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AD HOC WORKING GROUP OF LEGAL AND TECHNICAL
EXPERTS ON NON-COMPLIANCE WITH THE
MONTREAL PROTOCOL

First session
Geneva, 3-4 July 1998

REVIEW OF THE NON-COMPLIANCE PROCEDURE OF THE
MONTREAL PROTOCOL PURSUANT TO DECISION IX/35
OF THE NINTH MEETING OF THE PARTIES

Note by the Secretariat

Addendum

SUBMISSION OF AUSTRALIA TO THE AD HOC WORKING GROUP
OF LEGAL AND TECHNICAL EXPERTS

Non-compliance procedure: need for review

1. Australia considers that the Implementation Committee is a unique and innovative mechanism among environmental treaty regimes and that it has functioned well since its establishment. It has done so by carefully feeling its way forward, in an absence of extensive guiding procedures, any precedents or a strong mandate. The review of its operation provides Montreal Protocol Parties with an opportunity to assist decision making within the Implementation Committee by formally clarifying, in the light of experience, its procedures and mandate to ensure its effective functioning.
2. References below are to the "non-compliance procedure" (NCP) and the "indicative list of measures that might be taken by a Meeting of the Parties in respect of non-compliance with the Protocol" the indicative list".

Triggering of the non-compliance procedure

3. In the current formulation of the NCP, it is not as clear as it should be that a report of the Secretariat to the Meeting of the Parties and to the Implementation Committee triggers the non-compliance process (NCP, para. 3). The non-compliance process is clearly to be triggered by a:

(a) Submission, with supporting documentation from a Party concerned over another Party's implementation (NCP, paras. 1 and 2); or

(b) Submission from a Party that it considers itself to be in non-compliance (NCP, para. 4).

4. However, in the case of a matter reported to it by the Secretariat, the Implementation Committee is not required, in the way required under paragraphs 2 and 4 of the NCP (procedures (a) and (b) above), to "consider the matter as soon as possible", although it is required in the same way to "receive, consider and report on the matter", as one of its functions (set out in the NCP, para. 7(b)). The uncertainty might be remedied by inserting at the end of the NCP, paragraph 3, the sentence: "The Implementation Committee shall consider the matter as soon as possible".

5. The current provision requires that the Implementation Committee wait for a report to be passed to it by the Secretariat (NCP, para. 3). Given that reports are issued annually and are based on information that is usually 12-18 months behind the date of its provision to the Secretariat, information contained in annual reports is likely to be at least two years behind. Such delays in providing the Implementation Committee with the opportunity to consider suspected non-compliance can hamper its effectiveness.

6. The uncertainty and delay built in to the current formulation raise the question of whether the Implementation Committee should not be enabled to initiate its own considerations of evidence of non-compliance.

7. Australia suggests that it would be preferable for the Committee to be given a mandate to act upon information made available to it from any source, including communications from the Secretariat as soon as possible.

Factual determination of non-compliance

8. Non-compliance is a question of fact. It is not a political question nor, in the simple legal framework of the Protocol's phase-out obligations, can it often be a question of law. The role of Implementation Committee should be to determine at least questions of fact relating to non-compliance. Australia considers that the Committee should be expressly empowered in paragraph 9 of the NCP to formally determine non-compliance, including the frequency of non-compliance, length of non-compliance and whether there is a persistent pattern of non-compliance.

Consequences of non-compliance: recommendations

9. The Implementation Committee currently has a mandate to recommend to the Meeting of Parties responses to non-compliance (NCP, para. 9). Guidance beyond that provided in the Indicative List might be given to the Implementation Committee to assist it in matching appropriate responses to particular types of non-compliance. Australia considers that these responses should refer to the importance of the Protocol provisions breached, the factual circumstances of non-compliance and the reasons for the non-compliance.

10. A relevant factor is the importance of the provision of which the Party is breach. The importance of

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the provisions with which the party is non-compliant is relevant. For instance, obligations under Articles 2A-2H (consumption and production), Article 4 (trade restrictions) and Article 7 (reporting obligations) are central to the operation of the Protocol and their breach should not be taken lightly. Particular instances of non-compliance, such as gross over-production or over-consumption, or a persistent pattern of non-compliance, may warrant particular recommendations, such as the issuing of a caution. This would be so especially if no action is taken after an initial decision is made and the matter comes before the Implementation Committee on a second occasion. The reasons for a Party's non-compliance are not part of the actual finding of non-compliance but may be relevant to what response action is recommended to the Meeting of Parties for its consideration. For example, what bona fide efforts has a Party made to remedy its non-compliance? Therefore, consideration of the reasons for non-compliance should be required to be formally examined by the Implementation Committee and factored into its recommendations.

Adoption of recommendations: Meeting of Parties

11. It is currently the role of the Meeting of Parties to decide what action to take in response to the Implementation Committee's recommendations concerning non-compliance. This would seem to be the appropriate approach in the context of the Montreal Protocol at its current stage of political development: the non-compliance response remains a politicized question for a political body to address. However, it is possible that consensus may be blocked by the non-compliant Party. Therefore, reference should be made in the revised text of the NCP to a specified majority vote fall-back, (as is applicable in the case of adjustments under Article 2 and under rule 40 of the general rules of procedure).

Factual determination of return to compliance

12. Australia considers that there is a gap in the NCP concerning return to compliance. The Implementation Committee should be granted the authority to deem a Party to have returned to a state of compliance. This is a question of fact and should be determined by the Implementation Committee. Consequent upon its findings, the Implementation Committee should be empowered to make further recommendations, such as the recognition by the Meeting of Parties that no further steps are required to be taken to bring the Party into compliance.

Consequence of return to compliance: Meeting of Parties

13. In response to the finding by the Implementation Committee of compliance and any consequent recommendations that no further steps are required, a decision should be taken by the Meeting of Parties, which is responsible for the determination of steps to be taken. It should decide whether any steps that have been taken in respect of that party should cease to apply.
