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**Basel Convention on the Control of
Transboundary Movements of
Hazardous Wastes and their Disposal**

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**Rotterdam Convention on the Prior
Informed Consent Procedure for
Certain Hazardous Chemicals and
Pesticides in International Trade**



**Stockholm Convention on
Persistent Organic Pollutants**

**Ad hoc joint working group on enhancing cooperation and
coordination among the Basel, Rotterdam and Stockholm conventions**

Third meeting

Rome, 25–28 March 2008

Item 3 of the provisional agenda*

**Consideration of the intersessional work undertaken by the
members of the ad hoc joint working group and by the
Secretariats of the Basel, Rotterdam and Stockholm conventions**

**Information provided by the secretariat of the Montreal Protocol on
its experience with its compliance regime**

Note by the secretariats

1. In paragraph 72 of the meeting report of the report of the second meeting¹ of the ad hoc joint working group on enhancement of cooperation and coordination among the Basel, Rotterdam and Stockholm Conventions, the joint working group “agreed that it would be useful to have information from the secretariat of the Montreal Protocol on the operation of the Protocol’s Implementation Committee and other issue. It was agreed that the secretariats, in consultation with the co-chairs, would undertake to arrange with the secretariat of the Protocol for the provision of such information”.
2. In light of the above, the response from the secretariat of the Montreal Protocol is set out in annex I to the present note. The information has been reproduced as received and has not been formally edited.

* UNEP/FAO/CHW/RC/POPS/JWG.3/1.

¹ Document UNEP/FAO/CHW/RC/POPS/JWG.2/18.

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Annex

OPERATIONS OF THE IMPLEMENTATION COMMITTEE UNDER THE NON-COMPLIANCE PROCEDURE OF THE MONTREAL PROTOCOL

a) Background

The Non-Compliance Procedure (NCP) of the Montreal Protocol represents a new approach in monitoring compliance with treaty obligations. It was developed by the Meeting of the Parties to the Montreal Protocol as a response to Article 8 of the Protocol which provides that

“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.”

To accomplish this task, the Meeting of the Parties, decided in 1989 to establish an open-ended ad hoc Working Group of Legal Experts to develop and submit appropriate proposals for consideration and approval by the Parties at their second Meeting. The Working Group was charged with developing procedures and institutional mechanisms for determining non-compliance with the provisions of the Montreal Protocol and for the treatment of Parties that fail to comply with its terms. Parties and signatories to the Montreal Protocol were invited to submit to the Secretariat any comments or proposals they wish to see reflected in the working documents of the ad hoc Working Group.

At the second Meeting of the Parties in 1990, the Parties adopted, on an interim basis, the procedures and institutional mechanisms for determining non-compliance. The Meeting also extended the mandate of the open-ended ad hoc Working Group of Legal Experts to elaborate further procedures on non-compliance and the terms of reference for the Implementation Committee and to present the results of their review to the Fourth Meeting of the Parties in 1992.

The interim non-compliance Procedure that was applicable between 1990 and 1992 contained 11 paragraphs providing for concerns by one or more Parties regarding any Party's implementation of the Protocol to be addressed to the Secretariat. The Secretariat would transmit such concerns to the Party in default and be given reasonable opportunity to reply after which the Secretariat referred the information received to the Implementation Committee to be considered as soon as practicable

The interim NCP had established the Implementation Committee consisting of five Parties elected by the Meeting of the Parties for two years based on equitable geographical distribution. Its functions were to consider and report on any submission made by Parties and any information or observations forwarded by the Secretariat with a view of securing an amicable solution of the matter. The Implementation Committee was not given decision-making powers under the interim NCP but would report its findings to the Meeting of the Parties. Upon receipt of the report of the Committee, the Parties would decide upon any case and call for steps to bring about full compliance with the Protocol, including measures to assist the Party's compliance and to further the Protocol's objectives.

After one year of the operation of the interim non-compliance procedure, the Parties decided to broaden the mandate of the ad hoc Working Group of Legal Experts when elaborating further the procedures on non-compliance to include other important aspects. The Parties intended to create a procedure for non-compliance, which contained conciliatory measures and that would encourage full compliance. They were also keen to have the Implementation Committee play only the advisory and conciliatory role and forward its recommendations to the Meeting of the Parties which would retain the final decision on all matters pertaining to non-compliance.

The current NCP was adopted in 1992 on the basis of the final report of the Ad Hoc Working Group of Legal Experts (see Annex I). The NCP included the indicative list of measures that might be taken in respect of non-compliance (see Annex II). The new NCP is based on a number of fundamental principles, which distinguishes it from other procedures for dispute settlement. This includes non-confrontation, non-judicial, and is subject to the authority of the Meeting of the Parties. The non-confrontation approach adopted by the Parties was aimed at guaranteeing the implementation and compliance with the Protocol obligations and build confidence among Parties in a multilateral process. The Parties also recognised the fact that non-compliance was mostly a consequence of technical, administrative or economic problems and as such the emphasis was put on provision of assistance to Parties in difficulties than applying punitive measures to enforce compliance. By its nature, the mechanisms and procedures for

compliance are non-confrontational, non-judicial, and preventive, and oriented in the direction of helping Parties to implement the provisions of the Montreal Protocol.

b) The Non-Compliance Procedure

The Non-Compliance Procedure is composed of the Implementation Committee, the Secretariat and the Meeting of the Parties, each body playing a distinctive role.

(i) Implementation Committee - membership and functions

The 1992 NCP expanded the membership of the Implementation Committee from the original 5 to 10 Parties to be elected by the Meeting of the Parties for two years based on equitable geographical distribution. Outgoing Parties in the Committee may be re-elected for one immediate consecutive term and a Party that has completed a second consecutive two-year term is eligible for election again only after an absence of one year from the Committee.

Each year new members replace half of the membership and the rest are retained for the benefit of the Committee's institutional continuity. Membership in the Implementation Committee is by Parties only. In 1998 the Parties amended the NCP to provide for each Party selected to the Committee to notify the Secretariat within three months of its selection of who is to represent it, and to endeavour to ensure that such representation remains throughout the entire term of office. There is no special qualification required for membership in the Implementation Committee although individuals most knowledgeable about the obligations of Parties under the Montreal Protocol have tended to play an active role during the Committee's deliberations.

The Implementation Committee of the Montreal Protocol elects its own President and Vice-President each year, the latter also serving as Rapporteur. It meets twice a year unless decides otherwise. Participation in the meetings of the Implementation Committee is restricted to the Committee members and those Parties whose implementation of their obligations is at issue. In 1992, the Committee decided to invite the participation in its meetings by the representatives of the Multilateral Fund Secretariat and the Implementing Agencies (UNDP, UNEP, UNIDO, and World Bank). They were to provide additional information to the Committee especially on approved projects to phase out ozone-depleting substances and verify some of the information presented to the Committee by non-compliant Parties.

The Secretariat of the Global Environment Facility (GEF) was invited to participate in the meetings of the Committee when it began considering non-compliance issues related to the countries with economies in transition after 1994. The GEF was expected to provide financial assistance to eligible countries with economies in transition that are not developing countries and whose activities to implement the Montreal Protocol, while consistent with the objectives of the Protocol, are of a type not covered by the Multilateral Fund.

There are five main functions of the Implementation Committee. The Committee receives, considers and reports on any submission regarding non-compliance with the Protocol obligations. It also receives, considers and reports on any information or observations forwarded by the Secretariat in connection with the preparation of the reports by the Secretariat to the Meeting of the Parties on data reporting under Article 7 of the Protocol and on any other information received and forwarded by the Secretariat concerning compliance with the provisions of the Protocol.

The Committee may request further information on matters under its consideration and undertake information gathering in the territory of a Party concerned, upon its invitation, for the purpose of fulfilling its functions. It also maintains an exchange of information with the Executive Committee of the Multilateral Fund related to the provision of financial and technical co-operation, including the transfer of technologies to developing countries, for the purpose of drawing up its recommendations to the Meeting of the Parties.

The recommendations of the Implementation Committee on non-compliance with the Montreal Protocol are wide ranging. They range from recommendations on its own working procedures, data reporting, classification of developing countries, and non-compliance with the Montreal Protocol by Parties. Each recommendation of the Committee would elicit responses that have facilitated the work of the Committee and that of the Meeting of the Parties towards compliance.

(ii) The Secretariat

The Secretariat's role under the NCP is only facilitative by primarily assisting the Implementation Committee to discharge its functions. This role includes arranging and servicing the Committee's meetings, receiving submissions

from Parties regarding their own non-compliance or that of others and to submit such information to the Implementation Committee. The Secretariat carries out data analysis on production and consumption of ozone-depleting substances reported to the Secretariat by Parties under Article 7 and submits this information, including any cases of potential non-compliance with the Protocol control measures to the Implementation Committee. Other information collected by the Secretariat for presentation to the Implementation Committee is the status of implementation of the import and export licensing systems of ozone-depleting substances and the any information reported by Parties that might have been requested by the Meeting of the Parties on compliance-related matters. The Secretariat would request such information from Parties, analyse it and include any observations in its report to the Implementation Committee and the Meeting of the Parties.

Like the Implementation Committee, the Secretariat does not have any decision-making power under the NCP but its facilitative role is very important since it acts as a link between the Committee, the defaulting Parties and the Meeting of the Parties. The Secretariat also serves as a custodian of all the information on non-compliance, which comes from the Parties and other sources, the release of which becomes vital reference material during consideration of compliance issues by the Committee and the Parties.

(iii) *The Meeting of the Parties*

Decision-making under the NCP is reserved for the Meeting of the Parties, which receives reports from the Implementation Committee, including any recommendations it considers appropriate, or if requested to do so by the Meeting of the Parties. Instances of the Meeting of the Parties requesting the Implementation Committee to make recommendations to assist its consideration of matters of possible non-compliance are very rare. Most of the time it is the Committee which considers non-compliance issues and subsequently forward any recommendations to the Meeting of the Parties. Whatever measures are taken by the Meeting of the Parties, they are intended to secure an amicable solution of the matter on the basis of respect for the provisions of the Protocol. The measures are contained in the indicative list which was adopted by the Parties.

c) *Submissions on non-compliance*

According to the NCP, either one or two Parties that have reservations against another Party's implementation of its Protocol obligations may make submissions to the Implementation Committee. Submissions may also be made by self-incrimination, or through the Secretariat's reports.

In spite of the NCP empowering Parties to come forward and register their reservation regarding other Parties' performance with their Protocol obligations under paragraph 1, to date there has not been any submission on non-compliance from this source. This may be partly due to the fact that the information used to assess compliance is largely based on the mandatory data reporting to the Secretariat under Article 7 of the Protocol. When the data on production and consumption of ozone-depleting substances by individual Parties is reported to the Secretariat, there is a general expectation that any incidents of non-compliance with the Protocol obligations will emerge out of the data analysis by the Secretariat.

The NCP can also be invoked by the Secretariat in the course of preparing its report under Article 7 of the Montreal Protocol. The Secretariat may request the Party concerned to furnish necessary information to clarify any matter and if there is no response within a reasonable time or the issue is not resolved through administrative action, it is included in the report to the Meeting of the Parties. The data report to the Meeting of the Parties is normally considered first by the Implementation Committee which makes recommendations to the Meeting of the Parties for decisions.

Another method of submission of information on non-compliance is by self-incrimination. Under this method any Party after concluding that despite having made its best, bona fide efforts, is unable to comply with its Protocol obligations, may address its concerns in writing to the Secretariat by explaining, in particular, the specific circumstances that it considers to be the cause of non-compliance.

d) *Decision-making under the Non-Compliance Procedure*

All decisions by the Meeting of the Parties on non-compliance with the Montreal Protocol are adopted in accordance with the NCP of the Protocol. The majority of decisions on non-compliance adopted by the Parties contain a requirement to submit action plans to the Meeting of the Parties. The plans would enable the affected Parties to return to compliance with close monitoring by the Implementation Committee and the Meeting of the Parties. The typical elements of such action plans are:

- requesting a Party to submit to the Implementation Committee a plan of action with time-specific benchmarks to ensure a prompt return to compliance;
- the action plan would include (a) import or production quotas of ozone-depleting substances (ODS); (b) ban on imports of ODS-dependent equipment; (c) policy and regulatory instruments that will ensure progress in achieving the ODS phase-out;
- recommendation for international assistance by Multilateral Fund or GEF for projects to implement the country programmes for phasing out ODS;
- monitoring closely the progress of the party in non-compliance with regard to ODS phase out;
- caution to non-compliant Parties by the Meeting of the Parties, in accordance with item B of the indicative list of measures that might be taken by the Meeting of the Parties.

The most extreme action that the Parties might consider is the adoption of further measures under item C of the indicative list of measures in the event that the defaulting Parties fail to return to compliance in a timely manner. This measure includes the suspension of trade privileges under Article 4 of the Montreal Protocol whereby Parties will stop exporting or importing ozone-depleting substances that are a subject of non-compliance to the defaulting Parties.

Over the years, the close co-operation between the non-compliant Parties and the Implementing Agencies of the Multilateral Fund or GEF along with the close monitoring of progress in complying with the benchmarks contained in the decisions by the Implementation Committee have facilitated compliance by the defaulting Parties with considerable success.

One omission, and probably an unintentional one, in the Non-Compliance Procedure, is the lack of decision-making procedure within the NCP itself. Nowhere in the procedure is it provided on how the Implementation Committee shall make its own decisions. The only guidance available are the Rules of Procedure for the Meetings of the Parties to the Montreal Protocol which provides that unless otherwise decided by the meeting, the “rules shall apply mutatis mutandis to the proceedings of committees and working groups.” Even with this helpful provision, the Procedure itself lacks cross-reference to the rule providing that the Implementation Committee shall be guided by the rules of procedure applicable to the Meeting of the Parties unless otherwise decided by the Committee.

Decision-making by the Parties to the Montreal Protocol on all matters of substance are taken by consensus, and if consensus cannot be achieved, by a two-thirds majority votes of the Parties present and voting while decisions on matters of procedure are taken by a simple majority. By necessary implication, this is the same decision-making procedure, which guides the Implementation Committee except that the President of the Committee may exercise the right to vote.

ANNEX I

Non-Compliance Procedure of the Montreal Protocol

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 dispatch or such longer period as the circumstances of any particular case may require. If the Secretariat has not received a reply from the Party three months after sending it the original submission, the Secretariat shall send a reminder to the Party that it has yet to provide its reply. The Secretariat shall, as soon as the reply and information from the Party are available, but not later than six months after receiving the submission, transmit the submission, the reply and the information, if any, 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, which shall consider the matter as soon as practicable.
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. Each Party so elected to the Committee shall be requested to notify the Secretariat, within two months of its election, of who is to represent it and shall endeavour to ensure that such representation remains throughout the entire term of office. Outgoing Parties may be re-elected for one immediate consecutive term. A Party that has completed a second consecutive two-year term as a Committee member shall be eligible for election again only after an absence of one year from the Committee. 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 identify the facts and possible causes relating to individual cases of non-compliance referred to the Committee, as best it can, and make appropriate recommendations to the Meeting of the Parties;

- (e) To undertake, upon the invitation of the Party concerned, information-gathering in the territory of that Party for fulfilling the functions of the Committee;
 - (f) 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 co-operation, 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.

[Source: Annex II of the report of the Tenth Meeting of the Parties, document UNEP/OzL.Pro.10/9 (1998)]

ANNEX II

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

- A. Appropriate assistance, including assistance for the collection and reporting of data, technical assistance, technology transfer and financial assistance, information transfer and training.
- B. Issuing cautions.
- C. 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 mechanism and institutional arrangements.

[Source: Annex V of the report of the Fourth Meeting of the Parties, document UNEP/OzL.Pro.4/15 (1992)]
