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OPEN-ENDED WORKING GROUP OF THE PARTIES TO
THE MONTREAL PROTOCOL ON SUBSTANCES THAT
DEplete THE OZONE LAYER
Fifteenth meeting
Nairobi, 3-6 June 1997

FOLLOW-UP TO THE CANADIAN PROPOSED AMENDMENT TO THE MONTREAL PROTOCOL
ON SUBSTANCES THAT DEplete THE OZONE LAYER RELATING TO
THE ISSUE OF NON-COMPLIANCE WITH THE PROTOCOL:

Discussion document from Canada

1. Further to its proposal for an amendment to the Montreal Protocol (UNEP/OzL.Pro/WG.1/15/2/Add.5), Canada is submitting additional thoughts on addressing the issue of non-compliance with the Protocol. This discussion document is presented for consideration by the Parties at the fifteenth meeting of the Open-ended Working Group.
2. In its proposal, Canada noted that an amendment to Article 4, paragraph 9, combined with a decision to modify the Non-Compliance Procedure, could be one approach to implementing the following two decisions:
 - (a) Decision VII/9, by which Parties are to consider, by their Ninth Meeting, "in ~~Production and Use of~~ Production and Use of ~~substances which are imported and exported~~ substances which are imported and exported ~~of~~ of ~~the Montreal Protocol which have been found to be in non-compliance with the relevant provisions of the Protocol~~ of the Montreal Protocol which have been found to be in non-compliance with the relevant provisions of the Protocol Parties operating under Article 5".
3. The purpose of this document is to present another option to Parties for their consideration.
4. Canada believes that decisions VII/9 and VIII/26 could also be implemented without amending the Protocol. Rather, these decisions could be implemented solely through a decision by the Parties to modify the

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Non-Compliance Procedure, which was adopted by Parties at their Fourth Meeting.

5. Article 8 of the Protocol reads as follows:

"The Parties, at their first meeting, shall consider and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance."

6. In our view, Article 8 gives the Parties the authority to establish procedures to determine non-compliance and the consequences of that non-compliance - by decision rather than amendment. Parties have used that authority twice already through decisions rather than amendments: first in 1990, at the Second Meeting of the Parties, when they adopted by decision the Interim Non-Compliance Procedure, applicable until 1992, secondly in 1992 at the Fourth Meeting of the Parties, when they adopted by decision the current Non-Compliance Procedure. Canada also notes that modifications to the Non-compliance Procedure could also be made by decision.

CANADA'S PROPOSAL FOR DISCUSSION

7. Using Parties' authority under Article 8, Canada proposes modifying - by decision - the current Non-Compliance Procedure so that a persistent pattern of non-compliance with key provisions of the Protocol would lead to the consequence of the non-compliant Party being treated as a State non-Party to the Protocol under Article 4 and therefore subject to Article 4 trade measures for the substance for which the Party is in non-compliance. (Canada's views on definitions of a persistent pattern of non-compliance and key provisions are noted in section C below.)

8. Any decision to modify the Non-Compliance Procedure to reflect the above proposal would need to be guided by a number of underpinning principles and address a number of important aspects of the non-compliance process. Below is Canada's preliminary thinking on both principles and aspects.

Principles

- The non-compliance process should be aimed at assisting Parties to identify and remedy non-compliance.
- The non-compliance process should more clearly outline the following: identification of potential non-compliance, determination of non-compliance, consequences of non-compliance, monitoring, and determination of a return to compliance.
- The consequences of non-compliance should continue to cover the spectrum of possibilities - appropriate assistance, issuance of cautions, and suspension of specific rights and privileges under the Protocol.

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- All Parties have the right to be informed of the work of the Implementation Committee and of the Meeting of the Parties. Parties concerned have the right to participate in the consideration by the Implementation Committee of their case.
- All Parties have the right to equitable treatment under the Non-Compliance Procedure.

Aspects of the non-compliance process

A. Identification of potential non-compliance

9. The current Non-Compliance Procedure includes three ways for potential non-compliance to be identified to the Implementation Committee and ultimately the Parties:

(a) One or more Parties may raise to the Secretariat reservations about another Party's implementation of its obligations under the Protocol;

(b) The Secretariat may include a matter of possible non-compliance in its reports to the Meeting of the Parties, and inform the Implementation Committee accordingly;

(c) A Party may address to the Secretariat a submission in writing noting the Party's non-compliance and explaining the cause of its non-compliance.

10. Canada suggests that the Non-Compliance Procedure should more explicitly allow the Implementation Committee to initiate, in accordance with current practice, regular consideration of reports submitted by Parties in response to Protocol reporting obligations, and identify potential non-compliance situations.

B. Determination of non-compliance

11. Once potential non-compliance has been identified, determination of a state of non-compliance is the next step.

12. Currently, the Implementation Committee reviews all cases of potential non-compliance brought to its attention and prepares a report on each case, including any recommendations it considers appropriate, to the Meeting of the Parties.

13. The Meeting of the Parties then decides upon and calls for steps to bring about full compliance with the Protocol, including measures to assist the Party's compliance with the Protocol, and to further the Protocol's objectives.

14. Canada suggests that the Meeting of the Parties should continue to be in a position to formally determine non-compliance, based on recommendations from the Implementation Committee.

15. We believe that a clear and rigorous process needs to be put in place for the Meeting of the Parties to make a determination of persistent pattern

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of non-compliance with key provisions of the Protocol, due to the serious consequences of being treated as a State non-Party to the Protocol under Article 4. Two possible options exist, among others:

(a) Adoption of the determination by consensus minus one (one being potentially the Party concerned); or

(b) Adoption of the determination by a qualified majority (for example, two-thirds).

C. Consequences of non-compliance

16. Currently, as decided at the Fourth Meeting of the Parties, Parties have an "Indicative list of measures that might be taken by a meeting of the Parties in respect of non-compliance with the Protocol". These are:

(a) Appropriate assistance;

(b) Issuance of cautions;

(c) Suspension of specific rights and privileges under the Protocol.

17. Canada suggests that only a few, well-identified situations representing a persistent pattern of non-compliance with key provisions of the Protocol would lead to the consequence of the non-compliant Party being treated as a State non-Party to the Protocol under Article 4 and therefore subject to Article 4 trade measures for the substance for which the Party is in non-compliance. This consequence falls under item C of the above-mentioned list of indicative measures.

18. In our view, key provisions would be:

(a) Non-compliance with the control measures set out in Articles 2A to 2H - and the corresponding measures in Article 5;

(b) Contravention of the reporting obligations that are necessary to determine compliance with the control measures set out in Articles 2A to 2H and 5;

(c) Non-compliance with Article 4 (trading with a non-Party).

18. Canada notes also that Parties will need to define what is a persistent pattern of non-compliance, based on principles such as, inter alia, frequency of non-compliance, length of non-compliance, and reasons for non-compliance.

D. Monitoring of Parties' decisions on non-compliance

19. The current Non-Compliance Procedure calls for non-compliant Parties to report through the Secretariat to the Meeting of the Parties on actions taken to address their non-compliance.

20. In the case of a decision by Parties to declare one Party to be a non-Party under Article 4, and therefore subject to Article 4 trade measures for the substance for which the Party is in non-compliance, the monitoring role of the Implementation Committee and ultimately the Parties becomes critical to effective implementation of the decision. In this case, it might be useful to require all Parties to report on their actions to stop trade with the non-Party, and to automatically include this item on the agenda of every Implementation Committee meeting.

E. Determination of a return to compliance

21. Currently, the Non-Compliance Procedure does not specifically address the issue of determination of a return to compliance.

22. Canada proposes that the Non-Compliance Procedure be modified to ensure that a non-compliant Party has the opportunity to be deemed to have returned to compliance as quickly as possible, so that measures taken to ensure compliance do not have effect longer than necessary.

23. To do that, it is proposed that the Implementation Committee be granted the authority to deem a Party to have returned to a state of compliance on an interim basis, with confirmation to follow by a Meeting of the Parties. Moreover, non-compliant Parties would have the right to call for an extraordinary meeting of the Implementation Committee, if the Party is to present evidence that the non-compliance has been corrected.

24. In addition, the agenda of every Meeting of the Parties would automatically include the review of any cases of a persistent pattern of non-compliance with key provisions of the Protocol.

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