



# Global Environment Facility

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## NOTE ON ISSUES RELATED TO INTELLECTUAL PROPERTY RIGHTS

At its meeting in May 1997, the Council requested the Secretariat, in consultation with the Implementing Agencies, to prepare for Council review a note on the issues of intellectual property rights and potential use by other industries of technology developed with GEF financing.

As a first step, this note surveys the practice followed by the GEF Implementing Agencies in situations where their activities have led to the creation of intellectual property rights (IPRs). The Secretariat invites Council Members to submit their written comments on this note by June 4, 1999, together with views as to whether further work should be undertaken on this issue.

## **BACKGROUND**

1. This note is provided by the GEF Secretariat pursuant to the Council's request that this paper consider "the issues of intellectual property rights and the potential use by other industries of technology developed with GEF financing."<sup>1</sup> As a basis for future discussion by the Council, this note surveys the practice followed by the GEF implementing agencies when their activities have led to the creation of intellectual property rights (IPRs).

## **INTELLECTUAL PROPERTY RIGHTS GENERALLY**

2. IPRs are generally divided into two branches, copyrights and industrial property rights. Copyrights grant authors of original intellectual work the right to authorize or prohibit, for a period of time, certain uses of their works. For example, copyrights can protect analyses, reports, assessments and architectural plans. Industrial property rights protect creative work designed for industrial purposes through, *inter alia*, patents, trade secrets and trademarks. Patents are the grant of an exclusive right to make, use, or sell one's invention. These grants are normally made by governments and normally involve a formal registration process pursuant to which the details of inventions are publicly disclosed. Trade secrets do not involve registration, but many jurisdictions protect by statute or common law their owner against the disclosure and use, without authorization, of secret technical "know-how" (or proprietary information) such as special processes and formulae. The distinction between the two different branches of IPRs is important because, as this note demonstrates, the GEF implementing agencies have developed a long-standing practice regarding copyrights, but have a more limited experience dealing with other IPRs such as patents and trade secrets.

3. The specific issue raised by the Council's request is normally addressed through contractual arrangements. The specific contractual provisions reflect therefore an outcome of negotiations between the relevant parties which take into account, among other things, the relevant industry practice. For example, despite the general rule pursuant to which an inventor owns the rights in his/her inventions, employment contracts often provide expressly for the assignment of IPRs from the employee to the employer. Even where contracts are silent on the issue IPRs, some jurisdictions have recognized that employees, depending on their status, have a duty to assign the rights in inventions to their employer. More particularly, such duty will be implied when an employee was hired specifically for the purposes of developing intellectual property. By analogy, these principles may be applicable to the work performed by consultants.

## **PRACTICE FOLLOWED BY THE WORLD BANK AND THE INTERNATIONAL FINANCE CORPORATION**

4. The World Bank (the "Bank") and the International Finance Corporation ("IFC") do not have any administrative or operational policy specifically regarding IPRs. They have, however, developed a long-standing practice regarding copyrights to ensure the protection of the work performed by their staff and consultants, but also by consultants for the Bank's client countries. For example, the Bank obtains the appropriate copyrights for most of the publications it releases.

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<sup>1</sup> Joint Summary of the Chairs for the October 98 Council Meeting.

In addition, the Bank's Standard Form of Contract for Consultants' Services—applicable to contracts entered into between Bank's client countries and third parties for the purposes of carrying out a Bank project—provide that all plans, drawings, software and reports shall be the property of the client country.

5. IFC, which provides loans and equity investment to the private sector, has not required that it be granted any intellectual property rights in any particular technology which might be developed as a result of its financing. The Bank has limited experience with patents and other intellectual property because the nature of its operations historically has not led it to provide loans for projects that have sensitive technology components. There are two recent precedents, however, where the Bank has specifically addressed this issue.

6. The first is the "BioBanana Project" which has not been implemented and where the Bank examined the possibility of creating a specific trust fund for the purposes of developing a new variety of banana resistant to pest and diseases. The trust fund would be financed by public and private sector participants. During the negotiations of the Project (which were never concluded), the Bank took the position that participants to the fund could jointly own intellectual property developed as a result of the fund's activities, but that subsistence growers and farmers in the Bank's client countries would be granted a royalty-free license to use the new variety of banana. Another interesting precedent is the Information for Development Program (*infoDev*) administered by the Bank. *infoDev* provides grants to proponents who develop innovative projects that demonstrate the benefits of information and telecommunication technologies in economic and social development. As a matter of policy, all intellectual property developed pursuant to *infoDev* grants may be used freely by any person in the world. This allows the Bank's participation in *infoDev* to benefit the greatest number of persons in its borrowing countries.

#### **PRACTICE FOLLOWED BY UN AGENCIES**

7. UNEP and UNDP have developed a practice regarding copyrights which is similar to the one followed by the Bank. UNEP does not specifically finance projects that would lead to the development intellectual property. Among other activities, UNEP is very active in the field of technology transfer and maintains information systems and expert networks such as the OzonAction Information (OAIC) and International Cleaner Production Information (ICPIC) Clearinghouses.

8. Preliminary research suggests that UNDP, like the Bank, does not have any official policy regarding IPRs developed pursuant to its activities. In the absence of specific guidance on this issue, the United Nations Office for Project Services (UNOPS), a UN agency which implements UNDP projects, has generally "reserved" IPRs developed as a result of UNDP grants. This reservation is intended to protect UNDP rights in intellectual property, and has led UNOPS over the years to become, by default, the temporary owner of such property. When warranted by international conventions or industry practices, UNOPS has also granted licenses to third parties and recipients of UNDP grants. In the GEF Biodiversity Conservation and Management Project implemented in the Dominican Republic for example, joint ownership of the intellectual property was assigned to UNOPS, UNDP, the Government of the Dominican Republic and the recipient, a university research center. This assignment, however, excluded

biological and genetic resources regulated by the provisions on access and benefit-sharing of the Convention on Biological Diversity.

## CONCLUSION

9. This note attempted to survey the practice of the GEF implementing agencies and should not be considered as an exhaustive treatment or analysis of the issue of IPRs and the GEF activities. A number of considerations, however, can be identified. First, issues related to IPRs are best addressed through contractual arrangements. Generally, the entity that hires, provides funding or contracts with a third party specifically for the development of intellectual property can choose to acquire all or some of the rights to such property. However, international conventions, relevant industry practice and cost-benefit considerations need to be taken into account and will influence the negotiated outcome of these agreements.

10. Second, technicalities and institutional responsibilities associated with filing, maintaining, monitoring and enforcing IPRs should be considered, particularly in relation to industrial property rights. In part, the extent of these responsibilities may explain why the GEF implementing agencies have limited experience with regard to patents and trade secrets as opposed to copyrights. In addition, one must observe that the GEF implementing agencies have generally refrained from collecting royalties and marketing intellectual property, activities which would require a high degree of enhanced technical capacity. Rather, precedents like the BioBanana Project and *infoDev* suggest that the Bank has attempted to broadly disseminate the use of such property through royalty-free and non-exclusive licenses in a manner which is consistent with its mission.

11. Finally, as the GEF does not have a separate legal personality, it would not be in a position to own IPRs. Precedents like the Biodiversity Conservation and Management Project implemented by UNDP, however, demonstrate that alternative arrangements can be made whereby IPRs can be held on behalf of the GEF by its implementing agencies and/or recipient governments. These precedents do not address the issue of any income that may result from the exploitation of IPRs if this could be done in a manner compatible with the mission of the GEF and its implementing and executing agencies. Arrangements could be made so as to ensure that any such income would accrue to the GEF trust fund through these agencies.