

Compliance and Transition: Russia's Non-Compliance Tests the Ozone Regime

*Jacob Werksman**

I. Introduction

In December 1995, at their seventh Meeting, the Parties to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer celebrated the tenth anniversary of the Ozone regime¹ and faced a most serious challenge: the anticipated non-compliance of the Russian Federation.

As the economic and planning hub of a former empire, the Russian Federation is a major supplier for both Parties and non-Parties, and for developed and developing countries.² Thus Russia sits as a strategic lynchpin for the ozone-related activities of a vast region, and its compliance

* Programme Director, Foundation for International Environmental Law and Development (FIELD), Visiting Lecturer in International Economic Law, School of Oriental and African Studies (SOAS), University of London. The author would like to thank Hermann Ott, Wuppertal Institute and Duncan Brack, Royal Institute for International Affairs for their assistance. The views expressed are the author's.

¹ 1985 Vienna Convention on the Protection of the Ozone Layer, Vienna, March 1985, 26 ILM 1529 (1987) [hereinafter Vienna Convention]; 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, September 1987, 26 ILM 1550 (1987), [hereinafter Montreal Protocol]; as adjusted and amended by the second Meeting of the Parties, London, June 1990, 30 ILM 537 (1991) [hereinafter London Amendments]; as further adjusted and amended by the fourth Meeting of the Parties, Copenhagen, November 1992, 32 ILM 874 (1993) [hereinafter Copenhagen Amendments]; and further adjusted by the seventh Meeting of the Parties, Vienna, December 1995, UNEP/OzL.Pro.7/12 [hereinafter Vienna Adjustments].

² Russia is the "key to the problems of Ozone Layer Protection ... because it accounts for over 60 % of the consumption of controlled substances in the region, and because it is the only producer of controlled substances and the main supplier of ozone depleting substances of at least 20 of the countries with economies in transition", Assessment of Basic

with the Protocol's control measures and trade restrictions affects the behaviour of other states in the region and the stability of the treaty as a whole.³

The seventh Meeting of the Parties decided, over Russia's objections, to apply the stick and the carrot of non-compliance control and financial assistance, restricting Russia's exports in controlled substances to certain Parties to the Protocol, but recommending that funding be provided to help Russia come into compliance. This note will follow the legal arguments that accompanied Russia's non-compliance and the legal and institutional issues raised as these arguments passed through the Protocol's institutions and beyond.

II. The Evolution of Russia's Obligations Under the Protocol

Industrialised country Parties to the 1985 Vienna Convention on the Protection of the Ozone Layer, the Montreal Protocol and its London and Copenhagen amendments and adjustments are under four major types of obligations:

- to undertake the control measures in relation to the production and consumption of specified ozone depleting substances (Articles 2, 2A-2H);
- to restrict trade in certain controlled substances and in certain products containing controlled substances with non-Parties to the Protocol (Article 4);
- to report statistical data on its annual production and trade in controlled substances (Article 7); and
- to contribute to the Protocol's Multilateral Fund (Article 10).

Although Russia is, arguably, in non-compliance with each of these obligations, this note will focus on its difficulties complying with the Protocol's control measures and trade restrictions.⁴

Problems Confronting Countries with Economies in Transition in Complying with the Montreal Protocol: Report of the TEAP Ad-Hoc Working Group on CEIT Aspects, November 1995, 25 [hereinafter TEAP/CEIT Report].

³ This was explicitly recognised by the Montreal Protocol Implementation Committee (MPIC) at its 10th Meeting. Report of the Implementation Committee under the Non-Compliance Procedure of the Montreal Protocol on the Work of its Tenth Meeting, 30 August 1995, UNEP/OzL.Pro.ImpCom/10/4, para 32 [hereinafter Report of MPIC-10].

⁴ The Montreal Protocol Implementation Committee found at its 10th Meeting that Russia was not in compliance with its reporting obligations under Article 7, Report of MPIC-10 (note 3). Although Russia has since submitted additional data to the Ozone Secretariat, as of 28 March 1996 the Committee was still seeking data on production and con-

The dynamic character of the Protocol's rule-making procedures⁵ has enabled the obligations of industrialised country Parties to evolve rapidly since the Protocol was first adopted. The 1987 text required industrialised Parties to freeze, and then begin sharply to reduce their consumption and production of "Annex A" substances (CFCs and halons). Through Protocol's process of assessment and review, the Parties have since extended the Protocol's coverage to additional substances, by the mechanism of amendment, and have included stricter timetables for reduction and phase-outs, by the mechanism of adjustment. While both amendment and adjustment result in new, legally binding obligations, an amendment binds a Party only if it chooses to ratify it, while adjustments become binding automatically within a certain period after they are adopted by the Meeting of the Parties.

The steady tightening of the Protocol's substantive obligations has run in parallel with the unravelling of the Soviet and Russian economies and of their legal and political institutions. On 10 November 1988 the Union of Soviet Socialist Republics became a party to the Montreal Protocol, and undertook, along with other industrialised countries to begin to phase out its production and consumption of substances the Protocol identified as responsible for depleting the ozone layer. At the time the USSR was a major producer and consumer of the ozone de-

sumption levels of controlled substances "for 1986 and later years", Report of the Implementation Committee Under the Non-Compliance Procedure of the Montreal Protocol on the Work of its Thirteenth Meeting, UNEP/OzL.Pro/ImpCom/13/3, para 17 (d) [hereinafter Report of MPIC-13].

Russia is currently over US \$ 54 million in arrears in its contributions to the Multilateral Fund for the Montreal Protocol, Report of the Treasurer, Executive Committee of the Multilateral Fund for the Montreal Protocol, 12 April 1996, UNEP/OzL.Pro/ExCom/19/3. While no formal decision has been taken in relation to this situation, Russia has stated that it feels it should temporarily be released from its obligations as it "is now poorer than many of those whom [it] is required to help", Report of the Seventh Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Vienna, 5 - 7 December 1995, UNEP/OzL.Pro.7/12 [hereinafter Report of MOP-7], paras 128 -133.

⁵ Montreal Protocol, Article 2.9 (c) and (d); Article 11.4 (b) and (c). See T. Gehring, *International Environmental Regimes: Dynamic Sectoral Legal Systems*, in: G. Handl (ed.), *1 Yearbook of International Environmental Law* 35 (1990). See also: 1992: *The Year In Review, Air and Atmosphere: The Ozone Layer*, in: G. Handl (ed.), *3 Yearbook of International Environmental Law* 225 (1993). For a closer treatment of the complex procedures involved in adjusting and amending the Protocol D. Caron, *Protection of the Stratospheric Ozone Layer and the Structure of International Environmental Lawmaking*, *14 Hastings International and Comparative Law Review* 755 (1991); H. Ott, *The New Montreal Protocol: A Small Step for the Protection of the Ozone Layer, a Big Step for International Law and Relations*, *24 Law and Politics in Africa and Asia* 2, 1991.

pleting substances, and its economic profile and annual calculated level of consumption of controlled substances meant that it would shoulder responsibilities equal to those borne by its industrialised, free-market counterparts.

The expectation that the Russian SSR and its associated Republics and satellites would be held to such a high standard was based on a legal and political facade. This facade held firm in 1990 as the Parties to the Protocol met in London to adjust and amend the Ozone regime to expand its coverage to additional substances. Although a financial mechanism was established to assist developing country Parties to the Protocol, no similar concessions were made towards the still intact Soviet Union. Nevertheless, within a month of the formal dissolution of the Soviet Union, in December 1991, the newly formed Russian Federation ratified the London Amendments undertaking both financial and control measure obligations.

The Montreal Protocol was strengthened again in 1992 at Copenhagen. By then, perhaps, the Russian Federation had become wary of undertaking new commitments and it has yet to ratify the Copenhagen Amendments which add new substances to the Protocol's control.⁶ As a Party to the London Amendments Russia is, nevertheless, bound by the Copenhagen Adjustments which were adopted by consensus, enter into force without ratification, and accelerate the phasing out of substances already controlled by the Protocol. By May 1995, Russia notified the Parties that it would be unable to comply with its obligation under the London Amendments, as adjusted at Copenhagen, to phase out the production and consumption of certain ozone depleting substances by 1 January 1996.⁷

⁶ As of 14 June 1996, the Russian Federation had not submitted an instrument of ratification to the Copenhagen Amendments. United Nations Treaty Database, <http://www.un.org/Depts/Treaty/>. See also UNEP/OzL.Pro./Rat.49, 31 March 1996.

⁷ Statement by countries with economies in transition that are Parties to the Montreal Protocol – Belarus, Bulgaria, Poland, Russian Federation, the Ukraine, circulated at the Eleventh Meeting of the Open-ended Working Group of the Parties to the Montreal Protocol, May 1995, cited in: O. Greene, *The Montreal Protocol: Implementation and Development in 1995*, in: J. Poole/R. Guthrie (eds.), *Verification 1996: Arms Control, Environment and Peacekeeping* (forthcoming 1996).

*III. Overview of the Montreal Protocol's Procedures and Institutions for Non-Compliance and Financial Assistance*⁸

A. The non-compliance procedure

1. The Montreal Protocol Implementation Committee

As the Ozone regime's commitments grew and became more complex, the Parties recognised the need to develop "procedures and institutional mechanisms for determining non-compliance" and "for treatment of Parties found to be in non-compliance".⁹ Such procedures and mechanisms would build upon the capacity of the Meeting of the Parties to "review the implementation" of the Protocol.¹⁰ With assistance from an "*ad hoc* Working Group of Legal Experts" and after a trial run, the Parties developed and adopted the Non-Compliance Procedure.¹¹

Under this Non-Compliance Procedure, the Montreal Protocol Implementation Committee composed of representatives of 10 Parties, can receive and consider reports from:

- Parties wishing to express "reservations regarding another Party's implementation of its obligations";
- the Secretariat, should it have similar concerns; or
- a Party itself, should it find it is having difficulty complying.¹²

⁸ For a wider discussion of "compliance theory" and its application to international and regional environmental regimes, see: J. Cameron/J. Werksman/P. Roderick (eds.), *Improving Compliance with International Environmental Law*, 1996.

⁹ Montreal Protocol, Article 8.

¹⁰ Montreal Protocol, Article 11.4 (a) and (j).

¹¹ Decision I/8, Report of the First Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, UNEP/OzL.Pro.1/5, 6 May 1989 [hereinafter Report of MOP-1]; Decision II/5, Report of the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, UNEP/OzL.Pro.2/x, 27 June 1990 [hereinafter, Report of MOP-2]; Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, UNEP/OzL.Pro.4/15, 25 November 1992 [hereinafter Report of MOP-4]; Decision IV/5 and Annex IV, Report of MOP-4 [hereinafter NCP].

¹² NCP, paras 1–4. For a fuller discussion of the development and operation of the Non-Compliance Procedure, see M. Koskeniemi, *Breach of Treaty or Non-Compliance?, Reflections on the Enforcement of the Montreal Protocol*, in: G. Handl (ed.), *3 Yearbook of International Environmental Law 1992*, 123; P. Szell, *The Development of Multilateral Mechanisms for Monitoring Compliance*, in: W. Lang (ed.), *Sustainable Development and International Law*, 1995, and D. Victor, *The Operation and Effectiveness of the Montreal Protocol Implementation Committee*, 1995.

With the primary goal of “securing an amicable solution of the matter on the basis of respect for the provisions of the Protocol”, the Montreal Protocol Implementation Committee reports its recommendations to the Meeting of the Parties.¹³

2. The Meeting of the Parties

It is the Meeting of the Parties, as the governing body of the Protocol, that has the authority under the Non-Compliance Procedure to “decide upon and call for steps to bring about full compliance with the protocol.”¹⁴ To clarify the range of outcomes that Parties may expect from the Non-Compliance Procedure, the Parties have adopted an “Indicative List of Measures that Might be Taken By a Meeting of the Parties in Respect of Non-Compliance with the Protocol.”¹⁵

These measures are:

- a. Appropriate assistance, including assistance for the collection and reporting of data, technical assistance, technology transfer and financial assistance, information transfer and training.
- b. Issuing cautions.
- c. Suspension, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, of specific rights and privileges under the Protocol, whether or not subject to time limits, including those concerned with industrial rationalization, production, consumption, trade, transfer of technology, financial mechanism and institutional arrangements.

3. The Technical and Economic Assessment Panel

Though not formally part of the Montreal Protocol's Non-Compliance Procedure, UNEP's Technical and Economic Assessment Panel has greatly assisted the Meeting of the Parties and Montreal Protocol Implementation Committee, especially with regard to the difficulties experienced by countries with economies in transition from the former Soviet

¹³ NCP, para 8.

¹⁴ NCP, para 9.

¹⁵ Decision IV/5 and Annex V of the Report of MOP-4 [hereinafter, Indicative List of Measures].

Union and Central and Eastern Europe.¹⁶ A working group of the Panel on Countries with Economies in Transition was, for example able to carry out, informally, and with a low profile, some of the Montreal Protocol Implementation Committee's more controversial responsibilities, particularly with regard to country visits necessary to secure relevant data.¹⁷

B. Financial resources

1. *The Multilateral Fund of the Montreal Protocol*

As the Non-Compliance Procedure's Indicative List of Measures reflects, a lack of financial, technical and administrative resources is a major cause of non-compliance; and the provision and withholding of support can play a central role in encouraging the compliance of Parties experiencing difficulty. In order to encourage developing countries to join the Protocol and to support their efforts to comply, the Parties established a financial mechanism, the Multilateral Fund of the Montreal Protocol.¹⁸

The Fund operates under the authority of an Executive Committee, and relies upon "Implementing Agencies" – UNEP, UNDP, UNIDO and the World Bank to carry out the projects it funds. It was not formally assigned a role in the process of the Non-Compliance Procedure, but representatives of the Executive Committee and relevant Implementing Agencies regularly attend the Montreal Protocol Implementation Committee's meetings and provide invaluable information about technical and financial aspects of Parties' compliance.

¹⁶ An *Ad-Hoc* Working Group on Aspects of Countries with Economies in Transition was established under the Technical and Economic Assessment Panel and has been working since late 1994, see TEAP/CEIT Report (note 2). For an assessment of the influence of the ozone advisory panels on the decision-making of the Montreal Protocol Parties, and a potential backlash against this, see E.A. Parson/O. Greene, *The Complex Chemistry of the International Ozone Agreements*, 37 *Environment 2*, at 16 (1995).

¹⁷ NCP, para 7(d); TEAP/CEIT Report (note 2), 7.

¹⁸ The Multilateral Fund of the Montreal Protocol was first established, on a interim basis, at the Second Meeting of the Parties, with contributions of US \$ 240 million, Decision II/8, Report of MOP-2 (note 11). It was later confirmed on permanent basis by a decision of the fourth Meeting of the Parties, in Copenhagen in 1992, Annex IX, Report of MOP-4 (note 11). Parties are at present negotiating the level of replenishment for the 1997–1999 period and are expected to take a decision on this issue at the eighth Meeting of the Parties, Decision VII/24, Report of MOP-7 (note 4).

Only developing countries designated by the Meeting of the Parties as operating under Article 5.1 of the Protocol are eligible for funding under the Multilateral Fund of the Montreal Protocol.¹⁹ While some Parties from the former Soviet Union have sought and received such designation, Russia's economic profile and high levels of consumption and production of controlled substances render it ineligible for funding.

2. *The Global Environment Facility*

Instead, Russia and other countries from the former Soviet Union or Central and Eastern Europe have turned to the Global Environment Facility (GEF) and other funding agencies for support. The GEF is a multilateral financial mechanism established by participating states, UNEP, UNDP and the World Bank, to finance the incremental costs of projects designed to protect the global environment in the areas of climate change, biological diversity international waters and ozone depletion.²⁰ The GEF is governed by an intergovernmental Council with 32 members, including a constituency headed by the Russian Federation.²¹

Although the GEF Instrument does not anticipate a formal link between the Meeting of the Parties to the Protocol and the GEF Council, the increasing need for cooperation between the two bodies, brought on in part by the problems with economies in transition, has led both the Ozone Secretariat and the Secretariat of the Multilateral Fund of the Montreal Protocol to exchange letters of cooperation with the GEF Secretariat. The Secretariats have also made arrangements for "reciprocal representation" at meetings of each other's governing bodies.²²

¹⁹ Montreal Protocol, Article 5 of the Montreal Protocol (Vienna) provides extended compliance deadlines and access to financial resources for countries designated as "developing countries" and with minimal annual calculated levels of consumption. A list of developing countries was defined by the first Meeting of the Parties, and individual cases of Article 5 status with regard to levels of consumption are heard from time to time.

²⁰ Global Environment Facility, Instrument for the Establishment of the Restructured Global Environment Facility, Report of the GEF Participants Meeting, Geneva, Switzerland, 14–16 March, 1994 [hereinafter the GEF Instrument]. For a discussion of the establishment of the GEF and its relationship with the Climate Change and Biodiversity Conventions, see H. Sjöberg, *The Global Environment Facility*, in: J. Werksman (ed.), *Greening International Institutions* (forthcoming 1996); J. Werksman, *Consolidating Governance of the Global Commons, Insights from the Global Environment Facility*, in: G. Handl (ed.), *6 Yearbook of International Environmental Law 1995*.

²¹ Annual Report of the Global Environment Facility, 1995.

²² *Ibid.*, at 45.

The GEF Council, in adopting the GEF's Operational Strategy for Ozone Layer Depletion recognised that developing countries, which receive priority funding in the GEF's other focal areas, should be able to rely on the Multilateral Fund of the Montreal Protocol for Ozone assistance. The GEF will thus fund projects consistent with the policies and priorities adopted by the Fund and the Meeting of the Parties, but will primarily assist "otherwise eligible recipient countries that are not Article 5 countries"²³, i.e., countries with economies in transition.

The GEF Operational Strategy specifically takes into account a role for the GEF in promoting ratification of and compliance with the Protocol. Only Parties to the Montreal Protocol and the London Amendments are eligible for project funding. Ozone funding from the GEF for Parties that have triggered the Non-Compliance Procedure, must first have the endorsement of the Montreal Protocol Implementation Committee and the Ozone Secretariat, and will be consistent with the Indicative List of Measures and any other recommendations of the Parties.²⁴

IV. Russia's Legal Arguments with Regard to Non-Compliance

A. Overview

Russia's non-compliance has been brought before each of the bodies within and outside the Non-Compliance Procedure that are described above, and each has made an effort to avert a crisis. It should be stressed that at no point since its difficulties became manifest has Russia forsworn the objectives and principles of the Ozone regime. Indeed, Russia has stated frequently, formally and publicly that it remains committed to the principles of the Vienna Convention and Montreal Protocol²⁵, and fellow Parties and other bodies, have clearly relied on these avowals.

Had Russia's inability to comply been accompanied by an unwillingness to comply, it could have, after a notice period, simply withdrawn

²³ GEF Operational Strategy, Chapter 5.

²⁴ Ibid.

²⁵ Report of MOP-7 (note 4), para 76. Most recently, and in extremely formal, legalistic terms, the Russian Environment Minister, by the "powers vested" in him reaffirmed his country's commitment to comply with its obligations under the Vienna Convention and Montreal Protocol, Letter Dated 26 February 1996 From the Minister of Protection of the Environment and Natural Resources of the Russian Federation Addressed to the Executive Secretary of the Ozone Secretariat, in Annex III, Report of MPIC-13 (note 4).

from the Convention and its Protocol.²⁶ Many reasons can be put forward to explain why Russia has chosen to remain a Party to the treaties. The Protocol's current and potential trade restrictions would make such a withdrawal awkward.²⁷ Russia's weakened economic state leaves it greatly dependent on the good faith of industrialised countries that have strongly supported the Protocol's objectives.

Indeed, since coming into being the Russian Federation has sought to demonstrate its formal compliance with the Protocol. The Russian government has adopted a series of policies and laws aimed at implementing its obligations under the Protocol and has, through 1995, complied with its obligations to reduce production and consumption of ozone depleting substances.²⁸ However, as Russia has itself admitted, its ability to remain in compliance up until this critical point had been brought about not by

²⁶ Article 19, Vienna Convention; Article 19, Montreal Protocol.

²⁷ While Russia might be able to reach a level of self-sufficiency by manufacturing ozone depleting substances to meet its own needs, as a non-Party it could lose the potentially lucrative "basic needs" markets to Article 5.1 countries, would also lose the opportunity to trade with Parties in products that contain certain substances controlled by the Protocol and might, eventually, face trade bans of products (PPMs).

A list of the products containing controlled substances now banned for trade with non-Parties under Article 4.3, for ozone depleting substances controlled in Annex A of the Protocol (London Amendments) was adopted by the third Meeting of the Parties and now forms Annex D to the Protocol; Annex V, Report of the Third Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Nairobi, 21 June 1991, UNEP/OzL.Pro.3/11 [hereinafter Report of MOP-3]. For practical reasons, the Parties decided not to elaborate such a list for products containing controlled substances in Annex B, Decision VI/12, Report of the Sixth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, 10 October 1994, Nairobi, UNEP/OzL.Pro.6/7 [hereinafter Report of MOP-6], but have undertaken to elaborate an annex for products containing controlled substances in Annex C, Article 4.3 *ter*, Copenhagen Amendments. In the meantime, Parties will seek to regulate trade in products containing Annex A & B substances through legislative and administrative measures such as labelling. Decision VII/32, Report of MOP-7 (note 4).

Parties decided at their fifth meeting that it was not then technically or financially feasible to introduce the widest sweeping of the Protocol's bans on trade with non-Parties in products produced with but not containing substances controlled by the Protocol, Decision V/17, Report of the Fifth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, 17–19 November 1993, Bangkok, UNEP/OzL.Pro.5/12. The potential to invoke this powerful incentive remains in the Protocol, and the Technical and Economic Assessment Panels are to keep the issue under review. Article 4.4–4.4 *ter*, Copenhagen Amendments. See Presentation by Dr Robert Van Slooten, Chair, UNEP Economic Options Committee, at the OECD Workshop on Trade and Environment, Helsinki, 6–7 April 1994.

²⁸ TEAP/CEIT Report (note 2), 29.

policies implemented in response to its international legal obligations, but rather by a slump in production following economic collapse.²⁹

Because no structural changes have taken place, Russia is now faced with choosing between restraining its industrial output, switching to expensive imported substitutes, or violating the Montreal Protocol. Thus, while Russia has declared itself “committed” to the principle of the Ozone Agreements, it has sought relief from its substantive obligations under the Protocol through:

- a “grace-period” for compliance with its phase-out obligations, to be authorised by the Parties;
- the withholding of any additional trade restrictions on Russia’s exports of controlled substances; and
- the provision of financial and technical assistance.

To support its special case, the Russian Federation raised or implied a series of legal arguments:

- that, as it was the Soviet Union and not the Russian Federation that ratified the Montreal Protocol, Russia, as the successor Party, cannot be held fully responsible for fulfilling its commitments;³⁰
- that the collapse of the Soviet Union constituted an event “force majeure” or a “fundamental change in circumstances” that justifies flexibility in the application of the Protocol to Russia;³¹ and
- that more recent international environmental agreements reflect emerging legal principles that suggest the Montreal Protocol should be amended to provide greater flexibility for countries with economies in transition.³²

B. Succession, *force majeure* and *rebus sic stantibus*

The law of treaties and of state succession is highly complex and a detailed discussion is beyond the scope of this note. Russia’s general support

²⁹ Statement by the Minister of the Russian Federation at the Seventh Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer (Vienna, 4 – 7 December 1995) [hereinafter the Russian Statement at MOP-7].

³⁰ Russian Statement at MOP-7 (note 29), pointing out, somewhat inaccurately that “it was not the Russian Federation but the former Soviet Union that ratified the Montreal Protocol”. While this is true of the original Protocol, the Russian Federation has itself ratified the London Amendment.

³¹ *Ibid.*

³² Although it never tabled such an amendment, Russia suggested that the Ozone regime should be “rejuvenated” to recognize the “special status of states with economies in transition”, *ibid.*

for and participation in the Protocol has, for the most part, been consistent with state practice that suggests that upon the dismemberment and extinction of a state, "treaty rights and obligations attaching to particular parts of its territory will pass to whichever state assumes responsibility for the territory in question."³³

The dismemberment of the Soviet Union and the legal chaos that ensued in the Eastern Bloc has raised questions as to the legal capacity of the surviving states to carry out pre-existing obligations. Indeed, the Montreal Protocol Implementation Committee recently requested the Ozone Secretariat to seek clarification from the UN Legal Counsel on the status of the countries of the former Soviet Union with regard to succession to the Vienna Convention and the Montreal Protocol.³⁴

The change in borders resulting from the break up of the USSR did present very concrete legal difficulties for Russian compliance, especially with regard to collecting export and import data following the break up. On several occasions Russia pointed out that it could not take responsibility for collecting data from other countries, a number of which had not yet ratified the Protocol.³⁵

Nevertheless, there is clear evidence to suggest that as early as 1990, individual SSRs, including Russia, were prepared to take on the formal legal competence of bearing state responsibility for the transboundary impact of the use of natural resources and environmental protection within their territories. Declarations adopted by the parliaments of 11 Republics reaffirmed "each republic's sovereignty as regards international environmental cooperation."³⁶

Since then, Russia has claimed that "the collapse of the Soviet Union ... is beyond doubt a case of *force majeure*, which every canon of law requires to be taken into account."³⁷ By this Russia appears to be relying on customary and treaty law to argue that social and economic collapse would justify the suspension of a treaty when there is a "supervening im-

³³ Oppenheim's International Law, 9th ed., Vol. 1, Peace, sec 63. The Russian Federation inherited the bulk of the USSR's legal obligations, and of its capacity to produce ozone depleting substances. In 1990, the baseline year from which reductions under the protocol are measured, 110 of the 125 thousand tonnes of Soviet ozone depleting substances were produced within the Russian SSR, Russian Statement at MOP-7 (note 29).

³⁴ Report of MPIC-13 (note 4).

³⁵ Report of MPIC-10 (note 3), para 37.

³⁶ A. Timoshenko, 1990: The Year in Review, USSR, in: G. Handl (ed.), 1 Yearbook of International Environmental Law 1990, at 245.

³⁷ Russian Statement at MOP-7 (note 29).

possibility of performance” (*force majeure*) or a “fundamental change of circumstances” (*rebus sic stantibus*).³⁸

Judicial and academic opinions vary too widely to determine with any certainty whether the application of either rule would excuse Russia’s non-compliance under this particular set of circumstances.³⁹ It is interesting to note, however, that while Russia has suggested that in its current state it cannot be held to the same environmental standards as under the Soviet system, other former Eastern Bloc countries have invoked the same legal principles to release them from treaty obligations with low environmental standards.⁴⁰

Neither Russia nor the Non-Compliance Procedure addressed in any detail arguments with regard to succession and “fundamental change in circumstances”, and it can be concluded that they were invoked, at this stage, not to withdraw or terminate operation of the Protocol, but instead to elicit sympathy and unease from fellow Parties.

C. Common but differentiated responsibilities

Russia is correct in suggesting that several of the major international environmental agreements adopted since the collapse of the Eastern Bloc have recognised a special status under international law of “countries with economies in transition.” Both the 1992 Convention on Biological Diversity and the 1992 Framework Convention on Climate Change (UNFCCC) adopt the principle of “common but differentiated responsibility” that, for example, calls upon the Conference of the Parties to allow “a certain degree of flexibility” to developed countries “undergoing the process of transition to a market economy”.⁴¹

³⁸ See Articles 61 and 62 of the 1969 Vienna Convention on the Law of Treaties.

³⁹ See, e.g., Yearbook of the International Law Commission. Vol II, 1966, 256, et seq.; I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. 1984, 191, et seq.; P. Reuter, *Introduction to the Law of Treaties*, 2nd ed. 1994, 185, et seq.

⁴⁰ The author understands that in a dispute pending before the International Court of Justice, one country has argued that the dramatic and unforeseen political, economic and cultural changes – including an increase in general environmental awareness – that have resulted from the collapse of the Eastern Bloc, amounted to a “fundamental change in circumstances” that should justify the termination of a bilateral treaty providing for the construction of an environmentally damaging dam.

⁴¹ 1992 UN Framework Convention on Climate Change, 31 ILM 849 (1992), Article 4.6 [hereinafter UNFCCC].

The UNFCCC, which contains the more specific obligations of the two Rio treaties, requires all developed Parties to bear the same emissions stabilization commitment but allows Parties from the former Soviet Union or Central and Eastern Europe leeway in selecting their baseline year, against which progress will be measured. Countries with economies in transition are, furthermore, released from the UNFCCC's financial obligations,⁴² and are included in the Convention's vague offers of assistance with the transfer of technology.⁴³ They are not, however, eligible for financial assistance under the Climate Convention's Financial Mechanism.⁴⁴

Russia is justified somewhat in complaining against the UN's increasingly arbitrary categorisation of developing countries which obliges some countries to contribute financial assistance to others that are by some measures "richer".⁴⁵ But the changes of the last decade have left Russia itself deeply conflicted in the way it sees its role in the international community. During the same period that it was seeking treatment equivalent to a developing country to access funding for ozone assistance, Russia was lobbying for membership in OECD's club of richer nations.⁴⁶

While the Rio accords do reflect a greater appreciation of the special situation of countries with economies in transition than does the Montreal Protocol, such developments would not support the extension of this general principle into other regimes. As will be seen, the Protocol's institutions have treated Russia's situation with sympathy and flexibility, but its call to amend the Ozone regime to incorporate language similar to that found in the Climate and Biodiversity Conventions went largely unheeded.⁴⁷

⁴² Only those Parties included in Annex II, i.e., the OECD's original "Group of 24" are expected to contribute to the UNFCCC's financial mechanism, UNFCCC, Article 4.3, Annex II.

⁴³ UNFCCC, Article 4.5.

⁴⁴ UNFCCC, Article 4.3; Decision 11/CP.1, Report of the Conference of the Parties to the United Nations Framework Convention on Climate Change on its First Session, FCCC/CP/1995/7/Add.1, 6 June 1995.

⁴⁵ Russia, which is under an obligation to contribute to the Multilateral Fund of the Montreal Protocol has, by some calculations, a lower gross domestic product per capita (adjusted for purchasing power parity) than Brazil, which is eligible for assistance under the Fund, see, Russian Exceptionalism, in: *The Economist*, 15 June 1996, 21.

⁴⁶ The OECD: Punch-up in Paris, in: *The Economist*, 28 April 1996.

⁴⁷ Among the options that Russia raised and the Technical and Economic Assessment Panel considered, was either the reclassification of Russia as operating under Article 5.1, or amendments to the Protocol that would allow certain countries with economies in transition to be eligible for funding under the Multilateral Fund of the Montreal Protocol TEAP/CEIT Report (note 2), 46.

*V. How the Protocol's Institutions Responded
to Russia's Non-Compliance*

A. Timeline

Russia first called the Parties' attention to the prospect of its non-compliance in October 1994, at the sixth Meeting of the Parties.⁴⁸ By May 1995, in a Statement to the Open-ended Working Group of the Parties to the Montreal Protocol, Russia expressed its hope that the upcoming seventh Meeting of the Parties would take appropriate decisions to provide Russia and other parties which belong to the group of countries with economies in transition some relief from their obligations.

But it was not until the issue was brought before the Montreal Protocol Implementation Committee that Russia's case was reviewed in any detail. At its tenth meeting, held half a year before the seventh Meeting of the Parties, the Committee confronted directly Russia's non-compliance. In a bold step, it took Russia's statement to the Open-ended Working Group of the Parties to the Montreal Protocol and subsequent correspondence to the Protocol Secretariat as constituting a self-reported submission under paragraph 4 of the Non-Compliance Procedure.⁴⁹

Russia provided the Montreal Protocol Implementation Committee with additional submissions, including a message from the Chairman of the Government of the Russian Federation, and a Decree adopted by the Russian Government that established "first-priority measures for the implementation of the Vienna Convention and the Montreal Protocol". The Committee remained unsatisfied, however, and concluded that

⁴⁸ Report of MOP-6 (note 27).

⁴⁹ The relevant provision of the Non-Compliance Procedure reads that:

"[w]here a Party concludes that, despite its best bona fide efforts, it is unable to comply fully with its obligations under the Protocol, it may address to the Secretariat a submission in writing, explaining, in particular, the specific circumstances that it considers to be the cause of its non-compliance. The Secretariat shall transmit such submission to the Implementation Committee which shall consider it as soon as practicable", Annex V, Report of MOP-4 (note 11).

The Meeting of the Parties has since implicitly approved the Montreal Protocol Implementation Committee's unilateral characterisation of Russia's statements (as well as those made on behalf of Poland, Bulgaria and Belarus) as a submission to the Non-Compliance Procedure, Report of MOP-7 (note 4), Decision VII/18, para 1. Although Russia had not itself formally characterised its statements as paragraph 4 submissions, it did not react with hostility towards Committee's review, and was, indeed present and made a statement at its 10th and subsequent meetings.

further steps were needed before it could make recommendations to the Parties.⁵⁰

At the twelfth Meeting of the Montreal Protocol Implementation Committee, held just before the seventh Meeting of the Parties, the Committee sought to agree with the Russian delegation on an approach to responding to Russia's non-compliance that, in accordance with the Non-Compliance Procedure, could be recommended to the seventh Meeting of the Parties for adoption. Russia and the Committee failed to agree, in particular, on measures with regard to monitoring and trade. As a result, the Committee's recommendations went forward to the seventh Meeting of the Parties without Russia's full agreement.⁵¹ It offered a combination of rewards and punishments, recommending that the Parties:

- impose restrictions on Russia's trade in controlled substances, and
- encourage funding agencies to provide financial assistance to enable Russia's compliance with the Protocol.

Despite Russia's objections, the Montreal Protocol Implementation Committee's recommended draft decisions⁵² were adopted largely intact by the seventh Meeting of the Parties. Because Russia's 1 January 1996 deadline for compliance was still a few weeks away when the seventh meeting ended, the Meeting of the Parties did not formally determine that the Russian Federation was in non-compliance with its obligations, but rather deferred that question to the 1996 meetings of Montreal Protocol Implementation Committee.

B. Russia's "grace-period"

Since it began to alert the Parties to the likelihood that it would fail to meet its 1 January 1996 deadline, Russia has insisted that it be granted a grace period for the fulfilment of its obligations, that would allow it up to five additional years to complete its phase-outs.⁵³

At the core of Russia's arguments was a great sense of inequity and frustration at the differentiation in treatment, both in terms of control

⁵⁰ Report of MPIC-10 (note 3), paras 36 and 38.

⁵¹ Report of MOP-7 (note 4), para 44.

⁵² UNEP/OzL.Pro.7/9, Rev.1, 13.

⁵³ TEAP/CEIT Report (note 2), 16, citing Report of the Regional Meeting on the Montreal Protocol: Implementation in the Countries of the Commonwealth of Independent States, the Baltic States and Mongolia, Minsk, Belarus, 14–17 August 1994, UNEP, UNEP/OzL.Pro/Reg. 2/1/2, 1994, 09, 16.

measures and access to financial resources, between countries from the former Soviet Union or Central and Eastern Europe and developing countries, especially in light of the increasing relative production and consumption of ozone depleting substances from developing countries.⁵⁴

The Chair of the Technical and Economic Assessment Panel's Working Group indicated to the Montreal Protocol Implementation Committee that, without financial assistance, he expected delays in Russia's compliance with the Protocol of up to four years.⁵⁵ The Panel's assessment sought to balance environment, economic and political concerns. While recognising that "doing nothing could speed up the phase out process" by driving Russian companies which depend on ozone depleting substances out of business in a rapidly shrinking market, the Panel expressed concern that such a policy could lead to the loss of thousands of jobs throughout the former Soviet Union and Central and Eastern Europe, and would be contrary to the supportive attitude the Parties had taken towards other Parties experiencing difficulty complying.⁵⁶

It was the Montreal Protocol Implementation Committee, however, that set the tone for dealing with Russia's plea for a special grace period, by noting that nothing in the Protocol or the decisions of the Parties allowed for the extension of an individual Party's deadline and, wishing to stick within its mandate for dealing with non-compliance, the Committee preferred to leave any such decision to the Meeting of the Parties.

In the end the Meeting of the Parties, while resisting a formal extension for Russia's compliance, effectively conceded that Russia would enter a period of non-compliance. By noting that Russia's phase-out plan would be "gradual", would stretch well beyond 1996, and would depend on financial assistance, the Parties have neither secured a new deadline, nor established a precedent for the formal extension of a Party's obligation.

C. Trade restrictions⁵⁷

The Russian Federation, like all Parties to the London Amendments, is under an obligation to ban trade with non-Parties to the London Amendments in all controlled substances listed in Annexes A and B of the Pro-

⁵⁴ Russian Statement at the MOP-7 (note 29).

⁵⁵ Report of MPIC-10 (note 3), para 33.

⁵⁶ TEAP/CEIT Report (note 2), 42.

⁵⁷ See note 27, above. For a fuller discussion of the trade provisions of the Montreal Protocol, see D. Brack, *International Trade and the Montreal Protocol*, 1996.

tol, ⁵⁸ and in products containing substances listed in Annex A that have been identified in Annex D of the Protocol. ⁵⁹

This ban leaves Parties that are producers of controlled substances free to trade with fellow Parties. While the legal market in these substances should be sharply reduced by wide-spread compliance with control measures, developing countries operating under Article 5.1 will continue to be entitled to demand and consume these substances, at declining levels, until as late as 2015. Indeed the "basic needs" exception in the Protocol's control measures anticipates that a developed Party can, even after "total phase-out" of a substance, continue to produce up to 15 % of its 1989 baseline in order to meet the demands of Article 5.1 countries. Furthermore all Parties may apply for and receive permission to continue to produce and consume "phased-out" controlled substances under "essential use" exceptions specifically (and so far reluctantly) approved, on a case-by-case basis, by the Meeting of the Parties.

Sympathetic to the needs of those states dependent on Russia for supplies of ozone depleting substances, ⁶⁰ the Montreal Protocol Implementation Committee's proposed a draft decision that would have reflected a Russian agreement to restrict its exports to only those Article 2 (developed) Parties, that are members of the Commonwealth of Independent States. ⁶¹ A number of developing country delegations (Russia's competitors in this potentially lucrative "basic needs" market) sought to extend the ban further than that suggested by the Committee, and to impose trade restrictions that would have cut Russia off from trade with developing country Parties.

The Decision finally adopted by the seventh Meeting of the Parties reflects an ambiguous compromise. The decision allows Russia to con-

⁵⁸ London Amendments, Article 4.1, 4.1 *bis*, 4.1 *ter*; and 4.2, 4.2 *bis*, 4.2 *ter*.

⁵⁹ A list of the products containing controlled substances now banned for trade with non-Parties under Article 4.3 – 4.3 *ter*, for ozone depleting substances controlled in Annex A of the Protocol (London Amendments) was adopted by the third Meeting of the Parties and now forms Annex D to the Protocol, Annex V, Report of MOP-3 (note 27).

⁶⁰ The Technical and Economic Assessment Panel's findings supported Russia's arguments against an outright ban on trade in ozone depleting substances with states of the Commonwealth of Independent States and Baltic states. Among the potential negative effects of a such a ban on trade with states belonging to the Commonwealth of Independent States would be to increase the pressure on GEF funding for conversion of ozone depleting substances plants or a turn to the blackmarket. Other countries not party to the Protocol with dormant production facilities (e.g. Tajikistan) might take up the niche in the market left by Russia, TEAP/CEIT Report (note 2), 41 and 45.

⁶¹ UNEP/OzL.Pro/7/9/rev.1.

tinue to trade in ozone depleting substances with Article 2 (industrialised) Parties that are members of the Commonwealth of Independent States, thereby only implying that trade with other Article 2 Parties, outside the Commonwealth of Independent States, will be banned. No mention at all is made of restricting Russia's right to trade with Article 5.1 (developing) Parties. The Decision purports, however, to place Russia under an obligation to ensure that the ozone depleting substances Russia does export to countries of the Commonwealth of Independent States are not then sold on to Article 5.1 or other countries.⁶²

To the extent that the Decision of the seventh Meeting of the Parties does impose a ban on Russia's trade with Parties, the legal rationale for the restriction must be based on an interpretation of paragraph c of the Non-Compliance Procedure's Indicative List of Measures which would allow the Meeting of the Parties to suspend Russia's right to trade, by treating it, in that limited context, as a non-party to the Protocol.

Russia's strongly-worded response to the trade-restrictive aspects of the decision of the seventh Meeting of the Parties seems disproportionate to the potential loss in trade. Russia's objections implied that in taking trade measures against a fellow Party, the Meeting of the Parties would be overstepping its powers under the Protocol and the Non-Compliance Procedure. Russia sought to interpret the Non-Compliance Procedure's Indicative List of Measures as requiring measures to be taken in an ascending order of stringency, from financial assistance, to cautions, to trade measures. Russia accused the Meeting of the Parties of abusing its discretion by opting for the harshest measures (trade restrictions) without first exhausting the more lenient options.⁶³

Other objections that Russia might have raised include that the invocation of the Non-Compliance Procedure's Indicative List of Measures was premature, as Russia was not and has not yet been formally found in non-compliance; that the scope of the ban, which refers generally to substances controlled by the Montreal Protocol, would appear to include substances added in the Copenhagen Amendments, to which Russia is not yet a Party; and that by requiring Russia to "secure that no re-exports will be made from the [Commonwealth of Independent States]" the Meeting of

⁶² These additional restrictions were put in place on the basis of a proposal by the Philippines, Chair of the Group of 77.

⁶³ Report of MOP-7 (note 4), para 129.

the Parties was asking that Russia be held responsible for activities beyond its territorial control.⁶⁴

The ambiguity of the Decision of the seventh Meeting of the Parties, as adopted, derives from its permissive, rather than explicitly restrictive character, and doubts can remain as to whether any ban was actually imposed. Statements subsequent to the seventh Meeting of the Parties indicate that Russia is seeking to comply with both the explicit and the implicit trade restrictions in Decision, by imposing new "restrictions on exports of ozone depleting substances" to Article 5 Parties, and it is seeking, through licensing arrangements, to ban the re-export of ozone depleting substances exported from Russia to countries of the Commonwealth of Independent States.⁶⁵

Increasingly clear from the decision of the seventh Meeting of the Parties is the crucial role of the promise of financial assistance through the Global Environmental Facility in providing a powerful backstop of conditionality to a still fragile compliance system.

D. Financial assistance

The seventh Meeting of the Parties, on the basis of both the Technical and Economic Assessment Panel and the Montreal Protocol Implementation Committee reports, recommended that international assistance to the Russian Federation should be considered under specified conditions. These recommendations were made in the context of ongoing efforts by the GEF Council and the World Bank to encourage Russian compliance with the Protocol through heavily conditioned grants and loans. Though not part of the Non-Compliance Procedure, the GEF Council has played and will continue to play a key role in pressing for Russia's implementation of the decisions of the Montreal Protocol Implementation Committee and the Meeting of the Parties. The GEF Council has sought to

⁶⁴ Russia has pointed out that the regulation of trade in these substances, especially in the context of a privatised economy, requires the cooperation of the importer as well as the exporter. This seems all the more relevant in the context of increasing concerns about illegal trade of ozone depleting substances. The Worldwatch Institute reported that illegal imports into the European Union from Russia and Estonia in 1994 amounted to what the EU was itself permitted to manufacture legally in that year, *International Environment Reporter*, BNA, 31 May 1995. See also, *Smuggling Threatens Protocol Success*, in: *Global Environmental Change Report*, 24 May 1996, 3.

⁶⁵ Letter Dated 26 February 1996 From the Minister of Protection of the Environment and Natural Resources of the Russian Federation Addressed to the Executive Secretary of the Ozone Secretariat, in Annex III, Report of MPIC-13 (note 4).

achieve this by designing a large series of projects divided in three separate tranches to be released only on the fulfilment of specified conditions.

The GEF Council was fully aware, when discussing whether to approve the first tranche of Russian funding, that Russia was experiencing difficulties in fulfilling both its control measure and its financial resource obligations under the Protocol. The first projects were included in the GEF work programme prior to the seventh Meeting of the Parties, but on the understanding that Russia would communicate to the Meeting of the Parties its national programme for the gradual phasing out of ozone depleting substances and its plans for dealing with its contributions to the Montreal Protocol Multilateral Fund.⁶⁶

Further GEF Ozone projects were put on hold, primarily in response to developing country concerns that countries from the former Soviet Union or Central and Eastern Europe might quickly deplete the GEF trust fund, at the same time they were failing to contribute to the resources earmarked for developing countries in the Protocol's Fund. The Council thus suspended approval of further ozone projects until it could revisit its guidelines for country eligibility.⁶⁷

After the seventh Meeting of the Parties, and prior to approving the additional tranche of funds, the GEF Council sought the opinion of the Montreal Protocol Implementation Committee, which was then in the process of reviewing its response to Russia's non-compliance. The Committee recommended that the "GEF Council and other funding agencies should consider favourably additional steps to expedite financial assistance for projects proposed for approval within their work programmes ..." but that "[f]uture projects should be considered in light of further clarifications and information to be provided by the Russian Federation to the Implementation Committee."⁶⁸

The most recent GEF Council maintained this dynamic of incremental, conditioned funding, by approving the second tranche of funds on the condition that the GEF's Chief Executive Officer "has received confirma-

⁶⁶ Joint Summary of the Chairs of the GEF Council Meeting, 3-5 May 1995, GEF/C.4/1/Rev.1, April 5 1995, para 10, reprinted in: 1995 GEF Annual Report. The first tranche of GEF to go to Russia under the GEF's Ozone programme was a US \$ 8.6 million grant, to be matched by US \$ 5.6 million from the recipient enterprise. The project, which will replace CFC with hydrocarbon propellants is designed to reduce 10.5 % of Russia's 1992 annual weighted consumption of CFCs. The World Bank is the Implementing Agency for the project, GEF 1995 Annual Report, 47.

⁶⁷ *Ibid.*, Council Decisions, para 10.

⁶⁸ Report of MPIC-13 (note 4), para 19.

tion from the Ozone Secretariat that it has received satisfactory responses" to a series of questions posed to Russia at the thirteenth meeting of the Montreal Protocol Implementation Committee.

GEF funds will undoubtedly help. But the Technical and Economic Assessment Panel has noted that Russia will likely continue to see it being in its domestic interest to produce and consume controlled substances, and not the HCFC/HFC substitutes for which it as yet has no domestic capacity to produce. More funds than are likely to be available under the current GEF project cycle would be required to fund a transition to Russian self-sufficiency on ozone-friendly substances.⁶⁹

VI. Observations

The way in which the Meeting of the Parties adopted the decision on Russian non-compliance may have more important implications for the future development of the Protocol and of the Non-Compliance Procedure than does the substance of the decision itself. By adopting this Decision "by consensus" and yet over Russia's objections, and despite Russia's demand for a vote, the seventh Meeting of the Parties formalised the practice of interpreting its rules of procedures with regard to the adoption of decisions by consensus, as following the rule of "consensus minus one".⁷⁰

The use of such a rule in the context of a decision aimed directly at the interests of a Party in non-compliance might presage the evolution of the Non-Compliance Procedure towards a more rule-based system of dispute resolution that would allow the multilateral enforcement of retorsion against a defaulting state. While such a rule is clearly necessary to the ef-

⁶⁹ TEAP/CEIT Report (note 2), 40.

⁷⁰ The decision on Russia's compliance was adopted according to the Secretariat's interpretation that "the practice followed in Meetings of Parties to the Montreal Protocol was that, when only one Party objected to a draft decision, that decision would be carried by consensus and the position of the dissenting Party would be clearly reflected in the report of the Meeting", Report of MOP-7 (note 4), paras 130–132. In fact, the Meeting of the Parties has overridden an objecting state only once before, and then it involved technical concerns rather than a decision singling out a Party for condemnation. When the sixth Meeting of the Parties decided to grant juridical personality to the MPMF, Japan reserved its position, noting that for domestic legal reasons it needed prior authorization to give legal personality to international bodies, Decision VI/16, Report of MOP-6 (note 27).

fective operation of any system that singles out a defaulting state, it is an advance that has taken other regimes decades to develop.⁷¹

The Russian experience also underlines the importance of the close interplay between coercion and assistance. By encouraging the funding of Russia's projects in the context of a phase-out programme that has been reviewed by a range of institutions, the Parties have an opportunity not just to fund, but to influence and participate in designing, implementing and monitoring Russia's efforts. The GEF's post-UNCED project cycle provides for public participation, and for a formal monitoring and evaluation process that should provide a level of accountability to Russia's compliance that unilateral assurances could never have guaranteed.

While Russia's most recent appearance before the Montreal Protocol Implementation Committee demonstrated a more amenable tone from both the Committee and from Russia, the potential for conflict continues. Because the 1 January 1996 deadline had by then passed, the Committee "[r]ecognized that, while the information available showed a situation of non-compliance for 1996, the Russian Federation had by its actions taken important steps to comply with [the seventh Meeting of the Parties' decision on Russia's compliance] and towards achieving full compliance with the control measures of the Protocol".⁷² Nevertheless the Committee requested further and regular reporting from Russia to demonstrate its compliance with the decision of the seventh Meeting of the Parties and with previous decisions of the Meeting of the Parties limiting trade in recycled ozone depleting substances.⁷³ The Montreal Protocol Implementation Committee remains, in effect, not entirely satisfied with the Russian response to requests for information.

A further area of potential conflict lies in the relationship between the Protocol's trade sanctions, and the multilateral trading system. Though the specific and targeted benefits of GEF investment will likely outweigh the economic impact of the vague and loosely worded trade restrictions, Russia was clearly upset by the decision of the seventh Meeting of the Parties. At the time the decision was adopted, the Russian Federation "reserved the right to study the consequences of such a decision and to draw the appropriate conclusions for the conduct of its policy with regard to

⁷¹ The GATT Dispute Settlement System has only, with the conclusion of the Uruguay Round disposed of a system of unilateral veto that allowed any contracting party to prevent the adoption of a Panel Report of which it did not approve.

⁷² Report of MPIC-13 (note 4), paras 14–19.

⁷³ *Ibid.*, para 18(d); Decision VI/19, Report of MOP-6 (note 27).

the further implementation of the Montreal Protocol by the Russian Federation.”⁷⁴

While not yet a Member of the World Trade Organisation, many of the arguments Russia has raised in the course of its non-compliance – concerns with regard to the questionable legitimacy, proportionality and necessity of the trade measures adopted by the Meeting of the Parties – may provide the most concrete challenge yet to those seeking to resolve potential conflicts between the demands of free trade and environmental objectives.

⁷⁴ Report of MOP-7 (note 4), para 129.