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EXECUTIVE COMMITTEE OF
THE MULTILATERAL FUND FOR THE
IMPLEMENTATION OF THE MONTREAL PROTOCOL
Thirty-eighth Meeting
Rome, 20-22 November 2002

**FUNDING OF TECHNOLOGY THAT IS NOT IN THE PUBLIC DOMAIN:
FOLLOW-UP TO DECISION 37/62**

1. At its 37th Meeting, in Decision 37/62, the Executive Committee decided, inter-alia :
 - (a) to request members of the Executive Committee to provide the Secretariat with their comments on the views expressed in the report and the comments received from the World Intellectual Property Organisation (WIPO);
 - (b) to request the Secretariat, in consultation with the implementing agencies, to draft guidelines for the financing of projects using such technology, including the protection as well as the use of the related confidential information for project review on a need-to-know basis, and submit them to the Committee for its approval;
 - (c) in doing so, to seek the advice of the Technology and Economic Assessment Panel on their experience in dealing with commercially sensitive or confidential information, and other aspects of TRIPS.
2. Decision 37/62 also requested the Secretariat to report on this matter at the 40th Meeting. However the Secretariat has now completed this work and has taken the opportunity to present this report to the 38th Meeting so that Committee Members may take advantage of their continuity to complete consideration of this matter.
3. The Secretariat has not received any comments from members of the Executive Committee on this issue.
4. The Secretariat retained E. Richard Gold and David Lametti Professors, McGill Faculty of Law, the authors of the report to the 37th Meeting, to draft guidelines for the financing of projects containing technology that is not in the public domain. The draft guidelines were circulated to the implementing agencies. No revisions were necessary. The draft is attached (Annex I). The Executive Committee might consider whether it wishes to adopt the draft guidelines.
5. The Secretariat requested the World Intellectual Property Organisation (WIPO) to provide in a formal way WIPO's comments conveyed by Professor Gold in his presentation to the 37th Meeting. At the time of preparation of this document, WIPO's report was still pending, in spite of several encouraging exchanges with the Fund Secretariat.

6. Finally, the Secretariat requested the Technical and Economic Assessment Panel (TEAP) to advise on its experience in dealing with commercially sensitive or confidential information and other aspects of TRIPS. Dr. Steven Andersen, Co-Chair of TEAP provided the following response:

“TEAP has held the position that submitted information cannot be guaranteed to be kept as confidential.

TEAP has considered, but never needed, an approach that would limit the information to those with a strict "need-to-know" and get their approval to keep as confidential.

On rare occasion, a company or organization has balked at submitting information necessary for a decision, but has always submitted it in the end.

In some ways, openness and transparency is a cost of doing global business.

Good luck.”

Annex I**GUIDELINES ON FUNDING OF TECHNOLOGY NOT
IN THE PUBLIC DOMAIN**Introduction

1. Most project proposals submitted to the Executive Committee contain no disclosure of technology that is not in the public domain. Recently, however, a project proposal was submitted to the Executive Committee for consideration involving technology that the project beneficiary claimed was not in the Public Domain. In reviewing this project, it became clear that there was a need to balance the confidentiality concerns of those who prepared and submitted the project against the Executive Committee's duty to review and assess such proposals.
2. As a result of this recognition, the Secretariat had prepared for the Executive Committee a report suggesting ways for the Fund to deal with such project proposals. The report also suggested ways to minimise the possibility that Fund money would be used to infringe on any existing intellectual property rights. The Executive Committee determined, upon consideration of the report, its decision to develop Guidelines to address confidentiality, the duty to review and assess such project proposals and to minimise the potential for intellectual property infringement.
3. These Guidelines are designed to assist the Secretariat, Implementing Agencies and the Executive Committee in handling technical information related to a project proposal (a) that has commercial value (b) in respect of which the holder of that information has taken and continues to take reasonable steps to maintain confidentiality and (c) that is not publicly available through general knowledge or publication ("Technical Information not in the Public Domain"). These Guidelines are also designed to minimise the risk that Fund money will be used to infringe on any existing intellectual property rights.
4. One of the objectives of these Guidelines is to protect, to the extent practicable, Technical Information not in the Public Domain while ensuring that the Executive Committee, with the assistance of the Secretariat, receives full and fair disclosure of all aspects of a project proposal necessary to assure its eligibility for funding. This objective is implemented by combining a "need to know" principle, under which Technical Information not in the Public Domain is disclosed only as required, and transparency, which requires that the Secretariat and the Executive Committee have available all information that may be relevant to reviewing and considering a project proposal.
5. As a general rule, all information contained in a project proposal will be considered not to be Technical Information not in the Public Domain. No obligation of confidentiality will arise with respect to the information in the project proposal except in accordance with and to the extent granted by these Guidelines.
6. Nothing in these Guidelines preclude the Secretariat from requesting any information, including but not limited to Technical Information not in the Public Domain, in order to assist it in the review of a project proposal.

7. These Guidelines deal with claims that Technical Information not in the Public Domain are to be treated confidentially. They do so in three parts. Part I deals with the preparation of project proposals and the identification of Technical Information not in the Public Domain. Part II deals with the review by the Secretariat of information that includes Technical Information not in the Public Domain contained in a project proposal including through the use of external experts. Part III deals with requests by members of the Executive Committee to review Technical Information not in the Public Domain.

Part I : Preparation of Project Proposals

8. It is the responsibility of the relevant Implementing Agency, requesting country and enterprises therein to clearly and specifically identify in the project proposal all Technical Information not in the Public Domain that they desire to be subject to these Guidelines (“Identified Technical Information”) for instance, through use of highlighting, bold print, highlighted box, etc.

9. The project proposal should only include all the Technical Information not in the Public Domain that is required to support the proposal. The project proposal should also include a list of all other relevant Technical Information not in the Public Domain in a manner that does not disclose this information but that provides a sufficient description of it to permit the Secretariat to determine whether it requires access to some or all this information to complete the review process.

10. The relevant Implementing Agency has the responsibility for conducting adequate due diligence to minimise the risk that any technology funded by the Fund will be used to infringe an intellectual property right. The level of due diligence required will vary depending on circumstances such as whether the technology is developed in-house, is widely licensed and where it will be used. For most widely licensed technology, the Implementing Agency will easily be able to satisfy itself of the right to use the technology.

11. For technology that is developed either in-house or is not generally available on the market, the Implementing Agency may be required, in conformity with the general obligation set out in paragraph 10, to seek a letter from local counsel opining as to the non-infringement of any known intellectual property right caused by the use of that technology. Where the technology is being used in products being exported, the Implementing Agency should, in addition to this letter, seek the assurance of the exporter that the technology does not infringe on any intellectual property rights in any country to which the product will be exported and that the exporter will take all measures necessary to ensure that it has a license to any needed intellectual property right in all countries to which the product will be exported.

Part II: Assessment by Secretariat

(a) Internal use of Identified Technical Information

12. As staff of the Secretariat are bound by United Nations contracts and staff rules that provide for the maintenance of confidential information, the Secretariat may freely disclose any Identified Technical Information to any staff member.

13. The Secretariat will, from time to time in accordance with good practice, remind staff members of their obligations of confidentiality.

14. If, in its review of any project proposal that contains a list of Technical Information not in the Public Domain that has not been included in the project proposal, the Secretariat determines that it requires access to such Technical Information not in the Public Domain, it may request the Implementing Agency or the country in question to supply it with this information before proceeding further with its review.

15. Upon receipt of a request to supply Technical Information not in the Public Domain that was not disclosed in a project proposal, the Implementing Agency or country in question may either supply this Technical Information not in the Public Domain or decline to do so. In the latter case, the Secretariat will report accordingly to the Executive Committee, including, if relevant, its inability to complete the review process.

16. Any Technical Information not in the Public Domain provided as contemplated in paragraph 15 will be treated in the same manner as Identified Technical Information not in the Public Domain included in the original project proposal.

(b) Disclosure to external experts

17. In conducting its review of a project proposal, the Secretariat may, from time to time, require the assistance of a technical expert. In these circumstances, the Secretariat may need to disclose Identified Technical Information contained in the project proposal to the expert.

18. In some fields of expertise, there are few experts with sufficient depth and breadth of knowledge to assist the Secretariat in its review of a project proposal. These experts are often in high demand and will have or may in the future work with competitors of the enterprise from which the Identified Technical Information originates. In these circumstances, there is a need to balance the confidentiality requirements of the enterprise against the requirement of retaining the assistance of technically competent experts.

19. As a first step in achieving this balance, the Secretariat will only disclose such Identified Technical Information to external experts on a need-to-know basis as determined by the Secretariat.

20. As a second step in this regard, the Secretariat will only disclose Identified Technical Information to an external expert after that expert has agreed to comply with reasonable confidentiality provisions. These provisions must balance the needs of the originator of the Identified Technical Information to confidentiality against the expert's need to be able to continue to provide technical advice to other including to competitors of the originator. Thus, the confidentiality provisions should limit themselves to the Identified Technical Information and may provide the expert with the right to use information that is otherwise in the public domain or that is independently created by the expert even if this information is similar to the Identified Technical Information. Sample provisions are provided in Appendix A to these Guidelines.

21. Upon completion of the external expert's work assisting the Secretariat with the review of a project proposal, the expert should return all copies of the Identified Technical Information in his or her possession and destroy all electronic copies of this information.

22. Any obligation imposed on external experts with respect to confidentiality is subject to local laws and court or arbitral decisions requiring disclosure.

Part III : Review by Executive Committee

(a) Determination by Secretariat

23. Prior to submitting its recommendations and information concerning a project proposal to the Executive Committee, the Secretariat will review the Identified Technical Information contained in a project proposal to determine whether that information ought to be included in its initial submission to the Executive Committee. In making this determination, the Secretariat will balance the need to maintain the confidentiality of the Identified Technical Information against the Executive Committee's need to be briefed in appropriate detail. Initially, the Secretariat will only disclose Identified Technical Information to the Executive Committee that it considers is essential to enable the Executive Committee to take a decision.

24. Whenever the Secretariat determines that it need not disclose Identified Technical Information to the Executive Committee, it will note this fact in its recommendations to the Executive Committee.

25. If the Secretariat determines that it needs to disclose Identified Technical Information to the Executive Committee, it will inform the Implementing Agency of this determination.

26. The Implementing Agency, in consultation with the country from which the project proposal originated, will inform the Secretariat either of its agreement that the Secretariat disclose the requested Identified Technical Information to the Executive Committee without restriction or its disagreement. The Secretariat will report the latter to the Executive Committee, including if appropriate, a statement that it is unable to make a positive recommendation.

(b) Request from Executive Committee

27. Any member of the Executive Committee may, at any time, request that the Secretariat disclose to the entire Executive Committee any Identified Technical Information contained in a project proposal. Until such a request is either complied with or withdrawn, the Executive Committee will suspend consideration of the project proposal.

28. Upon receipt of a request under paragraph 27, the Secretariat will inform the relevant Implementing Agency of the request from the Executive Committee.

29. The Implementing Agency, in consultation with the country from which the project proposal originated, will either agree to the disclosure to the Executive Committee of the requested Identified Technical Information without restriction or will inform the Secretariat that the Secretariat may not disclose the Identified Technical Information to the Executive Committee.

30. If the Implementing Agency consents to the disclosure of Identified Technical Information to the Executive Committee without restriction, the Secretariat will disclose the Identified Technical Information to the Executive Committee. In doing so, the Secretariat will point out the confidential nature of the Identified Technical Information to the Executive Committee. Nevertheless, the disclosure of the Identified Technical Information to the Executive Committee creates, in itself, no legal obligation on behalf of the members of the Executive Committee.

31. If the Implementing Agency does not consent to the disclosure of the Identified Technical Information to the Executive Committee, the Secretariat will inform the Executive Committee of this decision. Unless the Executive Committee withdraws its request to have the Identified Technical Information disclosed to it, the project proposal will be deemed to have been withdrawn.

APPENDIX A: SAMPLE CONFIDENTIALITY PROVISIONS

“Technical Information of a Confidential Nature” means technical information related to a project proposal that has commercial value in respect of which the holder of that information has taken and continues to take reasonable steps to maintain confidential and that is not publicly available through general knowledge or publication.

“Designated Confidential Information” means Technical Information of a Confidential Nature that is clearly identified in writing to the Contractor as being confidential.

1. The Contractor will neither use nor disclose, nor permit the use or disclosure of, Designated Confidential Information except in accordance with this Agreement.
2. The Contractor will use reasonable commercial measures to maintain the confidentiality of the Designated Confidential Information including, but not limited to, segregating the Designated Confidential Information to the degree practicable from other documents and by requiring its employees to enter in confidentiality agreements similar to this Agreement in respect of the Designated Confidential Information.
3. Notwithstanding paragraph 1, nothing in this Agreement prevents the Contractor from using or disclosing general knowledge in its field, knowledge of a general nature contained in the Designated Confidential Information, or information that the Contractor has already developed or that it later develops without recourse to the Designated Confidential Information.
4. The Contractor may disclose any Designated Confidential Information if required to do so by law or by a court, arbitral body or administrative body that requires disclosure of the Designated Confidential Information. The Contractor will make reasonable efforts to inform the Secretariat of any such requirement as soon as is practicable in order to permit the Secretariat or the originator of the Designated Confidential Information to seek a court order preventing such disclosure.
5. Upon termination of the work contemplated by this Agreement, the Contractor will either return all copies of all documents containing the Designated Confidential Information within its control to the Secretariat and will permanently erase all electronic copies of documents containing the Designated Confidential Information.
