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Ad Hoc Working Group of Legal Experts
on Non-Compliance with the Montreal
Protocol

Third meeting
Geneva, 5-8 November 1991

Note by the Secretariat

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. At their Second Meeting, held in London from 27 to 29 June 1990, the Parties to the Montreal Protocol, 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 for the Fourth Meeting of the Parties, with a view to having the results considered at the Fourth Meeting (in 1992).
2. The second meeting of the Ad Hoc Working Group of Legal Experts on Non-Compliance with the Montreal Protocol, held in Geneva from 8 to 10 April 1991, considered the various issues relating to non-compliance. (The report of the meeting is contained in UNEP/OzL.Pro/WG.3/2/3, dated 11 April 1991.) The Group started to consider in detail the text of the Non-Compliance Procedure, as contained in Annex III of document UNEP/OzL.Pro.2/3, and completed discussion of the first two paragraphs and part of paragraph 3 of that Annex. The Group also added a chapeau at the beginning of Annex III.
3. The Third Meeting of the Parties to the Montreal Protocol, held in June 1991, considered the Report of the Ad Hoc Working Group and adopted decisions III/2 (substantive issues of non-compliance), III/17 (requesting the Ad Hoc Working Group to consider procedures for expediting the amendment procedure under Article 9 of the Vienna Convention for the Protection of the Ozone Layer) and III/20 (increasing the number of members of the Implementation Committee to ten from five).

4. The reports of the first and second meetings of the Implementation Committee under the Non-Compliance Procedure for the Montreal Protocol (UNEP/OzL.Pro/ImpCom/1/2 and UNEP/OzL.Pro/ImpCom/2/3), which considered various aspects of the Non-Compliance Procedure and the terms of reference for the Implementation Committee, raised the following matters:

(a) In relation to paragraph 5 of the Non-Compliance Procedure, the Committee suggested that it should be authorized to have direct contact with the Parties regarding matters of non-compliance;

(b) It was suggested that the Committee should hold at least two meetings annually - one in connection with the reporting of data by the Parties and another prior to the annual Meeting of the Parties;

(c) 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, which states that it is within the competence of the Committee "to consider the submission quoted by Parties". The Committee recommended that paragraph 6 should be further elaborated by the Ad Hoc Working Group of Legal Experts.

5. The Committee considered that it fell within its mandate to provide the Meetings of Parties with recommendations which could allow the contracting Parties to take decisions. The Committee highlighted the need to establish a link between itself and a Meeting of the Parties. It was suggested that such a link could be created by having the Committee Chairperson present his report to Meetings of the Parties.

6. The secretariat would suggest to the Ad Hoc Working Group of Legal Experts that the substantive issues which need consideration be approached as outlined below:

(a) Possible situations of non-compliance with the Protocol

- (i) Article 2 - Non-compliance with provisions relating to control measures covering consumption and production, industrial rationalization, exports to countries operating under Article 5, paragraph 1, and relating to uses of Halons;
- (ii) Article 4 - Non-compliance with provisions relating to trade with non-Parties;
- (iii) Article 7 - Reporting of data: non-compliance with time schedules and non-reporting of specified data;
- (iv) Article 9 - Failure to report a summary of the activities under this Article;
- (v) Article 10 (after entry into force of the Amendment) - Financial mechanism: Non-payment of contributions to the Multilateral Fund;

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- (vi) Article 10 A (after entry into force of the Amendment) - Transfer of technology: failure to take "every practicable step", consistent with the programmes supported by the financial mechanism, for transfer of technology;
 - (vii) Non-compliance with any of the decisions of the Parties to the Montreal Protocol.
- (b) Indicative list of advisory and conciliatory measures to encourage full compliance
- (i) In cases of non-compliance with reporting requirements, assistance to Parties in collection of data;
 - (ii) Technical assistance, technology transfer and financial assistance to countries operating under Article 5, paragraph 1;
 - (iii) Technical assistance and technology transfer to countries not operating under Article 5, paragraph 1.
- (c) Role of the Implementation Committee
- (i) Consideration of submissions by the Parties or of information from the secretariat, pursuant to Article 12 (c) of the Protocol;
 - (ii) Addressing further written enquiries, through the secretariat, to any Party for clarification;
 - (iii) Verification, with the consent and co-operation of the concerned Parties;
 - (iv) Recommendations to the Meeting of Parties on specific steps in case of reported non-compliance;
 - (v) Report on its activities to the Meeting of Parties and on any general issues regarding non-compliance.
- (d) Possible need for legal interpretation of the provisions of the Protocol
- (i) Legal interpretation of the provisions is to be provided by the secretariat;
 - (ii) Where there is a need for a more in-depth examination, the Parties could constitute an Ad Hoc Group of Legal Experts to examine the issues and make recommendations. A Meeting of the Parties could take the final decision.

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- (e) A possible indicative list of measures for consideration that might be taken by a Meeting of the Parties in respect of Parties that are not in compliance
- (i) Assistance;
 - (ii) Administering a caution;
 - (iii) Deprivation of certain rights, such as industrial rationalization for specified periods;
 - (iv) Revised control schedules;
 - (v) Declaration that, as concerns one or more Articles of the Protocol, a State is considered a non-Party for specified periods.
- (f) Expediting the amendment procedure under Article 9 of the Vienna Convention

7. Article 9, paragraph 5, of the Vienna Convention stipulates that any amendment to a protocol shall enter into force after at least two-thirds of the Parties to the protocol concerned have ratified the amendment, except as may otherwise be provided for in such a protocol. The question of how many ratifications would be required for an amendment to a protocol to enter into force arose during the negotiations on the Amendment adopted in London. As there were 57 Parties to the Protocol before the Meeting, the number of ratifications required by the Convention would have been 38. According to Article 2 of the adopted Amendment, however, it will enter into force on 1 January 1992 if at least 20 instruments of ratification, acceptance or approval have been deposited. The requirement to have only one-third of the number of Parties deposit instruments of ratification is not covered by the terms of the Convention, but a legal base for it can be found in the wording of Article 41 of the Vienna Convention on the Law of Treaties (1969). This clause allows two or more parties to a multilateral treaty to modify that treaty themselves, if the treaty does not expressly preclude this.

8. However, the Parties to the Montreal Protocol have recognized that in the Convention some express provision should be made for a more expeditious amendment procedure. The main reason for this is the growing number of Parties that have joined the Protocol. The Montreal Protocol entered into force on 1 January 1989 for 23 States. Currently, the Parties number 72, and this figure will continue to rise. For such a large number, the threshold of ratification by two-thirds of the Parties before an amendment can enter into force is very high. Ratification procedures are usually laborious and involve some negotiations with the appropriate legislative organs in the capitals. Therefore, the entry into force of an amendment may be unduly delayed if many ratifications are required. It seems quite advisable to provide for a more expeditious amendment procedure in the legal instruments themselves, rather than to rely on Article 41 of the Vienna Convention on the Law of Treaties (1969).

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9. One further aspect may also perhaps be considered by the Ad Hoc Group of Legal Experts. Important adjustments to the control measures can be made under the procedure specified in Article 2, paragraph 9, of the Montreal Protocol through a voting procedure, and these adjustments are binding on all Parties. Similarly, decisions taken by the Meetings of the Parties are binding on all the Parties. However, according to Article 9, paragraph 5, of the Vienna Convention, amendments enter into force only for the Parties that ratify, approve or accept them. Thus, each amendment creates two categories of Parties: one for which the amendments have entered into force, and any other for which they have not. A large number of categories of Parties will complicate the implementation of the Protocol. It is desirable to find a legal solution to this problem.

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