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AD HOC Working Group of Legal Experts
on Non-Compliance with the Montreal
Protocol

Second meeting
Geneva, 8-10 April 1991

Note by the Secretariat

I. INTRODUCTION

1. The First Meeting of the Ad Hoc Working Group of Legal Experts on Non-Compliance with the Montreal Protocol on Substances that Deplete the Ozone Layer was held in Geneva from 11 to 14 July 1989. The report of that meeting is contained in document UNEP/OzL.Pro.LG.1/3. Pursuant to article 8 of the Montreal Protocol, the Group drew up a draft non-compliance procedure for consideration by the Parties for approval and adoption. Under the non-compliance procedure an Implementation Committee is established to consider observations or reservations addressed to it through the Secretariat and find amicable solutions to issues referred to it.

2. The Parties to the Montreal Protocol at their Second Meeting, held in London from 27 to 29 June 1990, by decision II/5 (UNEP/OzL.Pro.2/3), adopted, on an interim basis, the procedures and institutional mechanisms for determining non-compliance with the provisions of the Protocol (this non-compliance procedure is contained in Annex III of document UNEP/OzL.Pro.2/3). The Parties also decided to extend the mandate of the open-ended Ad Hoc Working Group of Legal Experts to elaborate further procedures on non-compliance and terms of reference for the Implementation Committee and to present the results for review by the preparatory meeting to the Fourth Meeting of the Parties with a view to their consideration at the Fourth Meeting (in 1992).

3. The First Meeting of the Implementation Committee under the Non-Compliance Procedure for the Montreal Protocol was held in Nairobi on 10 and 11 December 1990. The report of the meeting is contained in document UNEP/OzL.Pro/ImpCom/1/2. The Committee discussed in detail the non-compliance procedure that had been adopted by the Second Meeting of the Parties, with a view to the establishment of specific terms of reference for the Committee (see paras. 6 and 7 below).

4. The Committee also examined the data reported by the Parties in accordance with article 7 of the Montreal Protocol, as contained in the report of the Secretariat on the reporting of data (UNEP/OzL.Pro/WG.2/1/3 and Add.1) and considered the recommendations of the Ad Hoc Group of Experts on the Reporting of Data, which held its first meeting in Nairobi on 6 and 7 December 1990 (UNEP/OzL.Pro/WG.2/1/4). The Committee expressed a number of concerns and made various recommendations which are contained in paragraphs 8-12 of the report of the First Meeting of the Implementation Committee under the Non-Compliance Procedure for the Montreal Protocol (UNEP/OzL.Pro/ImpCom/1/2).

5. In accordance with the suggestion of the Committee that its second meeting should be convened in conjunction with the second meeting of the Ad Hoc Working Group of Legal Experts, the Implementation Committee will meet from 11 to 13 April 1991, immediately following the present meeting of the Ad Hoc Working Group of Legal Experts.

II. SUBSTANTIVE MATTERS

6. During the course of its discussion on the non-compliance procedure, the Implementation Committee raised the following matters with a view to the establishment of specific terms of reference for itself (see UNEP/OzL/Pro/IMPCOM/1/2, paras. 7 (a) - 7 (h)):

- "(a) The Committee agreed that further consideration should be given to its relations and co-operation with the Ad Hoc Working Group of Legal Experts with a view to further elaborating procedures to deal with non-compliance and the terms of reference of the Implementation Committee. The Implementation Committee suggested that its second meeting should be convened in conjunction with the second Meeting of the Ad Hoc Working Group of Legal Experts;
- "(b) In relation to paragraph 5 of the non-compliance procedure, the Committee suggested that it should be authorized to have direct contacts with the Parties regarding matters of compliance. It agreed that further consideration should be given to its mandate to engage in direct correspondence with Parties regarding issues of non-compliance. It was noted that it was the understanding of the Ad Hoc Working Group of Legal Experts at its meeting in July 1989 that the mandate allowed the Committee to approach the Parties directly;
- "(c) Regarding paragraph 4 of the non-compliance procedure, it was suggested that the Committee should have at least two meetings annually - one in connection with the reporting of data by the Parties in accordance with article 7 of the Protocol, and another prior to the annual meeting of the Parties;
- "(d) While acknowledging that it was difficult to establish absolute procedural time-limits, the Committee agreed that the issue of time-limits should be further considered. The Committee recognized the importance of specifying time-limits specifically in relation to paragraph 2 of the procedure, which provided that Parties should be given a "reasonable opportunity to reply" and that the Committee should "consider the matter as soon as practicable";

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- "(e) In relation to paragraph 6 of the non-compliance procedure, the Committee agreed that special consideration should be given to amicable resolution on the basis of respect for the provisions of the Protocol;
- "(f) In relation to paragraph 7 of the non-compliance procedure, the Committee considered its role to be not only to report to the meetings of the Parties but also to provide them with recommendations. It was suggested that the three actions by the Parties referred to in paragraph 7, namely deciding upon steps, calling for steps and assisting compliance should be reflected in paragraph 6 of the procedure, under which it fell within the competence of the Committee to "consider the submission" by Parties. The Committee recommended that paragraph 6 should be further elaborated by the Ad Hoc Working Group of Legal Experts at its second meeting;
- "(g) Regarding paragraph 8 of the non-compliance procedure, the Committee agreed that special consideration should be given as appropriate to the link between the work of the Committee and the arbitration procedure outlined in article 11 of the Vienna Convention for the Protection of the Ozone Layer. It was suggested that that problem and the identification of links between the two procedures should be brought to the attention of the Conference of the Parties to the Vienna Convention and the Ad Hoc Group of Legal Experts. Further consideration of that link was particularly emphasized in light of the fact that in some cases procedures regarding non-compliance could be in practical terms the first step of the arbitration procedure. In relation to paragraph 8 of the non-compliance procedure, it was emphasized that both the Meeting of the Parties and the Implementation Committee had to be informed of the results of cases dealt with under article 11 of the Convention, and implementation of any decisions taken by the Parties under paragraph 7 of the non-compliance procedure;
- "(h) The Committee understood its mandate to include providing the Meetings of the Parties with recommendations which could allow the Contracting Parties to take decisions. The Committee highlighted the need to establish a link between the Committee and the Meeting of the Parties; that could be done by the Committee's Chairperson presenting its report to the Meetings of the Parties."

7. The Secretariat would like to suggest for the consideration of the Ad Hoc Working Group of Legal Experts that the substantive issues embodied in the report of the Implementation Committee be approached as outlined below:

A. Terms of reference for the Implementation Committee

(a) Further consideration should be given to the mandate of the Committee to engage in direct correspondence with the Parties regarding issues of non-compliance. It was the understanding of the Committee that the mandate allowed the Committee to approach the Parties directly;

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(b) The Committee should hold at least two meetings annually, one in connection with the reporting of data by the Parties in accordance with article 7 of the Protocol (this meeting would be likely to take place in late autumn, after the annual reporting of data has taken place by 30 September) and another meeting prior to the annual meeting of the Parties (to enable, inter alia, the preparation of the Committee's report to the Parties). The non-compliance procedure adopted by the Second Meeting of the Parties merely states that "the Committee shall meet as necessary to perform its functions" (see paragraph 4 of the non-compliance procedure);

(c) The Committee considered its role to be not only to report to the meetings of the Parties on issues as outlined in paragraph 5 (a) and 5 (b) of the non-compliance procedure, but also to provide the Parties with recommendations. At present, the non-compliance procedure provides expressly for the Committee to make recommendations to assist consideration by the Meeting of the Parties of cases of possible non-compliance, but only where the Meeting of the Parties so requests. The Implementation Committee is recommending that it should, in addition, be able to make recommendations in its own right;

(d) The Committee was of the opinion that it was important that not only the Meeting of the Parties, but also the Implementation Committee be informed of the outcome of settlement of dispute cases under article 11 of the Vienna Convention and also be informed of the implementation of any decisions taken by the Parties in pursuance of paragraph 7 of the non-compliance procedure;

(e) The Committee highlighted the need to establish a link between the Committee and the Meeting of the Parties by, for example, the Committee's Chairperson presenting the report of the Committee to the Meetings of the Parties;

(f) In addition to the above, the Ad Hoc Working Group of Legal Experts may consider it appropriate to make express provisions in paragraph 3 of the non-compliance procedure: (i) concerning the officers of the Meetings of the Implementation Committee (the officers of the Committee, on which five countries are represented, could be a Chairperson and a Vice-Chairperson who could also act as Rapporteur); and (ii) concerning whether these officers should be appointed to serve for a full year or for just one meeting of the Committee.

B. Further elaboration of procedures on non-compliance

(a) Possibilities should be examined of establishing absolute "time-limits" in relation to paragraph 2 of the non-compliance procedure, which provides for the Parties to be given a "reasonable opportunity to reply" and for the Committee to "consider the matter as soon as practicable";

(b) There should be consideration of what amounts to "amicable resolution" in relation to paragraph 6 of the non-compliance procedure and how this could be achieved. The mandate of the Committee could be clarified/elaborated so that the Committee could play a direct role in arriving at "amicable resolution", for example by establishing contacts directly with the Parties concerned;

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(c) There should be consideration of the link between the non-compliance procedure and the arbitration procedure under article 11 of the Vienna Convention. The Ad Hoc Working Group of Legal Experts may consider that the mandate of the Implementation Committee should identify ways of avoiding conflicts arising in individual cases between the two procedures. In this regard, the Implementation Committee noted that "in some cases procedures regarding non-compliance could in practical terms be the first step of the arbitration procedure" (see paragraph 6 (g) above).

9. The Legal Experts are invited to make other suggestions on the terms of reference for the Implementation Committee and the non-compliance procedure for consideration by the meeting.
