UNITED
NATIONS

EP

United Nations
Environment
Programme

Distr.
GENERAL

UNEP/OzL.Pro/WG.1/22/3
3 April 2002

ORIGINAL: ENGLISH

OPEN-ENDED WORKING GROUP OF THE PARTIES TO
THE MONTREAL PROTOCOL ON SUBSTANCES THAT
DEPLETE THE OZONE LAYER
Twenty-second meeting
Montreal, Canada 23-25 July 2002

PRECEDENTS IN ENVIRONMENT-RELATED CONVENTIONS REGARDING THE PROCEDURES FOR ADDING NEW SUBSTANCES TO A TREATY (DECISION XIII/6)

Report of the Secretariat

K0261191 240502

CONTENTS

Introduction

Decision XIII/6 of the Parties to the Montreal Protocol, entitled "Expedited procedures for adding new substances to the Montreal Protocol", requested the Ozone Secretariat to compile precedents in other Conventions regarding the procedures for adding new substances and to provide a report for the 22nd meeting of the Open-ended Working Group, in July 2002. The Parties had adopted also the following decisions on this issue: IX/24, "Control of new substances with ozone-depleting potential"; X/8, "New substances with ozone-depleting potential"; XI/19, "Assessment of new substances"; and XIII/5, "Procedures for assessing the ozone-depleting potential of new substances that may be damaging to the ozone layer".

This report considers a number of multilateral environmental agreements (MEAs) which list particular chemical substances or species of animals and/or plants which those MEAs control or regulate in some way, and describes how these lists may be modified. Sections B, C, D and E cover three MEAs which are now in force, whereas sections F and G consider a further three which have been agreed but have not yet entered into force. For comparison's sake, we start with the Montreal Protocol itself.

A. Montreal Protocol

1. The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer establishes a series of phase-out schedules for the production and consumption of ozone-depleting substances (ODS). The substances themselves are listed in four annexes to the Protocol, most of which are subdivided into groups. Annex A was included when the Protocol was originally agreed in 1987 and the others were added subsequently. The phase-out schedules for each group of substances is set out in the text of the Protocol itself. There are two ways of modifying the contents of the Protocol: by amendment, and by adjustment.

1. Amendment of the Montreal Protocol

2. The amendment procedure is set out in Articles 9 and 10 of the Vienna Convention for the Protection of the Ozone Layer, the framework Convention for the Montreal Protocol. Under Article 9, any Party may propose amendments to the Convention or to any of its protocols. The text of a proposed amendment must be circulated by the Secretariat at least six months before the meeting of the Parties which is to consider it; if the Parties cannot agree on the text by consensus, a two-thirds majority of Parties present and voting can adopt it. To date, all amendments to the Montreal Protocol have been adopted by consensus. An amendment enters into force for those Parties which ratify it 90 days after its ratification by two thirds of the Parties to the Protocol except where otherwise specified. The procedure for amending the Vienna Convention is the same, except that the majorities required for voting and for ratification are three fourths rather than two thirds.

3. Article 9 of the Vienna Convention deals with amendments to the text of the Convention or its Protocols; Article 10 deals with amendments to annexes to the Convention or to its protocols. Additional annexes, and amendments to existing annexes, may be proposed and adopted using the same procedure as described above with the exception that any additional annex applies automatically to all Parties to the Protocol unless they notify the Depositary[1], within six months of the adoption of that annex, that they object to it. In practice this is of limited relevance to the Montreal Protocol, since most of its annexes cannot be operational without accompanying modifications to the text of the Protocol itself. However, Annex D to the Protocol (a list of products containing controlled substances specified in Annex A) did not need any such modification to the text of the Protocol proper since it was already provided for in Article 4, paragraph 3 and therefore entered into force without the need for any such amendment.

[1] The Secretary-General of the United Nations.

4. The Montreal Protocol has been amended on four occasions, at London (1990), Copenhagen (1992), Montreal (1997) and Beijing (1999). Each amendment other than the Montreal Amendment added a new annex and/or group of controlled substances, but they all also modified the text of the Protocol proper in a significant way: each amendment specified the date by which it would enter into force, in each case, 1 January of the second year following the Meeting of the Parties provided sufficient ratifications had been received by then. In fact, in no case were sufficient ratifications received within that time and the amendments entered into force 23, 19, 26 and 27 months after the respective Meeting of the Parties.

2. Adjustments to the Montreal Protocol

5. The adjustment procedure of the Montreal Protocol was an important innovation, allowing the ozone regime to respond to evolving scientific evidence and technological developments more rapidly than if it relied on amendments alone. The procedure is set forth in paragraph 9 of Article 2 and allows the Parties to decide, on the basis of the periodic scientific, environmental, technical and economic assessments which are required under Article 6, whether adjustments should be made to the ozone-depleting potentials of the substances listed in the annexes, or to the production and consumption phase-out schedules set forth in Article 2. Under paragraph 10 of Article 2, the Parties may decide on which substances should be added to or removed from any annex to the Protocol and on the mechanism, scope and timing of any such addition or removal.

6. As with amendments, a proposed adjustment must be circulated at least six months in advance of the Meeting of the Parties at which it is to be considered and if it cannot be adopted by consensus, a two-thirds majority of Parties present and voting is required. Like amendments to the Protocol, adjustments have never been subjected to a vote. Unlike amendments, however, adjustments to the Protocol are binding on all Parties without the need for further ratification and, unless otherwise provided for, they enter into force six months after the date of circulation of the communication by the Depositary of the adjustment decision.

7. The Montreal Protocol has been adjusted on five occasions: at London (1990), Copenhagen (1992), Vienna (1995), Montreal (1997) and Beijing (1999). Adjustments have generally entered into force about nine months after the date of the meeting.

B. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

8. The CITES Convention of 1973 aims to protect certain endangered species from overexploitation by controlling the international trade. Trade in such species, their products and their derivatives are regulated under a system of import and export permits. Species are placed on different lists indicating the level of requirements to be fulfilled and the corresponding scope of documentation.

9. Appendix I to CITES includes all species that are threatened with extinction. Such species may not be traded unless authorized under exceptional circumstances. Appendix II includes species that are not necessarily threatened with extinction but may become so unless trade in specimens of such species is subject to strict regulation. Appendix III includes species that a Party has identified as being subject to regulation for the purposes of preventing or restricting exploitation and where it needs the cooperation of other Parties in controlling trade.

1. Amendment of CITES

10. The procedure for amending the Convention proper is set forth in its Article XVII and is similar in essence to the procedure for amending the Montreal Protocol: amendments must be considered by an extraordinary meeting of the Conference of the Parties - rather than a regular meeting - which must be convened by the Secretariat on the written request of at least one third of the Parties. The text of any proposed amendment must be communicated by the Secretariat at least 90 days before the extraordinary meeting and a two-thirds majority of Parties present and voting is needed to adopt it. An amendment enters into force for those Parties which ratify it 60 days after its ratification by two thirds of the States Parties.
.

11. CITES has been amended on only one occasion, at the extraordinary meeting of the Conference of the Parties in Bonn in June 1979; the amendment, which affected Article XI, entitled "Conference of the Parties", entered into force in April 1987. A second amendment allowing regional economic integration organizations such as the European Community to accede to CITES was approved at the second extraordinary meeting of the Conference of the Parties, in Gaborone in 1983, but has still not attracted sufficient ratifications to enter into force[2].

2. Amendments to the appendices to CITES

12. Article XV of CITES sets out the procedure for amending Appendices I and II. Such amendments must be implemented by the Conference of the Parties, in a manner broadly similar to that for adjustments to the Montreal Protocol, while States Parties themselves may enter species into Appendix III.

13. Amendments to Appendices I and II are decided at each meeting of the Conference of the Parties, with a postal procedure for urgent cases. Proposals for amendments must be submitted by Parties at least 150 days before a meeting of the Conference of the Parties. The Secretariat must then consult other Parties and interested bodies and communicate the response, together with its own recommendations, at least 30 days before the meeting. Guidelines for the Secretariat when making recommendations in accordance with Article XV set out in resolution Conf. 5.20, adopted in 1985.

14. A two-thirds majority of Parties present and voting at a meeting of the Conference of the Parties is required for amendments to be adopted. Adopted amendments enter into force 90 days after the meeting, except for those Parties entering a reservation within the 90-day period. Amendments approved at the most recent meeting, the 11th (Nairobi, April 2000), entered into force on 19 July 2000. Criteria for the amendment of Appendices I and II, and a format for proposals, are provided in resolution Conf. 9.24. Currently undergoing a review, to be considered at the 12th meeting of the Conference of the Parties in November 2002, these criteria are based on biological and trade parameters and include the precautionary measure that "Parties shall, in the case of uncertainty, either as regards the status of a species or as regards the impact of trade on the conservation of a species, act in the best interest of the conservation of the species" (Article 4 A).

15. Almost every meeting of the Conference of the Parties has discussed and voted on amendments to the appendices and these amendments have often generated considerable debate. Unusually amongst multilateral environmental agreements, decisions are normally voted on rather than being arrived at by consensus. Until 1994, voting at meetings of the Conference of the Parties was always by a show of hands, but at the ninth meeting an option for a secret ballot was introduced, despite objections by Parties concerned about the resultant loss of transparency. Rule 25 of the provisional rules of procedure[3] provides that a vote shall be by secret ballot if a request is seconded by representatives of 10 Parties. Although the rules state also that the procedure shall not normally be used in practice, the secret ballot is becoming the norm for controversial amendment proposals. At the 10th meeting it was used quite often and at the 11th most of the voting on strongly contested proposals, such as those concerning whales, sharks and the hawksbill turtle, was by secret ballot.

C. International Convention for the Regulation of Whaling (IWC Convention)

16. The International Convention for the Regulation of Whaling of 1946, better known under the name of its governing body, the International Whaling Commission (IWC), was negotiated to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry.

---

[2] As of February 2001, the amendment had been ratified by 63 parties out of the total of 154.

[3] CITES Doc. 11.1 (Rev. 1), Rules of Procedure (provisional), prepared for the 11th meeting of the Conference of the Parties, 10-20 April 2000.

17. The Convention itself contains no provision for amendment; the Schedule to the Convention is the key to the amendment regime. The Schedule lists which species of whales are to be completely protected, designates specified areas as whale sanctuaries, set limits on the numbers and size of whales which may be taken, prescribes open and closed seasons and areas for whaling, and prohibits the capture of suckling calves and female whales accompanied by calves.

18. The IWC Scientific Committee meets immediately before the annual IWC meeting. The information and advice it provides on the status of whale stocks form the basis on which the Commission develops regulations for the control of whaling, which require a three-fourths majority of the Commissioners (i.e., representatives of the Parties) who vote; changes become effective 90 days later unless a member State has lodged an objection, in which case the new regulation is not binding on that country. In addition, if the Commission cannot reach agreement on a quota for a particular species no limit is set and catches are effectively unregulated.

19. Each meeting of the IWC thus takes a series of decisions on which, as with CITES, there is frequently no consensus and a vote is taken.

D. International Convention for the Conservation of Atlantic Tunas (ICCAT)

20. The International Convention for the Conservation of Atlantic Tunas of 1966 covers the conservation of both tuna and tuna-like species in the Atlantic Ocean and adjacent seas. It regulates about 30 species, including bluefin and yellowfin tuna, albacore, blue marlin, swordfish and various species of mackerel. It currently has 31 Contracting Parties.

1. Amendment of ICCAT

21. The Convention itself may be amended by three fourths of the Contracting Parties. If the amendment contains no new requirements upon Parties, it enters into force without any further need for ratification. If it does contain new requirements it enters into force only for Parties that have “accepted”, that is, ratified it. An amendment is deemed to involve new obligations if any Party or Parties considers that it does.

2. Adjustments to ICCAT

22. The key decisions of ICCAT, however, are made through recommendations which cover issues such as catch and size limits, catch quotas, vessel limits, closed seasons and relations with non-Parties, which may include trade measures. Recommendations may be made either by the Commission itself or by a panel established by the Commission and require a two-thirds majority of Parties voting. They apply to all its parties six months after the date of notification. Contracting Parties may object to a recommendation, delaying its entry into force by a specified period.

23. If a majority of the Parties maintain their objection, the recommendation does not enter into force. If fewer than half but more than a quarter of the Parties object, the recommendation enters into force only for those Parties which have not objected. If fewer than a quarter of the Contracting Parties object, then the recommendation enters into force and applies to all Parties including the Parties objecting.

E. Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)

24. CCAMLR was signed in 1980 and entered into force in 1982. It established a Commission which oversees the implementation of the Convention; all 31 Parties to the Convention are entitled to join the Commission, which currently has 24 members. The Commission sets policy on and regulates activities associated with the rational utilization and management of marine living resources in the Southern Ocean. Commission decisions on “matters of substance” are taken by consensus, and on other matters by a simple majority; the decision on whether a decision is a matter of substance must itself be taken by consensus.

1. Amendment of CCAMLR

25. CCAMLR may be amended only after all the members of the Commission have ratified the amendment in question. When such ratification is achieved, however, the amendment becomes binding on all Parties to the Convention, including the non-members of the Commission. If a non-member does not give notification of acceptance of the amendment within one year of the amendment's entry into force, it is deemed to have withdrawn from the Convention.

2. Adjustments to CCAMLR

26. As with ICCAT, however, the key decisions of CCAMLR involve "conservation measures", which include catch limits, regional fishing limits, designation of open and closed seasons, and measures to be taken against non-Parties. Conservation measures are adopted by the Commission and become binding upon all Commission members 180 days after notification. Any member, however, may object to a conservation measure, in which case it does not apply to that member.

F. The Kyoto Protocol to the United Nations Framework Convention on Climate Change

27. The Kyoto Protocol of 1997 to the United Nations Framework Convention on Climate Change (UNFCCC) establishes quantified emission limitations and reductions for the six greenhouse gases or groups of gases which are set out in its Annex A; the limitation and reduction commitments themselves are listed country by country in Annex B, and must be met over the first commitment period of 2008 to 2012. Annex B currently lists only industrialized countries, those listed in Annex I to UNFCCC.

1. Amendment of the Kyoto Protocol

28. The procedure for amending the text of the Protocol is set out in its Article 20, and is the same as for the Vienna Convention (see section A): the text of a proposed amendment is circulated by the Secretariat at least six months before the meeting of the Conference of the Parties which considers it; if the meeting cannot agree on the text by consensus, a three-fourths majority of parties present and voting can adopt it; and it enters into force for those Parties which ratify it 90 days after its ratification by three-fourths of the Parties to the Protocol. Also as with the Vienna Convention, and Montreal Protocol, the creation of new annexes and amendments to existing annexes other than Annexes A and B enter into force six months after communication, for all Parties unless they explicitly notify the Depositary in writing that they object.

2. Adjustments to the Kyoto Protocol

29. Amendments to the key Annexes A and B are made in the same manner as amendments to the text of the Kyoto Protocol proper: they enter into force only for those Parties which ratify them. Amendments to Annex B require the explicit written consent of the Party concerned.

G. Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention)

30. The Rotterdam Convention of 1998, which is not yet in force, aims to promote cooperation and shared responsibility for the international trade in hazardous chemicals. The Convention applies to banned or severely restricted chemicals and severely hazardous pesticide formulations. Similar in principle to the system of prior notification and consent under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, under the Rotterdam Convention importing countries are given the power to determine whether they wish to import a chemical or ban it because of concerns that it cannot be managed safely. Exports of a chemical may take place only with the prior informed consent of the importing Party.

31. Annex III to the Convention lists the several pesticides and industrial chemicals that must be controlled for health or environmental reasons. Each Party must notify the Convention Secretariat of its final decisions on the future import of these chemicals, indicating whether the Party will consent or not consent to such imports or whether it will give consent under certain conditions; or it must provide an interim response consenting with or without conditions or not consenting to the import; or it must provide a statement that the decision is under active consideration; or it must submit a written request to the Secretariat for more information or a request to the Secretariat for assistance in evaluating the chemical. Parties must transmit to the Secretariat responses with respect to each chemical listed in Annex III.

1. Amendment of the Rotterdam Convention

32. The procedure for amending the Rotterdam Convention, set forth in its Article 21, is identical to that for amending the Vienna Convention (see section A), requiring in the absence of a consensus a three-fourths majority of Parties present and voting and the deposit of ratifications by three fourths of the Parties in order to enter into force.

2. Adjustments to the Rotterdam Convention

33. The procedure for adopting and amending annexes, with the exception of Annex III, is also the same as under the Vienna Convention, except that new annexes come into force one year rather than six months after their adoption. The procedure for amending Annex III, which lists the regulated substances, is described in Article 22, paragraph 51: Parties which have themselves banned or severely restricted a pesticide or chemical must notify the Secretariat in writing of that fact as soon as possible after the regulatory action is taken. When the Secretariat has received at least one notification from each of two Prior Informed Consent regions - regions which were determined by the Conference of the Parties at its first meeting - regarding a particular chemical and has verified that these notifications meet the requirements of Annex I, which lists the requirements for information about the substance and about the regulations applying to it, it forwards the notifications to the Chemical Review Committee, a committee of Government-designated experts in chemicals management appointed by the Conference of the Parties on the basis of equitable geographical distribution.

34. The Committee then reviews the notifications and decides, in accordance with the criteria set out in Annex II for listing banned or severely restricted chemicals, whether to recommend the substances concerned for inclusion in Annex III. The Conference of the Parties then decides whether or not to accept the recommendation, following a similar procedure to that for adjustments to the Montreal Protocol, including a six-month deadline for communication of the recommendation and no need for further ratification; the date of entry into force of the decision is specified in the decision itself. Decisions, however, must be taken by consensus; there is no provision for a majority vote.

35. Essentially the same procedure must be followed where new information comes to light suggesting that substances listed in Annex III can be de-listed; Parties submit the information to the Secretariat, which forwards it to the Chemical Review Committee, which produces a recommendation for a decision by the Conference of the Parties.

H. Convention on Persistent Organic Pollutants (Stockholm Convention)

36. The Stockholm Convention was signed in 2001 and is not yet in force. The objective of the Convention is to protect human health and the environment from persistent organic pollutants. Parties are required to prohibit or take measures necessary to eliminate the production and use of the substances listed in Annex A to the Convention, which currently includes nine chemicals or groups of substances including aldrin, heptachlor and polychlorinated biphenyls (PCBs), and to eliminate also the import and export of Annex A chemicals. Production and use of the chemicals listed in Annex B - currently, DDT - must be restricted, while measures must be taken to prevent the unintentional production of substances listed in Annex C, which currently includes chemicals such as PCBs and polychlorinated dioxins and furans.

1. Amendment of the Stockholm Convention

37. The procedures for amending the Stockholm Convention, and for adding new annexes, are identical to those of the Rotterdam Convention, as is the procedure for amending Annexes D, E and F - which specify various information requirements - except that the date of entry into force of the amendments must be specified in the decision of the Conference of the Parties, and amendments to Annexes D, E and F must be adopted by consensus.

2. Adjustments to the Stockholm Convention

38. The procedure for amending the three key annexes, Annexes A, B and C, which list the substances to be regulated, is almost the same as that for amendments to the Convention proper, requiring a three-fourths majority of Parties voting if consensus cannot be achieved. There is, however, one crucial difference: any Party may make a declaration with respect to any amendment, the effect of the declaration being that the Party in question must ratify the amendment before it can enter into force for that Party. For Parties that do not make such a declaration, the amendment enters into force without need for ratification on a date specified in the decision of the Conference of the Parties.

39. The procedures for proposing new substances for inclusion in Annexes A, B and C, which is described in Article 8 of the Convention, are similar in outline to those for amending Annex III of the Rotterdam Convention though rather more complicated in detail: Parties may propose the listing of any substance by submitting the information required under Annex D, which is the substance's chemical identity plus screening criteria such as persistence, bioaccumulative nature, potential for long-range environmental transport and adverse effects, to the Secretariat, which forwards it to the Persistent Organic Pollutants Review Committee.

40. The Committee applies the screening criteria and, if it is satisfied, invites all Parties to contribute to the formulation of a risk profile for the substance; the information required for the risk profile is specified in Annex E. A draft is circulated for comment and a full risk profile is then prepared. If the Committee is satisfied on the basis of the risk profile that global action is warranted, it invites Parties to contribute the information specified in Annex F on the socio-economic impact of banning or restricting the substance in question. The Committee then prepares a risk management evaluation and a recommendation as to whether the substance should be included in Annex A, B and/or C. This recommendation is forwarded to the Conference of the Parties for decision.

41. If after applying the screening criteria the Committee is not satisfied that the proposal should proceed, the submitting Party may resubmit its proposal, providing information to show why the Committee should reverse itself. If the Committee still turns down the proposal, its decision may be challenged by the submitting Party, which can refer it to the Conference of the Parties.

42. Similarly, a Party may challenge a decision by the Committee not to proceed with a request for a listing taken after the risk profile has been developed: the Party may request the Conference of the Parties to consider instructing the Committee to invite additional information from Parties during a maximum period of one year. After that period and on the basis of any information received, the Committee must reconsider the proposal. If it again sets it aside, the submitting Party may challenge the decision at the next meeting of the Conference of the Parties, which may decide that the proposal for listing should proceed.

I. Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention) and Convention on Biological Diversity (CBD)

43. Both the Basel Convention (1989) and the CBD (1992) provide for the standard procedure[4] for adopting amendments and annexes, all of which must be ratified before they enter into force and become binding. There is nothing in either Convention that is of relevance to the issue under consideration regarding expedited procedures for adding new substances or species to an MEA.

J. Conclusion

44. In comparison with the other MEAs described in this report, the Montreal Protocol possesses a standard procedure for adopting amendments and a relatively speedy procedure for adjusting control schedules for existing listed substances.

K. Recommendations

45. Whether or not these other agreements provide suitable models for introducing an expedited procedure for adding new ODS to the Montreal Protocol, any such procedure would of course have to be introduced by means of an amendment to Article 9 of the Vienna Convention for the Protection of the Ozone Layer. Several of the other MEAs contain procedures for listing new substances or species for regulation that do not require amendment and could therefore act as models. In this regard, Parties may wish to consider the following procedures:

(a) CITES can add new species to its appendices, or move species between appendices, by vote of its Conference of the Parties. A two-thirds majority is required and any Party may enter a reservation to any listing;

(b) The ICW Convention, ICCAT and CCAMLR all adopt their key regulatory decisions by voting at their meetings; the required majorities vary. Generally speaking, if a Party objects to a decision it does not apply to that Party, although in the case of ICCAT the level of objection to the decision determines when and to whom it applies: if fewer than a quarter of the Parties object, it enters into force for all Parties regardless;

(c) Both the Rotterdam and the Stockholm Conventions possess fairly elaborate procedures for adding new substances to their relevant annexes which involve considerable input from expert committees. Unlike most of the other MEAs listed above, however, individual Parties may prevent those decisions being taken (under the Rotterdam Convention, consensus is required) or may prevent them from applying to themselves (under the Stockholm Convention, any Party may in effect choose to regard the addition of a new substance as equivalent to an amendment, thus requiring ratification).

---

[4] Articles 17 and 18 of the Basel Convention and Articles 29 and 30 of CBD.