

# KIRKLAND ALERT

October 2009

## The United Nations Framework Convention on Climate Change: Current Impressions About the Implications for “Green IP”

### *Introduction*

Many companies are devoting substantial resources to developing environmentally friendly, or “green,” technologies. As they make new discoveries, many are seeking worldwide intellectual property protection for these new technologies. The number of U.S. patents granted in the field of “green IP” has consistently increased over the last several years.<sup>1</sup> However, current international climate change treaties may significantly alter the protection afforded to green intellectual property.

The United Nations Framework Convention on Climate Change (“the Convention”) was established in 1992 with the aim of building a comprehensive framework for managing intergovernmental efforts to address the challenges posed by global climate change. A sub-committee of the Convention, called the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA) is currently working on drafting proposed terms for administering the long-term implementation of the Convention’s objectives. The AWG-LCA plans to present these proposed terms and an overall plan of action at the fifteenth meeting of delegates to the Convention to be held in December 2009 in Copenhagen.

The proposed terms will include plans for addressing numerous aspects of global warming. Based on the most recent drafts of the proposed terms, it also appears that the final plan will include provisions potentially impacting the intellectual property rights of global signatories. This Client Alert analyzes the general nature of the Convention’s view on intellectual property rights, the specific provisions that the Convention might adopt, the United States’ apparent stance on these issues, and how all of this could potentially affect efforts to seek and protect green IP.

### *The United Nations Framework Convention on Climate Change: Overview*

The Convention is an international treaty with a stated goal of establishing a framework for addressing problems associated with global climate change. More specifically, under the Convention, Party nations:

- gather and share information on greenhouse gas emissions, national policies and best practices;
- launch national strategies for addressing greenhouse gas emissions and adapting to expected impacts, including the provision of financial and technological support to developing countries; and
- cooperate in preparing for adaptation to the impacts of climate change.<sup>2</sup>

A total of 193 countries, including the United States, Canada, China, Japan, Australia, the United Kingdom and many other European, Asian and African countries, have ratified the Convention since its inception in 1992. The United States ratified the Convention on October 15, 1992.<sup>3</sup> The United States’ involvement with the Convention is managed primarily by the EPA and the State Department.

Although each Party pledges to implement the goals of the Convention, the text of the Convention itself is phrased in terms of broad objectives and general commitments and is not legally binding.<sup>4</sup> Rather, the Convention anticipates the execution of further agreements or protocols, similar to the Kyoto Protocol, that will contain binding terms and commit Parties to specific actions directed at solving problems associated with global warming.

Another important feature of the Convention is that it treats developed countries and developing countries differently, based in part on the recognition that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries.<sup>5</sup> Thus, developed countries are also charged with the responsibility of “assist[ing] the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.”<sup>6</sup>

### The Copenhagen Deal

2009 is an important year for the Convention. At its thirteenth session, which took place in Bali in 2007, the Convention decided that it was time to “step up” efforts to solve climate change problems and achieve a more explicit plan for implementing the goals of the Convention.<sup>7</sup> The Parties formed the “Copenhagen Deal,” an agreement to adopt specific terms and measures for solving global climate change problems at the fifteenth Convention session, to be held in Copenhagen in December 2009.<sup>8</sup>

There are four main objectives for the adoption of terms under the Copenhagen Deal:

1. Set ambitious targets for greenhouse gas emission reduction for developed countries;
2. Identify appropriate actions for developing countries to limit their greenhouse gas emissions;
3. Define stable and predictable financing to help the developing world reduce greenhouse gas emissions and adapt to the inevitable effects of climate change;

4. Identify institutions that will allow technology and finance to be deployed in a way that treats the developing countries as equal partners in the decision-making process.<sup>9</sup>

The terms that are adopted by the Convention in Copenhagen at the end of 2009 are intended to be incorporated into a binding legal agreement. Although the exact nature of the agreement is yet to be determined, the possibilities include: (1) an amended Kyoto Protocol; (2) a new protocol; (3) a set of multiple individual agreements on tackling climate change; or (4) some combination of these options.<sup>10</sup>

### Control of the Convention

The Conference of the Parties to the Convention (“the COP”) is the “supreme body” of the Convention.<sup>11</sup> The COP consists of representatives from all of the countries who are Parties to the Convention and meets once a year to review the implementation of the Convention and examine the Parties’ commitments and progress in light of the Convention’s objectives and new scientific findings and experiences.<sup>12</sup> Additionally, various special-interest and “observer groups” attend meetings of the COP and its various sub-committees and contribute to the decisions made by those bodies.

When the COP adopted the Copenhagen Deal and the 2009 deadline for reaching a specific plan of action, it also established a sub-committee called the Ad Hoc Working Group on Long-term Cooperative Action (AWG-LCA).<sup>13</sup> Specifically, the AWG-LCA, which is comprised of a smaller group of representatives from the Parties to the Convention, was given the responsibility of devising a set of strategies and standards for addressing global warming to present for adoption at the COP’s fifteenth session in Copenhagen.<sup>14</sup> To that end, the members of the AWG-LCA have been meeting several times per year to draft proposed final terms governing long-term implementation of the Convention’s objectives.

### The Role of IP

Because the text of the Convention itself sets forth general goals and broadly defined commitments, it does not specifically address global intellectual prop-

erty rights in green technology. However, the COP and the AWG-LCA clearly anticipate that terms pertaining to intellectual property rights—patent rights, in particular—will be a part of the international framework for mitigating global warming.

The Convention website provides a glimpse of the Convention's view on the role of technology and patent rights in alleviating climate change problems:

Effective technology development, deployment and transfer will play a vital role in global efforts to reduce greenhouse gas (GHG) emissions and decrease vulnerability to the adverse impacts of climate change, which is now well recognized by all of us. Intensive discussion[s] have [] taken place recently to explore the solution to accelerate development and transfer of technologies. The IP system, especially the patent system, due to its close interrelation with many technologies that could help mitigate and adapt anthropogenic global warming, has received much attention by the climate change community.<sup>15</sup>

The Convention has acknowledged the fact that IP rights play a role in crafting solutions needed to address climate change. But environmental activists have sometimes perceived IP as an impediment to achieving their goals, and the Convention has specifically noted the view that IP can be a barrier to technology transfer.<sup>16</sup>

The specific terms pertaining to IP rights that have been proposed for adoption by the Convention are discussed in more detail below.

### *Negotiating Text of the Ad Hoc Working Group on Long-Term Cooperative Action: Overview and Terms Governing IP*

At each session of the AWG-LCA, representatives from Convention Parties and accredited observer groups are given the opportunity to submit ideas and proposals for how Parties can best achieve the goals of the Copenhagen Deal. The proposals are written up in a "Negotiating Text," which is revised after each meet-

ing of the AWG-LCA. Once the Negotiating Text is finalized, it will represent the set of specific terms that will be presented at Copenhagen in December 2009, some or all of which will be incorporated into a binding legal agreement among Convention Parties.

The first version of the Negotiating Text, which was published in January 2009, provided proposed "mechanisms to address intellectual property right[s] issues." The proposed mechanisms took a generalized approach to addressing intellectual property rights. Some of the ideas that were proposed were:

- *A suitable IPR regime for accessing technologies owned by the private sector in developed countries* (proposed by India);
- *An IPR sharing arrangement for joint development of environmentally sound technologies ("ESTs")* (proposed by China); and
- *Criteria on compulsory licensing for patented ESTs, joint technological or patent pools to disseminate technologies to developing countries at low cost, and limited-time patents and the provision of incentives (tax exemption, subsidies, etc.) for the owners of technology for differential pricing* (proposed by China, Pakistan, Bolivia, India).<sup>17</sup>

The first draft of the Negotiating Text makes clear that at least some Parties would be advocating decreased protection for intellectual property and increased access to environmentally friendly technologies.

### **Current Status of IP Provisions**

The draft language was revised significantly in the September 2009 draft of the Negotiating Text. The September 2009 revisions include a list of measures to address intellectual property rights. The proposed measures take the form of four "Options," the precise language of which is yet to be finalized. The key provisions of each of the Options are summarized below.

#### Option 1

Option 1 is cast in very broad terms. It proposes, generally, that the IP regime shall be used to promote technology development, diffusion and transfer. The

process shall encourage development of climate-friendly technologies, but simultaneously facilitate their demonstration, diffusion and transfer to developing countries. It proposes, for example, a compulsory licensing scheme. Additionally, it proposes that the cost of technologies be gradated based on a country's ability to pay.<sup>18</sup> An "Alternative Option 1" is even more ambiguous. Alternative Option 1 simply proposes that Parties "cooperate to develop and deploy patent sharing and/or intellectual property for renewable energy and energy efficiency technologies."<sup>19</sup>

Due to the lack of guidance that Option 1 and Alternative Option 1 provide, it may be an indication that the Convention is trending towards stronger protections for IP. It might also mean that further negotiations and more explicit terms regarding IP rights are forthcoming.

#### Option 2

Option 2 is the most extensive and most detailed of the Options. It proposes that "specific and urgent measures shall be instituted . . . and mechanisms developed to remove barriers to development and transfer of technologies from developed Parties to developing Parties."<sup>20</sup> The list of proposed measures that would facilitate technology transfer includes:

(a) All necessary steps shall be immediately taken in all relevant fora to:

- mandatorily exclude from patenting,
- revoke all existing patents on, and/or
- implement compulsory licensing for

specific climate-friendly technologies in developing countries, including those technologies developed through funding by governments or international agencies;

(b) Pooling and sharing publicly funded technologies and making the technologies available in the public domain at an affordable price that promotes sharing of and ensures access to technologies that can be used to adapt to or mitigate climate change;

(c) Use to the full flexibilities contained in the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, including com-

pulsory licensing to access intellectual property protected technologies, taking into account the example set by decisions in other relevant international forums relating to IPRs, such as the Doha Declaration on the TRIPs Agreement and Public Health;

(d) Parties agree that nothing in any international agreement on intellectual property shall be interpreted or implemented in a manner that limits or prevents any Party from taking any measures to address adaptation or mitigation of climate change, in particular, the development, transfer of and access to technologies;

(e) Adoption of a Declaration on IPRs and Environmentally Sound Technologies in relevant fora to, among other things, reaffirm the flexibilities in the TRIPS Agreement and enhance the enabling environment for implementing these flexibilities;

(f) Preferential or differential pricing between developed and developing countries;

(g) Reviewing all existing relevant IPR regulations in order to provide certain information to remove the barriers and constraints that greenhouse gas mitigation technologies are subject to;

(h) Promoting innovative IPR sharing arrangements for joint development of environmentally sound technologies;

(i) Limited/reduced-time patents on climate friendly technologies;

(j) Genetic resources, including germplasms of plant and animal species and varieties that are essential for adaptation in agriculture, shall not be patented by multinational or any other corporations. Alternatively, or additionally, biological resources including microorganisms, plant and animal species and varieties, and parts thereof that are used for adaptation and mitigation of climate change shall not be patented.<sup>21</sup>

Notably, many of the provisions under Option 2 would significantly diminish—and, in some instances,

eliminate—IP rights in green technologies, particularly in less-developed countries. Option 2 includes specific plans for providing free or low-cost access to environmentally friendly technologies by countries that do not presently have the capacity to develop such technologies. Option 2 also gives Parties significant leeway to take whatever measures they see fit to mitigate climate change and to facilitate the development and transfer of technology.

### Option 3

Option 3 proposes that least-developed countries, and/or countries vulnerable to the adverse effects of climate change, should be exempted from patent protection of climate-related technologies for adaptation and mitigation, as required for capacity building and development needs.<sup>22</sup> Thus, Option 3 is essentially a blanket exemption from any patent protection of climate-friendly technologies for countries that do not currently have the capacity to develop them or encourage their development. The Convention has identified a list of 49 “least-developed countries,” which comprise the group of Parties that would likely qualify for preferential treatment under Option 3 (or under any of the other Options). The list includes Afghanistan, Bangladesh, Cambodia and many African nations.<sup>23</sup>

Option 3 would significantly curtail the value of IP rights in green technologies in these “least developed countries.” If Option 3 is adopted by the Convention, it will likely require further negotiations to delineate more precise terms governing the exemption, such as terms to define which technologies are subject to it.

### Option 4

Option 4 proposes that a committee, advisory panel, or other body be created to proactively address patents and related intellectual property issues and to ensure both increased innovation and increased access to mitigation and adaptation technologies. The committee or panel would:

- (a) Engage enterprises and institutions in developed and developing countries;
- (b) Develop a clear framework for determining when IP becomes a barrier to international

technology research, development, deployment, diffusion and transfer and provide options for corrective action; and

- (c) Make recommendations back to the COP on barriers that may require further actions.<sup>24</sup>

Option 4 essentially delegates to a sub-committee the responsibility of exploring and developing IP-related provisions. Option 4 seems to be the course of action that leaves the most room for additional research, investigation and discussion. Alternatively, Option 4 could be adopted in combination with one of the other Options, so that a specific sub-committee would oversee the implementation of IP-related provisions adopted by the Convention and make adaptations as necessary.

### **The United States’ Stance on IP and the Convention**

The United States has demonstrated an awareness of the need to take steps to mitigate global warming, and it has also evidenced a commitment to its current obligations under the Convention. Additionally, Congress has already enacted federal statutes designed to allow access to important environmentally friendly technologies. For example, the Clean Air Act, an early landmark environmental statute, specifically grants the EPA the power to petition the Department of Justice for mandatory licensing of pollution-control technology. Under Section 308 of that statute, if the Department of Justice certifies that a technology protected by a patent is necessary for achieving Clean Air Act requirements, a mandatory licensing order can be issued by a U.S. District Court.

However, other facts indicate that the United States may be hesitant to sign on to a legally binding international agreement that would significantly diminish the rights of United States patent holders. As an initial matter, the United States is one of the few Convention Parties that did not ratify the Kyoto Protocol, which is the major binding legal agreement that has emerged from the Convention to date. The United States expressed its concern that the agreement “does not provide the long-term solution the world seeks to the problem of global warming,” and exempts many countries such as China and India “who are two of the top five emitters of greenhouse gasses in the world.”<sup>25</sup> The United States also recognized that the Kyoto Pro-



protocol could potentially have significant repercussions for the global economy.<sup>26</sup>

Furthermore, not long after the United States became a Party to the Convention, it indicated an intention to maintain autonomy when it comes to policy-making. In responding to a 1996 review by the Convention of a regular report called the “United States’ Climate Action Report,” the United States commented that “[I]t would not be appropriate for the [Convention review committees] to make policy recommendations about the relative merits of one or another policy choice by individual countries.”<sup>27</sup>

Additionally, the United States’ contributions to the Negotiating Text of the AWG-LCA are indicative of its stance on the role of IP in the framework for addressing climate change. In the very first draft of the Negotiating Text, the United States proposed that individual parties should “strengthen . . . legal and economic institutions to promote the protection and enforcement of IP rights” and “promote competitive and open markets for environmentally sustainable technologies.”<sup>28</sup>

More recently, President Obama, in a speech on innovation and sustainable growth, commented about the importance of a robust IP regime in the United States:

“[T]here are [] important steps to foster markets that value and promote risk-takers and idea-makers who’ve always been the center of our success. That’s why it’s essential that we enforce trade laws and work with our trading partners to open up markets abroad; *that we reform and strengthen our intellectual property system*; that we sustain our advantage as a place that draws and welcomes the brightest minds from all over the world. . . .”<sup>29</sup>

Thus, it appears that the United States might be hesitant to sign a binding international agreement that eliminates or significantly curtails IP rights without careful consideration of the broader implications of such an agreement.

### *Implications for Green Technology and IP*

There is still a significant amount of negotiating to be completed before a final set of IP-related terms are adopted by the Convention. Adding to the complexity of the negotiations, some of the proposed provisions could conflict with Convention Parties’ obligations under existing international agreements governing IP, such as Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Berne Convention, the Paris Convention, the General Agreement on Tariffs and Trade (GATT), and the various other treaties administered by the World Intellectual Property Organization (WIPO). Recognizing the need for terms under the Convention that will mesh with existing treaties and foster innovation, WIPO and other international organizations have stressed the importance of a deal at Copenhagen that will protect the planet, but will also “power green growth” and “build a more sustainable, prosperous global economy that will benefit all nations.”<sup>30</sup>

However, the most recent version of the Negotiating Text suggests that the final set of terms still could have significant impacts on IP rights worldwide. Companies who are investing resources in developing climate-friendly technologies should be aware of the terms currently under consideration that may protect less-developed countries’ access to those technologies. Individuals and companies with global IP portfolios will clearly be impacted by the outcome of the Convention. Indeed, depending on the final text adopted, and which Parties sign the convention, clients may be impacted differently from one country to another. Kirkland will continue to provide updates to our clients on the evolution of the text, and its possible implications.

- 
- 1 See Clean Energy Patent Growth Index (CEPGI), Heslin, Rothenberg, Farley and Mesiti, P.C.
  - 2 *The United Nations Framework Convention on Climate Change*, available at [http://unfccc.int/essential\\_background/convention/items/2627.php](http://unfccc.int/essential_background/convention/items/2627.php).
  - 3 See *Status of Ratification*, available at [http://unfccc.int/files/na/application/pdf/unfccc\\_ratification\\_20090826.pdf](http://unfccc.int/files/na/application/pdf/unfccc_ratification_20090826.pdf); *UN Framework Convention on Climate Change*, available at [http://www.epa.gov/climatechange/policy/international\\_unfccc.html](http://www.epa.gov/climatechange/policy/international_unfccc.html).
  - 4 See Patricia Ross McCubbin, *China and Climate Change: Domestic Environmental Needs, Differentiated International Responsibilities, and Rule of Law Weaknesses*, 3 EELPJ 200, 204 (2008).
  - 5 Convention Text at Preamble, ¶ 3; Dernbach, *supra*, at 9–10.
  - 6 Convention Text at Article 4(4).
  - 7 *Fact Sheet: Copenhagen - Background information*, available at [http://unfccc.int/press/fact\\_sheets/items/4975.php](http://unfccc.int/press/fact_sheets/items/4975.php).
  - 8 *Fact sheet: 10 frequently asked questions about the Copenhagen deal*, available at [http://unfccc.int/press/fact\\_sheets/items/4997.php](http://unfccc.int/press/fact_sheets/items/4997.php).
  - 9 *Id.*
  - 10 *Fact sheet: 10 frequently asked questions about the Copenhagen deal, supra.*
  - 11 *Convention Bodies*, available at [http://unfccc.int/essential\\_background/convention/convention\\_bodies/items/2629.php](http://unfccc.int/essential_background/convention/convention_bodies/items/2629.php).
  - 12 *See id.*
  - 13 See Bali Action Plan at 3–5.
  - 14 *See id.*
  - 15 *Intellectual Property Rights*, available at <http://unfccc.int/ttclear/jsp/IPR.jsp>.
  - 16 *See id.*
  - 17 Jan. 15, 2009 Negotiating Text at ¶ 129.
  - 18 See September 15, 2009 Negotiating Text at ¶ 33.
  - 19 *Id.*
  - 20 *See id.* at ¶ 34.
  - 21 *See id.*
  - 22 *See id.* at ¶ 35.
  - 23 *LDC Country Information*, available at [http://unfccc.int/cooperation\\_and\\_support/ldc/items/3097.php](http://unfccc.int/cooperation_and_support/ldc/items/3097.php).
  - 24 See Sept. 15, 2009 Negotiating Text at ¶ 36.
  - 25 U.S. Embassy Fact Sheet: United States Policy on the Kyoto Protocol, available at <http://vienna.usembassy.gov/en/download/pdf/kyoto.pdf>.
  - 26 *See id.*
  - 27 Summary of the Report of the In-Depth Review of the National Communication of the United States of America, UN-FCCC (Feb. 26, 1996).
  - 28 Jan. 15, 2009 Negotiating Text at ¶ 129.
  - 29 President Barack Obama, *Remarks by the President on Innovation and Sustainable Growth* (Sep. 21, 2009) (transcript available via [The White House Office of the Press Secretary](#)) (emphasis added).
  - 30 Press Release, WIPO, *Heads of Agencies “Seal the Deal” on Sidelines of Conference on IP & Public Policy Issues* (July 14, 2009).

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

David K. Callahan, P.C.  
Kirkland & Ellis LLP  
300 North LaSalle  
Chicago, IL 60654  
[www.kirkland.com/dcallahan](http://www.kirkland.com/dcallahan)  
+1 (312) 862-2182

Aaron D. Charfoos  
Kirkland & Ellis LLP  
300 North LaSalle  
Chicago, IL 60654  
[www.kirkland.com/acharfoos](http://www.kirkland.com/acharfoos)  
+1 (312) 862-2218

Elizabeth A. Nemo  
Kirkland & Ellis LLP  
300 North LaSalle  
Chicago, IL 60654  
[www.kirkland.com/enemo](http://www.kirkland.com/enemo)  
+1 (312) 862-7160

*This communication is distributed with the understanding that the author, publisher and distributor of this communication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, this communication may constitute Attorney Advertising.*

© 2009 KIRKLAND & ELLIS LLP. All rights reserved.

[www.kirkland.com](http://www.kirkland.com)