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First Meeting of the Ad Hoc Working Group
of Legal Experts on non-compliance
with the Montreal Protocol

Geneva, 11-14 July 1989

The UNEP Secretariat has received the following comments from Japan and Spain on the issue of non-compliance with the Montreal Protocol on Substances that Deplete the Ozone Layer.

NOTE FROM THE DELEGATION OF SPAIN ON THE PROCEDURE FOR THE SETTLEMENT OF DISPUTES UNDER THE MONTREAL PROTOCOL

Within the specific framework of international rules governing the protection of the ozone layer, the settlement of disputes is covered under article 11 of the Vienna Convention for the Protection of the Ozone Layer, of 22 March 1985, and in article 8 of its Montreal Protocol of 16 September 1987, which constitute the prescribed frame of reference on procedures and institutional mechanisms for both determining and making it possible to rectify non-compliance.

There are procedures for the settlement of disputes in other international instruments, although of a general nature, such as Article 33 of the Charter of the United Nations or the Vienna Convention on the Law of Treaties of 23 May 1969, article 60 of which governs the termination or suspension of the operation of a treaty as a consequence of its breach.

Among the rules governing specific areas independent of international regulations on the atmospheric ozone layer, the Finnish delegation invoked as a precedent annex V of the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), part XV of the Convention (articles 279 to 299), which refers to the settlement of disputes, and article 284, on conciliation. This Convention has not, however, been ratified by Spain. At the same time, the delegation of the United States proposed the establishment, composition and terms of reference of a Compliance Committee based on article 2, 4 and 7 of the Montreal Protocol.

This approach, within the framework of the Montreal Protocol, seems correct, since, with the Convention, the two instruments constitute the basic norms that must inevitably be referred to as a starting point for any regulatory act in respect of the protection of the ozone layer. The main omissions concern the adoption of measures, since the proposal was an initial attempt to put forward an idea. However, in its formal and procedural aspects, it is quite complete. The Compliance Committee proposed by the United States will therefore have to be seen in the light of article 11 of the Vienna Convention.

Article 11 lays down the following principles:

- In the event of a dispute, a solution shall be sought by negotiation;

- If this fails, the good offices of a third party may be sought, or mediation requested.

- Upon ratification, a written declaration may be made that for a dispute not resolved through the above measures, the party accepts arbitration procedures or submission of the dispute to the International Law of Justice;

- If the afore-mentioned procedure has not been accepted, the dispute shall be submitted to a commission composed of an equal number of members appointed by each party and a chairman chosen jointly by the members appointed by each party, which shall render a final and recommendatory award that the parties shall consider in good faith;

These provisions shall apply to any protocol, except as otherwise provided.

Article 8 of the Montreal Protocol states only that the Parties, at their first meeting, shall consider and approve procedures and institutional mechanisms for determining non-compliance with the provisions of the Protocol and for treatment of Parties found to be in non-compliance.

To sum up:

- The Vienna Convention (article 11) and the Montreal Protocol (article 8) constitute a whole and at the same an inevitable point of reference for the establishment of procedures for determining non-compliance with the obligations that flow from these instruments and for determining the measures to deal with parties found to be in non-compliance;

- The procedures established in the Charter of the United Nations (Article 33) and, above all, in article 60 of the Vienna Convention on the Law of Treaties would, because of their general nature and because they pre-date the Convention and Protocol by such a long time, be hard to apply, but their provisions, where compatible, could serve as a guide;

- The Conference on the Law of the Sea, in so far as it is highly specific and concerns an area that is not easy to compare or assimilate to the protection of the ozone layer, and because it has not been ratified by Spain, could hardly serve as point of reference for the conciliation procedure for the settlement of disputes;

- The compliance committee proposed by the United States, for which there is no explicit provision either in the Convention or in the Protocol, although it does invoke its articles 2, 4 and 7, would have to be compatible with the procedures, organs and institutions provided for in article 11 of the 1985 Vienna Convention;

- The working group agreed upon in Helsinki should follow article 11, in terms of the procedures and paths envisaged therein, and in accordance with the Montreal Protocol, and establish a framework of measures in line with those procedures that will enable effective international action in this area.

Comments of the Japanese Government On
The Subject of Non-Compliance

The basic views of the Japanese Government regarding measures to be adopted for cases of Non-Compliance are as follows:

1. Procedures and institutional mechanisms for determining Non-Compliance with the provisions of the Montreal Protocol and for treatment of parties found to be in Non-Compliance referred to in Article 8 should be formulated as supplementary measures to Article 11 of the Vienna Convention, without changing the procedures provided therein in any sense.

2. Should suspension of the right to vote or of operation of the Convention and the Protocol in relations with the party found to be in Non-Compliance be adopted as measures, those measures should be used prudently, since to do otherwise might result in Non-Complying parties withdrawing from the Convention and the Protocol.

The measures provided for should be more in the nature of calling on the party to cease the violation.

3. However, where a Non-Compliance is deemed to be so evident that it would be inappropriate to take no action before completion of the procedure for settlement of disputes between parties provided for in Article 11 of the Convention, one possible interim solution, separate from the procedure of Article 11 of the Convention, might be a recommendation to the party of Non-Compliance at a meeting of the parties convened in accordance with the Rules of Procedures.

4. The measures to be implemented in the case of Non-Compliance and detailed procedures for their implementation should be clearly stipulated.

5. Should the binding measures be taken restricting the right of a party under the Convention or the Protocol, careful consideation should be given as the amendment of the Protocol might be required.