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OPEN-ENDED WORKING GROUP OF THE  
PARTIES TO THE MONTREAL PROTOCOL

Second session of the third meeting  
Geneva,  
9-11 May 1990

NOTE BY THE EXECUTIVE DIRECTOR

A. INTRODUCTION

1. At the second session of the second meeting of the Open-ended Working Group of the Parties to the Montreal Protocol the elements of a financial mechanism were identified and discussed. The working group also developed principles for and a list of costs that might be covered by a fund or a financial mechanism. The deliberations of the working group are contained in UNEP/OzL.Pro.WG.II(2)/7.

2. Before the next session of this working group which is scheduled to meet 9-11 May in Geneva, two sub-working groups will meet.

3. Taking into account comments of governments, one group will attempt to establish a complete set of principles and a refined list of costs to be covered by the financial mechanism, which the Parties may wish to adopt at their second meeting in June 1990.

4. The other group will review any comments of governments on the elements of the financial mechanism presented in the three annexes to the report mentioned in paragraph 1. and attempt to agree on the elements that the Parties can agree upon at their second meeting.

5. The working group will have to review the results of these two sub-groups and take a final decision on the two issues recommending it to the Parties in their June meeting. The Executive Director of UNEP also expects the working group, in the light of its discussions of the work of its two sub-groups, to come as far as possible to an agreement regarding the proposals for amendments of the Montreal Protocol Articles 5, 10, 10bis and 13 as contained in UNEP/OzL.Pro.WG.II(1)/5 to facilitate the work of the second meeting of the Parties. The working group may also wish to further consider the issue of technology transfer.

B. TECHNOLOGY TRANSFER

6. The concept of technology transfer contains two basic elements. First, the access to and use of patents and intellectual properties and second, access to and use of know-how related to the technology.

I. Patents and other intellectual property rights

7. To enable countries to establish production facilities of their own choice it is necessary to allow access to patents and intellectual properties of the relevant technology. A basic requirement to decide on which actions are necessary in this field is a study of the implications of patent laws in the relevant countries. WIPO has recently provided UNEP with a study on the substances which are controlled by the Montreal Protocol and of interest with regard to the protection of the Ozone Layer. The study contains information on which substances are patented and in which countries. UNEP has requested WIPO to develop a further study on patent laws and licenses pertinent to the issues of transfer technology. A meeting of experts on this issue has been called by UNEP in co-operation with WIPO which took place in Geneva on 26-27 April 1990. Among others the following paragraphs (7. 11 and 12 of the report) could be of special interest in this context:

"7. The possibility of compulsory licensing was further discussed extensively. During the discussion it became apparent that although it is not a common practice and it happens only in very rare cases, it is still possible under national patent legislation in certain countries for the Government to use the given patent if it is in the public interest for the protection of the human health or for national security reasons. It is understood that such use can take place only if the fair compensation covering the cost of research and development of invention and expected profit is paid to inventor (e.g. "Crown use" in the UK). It was noted that in some cases, the use of patent as well as the level of compensation could be subject to contesting through the courts.

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11. It was stressed that a compulsory license provides the government or another licensee with the right to use the patent only within the country where the patent has been registered. The only known exception is the use of patent for foreign defence purposes. The patent is still owned by its proprietor, so the Government who took the license has only right to use it.

12. Many products or processes are not patented in many countries due to the cost of patenting. It is probable that few inventions of interest to the Montreal Protocol would be patented in developing countries; hence, there would be no rights in those countries to obstruct the free use of the technology there."

8. The Working Group may wish to consider the proposed amendments to the Protocol on the issue of transfer of technology along the lines of the outcome of the above meeting and the possible recommendation of the use of patents by governments - Parties to the Protocol - under compulsory licensing - because of the need to protect their own people's health by protecting the ozone layer.

9. An important factor in the decision on which action to take will be the time frame during which such substances/related technologies enjoy protection. In case a substance enjoys a ten-year protection from discovery, it takes normally 2-3 years before a substance can be marketed. This leaves 7-8 years for a company to recover its investment. Although there is the 10-year grace period allowed for developing countries, these developing countries who are now producing the substances would naturally prefer to use the new technology as early as possible and this situation dictates action.

10. One area to study further is pharmaceuticals. The Executive Director intends to request information from WHO on how they ensure availability of medicines and medical equipment to developing countries. He also intends to request information as to whether WHO has found it necessary/desirable to take international action with regard to patents.

11. Should these studies reveal a need for action the next step would be to determine, in co-operation with WIPO, to which extent and under which conditions patents can be made available to others through negotiations and/or legislative measures, if necessary, with compensation to the owners of the patents. A crucial issue in this respect will be what is to be compensated including expected reasonable profit. The possibility of and conditions for transferring patents to an international institution for the benefit of all countries would also be further examined.

12. In this context it would also be necessary to examine in detail the changes in production patterns when switching from producing the existing substances to producing the substitute chemicals. This would make it possible to determine which patents it would be most feasible to consider transferring (if possible) to an international institution, as it will not be economically feasible to attempt to transfer/buy all existing relevant patents.

## II. Access and use of know-how

13. It is generally accepted that market mechanisms to a large extent will ensure transfer of know-how to developing countries. When companies promote their goods, be it cars or chemicals, part of the sales argument is know-how on use and, if relevant, on production of the goods. It should not be disregarded that a significant technology transfer - especially to those using the new substitutes - will take place without the need for special support.

14. The most important question still remains. How can it be made certain that all countries have equal access to obtaining this know-how? Even if it is recognized that transfer of technology and the related know-how in most cases will happen by itself, the residual cases must be covered. One element could be to establish in connection with the regular technology assessment an "inventory" of available technology and related know-how. This would ensure equal access to the available information in a practicable manner. This "inventory" could be established as part of the task of a clearing house mechanism.

15. Additionally, a number of recommendations related to collection and dissemination of information were made by the working group on workplans and reflected in the report (UNEP/OzL.Pro.WG.I(3)/3). The elements were updating the assessment panel reports, public awareness workshops, dissemination of technical information, provision of consultants, and technology and retrofit studies.

16. The only remaining issue will continue to be the transfer of the know-how of producing the new substitute in which the inventor company will have little interest. This could be again the subject of considerations similar to those referred to in paragraphs 7,8.11 and 12 above.