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OPEN-ENDED WORKING GROUP OF THE PARTIES
TO THE MONTREAL PROTOCOL
First session of the second meeting

Geneva, 13-17 November 1989

REPORT OF THE LEGAL DRAFTING GROUP

INTRODUCTION

At the First Meeting of the Parties to the Montreal Protocol (Helsinki, May 2-5, 1989) the Parties decided to establish an Open-Ended Working Group to, inter alia, prepare proposals for adjustments and amendments to the Montreal Protocol. In accordance with this decision, there have been two Working Group sessions on this issue, Nairobi, 28 August - 5 September 1989, and Geneva, 13-17 November 1989. At each of these Working Group sessions a Legal Drafting Group was constituted to review and revise from a legal point of view proposals for adjustments and amendments to the Protocol and its Annex based on the proposals of the Parties.

This report presents the proposals for modifying the Protocol which have been put forward by the Parties present at the second session of the first meeting and the first session of the second meeting of the Open-Ended Working Group of the Parties to the Montreal Protocol. The Parties present at this meeting requested the Secretariat for the Vienna Convention and its Montreal Protocol to circulate the proposals contained in this report to all Parties in accordance with Article 9, paragraph 2, of the Vienna Convention and Article 2, paragraphs 9 and 10, of the Montreal Protocol.

Article 9, paragraph 1, of the Vienna Convention and Article 2, paragraphs 9 and 10, of the Protocol provide that proposed adjustments and amendments to the Protocol shall be communicated to the Parties by the Secretariat at least six months before the meeting at which they are proposed for adoption. In practical terms, this means the last date for Parties to the Protocol to submit proposals to the Secretariat for the Second Meeting of the Parties in June 1990 will be 1 December 1989.

This, however, does not mean that the Parties cannot consider proposals tabled after December 1989, so long as such proposals are sufficiently related to proposals communicated to the Parties in accordance with the Vienna Convention and the Montreal Protocol so that the Parties may be deemed to have had adequate opportunity to consider the merits of those proposals. Further, the group noted that depending on which proposals were accepted in June 1990, certain amendments of a purely technical nature would have to be made (e.g., if a baseline year other than 1986 were chosen, Article 7 would have to be modified).

Modifying the Protocol

The Legal Drafting Group has discussed the three options for modifying the Protocol: adjustments under Article 2, paragraph 9, amendments to the Protocol, and amendments to Annexes. The Working Group noted the difficulty of interpreting Article 2, paragraph 10, of the Protocol, but under the circumstances, it agreed that this provision could best be interpreted as requiring the application of Article 9 of the Vienna Convention without qualification.

Specific proposals for modifications

The following sections present, article-by-article, the proposed changes to the Protocol. Where necessary, specific language is followed by a brief comment by the Legal Drafting Group.

The bracketed texts below contain new language proposed for addition to the Protocol. Each proposal is prefaced by a description of the procedure that would have to be followed for that proposal to be adopted and enter into force. Wording that is already in the Protocol is left unbracketed; if it is proposed for deletion, it is underlined.

In many cases, alternative proposals have been made by Parties. For Article 2, Control measures, many proposals differ only in terms of effective date, percentage of reduction required or the baseline year. For these proposals, standard language has been developed with brackets. In the brackets are ranges representing the low and high ends of all proposals taken together. The specific proposals are set forth in footnotes to the respective proposals. Alternative proposals that differ more significantly are grouped together for comparison purposes.

I. ARTICLE 2: CONTROL MEASURES

Comment: Concerning the organization of Article 2, the Legal Drafting Group noted that it might be advisable to group the provisions according to the groups of controlled substances in Annex A, i.e., CFCs, halons, etc. Thus, each group of provisions might have a chapeau stating "With respect to the controlled substances in Group [] of Annex A:". Such an approach would appear to have two advantages - first, all the control measures relating to any particular group of controlled substances would appear together; second, it would make it easier to distinguish those provisions that are binding on all Parties (i.e., CFCs and halons) and those that are binding only on those Parties that have agreed to be bound by them (i.e., any of the additional controlled substances).

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A. Additional language to reduce halons ^{1/}

The following paragraphs would be added to Article 2, paragraph 2 as an adjustment in accordance with Article 2, paragraph 9:

[2 bis. Each Party shall ensure that for the twelve-month period commencing on 1 January [1995-1997], and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances listed in Group II of Annex A does not exceed, annually, [fifty] per cent of its calculated level of consumption in 1986. Each Party producing one or more of these substances shall, for the same periods, ensure that its calculated level of production of these substances does not exceed [fifty] per cent of its calculated level of production in 1986. However, in order to satisfy the basic domestic needs of the Parties operating under Article 5 and for the purposes of industrial rationalization between Parties, its calculated level of production may exceed that limit by up to [to be determined] per cent of its calculated level of production in 1986.]

[2 ter. Each Party shall ensure that for the twelve-month period commencing on 1 January [2000-2005] and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances listed in Group II of Annex A does not exceed zero. Each Party producing one or more of these substances shall ensure that, for the twelve-month period commencing on 1 January [1995-2005], and in each twelve-month period thereafter, its calculated level of production of the substances does not exceed zero. However, in order to satisfy the basic domestic needs of the Parties operating under Article 5 and for the purposes of industrial rationalization between Parties, its calculated level of production may exceed that limit by up to [to be determined] per cent of its calculated level of production in 1986.] [This paragraph will apply unless the Parties decide, on the basis of the assessment pursuant to Article 6 of the Protocol, to permit the level of production or consumption that is necessary to satisfy essential uses for which no adequate alternatives are available. [In no event shall such production or consumption of any Party exceed its calculated level of consumption or production in 1986 by more than [five] per cent.]]

^{1/} The following specific proposals regarding halons have been made. The brackets should be filled in as appropriate with the following information below:

- (a) 50 per cent by 1995-1996, 100 per cent by 2005;
- (b) 50 per cent by 1995 - 100 per cent by 2000 with exemptions for essential uses to be agreed on by the Parties;
- (c) 50 per cent by 1995-1997. 100 per cent as soon as feasible with exceptions for essential uses as decided by the Parties;
- (d) 100 per cent production by 1995 and 100 per cent consumption by 2000;
- (e) 10-50 per cent by 2000 on the basis of self-determined needs agreed to by the Parties.

[Each Party shall ensure that for the twelve-month period commencing on [1 July 1992-1993] and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances listed in Group II of Annex A does not exceed, annually, its calculated level of consumption in 1986 or the level necessary to cover its own essential uses as defined by itself and adopted by the Parties (whichever is the lower).]

Comment: The Legal Drafting Group noted that it would be difficult to implement such an approach, in that, in order to determine whether a Party was in compliance, the Parties would have to maintain ongoing consultations to determine the essential uses of each Party.

B. Additional reductions of CFCs ^{2/}

The following paragraphs would be substituted for or added after Article 2, paragraph 3, as an adjustment in accordance with Article 2, paragraph 9:

3. Each Party shall ensure that for the period 1 July 1993 to 30 June 1994 [the twelve-month period commencing on 1 [January] [July] [1991-1995] and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex A does not exceed annually eighty [fifty] per cent of its calculated level of consumption in 1986. Each Party producing one or more of these substances shall, for the same periods, ensure that its calculated level of production of the substances does not exceed annually eighty [fifty] per cent of its calculated level of production in 1986. However, in order to satisfy the basic domestic needs of the Parties operating under Article 5 and for the purposes of industrial rationalization between Parties, its calculated level of production may exceed that limit by up to [ten] per cent of its calculated level of production in 1986.

^{2/} The following specific proposals regarding the CFCs in existing Annex A have been made. The brackets are filled in, as appropriate, with the following information.

- (a) 50 per cent by 1994 or 1995; 85 per cent by 1998 and 100 per cent by 2000;
- (b) 50 per cent by 1991-1992 or 1993, 85 per cent by 1995-1996; and 100 per cent by 2000;
- (c) 100 per cent by 2000 with dates for intermediate reductions to be determined later;
- (d) 50 per cent of production by 1995 and 100 per cent production and consumption by 2000.

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[3 bis. Each Party shall ensure that for the twelve month period commencing on [1 January] [1 July] [1995-1998] and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex A does not exceed, annually, [fifteen-fifty] per cent of its calculated level of consumption in 1986. Each Party producing one or more of these substances shall, for the same periods, ensure that its calculated level of production of the substances does not exceed, annually, [fifteen-fifty] per cent of its calculated level of production in 1986. However, in order to satisfy the basic domestic needs of the Parties operating under Article 5 and for the purposes of industrial rationalization between Parties, its calculated level of production may exceed that limit by up to [to be determined]* per cent of its calculated level of production in 1986.]

Comment: If adopted this paragraph would replace existing paragraph 4.

[3 ter. Each Party shall ensure that for the twelve-month period commencing on [1 January] [1 July] 2000 and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances listed in Group I of Annex A does not exceed zero. Each Party producing one or more of these substances shall, for the same periods, ensure that its calculated level of production of these substances does not exceed zero. However, in order to satisfy the basic domestic needs of the Parties operating under Article 5 and for the purposes of industrial rationalization between Parties, its calculated level of production may exceed that limit by up to [to be determined] per cent of its calculated level of production in 1986.]

Comment: Some proposals include as an option shifting the control periods for Group I substances to a calendar year. The Legal Drafting Group notes that doing so, would create either one six-month control period (at the time of transition around 1992/3) or two twelve-month control periods that overlap by six months.

The quantity of additional production for Article 5 Parties or for industrial rationalization was also identified as an issue for the Parties to address. The need for continued availability of production increases for "industrial rationalization" following a phase-out was also raised and might no longer be required.

In addition, the Legal Drafting Group has noted that most of the proposals would result in Article 2, paragraph 4, being superseded.

* It was suggested by a Party that this additional quantity should be in the range of 5-10 per cent.

C. Reductions of other fully halogenated CFCs: Group III of Annex A ^{3/}

The following paragraphs would be added at the end of Article 2 as an amendment in accordance with Article 2, paragraph 10:

[1. Each Party shall ensure that for the twelve-month period commencing on the first day of the seventh calendar month following the date on which this provision enters into force for it, [but not earlier than] and in each twelve-month period commencing on 1 [January] [July] of the following year, its calculated level of consumption of the controlled substances in Group III of Annex A does not exceed, annually, its calculated level of consumption in [1986-1989]. By the end of the same period, each Party producing one or more of these substances shall ensure that its calculated level of production of the substance does not exceed its calculated level of production in [1986-1989]. However, in order to satisfy the basic domestic needs of the Parties operating under Article 5 and for the purposes of industrial rationalization between Parties, its calculated level of production may exceed that limit by up to [to be determined] per cent of its calculated level of production in [1986-1989].]

[2. Each Party shall ensure that for the twelve-month period commencing on 1 [January] [July] [1991-1998] and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group III of Annex A does not exceed, annually, [fifty-eighty] per cent of its calculated level of consumption in [1986-1989]. Each Party producing one or more of these substances shall, for the same period, ensure that its calculated level of production of the substances does not exceed, annually, [fifty-eighty] per cent of its calculated level of production in [1986-1989]. However, in order to satisfy the basic domestic needs of the Parties operating under Article 5 and for the purposes of industrial rationalization between Parties, its calculated level of production may exceed that limit by up to [to be determined] per cent of its calculated level of production in [1986-1989].]

[3. Each Party shall ensure that for the twelve-month period commencing on 1 [January] [July] [1995-1998] and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group III of Annex A does not exceed, annually, [fifteen-fifty] per cent of its calculated level of consumption in [1986-1989]. Each Party producing one or more of these substances shall, for the same periods, ensure that its calculated level of production of the substances does not exceed, annually, [fifteen-fifty] per cent of its calculated level of production in [1986-1989]. However, in order to satisfy the basic domestic needs of the Parties operating under Article 5 and for the purposes of industrial rationalization between Parties, its calculated level of production may exceed that limit by up to [to be determined] per cent of its calculated level of production in [1986-1989].]

^{3/} Proposals have been made to create Group III of Annex A and include in that Group either all of the fully halogenated CFCs, including their isomers, as listed or defined by the Science Panel or just CFC-112 and CFC-13. Production and consumption of the substances in Group III would be reduced and phased out on the same schedule as the CFCs in Group I. The baseline year for Group III would be 1986, 1987, 1988 or 1989.

[4. Each Party shall ensure that for the twelve-month period commencing on 1 [January] [July] 2000 and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances listed in Group III of Annex A does not exceed zero. Each Party producing one or more of these substances shall, for the same period, ensure that its calculated level of production of these substances does not exceed zero. However, in order to satisfy the basic domestic needs of the Parties operating under Article 5 and for the purposes of industrial rationalization between Parties, its calculated level of production exceed that limit by up to (to be determined) per cent of its calculated level of production in [1986-1989]. [This paragraph will apply unless the Parties decide, on the basis of the assessment pursuant to Article 6 of the Protocol, to permit the level of consumption or production that is necessary to satisfy the essential uses for which no adequate alternative are available. [In no event shall such production or consumption of any Party exceed its calculated level of consumption or production in 1986 by more than [five] per cent.]]

D. Amendments to Annex A, Group VII (other halons)

(a) Halons are saturated compounds that contain all of, and only, carbon, fluorine, and bromine atoms or that contain all of, and only, carbon, fluorine, chlorine and bromine atoms.

(b) Group VII contains halons as defined in (a) that have a vapour pressure exceeding [...] [and] [or] a boiling point exceeding [...] and are not contained in Annex A, Group II.

E. Limits on carbon tetrachloride: Annex A, Group IV ^{4/}

The following paragraphs would be added to Article 2, as an amendment in accordance with Article 2, paragraph 10:

[1. Each Party shall ensure that for the twelve-month period commencing on the first day of the seventh calendar month following the date on which this provision enters into force for it, but not earlier than [] and in each twelve-month period commencing on 1 [January] [July] of the following year, its calculated level of consumption of the controlled substances in Group IV of Annex A does not exceed, annually, its calculated level of consumption in [1986-1989]. By the end of the same

^{4/} Proposals were made to create group IV of Annex A and include in that Group carbon tetrachloride. The proposals differed on the reference year, and 1986, 1987, 1988 and 1989 were suggested. The proposals also differed on the schedule of control measures that would apply. The specific schedules proposed were as follows:

(a) 50 per cent by 1991-1992; 100 per cent by 2000;

(b) Freeze 6 months after entry into force; interim reductions on the same schedule as controlled CFCs; and 100 per cent by 2000;

(c) 100 per cent by 1 January 1995.

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period, each Party producing one or more of these substances shall ensure that its calculated level of production of the substance does not exceed its calculated level of production in [1986-1989]. However, in order to satisfy the basic domestic needs of the Parties operating under Article 5 and for the purposes of industrial rationalization between Parties, its calculated level of production may exceed that limit by up to [to be determined] per cent of its calculated level of production in [1986-1989].

[2. Each Party shall ensure that for the twelve-month period commencing on 1 [January] [July] [1991-1992] and in each twelve-month period thereafter, its calculated level of consumption of the controlled substance listed in Group IV of Annex A does not exceed, annually, [fifty-eighty] per cent of its calculated level of consumption. Each Party producing one or more of these substances shall, for the same periods, ensure that its calculated level of production of the substances does not exceed, annually, [fifty-eighty] per cent of its calculated level of production in [1986-1989]. However, in order to satisfy the basic domestic needs of Parties operating under Article 5 and for the purposes of industrial rationalization between Parties, its calculated level of production may exceed that limit by up to [to be determined] per cent of its calculated level of production in [1986-1989].

[3. Each Party shall ensure that for the twelve-month period commencing on 1 [January] [July] [1995-1998] and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances listed in Group IV of Annex A does not exceed, annually, [fifteen-fifty] per cent of its calculated level of consumption. Each Party producing one or more of these substances shall, for the same periods, ensure that its calculated level of production of the substances does not exceed, annually, [fifteen-fifty] per cent of its calculated level of production in [1986-1989]. However, in order to satisfy the basic domestic needs of Parties operating under Article 5 and for the purposes of industrial rationalization between Parties, its production may exceed that limit by up to [to be determined] per cent of its calculated level of production in [1986-1989].

[4. Each Party shall ensure that for the twelve-month period commencing on 1 [January] [July] [1995-2000] and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances listed in Group IV of Annex A does not exceed zero. Each Party producing one or more of these substances shall, for the same periods ensure that its calculated level of production of the substances does not exceed zero. However, in order to satisfy the basic domestic needs of the Parties operating under Article 5 and for the purpose of industrial rationalization between Parties, its calculated level of production may exceed that limit by up to [to be determined] per cent of its calculated level of production in [1986-1989].

F. Limits on methyl chloroform: Group V of Annex A 5/

The following paragraphs would be added to Article 2 as an amendment in accordance with Article 2, paragraph 10:

[1. Each Party shall ensure that for the twelve-month period commencing on the first day of the calendar month following the date on which this provision enters into force for it, but not earlier than [1991-1992] and in each twelve-month period commencing on 1 January of the following year, its calculated level of consumption of the controlled substances in Group V of Annex A does not exceed, annually, its calculated level of consumption in [1986-1989]. By the end of the same period, each Party producing one or more of these substances shall ensure that its calculated level of production of the substances does not exceed its calculated level of production in [1986-1989]. However, in order to satisfy the basic domestic needs of the Parties operating under Article 5 and for the purposes of industrial rationalization between Parties, its calculated level of production may exceed that limit by up to [to be determined] per cent of its calculated level of production in [1986-1989].]

[1.bis. The Parties shall decide at their meeting in 1994 on a schedule of reduction for production and consumption.]

[2. Each Party shall ensure that for the twelve-month period commencing on 1 January [1992-1993] and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group V of Annex does not exceed, annually, [zero-fifty] per cent of its calculated level of consumption in [1986-1989]. Each Party producing one or more of the controlled substances shall, for the same periods, ensure that its calculated level of production of the controlled substances does not exceed [zero-fifty] per cent of its calculated level of consumption in [1986-1989]. However, in order to satisfy the basic domestic needs of

Parties operating under Article 5 and for the purposes of industrial rationalization between Parties, its calculated level of production may exceed that limit by up to [to be determined] per cent of its calculated level of production in [1986-1989].]

5/ Proposals were made to create Group V of Annex A and to include Methyl Chloroform in that Group. The proposals differed on the reference year to be used and 1986, 1987, 1988 and 1989 were suggested. The proposals also differed on the schedule of control measures that would apply. The specific schedules proposed were as follows:

- (a) Freeze by 1991-1992; further consideration of a schedule of reductions in 1994;
- (b) Freeze by 1991-1992; 25-100 per cent by 2000;
- (c) 100 per cent by 1992;
- (d) 50 per cent by 1992-1993; 85 per cent by 1998; 100 per cent by 2000.

[3. Each Party shall ensure that for the twelve-month period commencing on 1 January 1998, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group V of Annex A does not exceed, annually, fifteen per cent of its calculated level of consumption in [1986-1989]. Each Party producing one or more of the controlled substances shall, for the same periods, ensure that its calculated level of production of the controlled substances does not exceed fifteen per cent of its calculated level of consumption in [1986-1989]. However, in order to satisfy the basic domestic needs of Parties operating under Article 5 and for the purposes of industrial rationalization between Parties, its calculated level of production may exceed that limit by up to [to be determined] per cent of its calculated level of production in [1986-1989].]

[4. Each Party shall ensure that for the twelve-month period commencing on 1 January 2000 and in each twelve-month period thereafter, its calculated level of consumption of the controlled substance listed in Group V of Annex A does not exceed [zero-seventy-five] per cent. Each Party producing one or more of these substances shall, for the same periods, ensure that its calculated level of production does not exceed [zero-seventy-five] per cent. However, in order to satisfy the basic domestic needs of the Parties operating under Article 5 and for the purpose of industrial rationalization between Parties, its calculated level of production may exceed that limit by up to [to be determined] per cent of its level of calculated level of production in [1986-1989]. This paragraph will apply unless the Parties decide on the basis of the assessment pursuant to Article 6 of the Protocol, to permit the level of consumption or production that is necessary to satisfy the essential uses for which no adequate alternatives are available. [In no event shall such a production or consumption of any Party exceed its calculated level of consumption or production in 1986 by more than [five] per cent.]

G. Add Section with limits on [HCFC's]: Group VI of Annex A

The following paragraph would be added to Article 2 as an amendment in accordance with Article 2, paragraph 10:

[1. Commencing on 1 January [2020-2040], each Party shall ban the manufacture of any equipment or product made with, containing or utilizing a controlled substance in Group VI of Annex A.

2. Each Party producing one or more of the controlled substances in Group VI of Annex A shall, for the twelve-month period commencing 1 January [2035-2060], and in each twelve-month period thereafter, ensure that its calculated level of production of these substances does not exceed zero.]

Comment: The following proposal was presented for an amendment of Article 2 with regard to HCFC's. However, the Legal Drafting Group could not, in light of the formulation of the proposal and due to its late submission, review it.

1. Controlled substances listed in Group VI of Annex A (HCFCs) should be used only for such purposes essential in order to meet the requirements of the Montreal Protocol.

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2. Such HCFCs should be limited to essential uses within the areas insulation foams, refrigeration, medical uses and other uses decided by the Parties.
3. The Parties shall introduce recycling and emission control measures in these areas as far as possible.
4. Production and consumption of such HCFC's shall be phased out before 1 January [2020] [2010].

H. Article 2, paragraph 5-25 kilotonne transactions

The following would be deleted from Article 2, paragraph 5 as an amendment in accordance with Article 9 of the Vienna Convention:

Any Party whose calculated level of production in 1986 of the controlled substances in Group I of Annex A was less than twenty-five kilotonnes may, for the purposes of industrial rationalization, transfer to or receive from any other Party, production in excess of the limits set out in paragraphs 1, [2] 3 and 4, provided that the total combined calculated levels of production of the Parties concerned does not exceed the production limits set out in this Article. The Secretariat shall be notified any transfer of such production no later than the time of the transfer.

Comment: This proposal would include the deletion of the reference to industrial rationalization in Article 2, paragraph 1, [2] 3 and 4.

The following would be added to Article 2 as a new paragraph 5. bis or 7. bis as an adjustment in accordance with Article 2, paragraph 9 of the Montreal Protocol or as an amendment in accordance with Article 9 of the Vienna Convention.

Comment: This proposal is made on the assumption that, when included in Article 2, it would also apply to Parties operating under Article 5. If that is unclear, the text would also have to be included in Article 5.

[No Party may by [date to be determined] increase its capacity for producing any controlled substance listed in Annex A, Group I and II.]

I. Article 2, paragraph 6

The following is to be added to Article 2, paragraph 6 as an amendment in accordance with Article 9 of the Vienna Convention:

[Nevertheless, for any such Party any intermediate reductions in the production and consumption of controlled substances shall not have the effect of reducing its calculated level of consumption of these substances to below 0.3 kilograms per capita.]

J. Article 2, paragraph 9 (c)

At the end of the second sentence, add the following as an amendment in accordance with the Vienna Convention, Article 9:

[As well as two-thirds of the Parties operating under paragraph one of Article 5 present and voting.]

Comment: The proposal was made because the proponents felt that a more balanced decision making mechanism was required. The Legal Drafting Group notes that the addition of such languages would in practice make it more difficult to adopt decisions. Another possible approach to achieving the desired balance might be simply to put a full-stop after the words "Parties present and voting" in Article 2, paragraph 9 (c).

K. Article 2, paragraph 10 (b)

The following paragraph would be deleted from Article 2, paragraph 10 as an amendment in accordance with Article 9 of the Vienna Convention:

(b) Any such decision shall become effective, provided that it has been accepted by a two-third majority vote of the Parties present and voting.

Comment: The deletion is proposed in order to clarify the interpretation of Article 2, paragraph 10.

Article 2, paragraph 10 (a) states that the decisions the Parties may take as specified in sub-paragraphs (i) and (ii) are to be taken in accordance with the procedures set out in Article 9 of the Vienna Convention.

As written, Article 2, paragraph 10 (b) does not qualify this procedure any further. It is therefore redundant.

II. ARTICLE 3: CALCULATION OF CONTROL MEASURES

Article 3, sub-paragraph (c) would be amended as follows in accordance with Article 9 of the Vienna Convention:

[Consumption by adding together its calculated levels of production and imports and subtracting its calculated level of exports as determined in accordance with sub-paragraphs (a) and (b). However, commencing on 1 January 1993 [1992], any export of controlled substances to non-parties shall not be subtracted in calculating the consumption level of the exporting Party.]

Comment: The Legal Drafting Group was of the opinion that either Article 2 (9) or Article 9 of the Vienna Convention could apply. If the recent Article 6 assessment did in fact contain a discussion of the economic factors that would form the basis of this proposal, the proposal could arguably be considered an adjustment under Article 2 (9) in that it reflects

an "adjustment ... of production". However, it may be considered that the proposal would alter the Article 2 régime in such a fundamental way that the Parties would not have intended for it to be a mere "adjustment".

III. ARTICLE 4: CONTROL OF TRADE WITH NON-PARTIES

The following changes would be included in Article 4 as amendments in accordance with Article 9 of the Vienna Convention:

A. Paragraph 2

Paragraph 2 would be changed as follows:

2. Beginning on 1 January 1993 [1992], no Party operating under paragraph 1 of Article 5 may export any controlled substance to any State not Party to this Protocol.

B. Paragraphs 3 and 4 would be replaced with the following:

[The Parties shall, following the procedures in Article 10 of the Convention elaborate in an Annex before 31 December 1991 a list of products produced with or containing controlled substances. Parties that have not objected to that Annex in accordance with the procedures in Article 10 of the Convention shall ban, within one year of the Annex having become effective the import of such products from any State not party to the Protocol.]

C. Additional changes to paragraphs 3 and 4

At the end of each of the paragraphs add the following:

[or any Party found to be in non-compliance in consequence of the procedure set out in Annex [] adopted pursuant to Article 8.]

D. Paragraph 5

Paragraph 5 would be amended as follows:

5. Each Party shall discourage [ban] the export, to any State not party to this Protocol, of technology for producing and for utilizing controlled substances.

E. Paragraph 6

Paragraph 6 would be amended as follows:

Each party shall refrain from providing [ban] new subsidies, aid, credits, guarantees or insurance programmes for the export to States not party to this Protocol of products, equipment, plants or technology that would facilitate the production of controlled substances.

F. A new paragraph 9 would be added as follows:

[9. For the purpose of this Article, the term "State not Party to this Protocol" shall include, with respect to any particular controlled substances, a Party that has not agreed to be bound by the control measures in effect for that substance.]

Comment: The legal drafting group notes that a problem similar to that addressed in this proposal may also exist in other articles of the Protocol e.g., Article 3 (c).

IV. ARTICLE 5: SPECIAL SITUATION OF DEVELOPMENT COUNTRIES

The following would replace or be added to the Article in accordance with Article 9 of the Vienna Convention:

[1. Any Party that is a developing country and whose annual calculated level of consumption of the controlled substances is less than 0.3 kilograms per capita on the date of the entry into force of the Protocol for it shall be entitled to delay for ten years its compliance with the schedule of the control measures set out in paragraphs 1 to 4 of Article 2. However, such Party shall not exceed an annual calculated level of consumption of 0.3 kilograms per capita. Any such Party shall be entitled to use either the average of its annual calculated level of consumption for the period 1995 to 1997 inclusive or a calculated level of consumption of 0.3 kilograms per capita, whichever is the lower, as the basis for its compliance with the control measures.

2. The obligation of the Parties operating under paragraph 1 of Article 5 to comply with the schedule of the control measures set out in Article 2, paragraphs 1 to 4 will be subject to the transfer of technologies and financial assistance as provided by Article 10 bis.

3. A meeting of the Parties shall review in 1999 the situation of Parties operating under paragraph 1 of Article 5 and shall adopt such further provisions regarding the schedule for the reduction of consumption of control measures set out in Article 2, paragraph 1 to 4 as are feasible and necessary to meet the objectives of the Protocol, taking into account the progress of research and development of substitutes the technology for using such substitutes and availability of such substances and technologies to developing countries.]

As a separate proposal an addition to article 5, paragraph 1, the following has been proposed:

[Ibis. The Parties undertake to facilitate access of adequate information on products containing or requiring for operation, one or more of the controlled substances, before such are exported to Parties operating under Article 5. Any Party that exports any such products to a Party operating under Article 5 without providing information on any controlled substances contained in or required for operation of the product shall, if requested by the Party operating under Article 5, provide either (a) substitute substances for the product that are not controlled; or (b) a substitute product that does not contain or require the use of controlled substances without any extra cost.]

Comment on 1. bis: In its discussion of this proposal the Legal Drafting Group came to the conclusion that some inconsistency existed in the language used, specifically with regard "to the legal consequences of facilitating access of adequate information." In light of the absence of the sponsor of this proposal no further action was taken to delete the first sentence of the paragraph.

V. ARTICLE 7: REPORTING OF DATA

The following would be added to the Article as amendments in accordance with Article 9 of the Vienna Convention:

1. Each Party shall provide to the secretariat, within three months of becoming a Party, statistical data on its production, imports and exports of each of the controlled substances [in Groups I and II] [in Groups I, II, III, IV and V of Annex A] for the year 1986, or the best possible estimates of such data where actual data are not available.

Comment: This amendment should be considered if HCFCs are introduced into the Protocol as Group VI substances for establishing a date for their phase-out, so that the reporting requirements will not apply for these substances.

As paragraph 1 bis.:

[Ibis. Each Party shall provide to the secretariat, within three months of entry into force of this paragraph or within three months of becoming a Party, whichever is later, statistical data on its production, imports and exports of each of the controlled substances in Groups III, IV and V of Annex A for the year [1986-1989] or the best possible estimates of such data where actual data are not available.]

Comment: This proposal should only apply in case of adoption of control measures in the Groups III, IV and V. Paragraph 1 bis. is related to the proposal to include Groups I and II in paragraph 1.

As a new paragraph:

[3. For Parties operating under the provision of Article 2 paragraph 8 (a) the requirements in paragraph 2 of this Article in respect of statistical data on imports and exports shall be satisfied if the regional economic integration organization concerned provides data on trade between the organization and States that are not members of that organization.]

Add after the first sentence of paragraph 2:

[Further, each Party shall provide statistical data to the Secretariat on the end uses of the controlled substances in Groups [methyl chloroform] [carbontetrachloride] [HCFC's] of Annex A that it produces.]

VI. ARTICLE 10: TECHNICAL ASSISTANCE

The title of the Article would be changed to **TECHNICAL AND FINANCIAL ASSISTANCE** and the following paragraph 1 bis would be added as amendments in accordance with Article 9 of the Vienna Convention:

As an addition to paragraph 1:

[1 bis. The Parties shall establish [by date] a programme to provide Parties operating under paragraph 1 of Article 5 with technical and financial assistance to facilitate their compliance with the schedule of control measures set out in paragraphs 1 to 4 of Article 2 of this Protocol. Such a programme shall include:

- (a) studies of individual Parties operating under paragraph 1 or Article 5 to identify specific projects and programmes that would facilitate their compliance with the schedule of control measures set out in paragraphs 1 to 4 of Article 2 of this Protocol;
- (b) technical assistance with such projects and programmes;
- (c) financial assistance with such projects and programmes; and
- (d) identification and implementation of an appropriate mechanism or mechanisms for covering the incremental costs of their compliance with the schedule of control measures set out in paragraphs 1 to 4 of Article 2 of this Protocol.]

Comment: The Legal Drafting Group noted that the proposal refers to "compliance with the schedule of control measures set out in paragraphs 1 to 4 of Article 2", while the existing paragraphs in Article 10 refer to "participation in and implementation of this Protocol". This apparent inconsistency may reflect an intention to make the scope of the proposal different from that of the existing paragraphs. The reference to paragraphs 1 to 4 of Article 2 may be subject to change should additional paragraphs to Article 2 be adopted by the Parties.

VII. ARTICLE 10 bis: TRANSFER OF TECHNOLOGY AND FINANCIAL ASSISTANCE

As an additional Article, the following would be added to the Protocol as an amendment in accordance with Article 9 of the Vienna Convention:

[Article 10 bis. Transfer of technology and financial assistance Parties other than those operating under paragraph 1 of Article 5 undertake to transfer to Parties operating under paragraph 1 of Article 5, on a preferential and non-commercial basis, the technologies for the recycling and conservation of controlled substances, manufacture of substitute substances, raw materials required for manufacturing such substances, equipment and products using such substances, and for the modification of user equipment.

2. An International Trust Fund shall be established within UNEP to meet fully the incremental costs to be incurred by the Parties operating under paragraph 1 of Article 5. This Fund shall operate in the following manner:

/...

- (a) The International Trust Fund shall be contributed to fully by Parties other than those operating under paragraph 1 of Article 5, annually, in proportion to each such Party's consumption of controlled substances in 1986;
- (b) Each of the Parties operating under paragraph 1 of Article 5, may present the Fund an estimate of such incremental costs at least a year in advance of the incidence of such costs;
- (c) The Fund shall be managed by a Committee established by the Parties, for a four year term, with equal representation of Parties operating under paragraph 1 of Article 5 and other Parties to the Protocol. The Committee shall scrutinize the estimates and decide on the amount to be paid to each of the Parties operating under paragraph 1 of Article 5.]

Comment: Adoption of this proposal would imply changes to following articles of the Protocol in order to make the language consistent:

Article 10: Paragraph 1 - delete in last line "... and implementation of"
Paragraph 2 - delete in last lines "... implementing or"

Article 11: Paragraph 4 (i) - substitute "... for implementing of this Protocol ..." with the phrase "... for the functioning of the secretariat ..."

Article 13: Paragraph 1 - delete in first line "... for the operation of this Protocol, including those ..."

VIII. ARTICLE 19: WITHDRAWAL

The following deletion would be an amendment in accordance with Article 9 of the Vienna Convention:

For the purposes of this Protocol, the provisions of Article 19 of the Convention relating to the withdrawal shall apply, except with respect to Parties referred to in paragraph 1 of Article 5. Any such Party may withdraw from this Protocol by giving written notification to the Depositary at any time after four years of assuming the obligations specified in paragraphs 1 to 4 of Article 2. Any such withdrawal shall take effect upon expiry of one year after the date of its receipt by the Depositary, or on such later date as may be specified in the notification of the withdrawal.

Comment: The deletion of the first sentence would essentially have no legal effect. The reason for the proposal was to give the appearance of similar treatment to all Parties to the Protocol.

IX. PREAMBULAR PARAGRAPHS

The following changes would be amendments in accordance with Article 9 of the Vienna Convention:

Preambular Paragraph 6: the last phrase should read:

/...

"Taking into account technical, economic [and developmental] consideration."

Preambular Paragraph 7: Add at the end ["... including the provision of new and additional (adequate) financial resources and access to relevant technologies."]

Preambular Paragraph 9: Replace:

"Considering the importance of promoting international co-operation in the research and development of science and technology ..."

by

["Considering the importance of promoting international co-operation in the research, development and transfer of (alternative) technologies."]

The following additions to the Groups in Annex A would be amendments in accordance with Article 2, paragraph 10:

X. PROPOSED CHANGES TO ANNEX A

- Group III - Other fully halogenated CFCs
- Group IV - Carbon tetrachloride
- Group V - Methyl chloroform
- Group VI - HCFCs.

As separate amendments to Annex A the following was proposed:

[Annex A, Group III (other fully halogenated CFCs)]

Saturated compounds that contain all of, and only, carbon, fluorine, and chlorine atoms; that are not specified under Group I; and may pose a threat to the ozone layer, as listed and defined below:

(a) Including list for Group I and III for one-carbon and two-carbon saturated compounds:

| | | |
|------------|---------------------------------------|--------|
| one-carbon | CFCl ₃ | (11) |
| | CF ₂ Cl ₂ | (12) |
| | CF ₃ Cl | (13) |
| two-carbon | CFCl ₂ -CCl ₃ | (111) |
| | CFCl ₂ -CFCl ₂ | (112) |
| | CF ₂ Cl-CCl ₃ | (112a) |
| | CF ₂ Cl-CCl ₂ F | (113) |
| | CF ₃ CCl ₃ | (113a) |
| | CF ₂ Cl-CF ₂ Cl | (114) |
| | CF ₃ CCl ₂ F | (114a) |
| | CF ₃ CClF ₂ | (115) |

(b) Other saturated compounds that contain three or more carbon atoms and all of and only, fluorine and chlorine atoms and that have a vapour pressure exceeding [] [and] [or] a boiling point exceeding []..

[Annex A, Group VII (other halons)]

(a) Halons as defined as saturated compounds that contain all of, and only, carbon, fluorine, and bromine atoms or that contain all of, and only, carbon, fluorine, chlorine and bromine atoms.

(b) Halons as defined as (a) having a vapour pressure exceeding [...] [and] [or] a boiling point exceeding [...] and not being contained in Annex A, Group II.]

[Annex A Group VI (HCFCs)]

Saturated compounds that contain all of, and only, carbon, fluorine and chlorine atoms, as well as one or more hydrogen atoms, and that may pose a threat to the ozone layer, as defined below:

Alternative I:

(a) Inclusive list for Group VI for one-carbon, two-carbon and three-carbon saturated compounds; where isomers are included in the formula:

| | | |
|--------------|--|-------|
| One-carbon | CHFCl ₂ | (21) |
| | CHF ₂ Cl | (22) |
| | CH ₂ FCl | (31) |
| Two-carbon | C ₂ HFCl ₄ | (121) |
| | C ₂ HF ₂ Cl ₃ | (122) |
| | C ₂ HF ₃ Cl ₂ | (123) |
| | C ₂ HF ₄ Cl | (124) |
| | C ₂ H ₂ FCl ₃ | (131) |
| | C ₂ H ₂ F ₂ Cl ₂ | (132) |
| | C ₂ H ₂ F ₃ Cl | (133) |
| | C ₂ H ₃ FCl ₂ | (141) |
| | C ₂ H ₃ F ₂ Cl | (142) |
| | C ₂ H ₄ FCl | (151) |
| Three-carbon | C ₃ HF ₄ Cl ₃ | (224) |
| | C ₃ HF ₅ Cl ₂ | (225) |
| | C ₃ HF ₆ Cl | (226) |
| | C ₃ H ₂ F ₄ Cl ₂ | (234) |
| | C ₃ H ₂ F ₅ Cl | (235) |
| | C ₃ H ₃ F ₂ Cl ₃ | (242) |
| | C ₃ H ₃ F ₃ Cl ₂ | (243) |
| | C ₃ H ₃ F ₄ Cl | (244) |
| | C ₃ H ₄ F ₂ Cl ₂ | (252) |
| | C ₃ H ₄ F ₃ Cl | (253) |
| | C ₃ H ₅ FCl ₂ | (261) |
| | C ₃ H ₅ F ₂ Cl | (262) |
| | C ₃ H ₆ FCl | (271) |

(b) Other saturated compound that contain four or more carbon atoms and all of, and only fluorine and chlorine atoms, as well as one or more hydrogen atoms and that have a vapour pressure exceeding [] [and] [or] a boiling point exceeding [].

Alternative II:

HCFCs which are deemed by the Technical and Scientific Assessment Panel to have an ODP equal to or greater than [0.03] and are adopted by the Contracting Parties.)

XI. PROCEDURAL PROPOSALS

One Party suggested that, in terms of negotiating the various proposed modifications to the Protocol next June, adjustments (which concern substances already in Annex A) be treated separately from amendments (which concern new substances and all other topics) and further that the Parties work toward a single amendment for adoption. Once the single amendment had been adopted, a Party would have to ratify that entire amendment or not ratify it at all. The result would be the creation of, at most, two categories of Parties: those bound by the original Protocol as modified by adjustments, and those bound by the original Protocol as modified by adjustments plus the new amendment. Such an approach would have the advantage of avoiding the creation of a multitude of different categories of Parties, i.e., some that had ratified all new provisions, some that had ratified none of the new provisions, and some that had ratified one or more but not all of the new provisions. The approach would also facilitate tradeoffs in the negotiating process.

The Legal Drafting Group recognized that the question of adjustments and amendments to the Protocol and Annexes is a complicated one which requires further examination.

XII. ADDITIONAL PROPOSALS NOT DISCUSSED BY THE LEGAL GROUP

The Legal Drafting Group did not have the opportunity to review the following proposal, which was tabled during the plenary session on 17 November 1989:

Add to Article 7, paragraph 3:

Each Party shall on an annual basis provide to the Secretariat statistical data on its annual production (with separate data on amounts destroyed by technologies approved by the Parties), imports, and exports to Parties and non-Parties, respectively, of the substances specified in Annex B. It shall forward the data no later than nine months after the end of the year to which the data relate.

Add to Annex B:

Substances detailed in the proposed amendment of Annex A to include a list of substances in Group VI (HCFCs).

The following comment accompanied the proposal:

/...

In the event that HCFCs are not adopted as controlled substances requiring full reporting by Parties, and in view of their potential to deplete the ozone layer and enhance greenhouse warming if released to the atmosphere in large quantities, this proposal is made to ensure that full data for the assessment of impacts is available.
