



Intro to International Environmental Law

June 4, 2018

Professor Yang



Three Background Questions

1. **Can we ignore global environmental problems?**
2. **What are the obstacles to global cooperation?**
3. **[Could the US go it alone in solving global problems?]**



THE HERESY TRIAL OF THE REVEREND RICHARD LAMM*

By
RICHARD D. LAMM**

You object to how I have changed the Biblical quote from "love thy neighbor" to "love thy nearest neighbor." You ask how a church with a tradition of missionaries and universal caring could love only thy nearest neighbor. You object to my concept of "Toughlove" in which we simply accept the starvation in much of the Third World. You ask, "How can I ignore those pitiful scenes of megafamine that we see on our television sets every day?"

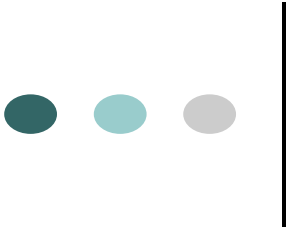
It is my sad and reluctant conclusion that the economy within the United States cannot keep up with all the problems outside of the United States and that we were foolish to try. It is my conclusion that "Toughlove" means that we let God's judgment take place in much of the Third World and that by trying to relieve this suffering all we do is postpone it.

Even if these countries had the capital, knowledge, and skills to become "developed" countries (which they do not), the world does not have the resources to give everyone a "developed country" standard of living. It would put an unbearable drain on the world's finite resources. In order to raise per capita energy consumption to the United States' level, the world would need to burn 300 percent more coal, 500 percent more petroleum, and 1100 percent more natural gas. To believe that this will happen is more than wishful thinking; it belongs to the Our Lady of Lourdes School of Politics.

Write me a "happy" scenario for Bangladesh. Show me a happy outcome, a nice solution to a poverty-wracked country that has ninety million people crowded into a country the size of Iowa. An average Bangladeshi woman has fourteen pregnancies to produce 6.5 children who survive. More than sixty percent of all women have seven or more children. Many women are pregnant twenty-four times or more, and it is common to see a woman of thirty with eight living children and seven grandchildren.⁸ Please, my mind just does not see it. What is the happy ending?

Give me a scenario of social justice in Mexico City in the year 2000 with thirty million people in a cramped, polluted basin; or Calcutta with twenty million; or Cairo, Tehran, or Karachi with fourteen to sixteen million. Does God give a prize to the city with the largest number of deserving poor? Can we both liberate and maximize the poor? Paint me an acceptable picture when we have Third World populations with over forty percent under sixteen years of age packed into shantytowns and barrios without adequate health or housing. There are now fifty-eight cities with over five million people, compared to twenty-nine such cities in 1984, most of them filled with poor, uneducated, unskilled people in a pressure cooker of social and economic stress.⁹


Write me a "Christian" scenario for these realities. There is none. That is why Reality Theology adopted its "Toughlove" ^{un-}compassionate philosophy. That is why Triage Ethics is, in the long run, the most



faced with and must make on a day-to-day basis. The redistribution of the United States' wealth would not make anybody rich. It would simply make us all poor. It is not heresy to point out that we should help other nations feed their own but we cannot and should not take that task upon our own nation. We must say "no" somewhere along the line and, ironically, the earlier we say "no," the fewer people will be hurt.

We all know the marvelous story of St. Martin of Tours who gave away half of his cloak to a naked beggar he met on the road. This has become a marvelous symbol of generosity and sharing, and it is part of our heritage. But the new analogy that we must consider is whether St. Martin, instead of meeting one starving beggar, had met twenty naked and starving beggars on his path. Would he have cut his cloak into twenty inadequate pieces? How would he have chosen among the twenty deserving and starving beggars? What standards and what values would he have brought to that decision? What happens when you have the resources to save a few but are confronted by many?

A story appeared a number of years ago that is a metaphor for Reality Theology. An American nun in Bangladesh, after a couple of days in the country, found a starving baby on her doorstep. She took in the baby, fed it and clothed it. The following morning there was another starving baby on her doorstep. She gave that one shelter and clothing also. On the third day she was confronted with yet another starving baby. Finally, her Order told her to stop taking in the starving babies. The task was too immense, the numbers too gargantuan. "Leave them on the doorstep," ordered her superior.



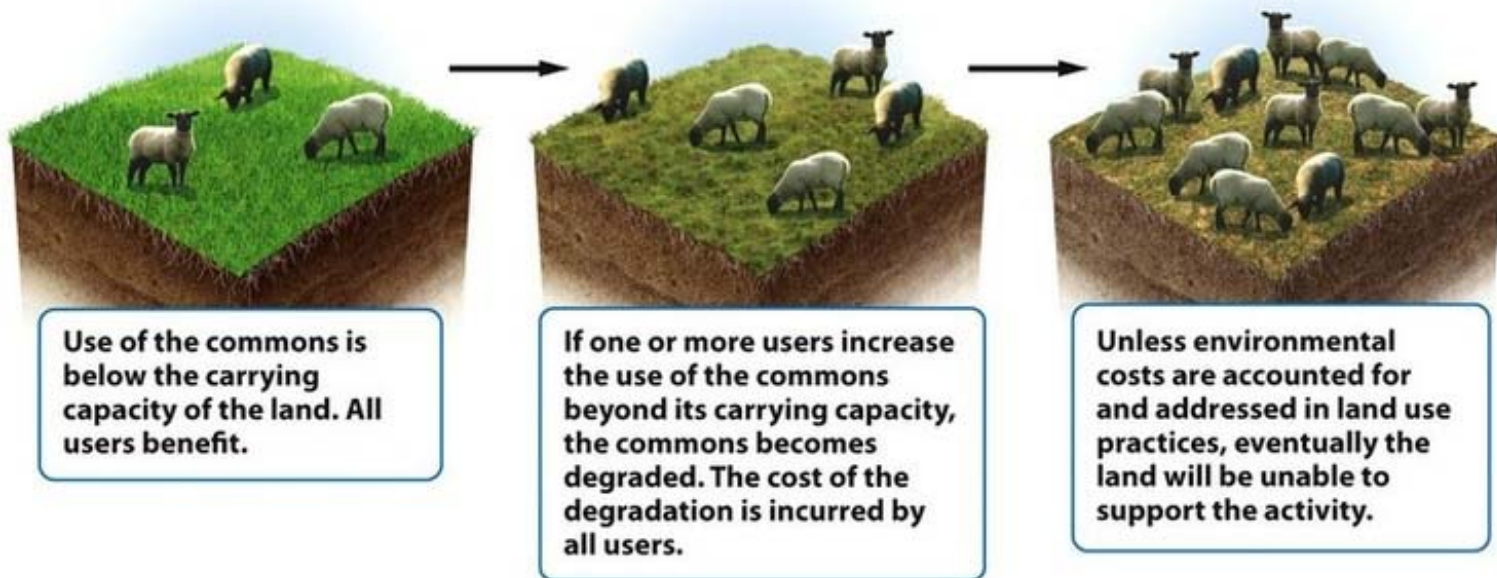
Lamm Essay – “Triage Ethics”

- Recognition of self-interest as moral imperative
- But fails to recognize
 - Interconnectedness of environment
 - Environmental refugees
 - Environment/natural resources as source of armed conflict & political instability
 - Global economy and interdependency of markets (supply and demand) via trade
 - Moral obligations based on historical/colonial relationships
- Ultimately posits a “false choice” of all or nothing in assistance



**What are the obstacles
to global cooperation?**

The Tragedy of the Commons



3 Fundamental Obstacles to International Cooperation

○ Collective Action

- Regulation, liability, property rights, markets

○ Values and Norms

○ Coordination





**Could the US go it
alone in solving
global problems?**



Extraterritorial Jurisdiction (Unilateral Action) Constraints

- Government Self-Restraint
 - Foreign Policy Implications
- International Law Constraints
 - Prescriptive Jurisdiction Principles
 - Territoriality, Nationality, Effects, Protective
 - Reasonableness of Exercise of Jurisdiction
- Domestic Law Constraints
 - Personal jurisdiction, Standing, Forum non conveniens
 - Foley/Aramco Presumption



The Proliferation of International Environmental Law



Major Multilateral Environmental Treaties

○ Atmosphere

- Climate Change: 1992 UN Framework Convn. on Climate Change & 1997 Kyoto Prot., 2015 Paris Agt.
- Stratospheric O₃ Layer: 1985 Vienna Convn. on the Protection of the O₃ Layer & 1987 Montreal Prot. on O₃ Depleting Substances

○ Oceans

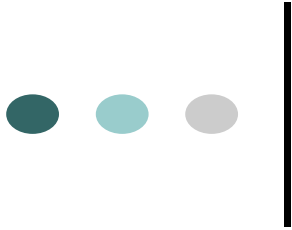
- 1982 UN Convn. on the Law of the Sea
- MARPOL 73/78 (Int'l Convn. for the Prev. of Pollution from Ships (1973) & 1978 Prot.)

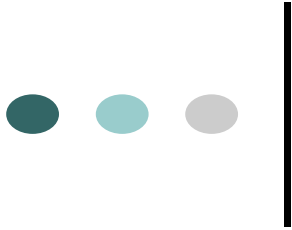
○ Biodiversity and Wildlife

- 1992 Convn. on Biological Diversity
- 1972 Convn. on Int'l Trade in Endangered Species
- 1946 Int'l Convn. for the Regulation of Whaling
- 1972 Ramsar Convn. (on wetlands protection)

○ Chem. & Wastes

- 1989 Basel Convn. on the Ctrl. of Transboundary Movts. of Haz. Wastes & their Disposal
- 1998 Rotterdam Convn. for the Application of Prior Informed Consent Procedure for Certain Haz Chem & Pesticides in Int'l Trade





1972 Stockholm – UN Conference on the Human Environment



1983 World Commission on Environment and Development



1992 Rio de Janeiro – UN Conference on Environment and Development



2002 Johannesburg – UN Summit on Sustainable Development



2012 Rio+20/ UN Conference on Sustainable Development



1972 Stockholm Conference on the Human Environment

- Stockholm Declaration
- 4 Major Conventions
 - The Ramsar Convention (on wetlands protection)
 - The Bonn Convention (on migratory wildlife species) (1979)
 - The World Heritage Convention (1972)
 - Convention on International Trade in Endangered Species (CITES) (1973)
- United Nations Environment Programme



1992 Rio Conference

- Rio Declaration on Environment and Development
- UN Framework Convention on Climate Change
- Convention on Biological Diversity
- Agenda 21 & Commission on Sustainable Development
- Several other International Instruments
 - Non-binding Forestry Principles
 - Agreements to Negotiate Treaties on
 - Desertification
 - Straddling Fish-stocks, and
 - Land-based Sources of Marine Pollution



The International Whaling Convention



○ <https://www.youtube.com/watch?v=b7-b3Q-dLbA>



ICRW Features

- History
- International Whaling Commission - <https://iwc.int/home>
- Membership (88) - <https://iwc.int/member-map>
- Scientific Committee
- Dolphins and Porpoises
- Current Moratorium
- Australia v. Japan (Antarctic Whaling case)



Policy Perspectives on Whaling

- **Sustainable Fishery Approach**
- **Environmentally Sustainable Use**
- **Indigenous Hunting**
- **Animal Rights**



A Primer on Public International Law



Preliminaries – International and Domestic Law



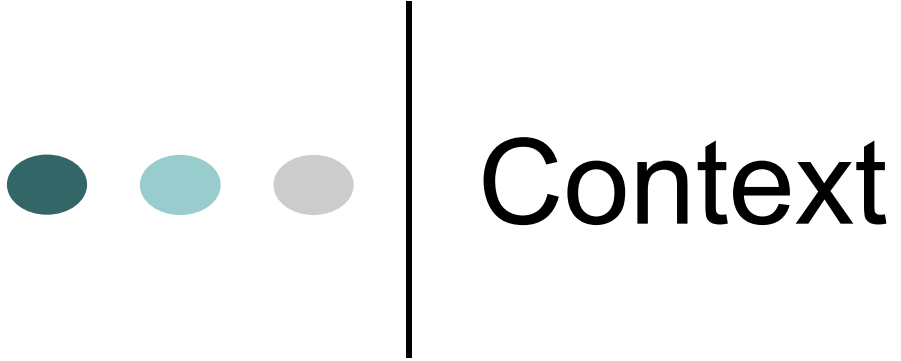
Preliminary Issue: Relationship of Domestic to International Law

- Dualistic (vs. monistic) system
 - International law is NOT automatically part of domestic law
- But . . . Complementarity of systems
 - International parts of IEL
 - Domestic/National parts of IEL, e.g. implementation of international environmental law in national system
 - Corollary . . . mutual influence



Treaties in US System

- Domestic/Constitutional Requirements for Treaties to become effective domestically
 - Senate advice & consent v. Executive/Congressional-Executive Agreements
 - President's authority over foreign affairs
 - But Congressional control of treaty-making process
- Implementation
 - Congressional Legislation
 - Self-Executing v. non-self-executing agreements
- Customary International Law and General Principles
 - State and Federal Common Law





**How might we go about
understanding IEL?**

- Parallels/analogues and differences from US**
- Substantive rules and processes**
- Institutions**



The Nature of International Law

- No Supra-national Authority:
 - to make law (legislature)
 - to authoritatively interpret laws (courts)
 - to enforce laws (executive)
- traditionally, private citizens had not role (political accountability)
- Legal character of law based on state consent



The Nature of International Law

- Is International Law Law at all?
- “Most states obey most of the rules of international law most of the time.” Thomas Franck



Article 38 of Statute of International Court of Justice

- Treaties
 - Customary International Law
 - General Principles
 - [Judicial Decisions/Eminent Jurists]
- Soft Law



Customary International Law



Customary International Law

- Rules of State practice followed by states based on a sense of legal obligation (opinio juris)



Customary International Law

- Rules of State practice followed by states based on a sense of legal obligation (*opinio juris*)
- 3 significant issues
 1. Consistency/uniformity of state practice
 2. Sense of legal obligation
 3. Objectors to rule



Treaties

- Written agreements between states that are governed by international law
 - Vienna Convention on Law of Treaties
- Dual nature – Law and Contract
- For interpretation, see Vienna Convention on Treaties
- Unilateral Treaties



The Treaty-Making Process

1. Informal Diplomacy: Problem Identification and Consensus over Need of Treaty/Instrument
2. Formal Diplomacy: Negotiation of the Treaty/Instrument
3. Adoption of Treaty/Instrument and Signature
4. Ratification of Treaty, Reservations & Implementation
5. Entry-into-Force
6. Amendment/Change of Treaty



Some Key Provisions

- Only states have capacity to conclude treaties (art. 6)
- Entry into force of treaty (art. 24)
- Treaties to be performed in good faith and without regard to effect of internal laws (art. 26-27)
- Territorial scope and resolution of conflicts b/n successive agreements (art. 29-32)
 - Treaty interpretation proceeds on post-hoc basis – contemporaneous and subsequent events are most important (art. 31)
 - Preparatory work is only supplemental means of finding intent of parties (art. 32)
- No effect on non-parties to treaty (art. 34)
- Termination/suspension of treaty possible as a consequence of material breach (art. 60)



General Principles

- Least well defined source of international law
- “Principles that are recognized by civilized nations”
- What do they include
 - Principles that appear in all legal systems?
 - Principles that inhere in the notion of law itself?



Innovations in IEL – The Role of Soft International Law

- Norms that are not yet law or not quite law
- Share many characteristics of legal norms, yet usually do not have the force of law or are not enforceable



Convention on Biological Diversity

Article 8. In-situ Conservation

Each Contracting Party shall, as far as possible and as appropriate:

- (a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;
- (b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity;
- (c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use;

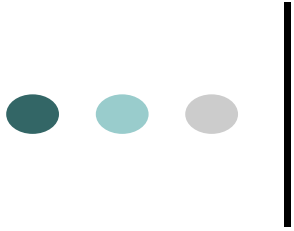


UN Framework Convention on Climate Change

Article 3 PRINCIPLES

In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following:

1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.
2. The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.



Trade in Hazardous Wastes:

THE BASEL CONVENTION



Basel Basic Principles

- Prior Informed Consent
- Polluter Pays
 - Waste Minimization & Internalization



Basel Convention TOC

1. Scope of the Convention
2. Definitions
3. National Def. of Haz Wastes
4. General Obligations
5. Design. Of Competent Auth. & Focal Points
6. Transboundary Movement b/n Parties
7. Transb. Movement through non-Party
8. Duty to Re-import
9. Illegal Traffic
10. Internat. Cooperation
11. Bilat., Multilat., Regional Agreements
12. Consults. On Liability
13. Transmission of Info
14. Financial Aspects
15. Conference of Parties
16. Secretariat
17. Amendment of Convention
18. Adopt. & Amendm. Of Annexes
19. Verification
20. Dispute Settlement
21. Signature
22. Ratification
23. Accession
24. Right to Vote
25. Entry into Fore
26. Reservation & Declaration
27. Withdrawal
28. Depository
29. Authentic Texts



Scope

- Substances covered:
 - Waste streams
 - Wastes with hazardous constituents
 - Wastes designated as hazardous by national legislation
- Waste – disposed of, intended or destined for disposal
 - Includes recovery & recycling
 - Excludes radioactive materials



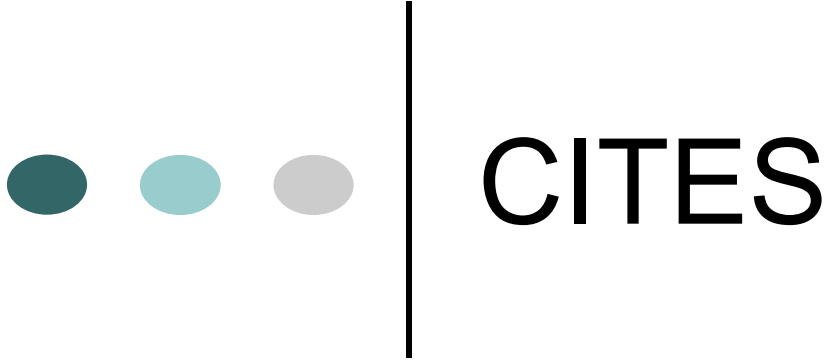
Basic Obligations

- Export prohibited if import state has prohibited or has not provided specific permission (art. 4(1))
- Ban on trade with non-parties
 - Exception for prior (“compatible”) or consistent (“no derogation”) bilateral/multilateral waste agreements
- Prohibition on export if no ESM (art. 4(2)(e))
- General Take-back obligation for failure of process or illegal traffic



Current Issues

- OECD/Non-OECD Ban
- Illegal Traffic
- Liability Protocol





CITES Articles

1. Definitions
2. Fundamental Principles
3. Regulation of trade in Appendix I species
4. Regulation of trade in Appendix II species
5. Regulation of trade in Appendix III species
6. Permits and certificates
7. Exemptions
8. Measures to be taken by the Parties
9. Management and Scientific Authorities
10. Trade with Non-parties
11. Conference of the Parties
12. Secretariat
13. International measures
14. Effect on domestic legislation and international conventions
15. Amendments to Appendices I and II
16. Appendix III and amendments
17. Amendment of the Convention
18. Dispute Resolution
19. Signature
20. Ratification
21. Accession
22. Entry into force
23. Reservations
24. Denunciation
25. Depositary



Heart of CITES: The Appendices

1. Appendix I - threatened with extinction, unless trade in specimen are strictly regulated
2. Appendix II - not necessarily now threatened with extinction, but which may become so unless trade is strictly regulated to avoid utilization incompatible with survival
3. Appendix III - any species that a party identifies as being subject to regulation within its jurisdiction for purposes of preventing or restricting exploitation, and which need cooperation of other parties to control



Appendix I Trade Requirements (Art. 3)

- Export permit required – Criteria:

1. export country scientific authority determines that export not threat to species survival
2. export management authority determines specimen not obtained in violation of export state laws
3. management authority satisfied that if living specimen, shipment w/o injury, damage to health & cruel treatment
4. management authority satisfied that there's an import permit granted

- Import permit required – Criteria:

1. scientific authority of importing state has determined that import is for purposes not detrimental to survival of species
2. scientific authority satisfied that recipient has suitable housing for living specimen
3. management authority of import state satisfied that specimen not to be used primarily for commercial purposes



Appendices II & III

- Appendix II

- all Appendix I export requirement, but no import permit
- [import requires export permit or certificate]

- Appendix III

- no need to determine species survival
- But any import must have certificate of origin or export permit



How would one get out of CITES obligations (art. VII)

- reservations
- denunciation
- pre-existing stock/art. VII(2) (Need certificate)
- captive breeding VII(4)
- transit (art. VII(1))
- personal household effects (art. VII(3))



What has contribute to regime effectiveness?

- membership, capacity building, positive compliance measures, primary rules
- trade with non-parties is restricted with regard to appendix I
- permitting requirement itself creates information
- permitting also slows trade down/deters it somewhat
- flexibility



The Minamata Convention

2013 Minamata Mercury Convention



Minamata Convention on Mercury

The Parties to this Convention,

Recognizing that mercury is a chemical of global concern owing to its long-range atmospheric transport, its persistence in the environment once anthropogenically introduced, its ability to bioaccumulate in ecosystems and its significant negative effects on human health and the environment,

Recalling decision 25/5 of 20 February 2009 of the Governing Council of the United Nations Environment Programme to initiate international action to manage mercury in an efficient, effective and coherent manner,

Recalling paragraph 221 of the outcome document of the United Nations Conference on

IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, have signed this Convention.

Done at Kumamoto, Japan, on this tenth day of October, two thousand and thirteen.

Convention Ratification

[HOME](#)[CONVENTION](#)[NEGOTIATIONS](#)[COUNTRIES](#)[PUBLICATIONS](#)[NEWS](#)

Global Treaty on Mercury Pollution Gets Boost from United States



UNEP's Achim Steiner Welcomes First Ratification of the Minamata Convention on Mercury.

Nairobi, 7 November 2013 - The United States has strengthened the international effort to bring down emissions and releases of a notorious heavy metal after simultaneously signing and ratifying the Minamata Convention on Mercury.

The treaty, adopted on 10 October in the Japanese city of Kumamoto and named after the place where thousands of people were poisoned by mercury in the mid-20th century, has now been signed by 93 countries.

The United States has become the first nation to complete the next and final step after Kerri-Ann Jones, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs deposited the 'instrument of acceptance' at the United Nations' headquarters on Wednesday.

THE MINAMATA CONVENTION
ON MERCURY WAS OPENED FOR SIGNATURE

**118 DAYS : 9 HOURS & 19 MINUTES
AGO**

94

SIGNATURES

1

RATIFICATION

WATCH THE VIDEO



Significance of Minamata Convention

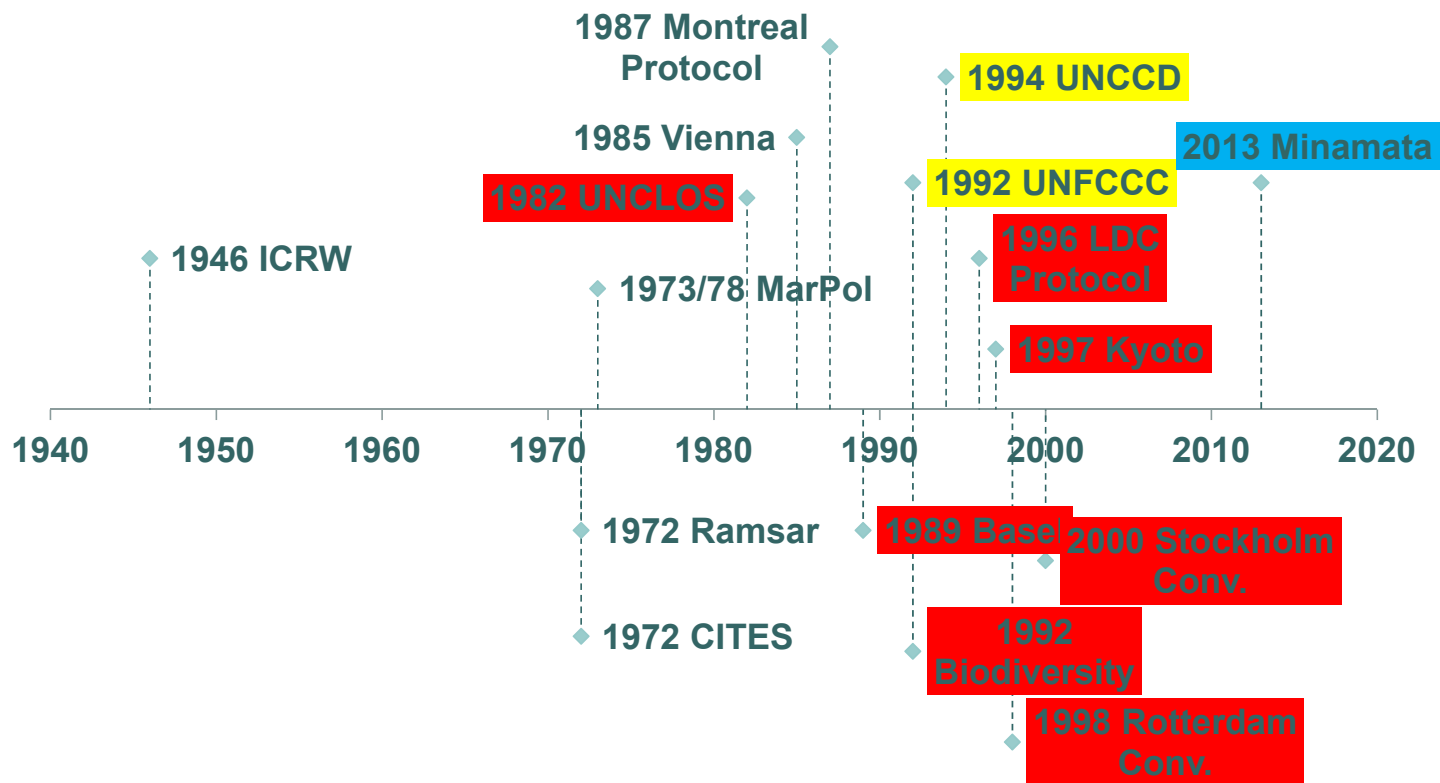
- Global environmental health issue

- Neurotoxin
- Bio-accumulation
- Global transport

- US acceptance of Convent



MEA Timeline

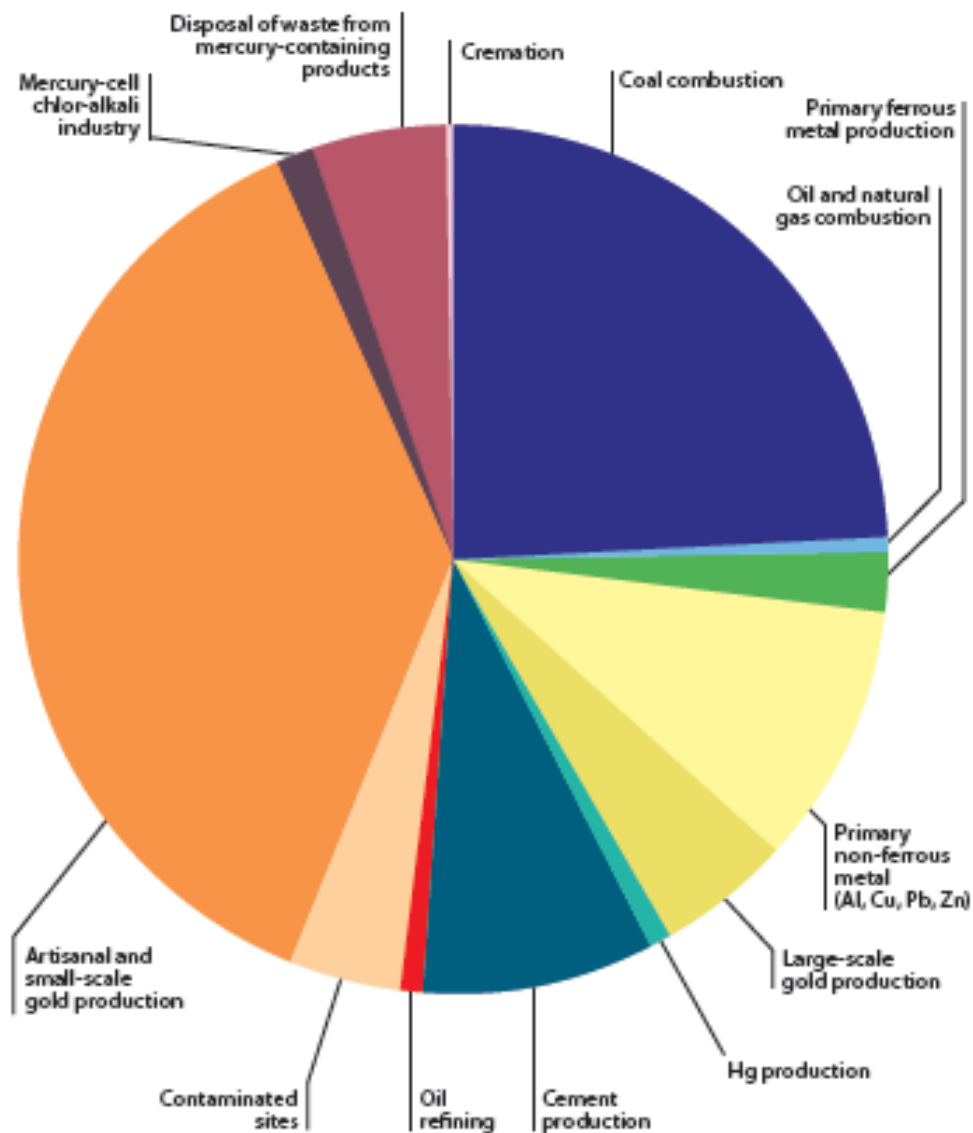


Significance of Minamata Convention

- Global environmental health issue
 - Neurotoxin
 - Bio-accumulation
 - Global transport
- US acceptance of Convention
 - Future support & leadership
- Adoption of US regulatory approach – “BAT”
Best Available Techniques



Relative contributions to estimated emissions to air from anthropogenic sources in 2010

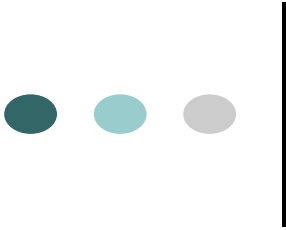


Source: UNEP Global Mercury Assessment 2013



Key Aspects - Scope

- Types of Hg
 - Elemental Hg & Hg compounds
 - Hg-added products
 - Hg wastes
- Sectors/Contexts of Hg-use & releases
 - Hg mining
 - International trade
 - Manufacture of Hg-added products
 - Emissions/releases into environment
 - Hg use in gold mining



Key Aspects - Commitments

- Prohibit new Hg mining (3.3)
- Control Hg trade (3.6-8)
- Phase-out Hg product mfg and trade (4)
- Phase-out Hg-using mfg processes (5)
- Reduce/eliminate use of Hg in gold mining (7)
- Control Hg air emission & land/water release (8,9)
- ESM of Hg waste (11)
- Identify/assess Hg-contaminate sites (12)



Standard MEA Architecture

- Convention bodies
- Institutional mechanisms
- Mostly standard relationship
 - Party commitments & discretion in implementation



Article 8.4 (Air Emissions)

“For its new sources, each Party shall
require the use of **best available**
techniques and **best environmental**
practices to control and, where feasible,
reduce emissions, as soon as practicable
.”
. . . .



The Challenge of making treaty design more effective . . . or

What can US Environmental Law Teach
International Environmental Treaty Design?



Scope and Participation

- Ensuring implementability and meaningful outcomes
- Use of appropriate tools
- Enabling/facilitating participation by key countries
- Enabling US participation through full use of domestic authority
 - Executive agreements
 - Presidential authority
 - Substantial compliance



Why Treaty Architecture . . . ?

- Global/international environmental problems as *regulatory problems* . . .
- MEA creation of administrative regulatory systems
- Treaties as legislation, rather than contract



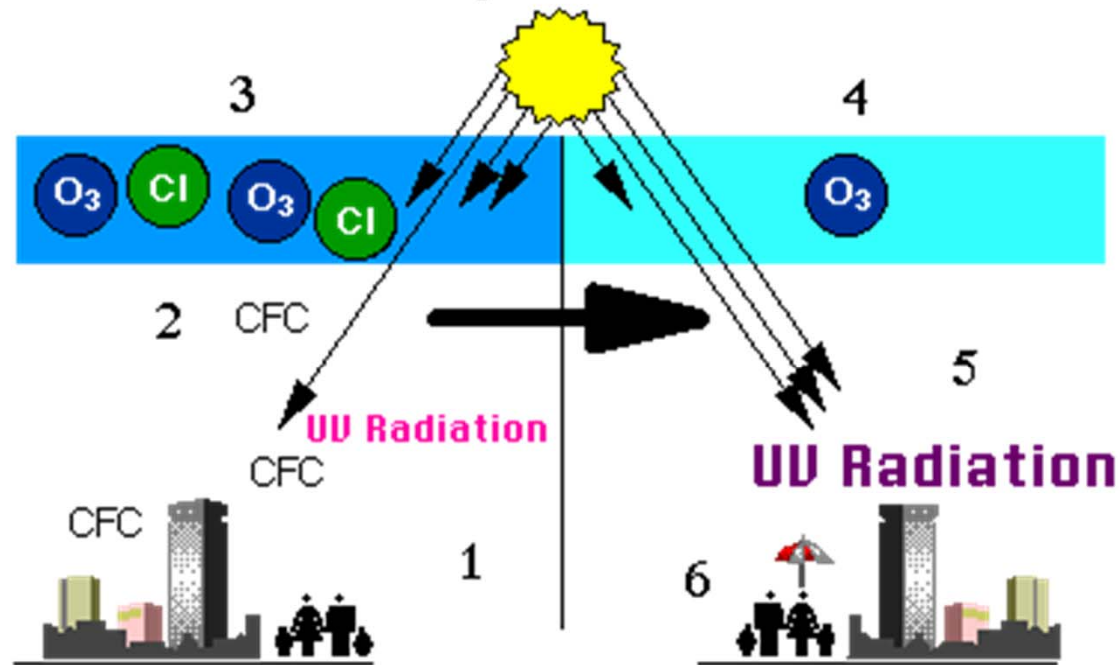
Montreal Protocol



Ozone Treaties

- Vienna Convention for the Protection of the Ozone Layer (1985)
- Montreal Protocol on Substances that Deplete the Ozone Layer (1987)

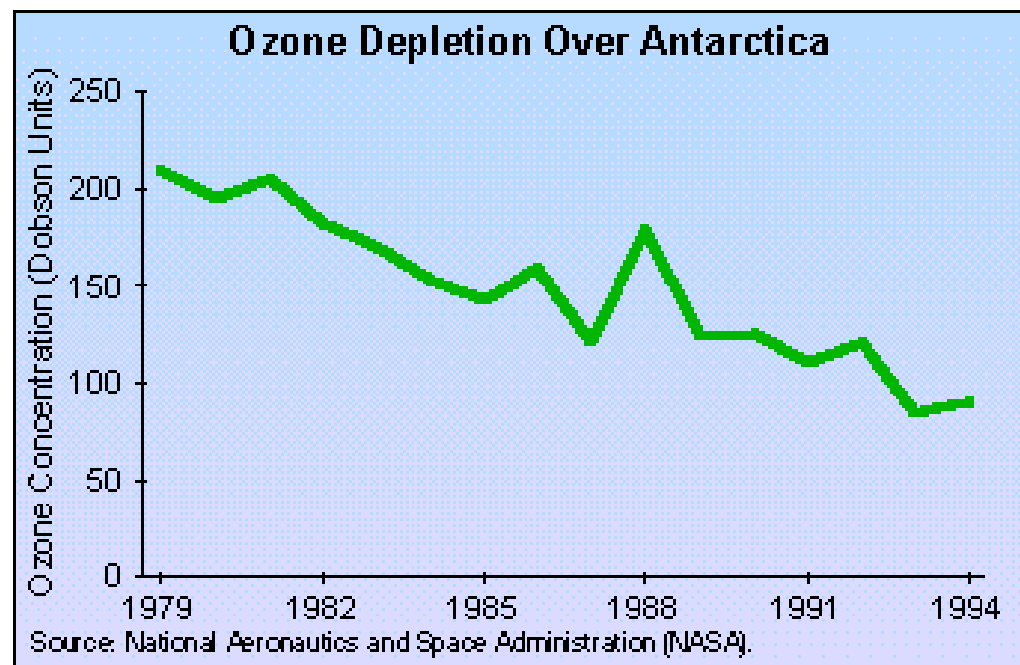
Ozone Depletion Process

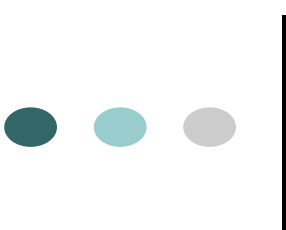


1 - CFCs released
2 - CFCs rise into ozone layer
3 - UV releases Cl from CFCs

4 - Cl destroys ozone
5 - Depleted ozone -> more UV
6 - More UV -> more skin cancer

Antarctic Ozone Depletion

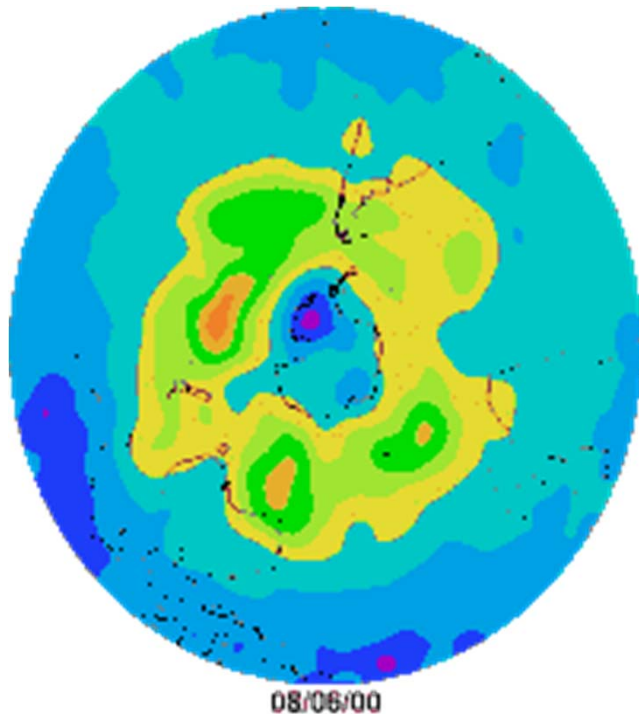




Vienna Convention on the Protection of the Ozone Layer (1985)

- Framework convention
 - Create institution for ongoing cooperation
 - Consensus on problem/need for action, values & goals
- States very general aspirations about ozone protection and obligations/commitments of parties
- No specific actions to help ozone depletion

The Antarctic Ozone Hole



- Antarctic Ozone Levels
Fall 2000
The ozone hole is represented by the purple, red, burgundy, and gray areas that appeared over Antarctica in the fall of 2000. The ozone hole is defined as the area having less than 220 dobson units (DU) of ozone in the overhead column (i.e., between the ground and space).



Montreal Protocol on Ozone Depleting Substances (1987)

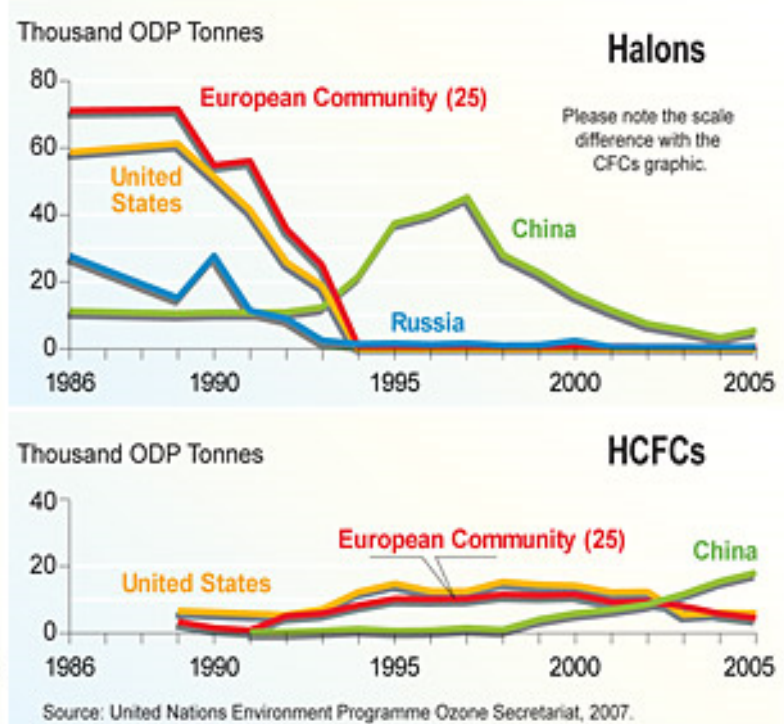
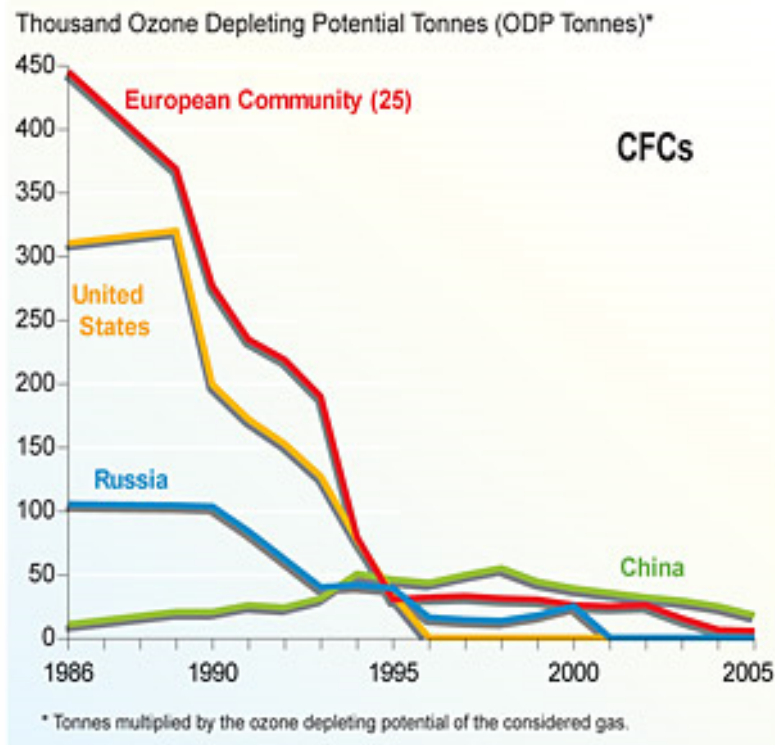
- Phase-out schedule for production (and consumption) of ozone depleting substances
 - But consumption defined by reference to production
- Designation of specific ozone depleting substances that are controlled by MP
- Unprecedented method of ratcheting up phase-out schedule (adjustments and amendments)
- Trading restrictions between parties & non-parties
- Other supporting measures (Montreal Protocol Fund, Non-compliance mechanism)
- Special phase-out delay for developing countries



The International Reaction: Ozone Treaties and Amendments

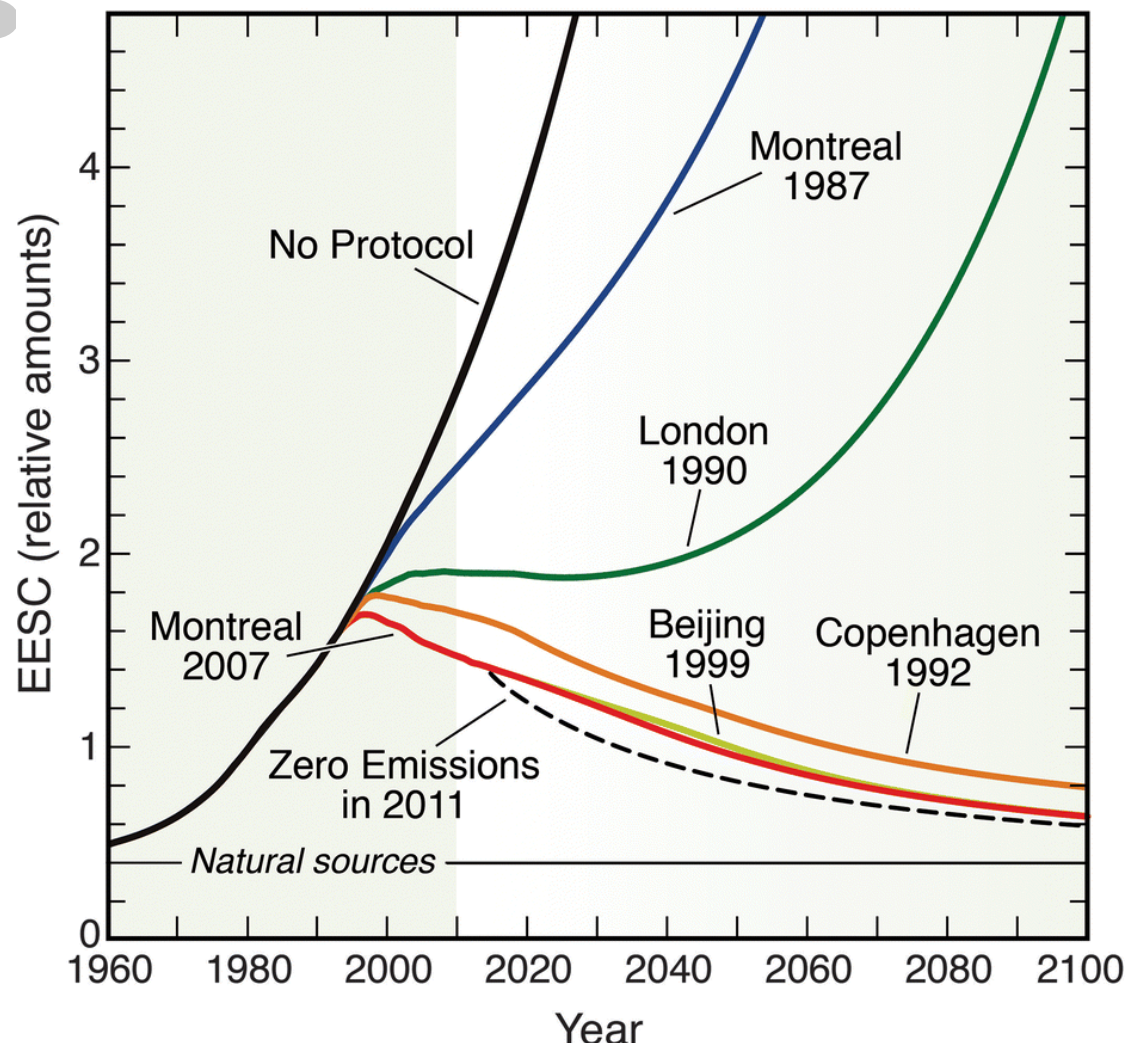
- 1981 Start Negotiations for Ozone Treaty
- 1985 Vienna Convention
- 1987 Montreal Protocol
- 1990 London Amendments & Adjustments
- 1992 Copenhagen Amendments & Adjustm.
- 1995 Vienna Adjustments
- 1997 Montreal Amendments & Adjustm.
- 1999 Beijing Amendments & Adjustments
- 2007 Montreal Adjustments
- 2016 Kigali Amendments

PRODUCTION OF MAIN ODS GASES



Effect of the Montreal Protocol

Long-term changes in equivalent effective stratospheric chlorine (EESC)



Source: Royal
Society of
Chemistry



Environmental Treaty Analysis Framework

- I. What is the Scope, Function, and Objectives of Treaty
 - check preamble, purpose provision, etc.
- II. Primary Substantive Commitments
 - what obligations directly aimed accomplishing treaty purpose (direct obligations/commitments to solve targeted problem)
- III. Secondary Instrumental Commitments and Mechanisms
 - aimed at *Supporting* Treaty Purpose, support the institution, indirectly help achieve the primary substantive commitments (membership, funding, etc.)
 - A. Generic/Non-Specific Mechanisms/Commitments
 - B. Treaty-specific Mechanisms/Commitments
- IV. What organizational entities/structures does the treaty create
- V. Mechanisms/Provisions for Changing/Updating the Treaty
 - law making process
- VI. [Enforcement & Compliance Mechanisms]



Primary Norms & Obligations

- Production & Consumption Reduction & Phase-out of various ODS (Annex A, B, C & E)
 - Definition of Production
 - Consumption



Generic Mechanisms/Commitments

- Technology Transfer (art. 10A)
- Financial Mechanism/MP Multilateral Fund (art. 10)
- Data Reporting and Assessment/Review of Control Measures (arts. 6 & 7)
- Research, Development, Public Awareness, Information Exchange (art. 9)



Treaty-Specific Support Mechs/Provs.

- Control of Trade with non-Parties
- 10-year phase-out delay/.3 kg growth limit
- Industrial Rationalization
- Basic Domestic Need, Essential Uses, Critical Uses
- Basket Approach (ODP)
- Proxies for Consumption



Law-Making/Changing

- Changing Treaty Language
 - Vienna 9(2) &(4), MP 14
- Adding Annex
 - Vienna 10(2)(a)
- Adding Substances to Annex
 - MP 2(10)
- Changing the Reduction Schedule
 - MP 2(9)