Accommodating the 800-Pound Gorilla: How Trade With Non-Parties Provisions Can Broaden American Participation in the 2015 Climate Agreement

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Summary

As negotiators approach a new climate change agreement in 2015, they should consider an often-overlooked category of legal provisions included in other multilateral environmental agreements: the Montreal Protocol on the Ozone Layer; the Convention on International Trade in Endangered Species; and the Basel Convention on Hazardous Wastes. Each include provisions committing their Parties to restrict trade with non-Parties in substances covered by the agreement. Experience with these provisions, which differs significantly in design and implementation, offers important lessons for how such a provision might be utilized to broaden American participation and deepen ambition in a new climate change agreement.

At the 17th Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC), in Durban, South Africa, in 2011, nations of the world decided to launch the "Durban Platform," one of whose key planks is the decision to "launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties, . . . [and to] complete its work as early as possible but no later than 2015. . . ."[1] If the new protocol, instrument, or outcome is styled as a treaty or an instrument requiring U.S. ratification with the advice and consent of two-thirds of the U.S. Senate as required by the U.S. Constitution, then, one of the perennial 800-pound gorillas at the international climate talks, the United States, would be widely expected not to ratify that instrument. Moreover, while many nations are gaining experience in the use of market-based measures to reduce global warming pollution,[2] it is unclear whether and to what extent the new instrument will embrace market-based approaches.

It is the thesis of this Article that if a new climate instrument does indeed include or embrace market-based approaches, then including in that instrument a "trade with non-Parties" (TWN) provision—a common feature of other multilateral trade-related environmental treaties—could invite effective U.S. participation, whether or not that instrument is styled as a treaty. This Article explores TWN provisions in three multilateral environmental agreements (MEAs): the 1987 Montreal Protocol on Substances That Deplete the Ozone Layer,[3] the 1972 Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[4] and the 1990 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal.[5] The Article examines how TWN provisions have been applied to trading in the "stuff"—ozone-depleting substances (ODS), endangered species, and hazardous wastes—covered by those MEAs. It then considers the potential relevance of TWN provisions to trading in the context of a new climate instrument,

1. Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action (Conference of the Parties to the UNFCCC Decision 1/CP.17, Nov. 2011), *available at* http://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf.
2. *See, e.g.*, The World's Carbon Markets: A Case Study Guide to Emissions Trading (International Emissions Trading Association, June 2013), *available at* http://www.ieta.org/worldscarbonmarkets.
3. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3 (entered into force Jan. 1, 1989), *available at* http://ozone.unep.org/new_site/en/Treaties/treaties_decisions-hb.php?sec_id=5.
4. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243 (entered into force July 1, 1975), *available at* http://www.cites.org/eng/disc/text.php.
5. Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, 1673 U.N.T.S. 126, Mar. 22, 1989 (entered into force May 5, 1992), *available at* http://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf.

where the traded "stuff" consists of greenhouse gas emissions allowances and credits.

TWN provisions are treaty design features that address the issue of extra-treaty trading between Parties and non-Parties in products and services that are the "stuff" of the treaty. Such provisions recognize the reality of fluid international markets that are not completely covered by the treaty, while also exerting some level of control measures aimed at ensuring that any extra-treaty trading upholds the environmental aims of the treaty. TWN provisions can serve useful purposes in preventing "leakage,"[6] in broadening effective participation, and in addressing concerns about trade discrimination that might otherwise arise under trade agreements if the restricted trade involves "stuff" covered by those trade agreements. Typically, the provisions are included in the context of control measures that are comprised of some form of equivalency requirement both for trades that occur with non-Parties and for the standards applied by non-Parties to the traded "stuff."

Three major MEAs—the Montreal Protocol, CITES, and the Basel Convention—have explicit TWN provisions, and each treaty's TWN provision has had a different degree of effectiveness in upholding its treaty's aims and standards. Each of the MEAs offers guidance in what makes a TWN provision succeed or fail. Such lessons could be applicable to the design of the 2015 UNFCCC instrument. In essence, the success of each TWN provision is directly tied to the overall strength of the treaties in exerting control over the trading activities of Parties themselves, mainly through monitoring, reporting, and verification (MRV) requirements and noncompliance measures. If such oversight provisions guiding intra-Party trading are rigorous, then generally so too are those guiding non-Party trading.

TWN under the successful Montreal Protocol, for example (which regulates international trade in ODS), very precisely mirrored the famously rigorous control of trade among the Parties themselves, making the Protocol's TWN provisions just as effective in upholding the treaty's environmental aims as inter-Party trading. On the other hand, the far more flexible, some would say weak, Basel Convention (which regulates international trade in hazardous waste) exerts very little oversight of non-Party trades, thus making non-Party trade a potential threat to the treaty's environmental aims.

By examining the text of and experience with the TWN provisions in each of these three treaties, clear lessons can be gleaned that could be applied in crafting a TWN in a new legal climate instrument that addresses emissions allowance/credit trading, whether such an instrument is done under UNFCCC auspices or otherwise developed. Overall, the experience indicates that TWN provisions, if designed with care and rigor, might indeed help a new climate instrument meet the goals of broadening participation and increasing ambition while maintaining carbon market integrity.

Indeed, such a provision might offer the best avenue for U.S. effective participation in a new agreement under UNFCCC auspices, and to the extent U.S. effective participation boosts prospects for the participation of other nations, thus offer one of the best chances for successfully averting catastrophic climate change.

Various authors have examined TWN provisions in the MEAs in varying degrees of detail. Most of these, however, have focused on the relationship between these MEA provisions and the rules of the multilateral trading system as embodied in the agreements under the World Trade Organization (WTO),[7] or on how such provisions might generally open pathways to broader participation.[8] Few authors, however, have considered TWN provisions from the perspective offered in this Article, namely the application of such provisions to the "stuff" of a carbon markets agreement, i.e., to trading between Parties and non-Parties in emissions allowances and credits.

In order to identify the most useful lessons for designing a TWN provision in a new climate agreement, this Article first will examine the highly successful TWN provision of the Montreal Protocol. The overall strength of the Protocol is mirrored in a TWN provision that mandates that Parties apply *identical* standards for trading in ODS controlled under the Protocol, whether the trades are with Parties or with non-Parties. More specifically, the rigorous reporting standards and stringent noncompliance procedures will be assessed below as particularly effective design features that ensured all trading with non-Parties upheld the treaty's goals.

Second, this Article will examine CITES and how its TWN provision has been moderately successful, largely as a result of organic institutions and norms that have developed over time within the regime. In particular, compliance oversight and enforcement features (such as the Standing Committee and unilateral standards enforcement by Parties themselves) will be identified as strengths. Specific CITES weaknesses, however, such as incomplete MRV and domestic measures in relation to trades with non-Parties, will also be identified.

Third, an examination of the Basel Convention's TWN provisions will show they have been largely ineffective at verifying that any transboundary movements of hazardous wastes covered by the treaty adhere to the same standards, regardless whether a transfer of wastes occurs between two

6. Leakage is the shift of restricted activities from regulated areas to nonregulated areas, which can potentially undermine the aims and effectiveness of those regulations.

7. Among the many articles on this subject, see, e.g., Yen Trinh, *Moving the Negotiations on Trade Measures in Multilateral Environmental Agreements Forward*, *in* Papers on International Environmental Negotiation, Volume 16: Enhancing the Effectiveness of the Treaty-Making System (Harvard Law School Program on Negotiation, 2007), text available at https://www.pon.harvard.edu/shop/papers-on-international-environmental-negotiation-volume-16-enhancing-the-effectiveness-of-the-treaty-making-system/.

8. *See, e.g.*, Farhana Yamin ed., Climate Change and Carbon Markets: A Handbook of Emissions Reduction Mechanisms (EarthScan, 2005); *and see* Annie Petsonk, *"Docking Stations": Designing a More Open Legal and Policy Architecture for a Post-2012 Framework to Combat Climate Change*, 19 Duke J. Intl. & Comparative L. 433 (2009), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1280&context=djcil.

Parties or between a Party and a non-Party. This ineffectiveness is largely a result of a general lack of clear environmental standards, in addition to a near-complete lack of noncompliance measures. This lack of effectiveness offers a stark cautionary lesson for the design of a TWN provision in the international climate change regime.

Lastly, a lessons-learned summary will compare the three treaties and offer a synopsis of how such lessons can be applied in the context of a new instrument on climate change.

I. The Montreal Protocol

A. *Montreal Protocol Overview*

The Montreal Protocol is an international success story that serves as a paragon of international cooperation and environmental effectiveness. The Protocol entered into force in 1989. Comprised today of 197 Parties, it regulates the "consumption"—defined as production plus imports minus exports—and trade of ODS. The Protocol imposes a series of mandatory obligations to freeze and reduce consumption of ODS.[9] It is backed up by a rigorous compliance mechanism developed at the first Meeting of the Parties (MOP). The Protocol requires that each Party annually report production, export, and import data to the Secretariat.[10] Technical assistance for compliance with the Protocol's reduction goals is specifically mandated[11] and well-funded by the MOP. In a significant display of discipline, the Protocol specifically charges the first MOP with adopting noncompliance measures and financial assistance mechanisms,[12] discussed *infra*. As a result, the Montreal Protocol is rightly regarded as one of the most effective MEAs, with universal ratification by Parties that both achieve and repeatedly tighten the Protocol's reduction goals.

B. *The Trade With Non-Party Provisions of the Montreal Protocol*

Perhaps unsurprisingly, then, the Montreal Protocol's TWN provision (Article 4) is one of the most strict of the MEAs. The first clause of Article 4 requires Parties to prohibit the import of ODS from non-Parties: "[w]ithin 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." The second clause bans exports starting in 1993, stating that "no Party . . . may export any controlled substance to any State not party to this Protocol." However, the import ban is limited by the eighth clause of Article 4:

> Notwithstanding the provisions of this Article, imports . . . may be permitted from 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 and this Article, and has submitted data to that effect as specified in Article 7.

In order to trade in ODS, then, a non-Party must commit to both the control measures (reductions) and the strict data-reporting requirements of the Protocol and of each of its progressively stricter amendments.[13] In essence, there is no way to be a "lone ranger"[14] outside the treaty and still trade with Montreal Protocol Parties.

The strictness of the TWN provision is largely due to the nature of the trade: with a rapidly depleting ozone layer at the time of the Protocol's negotiations, there was a pronounced risk of leakage and industrial migration undermining the urgent aims of the treaty, whereby non-Parties, free of trade restrictions, could produce and trade in increasingly scarce ODS. Additionally, Parties would also be at a significant competitive disadvantage if non-Parties had a significant market in which to trade.[15] In part, the Protocol addressed this concern through its entry-into-force provisions, through which the Protocol took effect only when 11 nations representing two-thirds of global consumption of ODS had ratified it—effectively creating a critical mass of producing and consuming nations committed to its success.[16] To augment these entry-into-force provisions, the Montreal Protocol banned all trade with non-Parties that were not in compliance with Articles 2 and 7. If those countries that did not join the agreement and/or comply with the relevant Articles, they risked complete and rapid cessation of access to ODS substances, long before the more gradual, funded phaseouts Parties could enjoy and therefore plan for. Unlike Basel and CITES, then, the nature of the traded "stuff" of the Montreal Protocol, ODS, and the subsequent design of the treaty, left almost zero incentive to attempt to be a non-Party "lone ranger."[17]

The urgency facing the Montreal Protocol (a rapidly depleting ozone layer) is similar to that facing the UNFCCC as it crafts the 2015 agreement. Such urgency, of rising sea levels and extreme weather events, should, as in the Montreal Protocol, heighten pressure for an agreement. Such pressure could spur Parties to create and expand the scope of robust markets for amounts of emissions allowances that necessarily decrease over time, similar to the market for dwindling supplies of ODS. The ability to participate in such a market may be the best chance for increased engagement with non-Parties, in particular the United States.

9. Art. 2.
10. Art. 7.
11. Art. 10.
12. Art. 11.
13. Art. 4.
14. *See* Carol Annette Petsonk, *The Role of the United Nations Environment Programme (UNEP) in the Development of International Environmental Law*, 5 Am. U. J. Intl. L. & Pol'y 351 (1990), at 370-71, *available at* http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1585&context=auilr.
15. Duncan Brack, *International Trade and the Montreal Protocol*, Earthscan 52 (1996).
16. Petsonk, *supra* note 14.
17. *Cf.* Petsonk, *supra* note 14, at 379-81.

Unsurprisingly, only one non-Party that had not yet ratified the Protocol has been permitted under the Protocol to participate in ODS trade as a non-Party under Article 4.[18] In 1992, Colombia, still a non-signatory, was deemed by the MOP nonetheless to be in full compliance with the control measures, based on the data it had submitted (as required of non-Parties wishing to engage in trading with Parties). Thus, Colombia was exempt from the trading ban applied to non-Parties and could trade in ODS under the strict terms of the Protocol. Similar to the trend of CITES non-Parties acceding to that treaty after engaging in treaty-sanctioned trade with Parties, Colombia acceded the following year.[19] Importantly, the experience of both CITES and the Montreal Protocol suggests that non-Party trading that upholds treaty standards is often a prelude to accession.

Such an outcome in the UNFCCC would be equally desirable: after "testing the waters" via emissions trading as a non-Party, the United States would be more likely to eventually ratify the 2015 or subsequent agreement, based on that positive experience in international emissions trading.

Article 4 exemptions from the non-Party trade restrictions were also utilized by Parties that subsequently fell into non-Party status, when those Parties could not ratify the Protocol's various required Amendments in a timely manner, but were otherwise in compliance with the control measures and data-reporting requirements. For example, Jordan, Malta, Poland, and Turkey, previous signatories to the Protocol, had not yet ratified the London Amendment in 1993 and thus applied for exemptions from trade restrictions under Article 4. The MOP granted the exemption, so long as adequate data was submitted in the interim before their ratification of the Amendment could be completed.[20] In this way, Article 4 has also served as a valuable "safety valve" that rewarded erstwhile Parties' good faith to ratify amendments in due time and remain in the Montreal Protocol, so long as they were in compliance with its provisions. In this way, a TWN provision in the UNFCCC is a flexible mechanism for obtaining the participation of an otherwise inflexible non-ratifier, such as the United States.

This unique flexibility of the Article 4 trading ban with non-Parties was also important for the needs of Taiwan. Unable to ratify the Montreal Protocol due to its lack of international recognition, it nonetheless adhered to the phaseout schedules and reporting, and was thus not subject to trade restrictions under Article 4.[21] Taiwan reported separate data from that of the People's Republic of China, but its data is now combined with that of China.[22] Despite this, in the early years of the Protocol, Taiwan acted as a non-Party duly reporting data.[23] That flexible situation is similar to that of the United Kingdom (U.K.) and Hong Kong (until 1997), when Hong Kong was an overseas territory under U.K. administration.[24] The U.K. would report its own data and separately report data applicable to Hong Kong, to ensure that Hong Kong could trade in ODS as if a discrete Party. That is no longer the case since 1998, when Hong Kong became a special administrative region of China.[25] In such instances, the Montreal Protocol's TWN provision, despite its overall strictness, created flexibility for quasi-states to avoid the possibility of trade restrictions. In sum, this flexibility demonstrates the ability of TWN provisions to increase the avenues to participation by nations that would otherwise not formally ratify a treaty.

C. The Protocol's Robust MRV Regime as a Barrier to Noncompliant Trading

An essential component to any climate change agreement is a robust MRV regime: carbon emissions are a global pollutant, so their sources must be rigorously quantified in order to assess and improve each Party's mitigation efforts. The MRV regime of the Montreal Protocol is essential for its highly functioning non-Party trading mechanism, and it offers clear precedent for a similar provision in a UNFCCC agreement.

Because any trading contemplated by non-Parties would necessitate meeting both the control (i.e., reduction) measures of Article 2[26] and the data reporting of Article 7, this robust MRV lends significant "teeth" to Article 4's TWN provision. The rigorous standards for meeting those core Protocol requirements were set early in the Protocol's life, at the initial design stages of the Implementation Committee.[27] Similarly, such MRV standards should and can be put in place early on in the 2015 agreement, and not left for later COPs to promulgate.

The powerful Implementation Committee created another significant "barrier to entry" for noncompliant non-Parties by establishing the Protocol's highly functioning noncompliance procedure,[28] which was also implemented early in the Protocol's life, as required by Article 8.[29] The ODS data submitted by Parties is reviewed by the Implementation Committee, which comprises represen-

18. *See* http://ozone.unep.org/new_site/en/Treaties/treaties_decisions-hb.php?nav_id=895.
19. *See* http://ozone.unep.org/new_site/en/treaty_ratification_status.php.
20. *See* http://ozone.unep.org/new_site/en/Treaties/treaties_decisions-hb.php?nav_id=843.
21. Brack, *supra* note 15, at 51.
22. Interview with Gilbert Bankobeza (Chief of Legal Affairs, UNEP Ozone Secretariat), July 23, 2012.
23. *Id.*
24. *Id.*
25. *Id.*
26. Article 2 mandates the following, which is the first of six reduction mandates in that Article:

    > 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 . . . .

27. Interview with Gilbert Bankobeza, *supra* note 22.
28. *See generally* http://ozone.unep.org/Publications/MP_Handbook/Section_2_Decisions/Article_8/.
29. Brack, *supra* note 15. Article 8 requires that "The Parties, at their first meeting, shall consider and approve procedures and institutional mechanisms for determining noncompliance with the provisions of this Protocol and for treatment of Parties found to be in noncompliance."

tatives from 10 Parties. The Committee's noncompliance findings are normally by way of recommendations to the MOP.[30] The MOP in turn makes decisions on all issues related to compliance. Those decisions have typically been to provide the "carrot" of assistance, though withholding financial assistance and applying trade restrictions have also been an effective "stick" for enacting compliance.[31]

As a cumulative result of strict data requirements and a robust compliance mechanism, the MRV regime of the Montreal Protocol has proven to be very effective, with exceptionally high reporting rates (despite early problems[32]) when compared to other MEAs.[33] It is also widely agreed that the ability of the Implementation Committee to engage in open dialogue with Parties (and to levy sanctions based on that dialogue) is another core component of the Protocol's effectiveness.[34] Similar MRV design components should be included in the 2015 climate agreement, as a way to ensure that non-Party emissions trading meets the environmental standards of the UNFCCC.

Another successful aspect of the Protocol is its robust Multilateral Fund, established by Amendment in 1990,[35] which has been utilized in over 2,500 institution-strengthening projects to assist developing nations in shifting consumption away from ODS.[36] It is common for CITES and Basel observers to point to the Montreal Protocol's Multilateral Fund as an element of its success in enforcing the treaty, and to note that the lack of such funding in other treaties is a comparative weakness. Oversight of data submission and compliance, and the rendering of noncompliance procedures, makes the Montreal Protocol unique in its effectiveness, as is reflected in the unparalleled success of the treaty. The designers of the next UNFCCC agreement should thus take advantage of the Protocol's well-documented successes in this area and apply such lessons to a TWN provision that opens the door to U.S. participation.

D. The Unique Trading Characteristics of ODS

Other aspects of the Montreal Protocol create a higher, indeed prohibitive, bar to noncompliant non-Party trading. First, the Protocol was designed to reduce (and to find substitutes for) a single, easily identifiable class of substances.[37] Moreover, there were only a few dozen major producers of ODS at the time the treaty was being negotiated.[38] Unlike the traded "stuff" of CITES or Basel, the Montreal Protocol is aimed at a narrow category of trade in substances with readily identifiable purposes and commercial pathways. As a practical matter, this relatively concentrated commerce-stream (despite occasional illegal trafficking) made the enforcement of standards more streamlined and achievable, unlike the more dispersed nature of the "stuff" of CITES and Basel. This had the effect of making "lone rangers" nearly impossible.[39]

Lastly, the Multilateral Fund and technology transfers provided for by the Protocol under Article 11 further encouraged more streamlined accession: rather than being "lone rangers," there was greater incentive to join and take part in the gradual reductions via funded technology shifts, rather than stay out and face sudden and disruptive cessation of ODS trade with "inside" Montreal Parties.[40] In short, regulating a single, relatively non-fungible commodity is a primary reason for the Protocol's accession rate. The carbon emissions allowance market has similar advantages as ODS that make a TWN provision practicable. Carbon is also a fungible commodity (assuming a rigorous and accountable MRV regime is in place) that can, in theory, be readily tracked, measured, and therefore traded, ideally by both Parties and non-Parties like the United States, in order to achieve maximum mitigation.

E. The Success of the Montreal Protocol's Non-Party Provision at Encouraging Accession

In 1997, 10 years after the Protocol was ratified, the number of non-Parties was already small (about 10 sizeable countries, including Iraq and Mongolia as the most significant non-Party ODS consumers[41]). Every non-Party by this time was a consumer of ODS, not a producer, and thus would increasingly need, absent ratification, to rely upon illegal trade for ODS needs, as the Protocol's control measures gradually tightened restrictions on ODS-producing Parties.[42] Exports to non-Parties had been permitted until 1993, after which any exports from Parties counted toward that Party's consumption total.[43] This had the effect of an export phaseout, putting non-Party consumers at an increasing disadvantage, particularly without access to the Multilateral Fund for transition assistance.[44] In this way, the teeth of the Protocol's non-Party trading ban made themselves gradually felt, even in smaller countries with relatively low consumption rates.

South Korea offers the clearest case of a sizeable country resisting accession, due to its significant reliance upon ODS for its then-burgeoning electronics and automotive industries.[45] As an ODS producer itself, Korea could have likely survived the increasingly phased-in restriction of imports of ODS post-1993, because there is no absolute ban on products containing or made with ODS.[46] However, the possibility of unilateral trade restrictions

30. Interview with Gilbert Bankobeza, *supra* note 22.
31. Gilbert Bankobeza, *Ozone Protection*, Eleven Int'l 265 (2005).
32. Brack, *supra* note 15, at 99.
33. Bankobeza, *supra* note 31, at 230.
34. *Id.*
35. *See* http://ozone.unep.org/new_site/en/Treaties/treaties_decisions-hb.php?dec_id_anx_auto=780.
36. Bankobeza, *supra* note 31, at 192.
37. Interview with Sebastian Oberthur (Academic Director of the Institute for European Studies), July 17, 2012.
38. *Id.*
39. *See* Petsonk, *supra* note 14.
40. Brack, *supra* note 15, at 55.
41. *Id.*
42. *Id.* at 54.
43. *Id.* at 55.
44. *Id.* at 45.
45. *Id.* at 55.
46. *Id.*

by Parties (particularly by the United States or the European Union (EU)) of ODS-containing exports (especially refrigerators and cars) was apparently sufficient to persuade Korea to accede in 1992, just five years after the Protocol was ratified.[47] Arguably, the presence of the Protocol's Multilateral Fund for developing country Parties and related technical assistance to transition away from ODS was a contributing incentive for Korea's accession, instead of continued ODS trade without access to that funding mechanism. In any case, here even the threat of extra-treaty trade restrictions by major economies prompted a large trader to accede.

There is not yet an international carbon trading market on which nations depend, as Korea and others depended upon ODS freely entering the stream of commerce. However, if the United States were able to trade in carbon allowances as a non-Party, the increasing attractiveness of that trade, particularly if the United States were able to make greater gains in efficiency, may serve as a further incentive to becoming a Party to the 2015 agreement.

F. The Montreal Protocol's Application to Carbon Trading

The strict TWN provision of the Montreal Protocol's Article 4 has useful analogues for a new climate agreement. First, there is a similar sense of urgency for greenhouse gas emission reductions, as there was for ODS reductions. If a new climate agreement included emissions allowance/credit markets, and paired those with a similarly structured TWN provision embracing correspondingly robust MRV, then non-Parties with comparable emission reduction commitments could participate in those allowance/credit markets, increasing the environmental effectiveness of the treaty without eroding trust in the carbon market.

The MRV regime for ODS, however, while not necessarily simple, is substantially less comprehensive than the multisector MRV requirements of greenhouse gas emissions accounting. By comparison, the Montreal Protocol merely has to compile trade data and reduction compliance at a few dozen facilities, among a predetermined number of producing Parties.[48] In addition to the more pronounced fears of leakage and industrial migration, the Montreal Protocol dealt with a far simpler MRV apparatus than that required for verified carbon emission reductions beyond business-as-usual baselines. In this way, the Montreal Protocol is a useful starting point for a model TWN provision, but the climate change treaty would require more advanced MRV requirements.

The Montreal Protocol offers another precedent for a carbon MEA: in writing a "general" rule that only applied to the Soviet Union, the Protocol directed a general rule at a specific (presumptive) Party, in order to ensure that nation's ratification.[49] Specifically, Article 2(6) allowed the Soviet Union to incorporate into its baseline ODS-production facilities that it had not yet built under its running five-year plan at the time. Essentially, to guarantee the Soviet Union's ratification, Article 2(6) allowed for a bit of "hot air." While not ideal, the Montreal Protocol created a "general" rule that in practice applied to one country. The UNFCCC might examine ways to craft a non-Party provision that in effect applies only to the United States, that upholds the aims and MRV of the treaty, and that is written in such a way that no other countries opt out of accession as a result in order to take advantage as a free rider.

II. The Convention on International Trade in Endangered Species

A. CITES Overview

CITES[50] provides further lessons in how a TWN provision can both benefit and hinder the environmental aims of a treaty. Indeed, because CITES is arguably a work in progress that has undergone substantial, ongoing evolution through decisions of the COP, and because it is a treaty that sees significant trade between Parties and non-Parties, it offers valuable lessons and precedents for the design of a TWN provision in the next UNFCCC agreement.

CITES entered into force in 1975 and now has 179 Parties. It regulates international trade in endangered species through an extensive import and export permitting process overseen by each Party's designated scientific and management authorities. Importantly, the CITES regime relies almost wholly upon the Parties to provide this domestic oversight.

The domestic "scientific authorities" oversee the actual health and viability of domestic species and assess potential species harm due to international trade; each scientific authority recommends trade be allowed *only* if such trade will not be detrimental to that species.[51] This requirement makes each scientific authority's "non-detriment findings" (the science-based finding that trading in a given species will not be a detriment to that species' survival) a core component of CITES oversight and effectiveness. This crucial gatekeeper role of domestic scientific authorities makes CITES regulation very reliant upon the fact-specific, science-based decisions each individual Party makes.

47. *Id.*
48. Interview with Sebastian Oberthur, *supra* note 37.
49. Article 2(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.

50. *See* http://www.cites.org/eng/disc/text.php.
51. Art. 3.

The domestic "management authorities" of the Parties oversee and provide permits for the trades themselves, with a standardized permit required from both the importing and exporting states in the case of endangered ("Appendix I") species.[52] The actual permits must contain specific information outlined in the CITES appendix, and CITES charges each Party's management authority with precise tracking, validation, and canceling of all permits.[53] Together, both of these domestic authorities, along with a largely standardized international permitting and customs regime, create a uniform "code of conduct," as well as an on-the-ground means of upholding the aims of the treaty.

In addition to this Party-by-Party enforcement of treaty requirements, a larger MRV regime is in place as well. CITES requires extensive recordkeeping of all trades and of all approved traders,[54] and each Party must provide an annual report of all trades, and a biennial report on domestic implementation progress.[55] The annual trading reports, taken together, would ideally provide sufficient statistical information on the total volumes of species-specific trade, which allows assessments to be made of each species' conservation status.[56]

The Secretariat is given a moderate compliance role: when any Party is perceived to have participated in trade contrary to CITES, the Secretariat may open a notice-and-inquiry process that may be reviewed by the COP.[57] As written, then, CITES has moderate teeth, less than the Montreal Protocol, but more than the Basel Convention. Over time, however, CITES has evolved to have even stronger oversight and enforcement of treaty aims than originally granted by the language of the treaty.

B. The Power of the Secretariat and the Standing Committee

The various apparati described above, dependent as they often are upon the good-faith action and oversight of individual Parties, are effective by virtue of a Standing Committee with considerable powers: the Committee may, if any trading nation is not upholding CITES standards, recommend trade suspensions to the Secretariat, who then transmits them to the Parties. Though technically only recommendations, adhering to trade suspensions is a widely prevailing norm among CITES Parties. While far from perfect, as this analysis will show, CITES enjoys the significant participation of 179 Parties, and there is a general consensus that those Parties adhere to the trade sanction recommendations of the Standing Committee,[58] even though they are technically nonbinding. These mechanisms, and their relative success, serve as an example to a TWN provision in the UNFCCC, wherein the standards of carbon trading are assured by rigorous oversight and, if necessary, the threat of trade suspensions. Valid carbon trades are, of course, essential to uphold the integrity of the larger treaty, as well as to ensure the valid participation of the United States as a non-Party.

C. The Standing Committee's Role in Overseeing Trade

CITES is notable (in stark contrast to the Basel Convention) for having a powerful Standing Committee,[59] with a robust ability to influence compliance with the basic trading requirements of the treaty. Such a body might be similarly implemented in a UNFCCC instrument, to assure the integrity of carbon markets, particularly in trades between Parties and non-Parties. As a way of understanding how non-Party trading standards are upheld under CITES, an examination of the Standing Committee is instructive. Initially an "advisory Steering Committee," it was established at COP1 merely to assist with organizing the following COP.[60] It was then made a permanent executive Standing Committee three years later in 1979.[61] The Committee's function is phrased generally: to provide "general policy and general operational direction."[62]

Despite this modest background, the Standing Committee has evolved into a "mini-COP" that has been significantly empowered by the COP itself in a variety of matters. Its role has expanded generally to oversee the operation of CITES between the biennial COPs, including: overseeing the Secretariat budget and all financing activities; coordinating COP working groups; providing coordination and advice for other committees; drafting potential COP resolutions; and performing "any other functions as may be entrusted to it" by the COP.[63] Indeed, the Standing Committee's meeting in the summer of 2012 was the focus of all CITES observers and affiliates interviewed for this Article. Most importantly, the Standing Committee has evolved to hold particular sway over trading matters, as it is the body that transmits recommendations to suspend trade to the Secretariat, who then transmits them to the Parties.[64] Given the difficulty in corralling agreement among the

52. Art. 3.
53. Art. 6.
54. Art. 7.
55. Art. 8(7).
56. Willem Wijnstekers, The Evolution of CITES 20 (6th ed., CITES Secretariat 2001).
57. Art. 13.
58. Interview with Craig Hoover (Chief of Division of Management Authority, U.S. FWS), July 18, 2012.
59. Similar to the U.N. caucus system, representation on the 19-member Standing Committee is regionally based: there are 16 regional Party representatives, in addition to Switzerland (the depository government), the previous COP host country, and the next COP host country. (Wijnstekers, *supra* note 56, at 455.) Each of the six designated CITES regions (Africa, Europe, Central and South America and the Caribbean, Asia, North America, and Oceania) is allotted one representative for regions comprising up to 15 Parties; two for regions comprising 16-30 Parties; three for 31-45 Parties; and four for more than 45 Parties. (*Id.*) As such, there are currently four representatives from Africa, three from Asia, three from Central and South America, four from Europe, one from North America, and one from Oceania. (http://www.cites.org/eng/notif/2012/E049.pdf) The depository votes in the event of a tie. (*Id.* at 455.)
60. Rosalind Reeve, *Policing Trade in Endangered Species*, Earthscan 47 (2002).
61. *Id.*
62. *Id.*
63. *Id.*
64. *See* http://www.cites.org/eng/res/11/11-01R15.php.

UNFCCC Parties, a body similar to the Standing Committee may prove valuable in making interim decisions between COPs.

Given such power, the CITES Standing Committee was criticized in its earlier days for not being transparent in its decisionmaking, with both meetings and reports largely inaccessible.[65] However, since 2002, nongovernmental organizations (NGOs) (besides just TRAFFIC and the International Union for the Conservation of Nature and Natural Resources, see later sections of this Article) have been permitted to observe committee deliberations, and its reports are now published on the CITES website.[66] Perhaps because of its relatively small size (see below) and the Parties' desire to avoid sensitive discussions in the glare of the highly publicized COPs, the Standing Committee in 1989 was given sole authority to decide on measures against noncompliant countries, including to recommend trade sanctions.[67] The Standing Committee is a unique feature of CITES, as it has evolved organically into an influential body, and it is a relatively streamlined means of overseeing and addressing trade-related issues, trade that the following analysis will show is a complex and far from perfect undertaking. A similar committee within the UNFCCC may be useful in overseeing non-Party trading under a new climate agreement.

D. The TWN Provision of CITES

This section will continue the analysis of TWN provisions as a means of upholding a treaty's environmental aims. There is no absolute non-Party trading ban under CITES. Article 10 is the "soft" TWN provision that states a Party "may" accept from a non-Party "comparable documentation issued by the competent authorities in that [non-Party] State which *substantially conforms* with the requirements of the present Convention for permits and certificates" (emphasis added). Article 10 is an optional measure for Parties to the Convention, and it uses positive ("may") rather than negative language (e.g., "shall not").

The text of the Convention itself provides merely a basic framework for the implementation of CITES; thus, the open-ended language of Article 10 clearly needed clarification by the COP. Charged by Article 11(3), one of the tasks of the COP is to make Resolutions to provide such subsequent clarification. As described by the Secretariat, resolutions are intended to be of a "more permanent nature, guiding implementation of the Convention over periods of many years."[68] While not technically binding (most Resolutions begin by stating that the COP "recommends that"), the Resolutions include the "guidance provided by the Conference of the Parties on how to interpret the provisions of the Convention."[69] It appears to be a norm among CITES Parties, therefore, to treat the Resolutions as if they were binding.

In order to clarify Article 10, Resolution 9.5 ("Trade With States Not Party to the Convention") further outlines the standards to which non-Parties should be held before trading takes place.[70] The Resolution largely requires (though again, the Resolution technically only "recommends") that Parties exact the same requirements of non-Parties as they do of Parties, mimicking language found in the Convention itself: these requirements of non-Party trading of endangered species include (1) comparable permits and certifications, (2) scientific findings by the non-Party authority that the trade in question is nondetrimental to the species ("non-detriment findings"), and (3) registered competent authorities (both scientific and management) in the non-Party state. In articulating these specific standards, Resolution 9.5 provides a template for what is required for non-Parties to "substantially conform" as Article 10 requires for non-Party trade. This model is instructive for a TWN provision in a new climate agreement: the design of the 2015 agreement must include a similar accountability measure that assures carbon unit trades with non-Parties meet a higher threshold than "substantial conformance."

While the language of Resolution 9.5 is soft (using the word "recommends"), the Secretariat is generally effective in transmitting information to the Parties about a non-Party's failure to meet the standards, and issuing trade restrictions as appropriate.[71] Despite Resolution 9.5's nonbinding status, then, the norm in CITES is to treat it as if it were binding.[72] It is beyond the scope of this Article to assess the prevailing norms of the Parties to the UNFCCC. Nonetheless, the design of trade restrictions of carbon units should take into account whether binding or "advisory" language is sufficient to ensure trade restrictions have teeth.

E. An Overview of the Mixed Success of CITES

The somewhat odd-sounding binding status of a nonbinding resolution accurately reflects the complex, often contradictory nature of CITES and its overall effectiveness in achieving its environmental objectives. It is important to the understanding of CITES, particularly vis-à-vis a UNFCCC 2015 agreement, to highlight this mixed nature of CITES effectiveness. Because of its complexity, CITES, more than either the Montreal Protocol or the Basel Convention, is a very active work in progress, with significant failures and significant successes, as well as ongoing challenges and continual improvements.

The reasons for this mixture of success and ongoing struggle are varied, and in this way approximate the similarly complex UNFCCC negotiations and its struggle to arrive at consensus. Overseeing as it does a vast arena of

65. *Id.* at 266.
66. *Id.*
67. *Id.*
68. *See* http://www.cites.org/eng/res/intro.php.
69. *Id.*
70. *See* http://www.cites.org/eng/res/09/09-05R15.php.
71. Patricia Birnie et al., International Law & the Environment 690 (3d ed., Oxford 2009).
72. Interview with Craig Hoover, *supra* note 58.

complex trade, each of which involves an individual species with a complicated ecological background, CITES has an undeniably ambitious mandate to control trade that, crucially, is often very economically valuable. Therefore, observers often herald even imperfect execution of the treaty as a resounding success (and others as an abject failure). Nearly every area of CITES' execution and evolution has its relative strengths and weaknesses (e.g., domestic CITES regulations are intended to be the teeth for overseeing CITES trade, yet while many Parties have exceptionally strict domestic standards, other Parties do not even have the capacity to implement them legislatively and administratively). For that reason, the complexities of CITES, as they relate to its TWN provision, serve as both an instructive template and cautionary tale for a similar design within the UNFCCC 2015 instrument.

Some observers believe this mixed bag of success (or at least this continual improvement of a flawed treaty) derives from CITES' inception, when it was an arguably overambitious treaty with relatively few signatories.[73] As such, many of the treaty's "lessons" had yet to be learned, and nearly 30 years later, CITES is a treaty simultaneously renowned for its success and high number of Parties and relentlessly criticized for its shortcomings. In this way, CITES is a treaty in which "beauty is in the eye of the beholder." As the following analysis attests, nearly every area of CITES has strengths and weaknesses, providing in the process many lessons for a climate change treaty that might follow in its ambitious footsteps, particularly as the COP weighs the inclusion and design of a TWN provision that would allow broader participation in a new climate agreement.

F. Good-Faith Standards Enforcement by CITES Parties

A close examination of the CITES TWN provision is instructive for purposes of including a similar measure in the upcoming UNFCCC instrument. In keeping with the complex, multi-layered success and challenges of CITES, the Article 10 TWN provision facially appears to be soft, given that Parties merely "may" accept comparable documentation issued by the competent authorities of the non-Party, and moreover that such documentation need only "*substantially* conform" with the requirements of permits (emphasis added). However, CITES is a treaty that relies upon the norms of its own Parties to adhere to the ultimate goals and "quality control" of the treaty itself, and many agree that, while there are certainly exceptions, Parties *do* engage by and large in a good-faith effort to demand that the spirit and letter of CITES are upheld, by Parties and non-Parties alike.[74] Indeed, some observers believe the high ratification and accession rate of CITES is due to the strictness of Article 10, whose high bar to trading creates an incentive to join as a Party.[75] A "soft" TWN provision, while useful in the CITES context, is not likely to be effective in carbon trading context: robust MRV accountability of carbon trades, by an outside, neutral arbiter, is essential if the integrity of a fungible marketplace is to be maintained.

In the CITES context, however, in effect, the Parties themselves impose a high standard for the requirements for non-Party trading. It should be noted again, however, that CITES is imperfect and is not always a watertight treaty: the rigorous standards that are supposed to be applied by Parties to non-Parties are sometimes not even applied to other Parties already within the treaty. In essence, Parties themselves do not always live up to the occasionally nebulous standards that CITES seeks to apply, much less demand them of non-Parties.[76] In this way, the dispersed, distributed burden of enforcing CITES standards is potentially just as much a problem among Parties as it is with non-Parties. Indeed, some believe that Article 10's "comparable" standard is insufficient, as it leaves an opening for fraud by *both* Parties and non-Parties alike.[77] In other words, CITES is a treaty in which there is little "policing of the police," that is, the Parties themselves. While the annual and biennial reporting requirements of CITES are meant to counteract a laxity of trading and oversight standards, even those MRV provisions are not universally adhered to. Again, this indicates a need within the UNFCCC for outside oversight of carbon allowance trading integrity.

Ultimately, then, the success of CITES relies upon the collective efforts and standards of the Parties themselves. Despite the exceptions mentioned above, it is generally agreed that the Parties have largely upheld high standards for both Parties and non-Parties.[78] Typically, for example, the domestic legislation of Parties requires the very same standards of non-Parties as they do of Parties.[79] Often, those similar standards will be indicated by the domestic statutory or regulatory requirement of "comparable" standards.[80]

1. Domestic Measures as a Metric of Non-Party Standards Enforcement

In addition to the established norm (with exceptions) of applying the same trading standards to non-Parties and Parties alike, there are other institutional safeguards in CITES that have contributed to the collective enforcement of high standards in non-Party trading. These safeguards should be examined as potential analogues for TWN provisions in a 2015 climate instrument that could ensure carbon market integrity, while opening the door to increased participation in the new agreement.

73. Interview with Marceil Yeater (Chief of Legal Affairs for the CITES Secretariat), Aug. 9, 2012.
74. Interview with Craig Hoover, *supra* note 58.
75. *Id.*
76. *Id.*
77. Lakshman D. Guruswamy, International Environmental Law 197 (4th ed., West 2012).
78. Interview with Craig Hoover, *supra* note 58.
79. Interview with Marceil Yeater, *supra* note 73.
80. *Id.*

First, Parties must implement domestic regulation of CITES provisions, at the very least to address the various administrative requirements of the treaty. Very often, those domestic regulations will explicitly mandate that any CITES-covered trade with non-Parties requires the identical permitting and non-detriment findings as those required of fellow Parties. The United States, for example, is one such Party that requires identical trading standards of Parties and non-Parties alike, in effect not distinguishing the two categories.[81] This is an important example for a similar non-Party carbon trading provision: domestic trading requirements that mimic the UNFCCC-wide standards would serve as an additional layer of carbon trading quality assurance.

Other CITES countries set their own very specific and strict trading procedures in their statutes and regulations, thus providing a template for non-Party trading as well. Mexico, for example, has very specific CITES procedures written into its domestic law, and Mexico consulted directly with the Secretariat to ensure their permitting and documentation procedures met CITES standards.[82] Some Parties will use domestic measures that are even stricter than those required by CITES. For example, some Parties will exert domestic, unilateral trade bans outside the auspices of CITES, in order to address suspected CITES violations or to influence the policies or practices in another Party.[83] The application of these principles to a new climate agreement is instructive. The CITES experience suggests that participants in a new climate agreement may be reluctant to surrender their sovereign prerogative to set their own, higher quality standards for transnational carbon unit trades. Without well-defined and generally accepted standards at the international level, Parties' unilateral, "go-it-alone" trade suspensions could undermine the coherence of an international carbon market.

There are other areas of domestic implementation strength, such as the EU requirement that members have domestic CITES regulations in place before they may join the EU.[84] Similarly, the EU requires that its members conduct trade only with nations that have full domestic implementation of CITES standards.[85] These domestic measures are often seen as a proxy for the more formal compliance measures at the Secretariat level.[86] Much as a rising tide lifts all ships, rigorous oversight and regulation of CITES trading *among* Parties, then, by extension can raise the bar for the trading standards applied to non-Parties as well.

While such domestic legislation and implementation is not explicitly spelled out by CITES, it is clearly expected: Article 8's reporting requirements mandate a biennial report on "legislation, regulation and administrative measures taken." Indeed, national legislation is clearly a necessity if Parties are to meet the myriad administrative obligations under CITES, including domestic requirements to: prohibit and penalize trade in protected species; designate each Party's domestic Scientific and Management authorities; provide proper care of living specimens in transit; provide for the return of confiscated specimens; maintain records; and provide the aforementioned annual and biennial reporting. As a practical matter, then, this same suite of regulations would presumably be exerted over any non-Party trading as well, if such trade is to "substantially conform" to equivalent Party trading. In other words, if a Party is already meeting the extensive CITES requirements for trade with Parties, it would therefore be difficult for Parties to apply different standards to non-Parties than are applied to Parties. Similarly, a robust, national oversight regime in each country that chooses to participate in transnational carbon markets would not only help ensure the integrity of carbon trading with Parties, but would also facilitate needed oversight of equivalent trades with non-Parties under a new climate agreement.

2. Domestic Standards Issues and Shortcomings

In practice, however, despite CITES' reliance upon domestic measures, and despite the successes in domestic legislation discussed above, domestic implementation remains an ongoing challenge, with a broad lack of national capacity and underfunding that continues today.[87] Clearly, if the feasibility of a non-Party carbon trading provision depends on domestic implementation, the capacity for Parties to implement such a provision must be assured, and ideally well-funded by the COP. The primary CITES Articles that must be legislated at the domestic level are Article 8 (the prohibition and penalizing of trade in violation of the treaty) and Article 9 (the creation of domestic management and scientific authorities). Clearly, neither Party nor non-Party trade can be effectively policed by Parties without their domestic houses in order. To begin to address a perennial issue of inadequate domestic regulation and implementation, COP 8, in 1993 (almost a full 20 years after CITES entered into force) passed Resolution 8.4,[88] which directed the Secretariat to identify Parties whose domestic legislation did not enable that Party to uphold the central requirements of the treaty.

Upon finding that a full one-half of the Parties did not have legislation sufficient to meet the requirements of the treaty, including adequate oversight of trade, successive COPs have allocated technical assistance (the "Legislative Assistance Project") to aid in legislative compliance,[89] for any party who requested such assistance.[90] (In comparison, the Montreal Protocol has very significant compliance funding, while Basel has virtually none). Six years after

81. *Id.*
82. Interview with Marco Heredia (Program Manager of Environmental Law, NAFTA's Commission for Environmental Cooperation), July 26, 2012.
83. Interview with Marceil Yeater, *supra* note 73.
84. *Id.*
85. Interview with Susan Richardson (Pew Environmental Group), Aug. 1, 2012.
86. Interview with Marceil Yeater, *supra* note 73.
87. Reeve, *supra* note 60, at 134.
88. *See* http://www.cites.org/eng/res/08/08-04R15.php.
89. Reeve, *supra* note 60, at 136.
90. *Id.* at 141.

instituting the Legislative Assistance Project, the continued existence of high trade-volume countries that still lacked sufficient national legislation in 2000 (Egypt, Guyana, and Senegal) prompted a recommendation from the Standing Committee to cease all trade in CITES species from those countries.[91] This was an effective stick to prompt national legislation: all three Parties responded very quickly to this threat of sanctions and implemented sufficient legislation.[92] Within a UNFCCC agreement, carbon trading sanctions amid a robust international market for carbon units would likely be a similarly effective tool.

In the next round of concerted oversight of domestic treaty implementation, four additional Parties with high trade-volume but insufficient domestic legislation (Fiji, Turkey, Vietnam, and Yemen) were also notified of impending recommended trade sanctions.[93] All but one (Yemen) responded quickly to the threat. Fiji, in particular, experienced "major socio-economic impact" as a result of the trade suspension before it came into compliance.[94] Fiji's experience illustrates the power of an MEA to exert influence over a Party trading in economically valuable "stuff." In yet another round of domestic legislation oversight, trade sanctions were then recommended against eight Parties (Cameroon, Dominican Republic, Mozambique, Panama, Poland, South Africa, and Thailand), which all soon came into compliance, demonstrating CITES' ability, when roused, to enforce domestic implementation among its Parties.[95]

CITES is unique among MEAs for utilizing trade restrictions in order to punish inadequate implementing legislation,[96] and the eventual use of such a "stick" in an international carbon trading scheme would indicate a healthy carbon market indeed. Clearly, both the "stick" approach of trade sanctions for the worst offenders works, as does the technical assistance "carrot" offer for domestic capacity-building. However, adequate domestic implementation remains a problem, offering a cautionary tale for other non-self-executing[97] MEAs that have no clear compliance mechanism to enact against Parties that fail to implement domestic measures. Any UNFCCC instrument that allows for carbon trading, then, must require very clear domestic measures, and clear sanctions for when those requirements are not met.

It is important to note that domestic implementation is a continuing problem for CITES: a primary order of business for the recent Standing Committee meeting in July 2012 was to discuss which Parties still do not have sufficient domestic regulations.[98] That recent meeting determined that, currently, only about 60% of Parties have domestic legislation adequate for the purposes of upholding all of the Convention's aims.[99] This relatively poor performance in such a fundamental element of treaty effectiveness points to the absolute necessity for up-front legislative assistance projects, early in treaty life. Some observers, for contrast, point to the Chemical Weapons Convention and to the Convention for Biological Diversity as successful examples of adequate and timely funding for implementing domestic measures.[100]

To be sure, domestic implementation is by its nature nonuniform and unharmonized: some claim that leaving CITES implementation to Parties and their domestic laws, and the inherent variation in scope and quality that results, is a core weakness of CITES.[101]

Others acknowledge that CITES started far too late in domestic implementation oversight, but point to the fact that domestic implementation is a lengthy process, with even committed countries taking over 10 years to fully implement them; still others have implemented domestic regulation, but simply have not gotten "credit" yet because their regulations have not yet been translated into acceptable format.[102] Despite the strength of many Parties' domestic CITES laws and regulations, the treaty nonetheless remains challenged by the overall implementation across all parties, invariably affecting the ability of Parties to apply uniform standards.

However, in regard to *non-Party* domestic regulations, the strength of the Secretariat (and the Standing Committee) in recommending trade restrictions can lessen the negative effects of non-Parties who have insufficient domestic implementation to meet the CITES standards. The Secretariat is effective in notifying Parties of non-Parties found not to have met proper domestic standards for the issuance of permits.[103]

Clearly, if a TWN provision is to be included in a 2015 climate agreement, the domestic implementation of CITES is instructive. Trade oversight might best be assigned to a well-respected international authority, similar to the Standing Committee. If not, domestic standards oversight should be tightly prescribed, with implementation required to be enacted on a strict and enforceable timetable.

G. *The Comparable "Competent" Authorities of Non-Parties*

In addition to its domestic legislation requirements and their checkered success at applying comparably high standards to non-Parties, the CITES requirement that Parties oversee species health through their "scientific authorities," while also providing oversight of trade and

91. Reeve, *supra* note 60 at 137.
92. *See id.*
93. *Id.* at 143.
94. *Id.*
95. *See id.*
96. *Id.* at 147.
97. "Self-executing" for the purposes of this Article means an MEA that clearly mandates the domestic measures that Parties must implement in order to enact the treaty. Here, CITES is non-self-executing because domestic measures are left to the Parties to enact, with no clear mandate to do so within the Convention.
98. Interview with Marceil Yeater, *supra* note 73.
99. *Id.*
100. *Id.*
101. Birnie et al., *supra* note 71, at 689.
102. Interview with Marceil Yeater, *supra* note 73.
103. Birnie et al., *supra* note 71, at 690.

permitting through their "management authorities,"[104] is another mechanism by which CITES oversight is dispersed among, and entrusted to, the Parties themselves. Indeed, it is important to note that the *true* substance of CITES' environmental and enforcement standards lies not in the trading itself: while the proper permits and reporting are certainly important, it is in the individual Parties' own pre-trading "non-detriment findings" that trade should be allowed in the first place, depending upon the health of the species, where the true effectiveness of CITES lies.

CITES' TWN provision, then, sets a high bar for non-Party trading, if the findings conducted by the scientific authority in advance of trade are sufficiently rigorous. In other words, each Party's (or non-Party's) scientific authority is required to conduct its own internal MRV of species health before trade is permitted. (Whether or not those non-detriment findings that allow trade to proceed are themselves sufficient is a matter of continuing debate within the CITES community.[105]) In this way, proper trading in CITES is heavily dependent upon the Parties' own internal MRV of the traded "stuff."

Domestic scientific authorities (and the management authorities), and their ability to provide a response to inquiry by the Secretariat or Standing Committee, provide a CITES oversight mechanism that is also applied to non-Parties. Six of the nine current non-Parties listed on the CITES website have registered their "competent authorities" (the collective term given the scientific and management authorities of non-Parties) with the Secretariat within the last two years, thus facilitating non-Party accountability and transparency.[106]

However, while the competent authorities of non-Parties are supposed to make the all-important non-detriment finding before a trade may be allowed, these findings are not required to be included in "comparable documentation," and are thus not always put in writing by non-Parties. This blind spot is a potential avenue for low CITES standards among non-Parties.[107] Accordingly, the next COP is slated to address the important MRV question of how to address the validity of non-detriment findings by non-Parties, a non-Party trading issue never before addressed by the CITES Parties.[108]

These non-Party competent authorities also provide an institution through which Parties, prior to approving a trade, may inquire into (or "look behind," in MEA parlance) the non-detriment findings made by non-Parties. No study exists that has quantified the level at which Parties "look behind" the legitimacy and rigor of such non-detriment claims made by non-Party competent authorities. There is widespread consensus, however, that Parties employ varying levels of scrutiny of non-Parties. For example, the United States will look behind the non-detriment findings made for Brazilian hardwoods, even though a permit from a non-Party may be legally issued and prima facie valid; the U.K., on the other hand, does not.[109] This is a telling example, in which two Parties employ widely differing and wholly discretionary levels of oversight before fungible hardwood enters the global marketplace.

H. Differing Party Standards for "Looking Behind" CITES Trading

There are sometimes specific reasons for such differing intra-Party standards for "looking behind" endangered species trades. Importing Parties that engage in very little trade will often very carefully scrutinize the non-detriment findings of an exporting state (Party or non-Party), while Parties that oversee high volumes of trade are correspondingly less suspicious of any given trade, unless there are clear errors or anomalies in the permits.[110] With regard to non-Parties, the United States falls in this latter category (despite its species-specific scrutiny of Brazilian hardwoods, which is perhaps a result of NGO pressure). The United States is not required under its domestic regulations to assess the non-detriment findings of non-Parties. The EU's regulations, on the other hand, do require such scrutiny of non-Parties.[111]

This experience within CITES of standards oversight and transparency of non-Parties has implications for a TWN provision in a 2015 UNFCCC agreement. Carbon units (like Brazilian hardwood) are fungible assets, once they have entered the international marketplace. Thus, a non-Party's own independent judgment of the validity of such units may serve to undermine the integrity of the market itself. Clearly, it is essential that a TWN provision includes a robust MRV and transparency regime that does not rely upon non-Party good-faith assessment of carbon unit integrity.

The Secretariat has acknowledged weaknesses in this patchwork element of the CITES regime across Parties. Some Parties have been known, for example, to openly export species that are clearly not native to that state (indicating potentially illegal trade).[112] These instances of poor governance are something the COP is actively trying to address.[113] Other NGO observers note with concern that the majority of Parties do not, in fact, ask for specific non-detriment findings from non-Parties as a precondition to trade.[114] In this case, then, the good faith that is often extended by CITES to its Parties is often extended by Parties to non-Parties as well, potentially to the detriment of CITES standards. In the carbon trading realm, this clearly calls for caution: oversight of emissions MRV should not be left to Parties or non-Parties, unless domestic implementation of MRV oversight is tightly prescribed and fully in place.

104. Art. 3.
105. Guruswamy, *supra* note 77.
106. *See* http://www.cites.org/cms/index.php/lang-en/component/cp/.
107. Interview with Marceil Yeater, *supra* note 73.
108. *Id.*
109. *Id.*
110. *Id.*
111. Interview with Susan Richardson, *supra* note 85.
112. *Id.*
113. *Id.*
114. *Id.*

On the other hand, however, some Parties create a higher burden for exporting states, and even impose the rather strict requirement that non-detriment findings be made of even Appendix II species (species that are not yet endangered and thus do not require non-detriment findings under CITES to be traded), before they will allow an import.[115] Additionally, the EU specifically requires that non-Parties provide their non-detriment findings before allowing trade.[116] Again, in keeping with the larger pattern of CITES, this discretion allows each Party to decide what level of scrutiny to impose, and in practice, that level of scrutiny often depends on the quantity being traded or the particular species.[117] For example, a low, insignificant trade quantity might escape scrutiny, while a high-profile mammal trade would not. In sum, except for formulaic permitting requirements, there is no uniform blueprint in CITES for what standards importing Parties must apply to Party or non-Party exporters before trade is approved. Such variable standards would undermine the integrity of fungible carbon allowances in an international market, and must be addressed by the UNFCCC COP in the design of a new climate instrument that includes carbon markets.

Lastly, Resolution 10.3 requires that the Secretariat list all countries (both Parties and non-Parties) that have not duly registered their designated management and scientific authorities.[118] While it is technically left to Parties to determine whether a non-Party has properly designated competent authorities, in practice, Parties are aware that a non-Party with whom it might trade has no designated authority.[119] The sheer absence of a non-Party competent authority is a basic threshold matter that alerts Parties to a non-Party's administrative inability to uphold basic requirements of the treaty. In such a case, trade is very unlikely, and possibly impossible as a practical matter, to occur.

In sum, non-Party competent authorities afford CITES an imperfect mechanism through which to quantify, or at least attempt to quantify, the internal MRV of endangered species in non-Party states. In designing the MRV regime of carbon trading, CITES in this case serves as a cautionary tale for the UNFCCC.

I. The MRV Regime of CITES

Just as CITES depends on Party and non-Party scientific authorities to quantify species health involved in individual trades, the collective reporting of global trade data derived from all Parties is arguably the cornerstone of CITES' effectiveness. Without that comprehensive data, it would be impossible to "manage what isn't measured." The Secretariat is thus charged by the treaty and subsequent COPs to collect, review, and disseminate a vast array of trade and species data.[120] In an international carbon trading scheme, such centralized oversight is essential in order to assure market faith in the traded "commodity."

Parties themselves are obligated by CITES' Article 8 to self-report all trade data (though NGOs have become an integral part of reporting). Party self-reporting is based on records that must be kept about each nation's importers and exporters, and actual trade volume for each Party. The reports must contain records of trading permits and certifications granted, as well as a list of all states with whom trading occurred (party and non-Party), and the amount of trade in each CITES species.[121] In aggregate, this information provides a basis for monitoring overall trade and thus assessing overall species health, as well as to alert the Secretariat to significant amounts of trade in a particular species (see the Review of Significant Trade mechanism, later in this Article).

COP resolutions have made reporting requirements increasingly elaborate,[122] and a third-party U.N. Environment Program (UNEP) organization, the World Conservation Monitoring Centre (WCMA), maintains the vast database.[123] The WCMA provides a biennial analysis and report to the Secretariat, including an accounting of any mismatches or discrepancies in the trade data.[124] With over 850,000 trades added each year, imports and exports between Parties can be cross-referenced[125] and thus expose underreporting or erroneous reporting by any one Party. When imports and exports do not match, the WCMC informs the Secretariat for further review.[126] The database is often criticized by NGOs, as it is not current and up-to-date at all times, and it has fundamental informational gaps. For example, some countries record actual trade, while others record only permitted trade, which will often be an amount above that which is actually traded.[127]

Despite these imperfections, the database is nonetheless a valuable tool with which to identify problematic trends.[128] In particular, the species-specific component of the database, which measures the volume of a given species, is indispensable for upholding the aims of the treaty, as that data is often used to correctly identify excessive or problematic species trade.[129] Clearly, then, Parties' own data reporting, with the assistance of NGOs, is a fundamental MRV component of the CITES regime, even if the database remains imperfect and the treaty and its mechanisms themselves are decidedly a work in progress. This underscores the need for the UNFCCC to avoid creating an ongoing "work in progress" MRV regime that could undermine faith in carbon markets, absent the assurance of real time market oversight. In creating a TWN provision

115. *Id.*
116. *Id.*
117. *Id.*
118. *See* http://www.cites.org/eng/res/10/10-03C15.php.
119. Interview with Marceil Yeater, *supra* note 73.
120. Reeve, *supra* note 60, at 62.
121. Arts. 8(6)(b) & (7)(a).
122. Resolution 11.17: http://www.cites.org/eng/res/11/11-17R14C15.php.
123. Reeve, *supra* note 60, at 63.
124. Interview with Susan Richardson, *supra* note 85.
125. Reeve, *supra* note 60, at 64.
126. *Id.*
127. Interview with Susan Richardson, *supra* note 85.
128. Interview with Marceil Yeater, *supra* note 73.
129. *Id.*

that would allow for broader participation in a new climate agreement, then, rigorous MRV of carbon emissions, verified by an independent entity, is essential to ensure the integrity of the carbon market.

1. MRV and Trading Database Challenges

Despite very significant improvement over the life of the treaty,[130] incomplete data reporting is an ongoing and fundamental challenge, repeatedly referred to in several CITES Resolutions.[131] Such a data-reliant treaty is only as strong as its weakest link, and reporting levels are typically low: in 1997, for example, only 30% of annual data reports were received by the deadline.[132] In 1998, fewer than 50% of Parties turned in an annual report.[133] Today, the figure is improved, with up to approximately 70% of Parties turning in the required annual reporting on time, and that number increases to 100% if non-reporting Parties come under risk of noncompliance sanctions.[134] One reason for this improvement in reporting is the clear consequences for non-reporting under COP Resolution 11.17,[135] under which Parties face a potential trade suspension recommendation if they are over three years late in reporting data.[136] Also, the increased use of electronic permitting has been helpful in increasing reporting rates.[137] Unsurprisingly, domestic MRV diligence often depends on domestic legislation: the EU countries, for instance, are statutorily required to turn data reports in on time.[138] Given this disparity in both domestic implementation and domestic MRV, then, early action by the Parties is essential in the event such reporting requirements are not explicitly laid out in the treaty itself.

2. The Review of Significant Trade Regime

In addition to relying on the trade database, however flawed it may be, to discern troublesome patterns, the Standing Committee can also deploy what has been called the "most innovative CITES mechanism"[139]: the Review of Significant Trade[140] (RST), which has been effectively applied to non-Parties in order to uphold treaty standards.[141] This verification process provides another incentive for non-Parties to meet the monitoring standards that Parties must uphold, because trade suspension is a potential outcome if non-Parties are unable to prove in the RST process that they meet CITES standards. Such a mechanism should be considered by the UNFCCC COP as a "backstop" to ensure the validity of carbon trades.

An RST is typically initiated when the Animal or Plants Committee alerts the Secretariat to a high ("significant") volume of exports in any particular species from one or more nations.[142] The Secretariat (or third-party NGO consultant) may then make an inquiry into how and why the exporting nation made the non-detriment finding for that species before it allowed the species to be exported in such quantities (the non-detriment finding being the primary internal monitoring mechanism that allows for specific species trade to occur in the first place).

Through this well-defined process of inquiry and response, the Secretariat, in consultation with the Animal or Plants Committee, serves as a backstop for a nation's scientific authority, fact-checking whether the non-detriment finding created a legitimate basis to allow trade to commence. If, when "looking behind" the exporter's non-detriment finding, the Secretariat determines that CITES standards have in fact not been met, the Standing Committee will likely issue a trade suspension recommendation (which is usually species-specific, rather than a blanket ban on all trade with the scrutinized Party or non-Party).[143] In this way, the RST is a specific MRV oversight mechanism.

Such a process was effectively applied, for example, to non-Party Haiti in the case of the queen conch species in 2003.[144] Four Parties noted high trade volume and initiated the review process with the Secretariat, and a trade suspension recommendation was made after the RST revealed an inadequate non-detriment finding.[145] According to the online CITES Trade Database, trade with Haiti in that species (*Strombus gigas*) plummeted post-recommendation,[146] implying that such a backstop, after-the-fact MRV regime of CITES is effective in upholding CITES standards with a non-Party (albeit after significant trading and perhaps species harm has already been done). It appears, then, that "look behinds" for significant levels of trade are strong, even though looking behind non-detriment claims in general is inconsistent at best. A similar mechanism under a 2015 climate agreement would help to assure confidence in carbon markets, particularly when non-Parties are allowed to trade their own emissions units.

J. Recommendations to Suspend Trade With Non-Parties

If an RST or some other indicator reveals problematic trading, trade restrictions have proven to be an effective "stick" for CITES compliance. If carbon trading becomes a robust international means for reducing emissions, restrictions on

130. Interview with Susan Richardson, *supra* note 85.
131. *See, e.g.*, http://www.cites.org/eng/res/11/11-03R15.php.
132. Reeve, *supra* note 60, at 65.
133. *Id.*
134. Interview with Marceil Yeater, *supra* note 73.
135. Interview with Susan Richardson, *supra* note 85.
136. Interview with Marceil Yeater, *supra* note 73.
137. Interview with Marceil Yeater, *supra* note 73; Interview with Susan Richardson, *supra* note 85.
138. *Id.*
139. Robert Wolfe & Shane Baddeley: Regulatory Transparency in MEAs (School of Policy Studies, Queen's Univ. 92012), at 2.
140. Resolution 12.8: http://www.cites.org/eng/res/12/12-08R13.php.
141. Interview with Craig Hoover, *supra* note 58.
142. Resolution 12.8.
143. *Id.*
144. *See* http://www.cites.org/eng/resources/ref/suspend.php.
145. Interview with Craig Hoover, *supra* note 58.
146. For example, in the two years prior to the recommendation, the United States imported over 90,000 queen conch carvings and over 350,000 shells. In the year following the trade ban recommendation, that number fell to zero.

such trades could prove an effective stick for treaty compliance as well. While the Secretariat and the primary committees (the Standing, Plants, and Animals Committees) are not technically empowered to mandate trade restrictions, there is a robust regime in place to determine whether or not to recommend trade restrictions, on Parties and non-Parties alike (recommendations which, in the norms of CITES, are subsequently followed).

The Standing Committee enjoys considerable latitude in calling upon any exporting nation to respond to concerns that the aims of the treaty are not being upheld.[147] The Committee might, for example, inquire into a Party or non-Party's scientific authority's "non-detriment" finding in trading a certain species, or conduct an inquiry into insufficient permitting standards. In essence, the Standing Committee has the unilateral capacity to "look behind" the claims or practices of any trading nation. A similar oversight body within the UNFCCC would be similarly valuable in assuring the integrity of future carbon trading.

If the Standing Committee is not satisfied with the response to its inquiries (non-Parties, of course, are under no obligation to respond), it may recommend that trade with that nation (typically of imports from that nation) be suspended.[148] Generally, it is a norm among CITES Parties to abide by these trade suspensions,[149] and, in another show of the primacy of domestic regulations in the CITES regime, U.S. and EU domestic regulations actually require that trade suspension recommendations are accepted and followed.[150] Parties that do not follow a trade suspension recommendation (a rare occurrence) would likely be referred to the Standing Committee, which is in a position to exert "soft" political pressure through the COP.[151] No study has been undertaken to assess what percentage of Parties statutorily require that trade suspension recommendations be followed, but nonetheless, as a catch-all requirement, domestic legislation often says that if any trade violates the treaty in any way, that trade must not be allowed.[152]

Absent illegal trading (by fraudulent paperwork, by circumventing customs, etc.), there is no way for a Party to contravene a recommended trade suspension without the Secretariat's eventual knowledge and transmission to the other Parties: every Party already has a permitting and reporting regime in place that captures trade with both Parties and non-Parties (despite its imperfections, discussed *supra*). When non-Party trade permitting and tracking is insufficient, the Secretariat circulates to the Parties a list of non-Parties who have been found not to meet COP standards for the proper trade permits.[153] Thus, the "teeth" of trade suspensions rely heavily upon CITES' overall MRV requirements: without reporting of all trade, there is no means of ensuring that Parties heed trade suspension recommendations.

Parties themselves may also apply trade suspensions. Under Article 14, Parties have the right to impose "stricter" action: a Party may refuse to accept shipments of all CITES species if the exporting country is found to be in persistent noncompliance with reporting or other requirements. Some Parties enact suspension if, within 90 days, another Party has not shown the Standing Committee that it has fully implemented the Convention.[154] This CITES provision for unilateral suspension has been utilized in at least 40 cases of noncompliance since 1985.[155] These are examples of how dependent CITES is upon domestic law, if trade restrictions, whether they are CITES-wide or unilateral, are to be effectively utilized to uphold the treaty's aims.

K. Domestic Customs Provisions as a CITES Backstop

In addition to the tools of the RST and trade suspensions to ensure CITES compliance among non-Parties, Parties' criminal and customs provisions act as additional backstops to CITES' "comparable documentation" standards for wildlife trade with non-Parties.[156] In any country with even a basic customs regime, it is difficult, as a practical matter, to cross through customs without both customs paperwork and, in the case of wildlife trade, "environmental paperwork."[157] While this does not of itself ensure that CITES standards are met by non-Parties, standard customs provisions, as in the case of illegal ivory travelling to Macau through Hong Kong, help to bring non-Party trade practices to the attention of the Secretariat, who would then presumably alert all CITES Parties.

In furtherance of using uniform customs procedures to enforce CITES standards, the World Customs Organization (WCO) has directly collaborated with CITES since early in the treaty's life.[158] The COP strengthened that relationship in 1994, resulting in a Memorandum of Understanding in 1997.[159] The resulting WCO-CITES program saw the inclusion of CITES-related customs nomenclature within the WCO, in order to facilitate customs control of CITES species.[160] An assessment of the success of this program has apparently not been completed; however, officials at the North American Free Trade Agreement (NAFTA) attest to the effectiveness of customs procedures as a general CITES backstop.[161]

147. Interview with Craig Hoover, *supra* note 58.
148. *See* http://www.cites.org/eng/res/12/12-08R13.php.
149. Interview with Craig Hoover, *supra* note 58.
150. Interview with Dr. Rosemary Gnam (Chief of Division of Scientific Authority, U.S. FWS), Aug. 7, 2012.
151. Interview with Susan Richardson, *supra* note 85.
152. Interview with Marceil Yeater, *supra* note 73.
153. Birnie et al., *supra* note 64, at 690.
154. Wolfe & Baddeley, *supra* note 139, at 31.
155. *Id.*
156. Interview with Marco Heredia, *supra* note 82.
157. *Id.*
158. Reeve, *supra* note 60, at 22.
159. *Id.* at 228.
160. *Id.*
161. Interview with Marco Heredia, *supra* note 82.

L. NGO Oversight

Backstop oversight is not limited to the Parties' customs authorities: a unique and essential feature of CITES is the integrated role that NGOs have come to play. Because Parties are themselves delegated the responsibility of permitting trade only when non-detriment findings are made by their respective scientific bodies, and the resulting trade is conducted under the aegis of their respective management authorities, there is room for underinformed decisionmaking in the former and politically or economically motivated decisionmaking in the latter.[162] Indeed, a common criticism of CITES is that too much "good faith" is allocated to the Parties, with the result that sufficiently stringent domestic measures and institutions are not always put in place.[163] Thus, NGOs have come to play a critical function as a backstop for scientific/non-detriment findings and for trade data and management. NGOs also directly gather information in the field that the central CITES regime itself does not capture.[164] Some commentators wholly attribute any success achieved by CITES to this participation by NGOs.[165]

The need for such oversight and assistance is understandable. CITES' effectiveness relies upon integrating a vast and sprawling network of information, including: the amount of species trade, the ecological data relied upon by Parties to make non-detriment findings to approve trades, species data from range habitats that often cross borders and comprise several, even dozens, of "range states," and the status of domestic implementing legislation by each Party. The Parties are responsible not only to collect and act upon scientific information (much of which is inherently subject to varying scientific interpretations), but also to report the same to the Secretariat in both annual and biennial reports.[166] Accurate and reliable MRV is essential to verify that Parties are upholding the treaty. However, general MRV requirements are not being met by all Parties, and the Secretariat accordingly listed failure to report data as one of two "major areas of CITES concern" in 2000.[167]

Against this logistically challenging backdrop, NGOs have stepped in to provide both authorized and informal oversight of MRV.[168] Information from TRAFFIC, in particular, is entered directly into the Secretariat's information system; NGOs also provide information indirectly to the Secretariat by reporting from the field to the Parties' designated authorities, which often welcome such assistance.[169] NGOs also provide crucial oversight in "identifying problematic trade with non-Parties."[170] Some believe that TRAFFIC's information network has given CITES "one of the best operational information sources of any MEA."[171] Clearly, for a treaty that relies upon both raw trade data and more nuanced scientific reporting on individual species health (non-detriment findings), NGO participation is a fundamental component of CITES. Thus, there are over 20 NGOs whose own mandates include assisting in the effectiveness of CITES.[172]

Depending on the particular nature of trade, other MEAs may find NGO participation in MRV oversight valuable. Other MEAs might instead ensure that reliance upon NGOs to uphold the MRV regime is not created in the first place, by instead implementing stronger internal controls via domestic implementation and rigorous oversight. Indeed, CITES is at a comparative advantage over other MEAs in attracting NGO assistance, given the widespread interest in "charismatic" endangered species. This is particularly so when contrasted against Basel's lack of corresponding NGO interest in hazardous waste trade.

In any event, the involvement of NGOs in overseeing carbon trading integrity within the UNFCCC is an open question. While NGO involvement is a crucial component to the integrity and effectiveness of CITES, the stakes for mitigating climate change under the UNFCCC are arguably too high to be left to a patchwork of NGO-driven MRV. Indeed, if carbon emissions MRV were left to NGOs in a manner similar to CITES, confidence in the carbon market might be undermined, thus voiding its efficacy in driving down carbon emissions. While NGOs have already proven a valuable asset in ongoing climate negotiations, NGO-driven MRV oversight of carbon markets may not translate to the same success seen in CITES.

M. Case Studies of Non-Party Trading Under CITES

Taken together, the mechanisms analyzed thus far (e.g., domestic legislation and MRV, the RST, NGOs) have resulted in effective if imperfect oversight of trading with non-Parties. While wildlife trade between two non-Parties will go unrecognized and unrecorded under the CITES regime, the treaty's reporting mechanisms have been effective in monitoring and correcting detrimental trade between Parties and non-Parties. Given a high accession rate, such trade levels are less significant today, but for several years in the treaty's life, high volumes of Party/non-Party trade occurred, making the TWN provision an important one.[173] Indeed, some observers believe CITES is unique for allowing non-Party trade to occur at all, seeing in the provision a pragmatic approach to the realities of global commerce.[174] This pragmatic approach is reflected in the qualities of the non-Parties themselves, as there are effectively two classes of non-Parties: those that do not bother to honor the "comparable" requirement of CITES,

162. Interview with Dr. Rosemary Gnam, *supra* note 150.
163. Alexandre Kiss Dinah Shelton, Guide to International Environmental Law 187 (Martinus Nijhoff 2007).
164. *Id.* at 71.
165. Daniel Bodansky et al. eds., The Oxford Handbook of International Environmental Law 381 (Oxford 2007).
166. Art. 8(7).
167. Reeve, *supra* note 60, at 66.
168. Bodansky et al., *supra* note 165, at 979.
169. Reeve, *supra* note 60, at 68.
170. Birnie et al., *supra* note 64, at 690.
171. Reeve, *supra* note 60, at 68.
172. Wolfe & Baddeley, *supra* note 139, at 9.
173. Interview with Marceil Yeater, *supra* note 73.
174. *Id.*

and those that do.[175] It is this latter category that shows the effectiveness of a pragmatic TWN provision in encouraging non-Parties to uphold the aims of a treaty to which they do not belong. This success in exacting higher standards in non-Parties is borne out in several case studies of non-Party trading.

For example, in a particularly notorious case, Mexico's CITES permitting regime brought attention to a shipment of 28 dolphins in 2004 from non-Party Solomon Islands. The ensuing publicity resulted in a trading ban of all dolphins from the Solomon Islands, and in its accession to CITES, moreover, three years later in 2007.[176] That accession is a part of a larger trend of non-Parties acceding soon after trading sanctions are imposed, suggesting a potential scenario in which the United States would accede to a UNFCCC 2015 agreement once it has commenced in significant trade in carbon units as a non-Party.

In 1984, the Secretariat, under advice of the Standing Committee, issued a trade suspension recommendation for all ivory trade with non-Party Singapore.[177] Information had been given to the Secretariat that "very large quantities" of illegal ivory were being shipped to Singapore, and that the non-Party's competent authority was not issuing the comparable documentation required by Article 10.[178] In addition to the CITES ivory trade suspension, the U.S. Fish and Wildlife Service (FWS) banned all wildlife imports, of any kind, from Singapore into the United States, citing their lack of "comparable documentation" for a variety of species.[179] In a remarkable display of Article 10 effectiveness (coupled with a large importing Party's unilateral trade suspension sparked by Article 10's "comparable documentation" requirement), Singapore acceded to the Convention in 1989 as a result.[180]

In another instance of Article 10 effectiveness in applying CITES standards to non-Parties, the Secretariat reported in 1985 that large volumes of illegal trade, without proper CITES documentation, was being imported into Macau (then a non-Party).[181] This information was received from Hong Kong, a Party, the transit state through which the illegal trade was being routed to Macau.[182] There had been "leakage" of ivory carving factories from Hong Kong to Macau after Hong Kong tightened its standards under CITES.[183] Due to the subsequent failure of Macau's competent authority to implement comparable domestic regulations, the Secretariat recommended a total trade ban. A mere month later, Macau acceded to CITES.[184] Here, CITES standards were effective in halting a non-Party's ability to act as a waypoint for "bad" trades in order to circumvent CITES and then enter the global marketplace. Clearly, such a mechanism would be useful under a UNFCCC carbon trading regime to ensure carbon markets are not undermined by units that are illegitimate in some way.

The Secretariat issued similar trade suspension recommendations for El Salvador and Equatorial Guinea, resulting in both countries' accessions less than one year after the suspensions were recommended.[185] Clearly, with 179 countries having ratified or acceded, the recommendation of trade suspension can be a potent tool in ensuring that non-Parties either adhere to CITES standards or, more commonly, simply accede. Accession, however, does not mean that CITES standards will then be universally upheld by that Party, given Parties' ongoing struggles to implement domestic legislation.

Moreover, another trade-related criticism of CITES is of its reservation and objection provision (Article 23), through which a Party may object to the listing of any species that Party deems in fact to not be threatened. Reservations and objections in effect grant a Party non-Party status with respect to that reserved species, leaving them free to trade in that species. Because this is clearly a potential contravention loophole, however, Parties making reservations can also in turn be the subject of trade restrictions for that reserved species, thus closing the potential loophole. Such a sequence occurred in 1992, when Singapore, a destination for illegal shipments of caiman skins, reserved that crocodile species.[186] Paraguay responded to the reservation by submitting a draft resolution for trade restrictions with Singapore for that species.[187] Before the draft could be acted upon, Singapore withdrew its reservation, again showing the power of trade sanctions among CITES Parties.

Lastly, Zimbabwe offers a more unique case study of pressure on non-Parties to accede: as a country involved in significant ivory trading, Zimbabwe initially resisted accession out of a fear of negative economic impacts.[188] However, trade with CITES Parties became increasingly difficult and Zimbabwe, instead of remaining a "lone ranger," acceded, precisely in order to alter the norms of the treaty from within: Zimbabwe then successfully advocated for sustainable elephant herd management, rather than a total ban on trade.[189] As a non-Party, then, Zimbabwe was not restricted in its ivory trade, until external trade restrictions made themselves felt. As a subsequent Party, Zimbabwe was able in fact to *increase* its ivory trading, while also providing for overall herd health (as well as tourism revenue) through a selective culling practice previously disallowed by CITES.[190] In essence, being inside the treaty allowed Zimbabwe to be a "rule maker" rather than a "rule taker." A TWN provision could similarly pave the way for increased U.S. engagement within the 2015 UNFCCC treaty.

175. *Id.*
176. *See* http://www.cites.org/eng/disc/Parties/alphabet.php.
177. Reeve, *supra* note 60, at 129.
178. *Id.*
179. *Id.*
180. *See id.* at 130.
181. *Id.* at 131.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 132.
186. *Id.* at 130.
187. *Id.*
188. Birnie et al., *supra* note 64, at 689.
189. *Id.*
190. *Id.*

These case studies show the overall tendency for non-Parties to accede after engaging in trade with CITES Parties. Some cite this as evidence of a successful treaty, one that is, above all, pragmatic if not watertight.[191] In the aggregate, the TWN provision of CITES is considered a smart and useful one that has worked, both in exerting accountability over non-Party trades as well as in encouraging non-Parties to accede. Indeed, during the initial negotiations of the treaty, it was anticipated that not many nations would join in the early years, so the negotiations thus included the TWN provision as a realistic acknowledgement of the global trade beyond CITES Party borders. Such a provision was thus utilized as a vehicle for "buy in" from non-Parties, and has since been recognized as an avenue to accession by non-Parties.[192]

N. Shortcomings of CITES Non-Party Trading Standards

Despite some institutional strengths in oversight of non-Party trading, CITES is clearly not waterproof in upholding its environmental standards in trade with non-Parties. In particular, "looking behind" the non-detriment findings of an exporting non-Party is an inherently difficult undertaking for any one Party. Indeed, the RST regime is only invoked in the case of relatively large volumes of trade, and then by the Plants or Animals Committee, not by any individual Party. As a practical matter, then, it is not common for a Party to "look behind" the non-detriment claims of an exporting Party, and possibly even less common to do so for the claims of a non-Party, given that non-Party competent authorities are typically less-equipped to respond to such inquiries.[193]

It should be noted, however, that it is difficult as a practical matter to obtain reliable information on any unilateral CITES-related inquiries by a Party of a non-Party, as such inquiries are often informal and moreover performed by often hard to identify government officials. Moreover, even if a Party made an MRV inquiry of a non-Party, there is no obligation for a non-Party to respond. In practice, there is no hard requirement for Parties to look behind the claims of non-Parties, so long as the non-Party's competent authority provides the comparable CITES paperwork. Like the notice-and-consent process of Basel, there is potential for CITES paperwork to become an insufficient proxy for true standards enforcement.

O. Application of CITES to Carbon Trading

The CITES TWN provisions depend upon rigorous oversight and adherence by the Parties themselves, with a significant backstop in a robust Standing Committee, whose recommendations to suspend trade are typically heeded.

Despite the collective institutional strength that holds non-Parties to CITES standards, however, a similar structure in a carbon allowance trading MEA may not be strong enough. In a fungible commodity, a chain cannot be merely as strong as its weakest link, as is essentially the case with CITES, where the strictest of standards might evaporate if one Party decides to be "soft" in its own decision to enforce MRV.

Furthermore, in contrast to carbon allowance trading, the traded "stuff" of CITES is unique: no two wildlife trades are alike, with some trades more detrimental to species health than others, but with no single trade necessarily threatening the overall integrity of the market. In trading fungible carbon allowances, however, the entire scheme can be jeopardized by the entry of nonstandardized emission allowances that were not subjected to a comprehensive and transparent MRV scheme. An illegal leopard skin, in other words, will not poison the wildlife market in the way that a bogus allowance will undermine a carbon market's entire credibility. Thus, a robust MRV regime is a far greater imperative in a carbon treaty.

Therefore, while CITES has a collective strength derived of the good-faith efforts of Parties and an empowered Standing Committee and its various tools of inquiry, a stronger, standardized MRV regime of non-Party oversight would be a necessity in an emissions trading scheme. This might include anti-circumvention provisions, prohibiting trading with any Party that itself trades with a non-Party not in compliance with applicable MRV rules. Additionally, domestic implementation of specific carbon trading requirements should be spelled out and mandated when the agreement enters into force, and be required of non-Parties as well. Such domestic implementation should be standardized and not left to the interpretation of the Parties, and any legislative implementation assistance project should be in place at entry into force or before.

III. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal

A. Basel Overview

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal regulates international hazardous waste, and it entered into force in 1989 and now has 179 Parties (significantly, the United States is not a Party to the Basel Convention). Rather than using centralized oversight or specific restrictions, Basel regulates waste trade primarily through information-sharing and through notice and consent between trading Parties. Trade under the Basel Convention is guided by the right of any Party to ban the import of any particular hazardous waste(s), upon notification to other Parties.[194] Perhaps more important (and far more

191. Interview with Marceil Yeater, *supra* note 73.
192. *Id.*
193. Interview with Craig Hoover, *supra* note 58.
194. Art. 4(1)(a): Parties exercising their right to prohibit the import of hazardous wastes or other wastes for disposal shall inform the other Parties of their decision pursuant to Article 13.

common in practice) is the requirement of prior notice by any exporting Party of any hazardous waste trade, the shipment of which also requires prior consent from the importing Party before that trade may take place.[195] Many observers believe this notice-and-consent regime is the bulk of Basel's trade measure effectiveness.[196] Each party must designate "competent authorities" to receive notices of waste shipments.[197] If shipments are not "in accordance with the terms of the contract," a "take-back" provision states that the exporting state "shall ensure that the wastes in question are taken back."[198]

The environmental standards of such trade and disposal are guided by soft language that states, "each Party *shall take appropriate measures*"[199] to ensure that overall environmental standards are met. The phrase "environmentally sound management" (ESM) can be found in a variety of contexts throughout Basel's trade measures.[200]

ESM is defined in Article 2 as "taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes."[201] Technical guidelines for ESM are not articulated in the Convention itself, except that they "shall be decided by the Parties at their first meeting."[202]

The reporting requirements of the Basel Convention mandate that amounts of hazardous waste exported and imported be reported to the Secretariat.[203] Financial assistance to Parties for implementation and compliance is only recommended by the Convention,[204] and the Secretariat primarily fills an information-sharing, rather than compliance, role.[205] No compliance mechanism or goal is outlined in the Convention. Partly for these reasons, many perceive the Basel Convention as a largely aspirational MEA with few teeth.

Indeed, the assessment of Basel below largely serves as a cautionary tale for the designers of a non-Party provision in the 2015 UNFCCC agreement. The loosely defined environmental standards of Basel, as embodied in ESM, would clearly be insufficient in the MRV regime for carbon trades. The lack of effective compliance mechanisms demonstrates the need for an effective "stick" with which to assure Parties and non-Parties uphold carbon market integrity. Finally, Basel's decentralized enforcement mechanisms, which rely almost wholly on unilateral Party action, would result in eroded faith in carbon markets. Thus, despite Basel's "something is better than nothing" aspirations, the analysis below is valuable to the ongoing UNFCCC process as a lesson in what design features to avoid, if a robust and trusted trade in carbon allowances is to be created under the 2015 agreement.

B. TWN Provisions of the Basel Convention

Non-Party trading under the Basel Convention is somewhat similar to the CITES treaty, with oversight of non-Party trading almost exclusively the province and at the discretion of the trading partners, with no oversight or enforcement authority residing in the Secretariat and committees. While Article 4(5) bans non-Party trading,[206] Article 11 permits such trade so long as trade is subject to a bilateral agreement, and so long as such bilateral "agreements or arrangements *do not derogate* from the environmentally sound management of hazardous wastes as required by this Convention" (emphasis added). That broad, "do not derogate" ESM requirement in bilateral (or multilateral) "Article 11 agreements" is the only particular (albeit vague) requirement for the content or format of Article 11 agreements with non-Parties, leaving Parties free to enter an agreement of any form or content they wish. Article 11 also allows for such equivalent agreements to be created between Parties as well.

Subsequent COPs have promulgated nonbinding technical guidelines for ESM.[207] Thus, the Basel Convention clearly aspires to improve overall international standards of hazardous waste disposal through a norm of ESM. Yet,

195. Art. 4(1)(c): Parties shall prohibit or shall not permit the export of hazardous wastes and other wastes if the State of import does not consent in writing to the specific import, in the case where that State of import has not prohibited the import of such wastes.
196. Interview with Robert Heiss (Director of Intl. Compliance Division, U.S. EPA), July 11, 2013.
197. Art. 5(1): [The Parties shall] [d]esignate or establish one or more competent authorities and one focal point. One competent authority shall be designated to receive the notification in case of a State of transit.
198. Art. 8: When a transboundary movement of hazardous wastes or other wastes to which the consent of the States concerned has been given, subject to the provisions of this Convention, cannot be completed in accordance with the terms of the contract, the State of export shall ensure that the wastes in question are taken back into the State of export, by the exporter, if alternative arrangements cannot be made for their disposal in an environmentally sound manner, within 90 days from the time that the importing State informed the State of export and the Secretariat, or such other period of time as the States concerned agree.
199. Art. 4(2) (emphasis added).
200. *E.g.*, 4(2)a, b, d, e, g, h, etc.
201. Art. 2(8): "Environmentally sound management of hazardous wastes or other wastes" means taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner that will protect human health and the environment against the adverse effects that may result from such wastes.
202. Art. 4(8): Each Party shall require that hazardous wastes or other wastes, to be exported, are managed in an environmentally sound manner in the State of import or elsewhere. Technical guidelines for the environmentally sound management of wastes subject to this Convention shall be decided by the Parties at their first meeting.
203. Art. 13(3): The Parties, consistent with national laws and regulations, shall transmit, through the Secretariat, to the Conference of the Parties established under Article 15, before the end of each calendar year, a report on the previous calendar year, containing the following information: (a) Competent authorities and focal points that have been designated by them pursuant to Article 5; (b) Information regarding transboundary movements of hazardous wastes or other wastes in which they have been involved, including: (i) The amount of hazardous wastes and other wastes exported, their category, characteristics, destination, any transit country and disposal method as stated on the response to notification . . . .
204. Art. 14: The Parties agree that, according to the specific needs of different regions and subregions, regional or sub-regional centres for training and technology transfers regarding the management of hazardous wastes and other wastes and the minimization of their generation should be established. The Parties shall decide on the establishment of appropriate funding mechanisms of a voluntary nature.
205. *See* Art. 16.
206. Art. 4(5): A Party shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party.
207. *See* http://www.basel.int/TheConvention/Publications/TechnicalGuidelines/tabid/2362/Default.aspx.

while ESM is defined by optional guidelines, in practice, these standards vary from country to country, and "looking behind" claims of ESM by an importing Party receiving hazardous waste is exclusively the duty of the exporter.[208] Thus, like many treaties, including CITES, the Basel Convention relies largely upon the collective norms and will of the Parties to verify ESM standards. However, for a variety of reasons, there is a reluctance of Parties to assess ESM in trading partners, though there is a concerted push within the COP to strengthen and standardize ESM accountability. Compared to CITES, however, there is clearly less capacity and appetite in Basel to verify or enforce the ESM standards of a non-Party.

C. The Role of ESM in Basel Negotiations

A hard requirement of ESM equivalency (rather than the current, vague requirement) in all Parties and trading non-Parties was discussed in treaty negotiations, and was particularly pushed for by NGOs and by developing nations (vulnerable as they were to receiving waste from developed nation "dumpers"[209]). A draft provision even required that non-Party agreements "shall not be inconsistent with the provisions of this Convention,"[210] effectively prohibiting Parties from entering into any agreement that is less strict in any way than the Basel Convention itself. Basel even initially outlined precise standards that were required to be included in any bilateral waste trade agreement with a non-Party. However, after the contentious debate over non-Party trading that followed (because many nations preferred non-Party trading to be unhindered), the question of how precise bilateral agreements must be, and how to determine whether any given non-Party agreement meets the ESM standards of the treaty, remain unanswered.[211] The "will of the Parties" during negotiations favored instead the sovereignty of nations to determine ESM on a case-by-case, unilateral basis.[212] Thus, the Basel Convention does not have the standardized trading standards or MRV oversight features of CITES or the Montreal Protocol.

The resulting Article 11 has been called "imprecise" and even "inconsistent."[213] Basel merely requires that, when trading with a non-Party, Parties "notify the Secretariat of any bilateral, multilateral or regional agreements."[214] Such agreements are posted to the Secretariat website, providing some measure of transparency, but little oversight or guidance from the COP regarding ESM standards.[215]

D. Oversight of ESM Standards

In addition to open-ended environmental standards when trading in hazardous waste, Basel strikingly lacks any "teeth" for overseeing, much less enforcing, implementation of environmental standards that are supposedly a predicate to any trade. Unlike the Montreal Protocol, for example, there is no funding stream to assist in compliance with the Basel Convention, nor is there a functioning noncompliance mechanism, making any remedy for noncompliance a notable gap.[216] These challenges lead some to say Basel's noncompliance mechanism is nonexistent.[217] Unlike CITES, which prescribes specific trade and reporting mechanisms that are often written directly into domestic regulations, Basel only requires that domestic legislation be passed, with little guidance on what precisely it must include.[218] For example, Canada's legislation includes no legal mechanism through which Canada can "look behind" claims of ESM by another Party or non-Party.[219] Also unlike CITES, there is no norm or mechanism for "naming and shaming" a Party that fails to live up to trading standards, perhaps due to a fear of insulting a valuable "commodity" trading partner.

This relative weakness in enforcement stems from a strikingly soft noncompliance measure. Adopted at COP6, the Parties adopted a compliance mechanism, overseen by the Implementation and Compliance Committee, that is explicitly described as "non-confrontational . . . flexible, [and] non-binding."[220] Aimed at preventing problems through dialogue and mediation, rather than enacting compliance, the Committee comprises 15 members, similar in composition to the CITES Standing Committee and the U.N. caucus system.[221] While the specifics of the Committee's function are spelled out in some detail,[222] its limited powers have rarely been utilized, given what appears to be the Committee's inactivity.

In the Basel universe, then, largely due to the perception of waste as an ideally "fluid" commodity, clarifying how to review ESM or ensure compliance by Parties is too contentious an issue to be substantively addressed.[223] Also, as a simple matter of the letter of the Convention itself, the Secretariat consciously avoids making inquiries into or pronouncements about any nation's ESM standards, as it simply has "no mandate" to do so.[224] The Basel Convention clearly has the least teeth in assessing whether non-Party trades (or even Party trades) meet the required standards for ESM.

208. Art. 4(2)(g): Each Party shall take the appropriate measures to [p]revent the import of hazardous wastes and other wastes if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner.
209. Interview with James Puckett (Executive Director, Basel Action Network), July 12, 2012.
210. Katharina Kummer, International Management of Hazardous Wastes: The Basel Convention 90 (Oxford 2000).
211. Interview with James Puckett, *supra* note 209.
212. Interview with Katharina Kummer Piery (Basel Secretariat), July 2, 2012.
213. Kummer, *supra* note 210, at 88.
214. Art. 11(2).
215. *See* http://www.basel.int/Countries/Agreements/tabid/1482/Default.aspx.
216. Art. 15(c).
217. Interview with James Puckett, *supra* note 209.
218. Art. 4(4).
219. Interview with Julie Croteau, Environment Canada, July 24, 2012.
220. Monitoring the Implementation of and Compliance With the Obligations Set Out by the Basel Convention UNEP/CHW.6/9 (Aug. 15, 2002), at 4, *available at* http://archive.basel.int/meetings/cop/cop6/cop6_09e.pdf.
221. *See id.*
222. *Id.* at 4-9.
223. Interview with James Puckett, *supra* note 209.
224. Interview with Katherine Kummer Piery, *supra* note 212.

That said, akin to CITES, Parties do occasionally address concerns about inadequate environmental standards of any given trading nation. These concerns, however, are usually handled bilaterally, and occasionally with the informal, undocumented assistance of the Secretariat.[225] In the event trading is then unilaterally suspended or cancelled by a Party because of those concerns, there is no mechanism for recording or even sharing this diplomatically sensitive information. As a commodity, then, hazardous waste trade under the Basel Convention does not create a paper trail (like CITES) for exposing poor ESM standards. As a result, there is also no larger regime in Basel to standardize ESM, nor is there a formal means or norm of verifying vague ESM standards asserted by a Party or non-Party.

E. The MRV Regime of Basel

There is no formal reporting requirement in place to verify that an exporting Party has done "due diligence" in verifying ESM standards in the importing nation, as is nominally required by the Convention. Indeed, Basel trade in general is poorly tracked: UNEP itself acknowledges that while Basel Parties are required to report aggregated trading figures, "there is ambiguity in the available data."[226] Estimating the total volume of global waste trade is further complicated by differing definitions of what is and is not hazardous, by the nonparticipation of the United States, and by the unknown but presumably significant amount of illegal trade.[227] In 2009, for example, about 11 million tons of imports were reported to the Basel Secretariat, while only six million was reported as exports.[228] Despite guidance from the Secretariat on what kind of information Parties must report,[229] accurate reporting varies by country, with some providing very detailed reports, and others not reporting trade at all.[230] The Secretariat itself notes that while the number of Parties to the Convention increased from 133 to 174 between 1999 and 2010, the number of Parties submitting national reports actually declined from 96 to 50 (less than 30%) over the same period.[231] Developing nations are a "mixed bag" with MRV, while most Organization for Economic Co-operation and Development (OECD) countries are deemed "very good" in their reporting.[232]

To a far greater degree than CITES, any aggregate world data should be assumed to be incomplete: for the last year that such a compilation is available (2006), only 70 Parties reported, down from a high of 108 Parties reporting in 2001.[233] With fewer than 50% of Parties reporting, it is clear that Basel is unable to enact meaningful compliance measures or to even accurately account for the trade it attempts to regulate. In regard to trade with non-Parties, the Secretariat office acknowledged that it "does not have information" regarding significant non-Party waste trade of any country besides that of the United States.[234]

Even trade among the three North American states—Canada, Mexico, and the United States (only the United States is not a Party to Basel)—is not comprehensively tracked or overseen by Basel or the Commission for Environmental Cooperation (CEC), NAFTA's relevant environmental body charged with oversight of hazardous waste.[235] Shipment notices, which are not computerized in the United States due to lack of funding, are often merely estimates (usually high) of what shipments are *likely* to occur (and thus require consent under Article 11).[236] Actual resulting shipments thus remain largely unquantified. Approximately 20,000 uncomputerized, hard-copy manifests are currently on file in the United States, with 2,200 paper manifests received annually.[237] Heightening this lack of clarity in hazardous waste trade data in North America, approximately 15,000 "waste streams" are filed each year ("waste streams" identify the particular chemical compositions contained in the shipments referred to in each notice).[238] Although the United States is a non-Party, this relatively unsophisticated MRV system is apparently typical of Mexico as well.[239] So, while data-gathering is supposed to occur and be recorded under Basel's Article 13,[240] there is a consensus among observers that overall trade data is incomplete,[241] even "shoddy."[242]

Basel in this respect shares the challenges of CITES on the one hand (inadequate Party-level MRV implementation), while lacking on the other hand the funding and enforcement strengths enjoyed by CITES (and the Montreal Protocol). Just as countries under CITES struggled (and still struggle) to implement sufficient domestic legislation to enact CITES, there is an even more pronounced lack of adequate domestic implementation focus in Basel, particularly in developing nations.[243] Basel, moreover, does not enjoy the funding streams and technical assistance of CITES to assist in implementation of reporting and environmental standards. An electronic data system, for example, still does not exist as it does under CITES. While some hope the current Country Led Initiative (CLI) process to clarify ESM standards might lead to better MRV accountability,[244] NGOs could play a role in strengthen-

225. *Id.*
226. *Towards a Green Economy*, UNEP, 2011, at 301, *available at* http://www.unep.org/greeneconomy/Portals/88/documents/ger/ger_final_dec_2011/Green%20EconomyReport_Final_Dec2011.pdf.
227. Wolfe & Baddeley, *supra* note 139, at 16.
228. *Id.*
229. *See* http://www.basel.int/Procedures/NationalReporting/Blankquestionnaire/tabid/2297/Default.aspx.
230. Interview with Robert Heiss, *supra* note 196.
231. *See* http://www.basel.int/Countries/NationalReporting/StatusCompilations/GraphicalStatus/tabid/1604/Default.aspx.
232. Interview with Robert Heiss, *supra* note 196.
233. *See* http://archive.basel.int/natreporting/stat-report/index.html.
234. E-mail from Juliette Kohler, Policy and Legal Advisor, Basel Secretariat, July 11, 2012.
235. Interview with Robert Heiss, *supra* note 196.
236. *Id.*
237. *Id.*
238. *Id.*
239. Interview with James Puckett, *supra* note 209.
240. Art. 13(3).
241. Interview with Robert Heiss, *supra* note 196.
242. Interview with James Puckett, *supra* note 209.
243. *Id.*
244. *Id.*

ing Basel, as they have for CITES. For example, in the new, somewhat uncharted realm of hazardous "e-waste," the Basel Convention is still attempting to put in place explicit guidelines.[245] NGOs such as Basel Action Network (BAN) and the Environmental Investigation Agency (EIA) have played a strong role in exposing and quantifying the problem of e-waste "leakage." This, and the experience of CITES, suggests that NGOs have a role to play in the MRV regime of Basel.

Regardless of the significant opportunity for improvement, hazardous waste does not have the same international appeal as endangered species, nor a perception of the immediate danger aroused by ODS. Due to the particular trading qualities of hazardous waste, then, appetite in the international community to invest in increased oversight of Party and non-Party MRV or ESM standards is not strong.

F. ESM Enforcement as a Strictly Unilateral Matter

Uniform standards of "environmentally sound management" under the Basel Convention are difficult to apply because of the relatively open-ended phrasing in the Convention itself: "Environmentally Sound Management of hazardous wastes" is defined as "taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes."[246] Recognizing the vagueness of the definition, an early attempt was made to clarify what exactly constitutes ESM: the Technical Working Group of the Basel Convention gathered highly specialized experts to clarify ESM standards, and these nonbinding technical guidelines were adopted at COP2.[247]

These broad technical guidelines appear to have had little impact in actual Basel-related trading for three reasons:

(1) the nonbinding nature of these technical guidelines;

(2) the inability of the Secretariat or any Committee to enforce or oversee their implementation; and

(3) the reluctance or inability of Parties to unilaterally verify the ESM claims of an importing nation.

Indeed, the very recent formation of another technical expert group[248] charged with clarifying ESM standards, over 20 years after ratification, is a tacit acknowledgement of the limited use or applicability of the early ESM technical guidelines.

Despite the fact that ESM of waste is a central tenet of the Basel Convention, the onus of oversight of a receiving Party's ESM standards is solely on the exporting Party. There is no real power of oversight in the Secretariat or other body. The Secretariat's role is limited to receiving information in cases of potential noncompliance; however, without approval from the complained of Party or from the COP, the Secretariat is unable to investigate further.[249]

The Implementation and Compliance Committee is specifically charged with assisting Parties in meeting their Convention obligations.[250] Parties can submit themselves as having internal difficulty implementing Convention requirements (make a "submission"), or report another Party's noncompliance (the Secretariat is only empowered to submit cases of noncompliance in reporting requirements, not in ESM or other requirements).[251]

However, the Implementation and Compliance Committee is almost wholly inactive in this realm: it received its very first submission for review only in 2009, and has received a total of 10 since then: one Party self-submission and nine Secretariat submissions (for nonreporting).[252] It is important to note that, while Parties have informally reported noncompliance concerns to the Secretariat, no Parties have reported noncompliance by another Party or non-Party to the Implementation and Compliance Committee. Furthermore, even in the relatively permissive atmosphere of Basel, the Implementation and Compliance Committee only takes a "non-confrontational" approach in dealing with noncompliance, one that moreover gives a procedural advantage to the reportedly noncompliant Party.[253] Perhaps not surprisingly, the dispute settlement mechanism[254] of Basel has never been invoked or utilized in any way. Basel offers a cautionary tale for MEAs that lack a clear and centralized noncompliance mechanism.

ESM oversight in Basel, then, is left to the Parties. Such extraterritorial verification is difficult as a practical matter, however, as the exporting Party rarely allocates resources on the ground in the importing nation to actually conduct verification. Even a developed nation like Canada acknowledges it does "not have the financial resources to verify" ESM standards in importing nations.[255] Because such environmental MRV is difficult as a practical, diplomatic, and budgetary matter, then, the core notice-and-consent requirement of Basel remains the de facto regime of environmental accountability among Basel Parties.[256] In essence, obtaining the consent of the importing nation to receive the waste (as specified under Article 4) serves as the proxy for ESM verification that is nominally required by Article 4(2) and Article 11. This de minimis process has been widely recognized as insufficient, considering that ESM was intended to be a cornerstone of Basel's aims. In the words of one U.S. long-time Basel observer, when it comes to verifying the sufficiency

245. *See* http://www.basel.int/Implementation/TechnicalAssistance/EWaste/tabid/2576/Default.aspx.
246. Art. 2(8).
247. *See* http://www.basel.int/TheConvention/Publications/TechnicalGuidelines/tabid/2362/Default.aspx.
248. *See* http://www.basel.int/Implementation/LegalMatters/CountryLedInitiative/tabid/1339/Default.aspx.
249. Wolfe & Baddeley, *supra* note 139, at 17.
250. *See* http://www.basel.int/TheConvention/ImplementationCompliance-Committee/Mandate/tabid/2296/Default.aspx.
251. Wolfe & Baddeley, *supra* note 139, at 39.
252. *Id.*
253. *Id.*
254. Art. 21.
255. Interview with Julie Croteau, *supra* note 219.
256. Interview with Robert Heiss, *supra* note 196.

of a trading partner's environmental standards, the "litmus test for ESM is very low."[257]

G. Attempts to Strengthen ESM Standards

Given this pronounced lack of environmental standards enforcement and MRV, there was an initial push to clarify ESM standards via technical guidelines. Due to the continued lack of ESM standardization and verification, there is currently a CLI process underway to strengthen and better define ESM standards.[258] (In Basel terminology, a CLI is a concerted effort by one or more Parties, in this case Indonesia and Switzerland, to influence or reform Basel norms and/or regulations, in collaboration with the COP.[259]) As a result of this recent CLI, a 30-member expert committee (including one member from each of the U.N.'s six regions) has been convened by the COP to explore how to improve the application and enforceability of ESM standards. This CLI process is meant to be informal, and for the explicit purpose of presenting findings to the COP; the group had three meetings over the course of 15 months. While it is too early to predict any particular outcome (the first meetings appeared to result in little substance[260]), the committee nonetheless seeks to clarify the ESM obligations of Parties and provide better ESM governance, especially in developing nations.[261] This is an example of how a trading ban can potentially stimulate standards improvement efforts.

In addition to environmental integrity, much is at economic stake in the CLI: in the absence of an ESM governance outcome for developing nations under the CLI, the Basel Convention's Ban Amendment (which is in the process of finally being formally ratified) will soon disallow any exports from OECD nations to non-OECD nations.[262] Thus, if the CLI process to clarify ESM in developing nations is unsuccessful, the Ban Amendment will result in significantly increased disposal costs in OECD nations.

However, if the CLI process is successful in promulgating ESM standards, Article 11 could then be utilized as an alternate bilateral or multilateral agreement between OECD and non-OECD Parties (Article 11 agreements may be applied as a Basel alternative to both Parties and non-Parties, so long as the minimum ESM standard is met). Thus, standardizing ESM in developing nations could be an avenue to avoid the Ban Amendment, by allowing OECD nations to export waste to developing nations under Article 11 bilaterals that meet the newly promulgated ESM standards (should they come to pass).

Complicating the ESM standards issue, trade with developing nations is a particularly thorny issue for the Basel Convention, and verifying standards in those nations is difficult.[263] Because developing nations are particularly vulnerable to "First World" waste (because they often lack the capacity to handle the waste, yet also are under economic pressure to accept that waste for purposes of "resource recovery"), verifying ESM in importing developing nations is a particularly important yet difficult task.[264] In a challenge similar to CITES, domestic regulations and funding are often insufficient in developing nations, or even literally nonexistent, as in the case of Ghana.[265]

The challenge of trade with developing nations and their potentially weak ESM standards, however, may soon be partially addressed under the aforementioned Ban Amendment. As part of that hard-won compromise, the COP created the CLI process to clarify ESM standards.[266] Regardless of whether ESM standards are clarified, standardized, or made accountable in some way, the problem of ESM in developing nations has been at least partially "solved" by the impending adoption of the Ban Amendment that prohibits OECD export of waste to non-OECD nations.

Implementation of voluntary certification programs provides another method for addressing the problem of Basel's "soft," even nonexistent ESM oversight and MRV. The Secretariat office foresees the possibility of certifications of resource recovery facilities in developing nations, as a way of creating an Article 11 bilateral agreement as a substitute for the Ban Amendment.[267] Such certifications would allow trade between OECD Parties with developing nations for resource recovery, in a way that upholds Basel's ESM goals.[268] Canada has proposed a 1-star, 2-star, 3-star, and 4-star ranking certification system, which would disallow trade with a facility that has not received the star-ranking appropriate for a particular waste stream.[269]

Clarifying ESM standards remains a complex and contentious issue. Some observers are wary of certification schemes of ESM in general due to their unwieldy and impractical complexity.[270] Others are skeptical of their potential contravention purposes, where an ESM "certification" scheme circumvents Basel requirements by being a "sham Article 11" agreement,[271] akin to greenwashing certification schemes commonly derided in the United States.[272]

Some see certification schemes as an Article 11 backdoor to avoid complying with the hard Ban Amendment, all while appearing to uphold the overall ESM requirements

257. Interview with Robert Heiss, *supra* note 196.
258. *See* http://www.basel.int/Implementation/LegalMatters/CountryLedInitiative/tabid/1339/Default.aspx.
259. *Id.*
260. *See* http://www.basel.int/Implementation/LegalMatters/CountryLedInitiative/Meetings/tabid/2680/Default.aspx.
261. Interview with Julie Croteau, *supra* note 219.
262. *See* http://www.basel.int/Implementation/LegalMatters/BanAmendment/tabid/1484/Default.aspx.
263. *See generally* Alan Andrews, *Beyond the Ban—Can the Basel Convention Adequately Safeguard the Interests of the World's Poor in the International Trade of Hazardous Waste?*, L. Envt. & Dev. J. (2009), *available at* http://www.lead-journal.org/content/09167.pdf.
264. *See id.* at 169.
265. *See id.* at 177.
266. *See* http://www.basel.int/Implementation/LegalMatters/CountryLedInitiative/tabid/1339/Default.aspx.
267. Interview with James Puckett, *supra* note 209.
268. *Id.*
269. Interview with Julie Croteau, *supra* note 219.
270. *Id.*
271. Interview with James Puckett, *supra* note 209.
272. *See, e.g.*, http://www.sierraclub.org/sierra/201207/grapple-greenwashing-golf-232.aspx.

of the Convention via certification.[273] Some observers note that Parties who advocate for a uniform ESM system, that is, ESM standards that can be quantified or standardized under a scheme (perhaps via certification), are largely the same Parties long opposed to the Ban Amendment,[274] such as Japan. Under such a process, a difficult-to-verify certification is given to a facility in a developing nation, Party or non-Party, opening the door to a "sham Article 11" bilateral agreement that on its face meets the ESM requirements of Basel, while exempting the exporting Party from the Ban Amendment.[275] In such an arrangement, the ESM process may actually be abused under the guise of certification, thus contravening the basic requirements of the treaty.

Regardless of the system or set of guidelines, it is widely acknowledged that linking uniform, Basel-wide standards to the transboundary movement of waste is a complicated undertaking, and the collective will to meaningfully implement such a regime anytime in the near future is far from guaranteed.

Others acknowledge that the "Ban Amendment compromise" (which allowed the Ban Amendment and its stark trade restriction to pass on the one hand, while also setting up a CLI to explore putting in place a defined ESM regime on the other) is simply a way to allow resource recovery from hazardous waste in developing nations, a form of trade that is believed to be an economic "win-win" for both exporter and importer.[276] This way, under an ESM standardization or certification scheme developed by the COP-sanctioned CLI process, those that prefer the Ban Amendment can simply cease export/import to developing nations, while developing nations who want to participate in "resource recovery" must follow the CLI's possibly forthcoming ESM standards in order for Basel Parties to be allowed to export waste to them under a separate, bilateral agreement under Article 11.

H. Recent Attempts at Article 11 Agreements

One such recent attempt at an alternate, extra-Basel Article 11 agreement (which some observers may consider a "sham Article 11" agreement that attempts to contravene Basel) is the Hong Kong Convention, which addresses ship dismantling, recycling, and disposal.[277] While ships for disposal are covered as hazardous materials by a resolution of the Basel Convention, if an "equivalent level of control" (the phrase utilized by the COP during debate over the Hong Kong Convention) can be delineated for ship disposal under the Hong Kong Convention, that treaty would itself serve as the Article 11 multilateral agreement that displaces the Basel Convention for the purposes of ship disposal.[278] This Article 11 agreement would only apply to those Parties that ratify it. In such a scenario, the Hong Kong Convention would obviate the need to laboriously amend the Basel Convention in order to address a new ship disposal regime. If such "equivalent level of control" is in practice weaker than the regime under Basel, then the feared "sham Article 11" becomes a reality, and Basel has been contravened. Despite a push by the EU, Japan, and other Parties, however, consensus at COP was not reached, and the Hong Kong Convention was not approved as an Article 11 multilateral agreement that displaces the Basel Convention for purposes of ship disposal.[279]

Had the Hong Kong Convention been approved as an Article 11 bilateral, some would have cited it as an example of the use of an Article 11 non-Party multilateral agreement to weaken the standards of Basel. This weakening of Basel standards has in fact occurred in other multilateral Article 11 agreements, clearly an outcome of Article 11's vague language that such trade "not derogate" from similarly vague ESM standards. The OECD's Article 11 multilateral agreement amongst the OECD members that supplants the Basel Convention for purposes of intra-OECD waste trade, for example, is slightly weaker than Basel standards: the notice-and-consent procedure allows for *tacit* consent, in the event one OECD Party does not respond to another OECD Party's notice of waste shipment.[280] The Basel Convention's core notice-and-consent procedure,[281] on the other hand, explicitly requires consent, without which trade is disallowed. While arguably a minor point, particularly given that OECD nations are likely well-equipped to handle waste shipments in an environmentally sound manner, this is a case of an Article 11 agreement that nonetheless technically weakens, and thus violates, the standards of the Basel Convention. As for ESM itself, there is specific mention in the same Article 11 agreement that any intra-OECD trades "shall be" handled in an "environmentally sound manner."[282] Perhaps unsurprisingly, ESM is not specifically defined in this multilateral Article 11 agreement.

Finally, within the COP process, Japan has long attempted to enact a regional, multilateral waste trade agreement under Article 11.[283] (Article 11 agreements can be struck between parties, as well as between Parties and non-Parties.) That effort has not yet been successful, and some believe that Japan's inability to forge such a regional, extra-Basel agreement is a result of the COP's reluctance to further open the Article 11 door to watering down Basel's ESM safeguards, flawed though they may already be.[284]

Thus, Article 11 is a potential avenue for circumventing the aims of the Basel Convention: by making a separate side agreement, either with a non-Party or for a particular class of waste (e.g., ships under the Hong Kong Convention), Parties could potentially escape the particular

273. Interview with James Puckett, *supra* note 209.
274. *Id.*
275. *Id.*
276. *Id.*
277. *See generally* http://www.imo.org/ourwork/environment/shiprecycling/pages/Default.aspx.
278. Interview with James Puckett, *supra* note 209.
279. *Id.*
280. *See* http://basel.int/Countries/Agreements/MultilateralAgreements/tabid/1518/Default.aspx.
281. Art. 6.
282. *Id.* at 6.
283. Interview with James Puckett, *supra* note 209.
284. *Id.*

requirements of the Basel Convention and not be subsequently accountable to the COP. Alert to this very possibility, there was much discussion during original treaty negotiations to require absolute equivalency in standards in any non-Party Article 11 trading, but compromise carried the day,[285] resulting in the vague ESM definition that merely states wastes will be "managed in a manner which will protect human health and the environment." So, even though Article 11 requires nonderogation from ESM, the vagueness of that ESM standard itself is a nearly self-defeating flaw for non-Party trading.

Early on in the Convention's life, there was still a good deal of interest in overhauling the potential loopholes of Article 11, due to its clear (and partly realized, some would say) potential for abuse and contravention.[286] However, because so many Parties have joined the Convention, the Article 11 non-Party clause has lost relevance (with the exception of the United States), and interest in refining the clause to require a more precise equivalency has waned.[287]

I. The Strengths in Basel Standards Enforcement

Despite the lack of a single, verifiable ESM standard, there are patchwork, unilateral attempts to verify ESM. Some Parties' domestic implementation requires verification of claims of ESM in importing countries.[288] Australia and Japan, for example, both make unilateral attempts to look behind claims of ESM in importing countries.[289] Some attribute this particular unilateral oversight to their status as island nations that are particularly reliant upon mainland Asia for disposal.[290] Additionally, EU countries already have comprehensive EU-wide regulations that clearly and specifically dictate ESM,[291] to an extent that is far more specific than the vague Basel definition.[292]

Furthermore, Article 4 of the Convention offers potential compliance teeth, as it mandates that trade be suspended if the exporting Party does indeed determine the importer does not have sufficient ESM capacity. However, as a practical matter, this prohibition has little meaning when the exporter relies solely on the notice-and-consent process as a proxy for ESM verification, which by and large is the dominant practice. Whether trades have indeed been cancelled or suspended due to these ESM inquiries and findings is unclear, since no such record exists with the Secretariat, nor is such an outcome likely to be public, due to the desire to maintain diplomacy.

Australia evaluates ESM in its trading partners on a case-by-case basis consistent with their own national legislation.[293] Their efforts in this area largely focus on evaluating the industrial process of the receiving facility, including the "process flows" and the fate of any residual materials.[294] To this end, Australia requires importing applicants to submit documentation detailing their industrial processes.[295] Somewhat similar to CITES practice, Australia also seeks confirmation from the competent authority of the importing Party that the facility under their jurisdiction is licensed and capable of processing the volume and amount of waste intended to be imported. Finally, Australia also ensures that its domestic exporters have a contract with the foreign facility for the proposed treatment of waste. Australia then requires submission of disposal certificates (once the waste treatment is completed) in order to confirm the material has been dealt with in the way that was originally proposed.[296] While this process clearly upholds Basel's vaguely defined aims of ESM, there is nonetheless no Basel mechanism that requires or verifies that Australia or any other Party conducts such unilateral MRV of ESM.

It is also not uncommon for Parties to send back materials that are discovered, after the fact, to be different than those specified in the Article 6 notice-and-consent process, a kind of "seller liability" built into Basel's Article 8 "take-back" provision. Also, Article 8 ("Duty to Re-Import") states that if a trade "cannot be completed in accordance with the terms of the contract, the State of export shall ensure that the wastes in question are taken back. . . ." Given Basel's relatively anemic MRV recordkeeping, it is difficult to obtain data on how often these measures are utilized in practice.

J. North American Non-Party Waste Trade

From the American perspective, the prospect of a large, diverse UNEP instrument indicated little leeway for the commodity trading of wastes. Some felt Basel's classification of wastes into only two Annexes was problematic.[297] Industry (represented in particular by the U.S. Chamber of Commerce) was particularly concerned with the early agitation for the Ban Amendment's bright line between developed and developing nations.[298] Some within the U.S. negotiating team even felt the early suggestion of the Ban Amendment's line drawn around OECD nations was "arbitrary."[299] Furthermore, there was never a political force or impetus in the United States at the time that proactively advocated for ratification.[300] Now, with the impending passage of the Ban Amendment, U.S. ratification of the Basel Convention remains unlikely, despite the vocal support of the Barack Obama Administration.[301]

The United States, by far the largest non-Party, has bilateral agreements, as is required by Basel of Parties that

285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*
289. Interview with Julie Croteau, *supra* note 219.
290. Interview with James Puckett, *supra* note 209.
291. *Id.*
292. Kummer, *supra* note 210, at 92.
293. E-mail from Paul Kesby (Ministry of the Environment, Australia), Aug. 1, 2012.
294. *Id.*
295. *Id.*
296. *Id.*
297. Interview with Patricia Whiting (U.S. EPA), July 13, 2012.
298. Interview with Robert Heiss, *supra* note 196.
299. Interview with Patricia Whiting, *supra* note 298.
300. *Id.*
301. Interview with Robert Heiss, *supra* note 196.

trade with non-Parties, with neighboring Canada and Mexico.[302] Those two nations together account for 95% of American hazardous waste trade.[303] The three North American countries are parties to NAFTA and participate in its environmental arm, the CEC.[304] Canada is the main trading partner of the United States, as both an exporter and importer, with the United States accounting for almost 99% of Canada's waste trade.[305] Mexico is primarily an importer of U.S. waste, all of which is "recovery" waste (recyclable), particularly spent lead acid batteries (SLABs) and scrubber dust from steel factories.[306]

The United States also has bilateral waste trade agreements with Costa Rica, Malaysia, and the Philippines.[307] In the case of these three developing nations, the United States has import-only agreements with them, primarily due to U.S. companies operating overseas (Intel, in the case of Costa Rica and the Philippines) who prefer to import waste into the United States, due to the lack of ESM in those developing nations.[308] These arrangements, despite American industry's overall resistance to Basel, are largely heralded as a good-faith effort by industry to internalize costs, which is the larger goal of the Basel Convention itself.[309] Ironically, then, the non-Party United States honors Basel's unenforced ban on trading when ESM standards are unable to be met by the importing Party.

Despite the lack of NGO oversight of waste trade when compared to CITES, NGOs have been successful in exerting pressure on the United States to decline to export waste to developing nations, not wanting to be seen as a "dumper."[310] Finally, the United States also has a multilateral agreement with OECD nations, but only approximately 30 notices of import per year are received from those nations.[311]

Domestically, the Resource Conservation and Recovery Act (RCRA)[312] serves as the proxy for ESM in the United States, and the bilateral agreements with Basel Parties often explicitly reference America's domestic legislation as the placeholder for ESM. Some argue, however, that RCRA has no clear criteria to judge whether bilateral agreements are upheld.[313] Canada assumes that the United States, because it is not a developing nation, has sufficient ESM measures in place for Canada to meet its Basel obligation to export only to nations with ESM.[314] Of course, under Basel, Canada's only hard affirmative obligation is to suspend trade if it has reason to believe ESM standards are not being met. Domestically, Canada's environmental agency verifies that a receiving province has the capacity to handle imported U.S. waste,[315] even though each province's ESM for any particular waste stream varies by province.[316] Canada and U.S. trading, then, primarily rely upon the "piecemeal" notice and consent process of Basel as the primary means of waste trade accountability.

In trading controversial shipments of SLABs with Mexico, the U.S. Environmental Protection Agency (EPA) relies upon notice and consent: under the bilateral agreement, the domestic laws of each country controls, and the United States "respects the sovereignty of its trading partner."[317] Thus, the United States makes no independent inquiry before it exports waste to Mexico, though the United States does inspect domestic export facilities.[318]

There is, however, regular cooperation among the NAFTA nations under the CEC, which has facilitated the beginnings of an electronic tracking system for waste trade between the three nations.[319] Some observers note that the Basel-required bilateral agreement between the United States and Canada is noticeably weaker than what is required of Basel Parties: the prior consent requirement is weaker, and it leaves environmental standards to be determined by domestic legislation,[320] rather than by Basel standards. Of course, given the subsequent lack of clear Basel standards, relying on domestic measures could very well result in more stringent ESM standards.

When trading with other Basel Parties, Canadian officials acknowledge that, due to the diplomatic imperative of sovereignty, it is difficult to verify ESM. Thus, when another Party claims ESM, Canada typically relies upon their status as a Basel Party as a good-faith proxy for ESM, in lieu of actual on-the-ground verification.[321] Moreover, Canada typically only trades with the United States and Europe, thus avoiding the more problematic exports to developing nations, where the quality of waste disposal facilities is more uncertain.

Here, the Basel Convention is strikingly different from CITES: there is no regime in place in Basel, either through inquiries by a Standing Committee or via the ability of the Secretariat to recommend a trade suspension, for international standards to be enforced across Parties, except when, as in the rare cases of Australia and Japan, such standards are unilaterally verified. Some observers believe Basel is "hobbled" by the typical UNEP arrangement of no internal enforcement mechanisms, relying instead on two partner countries to work collaboratively, often on an informal basis.[322] Hong Kong, for example, has often alerted the

302. *See* http://www.basel.int/Countries/Agreements/BilateralAgreements/tabid/1517/Default.aspx.
303. Interview with Robert Heiss, *supra* note 196.
304. *Id.*
305. Interview with Julie Croteau, *supra* note 219.
306. Interview with Robert Heiss, *supra* note 196.
307. *See* http://www.basel.int/Countries/Agreements/BilateralAgreements/tabid/1517/Default.aspx.
308. Interview with James Puckett, *supra* note 209.
309. *Id.*
310. *Id.*
311. Interview with Robert Heiss, *supra* note 196.
312. 42 U.S.C. §§6901-6992k, ELR Stat. RCRA §§1001-11011.
313. Interview with James Puckett, *supra* note 209.
314. Interview with Julie Croteau, *supra* note 219.
315. *Id.*
316. *Id.*
317. Interview with Robert Heiss, *supra* note 196.
318. *Id.*
319. *Id.*
320. Kummer, *supra* note 210, at 116.
321. Interview with Julie Croteau, *supra* note 219.
322. *See generally* Juliette Kohler, Compliance With and Enforcement of the Basel Convention: Latest Developments and Things to Come During the Tenth Meeting of the Conference of the Parties, *available at* http://inece.org/conference/9/proceedings/28_Kohler.pdf.

United States to illegal exports of waste from the United States, a notification undertaken largely outside the auspices of the Basel Convention.[323]

K. Comparison of Basel to CITES and the Montreal Protocol

The Basel Convention, like each of the treaties discussed above, deals with a specific trade whose qualities affect the architecture and execution of the agreement. First, the scope of the materials covered by Basel, and therefore the panoply of ESM that such materials require, is vastly more complex than the ODS of the Montreal Protocol, which has known technology to replace it, and thus a realistic reduction mandate. In contrast to the known and finite producers of ODS, who have greater difficulties in smuggling their product, waste is by contrast one of the most difficult of environmental issues, because it is difficult to control in any uniform way, given the long borders of countries, island nations, and all the opportunities for circumvention that they provide. Hence, while the Basel Convention deals with greater complexity than the Montreal Protocol, it is also less stringent, allowing for more limited control than other MEAs.[324]

CITES too has more precise and prescribed requirements, such as creating scientific and management authorities, domestic legislation compliance, and standardized permitting and reporting. It has also developed more international norms of compliance, empowered as it is with a powerful and functional Secretariat and Standing Committee (relative to the equivalent in Basel). Basel, by contrast, has no requirement, hard or soft, to obtain third-party verification (a role played by NGOs under CITES), nor is there a regime or Committee in place to certify that exporters assess the ESM of non-Party exporters.

L. The Unique Challenges of the Traded "Stuff" of Basel

Like both CITES and the Montreal Protocol, the trading provisions of the Basel Convention are profoundly affected by the nature of the trade it regulates. The regulated community often perceives hazardous waste as a commodity (indeed, the United States declined ratification largely due to the concern of American industry about the inability under Basel to trade freely in what it considers a global commodity market).[325] Such trade is of a substantially different nature than the trade addressed in other MEAs: the ODS of the Montreal Protocol had a limited number of producers and trade routes, as well as increasingly strict control measures, with rigid compliance measures behind them, as well as funding for ODS alternatives. CITES regulates trade in "stuff" for which there is an international consensus to preserve, and thus consensus to provide for strict (if imperfect) MRV. Moreover, there is not a single bloc of industrial Parties that have an interest in unfettered trading of endangered species, as there was for waste trade when, for example, the U.S. Chamber of Commerce lobbied against U.S. ratification of the Basel Convention.

Basel, on the other hand, regulates a seemingly unending stream of materials in a variety of forms, much of which is perceived to be of higher value to developing nations for "resource recovery." Accordingly, due to this "value," there is no mandate in the Basel Convention to place caps or quotas on the regulated material (as in the Montreal Protocol and CITES). These qualities make Basel an imperfect analogy for carbon trading under a climate change treaty.

Nonetheless, Basel offers implications for carbon trading, particularly through its shortcomings. Foremost, the unclear standards for what constitutes ESM have weakened Basel's effectiveness and offer a cautionary tale: a similar lack of clarity over what constitutes a true carbon emission reduction must be avoided in any non-Party trading mechanism. Absent such clarity, dubious carbon trades with non-Parties will "pollute" the fungible marketplace and erode confidence in the market itself. Basel's lack of enforcement and funding mechanisms are also a clear treaty weakness, as is the anemic reporting mechanism, and should be avoided if an international climate change treaty is to achieve more verifiable environmental integrity through a carbon trading scheme.

IV. Implications and Lessons Learned for Carbon Emissions Trading

Across the three treaties, each of which has a differing level of effectiveness, both as a whole and in overseeing non-Party trading, there is a great deal to be learned for and applied to a TWN provision in a climate change treaty. In many ways, the Montreal Protocol offers the starkest lesson, as it regulates a very narrow range of known substances, just as a climate change treaty would regulate the narrow range of greenhouse gases. Therefore, non-Party carbon trading should take advantage of the relatively straightforward MRV oversight capacity available for greenhouse gases and require the same strict data reporting as is required of both Parties and non-Parties under the Montreal Protocol. To ensure that this is feasible, adequate funding must be assured at the start, perhaps through a well-funded technical assistance program, before any trading commences. Carbon reductions are, however, dissimilar to ODS because nations are not economically dependent upon them, as they initially were upon ODS. Therefore, CITES and Basel must also be looked to for design feature lessons.

Like the Montreal Protocol's Implementation and Compliance Committee, CITES owes much of its success to a centrally powerful committee, the Standing Committee, which has the ability to make inquiries of non-Parties and Parties alike and to issue trade suspension recommenda-

323. *Id.*
324. Interview with James Puckett, *supra* note 209.
325. Interview with James Puckett, *supra* note 209; Interview with Robert Heiss, *supra* note 196.

tions as necessary. Such an overseeing body with similar powers would be necessary in a climate change treaty to ensure non-Party trading is valid.

Unlike the Montreal Protocol, CITES has suffered from a lack of national technical and financial capacity to effectively oversee standards, implementation, and non-Party trading. Thus, capacity-building and compliance funding should be provided for prior to trading. An NGO or NGOs with third-party oversight should be empowered for this or for any other design feature. Timely domestic implementation among Parties has also continually weakened CITES standards, so such delay must be anticipated and avoided through an up-front legislative assistance program.

Perhaps most crucially for carbon trading, consistent and transparent internal MRV oversight of emissions as well as tracking of units in all trading nations must be established before transnational trading commences under a new agreement, to ensure market confidence in a fungible commodity. Domestic vigilance over the MRV regime must be a key element of a 2015 climate instrument, rather than be allowed to languish and left for later COPs to clarify, as has been the case in CITES. Clear consequences for nonreporting and nonimplementation must be similarly determined early, before trading commences, including a well-defined process for trade suspensions. Domestic regulations should also be standardized, strict, and required to be implemented by Parties, in accordance to language within the agreement itself, rather than at subsequent COPs.

Indeed, perhaps the greatest lesson to be learned from CITES is not to leave subsequent COPs with decisions related to treaty design, implementation, and enforcement. That shortcoming is perhaps the single greatest flaw in CITES, one that has permeated several aspects of its functioning, and one that has hindered its effectiveness to the present day. CITES' constant need to clarify, refine, and correct itself in COPs has resulted in its checkered effectiveness outlined above, and offers a clear caution to the climate regime that it should ensure clarity of design during the negotiations stage.

The Basel Convention offers an even more stark caution for non-Party trading. First, the very unclear ESM standard highlights the absolute necessity for a uniform and unambiguous standard, within a climate agreement itself, of what constitutes a valid carbon unit. That standard must not be watered down in the negotiations process, nor should subsequent COPs be entrusted with making post hoc clarifications. Additionally, Basel amplifies the lessons of CITES that a poorly designed and enforced MRV regime, a lack of compliance funding, and a lack of a centralized noncompliance mechanism are anathema to a well-functioning MEA.

Clearly, no MEA is perfect, given the immensity of the challenges they are designed to address. Any international climate change treaty, however, has the benefit of hindsight based on these three MEAs, and potentially of a TWN provision designed according to the lessons offered here.

Appendix

	Montreal Protocol	CITES	Basel Convention
Entry into force	1989, upon at least 11 Parties' ratification, representing at least 2/3 of global ODS consumption.	1974, upon the ratification of 10 Parties.	1989, upon the ratification of 20 Parties.
Entry-into-force economics	Significant: created a cartel of countries inside the Protocol, leaving an insufficient market share outside the treaty for would-be "lone rangers."	Not significant, though the United States, as the first to ratify, is a significant importer.	Not significant, though the United States remains a non-Party.
Number of Parties	196 (universal)	179	179
The treaties' regulated "stuff," and their qualities	Ozone-depleting substances: Limited number of product streams and well-known producers and technology make enforcement simpler.	Endangered flora and fauna, and their byproducts (e.g., timber or ivory carvings): Virtually unlimited product streams increases difficulty of oversight, while the science of extinction and species health also increases the difficulty in obtaining and assessing data.	Hazardous waste: Waste is considered valuable in developing nations, thus complicating enforcement of environmental standards. Waste streams also difficult to quantify, due to illegal shipping or due to "grey areas" such as E-waste or ship dismantling.

	Montreal Protocol	CITES	Basel Convention
Effectiveness and strengths of TWN provisions in upholding treaty aims	Very effective, due to: strong entry-into-force provision created incentive to ratify; equal control measures and reporting requirements imposed upon non-Parties as Parties; Multilateral Fund; and rigorous noncompliance regime.	Moderately effective, due to: equivalent standards required of non-Parties, enforcement by Parties, moderate MRV oversight by Secretariat and the Standing Committee, NGO involvement, and trade suspensions for noncompliant non-Parties.	Non-Party trading agreements with non-Parties must be recorded with the Secretariat, and some Parties heed the requirement to "not derogate from the environmentally sound management" of such non-Party trading.
Weaknesses of TWN provisions in upholding treaty aims	No incentives for "free riders," "lone rangers," or consumer-only developing nations to participate in trade. (This problem solved however by the "cartel" entry-into-force economics and the Multilateral Fund for developing nations.)	Inadequate MRV regime with poor reporting rates, inadequate domestic implementation of TWN provisions, uneven compliance mechanisms, and non-Party enforcement is left entirely to the Parties.	Vague environmental standards are difficult to verify and enforce, there is little compliance mechanism, MRV is poor, standards are left entirely to the Parties to uphold, and the Secretariat has no oversight or enforcement powers.
MRV regime	Rigorous, with data submission reviewed by Implementation and Compliance Committee. MRV oversight assisted by the limited use and production facilities of ODS.	Improving, but timely and complete submission of reports remains a problem. No reporting required of non-Parties.	Poor, with fewer than 50% of Parties properly submitting the required reports, and with no coherent method or mechanism to oversee trade.
Volume of trade with non-Parties	Provision only utilized once, when Colombia was unable to ratify the Protocol in 1992.	No longer significant non-Party trading given high number of Parties. However, high levels of non-Party trading in the first 15 years of the treaty. Recent non-Party trade with Haiti significantly decreased post-trade suspension.	Significant in terms of U.S. (non-Party) export of waste to Canada and Mexico. Otherwise insignificant.
Hard v. soft ban	Hard ban.	Technically soft, but often hard in practice by the Parties (e.g., United States and EU).	Soft.
Reporting requirements	Strictly enforced annual reporting of all production, imports, and exports, with a phased-in requirement to report imports containing ODS.	Moderately enforced annual and biennial reporting. Not required of non-Parties, who need only register competent authorities every two years.	Annual trade reports required, as are any bilateral or multilateral trade agreements with non-Parties.
Funding stream for compliance	Significant under the well-funded Multilateral Fund, considered an essential part of the Protocol's success.	Moderate and uneven within the treaty, primarily aimed at technical assistance for domestic implementation. (Significant funding for NGO participation.)	Virtually none.
Noncompliance mechanism	Rigorous. Overseen by the Implementation and Compliance Committee, which lends assistance or levies sanctions (via the MOP) based on the data reporting it receives.	Moderate. Administered by the powerful Standing Committee. Trade suspensions are effective for harmful trade, but MRV-related noncompliance is slow to be addressed.	Weak. Take-back provision if trade is not according to terms of contract, and any other noncompliance measures are the responsibility of the Parties to implement domestically.
Frequency of non-Party trade provision use	Infrequent, except when Parties are rendered non-Parties when they are delayed in ratifying Amendments.	Relatively frequent when there is a non-Party with whom to trade, because Parties are responsible for oversight and may generally trade at will with non-Parties.	Infrequent: besides the United States: only four minor bilateral waste trade agreements with non-Parties exist.
Reporting requirements	Strictly enforced annual reporting of all production, imports, and exports, with a phased-in requirement to report imports containing ODS.	Moderately enforced annual and biennial reporting. Not required of non-Parties, who need only register competent authorities every two years.	Annual trade reports required, as are any bilateral or multilateral trade agreements with non-Parties.