

Canada in International Law at 150 and Beyond | Paper No. 10 – February 2018

Canadian Contributions to International Environmental Law on Chemicals and Wastes The Stockholm Convention as a Model

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CIGI Masthead

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About the Series

Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's past, present and future in international law and governance. "Canada in International Law at 150 and Beyond/Canada et droit international : 150 ans d'histoire et perspectives d'avenir" is a series of essays, written in the official language chosen by the authors, that provides a critical perspective on Canada's past and present in international law, surveys the challenges that lie before us and offers renewed focus for Canada's pursuit of global justice and the rule of law.

Topics explored in this series include the history and practice of international law (including sources of international law, Indigenous treaties, international treaty diplomacy, subnational treaty making, domestic reception of international law and Parliament's role in international law), as well as Canada's role in international law, governance and innovation in the broad fields of international economic, environmental and intellectual property law. Topics with an economic law focus include international trade, dispute settlement, international taxation and private international law. Environmental law topics include the international climate change regime and international treaties on chemicals and waste, transboundary water governance and the law of the sea. Intellectual property law topics explore the development of international IP protection and the integration of IP law into the body of international trade law. Finally, the series presents Canadian perspectives on developments in international human rights and humanitarian law, including judicial implementation of these obligations, international labour law, business and human rights, international criminal law, war crimes, and international legal issues related to child soldiers. This series allows a reflection on Canada's role in the community of nations and its potential to advance the progressive development of global rule of law.

"Canada in International Law at 150 and Beyond/Canada et droit international : 150 ans d'histoire et perspectives d'avenir" demonstrates the pivotal role that Canada has played in the development of international law and signals the essential contributions it is poised to make in the future. The project leaders are Oonagh Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); Valerie Hughes, CIGI senior fellow, adjunct assistant professor of law at Queen's University and former director at the World Trade Organization; and Mark Jewett, CIGI senior fellow, counsel to the law firm Bennett Jones, and former general counsel and corporate secretary of the Bank of Canada. The series will be published as a book entitled *Reflections on Canada's Past, Present and Future in International Law/Réflexions sur le passé, le présent et l'avenir du Canada en matière de droit international* in spring 2018.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

About the Author

Anne Daniel held the position of general counsel with the Constitutional, Administrative and International Law Section of the Department of Justice Canada. She advised on multilateral environmental agreements (MEAs) for approximately 25 years, primarily in the areas of mercury, chemicals, hazardous wastes, ocean dumping, biodiversity, biosafety, genetic resources, air pollution, liability, compliance and UN Environment Programme governance issues. She has participated on numerous Canadian delegations as head or alternate head of delegation, as negotiator and as adviser, including for several MEA negotiations. She has chaired many UN meetings and negotiating groups, including for compliance mechanisms, and has served as a chair or member of treaty compliance committees. Anne was elected chair of the Stockholm Convention's first Effectiveness Evaluation Committee.

Anne was the winner of the Canadian Council on International Law's 2017 Public Sector Lawyer Award in recognition of significant contribution or service in the field of public international law by a public sector lawyer.

Anne has published in a number of areas of international environmental law, including compliance, liability, ocean dumping, chemicals, genetic resources and biosafety. She has delivered MEA negotiating and chairing training, both internationally and to Government of Canada colleagues. She has lectured at a number of law schools, including Kobe University, and the University of Ottawa, where she obtained her master of laws. She also taught an intensive course on MEA negotiation and implementation at her first alma mater, the University of Windsor Law School.

Acronyms and Abbreviations

| | |
|-----------|--|
| AMAP | Arctic Monitoring and Assessment Programme |
| CLRTAP | Convention on Long-range Transboundary Air Pollution |
| CFCs | chlorofluorocarbons |
| CMP | Chemicals Management Plan |
| COP | Conference of the Parties |
| CRC | Chemical Review Committee |
| GMP | Global Monitoring Programme |
| HFCs | hydrofluorocarbons |
| ICC | Inuit Circumpolar Council |
| IISD | International Institute for Sustainable Development |
| INAC | Indigenous and Northern Affairs Canada |
| INC | Intergovernmental Negotiating Committee |
| JUSSCANNZ | Japan, the United States, Switzerland, Canada, Australia, Norway and New Zealand |
| LBI | legally binding instrument |
| MEAs | multilateral environmental agreements |
| OECD | Organisation for Economic Co-operation and Development |
| POPs | persistent organic pollutants |
| POPRC | Persistent Organic Pollutant Review Committee |
| SAICM | Strategic Approach to International Chemicals Management |
| UNECE | United Nations Economic Commission for Europe |
| UNEP | United Nations Environment Programme |
| WEOG | Western European and Others Group |

The burden of disease related to exposure to hazardous chemicals is significant worldwide, but more severe in non-OECD [Organisation for Economic Co-operation and Development] countries where chemical safety measures are still insufficient.

— “OECD Environmental Outlook to 2050”¹

The release of chemicals continues to affect all aspects of natural resources including the atmosphere, water, soil and wildlife...Environmental effects of the chemical intensification of the national economies are furthermore compounded by the transboundary movement of chemicals through the air or water.

— United Nations Environment Programme (UNEP), *Global Chemicals Outlook*²

Introduction

While chemicals are relied on daily to make society more comfortable and productive, there is a need to protect human health and the environment from their possible harmful effects. The world has often chosen multilateral environmental agreements (MEAs) as the tool to do so.

The current global chemicals and waste MEAs should be understood in the context of the last 45 years of intensive treaty making since the 1972 United Nations Conference on the Human Environment in Stockholm (the Stockholm Conference) which has resulted in a large number of bilateral, regional and global environmental agreements. These agreements, many of which have become increasingly regulatory in nature, have also targeted issues such as biological diversity and climate change.

This paper discusses Canadian contributions to international environmental law in its broadest sense in the context of the chemical and waste MEAs, focusing primarily on contributions to the development and implementation of the Stockholm

1 OECD, “OECD Environmental Outlook to 2050: The Consequences of Inaction”, (March 2012) at 4, “Key Facts and Figures”, online: <www.oecd.org/env/indicators-modelling-outlooks/49910023.pdf>.

2 UNEP, *Global Chemicals Outlook: Towards Sound Management of Chemicals. Synthesis Report for Decision-Makers* (Nairobi, Kenya: UNEP, 2012) at 19, online: <www.unep.org/chemicalsandwaste/what-we-do/policy-and-governance/global-chemicals-outlook>.

Convention on Persistent Organic Pollutants³ (the Stockholm Convention). Contributions are those typical at each stage of the negotiating process: the pre-negotiation phase, to develop a common scientific understanding of the environmental threat; the launch of treaty negotiations; the conduct of those negotiations; and post-negotiation international implementation.⁴ The paper then assesses current challenges and identifies opportunities for leadership in the future.

While the paper's focus is the Stockholm Convention as a model of what Canada might achieve, the paper also provides more limited examples of Canadian contributions in other chemicals and waste treaties before drawing some broader conclusions.

The major contribution to international environmental law and diplomacy made by Canadian Maurice Strong needs to be acknowledged. Strong was secretary-general of both the 1972 Stockholm Conference on the Human Environment and the 1992 UN Conference on Environment and Development, and the first head of UNEP from 1972 to 1976. Both the conferences and UNEP spurred on numerous international instruments.⁵ In many ways, Strong's leadership contributed the genesis at the macro level of much of international environmental law globally.⁶

Assessing Canadian Contributions to the Stockholm Convention

The Stockholm Convention is a global treaty that eliminates and restricts the intentional production, use, import and export of listed chemicals, beginning with the 12 original "dirty dozen" in the 2001 treaty and now regulating close to 30 chemicals.⁷ POPs are persistent organic pollutants: industrial chemicals or pesticides that are toxic, persistent in the environment, bioaccumulate, and travel long-range before being deposited in colder climates (the Arctic in particular).⁸ The convention provides a procedure for nominating new chemicals for listing to the convention, and a process that the standing Persistent Organic Pollutant Review Committee (POPRC) must follow in doing so. The convention allows for the possibility of exemptions and acceptable purposes for chemicals that are proposed for listing but have important uses for which no alternative chemical is available, or to allow time for phase-out.

The convention also regulates unintentional by-product emissions, requiring action plans and regulatory controls for sources listed in Annex C,⁹ and takes a life-cycle approach by also addressing POP wastes,¹⁰ linking its provisions with the rules for transboundary shipments of hazardous wastes under the Basel Convention.¹¹ It requires

3 *Stockholm Convention on Persistent Organic Pollutants*, 22 May 2001, 2256 UNTS 119, 40 ILM 532 (entered into force 17 May 2004) [*Stockholm Convention*].

4 Fen Osler Hampson & Michael Hart, *Multilateral Negotiations: Lessons from Arms Control, Trade, and the Environment* (Baltimore, MD: Johns Hopkins University Press, 1999) at 23, 345 (identifying facilitative factors in various stages of the negotiating process that contribute to successful outcomes). On leadership contributions in the mercury negotiations, see Jessica Templeton & Pia Kohler, "Implementation and Compliance under the Minamata Convention on Mercury" (2014) 23:2 RECIEL 211.

5 Jacqueline Peel, "International Law and the Protection of the Global Environment" in Regina S Axelrod & Stacy D VanDeveer, eds, *The Global Environment: Institutions, Law, and Policy*, 4th ed (Los Angeles, CA: Sage Publications, 2015) 53 at 59.

6 John Ralston Saul, "Maurice Strong: Environmental movement loses a founding father", *The Globe and Mail* (30 November 2015, updated 25 March 2017), online: <www.theglobeandmail.com/news/world/maurice-strong-environmental-movement-loses-a-founding-father/article27524715/>; Sam Roberts, "Maurice Strong, Environmental Champion, Dies at 86", *The New York Times* (1 December 2015), online: <www.nytimes.com/2015/12/02/world/americas/maurice-strong-environmental-champion-dies-at-86.html?mcubz=0>.

7 *Stockholm Convention*, *supra* note 3, art 3. For a useful overview of the convention, see David Leonard Downie, "Global POPs Policy: The 2001 Stockholm Convention on Persistent Organic Pollutants" in David Leonard Downie & Terry Fenge, eds, *Northern Lights against POPs: Combatting Toxic Threats in the Arctic* (Montreal, QC: McGill-Queen's University Press, 2003) 133 at 133; for a useful analysis of some of the underpinning concepts, see Nigel Banks, "The Stockholm Convention in the Context of International Environmental Law" in Downie & Fenge (*ibid*) 160 at 160.

8 See *Stockholm Convention*, *supra* note 3, Annex D, for the criteria for the listing of a chemical as a POP. See David P Stone, *The Changing Arctic Environment: The Arctic Messenger* (New York, NY: Cambridge University Press, 2015) at 113-15 for an explanation of the grasshopper effect by which pollutants travel to the Arctic.

9 *Stockholm Convention*, *supra* note 3, art 5.

10 *Ibid*, art 6.

11 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, 22 March 1989, 1673 UNTS 57, Can TS 1992 No 19 (entered into force 5 May 1992, ratification by Canada 28 August 1992).

parties to develop national implementation plans and to report on their actual implementation.¹²

The Conference of the Parties (COP) is required to establish a compliance committee, as soon as practicable, and to conduct periodic evaluations of the effectiveness of the Stockholm Convention based on global monitoring data, national reports and compliance information.¹³ It also establishes a financial mechanism to provide developing countries and economies in transition with financial resources to “assist in their implementation of the Convention.”¹⁴

So how did Canada contribute to the creation of this piece of international environmental law?

Developing a Common Scientific Understanding of the Environmental Threat

The negotiation of a global MEA is often spurred on by a crisis,¹⁵ which can occur through science identifying a problem.¹⁶ Starting in the mid-1980s, Canadian scientists in the then Department of Indian and Northern Affairs (now Indigenous and Northern Affairs Canada) began uncovering in blood samples of local populations evidence of organochlorines in the Arctic environment that had never been used there.¹⁷ Monitoring data showed that Canadian Indigenous people had among the highest levels of POPs in their blood among anyone in the world.¹⁸ Arctic ecosystems are particularly vulnerable to POPs because these chemicals are transported long distances in air currents, then descend into colder environments and are absorbed into those ecosystems, bioaccumulating up the food chain.¹⁹ This situation is particularly difficult for Indigenous peoples,

who are “disproportionately affected” because they live off the land for both practical and cultural reasons, eating large mammals, such as caribou, seal and walrus.²⁰ Although during the same time period Swedish scientists were undertaking related work and coming to similar conclusions,²¹ it has been noted that “in Canada more than any other country, the POPs issue has become integrated with more general scientific and political concerns about Arctic environmental contamination and health risks of indigenous peoples.”²²

A 1989 presentation of government research by the Canadian delegation convinced the United Nations Economic Commission for Europe’s (UNECE’s) Working Group on Effects — established under the Convention on Long-Range Transboundary Air Pollution (CLRTAP)²³ — to include hazardous air pollutants in its work plan, and to request Canada to supervise the preparation of a more extensive report on POPs. In 1990, as a result of this report and arguments by Canada and Sweden for further action under the CLRTAP, the Executive Body of the CLRTAP requested that Canada and Sweden co-lead a task force to prepare a more detailed report on POPs in the CLRTAP region and to develop options for international action.²⁴

Simultaneously, the Arctic Environmental Protection Strategy, adopted by Arctic ministers in 1991, initiated the Arctic Monitoring and Assessment Programme (AMAP) “to monitor the levels of pollutants and to assess their effects in the Arctic environment.”²⁵ A report prepared by Canada and Sweden in 1992 for AMAP provided benchmarks for the levels of these chemicals in Arctic inhabitants.²⁶

By the mid-1990s, Canadian scientists were convinced that POPs from foreign sources

12 *Stockholm Convention*, *supra* note 3, arts 7, 15.

13 *Ibid*, arts 16–17.

14 *Ibid*, art 13(6).

15 Hampson & Hart, *supra* note 4 at 272–73.

16 Henrik Selin & Noelle Eckley, “Science, Politics, and Persistent Organic Pollutants: The Role of Scientific Assessments in International Environmental Co-operation” (2003) 3:1 *Intl Environmental Agreements* 17 at 38.

17 Stone, *supra* note 8 at 111–12.

18 Henrik Selin, “Regional POPs Policy: The UNECE CLRTAP POPs Protocol” in Downie & Fenge, *supra* note 7 at 113 [Selin, “Regional POPs Policy”].

19 Russ Shearer & Siu-Ling Han, “Canadian Research and POPs: The Northern Contaminants Program” in Downie & Fenge, *supra* note 7 at 42–43.

20 See Sheila Watt-Cloutier, *The Right to Be Cold* (Toronto, ON: Penguin, 2015) at 144–45 for an excellent description of this “dilemma.”

21 *Ibid* at 139; Selin, “Regional POPs Policy”, *supra* note 18 at 111.

22 Henrik Selin, “Global Politics and Policy on Hazardous Chemicals” in Axelrod & VanDeveer, *supra* note 5 at 269 [Selin, “Global Politics”].

23 *Convention on Long-Range Transboundary Air Pollution*, 13 November 1979, 1302 UNTS 217, 18 ILM 1442 (entered into force 16 March 1983).

24 Selin, “Regional POPs Policy”, *supra* note 18 at 114.

25 Lars-Otto Reiersen, Simon Wilson & Vitaly Kimstach, “Circumpolar Perspectives on Persistent Organic Pollutants: The Arctic Monitoring and Assessment Programme” in Downie & Fenge, *supra* note 7 at 61.

26 Shearer & Han, *supra* note 19 at 42.

were ending up in the Arctic,²⁷ and their 1997 report substantiated the theory.²⁸ Similarly, AMAP's report delivered at a ministerial meeting in June 1997 was a key contribution to global understanding of these issues.²⁹

Leadership in the Launch of Negotiations

The work of the UNECE task force on POPs, completed in 1994, confirmed previous Canadian and Swedish findings, including identifying the atmosphere as the primary medium for the transport of emissions,³⁰ and concluded both that long-range transport required international regulation and that the CLRTAP was best placed to undertake such regulation.³¹ The Executive Body established an ad hoc preparatory working group on POPs, chaired by INAC's director of the Northern Contaminants Program, David Stone,³² to develop more detailed policy options on how to proceed. This work generated a draft protocol text, which led to negotiations being launched on a regional protocol, developed between January 1997 and February 1998,³³ which Canada was the first to ratify. The protocol paved the way for the launch of discussions on POPs at the global level, which ultimately resulted in the Stockholm Convention.³⁴

In 1995, the UNEP Governing Council adopted a decision³⁵ establishing an ad hoc working group to initiate a process to, among other things, consolidate existing information on POPs; analyze realistic response strategies, policies and mechanisms for reducing and/or eliminating

emissions and discharges; and include any information needed for a possible decision on an international legally binding instrument.³⁶ The process was chaired by Canadian John Buccini; one of the working group's meetings was hosted in Ottawa; and Canada was one of the strongest proponents of its work.³⁷ The working group produced a report, unanimously supported by governments and stakeholders, concluding that there was sufficient scientific information on 12 POPs to demonstrate the need for immediate international action. At the 1997 UNEP Governing Council meeting, the negotiating mandate for the global treaty was agreed under Buccini's chairmanship.³⁸

Leadership in the Treaty Negotiation

Leadership in treaty negotiations can take place in many forms,³⁹ and the most visible form for Canada was lending a senior chemicals official to chair the process as a substantial "in-kind" contribution. The Intergovernmental Negotiating Committee (INC), chaired by Buccini, successfully conducted its work through the course of four meetings of five days, and a fifth meeting of six days, the final day needing every one of its 24 hours.

Throughout the negotiations, Buccini aimed to maintain his role as neutral facilitator, but worked to improve the dialogue among negotiators through clear communication, transparency and a step-wise approach in developing convention text.⁴⁰ Through his leadership and that of the secretariat staff, the international community was able to come to closure on a binding agreement that was comprehensive and highly regulatory in nature.⁴¹

27 Stone, *supra* note 8 at 116.

28 Shearer & Han, *supra* note 19 at 45.

29 Stone, *supra* note 8 at 141.

30 Selin, "Regional POPs Policy", *supra* note 18 at 112–14.

31 *Ibid* at 116.

32 Stone was also chairing AMAP at the time: Reiersen, Wilson & Kimstach, *supra* note 25 at 68.

33 Selin, "Regional POPs Policy", *supra* note 18 at 116–21; UNECE Protocol on Persistent Organic Pollutants, 37 ILM (1998) 505; (in force 23 October 2003). Protocol to the 1979 Convention on Long Range Transboundary Air Pollution on Persistent Organic Pollutants (POPs), 24 June 1998, [2004] OJ, L 81/37, 37 ILM 505 (entered into force 23 October 2003).

34 Stone, *supra* note 8 at 142.

35 UNEP, *Governing Council Decision 18/32: Persistent Organic Pollutants*, 25 May 1995, online: < http://wedocs.unep.org/bitstream/handle/20.500.11822/17274/95_GC18_report.pdf?sequence=22&isAllowed=y > at 107.

36 John Anthony Buccini, "The Long and Winding Road to Stockholm: The View from the Chair" in Downie & Fenge, *supra* note 7 at 225.

37 *Ibid* at 233.

38 UNEP, *Governing Council Decision 19/13C*, 7 February 1997.

39 Hampson & Hart, *supra* note 4 at 42–43, 354–55; Templeton & Kohler, *supra* note 4.

40 A text was initially requested from the secretariat for adoption at INC2 as the basis of further work. On the results of INC2, see Anne Daniel, "A Global POPs Treaty: Proposed Actions to Control Harmful Chemicals" (1999) 3 *Can Intl Lawyer* 175 at 176. At INC4, the chair was asked to prepare a chair's text to facilitate the final negotiating round: Buccini, *supra* note 36 at 246, 253.

41 See Buccini, *supra* note 36, for a detailed recounting of the process leading up to the negotiations, as well as the negotiations themselves, and for the lessons he distilled from having chaired the process.

But there were other contributions made by Canada during the negotiations. Canada, out of concern to get negotiations under way as soon as possible, hosted the first INC in Montreal.⁴² Canada was also part of the “POPs club,” those countries that were publicly acknowledged for their voluntary contributions to the conduct of the Stockholm negotiations and related intersessional meetings.⁴³ Throughout the negotiations, Canada had a strong delegation, with experts and representatives from many government departments, co-led by Environment Canada and the Department of Foreign Affairs.

An important development was that the president of the Inuit Circumpolar Council (ICC), Canadian Sheila Watt-Cloutier, engaged significantly in the negotiations on behalf of the ICC as an observer organization. She participated at all of the INCs and made impassioned interventions on behalf of the Inuit.⁴⁴ During a reception at the second meeting of the INC (INC2), she presented a carving by Inuit artist Lucy Meeko of an Inuit mother and child to the executive director of UNEP, who promptly turned it over to the chair, who set it on the negotiating podium, where it has remained thereafter at every INC and COP as a symbol of what the Stockholm Convention is trying to achieve.⁴⁵ Throughout the negotiations, both the negotiating position and the moral authority of the Canadian delegation were strengthened by intensive consultations with the Inuit and participation by Inuit representatives both on and off the Canadian delegation.⁴⁶

Canada also led in engagement with the thorniest issues in the negotiations, such as the question of a financial mechanism for the Stockholm Convention. To help spur on the negotiations at INC4, Canada announced the establishment in the World Bank of the CDN\$20-million Canada POPs Fund to assist developing countries to build capacity to reduce or eliminate the release of POPs, focusing on implementation of the Stockholm Convention.⁴⁷

From the year 2000 to December 31, 2008, it funded 88 projects in more than 25 countries, in addition to regional and global projects, ranging from baseline studies and blood monitoring work to the testing of POPs alternatives for termite control.⁴⁸ That contribution was unfortunately not followed by major contributions from other governments, but it did provide a boost to the negotiations in general, and to the seemingly intractable negotiation on the financial mechanism for the convention in particular. A critical informal meeting on the financial mechanism before INC5 arranged by the INC chair also contributed significantly to breaking the logjam over the balance of responsibilities for the financing of implementation under the Stockholm Convention.⁴⁹

Canada also proposed inclusion of an innovative provision requiring periodic evaluations of the effectiveness of the Stockholm Convention, based on global monitoring data, national reports and compliance information.⁵⁰ This proposal had arisen out of concerns about how to measure progress on whether the convention would be successful in protecting human health and the environment from POPs in the future.⁵¹

To help resolve outstanding issues among the Western European and Others Group (WEOG) region, Canada hosted a meeting in Montebello before the final negotiating round to smooth over differences on key points.⁵²

The negotiations successfully concluded a global treaty in December 2000.

John Buccini chaired the preparatory meeting for the diplomatic conference, held in Sweden in May 2001, during which a deadlock developed on the interim work program. A Canadian proposal in the closing minutes of the preparatory meeting provided the compromise that allowed the work plan for the pre-entry into force

42 *Ibid* at 235.

43 *Ibid* at 240.

44 Watt-Cloutier, *supra* note 20 at 136; Stone, *supra* note 8 at 146.

45 Watt-Cloutier, *supra* note 20 at 136.

46 *Ibid* at 157.

47 Montreal Protocol/POPs Unit, Environment Department *Persistent Organic Pollutants: Backyards to Borders* (Washington, DC: World Bank: 2009) at 12.

48 World Bank, *Persistent Organic Pollutants, Canada, and the World Bank* (Washington, DC: World Bank, 2009) at 4, online: <http://siteresources.worldbank.org/INTPOPS/Publications/21314961/CanadaPOPs_brochure_041607_web.pdf>.

49 Buccini, *supra* note 36 at 246.

50 Environment Canada, UNEP & Joensuu University, *Multilateral Environmental Agreement Negotiator's Handbook*, 2nd ed (Joensuu: Joensuu University Department of Law, 2007) at 6–16, online: <http://staging.unep.org/delc/portals/119/MEAs_Negotiators_Handbook.pdf>.

51 Stone, *supra* note 8 at 150–51.

52 Buccini, *supra* note 36 at 146–47.

period — the key item to maintain momentum prior to the Stockholm Convention entering into force — to be agreed. At the diplomatic conference, David Anderson, then minister of the environment for Canada, not only signed but ratified the convention for Canada, making Canada the first state to do so. The domestic political importance of the treaty to Canada was reflected by a ceremony to provide the Canadian delegation with certificates of appreciation from then Prime Minister Jean Chrétien.

Ongoing Implementation Leadership Post-negotiations

Canada went on to chair INC6 and INC7, at which meetings Canada was also elected to chair the legal drafting group. Canada also served as a vice president of the bureau of the COP to the convention between COP5 and the end of COP6, although its chairing of numerous contact groups has brought it into the bureau room for most COPs.

Canada has been a member of the POPRC since its inception, enabling Canada to contribute its expertise in assessing nominated chemicals. Recently, Canada provided guidance through a webinar on how to prepare for meetings of the POPRC. Canada was also an active contributor to the expert group that developed initial guidance on best available technology and best environmental practices for article 5 (by-product emissions).

One of Canada's priority issues for the Stockholm Convention, as a recipient of POPs in the Canadian Arctic from foreign sources, has been the development of compliance procedures and mechanisms, which are required under the convention.⁵³ Canada has chaired the compliance negotiations since their inception, except for COP7,⁵⁴ and while compromise packages have been proposed, including by the COP6 president, due to consensus decision-making rules under the Stockholm Convention, a small number of countries have been able to block their adoption at each COP.⁵⁵

Canada has also been active as a member of the Global Monitoring Programme (GMP) of the

Stockholm Convention, and in developing the effectiveness evaluation framework adopted at COP6. At COP7, Canada was elected to the first effectiveness evaluation committee, and then to chair it, and had its GMP member nominated to represent that group on the committee. The committee's report, which has for the first time provided critical baseline data on the full range of convention issues, was welcomed by COP8.

Current Circumstances and Challenges

The 2017 effectiveness evaluation report⁵⁶ provides up-to-date baseline information (where available) and analysis of progress under the Stockholm Convention in meeting the convention's objective to protect human health and the environment from POPs. According to the report, the Stockholm Convention provides "an effective and dynamic framework to regulate POPs throughout their lifecycle."⁵⁷ However, a key issue identified in the report is inadequate implementation of the convention, two key areas being the failure to submit national reports⁵⁸ and the failure to enact implementing legislation specific to the Stockholm Convention.

The report noted that all mechanisms and processes required by the Stockholm Convention to support parties in meeting their obligations have been put in place, with the exception of compliance procedures and mechanisms.⁵⁹ The

53 *Stockholm Convention*, *supra* note 3, art 17.

54 At COP6 and COP8, Canada co-chaired with Colombia and Zambia. The author chaired these negotiations.

55 Templeton & Kohler, *supra* note 4 at 213, 218–20.

56 *Effectiveness evaluation of the Stockholm Convention on Persistent Organic Pollutants pursuant to Article 16: Executive summary of the report on the effectiveness evaluation of the Stockholm Convention on Persistent Organic Pollutants*, UN Doc UNEP/POPS/COP.8/22/Add.1 (2016) [Executive Summary of Effectiveness Evaluation 2016]. See also UNEP, *Report on the effectiveness evaluation of the Stockholm Convention on Persistent Organic Pollutants*, UN Doc UNEP/POPS/COP.8/INF/40 (2017); UNEP, *Experience in using the effectiveness evaluation framework and recommendations for future development*, UN Doc UNEP/POPS/COP.8/INF/41 (2017) (full report and review of the evaluation framework, respectively), all online: <<http://chm.pops.int/TheConvention/ConferenceoftheParties/Meetings/COP8/tabid/5309/Default.aspx>>. The author chaired this committee.

57 Executive Summary of Effectiveness Evaluation 2016, *supra* note 56 at para 20.

58 *Ibid* at paras 14, 15, 21, 149–56.

59 *Ibid* at para 21.

failure to adopt a compliance mechanism has meant that promotion of improved compliance and implementation has been neglected.⁶⁰ There is no intersessional body to monitor implementation issues, either more broadly — as the Basel Convention’s Open-ended Working Group, the United Nations Framework Convention on Climate Change’s and the Convention on Biological Diversity subsidiary bodies on implementation do, or — more narrowly — as the traditional MEA compliance mechanisms approach the review of systemic issues of non-compliance. The committee’s recommendation that “implementation of the Convention needs to be closely monitored and improved during the intersessional period between meetings of the Conference of the Parties”⁶¹ was suggestive of a governance discussion that did not receive attention at COP8. Finally, compliance data required for the effectiveness evaluation, as required under article 16, is unavailable.⁶²

The improvement of national reporting, tackled by most MEA compliance mechanisms as an issue of both individual and systemic non-compliance, in the absence of such a mechanism, is conferred on the secretariat, rather than on the parties, where it belongs.⁶³

Monitoring results indicate that regulations targeting POPs are succeeding in reducing levels of POPs in both humans and the environment. For the initial 12 POPs listed in the original treaty, concentrations measured in the air and in human populations have decreased and continue to decrease due to regulations that predated the Stockholm Convention and are now incorporated in it. For chemicals listed since the entry into force of the convention, concentrations are beginning to show decreases, although in a few instances

stable or increasing levels have been observed. The GMP established under the Stockholm Convention is one of its true successes, and the report recommends that global monitoring of POPs should be sustained in the long term to confirm decreasing concentrations of the original 12 legacy POPs in humans and the environment, and to identify trends in the concentrations of newly listed POPs post-entry into force of the convention.⁶⁴

On other governance issues, the report notes that the synergies process — which has involved a merger of the Basel, Rotterdam and Stockholm secretariats, as well as back-to-back COPs — can have an influence on the effectiveness of the Stockholm Convention, and recommended that the review of the synergies arrangements approved at COP8 should be factored into future effectiveness evaluations.⁶⁵ The approach since 2013 of back-to-back COPs has resulted in fewer days available to discuss the technical issues of each treaty, the implications of which the recent review did not address.⁶⁶ Further, not only has each COP experienced trading among issues within a COP, now a party can attempt to trade issues of one COP at the end of the two-week meeting with any outstanding issue from another COP, which becomes even more interesting when each COP has different voting rules for different substantive matters.⁶⁷

The report concluded that with the listing of 14 new substances (at the time of its writing), the process of listing can be considered successful, but recommended that parties and observers provide timely and adequate information during the listing process.⁶⁸

60 *Ibid* at paras 157–61. For the value of a compliance mechanism in MEAs, see Jan Klabbers, “Compliance Procedures” in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* (Oxford, UK: Oxford University Press, 2007) 995 at 1003.

61 Executive Summary of Effectiveness Evaluation 2016, *supra* note 56 at para 183.

62 *Ibid* at para 161. See Nils Goeteyn & Frank Maes, “Compliance Mechanisms in Multilateral Environmental Agreements: An Effective Way to Improve Compliance?” (2011) 10:4 Chinese J Intl L 791 at 826.

63 UNEP, *Decision SC-8/17: Reporting pursuant to Article 15 of the Stockholm Convention in Report of the Conference of the Parties to the Stockholm Convention on POPs on the work of its Eighth Meeting*, UN Doc UNEP/POPS/COP.8/32 (2017) at para 6, online: <<http://chm.pops.int/TheConvention/ConferenceoftheParties/Meetings/COP8/tabid/5309/Default.aspx>>.

64 Executive Summary of Effectiveness Evaluation 2016, *supra* note 56 at paras 22, 25–31.

65 *Ibid* at paras 177–78, 182.

66 UNEP, *Reviews of the synergies arrangements for the Basel, Rotterdam and Stockholm conventions, UNEP/POPS: Recommendations resulting from the reviews of the synergies arrangements of the Basel, Rotterdam and Stockholm Conventions and follow-up actions proposed by the Secretariat*, UN Doc UNEP/CHW.13/22/Add.1-UNEP/FAO/RC/COP.8/21/Add.1-UNEP (2016) and UN Doc UNEP/POPS/COP.8/25/Add.1, joint document online: <<http://chm.pops.int/TheConvention/ConferenceoftheParties/Meetings/COP8/tabid/5309/Default.aspx>>.

67 International Institute for Sustainable Development (IISD), “Summary of the Meetings of the Conferences of the Parties to the Basel, Rotterdam and Stockholm Conventions: 4–15 May 2015” (2015) 15:230 Earth Negotiations Bull at 35–37 [2015 Triple-COP Summary], online: <<http://enb.iisd.org/download/pdf/enb15230e.pdf>>.

68 Executive Summary of Effectiveness Evaluation 2016, *supra* note 56 at paras 109–13.

The challenge of consensus decision making for substantive matters other than the adoption of amendments is regularly illustrated by the compliance negotiations, where, as early as COP3, there was consensus among all but three parties. Consensus for substantive decisions will continue to rule until the unlikely event that all parties to the Stockholm Convention agree to remove the brackets on the qualified majority voting rule in the rules of procedure. An alternative that has been suggested could be to develop a practice, as has been done in climate fora, to overrule a single party trying to veto a decision of the governing body, or by amending the agreement to provide for different voting rules, depending on the issue.⁶⁹ A further alternative is to address important substantive matters, such as compliance, through amendments — which require only a three-quarters majority — when consensus cannot be achieved.⁷⁰ The Stockholm Convention has held one vote in its history — to successfully list pentachlorophenol — and, despite only India and Nepal opposing, the mere act of voting was considered controversial by some.⁷¹

The report noted that financial resources provided to date were insufficient to meet the capacity needs of developing countries — a crucial problem that must be ameliorated — and consequently outlined priority funding areas, such as for the elimination of polychlorinated biphenyls and the development of implementing legislation.⁷²

69 Luke Kemp, “Framework for the future? Exploring the possibility of majority voting in the climate negotiations” (2016) 16:5 Intl Environmental Agreements 757.

70 *Stockholm Convention*, *supra* note 3, art 21(3).

71 2015 Triple-COP Summary, *supra* note 67 at 35–36.

72 Executive Summary of Effectiveness Evaluation 2016, *supra* note 56 at paras 138–42.

What Does the Future Hold? Alliances, Roles and Opportunities for Leadership

Canada should continue to engage in the process to refine the effectiveness evaluation framework. Canada’s participation or leadership, or both, in the next committee is also a possibility, keeping in mind that others in JUSSCANNZ⁷³ will likely expect a turn at the table. At a minimum, Canada should be carefully monitoring the secretariat’s tracking of the COP8 outcomes of the committee’s recommendations to ensure that the next committee consolidates the gains made to date.

Canada should continue to play its strong role on the GMP, as this enables it to leverage its national scientific endeavours to ensure that global results are sound. The effectiveness evaluation demonstrated that the Stockholm Convention’s ability to obtain monitoring data is key to measuring whether the convention is effective in protecting human health and the environment from POPs — including protecting Canada’s Arctic Indigenous peoples and environment.

The question of whether the Stockholm Convention needs a standing body to address implementation issues between COPs is an important one. Addressing it requires the leadership to propose such a body in advance of the next COP and to ensure that the standing body is on the agenda for that meeting. While some Stockholm parties might balk at the cost of an additional standing body, the expense could be managed by giving the body a well-defined scope and emphasizing the benefits of focused attention intersessionally on the work of the convention by a body that reports to the COP. Other treaties, such as the Basel Convention and the Montreal Protocol, progress through substantial amounts of intersessional work carried out by standing bodies.

73 A group of developed countries outside the European Union, the acronym derived from its typical members: Japan, the United States, Switzerland, Canada, Australia, Norway and New Zealand. In different fora, other countries may also participate.

While Canada has provided chairing leadership in the development of a compliance mechanism for many years, it may be time to take another approach in order to find a way around the persistent recalcitrance of a small group of parties. If a standing body on implementation does not attract support, another option may be to try to secure a compliance mechanism via an amendment to the Stockholm Convention, which does not require consensus. While certain parties might not ratify the amendment, the majority of parties would benefit from compliance promotion activities, in particular regarding reporting and implementing legislation, and the possibility of financial assistance for participants could prove to be an incentive for all to join.⁷⁴

On the one hand, through the strength of its domestic Chemicals Management Plan (CMP), Canada has contributed significant scientific and risk-management information about substances that have gone through the POPRC process.⁷⁵ On the other hand, to date, Canada has not nominated a substance under the Stockholm Convention. Perhaps it is time for Canada to also demonstrate leadership in this manner, possibly with respect to a chemical that is of particular concern in the Arctic. Canadian members of the POPRC should continue to provide quality scientific advice to the POPRC and to help improve its working practices to enable it to make more robust recommendations. As the POPRC continues to assess substances that are still in commerce, information to support the COP in evaluating risk management, such as the need for specific exemptions and acceptable purposes, will continue to be of particular importance.

The effectiveness evaluation report calls for more information about POPs: their presence in products, their movements and associated releases, ideally to be provided during the

information-gathering stages of the POPRC's work, so that the POPRC can consider whether labelling measures should be part of an amendment package recommended to the COP. The report also calls for the secretariat's completion of draft guidance on labelling, and for collaboration with other fora, such as the voluntary Strategic Approach to International Chemicals Management (SAICM), to continue.⁷⁶ Perhaps the provision of voluntary funding to complete this guidance (on labelling or other means of identification of chemicals in products) in an appropriate manner could be a Canadian contribution.

While Canada has demonstrated huge financial leadership through its Canada POPs Fund and its substantial ongoing contributions to the Stockholm Convention's financial mechanism, the Global Environment Facility (which provides funding to implement MEAs), Canada should consider whether targeted voluntary funding within the convention would be a way to achieve specific outcomes that Canada wishes to see. Alternatively, this could include the provision of technical assistance in the form of training on the Canadian CMP.⁷⁷ Canada could consider providing funding to UNEP's Special Programme, designed to provide institutional strengthening to governments to implement the Basel, Rotterdam, Stockholm and Minamata Conventions, as well as the SAICM.

When Canada's turn comes up in the JUSSCANNZ rotation for a Stockholm bureau seat,⁷⁸ it should be seized with alacrity, especially so for the presidency. But reaching out to other regions of the world — in particular, the current chemicals producers — to share Canadian expertise and experience could help to shape their domestic chemicals management regimes.

Finally, countries such as India and Iran are aware of their non-compliance and have become challenging on other Stockholm fronts, such as listing and finance, and also with respect to the

74 For example, convention guidance to the GEF could be linked to the compliance mechanism, and/or links could be made with UNEP's Special Programme (www.unenvironment.org/explore-topics/chemicals-waste/what-we-do/special-programme). The Special Programme provides support to developing countries and countries with economies in transition to strengthen their institutional capacity at the national level to better implement the Stockholm, Basel, Rotterdam and Minamata Conventions, as well as the Strategic Approach to International Chemicals Management.

75 See e.g. "Call for information and follow-up to the twelfth meeting of the Persistent Organic Pollutants Review Committee", online: <<http://chm.pops.int/TheConvention/POPsReviewCommittee/Meetings/POPRC12/POPRC12Followup/tabid/5339/Default.aspx>>.

76 Executive Summary of Effectiveness Evaluation 2016, *supra* note 56 at paras 184–85; SAICM, online: <www.saicm.org/>.

77 Rick Smith, "Five Years of Gold-Star Chemicals Management", *Hill Times* (10 August 2011), online: <<http://environmentaldefence.ca/2011/08/10/five-years-of-gold-star-chemicals-management/>>.

78 Canada's region, the WEOG, provides nominations for relevant offices, with bureau seats split between the European Union and JUSSCANNZ. Japanese nominations are through the Asia-Pacific region.

Basel and Rotterdam Conventions.⁷⁹ This has arisen because while the three COPs meet sequentially over a two-week period every two years, all key decisions for each COP tend to be decided on the final night, encouraging complex cross-treaty trading. Canada could consider a better strategy for bringing these countries into the fold.

A Brief Snapshot of Canadian Contributions to the Other Chemical and Waste MEAs

The 1972 London Convention⁸⁰ arose from concerns about the impact of more than 100 years of industrialization, which had led to frequent dumping and the incineration at sea of wastes and other matter.⁸¹ At the second meeting of the Intergovernmental Working Group on Marine Pollution, hosted by Canada, the secretary-general of the Stockholm Conference, Maurice Strong, stated that there was no longer a need to await the results of “painstaking scientific research; they already knew enough to act.”⁸² During the 1990s, Canada was actively engaged in the negotiations to develop the 1996 Protocol⁸³

as a stronger replacement for the 1972 London Convention. Between 2011 and 2013, Canada was part of a small group of countries that met informally to develop an extensive package of amendments to regulate marine geo-engineering under the 1996 Protocol and to further address ocean fertilization.⁸⁴ Canada has provided long-standing leadership in the London Protocol and Convention, having chaired (more than once) the governing bodies, the Scientific Groups and the Compliance Group. Canada chaired negotiations of the compliance procedures, led work on technical guidelines and led or served on many intersessional correspondence groups. Canada also proposed the development of a strategic plan for the protocol, and co-chaired negotiations when it was adopted in 2016.

Canada played a significant role in the development of the Montreal Protocol.⁸⁵ The link between chlorofluorocarbons (CFCs) and the depletion of the earth’s protective ozone layer was first identified in the 1970s, and, in 1977, UNEP convened a conference at the request of the countries, including Canada, that had unilaterally banned CFCs in aerosols.⁸⁶ That conference’s World Plan of Action on the Ozone Layer outlined research needs on the ozone layer.⁸⁷ In 1981, the UNEP Governing Council convened an ad hoc working group of legal and technical experts to begin work on a framework convention.⁸⁸ In 1983, the Toronto Group (named after the site of its first meeting and consisting of Canada, Finland, Norway, Sweden, Switzerland and, later, the United States) recommended a global ban on nonessential uses of CFC aerosol sprays and proposed that a separate regulatory protocol be developed and adopted simultaneously with the framework convention.⁸⁹ Because a number of European producers of CFCs favoured no more

79 Iran noted its non-compliance during the meetings of the contact group on compliance, co-chaired by the author at COP8. For interesting insights into the complexity of the final night of a triple-COP, see 2015 Triple-COP Summary, *supra* note 67 at 235–37.

80 *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 29 December 1972, 1046 UNTS 138, CTS 1979 No 36, 2611 ILM 1358 (entered into force 17 December 1975).

81 David VanderZwaag & Anne Daniel, “International Law and Ocean Dumping: Steering a Precautionary Course Aboard the 1996 London Protocol, but Still an Unfinished Voyage” in Aldo Chircop, Ted L McDorman & Susan J Rolston, eds, *The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnson* (Leiden, Switzerland: Martinus Nijhoff Publishers, 2009) 515.

82 UN Conference on the Human Environment, *Report of the Intergovernmental Working Group on Marine Pollution on its Second Session*, UN Doc A/CONF. 48/IWGMPII/5 (1971) at para 5, online: <www.imo.org/en/KnowledgeCentre/ReferencesAndArchives/IMO_Conferences_and_Meetings/London_Convention/Related1972StockholmConferenceDocuments/Documents/A_CONF_48_IWGMPII_5_eng.pdf>.

83 *1996 Protocol to the London Convention 1972*, 7 November 1996, CTS 2006 No 5, 36 ILM 505 (entered into force 24 March 2006) [London Protocol].

84 Along with the United Kingdom, the Netherlands, Norway, Germany, Australia, the Republic of Korea and, later, Nigeria.

85 *Montreal Protocol on Substances that Deplete the Ozone Layer* 16 September 1987, 1522 UNTS 3, CTS 1989 No 142, 26 ILM 1550 (entered into force 1 January 1989).

86 Scott Barrett, *Environment and Statecraft: The Strategy of Environmental Treaty-Making* (Oxford, UK: Oxford University Press, 2003) at 223.

87 Peter M Morrisette, “The Evolution of Policy Responses to Stratospheric Ozone Depletion” (1989) 29 *Nat Resources J* 793, online: <www.ciesin.org/docs/003-006/003-006.html>.

88 Hampson & Hart, *supra* note 4 at 259.

89 O Yoshida, *The International Legal Regime for the Protection of the Stratospheric Ozone Layer* (The Hague: Kluwer Law International, 2001) at 49.

than a 30 percent cut in non-essential aerosol use of CFCs, agreement to a protocol could not be reached at that time.⁹⁰ However, at the time of adoption of the framework 1985 Vienna Convention for the Protection of the Ozone Layer,⁹¹ the Toronto Group secured a resolution that committed to the resumption of negotiations on a legally binding control protocol within two years, and the Montreal Protocol was subsequently quickly negotiated between December 1986 and September 1987.⁹² Ironically, the most damning science and attendant heightened public awareness came after the original protocol was developed, which resulted in a much stronger regime in terms of phase-outs of CFCs and other chemicals, and ensured developing country buy-in by establishing the Multilateral Fund to assist developing countries in meeting their Protocol obligations.⁹³

Canada also played a leadership role in the development of the 2016 amendments to regulate hydrofluorocarbons (HFCs) as part of a North American amendment proposal repeatedly put forward since 2009. As the Montreal Protocol phased out ozone-depleting CFCs and hydrochlorofluorocarbons, HFCs were often chosen as a substitute for many applications — unfortunately, as they have a huge global warming potential — thus incentivizing the use of these particularly harmful chemicals.⁹⁴ A complex package (including phase-down schedules and financing)⁹⁵ was finally reached in October 2016, with Canada’s minister of the environment and climate change, the US vice president and ministers

from other countries present at a July 2016 meeting to maintain pressure for that successful outcome.

Canada’s hosting in November 2017 of the thirtieth-anniversary celebrations of the adoption of the Montreal Protocol provided another opportunity to demonstrate continued Canadian leadership throughout the protocol’s history as a regime proponent and strong and consistent contributor of technical, financial, legal and chairing expertise, including of the Meeting of the Parties to the Montreal Protocol, the Extraordinary Meeting of the Parties to the Montreal Protocol, the Executive Committee of the Multilateral Fund, the Open-ended Working Group and the Implementation Committee.

The Basel Convention⁹⁶ arose out of pressure by non-governmental organizations and developing countries — stemming from highly publicized incidents involving exports of hazardous wastes to developing countries⁹⁷ — who argued for a convention banning all exports from north to south. Industrialized countries did not want rules prohibiting trade among themselves, and UNEP’s position was that a complete ban would preclude a country from sending waste where it could be managed properly.⁹⁸ When developing countries lost the initial battle for a ban convention, they proposed, in 1995, an amendment to the Basel Convention that would have banned all transboundary movements of hazardous wastes from Annex VII countries (members of the OECD and the EC, and Liechtenstein) to developing countries, initially for final disposal and, by 1997, also for recycling. Canada, along with Australia, Japan and the United States (a non-party), initially opposed the amendment, although Canada ultimately acquiesced in its adoption and, in 2011, to a more relaxed entry into force interpretation. Canada has nevertheless been

90 Morrisette, *supra* note 87 at 7; see also Gareth Porter & Janet Welsh Brown, *Global Environmental Politics* (Boulder, CO: Westview Press, 1991) at 75.

91 *Vienna Convention for the Protection of the Ozone Layer*, 22 March 1985, 1513 UNTS 323, CTS 1998 No 23, 26 ILM 1529 (entered into force 22 September 1988) [Vienna Convention].

92 Hampson & Hart, *supra* note 4 at 259; Richard Elliot Benedick, *Ozone Diplomacy: New Directions in Safeguarding the Planet* (Cambridge, MA: Harvard University Press, 1998) at 45.

93 Pamela S Chasek, David L Downie & Janet Welsh Brown, *Global Environmental Politics*, 7th ed (Boulder, CO: Westview Press, 2017) at 114–18.

94 Sikina Jinnah & Alexandra Conliffe, “Climate Change Bandwagoning: Climate Change Impacts on Global Environmental Governance” in Pamela S Chasek & Lynn M Wagner, eds, *The Roads from Rio: Lessons Learned from Twenty Years of Multilateral Environmental Negotiations* (New York: Routledge, 2012) 199 at 211.

95 UNEP, “The Kigali Amendment to the Montreal Protocol: HFC Phase-down”, online: <<http://multimedia.3m.com/mws/media/1365924O/unep-fact-sheet-kigali-amendment-to-mp.pdf>>.

96 *Basel Convention on the Control of Transboundary Movements of Hazardous and Their Disposal Wastes*, 22 March 1989, 1673 UNTS 57, CTS 1992 No 19, 28 ILM 657 (entered into force 5 May 1992).

97 Wordsworth Filo Jones, “The evolution of the Bamako Convention: An African perspective” (1993) 4:2 *Colo J Intl Envtl L & Pol’y* 324 at 326–29.

98 Katharina Kummer, *International Management of Hazardous Wastes: The Basel Convention and Related Legal Rules* (Oxford, UK: Clarendon Press, 1995); Hampson & Hart, *supra* note 4 at 279–80.

strongly criticized for not ratifying the amendment⁹⁹ — even though it is still not in force and almost all of Canada's transboundary movements are with the United States.¹⁰⁰

Recently, Canada has provided significant in-kind contributions by leading work to establish a process for a review of the Basel Convention's annexes,¹⁰¹ leading the development of seven POPs technical guidelines over four years, participating actively on the Implementation and Compliance Committee,¹⁰² securing a review of progress under the Strategic Plan and participating as part of the Bureaux of the COP and Open-ended Working Group.

The Rotterdam Convention¹⁰³ stems from two pre-existing voluntary guidelines, addressing industrial chemicals and pesticides, that were developed as a response to concerns by developing countries that they were becoming the dumping grounds for obsolete chemicals from developed countries. Turning these non-binding instruments into a binding convention was propelled by Agenda 21, an action plan for the twenty-first century adopted at the UN Conference on Environment and Development in 1992,¹⁰⁴ but was not the result of a particular crisis.¹⁰⁵ Canada has supported all chemicals proposed for listing under Rotterdam — except chrysotile asbestos, which resulted in well-deserved criticism, both domestically and internationally.¹⁰⁶ Since 2013, Canada

has no longer opposed the listing,¹⁰⁷ but, before COP8 in 2017, Canada announced that it would advocate for the listing and was developing new regulations to prohibit asbestos and products containing asbestos by 2018.¹⁰⁸ Canada has been a member of the Rotterdam Convention's standing Chemical Review Committee (CRC), which recommends chemicals for listing, since the convention's entry into force and in this context has offered in-kind advice and assistance to developing countries. (Interestingly, Canada's CRC member joined the consensus to support the proposal for the listing of chrysotile asbestos from the outset.) Canada has been a strong supporter and a sometime chair of compliance negotiations under the convention.

Canada also contributed to the development of the Minamata Convention on Mercury.¹⁰⁹ The impact of mercury on Canada's Arctic has been documented by Canada through the Northern Contaminants Program since the 1980s. Canada's 2010 Risk Management Strategy for Mercury identified that foreign emissions sources account for 95 percent of the anthropogenic mercury deposited in Canada.¹¹⁰ This national data was an important contribution to regional efforts through the Arctic Council's AMAP that provided a significant impetus to global understanding of the problem and the need for global action.¹¹¹ Thus, the global UNEP Global Mercury Assessment reports in 2002, 2008 and 2013 supported the fact of long-range mercury transport to the Arctic, and directly influenced negotiations on the Minamata Convention.¹¹²

The United States had long opposed a legally binding instrument (LBI), but one month after President Barack Obama took office, the United States reversed its position at the 2009 UNEP Governing Council, which became the deciding factor in allowing negotiations to proceed.¹¹³

99 See e.g. Kimberly A Breitmeyer, "Australia's Opposition to the Basel Ban Amendment on the Export of Hazardous Wastes: When Will Australia Stop Stalling and Ratify the Amendment?" (1999) 9:2 *Intl & Comp L Rev* 537.

100 Canada's 2015 Basel national report states that out of 607 shipments, only 20 were to countries other than the United States, and almost all of those were to Europe. Online: <<http://ers.basel.int/ERS-Extended/FeedbackServer/fsadmin.aspx?fscontrol=respondentReport&surveyid=66&voterid=48294&readonly=1&nomenu=1>>.

101 OEWG-10/8: *Providing further legal clarity*, online: <[www.basel.int/TheConvention/OpenendedWorkingGroup\(OEWG\)/Meetings/OEWG10/Overview/tabid/4626/mctl/ViewDetails/EventModID/8295/EventID/560/xmid/14062/Default.aspx](http://www.basel.int/TheConvention/OpenendedWorkingGroup(OEWG)/Meetings/OEWG10/Overview/tabid/4626/mctl/ViewDetails/EventModID/8295/EventID/560/xmid/14062/Default.aspx)>; UNEP/CHW.13/INF/10, *Review of Annexes I, III and IV and related aspects of Annex IX to the Basel Convention*, online: <www.basel.int/TheConvention/ConferenceoftheParties/Meetings/COP13/tabid/5310/Default.aspx>.

102 *Report of the eleventh meeting of the Basel Convention Implementation and Compliance Committee* (Geneva, 22-4 September 2014) UNEP/CHW/CC.11/16 at para 1, online: <www.basel.int/TheConvention/ImplementationComplianceCommittee/Meetings/ICC11/MeetingDocuments/tabid/3777/Default.aspx>.

103 *Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, 10 September 1998, 2244 UNTS 337, 38 ILM 1 (entered into force 24 February 2004).

104 United Nations, *Agenda 21, Chapter 19* at para 39.d., online: <www.un-documents.net/a21-19.htm>.

105 Katharina Kummer, "Prior Informed Consent for Chemicals in International Trade: The 1998 Rotterdam Convention" (1999) 8:3 *RECIEL* 323.

106 IISD, "PIC COP5 Highlights: Wednesday, 22 June 2011" (2011) 15:186 *Earth Negotiations Bull* at 2, online: <<http://enb.iisd.org/vol15/enb15186e.html>>; IISD, "Summary of the Fifth Meeting of the Rotterdam Convention on Prior Informed Consent: 20-24 June 2011" (2011) 15:188 *Earth Negotiations Bull* at 5, 13, online: <<http://enb.iisd.org/download/pdf/enb15188e.pdf>>.

107 IISD, "RC COP6 and BC COP11 Highlights: Tuesday, 7 May 2013" (2013) 15:207 *Earth Negotiations Bull* at 2, online: <<http://enb.iisd.org/download/pdf/enb15207e.pdf>>.

108 Environment and Climate Change Canada, News Release, "The Government of Canada supports the listing of chrysotile asbestos to the Rotterdam Convention" (21 April 2017), online: <www.canada.ca/en/environment-climate-change/news/2017/04/the_government_ofcanadasupportsthelistingofchrysotileasbestos.html?undefined&wbdisable=true>. It should be noted that at COP8 in 2017 the listing was not supported by a number of parties and was deferred for discussion at COP9.

109 *Minamata Convention on Mercury*, 10 October 2013, 55 ILM 586 (entered into force 16 August 2017).

110 Environment Canada, "Risk Management Strategy for Mercury" (October 2010) at section 5.2, online: <www.ec.gc.ca/doc/mercure-mercury/1241/index_e.htm#goto230>.

111 Stone, *supra* note 8 at 134-35.

112 Anne Daniel & Alison Dickson, "Minamata Convention on Mercury: Influence of Arctic Science on its Outcome" (Presentation to the Northern Contaminants Program, September 2013) [unpublished, on file with author].

113 Henrik Hallgrim Eriksen & Franz Xaver Perrez, "The Minamata Convention: A Comprehensive Response to a Global Problem" (2014) 23:2 *RECIEL* 195 at 198. They attribute Canada's lack of support to concerns about a heavy metals treaty that would also include lead and cadmium; conversely, Canada and others had raised concerns about lead and cadmium being of regional or local concern only.

Although also initially skeptical about the effectiveness of an LBI in addressing the issue, Canada expressed openness to all options from 2007, including an LBI, based on the huge impacts of mercury on the Arctic.¹¹⁴

Canada played a leadership role during the negotiations, from consistent, strong pleas for action on atmospheric emissions due to impacts on the Arctic,¹¹⁵ and from INC3 of the negotiations, co-chairing, including articles on storage, waste, contaminated sites, compliance and definitions, thereby also becoming part of the expanded bureau managing the negotiations. During INC5, when a single delegation threatened to block the entire negotiation, the INC chair asked the Canadian co-chair to resolve the outstanding issues on how mercury compounds would be addressed in various articles, which occurred by the second-last day of negotiations.¹¹⁶ Canada was also invited to the Friends of the Chair meeting on the final day¹¹⁷ of negotiations, organized to help key countries reach closure on the preamble (where the issue of common but differentiated responsibilities was outstanding), the financial mechanism and compliance. For the purposes of the package to be presented to the Friends, the INC chair asked the Canadian and Colombian co-chairs to prepare a balanced final text for the compliance article, based on negotiations to date.

Article 15 of the Minamata Convention on compliance was accepted by the Friends without change and is the most ambitious compliance article contained in any MEA

to date, including the Paris Agreement.¹¹⁸ It not only establishes the committee in the Minamata Convention, but provides it with sufficient powers to begin functioning as soon as members are elected at COP1.¹¹⁹

At the preparatory session of the diplomatic conference, Canada chaired negotiations on the terms of reference for the atmospheric emissions expert group, and signed the Minamata Convention at the diplomatic conference. Canada has since co-chaired a group negotiating the details of the voluntary fund established under article 13. Canada also provided a technical expert for the atmospheric emissions expert group, which prepared key guidance on meeting those important obligations, and hosted its first meeting in Ottawa.

Conclusion

Canada has made and continues to make strong contributions to chemical and waste MEAs.

The Stockholm Convention is a model for what Canada is capable of in contributing to chemicals and waste MEAs. Canada provided sustained leadership during all phases of the development and implementation of the convention. From the Canadian science that detected the problem to the Canadian pressure that forced regulatory action at the international level, and from Canada's chairing the global negotiations, substantial financial commitment, political presence at the diplomatic conference, involvement in the convention on all the issues that matter to its chairing the first committee that measured whether the convention is achieving what it set out to do — based on a convention article Canada proposed — Canada has delivered a very strong performance. Yet, as noted above, the Stockholm Convention still has much to do and Canada should continue to play a leadership

114 IISD, "First Meeting of the Ad Hoc Open-ended Working Group to Review and Assess Measures to Address the Global Issue of Mercury, 12–16 November 2007" (2007) 16:62 *Earth Negotiations Bull* at 4, 13, online: <<http://enb.iisd.org/download/pdf/enb1662e.pdf>>; Canada's position at that time has been characterized as somewhere between those objecting to a binding instrument and those fully supporting it: Steinar Andresen, Kristin Rosendal & Jon Birger Skjærseth, "Why negotiate a legally binding mercury convention?" (2013) 13:4 *Intl Envtl Agreements* 425 at 431, online: <<https://link.springer.com/article/10.1007/s10784-012-9198-6>>; Daniel & Dickson, *supra* note 112 at slide 8.

115 ICC, Press Release, "No consensus on atmospheric mercury emissions at UN negotiations" (9 November 2011), online: <www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/november_9_2011_inc3_icc.pdf>.

116 IISD, "Mercury INC5 Highlights: Thursday, 17 January 2013" (2013) 28:21 *Earth Negotiations Bull* at 1, online: <<http://enb.iisd.org/download/pdf/enb2821e.pdf>>.

117 Eriksen & Perrez, *supra* note 113 at 199.

118 United Nations Framework Convention on Climate Change, *Paris Agreement*, 12 December 2015 (entry into force 4 December 2016). See article 15 of the agreement, which is far less robust. For a description of the compliance negotiations, see Templeton & Kohler, *supra* note 4.

119 The establishment of the committee in the convention was insisted upon by WEOG to parallel the establishment of a financial mechanism in the convention to avoid the situation under the Rotterdam and Stockholm Conventions where compliance mechanisms have been blocked for many years by a small number of countries.

role in promoting enhanced implementation of a convention that matters so much to everyone.

Regarding the other MEAs, an illustration of Canada's leadership in those agreements in equal depth to that provided here in relation to the Stockholm Convention, or an analysis of why, at certain points in time, Canada has played less of a leadership role than at others, is beyond the scope of this paper. Leadership for Canada has often begun with producing the science or taking regulatory action that alerts the world to a given problem. Leadership may not always be demonstrated by a call for a binding treaty, if that is not seen as appropriate at the time. At all times, Canada, like other countries, first considers its national interests.

During treaty negotiations, Canada has consistently played a strong role, with sizeable delegations able to provide bridging solutions to negotiating problems, innovation in treaty content and competent chairs for negotiating groups. Similarly, after a treaty's entry into force, Canada has consistently excelled at contributing in-kind to activities that give life to an MEA: the provision of monitoring and assessment data; scientific, technical and legal contributions to convention bodies; chairing negotiating groups at COPs; supporting and/or chairing compliance procedures and their development; and consistently promoting the evaluation of progress under these agreements. The latter is a crucial activity for all treaties, given the risks to human health and the environment if treaties do not succeed.

In cases such as the Basel and Rotterdam Conventions, with no particular Canadian interest at the outset except for trade, Canada's track record has been less consistent,¹²⁰ but, in recent years, Canada has provided substantial leadership on technical and compliance issues.

Despite the importance of addressing chemicals and waste problems at the global level, the key environmental issue drawing most of the world's attention and resources continues to be climate change. Political leadership stressing the

importance of the problems chemicals and waste treaties address would be a major contribution that Canada could make to enhancing the international stature of the debate in this area. Political leadership lent important stature to Canadian efforts for the Stockholm Convention, and recent political participation pushed the world to secure the 2016 Montreal Protocol HFC amendments. While Canada contributes substantially to the Global Environment Facility, and hosted the thirtieth anniversary of the Montreal Protocol, it would be useful to have more resources available for the hosting of meetings and more targeted special projects within the MEAs.

While Canada is contributing a co-chair to the discussions on the shape of the international chemicals and waste regime post-2020 taking place under the rubric of the SAICM,¹²¹ it could also play an active role in helping further the analysis of the international community on what type of regime is appropriate to protect the planet from chemicals and wastes up to 2050 and beyond, showcasing Canada's expertise and experience with the chemical and waste MEAs and its national CMP.

Author's Note

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120 IISD, "Report of the Conference of Plenipotentiaries on the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade: 10–11 September 1998" (1998) 15:11 Earth Negotiations Bull at 7 (speech by Ambassador for the Environment John Fraser, who highlighted, *inter alia*, that the Rotterdam Convention did not affect rights and obligations under other agreements), online: <<http://enb.iisd.org/download/pdf/enb1511e.pdf>>.

121 SAICM, "Strategic Approach and sound management of chemicals and waste beyond 2020 – The Intersessional Process", online: <www.saicm.org/Beyond2020/IntersessionalProcess/tabid/5500/language/en-US/Default.aspx>. One (not new) option that has been raised has been that of a framework agreement on chemicals; see Tuula Honkonen & Sabaa A Khan, *Chemicals and Waste Governance Beyond 2020: Exploring Pathways for a Coherent Global Regime* (Copenhagen, Denmark: Nordic Council of Ministers, 2017); online: <<https://norden.diva-portal.org/smash/get/diva2:1061911/FULLTEXT01.pdf>>.


ON CANADA'S PAST, PRESENT AND FUTURE
IN INTERNATIONAL LAW

REFLECTIONS

RÉFLEXIONS

SUR LE PASSÉ, LE PRÉSENT ET L'AVENIR DU CANADA
EN MATIÈRE DE DROIT INTERNATIONAL

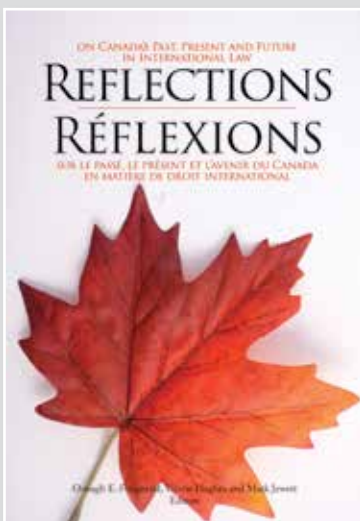
Oonagh E. Fitzgerald, Valerie Hughes and Mark Jewett,
Editors



Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's rich history in international law and governance, where we find ourselves today in the community of nations, and how we might help shape a future in which Canada's rules-based and progressive approach to international law gains ascendancy. These essays, each written in the official language chosen by the authors, provide a critical perspective on Canada's past and present in international law, survey the challenges that lie before us and offer renewed focus for Canada's pursuit of global justice and the rule of law.

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