



United Nations
Environment
Programme



Distr.
GENERAL

UNEP/Bio.Div/N5-INC.3/3
19 November 1991

ORIGINAL: ENGLISH

INTERGOVERNMENTAL NEGOTIATING COMMITTEE
FOR A CONVENTION ON BIOLOGICAL DIVERSITY

Fifth negotiating session/third session of INC
Geneva, 25 November - 4 December 1991

INTERPRETATION OF THE WORDS AND PHRASES "FAIR AND FAVOURABLE",
"FAIR AND MOST FAVOURABLE", "EQUITABLE", "PREFERENTIAL AND
NON-COMMERCIAL", "PREFERENTIAL", "NON-COMMERCIAL" AND
"CONCESSIONAL"

Note by the secretariat

Introduction

1. The present note has been prepared pursuant to the request made by the Intergovernmental Negotiating Committee at the fourth negotiating session/second session of INC and reflected in paragraph 104 of the report on the work of that session (UNEP/Bio.Div/N4-INC.2/5 and Corr.1):

"In discussing Article 16, the basic issue of what was meant by the words fair and favourable, fair and most favourable, equitable, preferential and non-commercial, preferential, non-commercial and concessional kept arising. Working Group II therefore recommended to the Plenary that the Secretariat be requested to prepare a Note on the interpretation of these words in other relevant fora".

2. The words and phrases mentioned in that paragraph are used both in legal and economic contexts.

3. Material from the the following sources has been used:

- (a) Resolutions of the United Nations General Assembly;
- (b) Documents of the Preparatory Committee for the United Nations Conference on Environment and Development;
- (c) Documents of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (INC/FCCC);
- (d) Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol on Substances that Deplete the Ozone Layer;

Na.91-6442

GE.91-03354

/...

(e) Texts included in the UNEP Environmental Law Guidelines and Principles series;

(f) Other relevant documents.

4. In all quotations, the words and phrases mentioned in the INC/BD decision have been given added emphasis.

5. In preparing the present note, the secretariat did not intend to comment on or provide an interpretation of the quotations from the documents. The quotations themselves, together with the context in which they are being used, provide the necessary basis for further understanding and interpretation.

I. "FAIR AND FAVOURABLE"

Use of phrase

1. General Assembly resolutions using the word "favourable"

6. By paragraph 11 of resolution 44/227 of 22 December 1989 entitled "Implementation of General Assembly resolutions 42/186 and 42/187, the Assembly stressed, inter alia, "the need to examine with a view to recommend effective modalities for favourable access to, and transfer of, environmentally sound technologies, in particular to the developing countries, including on concessional and preferential terms".

7. The nineteenth preambular paragraph of resolution 44/228 of 22 December 1989 on United Nations Conference on Environment and Development, starts as follows:

"Conscious of the crucial role of science and technology in the field of environmental protection and of the need of developing countries, in particular, concerning favourable access to environmentally sound technologies, processes, equipment and related research and expertise ...".

8. Paragraph 15 (m) of resolution 44/228 reads, in part:

"To examine with the view to recommending effective modalities for favourable access to, and transfer of, environmentally sound technologies, in particular to the developing countries, including on concessional and preferential terms, ...".

9. By paragraph 15 of its resolution 44/207 of 22 December 1989 on protection of global climate for present and future generations of mankind, the Assembly decided "that the concept of assured access for developing countries to environmentally sound technologies and assured transfer of those technologies to developing countries on favourable terms and the relation of that concept to intellectual property rights should be explored in the context of the elaboration of a framework convention on climate, ...".

/...

2. Texts included in the Environmental Law Guidelines and Principles Series using the word "fair"

10. Part I, section 5, of the Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes declares that:

"States should, in a manner appropriate to their needs and capabilities, whether directly or through the appropriate international organizations, promote actively and in accordance with their legitimate interests the transfer on fair and reasonable conditions of technology related to the environmentally sound management of hazardous wastes."

II. "FAIR AND MOST FAVOURABLE"

Use of the phrase

1. Adopted treaties

11. Article 10 A, subparagraph (b) of the Montreal Protocol on Substances that Deplete the Ozone Layer, as adjusted and amended by the Second Meeting of the Parties, states that each Party shall take every practical step to ensure "that the transfers referred to in subparagraph (a) [of the article] occur under fair and most favourable conditions".

2. INC/FCCC documents

12. The following quotations are taken from Document of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (INC/FCCC):

(a) "Ensure expeditious transfer of the best available environmentally sound and safe technology on [a fair and most favourable]/[a concessional and preferential]/[a preferential and non-commercial] basis to developing countries ..." (A/AC.237/WG.I/CRP.2, section II, para. 11);

(b) "... and the best available environmentally-sound technologies be transferred expeditiously on a fair and most favourable basis" "Compilation of texts related to principles" (A/AC.237/Misc. 6), section III A, para. 10; see also INC/FCCC decision 1/1, annex, para. 6 (b) (A/AC.237/6, annex II);

(c) "Recognizing the obligation of developed countries to transfer appropriate environmentally sound technologies to developing countries on

Alternatives:

- "(A) A concessional and preferential basis
- "(B) A preferential and non-commercial basis
- "(C) A fair and most favourable basis" ("Consolidated text based on proposals regarding principles and commitments, presented by delegations" (A/AC.237/Misc.9), p.3 see also part II (General commitments), para. 11 and part V (Financial and technology transfer), para. 1, of the same document).

/...

III. "EQUITABLE"

Use of word

1. General Assembly resolutions

13. Paragraph 3 (c) of resolution 42/186 of 11 December 1987 on Environmental Perspective to the Year 2000 and Beyond, states that:

"Since mass poverty is often at the root of environmental degradation, its elimination and ensuring equitable access of people to environmental resources are essential for sustained environmental improvements;"

Identical language is contained in paragraph 3 (c) of the Environmental Perspective, which is annexed to resolution 42/186.

14. Paragraph 4 (f) of the same resolution refers to:

"The establishment of an equitable system of international economic relations aimed at achieving continuing economic advancement for all States based on principles recognized by the international community, in order to stimulate and sustain environmentally sound development, especially in developing countries".

15. By paragraph 4 of its resolution 42/187 of 11 December 1987 on the report of the World Commission on Environment and Development, the General Assembly agreed that:

"An equitable sharing of the environmental costs and benefits of economic development between and within countries and between present and future generations is a key to achieving sustainable development".

2. INC/FCCC documents

16. The following quotations are taken from INC/FCCC documents.

(a) "Recognizing further that the principle of equity and the common but differentiated responsibility of countries should be the basis of any global response to climate change developed countries must take the lead" (A/AC.237/Misc.6, section III A, para. 10);

(b) "The Parties shall conduct effective international cooperation based on the principle of equity to deal jointly with the climate change issue without prejudice to sovereignty of States" (A/AC.237/WG.I/CRP.1/Rev.1, para. 1 of alternative D under the subheading "Sovereignty");

(c) "[Action to be taken should be based on equity, in accordance with the [proportionate]/[past, present and [future]] contributions to the problem, with [due]/[full] regard to the development requirements of developing countries, [especially those whose current emissions are low]]" (A/AC.237/WG.I/CRP.1/Rev.1, alternative B under the subheading "[[Equity] Common but differentiated responsibility/[Main responsibility]]");

(d) "[The principle of equity and the common but differentiated responsibility of countries [should]/[shall] be [the basis of any global response]/[the basis for response measures]/[taken into account in the global

/...

response] to climate change ..." (A/AC.237/WG.I/CRP.1/Rev.1, alternative D under subheading" [[Equity] Common but differentiated responsibility/[Main responsibility]").

3. Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol

17. Annex II, paragraph 1, of the Vienna Convention for the Protection of the Ozone Layer states that:

"The Parties to the Convention recognize that the collection and sharing of information is an important means of implementing the objectives of this Convention and of assuring that any actions that may be taken are appropriate and equitable. Therefore, Parties shall exchange scientific, technical, socio-economic, business, commercial and legal information".

18. The sixth paragraph of the preamble to the Montreal Protocol on Substances that Deplete the Ozone Layer, as adjusted and amended by the Second Meeting of the Parties, reads as follows:

"Determined to protect the ozone layer by taking precautionary measures to control equitably total emissions of substances that deplete it, with the ultimate objective of their elimination on the basis of developments in scientific knowledge, taking into account technical and economic considerations and bearing in mind the developmental needs of developing countries,"

4. Texts included in the UNEP Environmental Law Guidelines and Principles Series

19. Section I, paragraph 7, of the Declaration of the United Nations Conference on the Human Environment read, in part, as follows:

"To achieve this environmental goal will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level, all sharing equitably in common efforts ..."

20 Principle 1 of the Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States states that:

"It is necessary for States to cooperate in the field of the environment concerning the conservation and harmonious utilization of natural resources shared by two or more States. Accordingly, it is necessary that, consistent with the concept of equitable utilization of shared natural resources, States cooperate with a view to controlling, preventing, reducing or eliminating adverse environmental effects which may result from the utilization of such resources ...".

5. Other relevant documents

21. References to be found in other relevant documents include the following statements:

/...

(a) "States shall use transboundary natural resources in a reasonable and equitable manner" (report of the World Commission on Environment and Development, annex I, principle 9);

(b) "The responsibility for ensuring a better environment should be equitably shared and the ability of developing countries to respond be taken into account" (The Langkawi Declaration on Environment issued by Commonwealth Heads of Government on 21 October 1989, para. 5).

IV. "PREFERENTIAL"

Use of term

1. General Assembly resolutions

22. The word "preferential" may be found at the end of the quotations from resolution 44/227 and 44/228 contained in paragraph 6 and 8 above

2. Documents of the Preparatory Committee for the United Nations Conference on Environment and Development

23. The following quotations including the word "preferential" are taken from documents before the Preparatory Committee for the United Nations Conference on Environment and Development at its third session:

(a) "The identification with a view to the establishment of appropriate international mechanisms to promote, facilitate and finance the transfer of environmentally sound technology on concessional and preferential terms ..." (Paragraph 2 of draft decision A/CONF.151/L.46 on transfer of environmentally sound technology, submitted by China and Ghana (on behalf of the States Members of the United Nations that are members of the Group of 77));

(b) "Action-oriented proposals for effective modalities for favourable access to and transfer of environmentally sound technology, in particular, to developing countries including on concessional and preferential terms ..." (Paragraph 3 (b) of draft decision A/CONF.151/PC/L.49 on the structure and organization of Agenda 21, proposed by Chairman of the Preparatory Committee);

(c) "The [identification] [and examination] with a view to the establishment and/or development of appropriate international and national mechanisms to promote, facilitate and finance the transfer of environmentally [safe and] sound technology including on concessional and preferential terms, ..." (Paragraph 2 of the Coordinator's text on "Transfer of environmentally [safe and] sound technology" (A/CONF.151/PC/L.53, annex).

3. INC/FCCC documents

24. The following quotations are taken from various INC/FCCC documents:

(a) "Ensure expeditious transfer of the best available environmentally sound and safe technology on [a fair and most favourable]/[a concessional and preferential]/[a preferential and non-commercial] basis to developing countries ..." (A/AC.237/WG.I/CRP.2, part II, para. 11);

/...

(b) "Obligation of developed countries to effect transfer of appropriate environmentally sound technologies on a concessional and preferential basis" (A/AC.237/Misc.6, section V B, para. 2).

V. "NON-COMMERCIAL"

Use of term

1. Documents of the Preparatory Committee for the United Nations Conference on Environment and Development

25. The following examples of the use of the term "non-commercial" have been taken from documents before the Preparatory Committee for the United Nations Conference on Environment and Development at its third session:

(a) "Purchasing patents for their transfer to the developing countries on non-commercial terms;" (Paragraph 2 (d) of draft decision A/CONF.151/PC/L.46 on transfer of environmentally sound technology, submitted by China and Ghana (on behalf of the States Members of the United Nations that are members of the Group of 77));

(b) "Purchasing [appropriate] [environmentally] [safe and] sound technology] patents for their transfer to developing countries on non-commercial terms [as part of aid packages].

"[Purchasing patent licenses on commercial terms for their transfer to developing countries on non-commercial terms.]" (Paragraph 2 (d) of the Coordinator's text on "transfer of environmentally [safe and] sound technology" (A/CONF.151/PC/L.53, annex)).

VI. "PREFERENTIAL AND NON-COMMERCIAL"

Use of phrase

26. The following quotations in which the phrase "preferential and non-commercial" is used are taken from various INC/FCCC documents:

(a) "All obligations and commitments to be taken by developing countries are conditioned to and dependent upon the provision of new and additional financial resources and the transfer of technology on a non-commercial and preferential basis" (A/AC.237/WG.I/CRP.1/Rev.1, alternative C under the subheading "Special circumstances" (p.11 of the English text));

(b) "... and facilitate the transfer of environmentally sound and safe technologies expeditiously on a [fair and most favourable]/[preferential and non-commercial] basis." (A/AC.237/WG.I/CRP.3, para. 1);

(c) "The Parties shall take every practicable step, consistent with the programmes supported by the climate fund, to ensure that:

"(a) Environmentally sound and safe technologies are expeditiously transferred to developing country Parties; and

/...

"(b) The transfers referred to in paragraph (a) above should occur under preferential and non-commercial terms." (A/AC.237/WG.I/CRP.3, para. 5, alternative B);

(d) "Developing countries will also require technology transfers on preferential and non-commercial terms." (A/AC.237/Misc.6, section V B, para. 4);

(e) "Recognizing the obligation of developed countries to transfer appropriate environmentally sound technologies to developing countries on

Alternatives:

"(A) A concessional and preferential basis;

"(B) A preferential and non-commercial basis;

"(C) A fair and most favourable basis, ..." "Consolidated text based on proposals regarding principles and commitments, presented by delegations" (A/AC.237/Misc.9), section I (preamble)), eleventh paragraph);

(f) "Ensure expeditious transfer of the best available environmentally sound technology on a fair and most favourable/a concessional and preferential/a preferential and non-commercial basis to developing countries and promote rapid development of such technology in these countries" (A/AC.237/Misc.9, section II, para. 11);

(g) "The Parties shall create an international climate fund to expeditiously mobilize new and additional financial resources for developing countries Parties, in order to:

"(a) implement obligations under the Convention;

"(b) adapt to and mitigate the adverse effects of climate change;

"(c) provide assured access to appropriate, environmentally sound technologies on preferential and non-commercial terms to developing countries;" (A/AC.237/Misc.9, section V, alternative A).

VII. "CONCESSIONAL"

Use of term

1. General Assembly resolutions

27. The word "concessional" is used at the end of the quotations from resolutions 44/227 and 44/228 contained in paragraphs 6 and 8 above. The word is also used in paragraph 68 (j) of the Environmental Perspective to the Year 2000 and Beyond, annexed to Assembly resolution 42/186, which reads as follows:

"The transfer of clean, low-waste and pollution control technologies should be promoted through international cooperation. The possibility of making such technologies available at concessional prices to the

/...

countries in need should be explored. Governments of recipient countries should establish procedures for ascertaining the environmental implications of imported technologies".

2. Documents of the Preparatory Committee for the United Nations Conference on Environment and Development

28. The following quotations are taken from documents before the Preparatory Committee at its third session:

(a) "The identification with a view to the establishing of appropriate international mechanisms to promote, facilitate and finance the transfer of environmentally sound technology on concessional and preferential terms, ..." (UNCED Prep. Comm. III, third session, China and Ghana draft decision A/CONF.151/PC/L.46, on transfer of environmentally sound technology, submitted by China and Ghana (on behalf of the States Members of the United Nations that are members of the Group of 77), para. 2);

(b) "Action-oriented proposals for effective modalities for favourable access to and transfer of environmentally sound technology, in particular, to developing countries on concessional and preferential terms ..." (Draft decision (A/CONF.151/PC/L.49, on the structure and organization of Agenda 21, proposed by Chairman on the basis of informal consultations, para. 3 (b);

(c) "... facilitate and finance the transfer of environmentally [safe and] sound technology including on concessional and preferential terms, ..." (A/CONF.151/PC/L.53, annex, para. 2);

(d) "Specific arrangements for concessional transfer of technology would vary from case to case. However, the acceptance of certain principles may facilitate such case decisions. The factors which need to be taken into account could be:

- "a. the extent of the discrepancy between social costs and private benefits (e.g. where costs of environmental degradation greatly exceed the short-term commercial interests);
- "b. the degree of effective competition in the supply of a given technology;
- "c. the type of obligation on citizens/governments (e.g. phasing out of CFCs), part of which may be counterbalanced by indirect or direct financial support; or
- "d. the relative advantage of using price discounts as an inducement to alter public or corporate behaviour to obtain a social objective." (report of the Secretary-General of the Conference on transfer of technology (A/CONF.151/PC/53), para. 41).

3. INC/FCCC documents

29. The following quotations in which the word "concessional" is used are taken from INC/FCCC documents:

/...

(a) "This will require transfer of adequate, new and additional financial resources to developing countries as well as transfer of environmentally sound technologies, including state-of-the-art technologies, to developing countries on preferential and concessional terms." (A/AC.237/WG.I/CRP.1/Rev.1, para. 1 under the subheading "Cost-effectiveness" (p.11 of the English text));

(b) "Ensure expeditious transfer of the best available environmentally sound and safe technology on [a fair and most favourable]/[a concessional and preferential]/[a preferential and non-commercial] basis to developing countries ..." (A/AC.237/WG.I/CRP.2, section II, para. 11;

(c) "Obligation of developed countries to effect transfer of appropriate environmentally sound technologies on a concessional and preferential basis." (A/AC.237/Misc.6, section V B, para. 2);

(d) "Recognizing the obligation of developed countries to transfer appropriate environmentally sound technologies to developing countries on

Alternatives:

"(A) A concessional and preferential basis;

"(B) A preferential and non-commercial basis;

"(C) A fair and most favourable basis" (INC/FCCC, third session, ("Consolidated text based on proposals regarding principles and commitments, presented by delegations" (A/AC.237/Misc.9), preamble, eleventh paragraph);

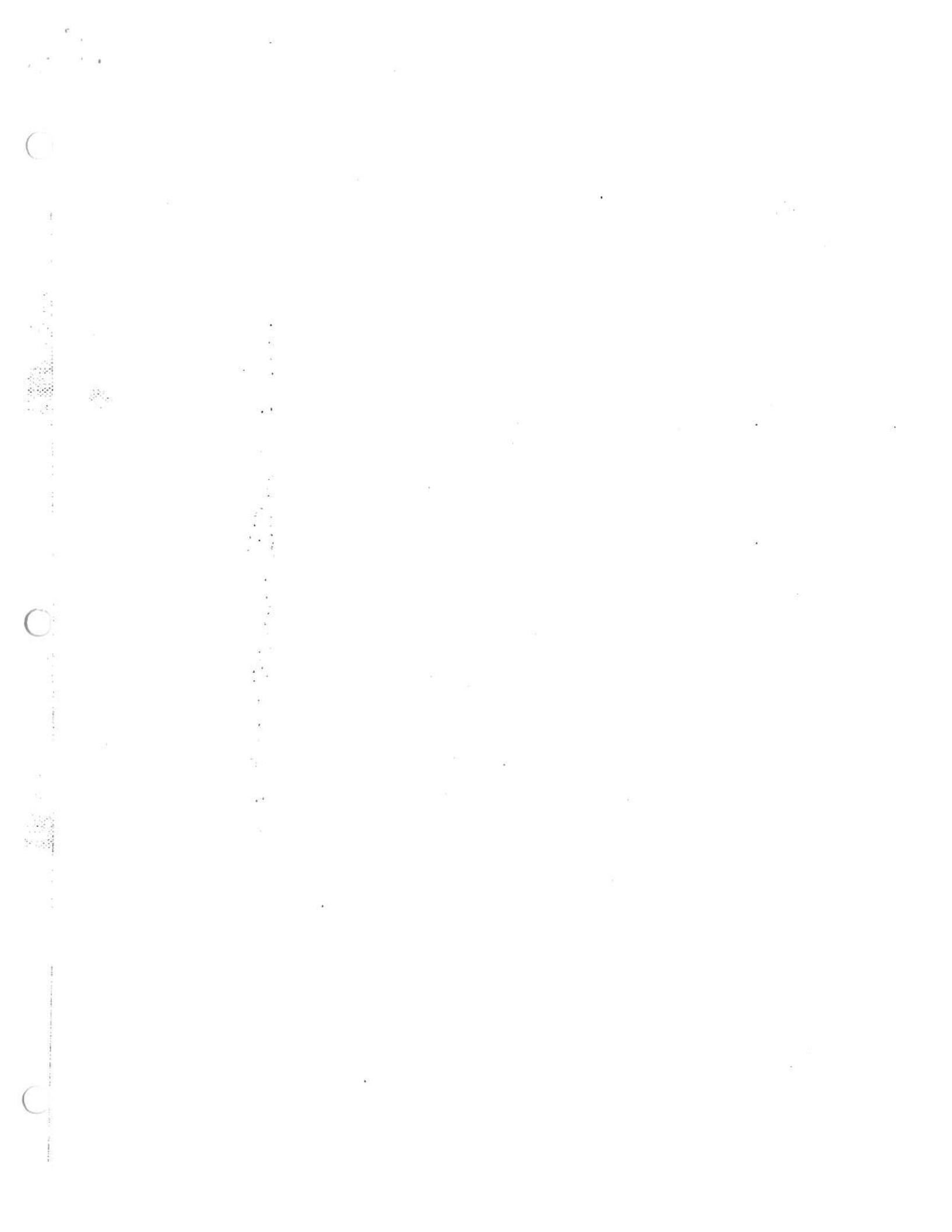
(e) "Ensure expeditious transfer of the best available environmentally sound technology on a fair and most favourable/a concessional and preferential/a preferential and non-commercial basis to developing countries and promote rapid development of such technology in these countries;" (A/AC.237/Misc.9, para. 11 under the heading "General commitments").

4. Montreal Protocol On Substances that Deplete the Ozone Layer

30. The word "concessional" is used in article 10, paragraph 3 (a), of the Montreal Protocol on Substances that Deplete the Ozone Layer, as adjusted and amended by the Second Meeting of the Parties, which reads as follows:

"The Multilateral Fund shall:

"(a) Meet, on a grant or concessional basis as appropriate, and according to criteria to be decided upon by the Parties, the agreed incremental costs".



100

100

100

100

100

100