planet. The mechanisms that are in place are discussed in Chapter Eight.

<sup>249</sup> L. Smith, *supra* note 12, In regard to state intervention there is difficulty reconciling the view that 'the public/private dichotomy is mistaken and not protective of women', with a view that 'intervention by a male-dominated state is not necessarily going to be an improvement'. For example, the courts rulings on surrogate motherhood are not thought to be supportive of a woman's control of her own body.



record to date. This is a particularly difficult issue when there is no international body to legislate or enforce.

### Context, Strengthening and Extending

Strengthening and extending the law effectively requires an accurate contextual analysis. One must have a correct understanding of the practical effect of incentives and disincentives in the real world or they may not work effectively in the agreement. For example, the trade sanctions against non-parties were important influences on state and industrial behaviour.<sup>250</sup> Even "emerging" countries, like Taiwan, while they were not parties to the agreement, announced their intention to meet the developed country phase-out schedule to protect its electronics industry. In light of the Montreal Protocol's restriction on trade in controlled substances and, eventually, substances made with controlled substances,<sup>251</sup> most emerging economies can't afford NOT to belong.<sup>252</sup>

In the absence of trade sanctions, the Montreal Protocol might have had to water down its provision to obtain broader participation. For example, the Women's Convention is among

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<sup>250</sup> O'Connor, David (1991) Policy and Entrepreneurial Responses to the Montreal Protocol: Some Evidence From the Dynamic Asian Economies, (OECD/GD/(91)197), OECD: Paris, at 10. He also mentions the domestic American CFC tax as an important factor in industrial behaviour.

<sup>251</sup> Copenhagen Amendments, supra note 135.

<sup>252</sup> O'Connor, ibid, at 15 Most of the electronics industry is run by multinational corporations in any case.

the most heavily reserved of international human rights conventions.<sup>253</sup> The numerous reservations permit many member states to accept far less than the goal of elimination of discrimination against women. It illustrates the risk of watering down the wording of a treaty to obtain coverage<sup>254</sup> and, in the end, not accomplishing the goal.

Trade policy outside the agreement also affects the Protocol. For example, one might argue that the lag time in controls on the South may ultimately work to the disadvantage of those Southern countries who delay as they will be left behind in a competitive trade environment.<sup>255</sup> This is an example of the danger of piecemeal change which is identified in feminist legal theory. The delay, intended to help the South may inadvertently harm, rather than help, developing countries.

International trade law is often referred to as a barrier to environmental protection.<sup>256</sup>

Vandana Shiva comments:

Recent statements and reports from the World Bank and GATT indicate that these Northern-dominated international agencies do not view the global environmental crisis

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<sup>253</sup> R. Cook, (1991). Although 111 countries have ratified it, approximately one quarter have made substantive reservations

<sup>254</sup> Williams, *supra* note 7, at 128.

<sup>255</sup> O'Connor, David, *supra* note 250, at 9.

<sup>256</sup> Shrybman, Steven (1991-2) "Trading Away the Environment". World Policy Journal 9: 93-110, Coalition letter to Minister Wilson.

in terms of a "common future", but in terms of environmental apartheid in which the North grows richer and cleaner and the South grows poor and more polluted.<sup>257</sup>

To classical theorists like Schoenbaum, trade is the ultimate value and nothing should interfere with the workings of free trade. He notes that a segment of the "large and influential environmentalist lobby has joined the growing coalition of interests seeking to scuttle what is left of international free trade" and that these critics are short sighted and wrong.<sup>258</sup>

Housman<sup>259</sup> disagrees. He postulates a moral value of more importance than trade. Housman points out that the requirement that the environmental standards must be the least trade restrictive is simply inappropriate when certain environmental imperatives are so central to humanity that they must be protected even at a cost to the larger society. Housman and Daly<sup>260</sup> question whether trade, in and of itself, enhances the greater human condition. They point out that the effort to overcome poverty through further growth is self-defeating once we have reached the point where growth in scale increases environmental costs faster than it increases production benefits. To address this, Housman's theory of competitive sustainability attempts to press markets into service to both enhance environmental quality and improve the

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<sup>257</sup> Shiva, Vandana, (1992) supra note 81, commenting on the controversial internal World Bank memo by Lawrence Summers recommending the shift of polluting industries to the Third World.

<sup>258</sup> Schoenbaum, "Agora: Trade and Environment", The American Journal Int. Law 86:700 at 700 thinks that GATT regulations place virtually no constraints on the ability of a nation to protect its own environment and resources against damage caused by domestic production or imported products.

<sup>259</sup> Housman, Robert F. "A Kantian Approach to Trade and the Environment" 49 Wash + Lee L Rev 1372.

<sup>260</sup> Housman, *ibid*, at 1382 citing Daly.

human condition. He states that "business is the only mechanism on the planet today powerful enough to produce the changes necessary to reverse global environmental and social degradation."<sup>261</sup>

The integrationist view is gaining currency as environmentalists attempt to Green the GATT and G7.<sup>262</sup> Even some trade economists go so far as to say that the environmental and economic systems are in fact so interlinked that they form one system, "ecolonomy".<sup>263</sup> A new umbrella institution, a Global Environment Facility, may be necessary to effect this integration effectively for ecological survival.

#### Amelioration, Strength and Extension

The enticement of aid (financial and technical) from the Multilateral Fund was a key factor in gaining developing country participation and a practical application of feminist legal principles. This integration of aid into the agreement reassured the South that other aid funds would not be reduced by the funds used for ozone.

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<sup>261</sup> Housman, *ibid*, citing Hawkin, at 1383.

<sup>262</sup> Until recently, economic meetings such as GATT and G7 did not officially consider environmental issues. The June 1995 G7 meeting in Canada is only the second to involve a pre-meeting of Ministers of Environment.

<sup>263</sup> Steve Charnovitz, "Improving Environmental and Trade Governance", *International Environmental Affairs*, Vol.7, No. 1, Winter, 1995; Roots, E. F. (1993) "The Right to Environment: Population, Carrying Capacity and Environmental Processes", in Human Rights in the 21st Century, K.E. Mahoney and P. Mahoney, Eds. Kulwer, Netherlands.

However, the incentive may backfire if the Multilateral Fund is not replenished. The developing world doubts the commitment of the developed world to this voluntary agreement. They particularly doubt the North's commitment to assist the South rather than to coerce them. These doubts are increased when so many developed countries are behind in their contributions to the Multilateral Fund.<sup>264</sup> The South feels that the developed world owes these contributions as part of the bargain. The Multilateral Fund is not charity. It is payment for the degradation of the environment by the industrialized world and is necessary to the success of the agreement. Without these contributions, many of the developing countries would be directing their attention elsewhere.

A danger in implementing ameliorative programs in an interdisciplinary legal method is the temptation to transport insights from one discipline to another without sufficient contextual understanding. Certain techniques might work when applied to men but not to women, in one country but not another. Transporting insights without sufficient context is a great danger in the male-female, North-South analogy. Women's inequality is not exactly the same as developing country inequality. It is significantly more difficult, for example, for women to negotiate as a cohesive block due to their personal links to males in the family. Although the world can be characterized as a global family of states, the links are not of the same nature. Thus, for some purposes, they should NOT be treated alike.

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<sup>264</sup> FoE, *supra* note 98; Montreal Protocol Handbook, *supra* note 12.

Strengthening and extending environmental law is accomplished in the Montreal Protocol in a manner modestly consistent with principles of feminist equality theory. A contextual analysis supports the cross integration of environment and trade law in the Protocol which is results-oriented and inclusive of all parties both North and South. The Montreal Protocol recognized the need for broad participation without diluting its ability to take strong action. However, It did not attract many developing countries until their economic development issues were addressed. Truly ameliorative programs would go beyond the small aid fund to the greening of trade and revaluing the South's assets. While the Montreal Protocol incorporates trade provisions into its own terms, it is unable to reach into trade law without a global cooperative framework.

## CHAPTER EIGHT: EQUITABLE DISPUTE RESOLUTION

"Yet the Montreal Protocol, held out as the greatest accomplishment of the international environmental regime, is light years behind the human rights, labour and nuclear nonproliferation regimes in its structural capacity to implement its obligations."<sup>265</sup>

"We (WCED) have no illusions about 'quick-fix' solutions. We have tried to point out some pathways to the future. But there is no substitute for the journey itself, and there is no alternative to the process by which we retain a capacity to respond to the experience it provides."<sup>266</sup>

Chapter Eight discusses the need to reinforce existing methods and develop new procedures for avoiding and resolving disputes that are consistent with the North-South equity. Feminist legal analysis is applied to the compliance and dispute mechanisms in the Montreal Protocol and focusses particularly on intersection of ameliorative action with dispute resolution..

The Montreal Protocol has been criticized for its structural capacity to implement obligations.<sup>267</sup> As discussed in Chapter Seven, there are no explicit penalties in the agreement (such as trade sanctions against parties for non-compliance). It is early to evaluate as there is no history of controls in the South to analyze. Yet, the methods currently used to

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<sup>265</sup> E. Barratt-Brown, *supra* note 88, at 571.

<sup>266</sup> WCED, *supra* note 1, at 309.

<sup>267</sup> E. Barratt-Brown, *supra* note 88, at 521+570; discussions Nairobi, 1993

encourage compliance: moral suasion, reporting and monitoring, committees, and informal mediation are not inconsistent with equality rights theory.

### Inclusive Cooperative Compliance

So far, the Montreal Protocol has been a model of voluntary compliance. The use of moral suasion as a compliance mechanism is inclusive imply a common value more important than state or corporate profit. The sanction promoting moral suasion is not formally built into the terms of the Protocol. It requires the presence of scientific information and the distribution of this information to the public along with environment group pressure on governments. The presence of Southern environmental groups in particular, makes it impossible for Southern governments to completely ignore environmental concerns even though they tend to emphasize the development agenda.

Despite their important role in balancing the influence of industry in the decision-making process, ENGO's must still request permission to attend and are not involved formally as decision-makers.<sup>268</sup> Currently however, both scientists and environmental activists have seen their funding diminish substantially. They will not be able to provide the same moral leadership in future and thus moral suasion as an important compliance factor will diminish in importance.

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<sup>268</sup> Montreal Protocol Handbook, *supra* note 12.



The monitoring system in the Protocol is consistent with the feminist legal principle of inclusiveness. In the country programs, Southern countries participate in the establishment of their country's standards, implementation criteria and implementation mechanisms. Southern representatives also participate on the various scientific committees.

In the absence of coercive compliance provisions, the implementation of the protocol has relied on less formal methods such as committee work. All the committees under the Protocol are participatory and inclusive of at least a 50% Southern balance. This balance is food but it could be argued though that the South should actually have a majority based on numbers of countries or numbers of people. Although travel funds are available, it is sometimes difficult to involve Southern representatives either because there are not many people appropriately trained or because that person has too many commitments. The administration of the agreements by the secretariat and the parties has been characterized by a marked degree of flexibility in designing and establishing various subsidiary groups to deal with particular aspects of the agreements.<sup>269</sup> Technical information and assistance is made available to all through the panel system.

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<sup>269</sup> Benedick and Pronove, *supra* note 87, at 141-2. The committees include: the Bureau of the Conference of the Parties to the Vienna Convention; the Meeting of Ozone Research Managers under the Vienna Convention; the Open-Ended Working Group of the Parties to the Montreal Protocol and the bureau of the Montreal Protocol, which meet intercessionally to develop and negotiate recommendations for the Meeting of Parties on protocol revisions and implementation issues; the Executive Committee of the Multilateral Ozone Fund with a small secretariat located in Montreal; the Implementation Committee and the Ad Hoc Working Group of Legal Experts on the Non-Compliance Procedure; the Open-Ended Working Group on Trade; the Ad Hoc Group of Experts on Data Reporting; the Ad Hoc Technical Advisory Committee on Destruction Technologies; and, assessment panels: Scientific, Technology and Economics, and Environmental Effects.

Compliance by committee reinforces the cooperative inclusiveness principle and provides the opportunity for countries to offer solidarity and (practical and/or financial) support to each other.

Although arbitration and mediation are provided for in the Convention and by implication the Protocol, no formal arbitrations or mediation are on record. Arbitration and mediation are inclusive in that they involve all parties and encourage them to articulate their own interest. One might argue that mediation is more inclusive of the parties as it is voluntary, consensual and there is no outside authority imposing a settlement.<sup>270</sup> Both methods require a neutral facilitator, agreeable to all sides.<sup>271</sup> and that may be difficult to find in the current polarized North-South context. In arbitration, the neutral makes a decision about a dispute much like an informal court. In mediation the neutral parties help the parties come to an agreement between themselves. Yet even informal mediation is still strongly affected by power relations whether or not it is attempted collaboratively.<sup>272</sup> It is possible that formal mediation is unpopular with the state representatives who feel more in control of the process without a formal third party neutral.

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<sup>270</sup> Steven Shrybman, (1991-2) "Trading Away the Environment", World Policy Journal 9: 93-110.

<sup>271</sup> Roger Fisher and William Ury, (1991) Getting to Yes: Negotiating Agreement Without Giving In Bruce Patton (ed.) 2d, Penguin, London/New York.

<sup>272</sup> Emond, Paul, "Alternative Dispute Resolution: A Conceptual Overview" 22 Kobe University Law Review 1.

Informal mediation occurs frequently within the context of Protocol meetings. As issues arise, some countries tend to act as mediators in the many different sorts of meetings in the multilateral forum. Canada is often called upon in this capacity. Canada is perceived by the South as sympathetic and not as domineering as the United States. At the same time, Canada is a Northern country and understands some of the perspective of a donor country. Occasionally ENGOs function as mediators since they have a clearly articulated interest which does not necessarily reflect either a North or South agenda (assuming the ENGO delegation is balanced North-South).

### Results, Compliance and Dispute Resolution

Moral leadership as a compliance mechanism must be results-oriented for it to operate. Moral suasion has produced results under the Protocol. For example, under pressure from science and environmental communities, the major producing countries (U.S., E.C. and Japan) announced the intention to act faster and more comprehensively than the original agreement required.<sup>273</sup>

The goals of the monitoring and reporting process are results-oriented and measurable. Many countries from North and South are in advance of the requirements. ENGO's embarrassing countries or companies in the media also has a monitoring effect but is hindered

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<sup>273</sup> E. Barratt-Brown, *supra* note 88, at 529.

by the diversity of standards for reporting. It is difficult to establish general tests or assess the variation from the goal if the information collected is not comparable between states.

Further, as in the Women's Declaration, there are no sanctions in the Montreal Protocol against Parties for not conforming to the reporting requirements.<sup>274</sup> The Implementing Committee, tasked under the Montreal Protocol with following up on reports, has no powers of investigation or enforcement.<sup>275</sup> Its members are political state representatives, not experts and the information submitted is confidential.

The work of the assessment panels assists the parties to know their own standard of compliance.<sup>276</sup> The panels of experts, from developed and developing countries, industry and non-governmental organizations, provided the basis for the significant revisions of the Protocol undertaken by the 1990 and 1992 Meetings of Parties. A problem with this

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<sup>274</sup> Women's Declaration, Art 17 as cited by M. O'Neil, (1990) "Women's Rights: Canada's Role and the UN Challenge" in Options Politiques 9. Once a year, the Committee on the Elimination of Discrimination Against Women is to report to the General Assembly through the Economic and Social Council. At the 1989 meeting only 55 of 170 countries submitted reports.

<sup>275</sup> There is little to learn in this regard from human rights conventions. There is no means of enforcing the decisions of the Human Rights Committee of the Optional Protocol aside from the embarrassment of the state party. In fact, experience under the Civil and Political Covenant may well produce a backlash. Countries, like Canada, who had assumed they were in substantial compliance have been found to be wanting. As a sanction, the embarrassment of an adverse opinion of the Human Rights Committee is relevant primarily to the countries which already pride themselves on good human rights standards.

<sup>276</sup> Montreal Protocol Handbook, p.82 The Scientific Panel reviews new scientific knowledge in a timely manner for the Parties. The Technology and Economics Panel analyzes and evaluates technical options for limiting use of ODS, estimates the quantity of controlled substances required by developing countries for their basic domestic needs and the likely availability of such supplies, and assesses the costs of technical solutions, the benefits of reduced use of controlled substances on issues of technology transfer. An Environmental Effects Panel surveys the state of knowledge of impacts on health and environment of altered ozone levels and the resultant increased ultraviolet radiation reaching the Earth's surface.

informal system occurred around the June approvals of the Executive committee. Although these technical committees are respected, it is not necessary for the Meeting to take the scientific advice into account. There have been instances where the scientific view was overridden in the approval of projects<sup>277</sup> The supportive environment of the committee structure is inclusive but it does dilute responsibility for a decision and therefore may interfere with results. For example, the Parties established a non-compliance committee to guide its actions in situations of non-compliance with reporting or achieving the goals set in the protocol but the parties so far have been hesitant to take strong measures against their non-complying colleagues.<sup>278</sup>

While the method is inherently results-oriented, formal mediation does not produce results under the Protocol since it is not used. Where the process works, it produces a stable result. Informal mediation is used but it is not possible to ascertain specific results without a record.

### Context, Compliance and Dispute Resolution

Moral leadership allows each party to incorporate their own context into decisions under the Protocol; however, moral suasion under the Protocol is also affected by North-

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<sup>277</sup> Executive Committee Meeting, June, 1995, projects proposed by the Bank were approved contrary to most recent scientific advice..

<sup>278</sup> Russia has stated that it can not meet either the control goals or the payment schedule. The Meeting of Parties is ultimately responsible for deciding upon and calling for steps to bring about full compliance with the Protocol, including measures to assist a Party's compliance.

South relations generally and the activities of environmental groups. Similarly, the flexible implementation process was designed to be contextual by recognizing national diversity in the country programs. However, they operate in an economic context which does not value equitably the contributions of the South.

Committees are inherently very contextual if all members take the opportunity to articulate their perspective and scientific information is made available. This is generally the case with the Protocol on minor issues. However, the major conflict over trade and development remains unresolved although it permeates all protocol decision-making.

Mediation allows contextual information to be provided by the parties. Unlike a court or arbitration, there are no formal exclusionary rules. However, as with the committees, the North-South power balance affects all negotiations.

#### Amelioration, Compliance and Dispute Resolution

Moral leadership ameliorates only in that it presents a value other than trade as important. Since it relies on ENGOs for its effect, more overt involvement of ENGOs in the compliance regime would appropriately reflect their actual role in the establishment of global environmental norms. The participation of ENGO's in the meetings of the Parties changes the dynamic and ensures that the environmental purpose is kept in the forefront of negotiations.

As mentioned above, the diverse implementation standards were established to allow contextualization and national diversity. They also contribute to capacity-building when national staff are involved in setting standards and monitoring. Southerners are included on each of the scientific panels so the process develops internal capacity while producing scientific information in a way accessible to the South. Yet, the entire program is useless where the standards create comparability problems for monitoring. Further, differing capacities for reporting compound the difficulties. Many developing countries have much more urgent uses for their funds than keeping records. There are already problems in number and quality of reports from the parties under the Montreal Protocol.<sup>279</sup> Amelioration can be built into the country plans and the criteria for monitoring. Capacity problems in reporting is dealt with by technical and financial support. There are specific funds available under the MLF for capacity building.

Compliance by committee allows amelioration to happen informally. Other states may offer moral support or bilateral aid. It may not provide strong sanctions for non compliance. However, the lack of central enforcement may not be such a loss in the context of current North-South inequity. The deterrence effect of the criminal law is only effective when its targets have something to lose.<sup>280</sup> The disadvantaged South is unlikely to be affected by

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<sup>279</sup> At the December, 1994 Meeting of the Parties, NGO's had to argue strenuously to be allowed to attend as observers at a meetings of the project assessment sub-committee which recommends to the Meeting of the parties which projects should be approved. While observers can make comments at the subsequent full meeting, NGO's cannot block a decision themselves. To influence the direction of a decision, one must know what arguments were considered in camera and have the time to lobby the government delegates.

<sup>280</sup> Irvin Waller, International Centre for the Prevention of Crime, personal communication.

deterrence alone. Therefore, the effectiveness of a global eco-police force, might be more limited than hoped by the advocates of an enforcement agency.

Equality rights theory requires power balancing (reducing the gap) be considered as a factor in dispute resolution. Mediation specifically tries to balance the power of the two groups. Still, some situations do not lend themselves to mediation. For example, women in abusive marriages are often advised NOT to enter mediation. The sheer physical and emotional fear of one party can disable the process. Sometimes the intervention of representatives can add perspective to the negotiations and protection for the weaker party. Under the Montreal Protocol the power difference between the North and South may be unresolved enough as to make formal mediation less useful.

Some argue that mediation inevitably favours the stronger party.<sup>281</sup> Only if relative power positions are recognized, the sides carefully balanced and both parties safe will the resulting solution be stable. Those involved in one dispute may fear retaliation from the other party in another unrelated area in which they are more vulnerable. One of the techniques of the South is to find safety in numbers. They tend to negotiate as a block to protect their members from isolation and retribution. If the compliance issue which arises is with a Southern country perhaps the mediation would have to be between the blocks of North and South.

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<sup>281</sup> Scott Snider, (1991) Review of the Grassy Narrows and Islington Mercury Pollution Settlement, Major Paper, Faculty of Environmental Studies, York Toronto.



There is very little scholarship on new institutional structures or the creation of institutional forms which implement environmental agreements in a spirit of equality between North and South. In fact, the literature provides many more critiques of the present than suggestions for the future.<sup>282</sup>

As the World Commission on Environment and Development<sup>283</sup> points out, there is a growing need for effective international co-operation to manage ecological and economic interdependence; yet, "such a reorientation on a continuing basis is simply beyond the reach of present decision-making structures and institutional arrangements, both national and international."

The Montreal Protocol responds to the criteria set out in the World Commission report. It has equitably redefined the roles and responsibilities between North and South, established an contextualized, results-oriented process, strengthened and extended the law effectively and equitably, and explored new institutional forms for dispute resolution. The informal provisions of the Montreal Protocol may be the sources of the future institutional forms which promote equity.

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<sup>282</sup> D. Greschner, "Judicial Approaches to Equality and Critical Legal Studies", Philosophies of Equality, at 59.

<sup>283</sup> WCED (1987) *supra* note 1, at 9+22.

The Montreal Protocol has not yet needed formal compliance mechanisms such as punitive sanctions, thus, it is unclear what would happen should a renegade country choose to destroy the ozone layer in the process of its own short-lived development.

One solution proposed is the establishment of a Global Environmental Organization (GEO) parallel to the World Trade Organization (WTO).<sup>284</sup> One solution proposed is the establishment of a Global Environmental Organization (GEO) parallel to the World Trade Organization (WTO).<sup>285</sup> Discussions of the potential locations of this new organization can be aided by feminist legal principles. A location at OECD would not be trusted to be inclusive since it is dominated by the North. Nor would it be seen as contextual since the Southern perspective is not now an important component. Results-orientation may not be a problem but amelioration is unlikely to be a major concern of that body due to its historical focus on competitive trade policy in the North.

In contrast, location at UNEP meets concerns about inclusion of North South balance, a contextual understanding of the issues, a results-orientation (as demonstrated by their role in promoting the Montreal Protocol) and a concern with amelioration of disadvantage of the South as they currently do in their programming. The problem, may be UNEP's capacity to house a GEO with its shrinking funding and the logistical difficulties with its location..

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<sup>284</sup> S. Charnovitz, citing Daniel C. Esty, *supra* note 263.

<sup>285</sup> S. Charnovitz, citing Daniel C. Esty, *ibid.*

In the absence of full-fledged innovative mechanisms, equality rights analysis provides some factors that should be considered in developing the new multilateral environmental institutions including their compliance mechanisms.

If multilateral agreements and institutions were inclusive and cooperative, like the Montreal Protocol, they would emphasize global cooperation toward a common environmental goal. They would follow the Montreal Protocol's precedent in ensuring that all states parties are able to participate. They might go beyond the Protocol in supporting the role of ENGO's as moral leaders and monitors. They would respect the diversity among nations as is demonstrated by the Montreal Protocol's flexible implementation process.

If multilateral agreements were contextual, they would consider the historical and present disadvantage of the South in creating a mutual strategy for implementation, as is done under Protocol with the Multilateral Fund. They would be interdisciplinary and integrated across other areas of law such as trade and human rights law. As in the Montreal Protocol, they would ensure that their effect is not marginal by isolation from economic or equitable considerations. They might develop a new global standard of living that would be available to all world citizens that extends beyond the purview of any one environmental agreement.

If the new agreements were results-oriented, like the Protocol they would have clear, agreed, measurable objectives which guide their activities. In fact, the results of their efforts would be carefully monitored and the theory and rules would change to ensure an equitable

and environmentally sound solution is reached. Thus it would be an iterative, evolving process of continual improvement. Like the Montreal Protocol, new mechanisms should be flexible to evolve with increased knowledge - scientific or socio-political.

If the new forms were to be ameliorative, it would use the contextual analysis to decide what actions would both achieve the environmental goal and operate against the continued subordination of the South. They would emulate the Montreal Protocol's focus on a common value (the ozone layer) which is held to be more important than any individual state's independent goals. Further, they would go beyond the Protocol's limited focus and hold certain basic values, the common interest of humankind, to be more important than any state or corporate profit.

Most important however, equality rights theory postulates the deconstruction of current global society and the reconstruction of a more equitable one. An equitable society would share resources fairly and redefine the respective roles and responsibilities of the parties.

Key to this change is a paradigm shift from overemphasis on competition to more emphasis on cooperation and equity. In a global family implementing a multilateral environment regime, the transfer of resources to the less industrialized "South" is an essential basic step. Without the transfer of technology and financial resources many "Southern" countries will be unable or unwilling to fulfil global environmental treaty obligations. Quite simply, they have other priorities for limited funds. Thus global environmental agreements

are challenged to balance environmental concerns with economic and development concerns of less-industrialized countries.

The compliance and dispute resolution mechanisms in the Montreal Protocol are highly inclusive, cooperative, and diverse. They are moderately contextual since the general context of deteriorating terms of trade is not addressed. They are not as results-oriented as they might be if ENGOs had adequate support and were more involved in monitoring or if there were a Global Environment Facility to provide sanctions of last resort. They are only moderately ameliorative since they do not address the general situation of disadvantage of the South. If the North-South power balance was more equal, formal mediation might have more appeal to the parties.

New forms have not yet evolved. To be consistent with feminist legal principles, new mechanisms would reflect an ethic of global cooperation toward mutual goals of common interest to humankind. The contextual analysis would be brought automatically by parties and diversity would be respected. Informal and formal mediation would provide win/win answers in the short and long term. Amelioration would be part of the process and go beyond the limited terms of the agreement.

## CHAPTER NINE: CONCLUSION

"It is insane at the end of the twentieth century to adhere to the belief that people are innately horrid and can do no better. Rather, we must recognize that our fears - of contingency, of dependency, of unimportance - have put us on a suicidal path. We need now to embrace the lesson of Darwin - that we are a self-creating species. The life and death struggle is now. This is the moment in history when guidance is most needed. Unless the law awakens from its nineteenth century slumber, it condemns itself, at best, to utter irrelevance and, at worst, to complicity in destruction."<sup>286</sup>

The foregoing chapters demonstrate that the Montreal Protocol is correctly identified as an innovative multilateral agreement and important model to study in the creation of future multilateral environment agreements.

The Montreal Protocol is a success in its own right in that it has succeeded in reducing the rate of ozone depletion in the stratosphere. To this end, it has necessarily created cooperative relationships between the North and the South.

The Montreal Protocol sets the stage for cooperative relationships between North and South. To this extent, many of its aspects successfully reflect feminist equality principles. In particular, the Protocol recognizes the disadvantaged position of the South and acts to reduce the resources gap between North and South. It provides for wide equitable participation, a delay in application of the control schedule to the South, a flexible

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<sup>286</sup> A. Scales, *supra* note 142, at 1382.

implementation process, and the Multilateral Fund with its positive incentives for the South in terms of grants and technology transfer.

Application of feminist equality principles leads to the conclusion that the Protocol offers a model for future environmental agreements that involve both North and South in a cooperative enterprise. The Protocol is inclusive, contextual, results-oriented and ameliorative of disadvantage.

It applies these principles in its 1) definition of relative roles and responsibilities of the parties, 2) the changing norms and standards of implementation within the agreement, 3) techniques for strengthening and extending the reach of the agreement and 4) compliance and dispute resolution mechanisms.

The Montreal Protocol treats the South as equal to the North in decision-making but as different in its capacity to implement the terms of the agreement. This new relationship is facilitated by the fact that the focus of the agreement is on the mutual result and the best means to reach it collaboratively.

The Protocol begins the development of new standards of measurement which are consistent with these new roles and responsibilities of North and South. It applies a contextual analysis to the development of a new standard and links it to the desired result and ameliorative aspects.

The Protocol applies the principles of inclusiveness, contextualization and results orientation in integrating the trade and aid provisions in the agreement. The trade sanction against non-parties provides a balance to the feminist principle of cooperation within the agreement. The balance of competition and cooperation however needs to be addressed in trade law as well. The increasing development gap threatens to overwhelm the small successes in individual environmental agreements like the Protocol on ozone Depletion. To significantly reduce the capacity gap between the North and South will require future steps to address the broader economic and equity issues in our global society.

Internally, the Protocol is developing new mechanisms for avoiding and resolving disputes. So far progress is consistent with feminist principles and these principles offer further guidance in creating these new institutions.

The feminist legal analysis indicates that there are challenges encountered by proponents of post-modern equality rights in the Protocol. It is difficult to make change on both the substantive and structural levels of law at the same time. There is difficulty in deriving common "tests" that neatly solve complex problems of North-South equity. There is a need for continual evolution in developing and applying new standards which do not have a disparately disadvantageous impact on the North or South. Sometimes parties sink into the temptation of a negative focus on the rich industrialized countries instead of developing and applying a new analysis. There is a need to integrate environment, development and trade



considerations yet there are difficulties in transporting insights from one discipline to another without sufficient examination of the different contexts of the laws.

Finally, there is danger in piecemeal change which inadvertently aggravates the general situation of the South as a whole. The entire Protocol, even with its innovative aspects, may be an example of an inappropriate focus on a small part of the whole picture. The very success of the Protocol may make it more difficult for the South to succeed in the larger equity agenda. The North may be tempted to address only the segmented issues of particular importance to it, leaving the South suffering under its continued disadvantage in other area.

Some dismiss the agreement as a special case. The Ozone issue is a limited topic with a clear threat to a common resource which was not within any one country's border. Environmental groups campaigned rigorously and effectively to raise consciousness at home and abroad about the problem. Responsibility for the problem lay clearly on the heads of the industrialized world and it had the resources to address it.<sup>287</sup> Public interest had been piqued by the graphic image of a hole in the sky. Industry decided that it could be in their economic interest to cooperate in terms of public image and the profit they could make from selling alternatives.

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<sup>287</sup> Round, Crossroads *supra* note 92

To apply the lessons of the Montreal Protocol, one must not try to replicate the process in detail. Instead, principles must be extracted which can be applied in a variety of situations. The feminist equality rights principles applied to four key aspects of an environmental agreement is a model with this in mind.

A second factor in the future application of the Montreal Protocol model is the change effected by the very success of the Protocol itself. The Protocol establishes a new starting point for negotiations between North and South. The new consciousness of the parties includes the knowledge that the economic situation of the South is becoming worse while the Protocol makes no significant contribution to the reduction of the gap.

As the negotiation of multilateral agreements is an iterative process, there will be more challenges to basic assumptions in the future. There will likely be a need to integrate the global economic context into the discussion of North-South equality.

There is a need to develop new mechanisms toward global environmental cooperation. The World Commission on Environment and Development opinion that it is not possible to make the necessary changes within present decision-making structures and institutional arrangements is consistent with feminist equality rights views of our current legal structure. The development of new legal and institutional structures to protect the environment on

behalf of present and future generations involves facing into equality rights issues, issues of justice, autonomy, hierarchy, public and private spheres.<sup>288</sup>

The World Commission on Environment and Development calls for transformational change in both the content and structure of the law. It demonstrates a belief that human society is in a continuous process of recreating itself. The model presented in this thesis is meant to be a support to that process.

The successful protection of the environment requires an alternative to dominance as a global social, economic and legal norm. The development of a new global ethic has started in the Montreal Protocol. There is more work ahead.

"If you have built castles in the air  
your work will not be lost;  
That is where they should be.  
Now put the foundation under them."

Henry David Thoreau

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<sup>288</sup> Miller 1991, *supra* note 83, at 141.

**Table 2: Summary of Conclusions**

<b>ELEMENTS OF PROTOCOL FEMINIST PRINCIPLES</b>	<b>ROLES &amp; RESPON SI- BILITIES</b>	<b>STANDA RD</b>	<b>EXTEND &amp; STREN G-THEN</b>	<b>DISPUT E RESOL UTION</b>
<b>INCLUSIVENE SS</b>	<b>high</b>	<b>high</b>	<b>high</b>	<b>high</b>
<b>RESULTS ORIENTATION</b>	<b>high</b>	<b>moderate</b>	<b>moderate</b>	<b>low</b>
<b>CONTEXTUAL ANALYSIS</b>	<b>moderate</b>	<b>low</b>	<b>moderate</b>	<b>moderate</b>
<b>AMELIORATIV E ACTION</b>	<b>high</b>	<b>moderate</b>	<b>low</b>	<b>moderate</b>

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## ANNEX 1

MONTREAL PROTOCOL ON SUBSTANCES THAT DEplete THE OZONE LAYER  
AS ADJUSTED AND AMENDED BY THE SECOND MEETING OF THE PARTIES  
LONDON, 27-29 JUNE 1990 AND FURTHER AMENDED  
BY THE THIRD MEETING OF THE PARTIES NAIROBI, 19-21 JUNE 1991  
AND BY THE FOURTH MEETING OF THE PARTIES COPENHAGEN, 23-25 NOVEMBER 1992

The Parties to this Protocol,

Being Parties to the Vienna Convention for the Protection of the Ozone Layer,

Mindful of their obligation under that Convention to take appropriate measures to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer,

Recognizing that world-wide emissions of certain substances can significantly deplete and otherwise modify the ozone layer in a manner that is likely to result in adverse effects on human health and the environment,

Conscious of the potential climatic effects of emissions of these substances,

Aware that measures taken to protect the ozone layer from depletion should be based on relevant scientific knowledge, taking into account technical and economic considerations,

Determined to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination on the basis of developments in scientific knowledge, taking into account technical and economic considerations and bearing in mind the developmental needs of developing countries,

Acknowledging that special provision is required to meet the needs of developing countries [for these substances], including the provision of additional financial resources and access to relevant technologies, bearing in mind that the magnitude of funds necessary is predictable, and the funds can be expected to make a substantial difference in the world's ability to address the scientifically established problem of ozone depletion and its harmful effects,

Noting the precautionary measures for controlling emissions of certain chlorofluorocarbons that have already been taken at national and regional levels,

Considering the importance of promoting international co-operation in the [research and development of science and technology] research, development and transfer of alternative technologies relating to the control and reduction of emissions of substances that deplete the ozone layer, bearing in mind in particular the needs of developing countries,

HAVE AGREED AS FOLLOWS:

ARTICLE 1: DEFINITIONS

For the purposes of this Protocol:

1. "Convention" means the Vienna Convention for the Protection of the Ozone Layer, adopted on 22 March 1985.
2. "Parties" means, unless the text otherwise indicates, Parties to this Protocol.
3. "Secretariat" means the Secretariat of the Convention.
4. "Controlled substance" means a substance [listed] in Annex A or in Annex B [, Annex B, Annex C or Annex E] to this Protocol, whether existing alone or in a mixture. It includes the isomers of any such substance, except as specified in the relevant Annex, but [it] excludes, [however] any [such] controlled substance or mixture which is in a manufactured product other than a container used for the transportation or storage of [the] that substance.
5. "Production" means the amount of controlled substances produced, minus the amount destroyed by technologies to be approved by the Parties and minus the amount entirely used as feedstock in the manufacture of other chemicals. The amount recycled and reused is not to be considered as "production".
6. "Consumption" means production plus imports minus exports of controlled substances.
7. "Calculated levels" of production, imports, exports and consumption means levels determined in accordance with Article 3.
8. "Industrial rationalization" means the transfer of all or a portion of the calculated level of production of one Party to another, for the purpose of achieving economic efficiencies or responding to anticipated shortfalls in supply as a result of plant closures.

ARTICLE 2: CONTROL MEASURES

1. (Incorporated in Article 2A as per the adjustments made in Second Meeting of the Parties in London in 1990).

2. Replaced by Article 2B.

3 and 4. Replaced in Article 2A.

5. [Any Party whose calculated level of production in 1986 of the controlled substances in Group I of Annex A was less than twenty-five kilotonnes may, for the purposes of industrial rationalization, transfer to or receive from any other Party, production in excess of the limits set out in paragraphs 1, 3 and 4 provided that the total combined calculated levels of production of the Parties concerned does not exceed the production limits set out in this Article. Any transfer of such production shall be notified to the secretariat, no later than the time of the transfer.]

5. Any Party may, for one or more control periods, transfer to another Party any portion of its calculated level of production set out in Articles 2A to 2E, (and Article 2H) provided that the total combined calculated levels of production of the Parties concerned for any group of controlled substances do not exceed the production limits set out in those Articles for that group. Such transfer of production shall be notified to the Secretariat by each of the Parties concerned, stating the terms of such transfer and the period for which it is to apply.

*5 bis. Any Party not operating under paragraph 1 of Article 5 may, for one or more control periods, transfer to another such Party any portion of its calculated level of consumption set out in Article 2F, provided that the calculated level of consumption of controlled substances in Group I of Annex A of the Party transferring the portion of its calculated level of consumption did not exceed 0.25 kilograms per capita in 1989 and that the total combined calculated levels of consumption of the Parties concerned do not exceed the consumption limits set out in Article 2F. Such transfer of consumption shall be notified to the Secretariat by each of the Parties concerned, stating the terms of such transfer and the period for which it is to apply.*

6. Any Party not operating under Article 5, that has facilities for the production of Annex A or Annex B controlled substances under construction, or contracted for, prior to 16 September 1987, and provided for in national legislation prior to 1 January 1987, may add the production from such facilities to its 1986 production of such substances for the purposes of determining its calculated level of production for 1986, provided that such facilities are completed by 31 December 1990 and that such production does not raise that Party's annual calculated level of consumption of the controlled substances above 0.5 kilograms per capita.

7. Any transfer of production pursuant to paragraph 5 or any addition of production pursuant to paragraph 6 shall be notified to the Secretariat, no later than the time of the transfer or addition.

8. (a) Any Parties which are Member States of a regional economic integration organization as defined in Article 1 (6) of the Convention may agree that they shall jointly fulfil their obligations respecting consumption under this Article and Articles 2A to 2E {Articles 2A to 2H} provided that their total combined calculated level of consumption does not exceed the levels required by this Article and Articles 2A to 2E {Articles 2A to 2H}.

(b) The Parties to any such agreement shall inform the Secretariat of the terms of the agreement before the date of the reduction in consumption with which the agreement is concerned.

(c) Such agreement will become operative only if all Member States of the regional economic integration organization and the organization concerned are Parties to the Protocol and have notified the Secretariat of their manner of implementation.

9. (a) Based on the assessments made pursuant to Article 6, the Parties may decide whether:

- (i) Adjustments to the ozone depleting potentials specified in Annex A and/or Annex B {, Annex B, Annex C and/or Annex E} should be made and, if so, what the adjustments should be; and
- (ii) Further adjustments and reductions of production or consumption of the controlled substances [from 1986 levels] should be undertaken and, if so, what the scope, amount and timing of any such adjustments and reductions should be;

(b) Proposals for such adjustments shall be communicated to the Parties by the Secretariat at least six months before the meeting of the Parties at which they are proposed for adoption;

(c) In taking such decisions, the Parties shall make every effort to reach agreement by consensus. If all efforts at consensus have been exhausted, and no agreement reached, such decisions shall, as a last resort, be adopted by a two-thirds majority vote of the Parties present and voting representing [at least fifty per cent of the total consumption of the controlled substances of the Parties;] a majority of the Parties operating under Paragraph 1 of Article 5 present and voting and a majority of the Parties not so operating present and voting;

(d) The decisions, which shall be binding on all Parties, shall forthwith be communicated to the Parties by the Depositary. Unless otherwise provided in the decisions, they shall enter into force on the expiry of six months from the date of the circulation of the communication by the Depositary.

10. [(a)] Based on the assessments made pursuant to Article 6 of this Protocol and in accordance with the procedure set out in Article 9 of the Convention, the Parties may decide:

- (i) whether any substances, and if so which, should be added to or removed from any annex to this Protocol, and
- (ii) the mechanism, scope and timing of the control measures that should apply to those substances;

[(b) Any such decisions shall become effective, provided that it has been accepted by a two-thirds majority vote of the Parties present and voting.]

11. Notwithstanding the provisions contained in this Article and Articles 2A to 2E (Articles 2A to 2H) Parties may take more stringent measures than those required by this Article and Articles 2A to 2E (Articles 2A to 2H).

#### INTRODUCTION TO THE ADJUSTMENTS

The Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer decides, on the basis of assessments made pursuant to Article 6 of the Protocol, to adopt adjustments and reductions of production and consumption of the controlled substances in Annex A to the Protocol, as follows, with the understanding that:

(a) References in Article 2 to "this Article" and throughout the Protocol to "Article 2" shall be interpreted as references to Articles 2, 2A and 2B;

(b) References throughout the Protocol to "paragraphs 1 to 4 of Article 2" shall be interpreted as references to Articles 2A and 2B; and

(c) The reference in paragraph 5 of Article 2 to "paragraphs 1, 3 and 4" shall be interpreted as a reference to Article 2A.

#### ARTICLE 2A: CFCs

1. Each Party shall ensure that for the twelve-month period commencing on the first day of the seventh month following the date of entry into force of this Protocol, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex A does not exceed its calculated level of consumption in 1986. By the end of the same period, each Party producing one or more of these substances shall ensure that its calculated level of production of the substances does not exceed its calculated level of production in 1986, except that such level may have increased by no more than ten per cent based on the 1986 level. Such increase shall be permitted only so as to satisfy the basic domestic needs of the Parties operating under Article 5 and for the purposes of industrial rationalization between Parties.

2. Each Party shall ensure that for the period from 1 July 1991 to 31 December 1992 its calculated levels of consumption and production of the controlled substances in Group I of Annex A do not exceed 150 per cent of its calculated levels of production and consumption of those substances in 1986; with effect from 1 January 1993, the twelve-month control period for these controlled substances shall run from 1 January to 31 December each year.

3. Each Party shall ensure that for the twelve-month period commencing on 1 January 1994, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex A does not exceed, annually, twenty-five per cent of its calculated level of consumption in 1986. Each Party producing one or more of these substances shall, for the same periods, ensure that its calculated level of production of the substances does not exceed, annually, twenty-five per cent of its calculated level of production in 1986. However, in order to satisfy the basic domestic needs of the Parties operating under paragraph 1 of Article 5, its calculated level of production may exceed that limit by up to ten per cent of its calculated level of production in 1986.

4. Each Party shall ensure that for the twelve-month period commencing on 1 January 1996, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex A does not exceed zero. Each Party producing one or more of these substances shall, for the same periods, ensure that its calculated level of production of the substances does not exceed zero. However, in order to satisfy the basic domestic needs of the Parties operating under paragraph 1 of Article 5, its calculated level of production may exceed that limit by up to fifteen per cent of its calculated level of production in 1986. This paragraph will apply save to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be essential.

## ARTICLE 2B: HALONS

1. Each Party shall ensure that for the twelve-month period commencing on 1 January 1992, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group II of Annex A does not exceed, annually, its calculated level of consumption in 1986. Each Party producing one or more of these substances shall, for the same periods, ensure that its calculated level of production of the substances does not exceed, annually, its calculated level of production in 1986. However, in order to satisfy the basic domestic needs of the Parties operating under paragraph 1 of Article 5, its calculated level of production may exceed that limit by up to ten per cent of its calculated level of production in 1986.

2. Each Party shall ensure that for the twelve-month period commencing on 1 January 1994, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group II of Annex A does not exceed zero. Each Party producing one or more of these substances shall, for the same periods, ensure that its calculated level of production of the substances does not exceed zero. However, in order to satisfy the basic domestic needs of the Parties operating under paragraph 1 of Article 5, its calculated level of production may exceed that limit by up to fifteen per cent of its calculated level of production in 1986. This paragraph will apply save to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be essential.

## ARTICLE 2C: OTHER FULLY HALOGENATED CFCs

1. Each Party shall ensure that for the twelve-month period commencing on 1 January 1993, its calculated level of consumption of the controlled substances in Group I of Annex B does not exceed, annually, eighty per cent of its calculated level of consumption in 1989. Each Party producing one or more of these substances shall, for the same period, ensure that its calculated level of production of the substances does not exceed, annually, eighty per cent of its calculated level of production in 1989. However, in order to satisfy the basic domestic needs of the Parties operating under paragraph 1 of Article 5, its calculated level of production may exceed that limit by up to ten per cent of its calculated level of production in 1989.

2. Each Party shall ensure that for the twelve-month period commencing on 1 January 1994, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex B does not exceed, annually, twenty-five per cent of its calculated level of consumption in 1989. Each Party producing one or more of these substances shall, for the same periods, ensure that its calculated level of production of the substances does not exceed, annually, twenty-five per cent of its calculated level of production in 1989. However, in order to satisfy the basic domestic needs of the Parties operating under paragraph 1 of Article 5, its calculated level of production may exceed that limit by up to ten per cent of its calculated level of production in 1989.

3. Each Party shall ensure that for the twelve-month period commencing on 1 January 1996, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex B does not exceed zero. Each Party producing one or more of these substances shall, for the same periods, ensure that its calculated level of production of the substances does not exceed zero. However, in order to satisfy the basic domestic needs of the Parties operating under paragraph 1 of Article 5, its calculated level of production may exceed that limit by up to fifteen per cent of its calculated level of production in 1989. This paragraph will apply save to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be essential.

## ARTICLE 2D: CARBON TETRACHLORIDE

1. Each Party shall ensure that for the twelve-month period commencing on 1 January 1995, its calculated level of consumption of the controlled substance in Group II of Annex B does not exceed, annually, fifteen per cent of its calculated level of consumption in 1989. Each Party producing the substance shall, for the same period, ensure that its calculated level of production of the substance does not exceed, annually, fifteen per cent of its calculated level of production in 1989. However, in order to satisfy the basic domestic needs of the Parties operating under paragraph 1 of Article 5, its calculated level of production may exceed that limit by up to ten per cent of its calculated level of production in 1989.

2. Each Party shall ensure that for the twelve-month period commencing on 1 January 1996, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substance in Group II of Annex B does not exceed zero. Each Party producing the substance shall, for the same periods, ensure that its calculated level of production of the substance does not exceed zero. However, in order to satisfy the basic domestic needs of the Parties operating under paragraph 1 of Article 5, its calculated level of production may exceed that limit by up to fifteen per cent of its calculated level of production in 1989. This paragraph will apply save to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be essential.

## ARTICLE 2E: 1,1,1 - TRICHLOROETHANE (METHYL CHLOROFORM)

1. Each Party shall ensure that for the twelve-month period commencing on 1 January 1993, its calculated level of consumption of the controlled substance in Group III of Annex B does not exceed, annually, its calculated level of consumption in 1989. Each Party producing the substance shall, for the same period, ensure that its calculated level of production of the substance does not exceed, annually, its calculated level of production in 1989. However, in order to satisfy the basic domestic needs of the Parties operating under paragraph 1 of Article 5, its calculated level of production may exceed that limit by up to ten per cent of its calculated level of production in 1989.

2. Each Party shall ensure that for the twelve-month period commencing on 1 January 1994, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substance in Group III of Annex B does not exceed, annually, fifty per cent of its calculated level of consumption in 1989. Each Party producing the substance shall, for the same periods, ensure that its calculated level of production of the substance does not exceed, annually, fifty per cent of its calculated level of production in 1989. However, in order to satisfy the basic domestic needs of the Parties operating under paragraph 1 of Article 5, its calculated level of production may exceed that limit by up to ten per cent of its calculated level of production in 1989.

3. Each Party shall ensure that for the twelve-month period commencing on 1 January 1996, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substance in Group III of Annex B does not exceed zero. Each Party producing the substance shall, for the same periods, ensure that its calculated level of production of the substance does not exceed zero. However, in order to satisfy the basic domestic needs of the Parties operating under paragraph 1 of Article 5, its calculated level of production may exceed that limit by up to fifteen per cent of its calculated level of production for 1989. This paragraph will apply save to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be essential.



**(ARTICLE 2F: HYDROCHLOROFLUOROCARBONS**

1. Each Party shall ensure that for the twelve-month period commencing on 1 January 1996, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex C does not exceed, annually, the sum of:

(a) Three point one per cent of its calculated level of consumption in 1989 of the controlled substances in Group I of Annex A; and

(b) Its calculated level of consumption in 1989 of the controlled substances in Group I of Annex C.

2. Each Party shall ensure that for the twelve month period commencing on 1 January 2004, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex C does not exceed, annually, sixty-five per cent of the sum referred to in paragraph 1 of this Article.

3. Each Party shall ensure that for the twelve-month period commencing on 1 January 2010, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex C does not exceed, annually, thirty-five per cent of the sum referred to in paragraph 1 of this Article.

4. Each Party shall ensure that for the twelve-month period commencing on 1 January 2015, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex C does not exceed, annually, ten per cent of the sum referred to in paragraph 1 of this Article.

5. Each Party shall ensure that for the twelve-month period commencing on 1 January 2020, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex C does not exceed, annually, zero point five per cent of the sum referred to in paragraph 1 of this Article.

6. Each Party shall ensure that for the twelve-month period commencing on 1 January 2030, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex C does not exceed zero.

7. As of 1 January 1996, each Party shall endeavour to ensure that:

(a) The use of controlled substances in Group I of Annex C is limited to those applications where other more environmentally suitable alternative substances or technologies are not available;

(b) The use of controlled substances in Group I of Annex C is not outside the areas of application currently met by controlled substances in Annexes A, B and C, except in rare cases for the protection of human life or human health; and

(c) Controlled substances in Group I of Annex C are selected for use in a manner that minimizes ozone depletion, in addition to meeting other environmental, safety and economic considerations.

**ARTICLE 2G: HYDROBROMOFLUOROCARBONS**

Each Party shall ensure that for the twelve-month period commencing on 1 January 1996, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group II of Annex C does not exceed zero. Each Party producing the substances shall, for the same periods, ensure that its calculated level of production of the substances does not exceed zero. This paragraph will apply save to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be essential.

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ARTICLE 2H: METHYL BROMIDE

Each Party shall ensure that for the twelve-month period commencing on 1 January 1995, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substance in Annex E does not exceed, annually, its calculated level of consumption in 1991. Each Party producing the substance shall, for the same periods, ensure that its calculated level of production of the substance does not exceed, annually, its calculated level of production in 1991. However, in order to satisfy the basic domestic needs of the Parties operating under paragraph 1 of Article 5, its calculated level of production may exceed that limit by up to ten per cent of its calculated level of production in 1991. The calculated levels of consumption and production under this Article shall not include the amounts used by the Party for quarantine and pre-shipment applications.)

ARTICLE 3: CALCULATION OF CONTROL LEVELS

For the purposes of Articles 2, 2A to 2E (2A to 2H) and 5, each Party shall, for each group of substances in Annex A or Annex B, (Annex B, Annex C or Annex E) determine its calculated levels of:

(a) Production by:

(i) multiplying its annual production of each controlled substance by the ozone depleting potential specified in respect of it in Annex A or Annex B, (Annex B, Annex C or Annex E);

(ii) adding together, for each such Group, the resulting figures;

(b) Imports and exports, respectively, by following, mutatis mutandis, the procedure set out in subparagraph (a); and

(c) Consumption by adding together its calculated levels of production and imports and subtracting its calculated level of exports as determined in accordance with subparagraphs (a) and (b). However, beginning on 1 January 1993, any export of controlled substances to non-Parties shall not be subtracted in calculating the consumption level of the exporting Party.

ARTICLE 4: CONTROL OF TRADE WITH NON-PARTIES

[1 Within one year of the entry into force of this Protocol, each Party shall ban the import of controlled substances from any State not party to this Protocol.

2. Beginning on 1 January 1993, no Party operating under paragraph 1 of Article 5 may export any controlled substance to any State not party to this Protocol.

3. Within three years of the date of entry into force of this Protocol, the Parties shall, following the procedure in Article 10 of the Convention, elaborate in an annex a list of products containing controlled substances. Parties that have not objected to the annex in accordance with those procedures shall ban, within one year of the annex having become effective, the import of those products from any State not party to this Protocol.]

[4. Within five years of the entry into force of this Protocol, the Parties shall determine the feasibility of banning or restricting, from States not party to this Protocol, the import of products produced with, but not containing, controlled substances. If determined feasible, the Parties shall, following the procedures in Article 10 of the Convention, elaborate in an annex a list of such products. Parties that have not objected to it in accordance with those procedures shall ban or restrict, within one year of the annex having become effective, the import of those products from any State not party to this Protocol.]

5. Each Party shall discourage the export, to any State not party to this Protocol, of technology for producing and for utilizing controlled substances.]

1. As of 1 January 1990, each party shall ban the import of the controlled substances in Annex A from any State not party to this Protocol.

1 *bis*. Within one year of the date of the entry into force of this paragraph, each Party shall ban the import of the controlled substances in Annex B from any State not party to this Protocol.

1 *ter*. Within one year of the date of entry into force of this paragraph, each Party shall ban the import of any controlled substances in Group II of Annex C from any State not party to this Protocol.

2. As of 1 January 1993, each Party shall ban the export of any controlled substances in Annex A to any State not party to this Protocol.

2 *bis*. Commencing one year after the date of entry into force of this paragraph, each Party shall ban the export of any controlled substances in Annex B to any State not party to this Protocol.

2 *ter*. Commencing one year after the date of entry into force of this paragraph, each Party shall ban the export of any controlled substances in Group II of Annex C to any State not party to this Protocol.

3. By 1 January 1992, the Parties shall, following the procedures in Article 10 of the Convention, elaborate in an annex a list of products containing controlled substances in Annex A. Parties that have not objected to the annex in accordance with those procedures shall ban, within one year of the annex having become effective, the import of those products from any State not party to this Protocol.

3 *bis*. Within three years of the date of the entry into force of this paragraph, the Parties shall, following the procedures in Article 10 of the Convention, elaborate in an annex a list of products containing controlled substances in Annex B. Parties that have not objected to the annex in accordance with those procedures shall ban, within one year of the annex having become effective, the import of those products from any State not party to this Protocol.

3 *ter*. Within three years of the date of entry into force of this paragraph, the Parties shall, following the procedures in Article 10 of the Convention, elaborate in an annex a list of products containing controlled substances in Group II of Annex C. Parties that have not objected to the annex in accordance with those procedures shall ban, within one year of the annex having become effective, the import of those products from any State not party to this Protocol.

4. By 1 January 1994, the Parties shall determine the feasibility of banning or restricting, from States not party to this Protocol, the import of products produced with, but not containing, controlled substances in Annex A. If determined feasible, the Parties shall, following the procedures in Article 10 of the Convention, elaborate in an annex a list of such products. Parties that have not objected to the annex in accordance with those procedures shall ban, within one year of the annex having become effective, the import of those products from any State not party to this Protocol.

4 *bis*. Within five years of the date of the entry into force of this paragraph, the Parties shall determine the feasibility of banning or restricting, from States not party to this Protocol, the import of products produced with, but not containing, controlled substances in Annex B. If determined feasible, the Parties shall, following the procedures in Article 10 of the Convention, elaborate in an annex a list of such products. Parties that have not objected to the annex in accordance with those procedures shall ban or restrict, within one year of the annex having become effective, the import of those products from any State not party to this Protocol.

4 ter. Within five years of the date of entry into force of this paragraph, the Parties shall determine the feasibility of banning or restricting, from States not party to this Protocol, the import of products produced with, but not containing, controlled substances in Group II of Annex C. If determined feasible, the Parties shall, following the procedures in Article 10 of the Convention, elaborate in an annex a list of such products. Parties that have not objected to the annex in accordance with those procedures shall ban or restrict, within one year of the annex having become effective, the import of those products from any State not party to this Protocol.

5. Each 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 (in Annexes A and B and Group II of Annex C).

6. Each Party shall refrain from providing new subsidies, aid, credits, guarantees or insurance programmes for the export to States not party to this Protocol of products, equipment, plants or technology that would facilitate the production of controlled substances (in Annexes A and B and Group II of Annex C).

7. Paragraphs 5 and 6 shall not apply to products, equipment, plants or technology that improve the containment, recovery, recycling or destruction of controlled substances, promote the development of alternative substances, or otherwise contribute to the reduction of emissions of controlled substances (in Annexes A and B and Group II of Annex C).

8. Notwithstanding the provisions of this Article, imports referred to in paragraphs 1, 1 *bis*, 3, 3 *bis*, [and] 4, and 4 *bis* and exports referred to Paragraphs 2 and 2 *bis* (and exports received to in paragraphs 1 to 4 *ter* of this Article) may be permitted from, or to, any State not party to this Protocol, if that State is determined, by a meeting of the Parties, to be in full compliance with Article 2, Articles 2A to 2E (, Article 2G) and this Article, and [has] have submitted data to that effect as specified in Article 7.

9. For the purposes of this Article, the term "State not party to this Protocol" shall include, with respect to a particular controlled substance, a State or regional economic integration organisation that has not agreed to be bound by the control measures in effect for that substance.

10. By 1 January 1996, the Parties shall consider whether to amend this Protocol in order to extend the measures in this Article to trade in controlled substances in Group I of Annex C and in Annex E with States not party to the Protocol.

#### ARTICLE 5: SPECIAL SITUATION OF DEVELOPING COUNTRIES

1. Any Party that is a developing country and whose annual calculated level of consumption of the controlled substances in Annex A is less than 0.3 kilograms per capita on the date of the entry into force of the Protocol for it, or any time thereafter [within ten years of the date of entry into force of the Protocol] until 1 January 1999, shall, in order to meet its basic domestic needs, be entitled to delay for ten years its compliance with the control measures set out in Articles 2A to 2E [paragraphs 1 to 4 of Article 2 by ten years after that specified in those paragraphs]. [However, such Party shall not exceed an annual calculated level of consumption of 0.3 kilograms per capita. Any such Party shall be entitled to use either the average of its annual calculated level of consumption for the period of 1995 to 1997 inclusive or a calculated level of consumption of 0.3 kilograms per capita, whichever is the lower, as the basis for its compliance with the control measures].

, provided that any further amendments to the adjustments or Amendment adopted at the Second Meeting of the Parties in London, 29 June 1990, shall apply to the Parties operating under this paragraph after the review provided for in paragraph 8 of this Article has taken place and shall be based on the conclusions of that review.

1 bis. The Parties shall, taking into account the review referred to in paragraph 8 of this Article, the assessments made pursuant to Article 6 and any other relevant information, decide by 1 January 1996, through the procedure set forth in paragraph 9 of Article 2:

(a) With respect to paragraphs 1 to 6 of Article 2F, what base year, initial levels, control schedules and phase-out date for consumption of the controlled substances in Group I of Annex C will apply to Parties operating under paragraph 1 of this Article;

(b) With respect to Article 2G, what phase-out date for production and consumption of the controlled substances in Group II of Annex C will apply to Parties operating under paragraph 1 of this Article; and

(c) With respect to Article 2H, what base year, initial levels and control schedules for consumption and production of the controlled substance in Annex E will apply to Parties operating under paragraph 1 of this Article.

[2. 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.]

[3. 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.]

2. However, any Party operating under paragraph 1 of this Article shall exceed neither an annual calculated level of consumption of the controlled substances in Annex A of 0.3 kilograms per capita nor an annual calculated level of consumption of controlled substances of Annex B of 0.2 kilograms per capita.

3. When implementing the control measures set out in Articles 2A to 2E, any Party operating under paragraph 1 of this Article shall be entitled to use:

(a) For controlled substances under Annex A, either the average of its annual calculated level of consumption for the period 1995 to 1997 inclusive or a calculated level of consumption of 0.3 kilograms per capita, whichever is the lower, as the basis for determining its compliance with the control measures.

(b) For controlled substances under Annex B, the average of its annual calculated level of consumption for the period 1998 to 2000 inclusive or a calculated level of consumption of 0.2 kilograms per capita, whichever is the lower, as the basis for determining its compliance with the control measures.

4. If a Party operating under paragraph 1 of this Article, at any time before the control measures obligations in Articles 2A to 2E (Article 2A to 2H) become applicable to it, finds itself unable to obtain an adequate supply of controlled substances, it may notify this to the Secretariat. The Secretariat shall forthwith transmit a copy of such notification to the Parties, which shall consider the matter at their next Meeting, and decide upon appropriate action to be taken.

5. Developing the capacity to fulfill the obligations of the Parties operating under paragraph 1 of this Article to comply with the control measures set out in Articles 2A to 2E, and any control measures in Articles 2F to 2H that are decided pursuant to paragraph 1 bis of this Article, and their implementation by those same Parties will depend upon the effective implementation of the financial co-operation as provided by Article 10 and the transfer of technology as provided by Article 10A.

6. Any Party operating under paragraph 1 of this Article may, at any time, notify the Secretariat in writing that, having taken all practicable steps it is unable to implement any or all of the obligations laid down in Articles 2A to 2E, or any or all obligations in Articles 2F to 2H that are decided pursuant to paragraph 1 bis of this Article, due to the inadequate implementation of Articles 10 and 10A. The Secretariat shall forthwith transmit a copy of the notification to the Parties, which shall consider the matter at their next Meeting, giving due recognition to paragraph 5 of this Article and shall decide upon appropriate action to be taken.

7. During the period between notification and the Meeting of the Parties at which the appropriate action referred to in paragraph 6 above is to be decided, or for a further period if the Meeting of the Parties so decides, the non-compliance procedures referred to in Article 8 shall not be invoked against the notifying Party.

8. A Meeting of the Parties shall review, not later than 1995, the situation of the Parties operating under paragraph 1 of this Article, including the effective implementation of financial co-operation and transfer of technology to them, and adopt such revisions that may be deemed necessary regarding the schedule of control measures applicable to those Parties.

9. Decisions of the Parties referred to in paragraph 4, 6 and 7 of this Article shall be taken according to the same procedure applied to decision-making under Article 10.

#### ARTICLE 6: ASSESSMENT AND REVIEW OF CONTROL MEASURES

Beginning in 1990, and at least every four years thereafter, the Parties shall assess the control measures provided for in Article 2 and Articles 2A to 2E, and the situation regarding production, imports and exports of the transitional substances in Group I of Annex C (Articles 2A to 2H) on the basis of available scientific, environmental, technical and economic information. At least one year before each assessment, the Parties shall convene appropriate panels of experts qualified in the fields mentioned and determine the composition and terms of reference of any such panels. Within one year of being convened, the panels will report their conclusions, through the Secretariat, to the Parties.

#### ARTICLE 7: REPORTING OF DATA

1. Each Party shall provide to the Secretariat, within three months of becoming a Party, statistical data on its production, imports and exports of each of the controlled substances in Annex A for the year 1986, or the best possible estimates of such data where actual data are not available.

[2 Each Party shall provide statistical data to the secretariat on its annual production (with separate data on amounts destroyed by technologies to be approved by the Parties), imports, and exports to Parties and non-Parties, respectively, of such substances for the year during which it becomes a Party and for each year thereafter. It shall forward the data no later than nine months after the end of the year to which the data relate.]

2. Each Party shall provide to the Secretariat statistical data on its production, imports and exports of each of the controlled substances in Annex B and each of the transitional substances in Group I of Annex C, for the year 1989, or the best possible estimates of such data where actual data are not available, not later than three months after the date when the provisions set out in the Protocol with regard to the substances in Annex B enter into force for that Party.

3. Each Party shall provide statistical data to the Secretariat on its annual production (as defined in paragraph 5 of Article 1), and, separately,

- amounts used for feedstocks,

- amounts destroyed by technologies approved by the Parties,
- imports and exports to Parties and non-Parties respectively,

of each of the controlled substances listed in Annexes A and B as well as of the transitional substances in Group I of Annex C, for the year during which provisions concerning the substances in Annex B entered into force for that Party and for each year thereafter. Data shall be forwarded not later than nine months after the end of the year to which the data relate.

2. Each Party shall provide to the Secretariat statistical data on its production, imports and exports of each of the controlled substances

- in Annexes B and C, for the year 1989;
- in Annex E, for the year 1991,

or the best possible estimates of such data where actual data are not available, not later than three months after the date when the provisions set out in the Protocol with regard to the substances in Annexes B, C and E respectively enter into force for that Party.

3. Each Party shall provide to the Secretariat statistical data on its annual production (as defined in paragraph 5 of Article 1) of each of the controlled substances listed in Annexes A, B, C and E and, separately, for each substance,

- Amounts used for feedstocks,
- Amounts destroyed by technologies approved by the Parties, and
- Imports from and exports to Parties and non-Parties respectively,

for the year during which provisions concerning the substances in Annexes A, B, C and E respectively entered into force for that Party and for each year thereafter. Data shall be forwarded not later than nine months after the end of the year to which the data relate.

3 bis. Each Party shall provide to the Secretariat separate statistical data of its annual imports and exports of each of the controlled substances listed in Group II of Annex A and Group I of Annex C that have been recycled.

4. For Parties operating under the provisions of paragraph 8 (a) of Article 2, the requirements in paragraphs 1, 2 and 3 (in paragraphs 1, 2, 3 and 3 bis) of this Article in respect of statistical data on imports and exports shall be satisfied if the regional economic integration organization concerned provides data on imports and exports between the organization and States that are not members of that organization.

#### ARTICLE 8: NON-COMPLIANCE

The Parties, at their first meeting, shall consider and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance.

ARTICLE 9: RESEARCH, DEVELOPMENT, PUBLIC AWARENESS  
AND EXCHANGE OF INFORMATION

1. The Parties shall co-operate, consistent with their national laws, regulations and practices and taking into account in particular the needs of developing countries, in promoting, directly or through competent international bodies, research, development and exchange of information on

(a) best technologies for improving the containment, recovery, recycling, or destruction of controlled substances or otherwise reducing their emissions;

(b) possible alternatives to controlled substances, to products containing such substances, and to products manufactured with them; and

(c) costs and benefits of relevant control strategies.

2. The Parties, individually, jointly or through competent international bodies, shall co-operate in promoting public awareness of the environmental effects of the emissions of controlled substances and other substances that deplete the ozone layer.

3. Within two years of the entry into force of this Protocol and every two years thereafter, each Party shall submit to the Secretariat a summary of the activities it has conducted pursuant to this Article.

[ARTICLE 10: TECHNICAL ASSISTANCE

1. The Parties shall in the context of the provisions of Article 4 of the Convention, and taking into account in particular the needs of developing countries, co-operate in promoting technical assistance to facilitate participation in and implementation of this Protocol.

2. Any Party or Signatory to this Protocol may submit a request to the Secretariat for technical assistance for the purposes of implementing or participating in the Protocol.

3. The Parties, at their first meeting, shall begin deliberations on the means of fulfilling the obligations set out in Article 9, and paragraphs 1 and 2 of this Article, including the preparation of workplans. Such workplans shall pay special attention to the needs and circumstances of the developing countries. States and regional economic integration organizations not party to the Protocol should be encouraged to participate in activities specified in such workplans.]

ARTICLE 10: FINANCIAL MECHANISM

1. The Parties shall establish a mechanism for the purposes of providing financial and technical co-operation, including the transfer of technologies, to Parties operating under paragraph 1 of Article 5 of this Protocol to enable their compliance with the control measures set out in Articles 2A to 2E, and any control measures in Articles 2F to 2H that are decided pursuant to paragraph 1 bis of Article 5 of the Protocol. The mechanism, contributions to which shall be additional to other financial transfers to Parties operating under that paragraph, shall meet all agreed incremental costs of such Parties in order to enable their compliance with the control measures of the Protocol. An indicative list of the categories of incremental costs shall be decided by the meeting of the Parties.

2. The mechanism established under paragraph 1 shall include a Multilateral Fund. It may also include other means of multilateral, regional and bilateral co-operation.



**3. The Multilateral Fund shall:**

- (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;
- (b) Finance clearing-house 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 these 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 the secretarial services of the Multilateral Fund and related support costs.

4. The Multilateral Fund shall operate under the authority of the Parties who shall decide on its overall policies.

5. The Parties shall establish an Executive Committee to develop and monitor the implementation of specific operational policies, guidelines and administrative arrangements, including the disbursement of resources, for the purpose of achieving the objectives of the Multilateral Fund. The Executive Committee shall discharge its tasks and responsibilities, specified in its terms of reference as agreed by the Parties, with the co-operation and assistance of the International Bank for Reconstruction and Development (World Bank), the United Nations Environment Programme, the United Nations Development Programme or other appropriate agencies depending on their respective areas of expertise. The members of the Executive Committee, which shall be selected on the basis of a balanced representation of the Parties operating under paragraph 1 of Article 5 and of the Parties not so operating, shall be endorsed by the Parties.

6. The Multilateral Fund shall be financed by contributions from Parties not operating under paragraph 1 of Article 5 in convertible currency or, in certain circumstances, in kind and/or in national currency, on the basis of the United Nations scale of assessments. Contributions by other Parties shall be encouraged. Bilateral and, in particular cases agreed by a decision of the Parties, regional co-operation may, up to a percentage and consistent with any criteria to be specified by decision of the Parties, be considered as a contribution to the Multilateral Fund, provided that such co-operation, as a minimum:

- (a) Strictly relates to compliance with the provisions of this Protocol;
- (b) Provides additional resources; and
- (c) Meets agreed incremental costs.

7. The Parties shall decide upon the programme budget of the Multilateral Fund for each fiscal period and upon the percentage of contributions of the individual Parties thereto.

8. Resources under the Multilateral Fund shall be disbursed with the concurrence of the beneficiary Party.

9. Decisions by the Parties under this Article shall be taken by consensus whenever possible. If all efforts at consensus have been exhausted and no agreement reached, decisions shall be adopted by a two-thirds majority vote of the Parties present and voting, representing a majority of the Parties operating under paragraph 1 of Article 5 present and voting and a majority of the Parties not so operating present and voting.

10. The financial mechanism set out in this Article is without prejudice to any future arrangements that may be developed with respect to other environmental issues.

#### ARTICLE 10A: TRANSFER OF TECHNOLOGY

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.

#### ARTICLE 11: MEETINGS OF THE PARTIES

1. The Parties shall hold meetings at regular intervals. The Secretariat shall convene the first meeting of the Parties not later than one year after the date of the entry into force of this Protocol and in conjunction with a meeting of the Conference of the Parties to the Convention, if a meeting of the latter is scheduled within that period.
2. Subsequent ordinary meetings of the parties shall be held, unless the Parties otherwise decide, in conjunction with meetings of the Conference of the Parties to the Convention. Extraordinary meetings of the Parties shall be held at such other times as may be deemed necessary by a meeting of the Parties, or at the written request of any Party, provided that within six months of such a request being communicated to them by the Secretariat, it is supported by at least one third of the Parties.
3. The Parties, at their first meeting, shall:
  - (a) adopt by consensus rules of procedure for their meetings;
  - (b) adopt by consensus the financial rules referred to in paragraph 2 of Article 13;
  - (c) establish the panels and determine the terms of reference referred to in Article 6;
  - (d) consider and approve the procedures and institutional mechanisms specified in Article 8; and
  - (e) begin preparation of workplans pursuant to paragraph 3 of Article 10.\*
4. The functions of the meetings of the Parties shall be to:
  - (a) review the implementation of this Protocol;
  - (b) decide on any adjustments or reductions referred to in paragraph 9 of Article 2;
  - (c) decide on any addition to, insertion in or removal from any annex of substances and on related control measures in accordance with paragraph 10 of Article 2;
  - (d) establish, where necessary, guidelines or procedures for reporting of information as provided for in Article 7 and paragraph 3 of Article 9;

\*The Article 10 in question is that of the original Protocol adopted in 1987.

- (e) review requests for technical assistance submitted pursuant to paragraph 2 of Article 10;
- (f) review reports prepared by the secretariat pursuant to subparagraph (c) of Article 12;
- (g) assess, in accordance with Article 6, the control measures and the situation regarding transitional substances [provided for in Article 2];\*
- (h) consider and adopt, as required, proposals for amendment of this Protocol or any annex and for any new annex;
- (i) consider and adopt the budget for implementing this Protocol; and
- (j) consider and undertake any additional action that may be required for the achievement of the purposes of this Protocol.

5. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State not party to this Protocol, may be represented at meetings of the Parties as observers. Any body or agency, whether national or international, governmental or non-governmental, qualified in fields relating to the protection of the ozone layer which has informed the secretariat of its wish to be represented at a meeting of the Parties as an observer may be admitted unless at least one third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Parties.

#### ARTICLE 12: SECRETARIAT

For the purposes of this Protocol, the Secretariat shall:

- (a) arrange for and service meetings of the Parties as provided for in Article 11;
- (b) receive and make available, upon request by a Party, data provided pursuant to Article 7;
- (c) prepare and distribute regularly to the Parties reports based on information received pursuant to Articles 7 and 9;
- (d) notify the Parties of any request for technical assistance received pursuant to Article 10 so as to facilitate the provision of such assistance;
- (e) encourage non-Parties to attend the meetings of the Parties as observers and to act in accordance with the provisions of this Protocol;
- (f) provide, as appropriate, the information and requests referred to in subparagraphs (c) and (d) to such non-party observers; and
- (g) perform such other functions for the achievement of the purposes of this Protocol as may be assigned to it by the Parties.

#### ARTICLE 13: FINANCIAL PROVISIONS

1. The funds required for the operation of this Protocol, including those for the functioning of the Secretariat related to this Protocol, shall be charged exclusively against contributions from the Parties.
2. The Parties, at their first meeting, shall adopt by consensus financial rules for the operation of this Protocol.

\* The part in bold will not apply once the Copenhagen Amendment enters into force.

ARTICLE 14: RELATIONSHIP OF THIS PROTOCOL TO THE CONVENTION

Except as otherwise provided in this Protocol, the provisions of the Convention relating to its protocols shall apply to this Protocol.

ARTICLE 15: SIGNATURE

This Protocol shall be open for signature by States and by regional economic integration organizations in Montreal on 16 September 1987, in Ottawa from 17 September 1987 to 16 January 1988, and at United Nations Headquarters in New York from 17 January 1988 to 15 September 1988.

ARTICLE 16: ENTRY INTO FORCE

1. This Protocol shall enter into force on 1 January 1989, provided that at least eleven instruments of ratification, acceptance, approval of the Protocol or accession thereto have been deposited by States or regional economic integration organizations representing at least two-thirds of 1988 estimated global consumption of the controlled substances, and the provisions of paragraph 1 of Article 17 of the Convention have been fulfilled. In the event that these conditions have not been fulfilled by that date, the Protocol shall enter into force on the ninetieth day following the date on which the conditions have been fulfilled.
2. For the purposes of paragraph 1, any such instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.
3. After the entry into force of this Protocol, any State or regional economic integration organization shall become a Party to it on the ninetieth day following the date of deposit of its instrument of ratification, acceptance, approval or accession.

ARTICLE 17: PARTIES JOINING AFTER ENTRY INTO FORCE

Subject to Article 5, any State or regional economic integration organization which becomes a Party to this Protocol after the date of its entry into force, shall fulfill forthwith the sum of the obligations under Article 2, as well as under Articles 2A to 2E, (Articles 2A to 2H) and Article 4, that apply at that date to the States and regional economic integration organizations that became Parties on the date the Protocol entered into force.

ARTICLE 18: RESERVATIONS

No reservations may be made to this Protocol.

[ARTICLE 19: WITHDRAWAL

For the purposes of this Protocol, the provisions of Article 19 of the Convention relating to withdrawal shall apply, except with respect to Parties referred to in paragraph 1 of Article 5. Any such Party may withdraw from this Protocol by giving written notification to the Depositary at any time after four years of assuming the obligations specified in paragraphs 1 to 4 of Article 2. Any such withdrawal shall take effect upon expiry of one year after the date of its receipt by the Depositary, or on such later date as may be specified in the notification of the withdrawal.]

ARTICLE 19: WITHDRAWAL

Any Party may withdraw from this Protocol by giving written notification to the Depositary at any time after four years of assuming the obligations specified in paragraph 1 of Article 2A. Any such withdrawal shall take effect upon expiry of one year after the date of its receipt by the Depositary, or on such later date as may be specified in the notification of the withdrawal.

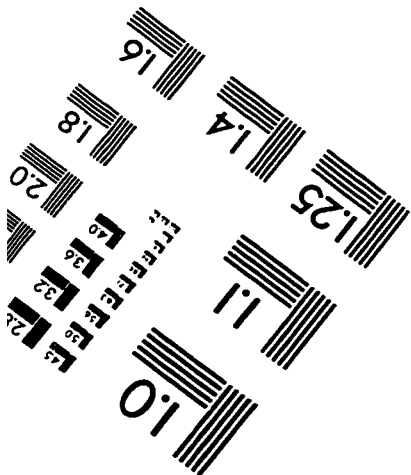
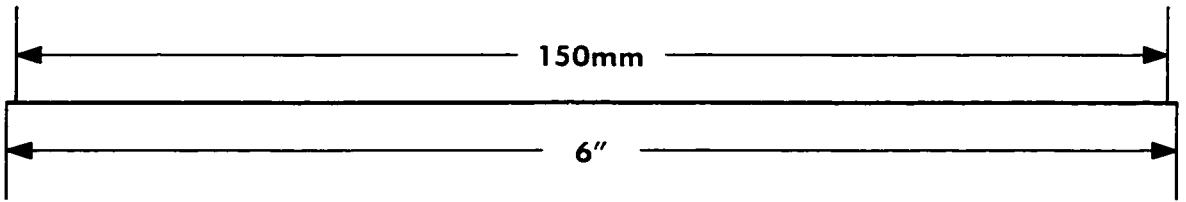
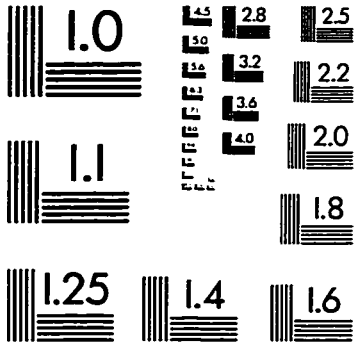
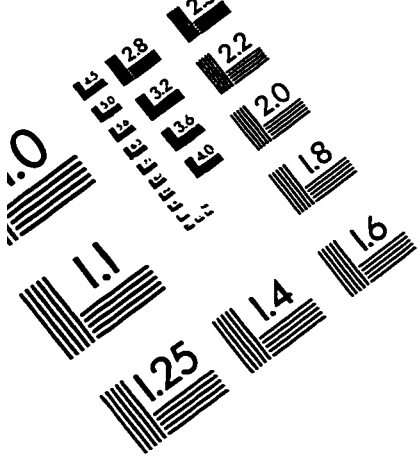
ARTICLE 20: AUTHENTIC TEXTS

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF THE UNDERSIGNED, BEING DULY AUTHORIZED TO THAT EFFECT, HAVE SIGNED THIS PROTOCOL.

DONE AT MONTREAL THIS SIXTEENTH DAY OF SEPTEMBER, ONE THOUSAND NINE HUNDRED AND EIGHTY SEVEN.

# TEST TARGET (QA-3)



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