

**Seventeenth Meeting of the Parties
to the Montreal Protocol on
Substances that Deplete the
Ozone Layer**
Dakar, 12–16 December 2005
Item 8 of the provisional agenda of the preparatory segment*

Other matters

**Review of the implementation of the non-compliance procedure for
the resolution of compliance matters**

Submission by Australia

* UNEP/OzL.Conv.7/1–UNEP/OzL.Pro.17/1.

Review of the implementation of the non-compliance procedure for the resolution of compliance matters

Proposal and explanatory note submitted by the Government of Australia

A. Introduction

1. This note considers the increasing number and complexity of matters for consideration by the Implementation Committee under the Non-Compliance Procedure of the Montreal Protocol.
2. This note reviews the existing procedure for implementing the Non-Compliance Procedure and presents a proposal by the Government of Australia to undertake a review of the implementation process with a view to identifying options for improving and refining these arrangements.

B. Background

3. The Non-Compliance Procedure (NCP) of the Montreal Protocol was established in 1992 by Decision IV/5 and revised in 1998 by decision X/10. Since its inception, as a result of the commitment of the Ozone Secretariat, Fund Secretariat, Committee members, implementing agencies and all the Parties, the operation of the Implementation Committee has evolved to represent a flexible and sophisticated compliance system which is widely regarded as a model for other multilateral environmental agreements.
4. Over the period 2003-2005 an average of 35 individual compliance matters were reported by the Implementation Committee at each meeting. These compliance matters resulted in between 8-20 requests for Parties to submit a plan of action to address non-compliance and return the Party to compliance as soon as possible. This level of activity compares with 16 individual compliance matters reported by the Committee in 2000, and 3 matters of individual compliance reported by the Committee in 1996.
5. The comparatively recent increase in the Implementation Committee's activities reflects an increase in the commitments undertaken by the Parties to the Montreal Protocol: during 1999, Article 5 Parties undertook controls on Annex A/I (CFCs); in 2002, controls on Annex A/II (halons), Annex C/III (BCM), Annex E (methyl bromide); in 2003, controls on Annex B/I (CFCs), Annex B/III (methyl chloroform). In addition, non-article 5 Parties undertook additional Annex E (methyl bromide) controls in 2001 and 2003 and Annex C/I (HCFCs) controls in 2004.
6. The current year, 2005, will see Parties undertake commitments to further controls on substances in Annex A/I (CFCs), Annex A/II (halons), Annex B/II (CTC), Annex B/III (methyl chloroform), and Annex E (methyl bromide). This can be reasonably expected to further increase the number of issues brought to the attention of the Implementation Committee.

C. NCP implementation challenges under Decision IV/5 and X/10

7. The implementation of the existing Non-Compliance Procedure as presented in Decisions IV/5 and X/10, has inherent and unresolved difficulties when applied to the current cycle of data reporting and meeting schedules. These challenges have been compounded by the recent significant increase in the number of instances of potential non-compliance brought to the attention of the Implementation Committee.
8. There are three elements of the NCP which contribute to implementation challenges:
 - (a) The timing of data submission: Parties are granted up to 3 months to provide a response to a request for information or clarification, 'or such longer period as the circumstances of the particular case may require';
 - (a) In implementing the NCP the Committee is, in a number of instances, required to 'consider the matter as soon as practicable';

(b) The Implementation Committee is required to provide its report to the Meeting of Parties, not later than six-weeks before their meeting.

9. The Parties may consider that, in light of the difficulties arising, this is a timely opportunity for review of the implementation of the NCP, particularly with regard to providing better guidance on the timelines for submission of information, its consideration, and the development of recommendations for resolution.

10. The results of a review would provide clarification for Parties, the Committee, and the Secretariat in their continued efforts to implement an effective and equitable non-compliance procedure.

11. This review of the implementation of the non-compliance procedure could consider *inter alia*, the following elements.

1. Submission of information for consideration at a Committee meeting.

12. Under the existing procedure, Parties are requested to submit information to the Secretariat regarding non-compliance matters. For compliance matters that are to be considered by the Implementation Committee the Secretariat or the Committee makes the request depending on the stage of the compliance matter.

13. The format for requests has varied, for example at the 31st meeting Parties were requested to 'submit information as a matter of urgency, in time for the [consideration by the Committee at its next meeting] or [Parties' consideration at their xx meeting]. For the first time at the 32nd Committee meeting, Parties were requested to submit information to the Secretariat 'no later than 30 September'.

14. The main route for identifying possible cases of non-compliance has been through the data report presented by the Secretariat to each meeting of the Implementation Committee. Under Article 7 Parties are required to submit data not later than the 30 September in the year following the year to which the data relate. The existing NCP allows a minimum of 3 months for provision of an explanation of any divergences from the phase-out schedules. Whilst this provides a Party a reasonable response time it can result in submission after the time of the next Committee meeting and a corresponding delay in response by the Parties, including provision of assistance.

15. In practice, whilst many Parties submit information on time, others continue to submit information up to the start of the Committee meeting, during the Committee meeting, and after the conclusion of a Committee meeting. This presents problems for the operation of the Committee as a procedure for considering these last-minute submissions has not been formally established. There is an expectation from the Party submitting the information that the Committee will consider the information prior to reporting its recommendations, when this may be impractical and could result in inequitable treatment. It is unclear whether this approach meets the requirement for the Committee to consider a response 'as soon as practicable'.

16. It is important to the efficient operation of the non-compliance procedure that the Meeting of the Parties does not consider recommendations that have become outdated by new information, particularly when these deem a Party to be in non-compliance or potential non-compliance. In order to ensure that the best advice is provided to the Parties, the Committee members should provide advice based on the latest information. However, the Committee also needs time to ensure that it gives due consideration to this information. There is a need to ensure a balance between flexibility and ensuring due consideration of the information presented before making recommendations to the Parties.

Possible solution

17. The review could consider establishing an appropriate submission date for the provision of information prior to an Implementation Committee meeting. Submission of information by this date would ensure that the information was considered, along with its compliance matter, at the Committee meeting. If information was submitted after this date then the Committee would have the option of deferring consideration until the following meeting, subject to available time and resources.

18. In the case of a Committee meeting preceding a Meeting of Parties, if the information were to be submitted after the close of the meeting, the Committee could reconvene to consider or defer the matter. If there were collective and unanimous views on the information, then the information could be

considered by the upcoming Meeting of Parties; if not, then the matter would be deferred to the next regular Committee meeting.

19. The advantage of this approach is that it would provide certainty to a Party that a submission made by an agreed deadline would guarantee consideration at the next meeting. This approach would assist the Committee in that it would ensure that information is presented in an appropriate format, for example by allowing sufficient time for translation, a consideration that can be particularly important for the resolution of complex compliance matters.

20. The option for the Committee to reconvene to agree to consider, or to defer consideration, retains an important element of flexibility which ensures that Parties are able to respond to non-compliance issues in a timely and effective manner.

2. Official recording of Committee recommendations

21. To date, compliance matters considered by the Committee have been officially recorded in the report of the Committee meeting. The recommendations, including those containing draft decisions, are then considered by the annual Meeting of the Parties and, if adopted, are recorded in the official report of that Meeting. Additional information on a number of compliance matters may also be recorded in the report of the Meeting of the Parties through the summary report presented verbally to the Meeting of the Parties by the President of the Committee.

22. This process has not, however, managed to consistently record the resolution of compliance matters in cases where the resolution has occurred after the conclusion of the meeting of the Committee, for example by late submission of relevant information. To date, as the resolutions have occurred after the conclusion of the meeting of the Committee, they have not been recorded in the report of that meeting. On a number of occasions the resolutions have been mentioned in the report of the President to the Meeting of the Parties but they have not been consistently recorded in the official report of the Meeting of the Parties.

23. To illustrate the former case, the thirty-third meeting of the Committee in November 2004 agreed to include Party A in a draft decision that noted the Party to be in non-compliance with its data reporting obligations and requested it to submit data for the purpose of confirming its status as a Party operating under Article 5 of the Protocol. Prior to this draft decision being considered by the subsequent Sixteenth Meeting of the Parties, Party A submitted data enabling its status to be confirmed. Following agreement with the President of the Committee, the Party's name was removed from the draft decision presented to the Sixteenth Meeting. The resolution of Party A's compliance matter, through its submission of data, was not however officially recorded in the report of the Sixteenth Meeting of the Parties.

Possible solution

24. The review could consider a possible approach to ensure accurate recording of Implementation Committee recommendations, particularly those that immediately precede a Meeting of Parties.

25. Options for a solution would be linked to the outcome of considerations under *i) Submission of information for consideration at a Committee meeting*. Consideration would need to be given to official recording, for example, if compliance matters were resolved by the Committee reconvening after the official close of its Meeting. The Secretariat could ensure that the resolution is brought to the attention of the Meeting of Parties by the President of the Implementation Committee so that it may be recorded in the Meeting report.

3. Endorsement of recommendations and adoption of decisions by the Meeting of Parties

26. Decision IV/5 requires that the 'Implementation Committee shall report to the Meeting of the Parties, including any recommendations it considers appropriate.....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'.

27. The President of the Implementation Committee presents a summary of the report of the Committee's work from its preceding meeting, the full text of which is before the Meeting of Parties, including any accompanying draft decisions. The number of these draft decisions has been increasing,

the report in recent times typically containing approximately 30-40 decisions and recommendations. For example the 33rd Committee meeting made 32 recommendations and proposed 17 draft decisions.

28. The types of compliance matters addressed by draft decisions varies, but typically includes: noting non-compliance with data reporting; noting potential non compliance of individual Parties or groups of Parties; requests to submit plans of action; requests to endorse plans of action; and requests to endorse changes to a Party's baseline.

29. These draft decisions are taking up an increasingly large proportion of the Meeting of Parties agenda: at the 2002 MOP, for example, no less than 25 of 43 decisions originated from, or were related to, the Implementation Committee.

30. The consideration of the Committee's recommendations by the Meeting of Parties is complicated by the short time available between the conclusion of the Implementation Committee meeting and the convening of the Meeting of Parties. There are an increasingly large number of complex issues for Parties to consider in an extremely short time frame. Parties have previously made the comment that there was a need for greater transparency in the wording of the draft decisions and this may in part be due to the selection of information to be included in the draft decisions, compared to the fuller consideration available in the official Committee meeting report.

Possible solution

31. Noting the large number of decisions and recommendations made by the Committee, and the likelihood of these increasing, it would be timely to consider options for streamlining the process by which the Meeting of Parties considers the Committee's recommendations.

32. One approach would be to consider if it was practicable for the Meeting of Parties to adopt the Committee report by Decision and thereby endorse the recommendations contained therein. The Parties could then consider whether there was a continued need to retain individual decisions, and if so which compliance matters would be subject to individual decisions: for example the endorsement of a Parties' proposed plan of action to return to compliance, as these plans can deviate from the Protocol's existing control measures.

33. The Parties could also review the presentation of these decisions by considering: standardizing the format and content; options for presenting the decisions in a tabular form for some compliance matters e.g., for those Parties simply being requested to submit information for consideration by the Committee.

34. The overall objective would be to improve the method of presentation of the recommendations to the Parties; to facilitate and promote understanding of the process undertaken to arrive at these recommendations; and to present these recommendations in a consistent and accessible format; thereby ensuring transparency of approach.

D. Summary

35. The current situation of the operation of the Implementation Committee and the challenges of increasing workload and complexity provide a timely opportunity to undertake a review of the non-compliance procedure with a view to streamlining the process and identifying options to improve the transparency and accountability of the Protocol's non-compliance procedure.

36. Developing a consolidated description of the non-compliance procedure's operation would also be of benefit to other multilateral environment agreements seeking to draw upon the Montreal Protocol's experiences.

37. Australia proposes that the Parties adopt a decision on a review of the implementation of the procedure for the resolution of compliance matters. A draft decision is attached for the consideration of the Parties.

Draft decision XX Review of the implementation of the Non-Compliance Procedure

Recalling the non-compliance procedure adopted by the Fourth Meeting of the Parties in its decision IV/5,

Noting that these procedures were reviewed in Decision IX/35,

Aware that the effective operation of the Protocol requires that these procedures should be reviewed on a regular basis,

Also aware of the fundamental importance of ensuring compliance with the provisions of the Montreal Protocol and of assisting Parties to that end,

1. To establish an Ad Hoc Working Group of Legal and Technical Experts on Non-Compliance composed of fourteen members: seven representatives from Parties operating under paragraph 1 of Article 5 and seven representatives from Parties not operating under Article 5, to review the implementation of the non-compliance procedure of the Montreal Protocol and to develop appropriate conclusions and recommendations for consideration by the Parties, [identifying options for improving and refining these arrangements].
2. To select the following seven Parties [] from those Parties not operating under paragraph 1 of Article 5, and to select the following seven Parties [] from those operating under paragraph 1 of Article 5, as members of the Ad Hoc Working Group of Legal and Technical Experts on Non-Compliance;
3. To note that the Ad Hoc Working Group of Legal and Technical Experts on Non-Compliance shall select two Co-Chairs, one from those Parties operating under paragraph 1 of Article 5 and one from Parties not so operating;
4. To adopt the following timetable for the work of the Ad Hoc Working Group of Legal and Technical Experts on Non-Compliance:
 - (a) [?Date]: each of the selected Parties is invited to indicate to the Secretariat the name of its representative to the Ad Hoc Working Group;
 - (b) [?Date]: all Parties are also invited to submit to the Secretariat any comments or proposals they wish to see considered in the work of the Ad Hoc Working Group;
 - (c) The Ad Hoc Working Group will meet during the three days immediately prior to the twenty-sixth Open-ended Working Group. It should provide a short report to the twenty-sixth Open-ended Working Group of the Parties on the status of its work;
 - (d) The Ad Hoc Working Group will meet during the three days immediately prior to the Eighteenth Meeting of the Parties. It should provide a status report on the outcome of its work, including any conclusions and recommendations;
 - (e) The Group may also consider carrying out additional work through correspondence or any other means it considers appropriate;
5. To request the Ad Hoc Working Group of Legal and Technical Experts on Non-Compliance, when reviewing the non-compliance procedure to:
 - (a) Consider any proposals presented by Parties for [improving and refining the process for the implementation of the Non-Compliance Procedure].
6. To consider and adopt any appropriate decision at the Eighteenth Meeting of the Parties upon the review of the work of the Ad Hoc Working group of Legal and Technical Experts on Non-Compliance, including its conclusions and/or recommendations;
7. To note that the review of the “Indicative list of measures that might be taken by a meeting of the Parties in respect of non-compliance with the Protocol” is not included in the mandate of the Ad Hoc Working Group;