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PERSPECTIVE ON “COMPLIANCE” UNDER THE MONTREAL PROTOCOL

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PERSPECTIVE ON “COMPLIANCE” UNDER THE MONTREAL PROTOCOL

PAPER SUBMITTED BY UNEP DTIE OZON ACTION FOR THE CONSIDERATION OF THE 48TH EXECUTIVE COMMITTEE MEETING

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WHY THIS PAPER

Countries operating under Article 5(1) are making rigorous efforts to meet with the compliance requirements of the Montreal Protocol, and the majority of them are succeeding in meeting the production and consumption targets.

During the meetings of the Regional Networks, some Article 5 countries have expressed the need to review their situation and seek assistance in cases where the country meets its production and/or consumption compliance target but later finds it difficult to maintain that compliance. UNEP has also been concerned about the sustainability of compliance beyond the phase out targets, i.e. the year 2010 in the case of CFCs.

This paper has been prepared to analyze the “compliance” perspective in the context of the Montreal Protocol and suggest measures that may be important for the countries to undertake to achieve sustained and permanent compliance. Its objective is to invite the attention of the Executive Committee to this important issue and obtain advice on the actions needed from the Article 5 countries.

COMPLIANCE AS USED IN THE MONTREAL PROTOCOL

The term “compliance” is not *explicitly* defined in the text of the **Montreal Protocol** treaty, although the term “compliance” is mentioned in a number of places, and from that use one can *infer* a definition.

Compliance is mentioned in several paragraphs relating to the *control measures* where it indicates that Parties should be “in full compliance” with specific Articlesⁱ. The Protocol also mentions that an Article 5 Party is entitled to delay for ten years its “compliance with control measures”ⁱⁱ and that the **Financial Mechanism** is established to “enable Article 5 Parties’ compliance with the control measures set out in Articles 2A to 2E and Article 21”ⁱⁱⁱ.

The treaty also establishes a **non-compliance procedure** for dealing with countries in “non-compliance with the provisions of this Protocol”, i.e. Article 8. This procedure does not specify what constitutes non-compliance with the Protocol, but this would have to be *inferred* from the provisions of the Protocol.^{iv} It speaks of a Party’s “implementation of its obligations under the Protocol”^v and refers to compliance in terms of “implementation of a particular provision of the Protocol”^{vi}.

As used in the Protocol text, “compliance” appears to mean a Party demonstrating through its reported data that it fully meets a **specific legal obligation** under the Protocol, according to an agreed timetable.

COMPLIANCE AS USED IN DECISIONS OF THE PARTIES

Starting from this perspective, the various **Decisions of the Parties** have used the term “compliance” in different ways which, when taken together, provide a more nuanced sense of the term. The Decisions refer to “compliance with” a *range of obligations*, including:

- the Montreal Protocol^{vii}
- all relevant provisions of the Protocol^{viii}
- obligations under the Montreal Protocol^{ix}
- the agreed control measures^x
- the phase-out schedule^{xi}
- reporting requirements^{xii}
- licensing requirements^{xiii}

The Decisions also describe the opposite condition in a similar way, i.e. “non-compliance” with:

- the Protocol^{xiv}
- the provisions of the Montreal Protocol^{xv}
- the control measures^{xvi}
- consumption phase-out^{xvii}
- the freeze on CFC consumption^{xviii}
- data reporting requirements^{xix} or data compliance issues^{xx}
- the national plans^{xxi}

The Decisions indicate that a Party can be “in compliance”, declared to be in “non-compliance”, in a “state of potential non-compliance”^{xxii} or in a “state of technical non-compliance”^{xxiii}.

They also describe different conditions in which a Party can:

- com[e] into compliance^{xxiv}
- [make] progress towards compliance^{xxv}
- return to compliance^{xxvi}
- maintain compliance^{xxvii}

The Decisions also refer to the concept of various entities “facilitating”^{xxviii} and “enabling”^{xxix} compliance of Parties.

UNEP’S PERSPECTIVE BASED ON FEEDBACK FROM ARTICLE 5 COUNTRIES

From the above references, compliance is understood to be not just the narrow definition of a country meeting its phase out targets, but a country *demonstrably meeting a range of obligations under the Protocol including the control measures, reporting and licensing requirements, and commitments made under national and sector plans*. Another part of the overall compliance concept is the understanding that there should also be a *sustained political commitment* to implement the Protocol on the part of the country, which is implicit in the original Montreal

Protocol but which is also evident in several Executive Committee decisions related to Institutional Strengthening.^{xxx}

Sustainability issues are particularly emphasized in the national and sector plans, which mention that the phase out achieved needs to be sustained over a period of time. Such plans are becoming a major emphasis in the strategic planning of the Multilateral Fund and consideration of their long-term sustainability is of paramount importance.

The Multilateral Fund is mandated “to enable compliance” of Article 5 countries^{xxxii} in particular “to assist developing country parties...to comply with the control measures of the Protocol”.^{xxxiii} Within this mandate, the Multilateral Fund family has three main goals:

- **Short-term – immediate.** Help countries that are in non-compliance to return to compliance (*restorative role*), and help countries that are in danger of becoming in non-compliance to remain in compliance (*preventative role*).
- **Medium-term – 2006-2010.** Assist countries that have already achieved compliance to maintain that condition until they have met the major phase out targets (*support role*).
- **Long-term perspective – 2006- post-2010.** Ensure or enable countries to *sustain* compliance indefinitely, or as long as needed, to fully implement the provisions of the Montreal Protocol (*guardian role*). “Sustainability” is used here in the sense of “keeping up or prolonging”^{xxxiiii} the condition of compliance. The period of time covered by this long-term perspective conceivably runs until the final phase out obligation of Article 5 countries, i.e. 2040.

Ensuring compliance does not end with the Agency’s delivery of equipment and/or training and submission of the project completion reports. The relationship between the Multilateral Fund family and Article 5 countries is not a series of financed projects but more of a commitment to work with and assist the countries until all of their commitments have been met under this multilateral environmental agreement. Given the timelines and modalities included under the Protocol, it is implied that at some point in time Article 5 countries will need to gradually assume the complete responsibility for the phase out process which will include their provision of resources of various types (financial and human). This is in line with the strategic planning approach under the Multilateral Fund.

Based on feedback received by UNEP from countries^{xxxiv}, *some of the long-term compliance issues* in Article 5 countries that will need to be addressed in the post-2010 period are:

Political will	<ul style="list-style-type: none"> ▪ Maintaining high-level political will at the national level needed to implement remaining ODS obligations from 2010 to 2040 is essential.
Institutional	<ul style="list-style-type: none"> ▪ Ensuring that there is a functioning Ozone Unit or its equivalent within the Government that will manage the residual post-2010 implementation of the Montreal Protocol. ▪ Guidance on the development of long-term, nationally-funded institutional structures to support ODS phase out in

	<p>the post-Multilateral Fund/GEF period.</p> <ul style="list-style-type: none"> ▪ Accessing the peer expertise and support of other Ozone Units through some form regional networking to help them face post-2010 challenges, with the goal of Ozone Units gradually assuming financial responsibility for such activities.
Information and awareness	<ul style="list-style-type: none"> ▪ Providing the Ozone Unit access to international expertise, information and other support until it is no longer needed. ▪ Maintaining sufficient levels of awareness within specific stakeholder groups about the need to take action. ▪ Providing information on specific longer-term issues (e.g. MDI strategies, disposal and destruction issues, ODS bank management, possible essential uses).
Non-compliance	<ul style="list-style-type: none"> ▪ Addressing any unresolved non-compliance issues from the 2006-2009 period. ▪ Addressing any new non-compliance issues that arise in 2009. <i>Note: the 2009 Article 7 data that will determine compliance with the 2010 control measures will be submitted by countries in September 2010. This zero consumption level will need to be sustained in the 12-month period of 2010. The data for that year will then be submitted in September 2011, therefore the work for CFCs will need to be sustained at least until the end of 2011.</i>
Data reporting	<ul style="list-style-type: none"> ▪ Meeting data reporting obligations post-2010.
Consumption and production phase out	<ul style="list-style-type: none"> ▪ Phasing out any residual ODS sub-sectors that might persist beyond 2010. ▪ Phasing out methyl bromide by 2015, including prevention of growth of new consumption by using existing institutions to ensure that methyl bromide is replaced in non-QPS sectors and minimised in the QPS sector. ▪ Phasing out HCFC consumption by 2040. ▪ Addressing phase out of ODS in laboratory and analytical uses. ▪ For QPS uses of methyl bromide, alternatives may not be available until 2015, therefore the phase out for that substance may persist beyond 2015.
Policies and enforcement	<ul style="list-style-type: none"> ▪ Modification to licensing systems to include other ODS such as methyl bromide and HCFCs. ▪ Assistance in developing new legislative and policy controls for HCFCs^{xxxv} including HCFC quota systems. ▪ Combating illegal trade, including possibly methyl bromide as 2015 approaches. ▪ Strengthening national enforcement structures and actions, including development of long term cooperative institutional mechanisms to enforce the ODS controls (including judges, prosecutors, parliamentarians). ▪ Continuing to monitor and improve the existing ODS and

	<p>ODS-containing product import/export licensing systems.</p> <ul style="list-style-type: none"> ▪ Development of national Essential Use and Standards Panels for all ODS.
<p>Servicing and banks</p>	<ul style="list-style-type: none"> ▪ Meeting all CFC servicing needed until the retirement of all existing CFC-based equipment, for example through development of CFC banks or stockpiles.^{xxxvi} ▪ Ensuring access to adequate supplies of banked ODS for critical uses until the equipment is retired. ▪ Avoiding possible Essential Use Exemption requests by Article 5 countries for consumption or production of controlled substances. ▪ Development of ODS bank guidelines, controls and tracking systems to cope with, for example, the possibility of Article 2 banked ODS being transferred to Article 5 countries after 2010.
<p>New ODS</p>	<ul style="list-style-type: none"> ▪ Avoiding spread of any new ODS that might be developed in the future that is not controlled under the Montreal Protocol, e.g. the recent example of n-Pb.^{xxxvii}

Some Implementing Agencies have raised the issue that once their investment projects or multi-year agreements are completed in a country, some entity needs to help ensure that there is no backsliding and that the project results are sustainable.^{xxxviii}

The key to long-term sustainability for the above and other issues requires that the country *fully internalizes the Montreal Protocol in its national plans*. At the same time, there needs to be a corresponding transfer or assumption of responsibility and ownership from external agencies and bodies to national counterparts and institutions. The goal is that the country will reduce and eventually eliminate its need for structured external assistance and intervention, including financial, technical and political support.

Part of the answer includes *exporting the Montreal Protocol goals* into the agendas, legal mandates and work of other institutions and mechanisms which are supported by core, long-term funds. Once adopted, those goals should become sustainable in the long term as they no longer require the active promotion of the Montreal Protocol community. Such exports must take place at all levels, i.e. national, regional and international.

Examples of such “exports” that are helping to sustain the Protocol objectives into the future include:

- Modifications to national and international standards to address Montreal Protocol issues.
- Modifications to national laws and legislation to address Montreal Protocol issues.
- Incorporation of Montreal Protocol customs training material into national customs training curricula.
- Incorporation of Montreal Protocol refrigeration technician training material into national servicing sector curricula.
- Setting up and strengthening National Refrigeration Associations.
- Commitment of World Customs Organisation Regional Intelligence Liaison Offices to address ODS illegal trade and enforcement issues.

- Carrying out the cost-benefit analysis of incorporating long-term ODS control into general government offices and function as a percentage of the Civil Service budget as a whole (human and technical resources).

This can only be accomplished through pro-active interaction/communication at the political and technical-operational levels, information sharing, joint activities, and co-financing. Maintaining high-level political awareness in Article 5 countries is also highly important. At the international level, this interaction should include establishing inter-linkages with other MEA communities and environmental initiatives.

NOTES

- ⁱ For example Article 4 para 8, and Article 5 para 3(a).
- ⁱⁱ Article 5.
- ⁱⁱⁱ Article 10.
- ^{iv} UNEP ROAP CAP/OzonAction, *Guide for National Ozone Units*, 2005, pg. 69.
- ^v UNEP Ozone Secretariat, *Handbook for the International Treaties for the Protection of the Ozone Layer*, 6th Edition, 2003, pg. 295
- ^{vi} *Handbook*, pg. 295
- ^{vii} *Handbook*, pgs. 180, 185
- ^{viii} *Handbook*, pgs. 164, 184
- ^{ix} *Handbook*, pgs. 178, 181
- ^x *Handbook*, pg. 161.
- ^{xi} *Handbook*, pgs. 165, 177, 194
- ^{xii} *Handbook*, pg. 170
- ^{xiii} *Handbook*, pg. 180
- ^{xiv} *Handbook*, pgs. 183, 184, 185
- ^{xv} *Handbook*, pg. 183 passim
- ^{xvi} *Handbook*, pg. 192
- ^{xvii} *Handbook*, pg. 192
- ^{xviii} *Handbook*, pgs. 190, 192
- ^{xix} *Handbook*, pgs. 178, 191, 193
- ^{xx} *Handbook*, pg. 217
- ^{xxi} *Handbook*, pg. 192
- ^{xxii} *Handbook*, pg. 196
- ^{xxiii} *Handbook*, pg. 203
- ^{xxiv} *Handbook*, pg. 203
- ^{xxv} *Handbook*, pg. 202
- ^{xxvi} *Handbook*, pgs. 190, 192, 193, 195, 196
- ^{xxvii} *Handbook*, pgs. 232, 234
- ^{xxviii} *Handbook*, pgs. 192, 298
- ^{xxix} *Handbook*, pgs. 189, 195, 199, 201, 208, 240, Decision XIV/37.
- ^{xxx} For example Decisions 30/7, 35/57 and 43/37.
- ^{xxxi} *Handbook*, pg. 240
- ^{xxxii} Multilateral Fund website.
- ^{xxxiii} Webster's New Collegiate Dictionary.
- ^{xxxiv} UNEP survey of Article 5 countries and countries receiving ozone assistance under the MF/GEF. 17 January 2006 correspondence from CW.
- ^{xxxv} Many countries have not worked out the best way to begin the process of HCFC phase out, as HCFCs were heavily adopted in Article 5 countries. Support for a strong and effective cross-ministerial team to manage HCFC management crucial.
- ^{xxxvi} The experience of developed countries shows that this remains a persistent issue.
- ^{xxxvii} Although it is not a legal obligation it is consistent with the spirit of the Montreal Protocol.
- ^{xxxviii} Discussion during Inter-agency Coordination Meeting, January 2006, Montreal.