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The International Climate Change Negotiations and Intellectual Property: *Another Climate Change Risk?*

BY JON P. SANTAMAURO, ROGER R. MARTELLA, JR.,
JAMES MENDENHALL, TATJANA SACHSE
AND ANDREW W. SHOYER (SIDLEY AUSTIN LLP)

Introduction

In the context of ongoing negotiations to supplement the United Nations Framework Convention on Climate Change (UNFCCC), many developing countries, including China and India, are making proposals that, if accepted, would undermine important intellectual property rights needed to provide sustainable incentives to develop climate-related technology. These proposals may also redefine key principles contained in international intellectual property agreements, including the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

Innovative industries should monitor and consider engaging in this process to preserve their interests. Unlike previous efforts at the international level, no particular industry sector is excluded or singled out in these proposals. Any technology that may be relevant to climate adaptation or mitigation is at risk, including not only those that help reduce carbon emissions such as alternative energy technologies, but also those technologies that address the perceived human and environmental consequences of climate change. The negotiations are intended to be concluded by December 2009. Over the next few months, there will be many opportunities for companies and other industry interests to ensure that their voice is heard.

The Revised Negotiating Text on Intellectual Property and Technology Transfer

The UNFCCC is the foundational international agreement relating to climate change. The UNFCCC entered into force in 1994, and 192 countries (including the United States) have ratified it. It is, as its name suggests, a framework, but not much more: it facilitates the sharing of information among countries about greenhouse gas emissions and national strategies to address climate change, encourages countries to stabilize emissions, and promotes cooperation on adaptation efforts. The Parties

to the UNFCCC adopted a Protocol in Kyoto in 1997 that committed 37 industrialized countries and the European Union to meet binding targets to reduce emissions. The Kyoto Protocol entered into force in 2005, and 187 countries (but not the United States) have ratified it. The Protocol is set to expire in 2012.

Negotiations are ongoing to supplement the UNFCCC, and to create a successor agreement to the Kyoto Protocol that the United States could ultimately ratify, by the fifteenth meeting of the Conference of the Parties (COP) to the UNFCCC to be held in Copenhagen, Denmark, in December 2009.

The Ad-Hoc Working Group on Long-term Cooperative Action recently produced a revised Negotiating Text¹ as the outcome of its sixth meeting, which was held in Bonn, Germany, from June 1-12, 2009. During those negotiations, the portion of the draft text relating to intellectual property and technology transfer grew from eight pages to thirty. The expanded size of the section reflects an increasing interest among developing countries in these issues, but also the sheer number of alternatives and options included in the draft text.

The mere inclusion by the UNFCCC Secretariat of proposals in the draft text does not indicate that they have any particular degree of support or that they are close to adoption. There are, however, several proposals in this section that, if adopted, would eliminate or undermine valuable intellectual property for innovative industries. In fact, several proposals specifically call for a prohibition on patents or for the compulsory licensing of patents on a wide-range of climate-related technologies.

An illustrative list of proposals that are now reflected in the most recent Negotiating Text includes proposals to:

- i. Exclude "climate-friendly" technology from patentable subject matter;
- ii. Revoke existing patents on "climate-friendly" technology;

Intellectual Property

- iii. Mandate patent or technology “pools” to provide for access to proprietary technology on a royalty-free or “affordable” basis;
- iv. Mandate or encourage compulsory licensing for particular “green” fields of technology;
- v. Reinterpret “flexibilities” in existing international agreements on intellectual property (e.g., the TRIPS Agreement) and climate change; and
- vi. Establish a new international body or institutional arrangement under the UNFCCC to address technology-transfer related issues, including intellectual property issues.

Those who support the types of proposals summarized above view intellectual property as a “barrier” to access to technologies in the developing world. As a result, their proposals to weaken intellectual property rights are coupled with proposals to help ensure that governments can exploit any existing or newly created exceptions to intellectual property rights. For example, proposals have been made to formalize a Multilateral Climate Technology Fund (MCTF) that would be used to finance compulsory licensing of proprietary technologies in UNFCCC Parties. In addition, Action Plans have been proposed to “ensure that privately owned technologies are available on an affordable basis” through the use of compulsory licensing.

If implemented, such proposals would put highly valuable intellectual property rights, especially patents, and the investments underpinning those rights, at risk. In addition, several of the proposals, if implemented, would put UNFCCC Parties in violation of their obligations under the TRIPS Agreement and would undermine international standards that are well-established through other international agreements on intellectual property, including the long-standing treaties administered by the World Intellectual Property Organization (WIPO), the UN specialized agency with expertise in intellectual property rights.

Alternative approaches are needed that recognize the importance of intellectual property rights to establishing sustainable incentives for the creation of new climate-related technologies.

The Process

As noted, the negotiations to supplement the UNFCCC, and to create a successor agreement to the Kyoto Protocol, have a target date of December 2009. In the interim, meetings are scheduled to take place August 10-14, 2009, September 28 - October 9, 2009 and November 2-6, 2009, in addition to the COP. This sequence of meetings provides opportunities for affected industries to engage more fully in the process.

Looking Ahead

Many developing country Parties, including emerging markets where the protection of intellectual property is more important than ever, are advocating extreme measures to

address perceived conflicts between effective intellectual property systems and development priorities. The problems are broad in scope and far-reaching in nature. While most of the recent activity has taken place in the UNFCCC discussions, similar discussions are taking place elsewhere. Already, WIPO has begun investigating this issue, and the WTO Secretariat recently has noted the importance of intellectual property in the climate change area.

These discussions are highly charged and may reconfigure the international legal framework in a way that undermines the vital intellectual property rights of innovative industries and puts jobs and investments at risk. Innovative companies with valuable intellectual property should work with governments, international organizations, and like-minded stakeholders to influence the outcome of these deliberations in an appropriate manner. Each of the meetings on the road to Copenhagen offers an opportunity for building consensus and influencing the process. There is a need for solutions that can preserve valuable intellectual property, provide sustainable incentives for the development of climate-related technologies, and facilitate the diffusion of climate-related technologies around the world.

- 1 United Nations Framework Convention on Climate Change. Revised Negotiating Text: Note by the Secretariat, Document No. FCCC/AWGLCA/2009/INF.1 (Jun. 22, 2009).

Jon Santamauro (jsantamauro@sidley.com) is counsel in the Washington, D.C. office of Sidley Austin LLP. His focus is on patent law and international intellectual property and trade policy. Roger Martella (rmartella@sidley.com) is a partner in the Environmental practice group, in Washington, D.C. He recently rejoined Sidley after serving as the General Counsel of the United States Environmental Protection Agency, concluding 10 years of litigating and handling complex environmental and natural resource matters at the Department of Justice and EPA. James Mendenhall (jmendenhall@sidley.com) is counsel in the International Trade and Dispute Resolution group of Sidley's Washington, D.C. office and concentrates in international trade policy and litigation. Arnoud Willems (awillems@sidley.com) is a partner in Sidley's Brussels office and a member of the firm's International Trade and Arbitration group. As an EU and international trade practitioner, Mr. Willems advises governments, industries and major corporations on trade legislation including the negotiation, conclusion and implementation of trade agreements and WTO rules. Tatjana Sachse (tsachse@sidley.com) is an associate in Sidley's Geneva office and a member of the International Trade and Arbitration group, where she focuses on international intellectual property and trade policy.

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