



Technology Transfer and Intellectual Property Issues Take Center Stage in UNFCCC Negotiations

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INTRODUCTION

The world will not be able to mitigate the impact of climate change without advanced clean technologies. Although technology is not the only solution, it is a critical element in the fight against climate change. Technology transfer and intellectual property issues have captured the world's attention at the United Nations Framework Convention on Climate Change (UNFCCC) negotiations in Copenhagen. However, a legally binding agreement on climate change will almost certainly be delayed until at least 2010—in part because of the failure to agree on technology transfer and intellectual property issues.

Unlike a natural disaster or outbreak of disease, climate change will affect 100% of the world's population. Companies and non-profit entities in both developed and developing countries are working on solutions to the climate change problem. There is consensus among the UNFCCC delegations that reductions in greenhouse gas emissions to counteract climate change will require the adoption of clean technology by developed and developing countries. A key question is how innovative technology will be disseminated. Negotiations have stalled over differing views on how best to fund and facilitate the commercialization and deployment of clean technologies.

Even if a binding UNFCCC agreement is not made until 2010 or beyond, the policies currently under discussion will impact your business for years to come. Companies and institutions with technologies and intellectual property rights relevant to clean technology cannot ignore the issues raised in the Copenhagen negotiations, particularly if they have their eye on markets in developing countries. Entities that are developing or selling clean technologies, or plan to do so, should seize the opportunity to participate in structuring the policies and frameworks for technology transfer that will shape the market for those technologies.

UNFCCC COMPULSORY LICENSING PROPOSALS

Of the proposals circulated in the UNFCCC negotiations for improving technology transfer, compulsory licensing is the most contentious. India and China have been particularly vocal that compulsory patent licensing should be expanded to cover clean technologies. Compulsory licensing refers to a government's permission to make, use, sell, import and otherwise practice a patented item or process without the consent of the patent owner where such consent would otherwise be required. One compulsory licensing proposal seeks to expand Article 31 of the Trade-Related Aspects of Intellectual Property Rights agreement (TRIPs) which allows for compulsory licensing by governments in cases of national emergency, extreme urgency or public non-commercial use. Currently, there are four options being circulated for the UNFCCC draft agreement's section on intellectual property rights and two of those options include compulsory licensing proposals.

U.S. STANCE ON COMPULSORY LICENSING

Because the UNFCCC agreement will require consensus of all the negotiating countries, the chances that a broad expansion of compulsory licensing will be included in the final draft are low. The United States in particular has been clear in its opposition to compulsory licensing, asserting that such a scheme will discourage companies from investing in innovation. Buttressing that negotiating position, the U.S. House of Representatives has taken a strong stand against the weakening of intellectual property rights with respect to "green" technologies. Section 329 of the Foreign Relations Authorization Act bill, H.R. 2410, states that it shall be U.S. policy to "prevent any weakening of, and ensure robust compliance with and enforcement of, existing international legal requirements as of the date of the enactment of this Act for the protection of intellectual property rights related to energy or environmental technology..."

VOLUNTARY LICENSING MODELS

More politically viable technology transfer and intellectual property proposals are under discussion at the UNFCCC negotiations. One potential UNFCCC resolution centers on voluntary licensing programs for technology and intellectual property rights where patent and technology holders can "choose" to participate. Moreover, a number of U.S.-based companies and NGOs have galvanized efforts to support technology transfer as well as intellectual property protection, by offering alternatives to compulsory licensing. Most of these groups aspire to create incentives for open innovation and sharing of green technology, in part by reducing the transaction costs associated with technology transfer.

The GreenXchange is a project spearheaded by Nike and the Creative Commons. The GreenXchange is based on the Creative Commons project for copyright and intends to leverage open innovation to solve problems of sustainability. The Creative Commons plans to provide flexible, standardized and easy to use licenses for granting patent rights for sustainable uses. Under the GreenXchange, companies can make their patents available under a license for either commercial or non-commercial uses.

At the World Business Council for Sustainable Development, IBM, Nokia, Pitney Bowes and Sony launched the Eco-Patent Commons project to invite companies to contribute patents on technology with environmental benefits to a

“commons” for the public benefit. Companies contribute patents to the “commons” by irrevocably covenanting not to sue others that use the patents for environmentally beneficial uses.

The benefits of participating in a private-sector intellectual property programs include the opportunity to deliver on a commitment to corporate social responsibility as well as new opportunities for generating licensing revenue and creating business partnerships.

UNFCCC TECHNOLOGY TRANSFER PROPOSALS

Worldwide dissemination of clean technologies will require support and coordination for more than just transfers of legal rights. Intellectual property rights proposals, including compulsory licensing, fail to address critical issues, such as financing investments needed to mitigate climate change and the practical aspects of transferring the know-how and technology that will reduce dependence on fossil fuels. The primary goal of most other technology transfer proposals is to shorten the technology development and commercialization cycle, bring clean technologies to market, and deploy appropriate technologies to developing countries quickly. Such proposals under discussion aim to create business opportunities, increase local capacity and expertise, and improve coordination and institutional support for technology transfer and projects. The following proposals may be included in the final draft of the UNFCCC agreement:

- creating regional and national technology action plans that identify clean technologies for adoption based on affordability, capacity to implement and local conditions, and define policies and funding requirements necessary for technology transfer;
- setting up joint ventures and other partnerships in developing countries (including those with private, public, and NGO participation) focused on cooperative research and development, demonstration projects, and deployment of technology where companies with technology to offer can benefit from wider and more coordinated dissemination of their technology;
- creating financial incentives for technology transfer, research and development, and skills training in developing countries through subsidies and tax benefits to the technology holders;
- setting up a multilateral climate technology fund to provide a financial mechanism for facilitating technology transfer;
- removing tariff and nontariff barriers to trade to enable participation in new markets; and

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- creating regional research and education centers with the knowledge and expertise to build capacity and accelerate diffusion of technology in developing countries.

The majority of these proposals attempt to pair outbound technology transfer with a business benefit for the technology holder, and aim to leverage market principles to disseminate clean technologies to developing countries. Other proposals intend to provide the institutional and educational support necessary for developing countries to connect businesses with local opportunities and deploy technologies at the local level. The overall goal is to turn the climate change “problem” into an “opportunity.”

CONCLUSION

Every company with intellectual property rights or technology relevant to reducing emissions will be affected by the UNFCCC agreement whether or not compulsory licensing is adopted. The agreement will be particularly relevant to companies (1) with high impact clean technology that is adaptable to the local conditions and capacity of developing countries and (2) interested in supporting or setting up research, development, and/or manufacturing facilities in developing countries.

We recommend that in-house counsel (1) monitor the UNFCCC negotiations to stay abreast of the various opportunities that may be made available once agreement is reached, (2) evaluate their patent portfolios to identify patents that they may be willing to contribute to a “commons” for environmentally beneficial uses or license under a standardized agreement, (3) encourage their business and technology teams to identify existing and potential clean technologies that could be deployed or licensed in developing countries, (4) get involved on the policy side to advocate for technology transfer proposals that will help companies break into emerging markets, and (5) consult counsel regarding how to best protect and commercialize company intellectual property in domestic or international markets. Once agreement is reached and financing is pledged by developed countries, political pressure will be strong to rapidly implement policies and programs to speed the development, commercialization and deployment of clean technologies worldwide. Being prepared is the key to taking advantage of the opportunity.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.