ANNEX V

WHETHER SUPPORT FROM THE FUND COULD BE GIVEN RETROACTIVELY

This paper discusses two main issues:

(1) Whether the resources of the Fund could cover expenses incurred for CFC phasing-out activities prior to the country becoming a Party to the Montreal Protocol;

(2) Whether resources of the Fund should be available to support actions taken within an Article 5, paragraph 1 Party prior either to the approval of a specific project by the Executive Committee and implementing agency or to the project's inclusion in an implementing agency's work programme.

<u>The first issue</u>:

In accordance with principles of general international law as reflected in Article 36, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties "A right arises for a third state from a provision of a treaty if the Parties to the treaty intend the provision to accord that right either to the third state, or to a group of states to which it belongs, or to all states, and the third state assents thereto".

The text of Article 10 of the amendment to the Montreal Protocol makes it clear, that in taking a decision on the establishment of the financial mechanism and the Multilateral Fund, the intent of the Parties to the Montreal Protocol was to provide benefits and give certain rights <u>only to the countries that are Parties to the Protocol</u>.

According to Article 10 of the amendment to the Montreal Protocol, the resources of the Multilateral Fund shall be used for a particular purpose, which is to enable the Parties operating under paragraph 1 of Article 5 of the Protocol to comply with the control measures specified in the Protocol. In other words, the resources of the Multilateral Fund should be utilized in order to assist specific countries, which are Parties to the Protocol, to meet their obligations under its provisions. Paragraph 1 of Article 10 of the amendment to the Protocol is quite explicit in this regard. It states that "The Parties shall establish a mechanism for the purposes of providing financial and technical co-operation, including the transfer of technologies, to Parties operating under paragraph 1 of Article 5 of this Protocol to enable their compliance with the control measures set out in Árticles 2A to 2E of the Protocol". Neither the original text of the Montreal Protocol nor its London amendment contain any references to similar benefits being extended to third Parties.

Recommendation:

The resources of the Fund can cover expenses incurred for CFC phasing-out activities undertaken only after a country has ratified the Montreal Protocol and qualified as an Article 5 Paragraph 1 country.

The second issue:

The issue of retroactive payments from the Interim Multilateral Fund was raised at the Fifth Meeting of the Executive Committee when the first country programmes were under consideration. The Executive Committee made the following comments on this issue:

- "The issue of whether the resources of the Fund should be available to support actions taken within an Article 5, paragraph 1 Party prior either to the approval of a specific project by the Executive Committee and implementing agency or to the project's inclusion in an implementing agency's work programme raised important policy issues that should be addressed by the next Executive Committee meeting. The Secretariat should prepare a discussion paper on the subject to facilitate review by the Committee, including recognition and consideration for developing countries which have accelerated implementation of their projects to phase out the consumption and emission of ODSs."
(Report of the Fifth Meeting of the Executive Committee UNEP/OzL.Pro/ExCom/5/16, paragraph 28(e).

In accordance with paragraph 10 (g) of its terms of reference, the Executive Committee shall: "consider and, where appropriate, approve country programmes for compliance with the Protocol and, in the context of those country programmes, assess and, where applicable, approve all project proposals or groups of project proposals where the agreed incremental costs exceed US $500,000".

Also, according to the terms of reference of the Executive Committee as adopted by the Second Meeting of the Parties in Decision II/8, the Committee is at liberty to determine its own procedure. Paragraphs 1 and 10 of the terms of reference allow the Executive Committee inter alia to develop and monitor the implementation of specific operational policies, guidelines and administrative arrangements, including the disbursement of resources.

According to the Implementation Guidelines and Criteria for Project Selection, approved by the Third Meeting of the Executive Committee "individual projects prepared prior to the completion of a country programme shall also qualify for funding if consistent with project eligibility criteria approved by the Executive Committee". (Report of the Third Meeting of the Executive Committee, UNEP/OzL.Pro/ExCom/3/18/Rev.1, Annex III, page 30).

Project proposals not developed in cooperation with the implementing agencies and where the agreed incremental costs are less than US $500,000 shall be submitted to the Secretariat for review and subsequent submission to and approval by the Executive Committee. After approval,the project proposals shall be transmitted to the appropriate implementing agencies for inclusion in their next work programme[10].

Conclusion:

The resources of the Fund may be extended to cover the agreed incremental costs of projects that had not received prior approval by the Executive Committee provided that: (a) they were incurred by an Article 5, paragraph 1 country subsequent to the date on which it became a Party to the Montreal Protocol, (b) they meet the eligibility criteria.

[10] The Executive Committee agreed at its third meeting "that the regional and national agencies were in principle not excluded from being considered as implementing agencies provided that they were invited to co-operate with the Committee and were considered by it to have appropriate expertise" (UNEP/OzL.Pro/ExCom/3/18/Rev.1).