

BRIEFING NOTE on Non-Party Trade Provisions

1. Scope of the Briefing Note

In 2015, at their Twenty-Seventh Meeting, the parties decided in decision XXVII/1 entitled “Dubai pathway on HFCs” to “work within the Montreal Protocol to an HFC amendment in 2016 by first resolving challenges by generating solutions in the contact group on the feasibility and ways of managing HFCs”. One of the challenges identified by parties is “Non-party trade provisions.”

The purpose of this briefing note is to provide background information on the manner in which trade between parties and non-parties has been treated under the Montreal Protocol and outline how this issue is dealt with in the four proposals put forward by a number of parties to amend the Montreal Protocol to regulate the production and consumption of HFCs.¹

2. Rationale of the provisions on non-party trade

Provisions on trade by parties with non-parties (referred to also as non-party trade in the context of this note) have been set out in Article 4 of the Protocol since its inception. The provisions were applied originally to the initial groups of controlled ozone-depleting substances (ODS) and have been extended over time to include the additional groups of substances included in the Protocol in successive amendments.

The non-party trade provisions prohibit or restrict States party to the Protocol from trading in ODS with States not party to the Protocol. By doing so, those provisions aim at maximizing participation in the Protocol, primarily by cutting off ODS trade between parties and non-parties. The trade provisions have, thus, provided an important incentive for States to become parties to the Protocol and its amendments.

It is important to note that, for the purposes of Article 4, the term “State not party to the Protocol” (referred to also as “non-party” in the context of this note) is defined in paragraph 9 of that Article to “include, with respect to a particular controlled substance, a State or regional economic integration organization that has not agreed to be bound by the control measures in effect for that substance”. Thus, if an amendment stipulates control measures for a specific substance or group of substances, a State that does not ratify that amendment is not bound by those control measures and is therefore considered to be a State not party to the Protocol with respect to that substance or group of substances.

As such a non-party, that State is not subject to any prohibitions or restrictions on trade in that substance or group of substances; it is the State party to the amendment that is prohibited from trading in that substance or group of substances with the non-party in question. To date, all 197 member States have ratified the Montreal Protocol and all subsequent amendments.

¹ The North American proposal put forward by Canada, Mexico and the United States of America:

<http://conf.montreal-protocol.org/meeting/oweg/oweg-37/presession/English/OEWG-37-3E.pdf>;

The Indian proposal put forward by India:

<http://conf.montreal-protocol.org/meeting/oweg/oweg-37/presession/English/OEWG-37-4E.pdf>;

The European Union proposal put forward by the European Union on behalf of its 28 member States:

<http://conf.montreal-protocol.org/meeting/oweg/oweg-37/presession/English/OEWG-37-5E.pdf>; and

the Island States proposal put forward by Kiribati, Marshal Islands, Mauritius, Micronesia (Federated States of), Palau, Philippines, Samoa and Solomon Islands:

<http://conf.montreal-protocol.org/meeting/oweg/oweg-37/presession/English/OEWG-37-6E.pdf>

3. Existing provisions on non-party trade and dates of application

While the prohibitions or restrictions of parties' trade with non-parties are set out in Article 4 of the Protocol, the relevant reporting requirements are stipulated under Article 7. The key provisions of these two articles are outlined in table 1 below.

Table 1: Key existing provisions on non-party trade

Article 4

Paragraph 1) prohibits the import of controlled substances by parties from non-parties

Paragraph 2) prohibits the export of controlled substances by parties to non-parties

Paragraph 3) prohibits the import of products containing controlled substances by parties from non-parties

Paragraph 5) discourages the export to non-parties of technology for producing and utilizing controlled substances

Paragraph 6) requires parties to refrain from providing any support (through subsidies, etc.) for the export to non-parties of products, equipment, plants or technology that would facilitate the production of controlled substances

Paragraph 7) provides an exception to paragraphs 5 and 6 by allowing the export of products or equipment or plants or technology that improves containment, recovery, recycling or destruction, promotes the development of alternatives or otherwise contributes to the reduction of controlled substance emissions

Paragraph 8) exempts trade with non-parties, where the non-party in question is determined by a meeting of the parties to be in full compliance with Articles 2 (Control measures) and 4 (Control of trade with non-parties), and has submitted data to that effect under Article 7

Paragraph 9) defines the term "State not party to this Protocol" with respect to a particular controlled substance to mean a State or regional economic integration organization that has not agreed to be bound by the control measures in effect for that substance

Article 7

Paragraph 3) requires parties to report data on any imports and exports of controlled substances from and to non-parties

The prohibitions on imports from and exports to non-parties of specific controlled substances have generally been adopted at the same time as the control measures for those substances have been adopted. The time at which the actual application of the trade provisions has begun, however, has not always been the same as the time at which the application of the control measures has begun. The parties have instead been flexible regarding the question of when the application of trade provisions should begin.²

² Bans on imports from non-parties of CFCs were applied from 1 January 1990, which is six months after the consumption and production freeze started for non-Article 5 parties (1 July 1989), while bans on exports were applied from 1 January 1993, which was 3 and half years later than the freeze; Bans on imports of halons from non-parties were applied from 1 January 1990, which is 2 years before the consumption and production freeze started for non-Article 5 parties (1992), while bans on exports were applied from 1 January 1993, which was the same time as the freeze date; Bans on non-party imports and exports of other CFCs, carbon tetrachloride and methyl chloroform were applied from 1993, which for non-Article 5 parties is 2 years before the carbon tetrachloride consumption and production freeze started (1995), and the same time as the start of the consumption and production freeze for other CFCs and methyl chloroform (1993); The control measures for Article 5 parties for these substances started ten years later, hence the corresponding timelines would be adjusted by that ten year delay.

In the case of HCFCs and methyl bromide, for example, at the time of the adoption of the Copenhagen amendment, which introduced the control measures for those substances, the parties decided to consider the introduction of non-party trade provisions at a later date.

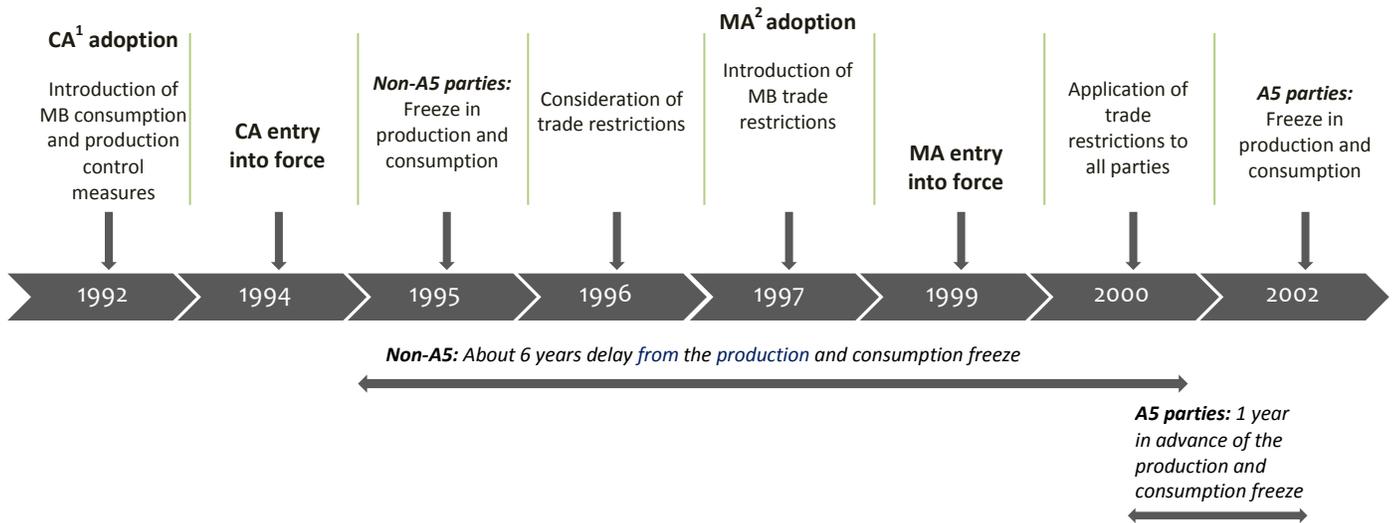
In particular, the 1992 Copenhagen Amendment, which entered into force in 1994, added to the Protocol consumption control measures for HCFCs and consumption and production control measures for methyl bromide. The amendment, however, did not immediately extend trade provisions to those substances. Instead, it stipulated that by 1996 the parties would consider whether to extend the trade restrictions to HCFCs and methyl bromide (Article 4(10)). In 1993, the Meeting of the Parties requested the Technology and Economic Assessment Panel (TEAP) to assess the feasibility and implications of extending the trade restrictions to HCFCs and methyl bromide (decision V/20).³

Methyl bromide trade restrictions were introduced to the Montreal Protocol through the 1997 Montreal Amendment (MA), which entered into force in 1999. The Amendment provided that methyl bromide exports to and imports from non-parties would be prohibited one year following its entry into force. Thus, the restrictions on trade with non-parties in methyl bromide started from 10 November 2000, which is approximately:

- 6 years after the consumption and production freeze started for non-Article 5 parties (1 January 1995).
- 1 year prior to the consumption and production freeze started for Article 5 parties (1 January 2002);

A schematic representation of the sequence of events leading to the adoption of methyl bromide trade restrictions for Article 5 and non-Article 5 parties is presented in Figure 1 below.

Figure 1: Timeline of application of methyl bromide (MB) trade restrictions to MP parties



¹ Copenhagen Amendment

² Montreal Amendment

³ In order to be in a position to take informed decisions on trade matters, the Meeting of the Parties has adopted over the years several decisions requesting TEAP to study the feasibility, implications or other aspects of specific trade provisions e.g. decisions IV/27, IV/28, V/17, v/20, VII/7.

In the case of HCFCs, trade restrictions (along with production control measures for HCFCs) were introduced through the 1999 Beijing Amendment, which entered into force in 2002. That amendment provided that the standard prohibition of trade in HCFCs with non-parties would apply from 1 January 2004. Decisions XV/3 (adopted in 2003) and XX/9 (adopted in 2009) delayed the application of trade restrictions to Article 5 parties until 1 January 2016 and 1 January 2013, respectively⁴.

Hence, for non-Article 5 parties, the HCFC non-party trade restrictions started from 1 January 2004, namely:

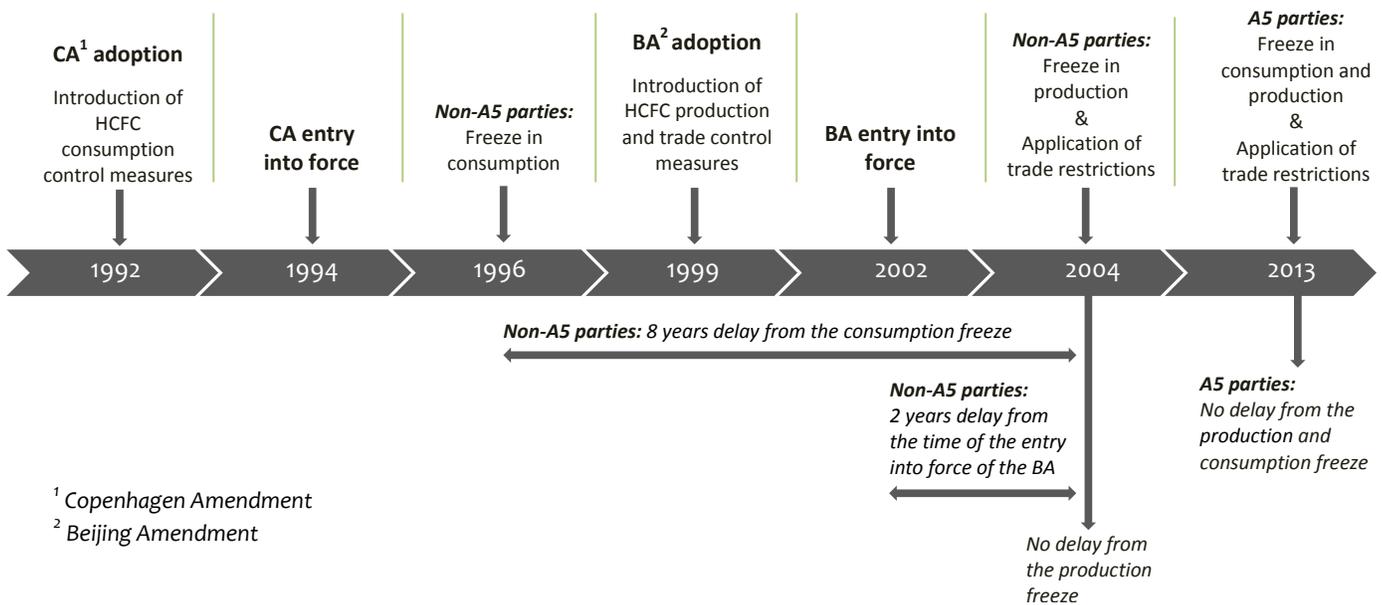
- 8 years after the start of the consumption freeze (1 January 1996);
- At the same time as the start of the production freeze (1 January 2004).

For Article 5 parties the HCFC non-party trade restrictions started from 1 January 2013, namely:

- At the same time as the start of the consumption and production freeze (1 January 2013).

A schematic representation of the sequence of events leading to the adoption of HCFC trade restrictions for Article 5 and non-Article 5 parties is presented in Figure 2 below.

Figure 2: Timeline of application of HCFC trade restrictions to Montreal Protocol parties



⁴ Decision XV/3 (adopted in 2003) provided clarity on the application of the non-party trade restrictions for HCFCs including that:

- The term ‘State not party’ to the Protocol did not apply to Article 5 parties until HCFC production and consumption control measures started for Article 5 parties from 1 January 2016. This start date was brought forward to 1 January 2013 (Decision XX/9, 2008) following the decision in 2007 to accelerate the phase out of HCFCs;
- Non-Article 5 parties that notified the Secretariat by March 2004, and again by March 2005, that they intended to ratify, accede or amend the Beijing Amendment; and certified they were in compliance with the Protocol control and trade measures that applied to them at the time (Articles 2, 2A-2G and Article 4), would not be considered a ‘state not party’ to the Protocol until the 17th Meeting of the Parties in 2005.

Decision XXIV/2, adopted in 2012, made similar concessions for Article 5 parties.

4. Exceptions to the non-party trade restrictions

As mentioned above, trade with any State not party to the Protocol may be permitted (Art. 4, para. 8), if that State is determined, by a Meeting of the Parties, to be in full compliance with the Protocol's control measures, and has submitted data to that effect as specified in Article 7.

Over the years, the situation of several States not party to various amendments has been considered in the light of paragraph 8 of Article 4. This led to the adoption of a number of decisions⁵ allowing those States to be treated, for a limited time period, as parties to the amendments by virtue of having fulfilled the conditions set out in that paragraph. Trade was therefore permitted with those States during those time periods.

It is, thus, evident that the restrictions on non-party trade have been applied flexibly under the Protocol in order to accommodate States that had not managed to ratify the various amendments in time but were in compliance with the relevant control measures.

5. Non-party trade provisions included in the proposed amendments

All of the amendment proposals add HFCs to Article 4, either through the insertion of new paragraphs banning parties from trading in HFCs with non-parties (paras. 1 *sept* and 2 *sept*) or through incorporating HFCs in existing paragraphs pertaining to trade in technology, products and equipment (paras. 5, 6, 7). In addition, all proposals add HFCs in paragraph 8, thus allowing parties to trade with non-parties in HFCs, under specific conditions discussed in the above section.

The new paragraphs provide that each party shall ban trade in HFCs with non-parties within one year of the entry into force of the measures on non-party trade. However, section IV in all amendments provides varying conditions for entering into force of both the amendment and the measures on non-party trade. Those conditions pertain to specified dates for entry into force and/or the number of ratifications required for the trade measures to become effective. For ease of reference, the common and varying elements pertaining to non-party trade provisions in the four proposed amendments are summarized in table 2.

Table 2: Non-party trade provisions included in the HFC amendment proposals

Common elements				
Adding HFCs into the existing measures on non-party trade under Article 4 (paras. 1, 2, 5, 6, 7, 8 and 9)				
Adding HFCs into the requirements for reporting data and information on trade with non-parties under Article 7(3)				
Varying elements				
	Earliest ¹ entry into force of the amendment	Number of ratification instruments required	Earliest ¹ entry into force of non-party trade provisions	Number of ratification instruments required
North American proposal	1 January 2018	20	1 January 2020	80
Indian proposal	1 January [20xx]*	20	1 January [20xx]*	70
European Union proposal	1 January 2017	20	1 January 2019	70
Island States proposal	1 January 2017	20	1 January 2017	70

* Unspecified year

¹ Subject to the attainment of the required number of ratification instruments

⁵ Decisions IV/17B, IV/17C, V/3, VI/4, XV/3, XVII/3, XVII/4, XX/9, XXIV/2

On the basis of the non-party trade provisions included in all HFC amendment proposals, which stipulate that parties' bans on trade in HFCs with non-parties be applied within one year of the entry into force of the measures on non-party trade, table 3 presents the time difference between the earliest start of non-party trade restrictions and the start of the application of the first control measures for Article 5 and non-Article 5 parties.

Table 3: Time difference between the earliest start of non-party trade restrictions and the start of the application of the first control measures for all parties included in the HFC amendment proposals					
	All parties	Non-Article 5 parties		Article 5 parties	
	Earliest start ¹ of trade measures ²	Start of the first control measure	Earliest start ¹ of trade measures compared to the first control measures	Start of the first control measure	Earliest start ¹ of trade measures compared to the first control measures
North American proposal	1 January 2021	1 January 2019	2 years later	1 January 2021	Same year
Indian proposal	1 January [20xx]*	1 January 2016	[unspecified] ³	1 January 2031	[unspecified] ³
European Union proposal	1 January 2020	1 January 2019	1 year later	1 January 2019	1 year later
Island States proposal	1 January 2018	1 January 2017	1 year later	1 January 2020	2 years later

* Unspecified year

¹ Subject to the attainment of the required number of ratification instruments

² One year after the earliest entry into force of non-party trade provisions in the respective proposals

³ One year after 1 January [20xx], to be specified at a later stage

Hence, the proposed amendments offer the possibility of dealing with non-party trade in HFCs by adopting the following options, either separately or in combination:

- A delay in the entry into force of the non-party trade provisions until a specified date;
- A requirement for a higher number of ratifications (than that required for the entry into force of the amendment itself) before the trade provisions enter into force.

6. Summary

Under the Montreal Protocol, parties are prohibited from trading in controlled substances with non-parties. Restrictions on non-party trade, however, have been applied flexibly in order to accommodate the specific circumstances of States that had not ratified the various amendments in time. This flexibility has been exercised through a number of decisions of the Meeting of the Parties that permitted such trade to take place by:

- Allowing a non-party to be treated as a party for a limited period of time, provided it meets certain conditions;
- Stipulating different dates for the start of the control measures and the start of the non-party trade measures;
- Deciding to consider trade prohibitions/restrictions at a later point in time, after the adoption of the amendment introducing consumption and production control measures for a specific substance or group of substances (as in the case of HCFCs and methyl bromide).

Consideration of trade issues has been guided by TEAP studies requested by the Meeting of the Parties through a number of decisions.