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The Road to Copenhagen: Intellectual Property and Climate Change

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**THE ROAD TO COPENHAGEN:
INTELLECTUAL PROPERTY AND CLIMATE CHANGE
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The draft negotiating text on long-term co-operative action under the *United Nations Framework Convention on Climate Change* FCCC/AWGLCA/2009/8; the *Foreign Relations Authorization Act, Fiscal Years 2010 and 2011* HR 2410 (United States); the *American Clean Energy and Security Act* of 2009 HR 2454 (United States); the *Foreign Operations, and Related Programs Appropriations Act* 2010 HR. 3081 (United States); and the *TRIPS Agreement* 1994.

Abstract

In the lead up to the discussions over intellectual property and climate change in Copenhagen in 2009, the United States House of Representatives has passed a resolution that it should be the policy of United States government officials in discussions over the long-term action under the *United Nations Framework Convention on Climate Change* 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’.

Legal Context

The Ad Hoc Working Group on Long-Term Cooperative Action has prepared a draft negotiating text for ‘a shared vision for long term co-operative action’ under the *United Nations Framework Convention on Climate Change* FCCC/AWGLCA/2009/8. As well as dealing with the need for enhanced action on mitigation and adaptation to the impact of global warming, and questions of financing, technology and capacity-building, the document canvasses three options to deal with intellectual property and climate change.

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Under the first Option, ‘Technology development, diffusion and transfer {shall} be promoted by operating the intellectual property regime in a manner that encourages development of climate-friendly technologies and simultaneously facilitates their diffusion and transfer to developing countries.’

Under the second option, ‘Specific measures {shall}{should} be established to remove barriers to development and transfer of technologies from developed to developing country Parties arising from the intellectual property rights (IPR) protection, including:

- (a) Compulsory licensing for specific patented technologies;
- (b) Pooling and sharing publicly funded technologies and making the technologies available in the public domain at an affordable price;
- (c) 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*’

Under the third option, ‘[Least Developed Countries] should be exempted from patent protection of climate-related technologies for adaptation and mitigation, as required for capacity-building and development needs. 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.’

Facts

The United States House of Representatives has been alarmed by the language of the draft negotiating text on long-term co-operative action under the *United Nations Framework Convention on Climate Change*.

On the 10th June 2009, Representative Rick Larsen, a Democrat from Washington’s 2nd District, moved amendment no. 187, in the United States House of Representatives to the *Foreign Relations Authorization Act, Fiscal Years 2010 and 2011* HR 2410 (United States). The amendment was a statement of policy regarded climate change:

To protect American jobs, spur economic growth and promote a ‘Green Economy”, it shall be the policy of the United States that, with respect to the *United Nations Framework Convention on Climate Change*, the President, the Secretary of State and the Permanent Representative of the United States to the United Nations should 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, including wind, solar, biomass, geothermal, hydro, landfill gas, natural gas, marine, trash combustion, fuel cell, hydrogen, micro-turbine, nuclear, clean coal, electric battery, alternative fuel, alternative refueling infrastructure, advanced vehicle, electric grid, or energy efficiency-related technologies.

Speaking to the amendment, Larsen emphasized that ‘[Intellectual Property Rights] protection gives companies the confidence to invest in critical research and development efforts to meet the growing demand for clean-energy technology’. He contended that the amendment to H.R. 2410 would ‘protect the [intellectual property rights] of these clean technologies and ensure these green jobs stay right here in the United States’. Larsen emphasized: ‘It is critical that the investments that American companies are making in clean technology are protected’. He concluded: ‘Protecting individual property rights will help us reward innovation instead of penalizing it.’

The co-sponsor, Representative Mark Steven Kirk, a Republican from the 10th district of Illinois, and a member of the United States delegation to Kyoto in 1997, was suspicious of the language of the draft *United Nations Framework Convention on Climate Change*. He contended:

The American people need to know that those were code words, like ‘compulsory licensing’ and ‘technology transfer,’ that really mean allowing other countries to steal the American patents, copyrights and trademarks for anything related to climate change, efficiency or energy under the draft climate change treaty.

If the United States agrees to a climate change treaty that allows developing countries to seize U.S. intellectual property in this area, economic consequences for green-collar jobs would be devastated. American inventors now hold 50 percent of the world's patents on clean energy, 52 percent of the patents on fuel cells, nearly half of the world's wind patents, 46 percent of the world's solar patents, and 40 percent of the world's patents in the hybrid-electric vehicle market.

Representative Kirk feared: ‘If a climate change treaty specifically allowed compulsory licensing so that Chinese competitors, for example, or European opposition could simply steal the intellectual property of a key U.S. green-collar manufacturer’. He reported an anecdote from Gregg Patterson, the CEO of PV Powered - America's largest manufacturer of solar power inverter technology: ‘One leading American innovator told me, If we lose intellectual property rights, capital markets die.’

Representative Howard Berman, a Democrat representing the 28th District of California, and a noted intellectual property ‘maximalist’, expressed similar concerns:

If we want to encourage the international cooperation that's needed in this area, I'm telling you you've got to ensure that the entrepreneurs and the innovators know that their cutting-edge breakthroughs and innovations

are protected. This isn't even as much about fair return for the inventors as it is ensuring that people will keep innovating and researching and advancing the technologies because they know that ultimately they will be compensated. So it's a symbiotic relationship. The more we ensure and protect intellectual property, the more we will be able to do in achieving our very important goals with respect to the development and deployment of new energy and environmental technologies.

He was worried that the United States would be deprived of lucrative income from the 'Green Economy': 'The United Nations reported that the global market for environmental technologies could double to \$2.74 trillion by 2020 from the \$1.37 trillion today because of growth in areas like energy-efficient technologies, sustainable transport systems, and water supply and efficiencies markets.'

In support of the amendment, Representative Marsha Blackburn, a Republican from the 7th District of Tennessee, made the following remarks:

American innovators hold 50 percent of the world's patents granted between 2002 and 2008 in the clean-energy field, and I will note that Tennesseans alone hold 1 percent of those worldwide patents in the hybrid/electric vehicle market. It's serious business for our American patent holders. They have invested a lot of time, passion, effort, energy, and economic capital in developing these technologies. It is therefore incumbent upon us in Congress to protect what they have created.

She was of the view that the language in the draft *United Nations Framework Convention on Climate Change* 'would lead to outright theft of our American intellectual property and indirectly benefit the world's most prominent CO² emitters'.

The resolution reflected intense lobbying from industrial groups - including the United States Chamber of Commerce, the Emergency Committee for American Trade, the Solar Energy Industries Association, the Natural Hydrogen Association, and the National Association of Manufacturers. According to the Green Patent Blog, Carl Horton, intellectual property counsel from General Electric, said that the new ginger group, the Innovation, Development, and Employment Alliance (IDEA), heavily lobbied members of Congress about the resolution. This new business coalition has sought to promote to the United States Congress and the Obama Administration the need for strong intellectual property rights protection to boost innovation and jobs growth.

Without demurral, the United States House of Representatives agreed to the Larsen-Kirk amendment 432-0.

In addition to the *Foreign Relations Authorization Act, Fiscal Years 2010 and 2011* HR 2410 (USA), the United States House of Representatives has also passed the *American Clean Energy and Security Act* of 2009 HR 2454 (USA), sponsored by Representatives Henry Waxman (Democrat, California's 30th District) and Edward Markey (Democrat, Massachusetts' 7th District).

The chapter on exporting technology has a number of clauses on intellectual property and climate change. Section 441 (8) emphasizes: 'Intellectual property rights are a key driver of investment and research and development in, and the global deployment of, clean technologies'. Section 441 (10) stresses: 'Any weakening of intellectual property rights protection poses a substantial competitive risk to U.S. companies and the creation of high-quality U.S. jobs, inhibiting the creation of new 'green' employment and the transformational shift to the 'Green Economy' of the 21st Century.' Moreover, section 441 (11) observes: 'Any U.S. funding directed toward assisting developing countries with regard to exporting clean technology should promote the robust compliance with and enforcement of existing international legal requirements for the protection of intellectual property rights as formulated in the Agreement on Trade-Related Aspects of Intellectual Property Rights, referred to in section 101(d)(15) of the Uruguay Round Agreements Act (19 U.S.C.3511(d)(15) and in applicable intellectual property provisions of bilateral trade agreements.'

Section 444 (3) provides that the eligibility of countries will be subject to 'such other criteria as the President determines will serve the purposes of this subtitle or other United States national security, foreign policy, environmental, or economic objectives including robust compliance with and enforcement of existing international legal requirements for the protection of intellectual property rights for clean technology, as formulated in the Agreement on Trade-Related Aspects of Intellectual Property Rights, referred to in section 101(d)(15) of the Uruguay Round Agreements Act (19 U.S.C. 3511(d)(15)) and in applicable intellectual property provisions of bilateral trade agreements.' Section 446 (3) provides that 'no funds be expended for the benefit of any qualifying activity where that activity or any activity relating to a qualifying activity under section 445 undermines the robust compliance with and enforcement of existing legal requirements for the protection of intellectual property rights for clean technology, as formulated in the Agreement on Trade-Related Aspects of Intellectual Property Rights, referred to in section 101(d)(15) of the Uruguay Round Agreements Act (19 U.S.C. 3511(d)(15)).'

This legislation was passed by 219 votes to 212, with 3 not voting

The House of Representatives also passed the appropriations act, the *Foreign Operations, and Related Programs Appropriations Act* 2010 HR. 3081 (USA). Section 7089 provides: 'Prior to the obligation of the funds made available in this Act for 'Contribution to the Clean Technology Fund' or 'Strategic Climate Fund' of the World Bank, the Secretary of State shall certify in writing to the Committees on Appropriations that all actions taken during the negotiations of the *United Nations Framework Convention on Climate Change* ensure robust compliance with and enforcement of existing international legal requirements as of the date of the enactment of this Act that respect intellectual property rights and effective intellectual property rights protection and enforcement for energy and environment technology, including wind, solar, biomass, geothermal, hydro, landfill gas, natural gas, marine, trash combustion, fuel cell, hydrogen, microturbine, nuclear, clean coal, electric battery, alternative fuel, alternative refueling infrastructure, advanced vehicle, electric grid, or energy efficiency-related technologies.'

In addition to such legislative actions, on the 29th July 2009, the Select Committee on Energy Independence and Global Warming held a hearing entitled, 'Climate for Innovation: Technology and Intellectual Property in Global Climate Solutions.' This hearing was promoted thus:

The key to solving climate change and developing clean energy is technology, and at the center of technology are intellectual property rights. In the Space Race, America had a singular competitor. In the Clean Energy Race to stop global warming, America is competing with the Chinese, Germans, Koreans, and countless others. How these countries and the world deal with intellectual property rights will have a huge impact on whether technology is available and deployed to solve our global problems.

The inquiry focused upon 'the impact of intellectual property rights on global warming solutions and how to encourage American innovation while spreading climate related technologies globally.'

Analysis

The members of the United States House of Representatives seem to be under a misapprehension about the nature of the draft *United Nations Framework Convention on Climate Change*. Far from representing a radical change to intellectual property law, the draft *United Nations Framework Convention on Climate Change* seems to merely reiterate language, which is already present in the *TRIPS Agreement* 1994.

Members of the World Trade Organization already enjoy the flexibility of excluding clean technologies from patent protection in order 'to avoid serious prejudice to the environment'. Article

27 (2) of the *TRIPS Agreement* 1994 provides: ‘Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or **to avoid serious prejudice to the environment**, provided that such exclusion is not made merely because the exploitation is prohibited by their law’ (my emphasis). In this context, the third option under discussion in Copenhagen is much more limited than the language of the *TRIPS Agreement* 1994: ‘[Least Developed Countries] should be exempted from patent protection of climate-related technologies for adaptation and mitigation, as required for capacity-building and development needs’.

Far from being a codeword for theft and stealing, as Republican Representative Mark Steven Kirk would have us believe, the *TRIPS Agreement* 1994 has long recognised the capacity of nation states to provide exceptions for research, and to engage in compulsory licensing and state use. Article 30 of the *TRIPS Agreement* 1994 recognises that ‘Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.’ Article 31 of the *TRIPS Agreement* 1994 acknowledges that Member States may provide for the use of patents by governments of third parties, without the authorization of the rights holder. This Article is subject to a number of procedural safeguards – including that ‘the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization’. Thus, the statement of the Republican Representative Mark Steve Kirk about compulsory licensing is oxymoronic – because such licensing necessarily involves compensation to the patent holder. In this context, the options are discussion under the second option at Copenhagen – such as compulsory licensing for specific patented technologies; patent pooling; and sharing publicly funded technologies – appear to be entirely within the bounds of the *TRIPS Agreement* 1994.

Finally, the concerns of the United States House of Representatives in respect of transfer of climate-friendly technologies have also been overstated. There has been a longstanding concern within the World Trade Organization about intellectual property and technology transfer. Article 7 of the *TRIPS Agreement* 1994 provides: ‘The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.’

Article 66 (2) of the *TRIPS Agreement* 1994 provides that ‘developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.’ These articles are relevant to both the first and third options in respect of intellectual property and climate change under contemplation at Copenhagen.

It would appear to be entirely appropriate for the draft text on long-term action under the *United Nations Framework Convention on Climate Change* to address such matters as subject matter exemptions, compulsory licensing, patent pooling, sharing of publicly developed technologies, and technology transfer. Indeed, it would be a matter of great concern if the proposed agreement did not properly address matters of intellectual property and climate change.

Significance

Given the existing framework of international IP law, how should one interpret the legislative proposals of the United States House of Representatives on intellectual property and climate change?

At best, the United States House of Representatives could be seen as engaging in political posturing in the lead up to the negotiations in Copenhagen over intellectual property and climate change. In this light, the amendment could be seen as a piece of political theatre, designed to pander to domestic industries, to place pressure on the executive, and act tough to foreign competitors.

A more cynical view would be that the United States House of Representatives has been captured by industry groups, and is reiterating the specious arguments of lobbyists, without critical reflection or appraisal. If true, this would be somewhat concerning – as it would show a basic ignorance of the existing framework laid down by the *TRIPS Agreement* 1994, and a misapprehension of the options under discussion in Copenhagen.

The Obama Administration, though, may be more willing to compromise than the United States House of Representatives in dealing with intellectual property and climate change. The Energy Secretary, Nobel Laureate Steven Chu, has expressed a pragmatic willingness to share certain climate-mitigating technology. He observed, for instance, that there was scope for co-operation between the United States and nations like China in sharing technologies like systems for capturing and storing carbon dioxide from power plants:

Since power plants are built in the home country, most of the investments are in the home country. You don't build a power plant, put it in a boat and ship it overseas, similar to with buildings. So developing technologies for much more efficient buildings is something that can be shared in each country. If countries actively helped each other, they would also reap the home benefits of using less energy. So any area like that I think is where we should work very hard in a very collaborative way — by very collaborative I mean share all intellectual property as much as possible. And in my meetings with my counterparts in other countries, when we talk about this they say, yes, we really should do this. But there hasn't been a coordinated effort. And so it's like all countries becoming allies against this common foe, which is the energy problem.

The statement, albeit qualified, by the Energy Secretary would suggest that, at least some members of the Obama Administration, are willing to negotiate and make compromises over the options under discussion in the draft negotiating text for long-term action under the *United Nations Framework Convention on Climate Change*.