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FUNDING OF TECHNOLOGY THAT IS NOT IN THE PUBLIC DOMAIN

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DOMAIN**

**A Report Prepared for the Secretariat of the Multilateral Fund for the
Implementation of the Montreal Protocol**

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EXECUTIVE SUMMARY

- Patents and other intellectual property rights are awarded on a country-by-country basis, making the analysis of potential infringement of these rights difficult.
- When a company uses technology solely within one particular country, only the intellectual property rights that exist in that country need to be examined. Where a company sells products or services that are subject to patent or other intellectual property rights in more than one country, the situation becomes more complex.
- In the situation where a company is using technology within a single country, the Fund can properly demand of the applicant or Implementing Agency to furnish a written opinion of counsel from that country that the use of the technology by the applicant does not infringe upon any other person's intellectual property rights. The Fund can then choose whether and the amount of compensation to grant according to its policies and priorities.
- Where the products or services are subject to patents in more than one country, it will be virtually impossible to determine whether the sale of the product or service will infringe upon some person's intellectual property rights in some country. The most that the Fund can do to limit the possibility of infringement is -- in addition to requiring a written opinion from legal counsel stating that the use of the technology does not infringe any other person's intellectual property rights -- to request that the applicant assure the Fund that the use of the technology by the applicant will not infringe upon any intellectual property rights. If this is not possible, the Fund can request that the applicant provide an undertaking not to sell any good or provide any service involving the technology into any country before it has first determined that it has the right to do so without violation of an intellectual property right.
- In assessing claims for compensation, the Secretariat needs access to information that will often be subject to trade secrecy protection. As it is likely inappropriate for the Secretariat to enter into a detailed and strict confidentiality agreement, the Secretariat ought to offer the applicant a choice between submitting the requested information without a confidentiality agreement or to wait to make its claim to compensation until after the information has ceased to be secret.

FUNDING OF TECHNOLOGY THAT IS NOT IN THE PUBLIC DOMAIN

The Executive Committee of the Multilateral Fund for the Implementation of the Montreal Protocol has recently confronted a request for funding of a conversion project in which compensation was requested for the acquisition of intellectual property rights by way of licence from a related company. This request has raised the general issue of how the Fund ought to address intellectual property issues arising out of requests for funding. In particular, the case raises the following two questions:

1. What are the circumstances under which a technology acquirer obtains rights in relation to intellectual property (for example, the development or acquisition of patents, trade secrets, copyrights, etc. or licences to use any of these rights) that would render it eligible for compensation from the Fund in accordance with the Fund's existing rules and policies?
2. Which procedures ought the Secretariat to follow in order to evaluate proposals requesting funding in respect of technology covered by trade secrets, pending patent applications, and other non-public information?

This report will examine these two questions in turn. Before doing so, we discuss the nature of intellectual property right protection with a special emphasis on those intellectual property rights likely to be contained in project proposals before the Executive Committee. In this discussion, we note, in particular, the national nature of so-called international intellectual property rights and the very limited role that international conventions (including trade agreements) play in responding to these questions.

Intellectual Property Rights Background

(i) The nature of patents

A patent is a monopoly over the potential use and exploitation of a useful and innovative invention for a set period of time, usually twenty years. An “invention” can be either a product or a process. Once an inventor passes the initial steps of showing that the invention is novel, useful and non-obvious, and properly registers the invention under a domestic patent statute, the “exclusive right of use” is conferred. In exchange for the right, the inventor must divulge publicly “the secret” behind the product or process in a public register such that when the patent expires all might have an opportunity to re-create and use the invention or the process that is the subject-matter of the patent. Once conferred, the right in effect protects both the idea itself and the form of the idea: no one else is allowed to invent a similar product or process, even if it is done independently. That is, the defence of independent creation is not allowed.

The term “exclusive right of use”, while commonly employed, is in reality a misnomer. It is true that in the abstract, in terms of use and possession, the patent monopoly gives an almost absolute right for the term of the patent. The patent comprises

full rights of potential exploitation for the duration of the patent. In reality, however, the powers of the patent right are neither absolute, nor do they truly confer an exclusive right to use. Rather a patent is only a *potentially* exclusive right. Indeed, the patent monopoly is better understood as conferring a *right to exclude others from using the invention*.

Whether one can actually use the patent right will depend on a number of factors ranging from competing rights that others may hold in component parts of the patented product or process (often protected by separate patents), to the regulatory environment in which a patent-holder finds itself. There may be some rights that inure to users by statute or common law, and generally turn on non-competing, non-commercial uses. Additionally, and unlike traditional property rights, there are potential risks to non-use: abuse of right provisions in a domestic patent statute might allow for the patents administrator to circumvent patent rights where the market demand for a product is not being met or where an emergency requires.

It bears repeating that those who wish the benefit of patent protection must apply for it. Patent rights are creatures of national statutes. The right does not arise automatically, and is only valid in the jurisdiction in which the application is granted. Moreover, as the application for patent protection does not automatically lead to protection, applicants frequently choose to protect their inventions as trade secrets until their patent applications have been published (usually 18 months after filing the patent application in most countries). Finally, it is also worth noting that issued patents are not necessarily valid; they are subject to attack during their life by interested persons. (For example, one study suggested that 46% of challenged patents are held invalid in the United States.)

In terms of infringement, courts have generally taken an expansive view towards defining infringements. Thus any direct or indirect use of the invention without consent which prevents the whole profit and advantage, or any act that interferes with the full enjoyment of the patent, is an infringement. This points to a wide set of rights insofar as commercial activity is involved.

(ii) The nature of trade secrets

The bargain between the inventor and the State which is said to be at the heart of the patent monopoly is often contrasted with trade secrets and confidential information. Trade secrets are valuable business designs, processes and methods that – as the name implies – are in a form not readily available to others and, indeed, usually are deliberately kept away from competitors. Confidential information is similarly useful trade information such as customer databases and such that gives a competitive advantage to a company doing business. They are valuable in the sense that they give some competitive advantage to the secret-holder or information-holder, and hence are valuable only insofar as they can be guarded. As such, they are potentially infinite in time, and are capable of protecting both ideas generally and specific forms of ideas. While trade secrets are good against the world, they are only good insofar as they are kept private: unlike the patent bargain where the recipe, design or process for the product or process are made public.

As such, independent creation is a defence. Thus trade secrets are inherently risky; one might lose the whole advantage overnight through a leak or reverse engineering. By contrast, patent trades off the potentially indefinite protection of trade secrets for relatively absolute protection in the short to medium term. Where trade secrets are divulged for business reasons – to licensees and franchisees, for example – they are protected by contractual agreements purporting to protect the information.

(iii) The concept of copyright

The concept of copyright revolves around the protection of specific expressions of larger general ideas: forms are protected, ideas are not. These expressions may be in the form of words, pictures, artistic works and designs, dramatic works, musical works, photographs, computer software and such. Neighbouring rights extend the scope of these protected expressions to performances, sound recordings as well as telecommunications broadcasts and internet streaming. The scope of protection of these rights extends to what one might call the economic rights in the expression: thus, in principle, copyright protection amounts to a prohibition against unauthorized *copying* of these works for a time period. This period is usually set at the life of the author, plus fifty years, and fifty years from the year of creation for photographs and neighbouring rights. (Some jurisdictions are now using “life plus seventy years” as their base period.) As copyright protects against copying, independent creation is a defence against a claim of infringement. Copyright protection, while domestic in scope and usually regulated by statute, generally arises automatically for any original work, though registration under copyright legislation results in various advantages in terms of protecting one’s rights.

Copyright might be asserted in a situation where an applicant has failed to register for a patent in a specific country but has a written document that describes its inventions. Here the applicant might assert that it automatically has copyright in the written document, and any copying of the content of the text might constitute a violation of copyright. While courts generally do not allow such claims where the substance of the document describes a functional process that is usually within the realm of patent, the possibility of such a claim nevertheless exists. In any case, the copyright in the text will not prevent others from building or using the invention, only the text describing the use of the invention.

(iv) Trade and service marks

Trademarks and service marks are words, phrases, symbols, diagrams, etc. that embody the goodwill of an enterprise and identify the source of the product or service. They can arise either at common law, by virtue of innate distinctiveness or acquired distinctiveness built up through use, advertising, etc., or through registration. In either case, the mark comes to embody the goodwill of the company. The mark is protected across the jurisdiction in which it is registered or used, in essence for as long as it remains in use. It is protected against confusingly similar marks and often the dilution or the depreciation of the mark.

A claim by an applicant will not likely run afoul of trademark law unless in marketing its products the applicant uses words, symbols, etc., that are similar to a competitor's product.

(v) The role of international conventions

As a general rule, intellectual property rights are created, formalized and protected within national boundaries. International conventions (including trade agreements) do not provide for international protection of intellectual property rights. Instead, these conventions accomplish three tasks:

- They harmonize the intellectual property regimes of member states by establishing minimum standards that national legislation must meet in respect of those rights
- They provide for the mutual recognition of creative or inventive activity in other member states
- They establish a simplified method of obtaining intellectual property rights in each of the member countries for the same invention or work

Thus agreements, such as the TRIPs Agreement, do not in and of themselves create substantive international law. Rather, they set standards and force countries to enact their own substantive domestic legislation that meets these international standards. (The Agreement on Trade-Related Aspects of Intellectual Property Rights, or TRIPs, forms a part of the Uruguay Round of Multilateral Trade Negotiations held under the auspices of the World Trade Organization. It sets out minimum *domestic* standards for the protection of intellectual property rights, either directly or by reference to existing international conventions, that countries must enact if they are going to be a member of the WTO.) Consequently it remains a basic principle that intellectual property holders must always have reference to the domestic law of the country in which they seek to assert their intellectual property rights.

This means that the ability to use a particular invention or work in a particular country depends on the existence of intellectual property rights *in that country*. Thus copyright, before it can be protected internationally, must subsist in a national jurisdiction that is part of the Berne Convention or Universal Copyright Convention and the TRIPs Agreement. Since copyright arises automatically, this is a fairly easy pre-condition to meet. Patent protection, however, is only granted in a particular country if the inventor makes an application and complies with national domestic law. Trade secrets are obtained by maintaining confidential information as confidential, and thus need no international agreement to protect them. This means that copyright and trade secrets exist in all member countries in respect of a given work, but patents exist only in those member countries in which the inventor has submitted a patent applicant that has successfully met the requirements of national legislation

(vi) General Conclusions

By way of conclusion, this survey of intellectual property protection allows us to conclude that intellectual property rights are best understood as a right to exclude others, and not as an automatic right to use an invention. Rather the ability to use an invention/work depends on others' rights in parts of the product or process (including patent rights and copyrights) and regulatory environment. Finally, it must be noted that domestic laws are the source of intellectual property rights and regulations, and international law only extends the rights through national treatment and mutual recognition of rights.

Compensation for Acquisition of Intellectual Property

On occasion, applicants to the Fund may request compensation for the acquisition of the right to use an invention or a work subject to intellectual property rights. The Fund would provide this compensation if the request falls within the policies and decisions of the Fund.

The fundamental or preliminary question in a sense is whether the Fund should even entertain applications that appear to violate intellectual property rights. However, this issue is by no means easy to resolve. Because intellectual property rights are, by their very nature, difficult to define prior to court determination, there will often remain some level of uncertainty over the violation of intellectual property rights. In these circumstances, the most the Fund can hope to achieve is to reduce the risk of infringement of intellectual property rights to the extent possible.

This section examines four situations in which such a request may be made and proposes a strategy to evaluate these requests in light of the Fund's existing policies and decisions.

The four situations are as follows:

1. Company A situated in a particular country wishes to use a technology patented in that country by Company B in its manufacturing process in order to reduce its ozone depleting substances emissions/consumption. The technology relates to any of the conversion of existing production facilities, the establishment of new production facilities, or the manufacturing of goods. Company A claims compensation from the Fund for licence fees it must pay to Company B in respect of this technology. Company B may be independent of Company A or may be a related company.
2. Company C situated in a particular country wishes to use a technology that it has itself developed in order to reduce its ozone depleting substances emissions/consumption. Again, the technology relates to the conversion of existing production facilities, the establishment of new production facilities, or the manufacturing of goods. It claims compensation from the Fund for use of this

technology. The technology may be subject to patents rights held by other companies in the country in which Company C is situated or outside that country.

3. Company D situated in a particular country wishes to use a technology patented in that country and internationally by Company E where that technology is or forms a component of the goods or services sold by Company D internationally. That is, Company D's exports of its products or services place the technology into international streams of commerce. These streams may include both Article 5 and non-Article 5 countries. Company D claims compensation from the Fund for licence fees it must pay to Company E. Company E may be independent of Company D or may be a related company.
4. Company F situated in a particular country wishes to use a technology that it has itself developed where that technology is or forms a component of the goods or services sold by Company F internationally. Company F claims compensation from the Fund for use of this technology.

We examine each of these cases in turn.

Company A

As set out earlier, patent rights are granted on a country-by-country basis. This means that, given that Company A is using the technology only in its country of operations, we need only examine the patent situation that exists in that country. That is, the existence or non-existence of patent rights outside of Company A's country of operations has no bearing on Company A's entitlement to use a particular technology in that country.

Thus, the Executive Committee may wish to consider requesting Implementing Agencies to provide the Fund with an opinion of legal counsel within Company A's country of operations stating that the use of the technology by Company A (taking into consideration the licences obtained by Company A) will not infringe any intellectual property right provided that the licence agreements remain in good standing.

Regarding this case, Company A will only need a licence to use Company B's patents relating to the technology used by Company A if Company B has a valid patent in Company A's country of operations. The existence of such patent rights is determined by a combination of the patent laws of Company A's country of operations and Company B's decision to apply for or not apply for patent rights in that country. It is not infrequent that companies in the position of Company B will seek patent protection only in those countries in which it plans to operate. In these circumstances, and since patents can be expensive to obtain, Company B could quite rationally conclude that it will not seek exclusive rights to use its technology in Company A's country of operations.

If no patent exists in Company A's country of operations, then Company A will not require a licence to use the patent. Given that the information contained in a patent is

public, trade secrecy law does not apply to the patented technology. Nevertheless, despite the absence of patent rights, Company A may wish to license certain technical know-how from Company B that is not contained in any patent.

If Company B holds a valid patent in Company A's country of operations, the patent will take one of two forms. First, the patent may apply to the process of manufacture (that is, the use of the new or modified production facilities). This patent would, in the absence of a licence, prevent Company A from using its production facilities to produce its product or deliver its service. Second, the patent may apply to a product. This patent would prevent Company A from making a patented intermediary product or from using a patented machine in its production of its end product or service.

To summarise, Company A would need to obtain a licence from Company B in any of the following circumstances:

- 1) Company B holds a valid patent in Company A's country of operations over the process used by Company A in its manufacturing process;
- 2) Company B holds a valid patent in Company A's country of operations over an intermediary product used by Company A;
- 3) Company B holds a valid patent in Company A's country of operations over a machine used by Company A; or
- 4) Company B may or may not hold a valid patent in Company A's country of operations but maintains information as secret. Company A will need a licence where it must obtain this information in order to manufacture its product or deliver its services.

It is worth reiterating that the fact that the technology used by Company A may be patented outside Company A's country of operations is not relevant to the decision regarding whether Company A ought to receive compensation from the Fund.

In light of the Indicative List of Categories of Incremental costs, the Executive Committee would be in a position to consider an application for compensation in the circumstances described above where Company A's use of the technology covered by intellectual property rights is an incremental cost as described in those policies.

Company C

This case is similar to that involving Company A except that Company C created its own technology rather than acquired access to it by licence. As in the case of Company A, the only patent rights that are of interest are those that are valid in Company C's country of operations. The intellectual property rights of interest would most likely be patents on either the same product or process or components of that product or process held by others in Company C's country of operations. As mentioned in the background section, depending on the product and how it is either described or marketed, there is also a slight chance of a copyright or trademark infringement.

Once again, the Executive Committee may wish to consider requesting Implementing Agencies to provide the Fund with an opinion of legal counsel within Company C's country of operations stating that the use of the technology by Company C will not infringe any intellectual property right.

Regarding compensation from the Fund, the Executive Committee may properly decide that Company C not, in principle, be treated any differently than Company A. This policy approach would mean that, to the extent that Company A would have received compensation for its acquisition of rights to use technology, so should Company C receive compensation for the use of its own technology. At the same time, Company C should not receive a greater benefit than Company A. That is, according to this approach, Company C should not receive compensation for the costs of developing the technology where this exceeds reasonable licence fees it would have paid to a third party.

The above analysis is consistent with the Indicative List of Categories of Incremental costs that provides that Company C is entitled to compensation for its incremental costs of acquiring intellectual property.

To summarise, it would be open to the Executive Committee to consider Company C as being entitled to receive compensation for a technology that represents an incremental cost to Company C in accordance with Fund policies in the following circumstances:

- 1) Company C holds a valid patent in its country of operations over the process used by it in its manufacturing process;
- 2) Company C holds a valid patent in its country of operations over an intermediary product used by it;
- 3) Company C holds a valid patent in its country of operations over a machine used by it; or
- 4) Company C may or may not hold a valid patent in its country of operations but maintains information as secret that it needs to use in order to manufacture its product or deliver its services.

Company D

This case study raises all the issues discussed with respect to Company A plus some others. Unlike the case of Company A, this case raises the possibility of patent infringement outside of Company D's country of operations. In this case, Company D is subject to the intellectual property laws of all countries in which it sells its product or provides its services.

Where Company D exports its product or service it becomes subject to the intellectual property rights in the importing state. Thus, even if Company D did not obtain patent rights in Company D's country of operations, Company D would still need a licence to sell its product or provide its service in those countries in which Company D had obtained patent rights. Given the multiplicity of jurisdictions, the different patenting

strategies employed by companies such as Company E, and differences in patent law between jurisdictions, it is virtually impossible for the Fund to determine in advance whether the sale of a good or service will violate a patent right somewhere in the world.

In situations where Company D enters into a world-wide licence agreement with Company E to permit Company D to sell its products or provide its services around the world, none of Company D, Company E, nor the Fund can be certain that Company D will not be violating someone's patent rights somewhere. The Fund can, however, take some comfort that both Company D and Company E have an incentive to avoid violating patents and that they will, therefore, take appropriate measures to ensure that, before entering into any particular country, that they assure themselves that they will not be violating any intellectual property rights. This is particularly true where Company E is a large company with sufficient resources to carry out this type of inquiry.

Where Company D is not only operating in its home country but exporting to other countries, the opinion of local counsel discussed in the case of Company A will be necessary but not sufficient. In these circumstances, the Executive Committee may wish to consider requesting Implementing Agencies to provide the Fund with an assurance from Company E that use of the technology licensed by Company E does not violate any intellectual property rights in all countries in which it sells its product or provides its service. It should be noted that many companies are reluctant to provide such an assurance as it is impossible for them to completely assure themselves that this is, in fact, the case. Therefore, in addition to or in substitution for such an assurance, the Executive Committee may wish to consider obtaining Company D's undertaking to not sell its goods or services in any country until it has determined that either its sale or provision of the goods or services will not violate any intellectual property rights or until it obtains all necessary licences to do so.

For brevity's sake, we do not repeat the discussion of compensation in respect of converting production facilities, establishing new production facilities, or manufacturing goods. Rather, we concentrate on a request for compensation in respect of the incremental costs incurred with respect to a licence relating to an intermediate product that constitutes a component of a final product or service or in respect of the final product or service itself.

It would be open to the Executive Committee to consider Company D's incremental costs in acquiring technology forming part of the final product or service sold by Company D to be subject to compensation from the Fund as an intermediate product, as described in the Indicative List of Categories of Incremental costs.

In these circumstances, Company D should be able to claim its incremental costs involved with licensing Company E's patents and trade secrets on a world-wide basis. That is, to the extent that Company D is acquiring a licence to Company E's technology to reduce the amount of ozone depleting substance emissions/consumption emitted or consumed by its final product or service, then Company D should be able to receive compensation from the Fund.

As in the case of Company A, the amount of compensable licence fees payable to Company D ought to be calculated as described in the case of Company A.

Company F

The case of Company F raises the same difficulty as the case of Company D except that the Fund will not have the assurance of a third party similar to Company E that no intellectual property rights will be violated. In these circumstances, the most the Fund can do (in addition to requesting a letter from local counsel as to intellectual property right infringement in Company F's country of operations) is to obtain the undertaking of Company F that it will not sell its goods or services in any country until it has determined that either its sale or provision of the goods or services will not violate any intellectual property rights or until it obtains all necessary licences to do so.

It would be open to the Executive Committee to consider compensation calculated on the same basis as in the case of Company C, either approximating the amount of a licence with an independent company or by assessing the total costs of developing the technology from the outset.

Evaluating Technology Subject to Secrecy

A company that has developed a technology that is not in the public domain (because it is protected as a trade secret whether pending the determination of a patent application or otherwise) will not normally be willing to reveal its technology to officials at the Fund except under the protection of a confidentiality agreement. This is a reasonable position for the company to take since it is not assured of patent protection and will normally wish to protect the secrecy of its invention until the patent application is made public (in most cases, 18 months after the patent application was first made anywhere in the world).

A company's need for secrecy presents the Fund with a practical difficulty. In order to assess whether a claim for compensation in respect of the acquisition, development, or licensing of intellectual property relating to an incremental technology is valid, the Secretariat requires access to information concerning the nature of the technology. Where the technology is protected as a trade secret, the Secretariat's access to this information may be limited.

There are three ways in which the Secretariat can address its need for information and the company's need for secrecy. These are as follows:

1. The Secretariat can enter into a confidentiality agreement with the requesting Implementing Agency. This places the Secretariat in an awkward position since it will require its staff to sign a similar agreement. In addition, unless members of the Executive Committee sign a similar agreement, the Secretariat will not be able to share any information relating to the technology with the Executive Committee.

2. The Secretariat and the Implementing Agency involved can jointly agree that an independent third party will undertake the evaluation of the technology and report its findings, but not the nature of the technology, to the Secretariat. This third party will be asked to enter into a confidentiality agreement with the company. This solution presents difficulties as well. First, it represents a radical departure from present Fund practice. Although the Secretariat does occasionally use consultants to answer specific questions, it has never delegated the authority to make the recommendations envisioned by this proposal. This it reserves to itself. Second, it may be difficult to find a third party willing to enter into such an agreement. This is because any third party expert enough to evaluate the technology will need to remain free from confidentiality agreements that may limit their ability to provide services to others in the industry. Third, the third party will not be able to share information with the Secretariat or the Executive Committee with respect to the technology.
3. The Secretariat can present the Implementing Agency with a choice of either disclosing the technology immediately in return for a prompt evaluation of the company's claims or to wait until the technology is no longer secret before submitting its claim. Where the technology is subject to a patent application, it will normally become publicly available 18 months following the date that the patent application was first filed. On the other hand, where the company is relying exclusively on trade secret protection, the technology may never be revealed to the public. This option has the disadvantage of postponing compensation to legitimate claimants with respect to patented technology and the possibility of leaving uncompensated the use of technology subject to a trade secret. Further, the problem of gaining access to secrets will be more acute where the company requested compensation does not own the technology. In this case, funding cannot be provided until the owner of the technology decides to render the technology public, something that lies outside the control of the claiming party.

While none of the above options is without problems, the third approach seems to be accord with the Fund's existing policies. In particular, it is consistent with the obligation of a claiming party to demonstrate the substance of its claim.

Conclusion

The fact that patents and other intellectual property rights are awarded on a country-by-country basis makes the analysis of potential breaches of these rights difficult. Nevertheless, when a company uses technology solely within one particular country, only the intellectual property rights that exist in that country need to be examined. Where a technology is subject to one or more patents and/or trade secrets in a country, any company wishing to use that technology will need a licence to do so. Since, in these cases, the only relevant intellectual property rights are those existing in a single country, the Fund can properly demand of the applicant or Implementing Agency to furnish a

written opinion of counsel from that country that the use of the technology by the applicant does not infringe upon any other person's intellectual property rights.

To the extent that this technology falls within the meaning of incremental costs as articulated in the Fund's policies, it would be open to the Executive Committee to consider the costs of such licences as compensable. Similarly, where a company develops its own technology and where that technology represents an incremental cost, the Executive Committee may decide that company may receive compensation as determined by the Fund's policies.

Where a company sells products or services that are subject to patent or other intellectual property rights in more than one country, the situation becomes more difficult. In this case, it will be virtually impossible to determine whether the sale of the product or service will infringe upon some person's intellectual property rights in some country. The most that the Fund can do to limit the possibility of infringement is, in addition to the opinion letter discussed above, to request that the applicant assure the Fund that the use of the technology by the applicant will not infringe upon any intellectual property right. If this is not possible, the Fund could request that the applicant provide an undertaking not to sell any good or provide any service involving the technology into any country before it has first determined that it has the right to do so without violation of an intellectual property right.

In assessing claims for compensation, the Secretariat needs access to information that will often be subject to trade secrecy protection. In this case, it would likely be inappropriate for the Secretariat to enter into a detailed and strict confidentiality agreement. Therefore, the Secretariat ought to offer the applicant a choice between submitting the requested information without a confidentiality agreement or to wait to make its claim to compensation until after the information has ceased to be secret. In the case of technology subject to a patent application, the information will cease to be secret 18 months following the filing of the patent application.