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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

REPORT OF THE THIRD MEETING OF THE AD HOC WORKING GROUP OF
LEGAL EXPERTS ON NON-COMPLIANCE WITH THE MONTREAL PROTOCOL

I. INTRODUCTION

1. The Third Meeting of the Ad Hoc Working Group of Legal Experts on Non-Compliance with the Montreal Protocol was held at Geneva from 5 to 8 November 1991.
2. The Meeting was attended by representatives of the following countries and regional economic integration organizations: Argentina, Australia, Austria, Bolivia, Burkina Faso, Cameroon, Canada, Chile, China, Costa Rica, Denmark, Egypt, the European Community, Fiji, France, Greece, India, Indonesia, Japan, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Peru, Poland, Republic of Korea, Saudi Arabia, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Thailand, Tunisia, Uganda, Union of Soviet Socialist Republics, United Kingdom, United States of America and Venezuela.
3. The Meeting was also attended by representatives of the following United Nations bodies: UNCHS (Habitat) and the United Nations Conference on Environment and Development (UNCED).
4. The Meeting was also attended by representatives of the following intergovernmental organizations: General Agreement on Tariffs and Trade (GATT) and the Inter-American Development Bank (INTAMBANK).
5. The Meeting was also attended by representatives of the following non-governmental organizations: Industrial Technology Research Institute (ITRI) and the International Union for the Conservation of Nature (IUCN).

II. ORGANIZATIONAL MATTERS

A. Opening of the Meeting

6. The Meeting was opened by Mr. K. Madhava Sarma, Coordinator, the Secretariat for the Vienna Convention and Montreal Protocol, who welcomed the participants on behalf of Dr. M.K. Tolba, Executive Director of UNEP. He summarized those decisions relevant to the Ad Hoc Working Group of Legal Experts taken at the Second and Third Meetings of the Parties to the Protocol. The Parties had extended the mandate of the Working Group to elaborate further procedures on non-compliance and terms of reference for the Implementation

Committee, to be submitted to the Parties at their Fourth Meeting. The Parties had also decided to request the Ad Hoc Working Group of Legal Experts to consider full procedures for expediting the amendment procedure under Article 9 of the Vienna Convention.

7. The note by the Secretariat (UNEP/OzL.Pro/WG.3/3/2) contained a summary of the recommendations of the Implementation Committee under the Non-Compliance Procedure for the Montreal Protocol, possible situations of non-compliance, an indicative list of advisory and conciliatory measures to encourage full compliance and an indicative list of measures that might be taken in respect of Parties that were not in compliance with the Protocol.

B. Adoption of the Agenda

8. The following agenda, as contained in document UNEP/OzL.Pro/WG.3/3/1, was adopted by consensus:

1. Opening of the meeting.
2. Adoption of the agenda.
3. Election of officers.
4. Substantive matters:
 - (a) Further elaboration of the procedure of non-compliance, including the terms of reference for the Implementation Committee;
 - (b) Identification of possible situations of non-compliance with the Protocol;
 - (c) Developing an indicative list of advisory and conciliatory measures to encourage full compliance with the Protocol;
 - (d) The possible need for legal interpretation of the provisions of the Protocol and methods of providing the interpretation;
 - (e) Developing an indicative list of measures that might be taken by a meeting of the Parties in respect of Parties that are not in compliance with the Protocol;
 - (f) Procedures for expediting the amendment procedure under Article 9 of the Vienna Convention;
5. Other matters.
6. Adoption of the Report.
7. Closure of the meeting.

C. Election of Officers

9. The Meeting agreed to continue with the Bureau elected at its First and Second Meetings. The composition of the Bureau was as follows:

Chairman:	Mr. Patrick Szell (United Kingdom)
Vice-Chairmen:	Mr. Gao Feng (China) Ms. Imeria Odreman (Venezuela)
Rapporteur:	Mr. Maurice Hartenbach (Switzerland)

10. In his introductory statement, the Chairman said that the Working Group's mandate was to develop further the provisional non-compliance procedure and not to replace it. Some paragraphs might be acceptable as they stood. Texts which had been finalized at the Working Group's previous meetings should not be reopened. At its Second Meeting the Working Group had been considering one paragraph and its first task would be to complete that paragraph. Once that paragraph had been approved, it would then revert to the text of the provisional non-compliance procedure to consider its remaining paragraphs.

11. The Chairman reminded the Meeting that the European Community had submitted a formal proposal, the text of which was annexed to the report of the Working Group's Second Meeting. When it had completed its work on the non-compliance regime, the Working Group would have to propose a way to have the non-compliance regime adopted by the Parties.

12. Finally, the Working Group would have to address the matter of procedures for expediting the amendment procedures under Article 9 of the Vienna Convention.

III. SUBSTANTIVE MATTERS

(a) Further elaboration of the procedure on non-compliance, including the terms of reference for the Implementation Committee

13. One representative asked whether the Parties' request that the Working Group should reflect on the possible need for legal interpretation of the provisions of the Protocol did not constitute an expansion of its mandate.

14. The Chairman replied that the heading of the decision in question clearly indicated that the legal interpretation in question related solely to the non-compliance procedure and that, therefore, the request remained within the existing mandate of the Working Group. He then invited the Working Group to consider the paragraph, which had been left unfinished at its Second Meeting.

15. The President of the Implementation Committee informed the Meeting about the decision III/2 of the Third Meeting of the Parties with regard to the increase in the size of the Committee from 5 to 10 members. The increase was considered to give a more equitable geographical distribution and a better balance between developed and developing countries.

16. The President of the Implementation Committee suggested that the Committee should hold at least two meetings a year. The reference to a "two-year" term for its members was not very clear and she raised the question whether the term would be considered to begin in the month of June 1990 when the Second Meeting of the Parties established the Committee, or whether the term should be regarded in terms of numbers of the Meetings of the Parties.

17. Some participants felt that the wording in the text of the provisional non-compliance procedure regarding the balance between developed and developing countries in the composition of the Implementation Committee ought to be retained.

18. The Chairman of the Working Group said that the imprecision regarding "the two-year term" could be overcome with the reasonable interpretation that the members would continue to serve until they were replaced by the Meeting of the Parties in the second year after their election. Since the Parties had only recently deleted the words "and a balance between developed and developing countries" from paragraph 3 of the provisional non-compliance procedure, the Working Group had to accept their decision.

19. After some discussion, paragraph 3 of the provisional non-compliance procedure was approved, with certain amendments, as paragraph 5 of the new text in Annex I.

20. The proposal by the European Community that, when a Party that was a member of the Implementation Committee was itself involved in a case of non-compliance, it should not participate in the proceedings on that case was then discussed. There was general agreement that both the Parties making a submission regarding the possibility of non-compliance and the Parties that were the subject of such a submission should be able to present their case to the Implementation Committee. Some representatives felt that that end could be achieved by according ad hoc membership of the Committee to the non-member Parties involved. Some argued that the Working Group had no mandate to add to or subtract from the membership of the Committee.

21. After the matter had been considered in a drafting group, the Working Group approved the provision in the form of two paragraphs, now 10 and 11 of the new text in Annex I.

22. With respect to paragraph 4 of the provisional non-compliance procedure the Working Group decided that the paragraph should read as in paragraph 6 of the new text in Annex I.

23. The Working Group then considered a European Community proposal on the functions of the Implementation Committee. There was broad agreement on the functions relating to the submissions and the report of, and information forwarded by, the Secretariat. On the remaining elements of the proposal, i.e. considering possible irregularities, obtaining further information and undertaking examinations, opinions were divided. Some representatives considered that the Committee needed such powers if it were to function effectively. Others, however, felt that those elements were inconsistent with the advisory and conciliatory role of the Committee. A number of them objected to consideration by the Committee of any information from non-governmental sources, such as industry, the mass media, non-governmental organizations or individuals. However, others took the view that information from such sources was important for the effective implementation of the Protocol. After consideration of the matter by a drafting group, a compromise text was approved by the Working Group as paragraph 7 of the new text in Annex I.

24. After a discussion, the Working Group decided to retain and amend slightly paragraph 6 of the provisional non-compliance procedure and place it as paragraph 8 of the new text in Annex I.

25. One representative submitted a proposal in writing for a new paragraph on the subject of a Party reporting its own inability to comply fully with its obligations under the Protocol. After a discussion, the Working Group approved a slightly amended version of the paragraph and placed it as paragraph 4 of the new text in Annex I. The meeting was of the view that self-reporting was not intended to introduce additional flexibilities into the non-compliance procedure or as a means of circumventing Protocol obligations.

26. One representative proposed an addition, regarding exchange of information with the Executive Committee of the Multilateral Fund, to the paragraph on the functions of the Committee of the new text in Annex I. A second representative then proposed an amendment whereby a phrase would be inserted. Whereas there appeared to be broad agreement in the Working Group that the original proposal was acceptable, strong differences of opinion were expressed concerning the proposed phrase. The Working Group finally decided to place the entire proposal in paragraph 7 of the new text in Annex I within square brackets and to place further square brackets around the proposed phrase.

27. The Chairman invited the Working Group to consider original paragraph 7 of the provisional non-compliance procedure, together with the amendments to that paragraph proposed by the European Community. In the discussion that followed, one representative stressed, in connection with the possible content of the Implementation Committee's report to the Meeting of the Parties, that, in addition to recommendations, the Committee should be encouraged to report on other matters that it considered appropriate, such as general observations on the efficacy of the non-compliance procedures and any obstacles to performing its functions. After several proposals for amendments had been considered, the Working Group approved the paragraph and placed it as paragraph 9 of the new text in Annex I.

28. After brief discussion, paragraphs 8 and 9 of the provisional non-compliance procedure were approved and placed as paragraphs 12 and 13 of the new text in Annex I.

29. Paragraph 10 of the provisional non-compliance procedure was approved, with a slight amendment, and placed as paragraph 14 of the new text in Annex I.

30. There was a lengthy discussion concerning the two proposals on the transparency of the Implementation Committee's work and on the relationship of these proposals to the existing sentence in paragraph 11 of the provisional non-compliance procedure. A drafting group formulated two further sentences on those matters for inclusion in the text. Since no consensus could be reached on those additional sentences, the Working Group decided to retain the original sentence of paragraph 11 unchanged. The two additional sentences were then placed between square brackets, in a new paragraph 16 of the new text in Annex I.

31. The revised non-compliance procedure, as approved by the Working Group, is attached to the report as Annex I.

(b) Identification of possible situations of non-compliance with the Protocol

32. The Working Group then turned to its tasks under Decision III/2, paragraphs (i), (ii) and (v), of the Parties. It decided to base its work on the lists suggested in paragraph 6 of the Note by the Secretariat.

33. With regard to the Secretariat's list of possible situations of non-compliance with the Protocol, the Working Group discussed possible situations (i) and (ii) and approved them with some amendments. The texts are to be found in Annex II, section I, to this report.

34. A delegation proposed a new paragraph to address a possible situation under Article 5 but, after discussion, the proposal was withdrawn. The Working Group noted, however, that there were two possible interpretations of the provision concerning failure to maintain specified consumption levels.

35. One representative noted that, in identifying possible situations of non-compliance, there was a possibility that, in the event of a Party operating under Article 5, paragraph 1, exceeding the allowable consumption limits permitted under that Article, issues concerning its compliance with Article 2 must be resolved. That issue was raised in Decision III/13 and would be addressed by the Open-Ended Working Group of the Parties.

36. The texts of possible situations (iii) and (iv) were approved with some amendments.

37. No agreement could be reached on the inclusion in the list of possible situations of non-compliance with the Protocol of a failure to comply with the provisions concerning the operation of the financial mechanism and the payment

of contributions to the financial mechanism, because certain delegations expressed the view that Article 10 (after entry into force) provided for voluntary rather than mandatory contributions to the financial mechanism.

38. Because of lack of time and the apparent political implications of the question concerned, it was decided not to pursue the discussion on that question further and to refer it to the Meeting of the Parties for its consideration. A number of delegations expressed surprise at and serious concern with the view that Article 10 (after entry into force) did not contain an obligation to contribute to the financial mechanism. One delegation expressed surprise at that expression of surprise and concern.

39. After a prolonged discussion, during which it was agreed that the words "Multilateral Fund" should be replaced by the words "financial mechanism" and an alternative text was proposed by one representative, it was decided that, since agreement could not be reached, both alternatives should be included in the list between square brackets.

40. The text of possible situation (vi) was approved, although one representative expressed some misgivings about the drafting style.

41. In connection with possible situation (vii), a number of representatives pointed out that decisions of the Parties did not have the same legal status as Articles of the Protocol. Some representatives stated that not all such decisions were binding on the Parties. Some other representatives maintained that they were always legally binding if they related to matters of substance. One delegation entered a reservation. The Working Group therefore decided that that text should, after amendment, be placed between square brackets.

42. One delegation stated that, when considering cases of non-compliance, account should be taken of implementation measures adopted by the Meeting of the Parties and of the fact that the various obligations formed a balanced whole and could not be considered in an entirely separate way.

43. The final list, as approved, is to be found in Annex II, section I. The note at the bottom of the list was intended to clarify that, in determining non-compliance with any provision of the Protocol, due account should be taken of its context in the Protocol and the relationship of that provision to the other provisions of the Protocol.

(e) Developing an indicative list of measures that might be taken by the Parties in respect of Parties that are not in compliance with the Protocol.

44. The meeting adopted the indicative list of measures in Annex II, section II. In so doing, the Working Group took the view that, when considering cases of non-compliance, flexibility should be ensured in selecting and administering appropriate response measures, understanding that all situations of non-compliance were not of equal importance. Response measures contemplated should be commensurate with the nature and degree of and reason behind non-compliance, as well as with the importance of the provision itself. All possible assistance measures encouraging Parties to comply with the Protocol should be exhausted before stronger measures were considered.

(c) Developing an indicative list of advisory and conciliatory measures to encourage full compliance with the Protocol.

45. Some representatives thought that the Working Group did not have adequate time to address the task in question. However, other representatives took the view that the measures included in Annex II, section II, (i), already approved, went a long way towards carrying out the Working Group's mandate under Decision III/2, paragraph (ii).

(d) The possible need for legal interpretation of the provisions of the Protocol and methods of providing the interpretation

46. Many delegates noted that, in its work, the Implementation Committee would need to make legal interpretations of the provisions of the Protocol and that, first and foremost, responsibility for legal interpretation of the Protocol rested with the Parties themselves. One delegation, however, felt that there was not enough time in the Meeting to discuss that issue and that there was a need to provide legal interpretation of the provisions of the Protocol. Another delegation said that that mainly concerned the Amendment that had not yet come into force.

(f) Procedures for expediting the amendment procedure under Article 9 of the Vienna Convention

47. The Working Group did not recommend any means of expediting the amendment procedure. There would be many problems inherent in different procedural obligations for different Parties, if such an amendment was proceeded with. Moreover, considering the need for acceptance of the substance of any amendment to the Protocol by a large number of Parties for its effective implementation, the existing procedure was satisfactory. In addition, the Parties had successfully adopted an amendment in London, using the existing procedure. It was felt that measures such as reducing the period for tabling an amendment were not feasible in the current state of communications.

Recommendations by the Working Group

48. The Working Group made the following recommendations:

1. That the report of the Meeting be brought to the notice of the fourth Meeting of the Parties to the Montreal Protocol in November 1992;
2. That the Meeting be invited to adopt by means of a decision the Non-Compliance Procedure set out in Annex I to that report, subject to resolution of any outstanding matters;
3. That that Meeting be invited to take action, as appropriate, with regard to the indicative lists set out in Annex II to the report; and
4. That that Meeting be invited to take note of the Working Group's advice on the question of expediting the amendment procedure under Article 9 of the Vienna Convention, set out in paragraph 47 of the report.

V. OTHER MATTERS

49. There were no other matters.

VI. ADOPTION OF THE REPORT

50. During consideration of the report, one representative expressed his utter dismay at the language used by certain delegations to reflect their positions concerning Article 10 of the Protocol.

51. The meeting adopted its report.

VII. CLOSURE OF THE MEETING

52. The Chairman declared the Meeting closed on 8 November 1991 at 9.30 p.m.

ANNEX I

Non-Compliance Procedure

The following procedure has been formulated pursuant to Article 8 of the Montreal Protocol. It shall apply without prejudice to the operation of the settlement of disputes procedure laid down in Article 11 of the Vienna Convention.

1. If one or more Parties have reservations regarding another Party's implementation of its obligations under the Protocol, those concerns may be addressed in writing to the Secretariat. Such a submission shall be supported by corroborating information.
2. The Secretariat shall, within two weeks of its receiving a submission, send a copy of that submission to the Party whose implementation of a particular provision of the Protocol is at issue. Any reply and information in support thereof are to be submitted to the Secretariat and to the Parties involved within three months of the date of the despatch or such longer period as the circumstances of any particular case may require. The Secretariat shall then transmit the submission, the reply and the information provided by the Parties to the Implementation Committee referred to in paragraph 5, which shall consider the matter as soon as practicable.
3. Where the Secretariat, during the course of preparing its report, becomes aware of possible non-compliance by any Party with its obligations under the Protocol, it may request the Party concerned to furnish necessary information about the matter. If there is no response from the Party concerned within three months or such longer period as the circumstances of the matter may require or the matter is not resolved through administrative action or through diplomatic contacts, the Secretariat shall include the matter in its report to the Meeting of the Parties pursuant to Article 12 (c) of the Protocol and inform the Implementation Committee accordingly.
4. Where a Party concludes that, despite having made its best, bona fide efforts, it is unable to comply fully with its obligations under the Protocol, it may address to the Secretariat a submission in writing, explaining, in particular, the specific circumstances that it considers to be the cause of its non-compliance. The Secretariat shall transmit such submission to the Implementation Committee which shall consider it as soon as practicable.
5. An Implementation Committee is hereby established. It shall consist of 10 Parties elected by the Meeting of the Parties for two years, based on equitable geographical distribution. Outgoing Parties may be re-elected for one immediate consecutive term. The Committee shall elect its own President and Vice-President. Each shall serve for one year at a time. The Vice-President shall, in addition, serve as the rapporteur of the Committee.
6. The Implementation Committee shall, unless it decides otherwise, meet twice a year. The Secretariat shall arrange for and service its meetings.
7. The functions of the Implementation Committee shall be:
 - (a) To receive, consider and report on any submission in accordance with paragraphs 1, 2 and 4;
 - (b) To receive, consider and report on any information or observations forwarded by the Secretariat in connection with the preparation of the reports referred to in Article 12 (c) of the Protocol and on any other information received and forwarded by the Secretariat concerning compliance with the provisions of the Protocol;

(c) To request, where it considers necessary, through the Secretariat, further information on matters under its consideration;

(d) To undertake, upon the invitation of the Party concerned, information-gathering in the territory of that Party for fulfilling the functions of the Committee;

[(e) To maintain [, in particular for the purposes of drawing up its recommendations,] an exchange of information with the Executive Committee of the Multilateral Fund related to the provision of financial and technical cooperation, including the transfer of technologies to Parties operating under Article 5, paragraph 1, of the Protocol.]

8. The Implementation Committee shall consider the submissions, information and observations referred to in paragraph 7 with a view to securing an amicable solution of the matter on the basis of respect for the provisions of the Protocol.

9. The Implementation Committee shall report to the Meeting of the Parties, including any recommendations it considers appropriate. The report shall be made available to the Parties not later than six weeks before their meeting. After receiving a report by the Committee the Parties may, taking into consideration the circumstances of the matter, decide upon and call for steps to bring about full compliance with the Protocol, including measures to assist the Parties' compliance with the Protocol, and to further the Protocol's objectives.

10. Where a Party that is not a member of the Implementation Committee is identified in a submission under paragraph 1, or itself makes such a submission, it shall be entitled to participate in the consideration by the Committee of that submission.

11. No Party, whether or not a member of the Implementation Committee, involved in a matter under consideration by the Implementation Committee, shall take part in the elaboration and adoption of recommendations on that matter to be included in the report of the Committee.

12. The Parties involved in a matter referred to in paragraphs 1, 3 or 4 shall inform, through the Secretariat, the Meeting of the Parties of the results of proceedings taken under Article 11 of the Convention regarding possible non-compliance, about implementation of those results and about implementation of any decision of the Parties pursuant to paragraph 9.

13. The Meeting of the Parties may, pending completion of proceedings initiated under Article 11 of the Convention, issue an interim call and/or recommendations.

14. The Meeting of the Parties may request the Implementation Committee to make recommendations to assist the Meeting's consideration of matters of possible non-compliance.

15. The members of the Implementation Committee and any Party involved in its deliberations shall protect the confidentiality of information they receive in confidence.

[16. The report, which shall not contain any information received in confidence, shall be made available to any person upon request. All information exchanged by or with the Committee that is related to any recommendation by the Committee to the Meeting of the Parties shall be made available by the Secretariat to any Party upon its request; that Party shall ensure the confidentiality of the information it has received in confidence.]

ANNEX II

Indicative lists

I. Indicative list of possible situations of non-compliance with the Protocol

- (i) Article 2 - Non-compliance with provisions relating to control measures, including those covering consumption and production, industrial rationalization, exports to countries operating under Article 5, paragraph 1, and relating to essential uses of Halons;
- (ii) Article 4 - Non-compliance with provisions relating to control of trade with non-Parties, including the banning of import/export of controlled substances, the undertaking to discourage export of technology and refraining from providing subsidies, aid, credits, guarantees or insurance programmes;
- (iii) Article 7 - Non-compliance with time schedules and non-reporting of specified data;
- (iv) Article 9 - Failure to cooperate in, and to report a summary of, the activities under this Article;
- [(v) Article 10 (after entry into force of the Amendment) - Non-payment of contributions to the financial mechanism]
- [(v) Article 10 (after entry into force of the Amendment) - "Non-provision of the contributions referred to in Article 10, paragraph 1, for the purpose of financing on a grant or concessional basis the incremental costs agreed upon in its paragraph 3, as well as what is provided for in Article 10A concerning substitute substances and the transfer of technology.]
- (vi) Article 10A (after entry into force of the Amendment) - failure to take "every practicable step" consistent with the programmes supported by the financial mechanism, for transfer of technology;
- [(vii) Non-compliance with the obligations in decisions of the Parties to the Protocol.]

Note The above list is without prejudice to the generally accepted rules of international law related to the interpretation and application of treaties.

II. Indicative list of measures that might be taken by a meeting of the Parties in respect of non-compliance with the Protocol

- (i) Appropriate assistance, including assistance for the collection and reporting of data, technical assistance, technology transfer and financial assistance, information transfer and training;
- (ii) Issuing cautions;

- (iii) Suspension, in accordance with the applicable rules of international law concerning the suspension of the operation of a Treaty, of specific rights and privileges under the Protocol, whether or not subject to time-limits, including those concerned with industrial rationalization, production, consumption, trade, transfer of technology, financial mechanisms and institutional arrangements.
