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The Copenhagen Accord and Climate Innovation Centres

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THE COPENHAGEN ACCORD AND CLIMATE INNOVATION CENTRES

CLEAN IP EDITORIAL

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After much hue and cry, the Copenhagen negotiations over intellectual property and climate change ended in a stalemate and an impasse. There was a gulf between the views of intellectual property maximalists who demanded strong protection of intellectual property rights in respect of clean technologies; and nation states and civil society groups calling for special measures to facilitate technology transfer.

As a result, the Copenhagen Accord did contain any text on intellectual property and climate change. Nonetheless, the Copenhagen Accord does, though, contain an important compromise. The text provides for a technology mechanism, which envisages a network of Climate Innovation Centres to facilitate collaboration on clean technologies between the private sector and the public sector, developed countries, and developing nations.

The Development Agenda

The Copenhagen negotiations were characterised by strong divisions between developed countries, BRICS nations (comprising Brazil, India, China and South Africa), developing countries, least developed countries, and small Island states.

The chairs of the Ad Hoc Working Committee on long-term action under the *United Nations Framework Convention on Climate Change* have been considering five distinct options to address the crucially important issue of intellectual property and climate change. Members of the G77, least developed countries, and Small Island States supported such options vigorously during the discussions.

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The first option suggested that ‘Technology development, diffusion and transfer [shall] be promoted by operating the intellectual property regime in a balanced manner.’

Under Option 2, countries could take a range of measures to ‘address adaptation or mitigation of climate change’ – including the use of compulsory licensing, the creation of a patent pool, and the sharing of publicly developed technology. Under Option 3, least developed states and countries vulnerable to climate change could exclude environmentally sound technologies to adapt to and mitigate climate change.

Under Option 4, ‘The Executive Body on Technology should establish a committee or an advisory panel or designate some other body to proactively address patents and related intellectual property issues to ensure both increased innovation and increased access for both mitigation technologies and adaptation technologies.’ Under Option 5, ‘Parties may compulsorily license specific technologies for the purpose of mitigation and adaptation to climate change.’

During the Copenhagen negotiations, the Contact Group on Enhanced Action on Development and Transfer of Technology further refined the options to deal with the question of intellectual property and climate change.

The Business Lobby

In response, developed countries, such as the United States, Japan, Australia and the members of the European Union resisted the inclusion of such options in any agreement, and pushed for the strong protection of intellectual property rights. The so-called Danish text reflected this intellectual property maximalist ideology. Paragraph 18 provided: ‘Parties commit to enable the accelerated large-scale development, transfer and deployment of environmentally sound and climate friendly technologies across all stages of the technology cycle, respecting IPR regimes including protecting the legitimate interests of public and private innovators.’ Such language echoes the ‘messaging’ used by key business groups.

Throughout the negotiations, the United States Chamber of Commerce pushed for the strong protection of intellectual property rights. Mark Esper observed:

Protecting the intellectual property (IP) rights of [technology] firms and inventors will be critical to both incentivizing their continued investments, and helping spread the knowledge gained from such research and development. Negotiators from the United States and other nations consistently reiterated this pro-IP position during negotiations over the past year, and worked together to protect IP from efforts to weaken existing laws and norms. Their steadfast support of IP rights and innovation should be commended.¹

Esper bemoaned the efforts by developing countries and least developed countries to address intellectual property in the Copenhagen negotiations: ‘Although no climate change agreement emerged from Copenhagen, efforts by some nations to craft political statements and treaty provisions designed to weaken IP rights leaves much room for concern’. He warned: ‘Efforts to undermine IP protections will not stop, and anti-IP activists already have their sights set on the next round of talks’. Esper told his constituency: ‘As such, it is important that we remain engaged and vigilant if we are to address climate change in a timely and effective manner’.

The United States Chamber of Commerce, though, was less than impressed by the intervention of the culture-jamming group, The Yes Men. Cheekily, The Yes Men impersonated officials from the United States Chamber of Commerce, and suggested that the peak body had changed its position from climate scepticism to one of climate justice. The somewhat dour and humourless United States Chamber of Commerce has taken legal action against The Yes Men for copyright infringement, trade mark infringement, trade mark dilution, unfair competition, and cyber-squatting. The Electronic Frontier Foundation are defending The Yes Men, claiming that they are protected under the defence of fair use and the First Amendment.

Furthermore, the Yes Men impersonated representatives from Coca-Cola, performing a mea culpa for ‘greenwashing’. The group capped off an eventful year by punking the Canadian delegation over its excess emissions during the Copenhagen negotiations.

The Copenhagen Accord

The minimalist *Copenhagen Accord* was reached on the 18 December 2009.² Tove Iren S. Gerhardsen reported that ‘Intellectual property issues were again discussed in a smaller group during one of the last days, but are not mentioned in the final text, which is entitled the

¹ Esper, M. (2009), ‘IP and Copenhagen: Final Thoughts’, United States Chamber of Commerce, 18 December, <http://www.chamberpost.com/2009/12/ip-and-copenhagen-final-thoughts.html>

² http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf

“Copenhagen Accord.”³ Nonetheless, there is some discussion in the text about the infrastructure required for technology transfer. Paragraph 11 observed: ‘In order to enhance action on development and transfer of technology we decide to establish a Technology Mechanism to accelerate technology development and transfer in support of action on adaptation and mitigation that will be guided by a country-driven approach and be based on national circumstances and priorities.’ The Technology Mechanism consists of a Technology Executive Committee, and a network of Climate Innovation Centres.

India and the Carbon Trust based in the United Kingdom promoted the idea of Climate Innovation Centres as a means of facilitating technology development and collaboration. Cath Bremner, the head of international development at the Carbon Trust, argued:

Our answer at the Carbon Trust, developed with the Indian Institute of Technology and Climate Strategies, is to establish a global network of Climate Innovation Centres in developing countries, funded by the international community, national governments, local and global businesses. These centres would build local capacity, encourage enterprise and provide finance to roll out the technologies we have today and develop the ones we'll use tomorrow.⁴

The innovation model is elaborated in an influential paper entitled, ‘Climate Innovation Centres: A partnership approach to meeting energy and climate challenges’ in the *Natural Resources Forum*.⁵

Some commentators are hopeful that the model of Climate Innovation Centres will be a productive one. Rajiv Tikoo observed: ‘While the centres may not deliver breakthrough technologies in geo-engineering or carbon capture and storage, they are expected to deliver utilitarian technologies like

³ Gerhardsen, T.I.S. (2009), ‘IP References Left Out Of Last-Minute, Weak Global Climate Deal In Copenhagen’, *Intellectual Property Watch*, 19 December.

⁴ Bremner, C (2009), ‘Technology Transfer to Developing Countries is an Impossible Dream: Collaboration Between Private Investors and Public Sector is the Only Way to Introduce Low-Carbon Technology to Poor Countries’, *The Guardian*, 9 December, <http://www.guardian.co.uk/environment/cif-green/2009/dec/09/technology-transfer>

⁵ Sagar, A., C. Bremner, and M. Grubb (2009), ‘Climate Innovation Centres: A Partnership Approach to Meeting Energy and Climate Challenges’, *Natural Resources Forum*, **33** (4), 274-284.

development of cleaner cooking ranges and deployment of energy efficient lighting solutions, catering to the existing market and beyond.’⁶

It remains to be seen whether the model of a network of Climate Innovation Centres will be an effective means of promoting technology development, innovation, and diffusion. Unfortunately, the model does not address any of the underlying intellectual property issues relating to climate change, or to collaborations between nation states, and the public and private sectors. As can be seen in Australia, collaborations between government, the public sector, and the private sector under the framework of Co-Operative Research Centres can sometimes be fraught and complicated affairs.

Arguably, though, the outstanding question of intellectual property and climate change needs to be revisited in a number of international fora – including the *United Nations Framework Convention for Climate Change*, the World Trade Organization, and the World Intellectual Property Organization. Intellectual property plays a critical role, especially in determining who owns clean technologies, who benefits from clean technologies and who has access to clean technologies.

There is a desperate need to reform the intellectual property system to properly address environmental concerns. The current ‘technology-neutral’ approach provides incentives for polluting and clean technologies alike, without discrimination. Any future agreement should provide workable mechanisms for access to clean technologies – including technology transfer, compulsory licensing, patent pools, sharing of publicly funded technology and even exclusions of intellectual property rights for those countries worst affected by climate change.

Such flexible measures are already recognised and permitted under the *TRIPS Agreement* in the World Trade Organization.

⁶ Tikoo, R. (2009), ‘Innovation centres to develop clean technologies: India’, *Financial Express*, 14 December.