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**Open-ended Working Group of the Parties to
the Montreal Protocol on Substances that
Deplete the Ozone Layer**

Twenty-sixth meeting

Montreal, 3–6 July 2006

Item 6 of the provisional agenda*

**Treatment of stockpiled ozone-depleting substances relative to compliance
(UNEP/OzL.Conv.7/7-UNEP/OzL.Pro.17/11, paragraph 180)**

Note by the Secretariat

1. The treatment of stockpiling of ozone-depleting substances relative to compliance with the Montreal Protocol was considered by the Implementation Committee last year based on an analysis prepared by the Secretariat for the Committee's consideration. The Secretariat's analysis, which is reproduced in the annex to the present note, sets out four instances in which Parties had explained that excess production or consumption of ozone-depleting substances in a given year was the result of stockpiling of ozone-depleting substances produced or imported in that year for destruction, use as feedstock, export for feedstock or export for basic domestic needs in a future year.
2. The Seventeenth Meeting of the Parties agreed that the issue of stockpiling relative to compliance was an important topic but also a complex one requiring further consideration. It was proposed that it be taken up again at the twenty-sixth meeting of the Open-ended Working Group. Accordingly, the issue has been included on the agenda of the meeting, as reflected in document UNEP/OzL.Pro.WG.1/26/1.

* UNEP/OzL.Pro.WG.1/26/1.

Annex

The issue of ODS stockpiling¹ relative to non-compliance with the Montreal Protocol

Executive summary

The Montreal Protocol includes very specific time-bound control measures which must be met to achieve and maintain compliance. Those control measures are most often framed in language similar to that which follows:

“Each Party shall ensure that for the 12-month period commencing on 1 January [year], and in the 12-month period thereafter, the calculated level of [consumption or production] of the controlled substances in [Group x of Annex x] does not exceed, annually, [prescribed level]”.

Nevertheless, in previous years a number of Parties which exceeded the prescribed level of production or consumption of a particular controlled substance for a given year explained that their excess production or consumption represented:

- (a) ODS production in that year which had been stockpiled for domestic destruction or export for destruction in a future year;
- (b) ODS production in that year which had been stockpiled for domestic feedstock use or export for that use in a future year;
- (c) ODS production in that year which had been stockpiled for export to meet basic domestic needs of developing countries in a future year;
- (d) ODS imported in that year which had been stockpiled for domestic feedstock use in a future year.

When the Secretariat received those explanations from the Parties in past years, it included them in its data report to the Implementation Committee but did not highlight the issue for the Committee under the non-compliance procedure of the Montreal Protocol, or ask the Committee if the explanations were sufficient to justify the apparent deviation from the related Protocol control measure. In order to ensure that the Secretariat was correctly discharging its obligations under the Protocol’s non-compliance procedure to identify and report to the Parties possible cases of non-compliance, it invited the Committee at its thirty-fourth meeting to consider whether the Secretariat should be reporting the type of deviations mentioned above as cases of possible non-compliance. In response, the Committee requested the Secretariat to place the issue on the agenda of the thirty-fifth meeting and to prepare an information document on the subject.

In the course of preparing the present information document, the Secretariat requested Parties which had previously submitted the explanations listed in the second paragraph above to provide further details of the circumstance which had resulted in their production or consumption deviations. The Secretariat also identified those Articles of the Protocol and the decisions of the Parties which appeared to provide guidance on whether those deviations were consistent with the Protocol’s control measures. The Secretariat sought in particular to identify any Article or decision which might support the explanations submitted by the Parties by allowing production or import for destruction, feedstock use or basic domestic needs for developing countries to exceed the annual levels of production or consumption prescribed by the Protocol for the corresponding 12-month period. The primary sources of guidance identified by the Secretariat were Article 1, paragraphs 5 and 6, Articles 2A to 2H, Article 5 and Article 7, paragraph 3, of the Protocol, and decisions VII/30 and IX/28 of the Meeting of the Parties.

From its review, the Secretariat observed that, of the four types of deviation from the Protocol’s production and consumption control measures listed in paragraph 2 of the present note, only the type described in subparagraph (d) appeared to be consistent with the Protocol. That type of deviation

¹ The terms “stockpiled” and “stockpiling” are used throughout the present document to refer to ODS which is not put to its intended use in the year in which it is produced or imported. The explanations submitted by some Parties for their consumption or production deviations do not specifically use those terms. However, the nature of their explanation indicates that stockpiling has occurred.

concerned the situation where imports in excess of the level prescribed for consumption in a given 12-month period were stockpiled in that period for domestic feedstock use in future years. It appeared to be consistent with the Protocol on the basis of decision VII/30, which addresses the export and import of controlled substances for feedstock use.

With regard to the other three types of consumption and production deviations listed in subparagraphs (a) to (c), the Secretariat was not able to identify any Protocol provisions or decisions of the Parties which would support the conclusion that those types of deviation were consistent with the Protocol. Those deviations concerned situations where production in excess of the level prescribed by the Protocol for production or consumption in a given 12-month period were stockpiled in that period for domestic destruction, domestic feedstock use or export for destruction, export for feedstock use or export to meet the basic domestic needs of developing countries in future years.

On that basis, unless the Implementation Committee recommends otherwise, future deviations consistent with the types of deviations listed in subparagraphs (a) to (c) above will be highlighted to the Committee and the Parties in the data report of the Secretariat as cases of possible non-compliance, to enable the Committee and the Parties to consider each instance on a case-by-case basis, in accordance with the usual practice.

A. Background

1. The present note has been prepared in response to a request by the Implementation Committee at its thirty-fourth meeting. At that meeting, the Ozone Secretariat reported that, in previous years, a number of Parties had explained that deviations from their ODS consumption and production phase-out obligations in a particular year fell into one of the following categories:

- (a) ODS production in that year which had been stockpiled for domestic destruction or export for destruction in a future year;
- (b) ODS production in that year which had been stockpiled for domestic feedstock use or export for that use in a future year;
- (c) ODS production in that year which had been stockpiled for export to meet basic domestic needs of developing countries in a future year;
- (d) ODS imported in that year which had been stockpiled for domestic feedstock use in a future year.

2. The Secretariat advised that, in previous years, when those explanations were included in the Secretariat's data reports to the Committee and the Meeting of the Parties, they had not been highlighted by the Secretariat as possible cases of non-compliance and were not discussed by those bodies.

3. In order to ensure that the Secretariat was correctly discharging its obligation under the Protocol's non-compliance procedure to identify and report to the Parties possible cases of non-compliance, it invited the Committee at its thirty-fourth meeting to consider whether the Secretariat should be reporting the type of deviations mentioned in paragraph 1 above as cases of possible non-compliance.

4. In response, the Committee requested the Ozone Secretariat to place the issue on the agenda of its thirty-fifth meeting and prepare an information document on the subject.

5. The present note summarizes information which Parties have submitted to the Secretariat on the circumstances leading to those Parties' stockpiling ODS for future years for the aforementioned purposes, the approach to date on the issue, and the Articles of the Montreal Protocol on Substances that Deplete the Ozone Layer and decisions of the Parties to the Protocol which appear relevant to the issue.

B. Information submitted by Parties with regard to stockpiling for future purposes

6. The Secretariat contacted Parties which had submitted explanations consistent with those listed in paragraph 1 of the present note with regard to ODS consumption or production deviations in previous years. Those Parties were requested to provide additional information on the reasons why the ODS which caused the deviation was stockpiled rather than put to its intended purpose in the year in which it was imported or produced.

7. To date, Parties have reported to the Secretariat the following information:

(a) The ODS was produced throughout the year as by-product and used as feedstock by domestic enterprises or by the Parties to which the producing Party exports. The process by which the ODS by-product is created is continuous. Consequently, the producing Party would always have a quantity of the ODS remaining at the end of each year, which would be stockpiled until it could be used as feedstock the following year;

(b) The ODS was produced as by-product, captured through mandatory emission minimization measures, and exported for destruction. The ODS was sometimes stockpiled for export for destruction in a future year in order to minimize transport and destruction costs. At other times, the ODS was stockpiled for export for destruction in a future year to accommodate the limited capacity of the destruction facility;

(c) The ODS was produced as by-product and destroyed as soon as a sufficient quantity of waste liquid from the production of epichlorhydrine became available to make an appropriately proportioned mixture. Destruction of the ODS in a mixture, rather than pure form, was considered necessary because of the chemical properties of the ODS by-product, carbon tetrachloride. The production of the waste liquid does not always synchronize with the production of the ODS by-product. Consequently, ODS production must sometimes be stockpiled for destruction in a future year;

(d) The ODS was produced for feedstock, upon demand. The customer subsequently requested postponement of the export until the following year, requiring the producing Party to stockpile the feedstock until that time;

(f) The ODS was produced each year to meet the basic domestic needs of developing countries, in quantities no greater than the annual allowance prescribed by the Protocol. The national authority assumed that a portion of that production was stockpiled for export to the developing countries in a future year because the associated commercial arrangements could not be completed before the end of the year of production. The stockpiling was not prohibited on the basis that prohibition would be overly restrictive of commercial trade.

C. The current approach

8. Whenever a Party's data report showed that it had imported or produced ODS in a certain year, the Secretariat would add the quantity imported into the calculation of the Party's consumption level for that year and add the quantity produced into the calculation of the Party's production and consumption levels for that year. That approach would be taken regardless of whether the Party's data report showed that the imported or produced ODS was intended for domestic destruction or feedstock use in a future year, or for export for destruction, feedstock use or basic domestic needs in a future year.

9. Parties whose calculated production or consumption exceeds their annual consumption or production limit as prescribed by the Protocol's control measures are shown in the data report of the Secretariat as deviating from the control measures of the Protocol. Also, the Secretariat includes in its data report to the Committee and the Parties the explanations or clarification associated with the excess production or consumption. Should the Party's data report not provide an explanation for the deviation, the Secretariat would request an explanation from the reporting Party.

10. Consequently, the data report of the Secretariat has to date included the explanations listed in paragraph 8 of the present note in the "clarification" column of the tables which specify apparent deviations from the consumption and production control measures of the Protocol. The Secretariat has not previously asked the Parties or the Committee if these explanations were sufficient to justify the apparent deviations from the relevant Protocol control measure.

11. Recent requests for advice on the matter, however, led the Secretariat to review the guidance provided by the Articles of the Protocol and decisions of the Parties. The Secretariat's review raised questions regarding the consistency of those deviations with the terms of the Protocol and led the Secretariat to conclude that it should ask the Committee and the Parties to determine if those types of deviations from the Protocol's consumption and production control measures were consistent with the Protocol, and the manner in which the deviations should be treated in future with respect to the Protocol's non-compliance procedure.

D. Relevant Articles of the Montreal Protocol and decisions of the Parties

12. Articles 2A to 2I and 5 set out the levels of consumption and production which a Party must not exceed in a prescribed period. The prescribed periods are 12 months in duration, commencing on 1 January.

13. Article 1, paragraph 5, of the Montreal Protocol defines production as the amount of controlled substances produced, minus the amount destroyed by technologies to be approved by the Parties and minus the amount entirely used as feedstock in the manufacture of other chemicals. Paragraph 6 of that Article defines consumption as production plus imports minus exports of controlled substances. Therefore, unless otherwise prescribed by the Protocol, the Secretariat's understanding of those provisions is that ODS imported or produced in a given year should be included in the calculation of a Party's controlled consumption and production levels for that year, and the Party's calculated level of consumption and production for that year should not exceed the level prescribed in Articles 2A to 2I and 5.

14. Whether ODS imported and produced by a Party in a given year for domestic destruction or feedstock use, or export for destruction, feedstock use, or basic domestic needs in a future year should be presented as instances of possible non-compliance therefore appears to depend upon whether the production or import is allowed by the Protocol or can be legally excluded from the calculation of the Party's controlled consumption and production levels for the year in which it was imported or produced. As noted in the definition of consumption in the preceding paragraph, the Protocol makes provision for the deduction of exports. Other Articles of the Protocol and decisions of the Parties make provision for the deduction of feedstock use and destruction, and also allow additional production to meet the basic domestic needs of developing countries.

15. Consequently, whether those Articles and decisions can be applied to the consumption and production deviations under consideration appears to depend upon the year in which the calculation of a Party's annual consumption and production levels should take into account the act of domestic destruction or feedstock use, or export for destruction, feedstock use, or basic domestic needs of developing countries. That is, should it be accounted for in the year in which the destruction, feedstock use or export occurs, or in the year in which the ODS is imported or produced for that purpose?

16. The section of the present note below presents the Articles of the Protocol and decisions of the Parties relevant to the issue, addressing in turn each of the explanations for consumption and production deviations listed in paragraph 1 above.

1. ODS production in a given year which has been stockpiled for domestic destruction or export for destruction in a future year

17. Article 1, paragraph 5, of the Protocol makes provision for the deduction of ODS destruction from a Party's controlled production, as it defines production as the amount of controlled substances produced, minus the amount destroyed by technologies to be approved by the Parties and minus the amount entirely used as feedstock in the manufacture of other chemicals. ODS destruction is therefore also deducted from a Party's controlled consumption, given that paragraph 6 of the Article defines consumption as production plus imports minus exports of controlled substances. Paragraph 6 also makes provision for the deduction of exports, regardless of their intended purpose.

18. With the exception of the initial years of the phase-out schedule applicable to Annex A, group I CFC, Articles 2A to 2I and 5 prescribe the Protocol's controls on consumption and production on a 12-monthly basis, commencing 1 January. That is, each Article contains the equivalent of the following part of the passage from Article 2B, paragraph 1, that:

“Each Party shall ensure that for the twelve-month period commencing on 1 January 1992, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in group II of Annex A does not exceed, annually, its calculated level of consumption in 1986. Each Party producing one or more of these substances shall, for the same periods, ensure that its calculated level of production of the substances does not exceed, annually, its calculated level of production in 1986.”

19. Article 7, paragraph 3, prescribes the data which must be submitted to the Secretariat each year to calculate a Party's level of controlled consumption and production. In doing so, it appears to provide guidance on the year in which a Party should report data on destruction and export for destruction, and

thereby, the year in which destruction or export for destruction should be deducted from a Party's controlled production or consumption levels. Paragraph 3 of the Article states that:

“Each Party shall provide to the Secretariat statistical data on its annual production (as defined in paragraph 5 of Article 1) of each controlled substance listed in Annexes A, B, C and E and, separately, for each substance...

- Amounts destroyed by technologies approved by the Parties, and
- Imports from and export to Parties and non-Parties respectively,

for the year during which provisions concerning the substances in Annexes A, B, C and E respectively entered into force for that Party and for each year thereafter...”

20. Decision IX/28 adopted the existing official data reporting forms and instructions. The guidance provided in the forms and instructions on the year in which a Party should report destruction and export of ODS for destruction, and thereby the year in which the destruction or export for destruction should be deducted from a Party's controlled production or consumption levels, appear consistent with the guidance of Article 7, paragraph 3, of the Protocol. Question 1.2 of the questionnaire, contained in the instructions, reads:

“Did your country export CFCs, halons, carbon tetrachloride, methyl chloroform, HCFCs, HBFCs, bromochloromethane, or methyl bromide in the reporting year?”

Question 1.4 reads:

“Did your country destroy any ODSs in the reporting year?”

The instructions for data reporting form 4 are:

“If your country has destroyed any of the substances listed in Annex A (CFCs and Halons), Annex B (other fully halogenated CFCs, methyl chloroform and carbon tetrachloride), Annex C (HCFCs, HBFCs or BCM), or Annex E (methyl bromide) in the reporting period, please use data form 4”.

21. From the above discussion, and unless the Parties decide otherwise, it would appear that Article 7, paragraph 3, of the Protocol and the data reporting instructions given under decision IX/28 support the conclusion that a consumption or production deviation which represented ODS produced in the year of the apparent deviation and stockpiled for domestic destruction in a future year, or export for destruction in a future year, is not consistent with the Protocol. That would mean that the amount stockpiled for domestic destruction in a future year should be legally excluded from the calculation of a Party's controlled consumption and production levels only in the year in which it is destroyed, rather than the year in which it was produced and stockpiled. Similarly, the amount intended for export for destruction should be legally excluded from a Party's controlled consumption level only in the year in which it was exported.

2. ODS production in that year which had been stockpiled for domestic feedstock use or export for that use in a future year

22. Article 1, paragraph 5, of the Protocol makes provision for the deduction of ODS used as feedstock from a Party's annual controlled production, as it defines production as the amount of controlled substances produced, minus the amount destroyed by technologies to be approved by the Parties and minus the amount entirely used as feedstock in the manufacture of other chemicals. ODS used as feedstock is therefore also deducted from a Party's annual controlled consumption, given that paragraph 6 of the Article defines consumption as production plus imports minus exports of controlled substances. Paragraph 6 also makes provision for the deduction of exports, regardless of their intended purpose, as the paragraph defines consumption as production plus imports minus exports of controlled substances.

23. As stated in paragraph 25 above, Articles 2A to 2I and 5 prescribe the Protocol's controls on consumption and production on a 12-monthly basis, commencing 1 January.

24. Article 7, paragraph 3, also appears to provide guidance on the year in which a Party should report the use of domestically produced ODS for feedstock and export for feedstock, and thereby, the year in which the feedstock use or export for feedstock use should be deducted from a Party's controlled production or consumption levels. Paragraph 3 of the Article states that:

“Each Party shall provide to the Secretariat statistical data on its annual production (as defined in paragraph 5 of Article 1) of each controlled substance listed in Annexes A, B, C and E and, separately, for each substance,

- Amounts used for feedstocks, ...
- Imports from and export to Parties and non-Parties respectively,

for the year during which provisions concerning the substances in Annexes A, B, C and E respectively entered into force for that Party and for each year thereafter...”

25. With regard to Parties which stockpile domestically produced ODS in a given year for export for feedstock uses in a future year, decision VII/30 is intended to provide guidance on how the export should be treated. Entitled “Export and import of controlled substances to be used as feedstock”, paragraphs 1 and 2 of the decision provides as follows:

“1. That the amount of controlled substances produced and exported for the purpose of being entirely used as feedstock in the manufacture of other chemicals in importing countries should not be the subject of the calculation of ‘production’ or ‘consumption’ in exporting countries. Importers shall, prior to export, provide exporters with a commitment that the controlled substances imported shall be used for this purpose. In addition, importing countries shall report to the Secretariat on the volumes of controlled substances imported for these purposes; and

“2. That the amount of controlled substances entirely used as feedstock in the manufacture of other chemicals should not be the subject of calculation of ‘consumption’ in importing countries.”

26. The information presented in paragraph 20 above on the guidance provided by the data reporting forms and instructions with respect to reporting the export of domestically produced ODS for destruction also appears to apply to the export of domestically produced ODS for feedstock use. With respect to the domestic feedstock use of domestically produced ODS, the forms and instructions adopted by decision IX/28 appear to provide further guidance on the year in which a Party should report that use, and thereby the year in which the use should be deducted from a Party’s controlled production and consumption levels. The instructions state:

“If your country produced ODS for feedstock use within the reporting period, please provide data on the quantity of each ODS produced for feedstock purposes in column 4”.

Column 4 is entitled “Production for feedstocks within your country”.

27. From the above discussion, and unless the Parties decide otherwise, it would appear that decision VII/30 supports the conclusion that a consumption or production deviation which represents ODS produced in the year of the deviation and stockpiled for export for feedstock use in a future year is not consistent with the Protocol. That would mean that the amount produced for export for feedstock in a future year should be legally excluded from the calculation of a Party’s controlled consumption and production levels only in the year in which it was exported, rather than the year in which it was produced and stockpiled.

28. Also, from the above discussion and unless the Parties decide otherwise, it would appear that Article 7, paragraph 3, of the Protocol and the instructions adopted under decision IX/28 support the conclusion that a consumption or production deviation which represents ODS produced in the year of the deviation and stockpiled for domestic feedstock use in a future year is not consistent with the Protocol. That would mean that the amount stockpiled for domestic feedstock use in a future year should be legally excluded from the calculation of a Party’s controlled consumption and production levels only in the year in which it was used as feedstock, rather than the year in which it was produced and stockpiled.

3. ODS production in that year which had been stockpiled for export to meet basic domestic needs in a future year

29. The definition of production contained in Article 1, paragraph 5, of the Protocol does not make provision for the deduction of ODS produced to meet basic domestic needs from a Party’s annual controlled production. As stated previously, paragraph 6 of that Article makes provision for the deduction of exports, regardless of their intended purpose, as the paragraph defines consumption as production plus imports minus exports of controlled substances.

30. As stated in paragraph 18 above, Articles 2A to 2I and 5 prescribe the Protocol's controls on consumption and production on a 12-monthly basis, commencing on 1 January. Also, Articles 2A to 2F, 2H and 5 allow a Party to exceed its annual production limit by a prescribed amount in order to satisfy the basic domestic needs of the Parties operating under paragraph 1 of Article 5. That is, each of those Articles contains the equivalent of the following passage from Article 2B, paragraph 1:

“Each Party producing one or more of those substances shall ensure that its calculated level of production of the substances does not exceed, annually, its calculated level of production in 1986. However, in order to satisfy the basic domestic needs of the Parties operating under paragraph 1 of Article 5, its calculated level of production may exceed that limit by up to 10 per cent of its calculated level of production in 1986.”

Those Articles do not, however, make provision for Parties to exceed their annual consumption limit by the above amount.

31. Article 7, paragraph 3, appears to provide guidance on the year in which a Party should report the production of ODS for basic domestic needs and the export of ODS to meet those needs. The Article also appears to provide guidance on the year in which the production of ODS for basic domestic needs and the export of ODS to meet those needs should be added to the Party's controlled production levels and deducted from its controlled consumption level. Paragraph 3 of the Article states that:

“Each Party shall provide to the Secretariat statistical data on its annual production (as defined in paragraph 5 of Article 1) of each controlled substance listed in Annexes A, B, C and E and, separately, for each substance...

- Imports from and export to Parties and non-Parties respectively,

for the year during which provisions concerning the substances in Annexes A, B, C and E respectively entered into force for that Party and for each year thereafter...”

32. The information presented in paragraph 20 above on the guidance provided by the data reporting forms and instructions with respect to reporting the export of domestically produced ODS for destruction also appears to apply to the export of domestically produced ODS for basic domestic needs. With regard to guidance on reporting ODS production for basic domestic needs, the instructions state that:

“Producers of Annex A and Annex B substances are allowed to produce additionally, 10 per cent (prior to phase-out) or 15 per cent (after phase-out), of their base-year production to meet the basic domestic needs of Parties operating under Article 5, paragraph 1. If your country produced ODS for this purpose, please enter the amount so produced in column 6 on Data Form 3.”

Column 6 is entitled “Production for supply to Article 5 countries in accordance with Articles 2A–2H and 5”.

33. From the above discussion, and unless the Parties decide otherwise, it would appear that Article 7, paragraph 3, of the Protocol and the data-reporting instructions adopted under decision IX/28 support the conclusion that a consumption deviation which represents ODS produced in the year of the deviation and stockpiled for export to meet basic domestic needs in a future year is not consistent with the Protocol. That would mean that the amount stockpiled for export to meet basic domestic needs should be legally excluded from the calculation of a Party's controlled consumption levels only in the year in which it was exported rather than the year in which it was produced and stockpiled.

4. ODS imported in that year which had been stockpiled for domestic feedstock use in a future year

34. As noted with regard to case (b) above, Article 1, paragraphs 5, of the Protocol makes provision for the deduction of ODS used as feedstock from a Party's annual controlled production, as it defines production as the amount of controlled substances produced, minus the amount destroyed by technologies to be approved by the Parties and minus the amount entirely used as feedstock in the manufacture of other chemicals. ODS used as feedstock is therefore also deducted from a Party's annual controlled consumption, given that paragraph 6 of the Article defines consumption as production plus imports minus exports of controlled substances. Paragraph 6 also requires the addition of imports in the calculation of a Party's consumption.

35. As stated in paragraph 18 above, Articles 2A to 2I and 5 prescribe the Protocol's controls on consumption and production on a 12-monthly basis, commencing 1 January.

36. Article 7, paragraph 3, appears to provide guidance on the year in which a Party should report the use of imported ODS for feedstock, and thereby the year in which the feedstock use should be deducted from a Party's controlled production levels. Paragraph 3 of the Article states that:

“Each Party shall provide to the Secretariat statistical data on its annual production (as defined in paragraph 5 of Article 1) of each controlled substance listed in Annexes A, B, C and E and, separately, for each substance,

- Amounts used for feedstocks,
- Imports from and export to Parties and non-Parties respectively,

for the year during which provisions concerning the substances in Annexes A, B, C and E respectively entered into force for that Party and for each year thereafter...”

37. Decision VII/30 provides guidance on the treatment of ODS imported for feedstock use with regard to a Party's annual calculated consumption. The paragraphs 1 and 2 of the decision provide as follows:

“1. That the amount of controlled substances produced and exported for the purpose of being entirely used as feedstock in the manufacture of other chemicals in importing countries should not be the subject of the calculation of ‘production’ or ‘consumption’ in exporting countries. Importers shall, prior to export, provide exporters with a commitment that the controlled substances imported shall be used for this purpose. In addition, importing countries shall report to the Secretariat on the volumes of controlled substances imported for these purposes; and

“2. That the amount of controlled substances entirely used as feedstock in the manufacture of other chemicals should not be the subject of calculation of ‘consumption’ in importing countries.”

38. The forms and instructions adopted under decision IX/28 appear to provide further guidance on how ODS imported for feedstock use in a future year should be treated. The instructions state that:

“In reporting total quantities of new substances imported in column 3, the quantities imported for feedstocks, reported in column 5, should not be deducted. The Secretariat will make the necessary deductions.”

Column 5 is entitled “Quantity of new substances imported as feedstock”.

39. From the above discussion, and unless the Parties decide otherwise, it would appear that decision VII/30 and the data-reporting instructions adopted under decision IX/28 support the conclusion that a consumption deviation which represents ODS imported in the year of the deviation and stockpiled for domestic feedstock use in a future year is consistent with the Protocol. That would mean that the amount imported for feedstock in a future year would be legally excluded from a Party's controlled consumption level in the year it was imported and stockpiled, rather than the year in which it was used as feedstock.

E. Conclusion

40. In the light of the guidance provided by the Articles of the Protocol and decisions of the Parties, only one of the four types of consumption and production deviation listed in paragraph 1 above appears to be consistent with the Protocol. That type of deviation, listed in subparagraph 1 (d), concerns the situation where imports in excess of the level prescribed by the Protocol for consumption in a given 12-month period were stockpiled in that period for domestic feedstock use in future years. It appears to be consistent with the Protocol on the basis of decision VII/30, which addresses the export and import of controlled substances for feedstock use.

41. With regard to the other three types of consumption and production deviations listed in subparagraphs 1 (a) to 1 (c), the Secretariat was not able to identify any Protocol provisions or decisions of the Parties which would support the conclusion that those types of deviation were consistent with the Protocol. Those deviations concerned situations where production in excess of the level prescribed by the Protocol for production or consumption in a given 12-month period were stockpiled in that period for domestic destruction, domestic feedstock use or export for destruction, export for feedstock use or export to meet the basic domestic needs of Parties operating under Article 5 of the Protocol in future years.

42. On that basis, unless the Implementation Committee recommends otherwise, future deviations consistent with the types of deviations listed in subparagraphs 1 (a) to 1 (c) above will be highlighted to the Committee and the Parties in the data report of the Secretariat as cases of possible non-compliance to enable the Committee and the Parties to consider each instance on a case-by-case basis, in accordance with the usual practice.
