

transfer of climate change adaptation and mitigation will be “guided by a country-driven approach” and be based on “national circumstances and priorities.”⁷¹

5. UN Convention to Combat Desertification (1996)

Climate change negotiators can also refer to certain provisions of the UN Convention to Combat Desertification (UNCCD).⁷² Article 18 of the UNCCD governs obligations regarding transfer, acquisition, adaptation and development of relevant technology and provides for commitments on technology diffusion from developed countries to developing countries. Parties must take into account the need to protect IP under UNCCD Article 18(1)(b) and (e) and take appropriate measures to create domestic market conditions and incentives conducive to development, transfer, acquisition and adaptation of suitable technology, knowledge, know-how and practices. Parties may employ different technology transfer models such as standards or joint ventures (Article 18(1)(d) of the UNCCD). Pursuant to Article 18(2)(a) of the UNCCD, parties shall publish inventories of technology, knowledge, know-how and practices.⁷³

6. Kyoto Protocol (1997)

The Kyoto Protocol to the UNFCCC,⁷⁴ adopted in December 1997 and entered into force in February 2005, imposes binding obligations on Annex I countries to reduce greenhouse gas emissions, whereby the benchmark is the 1990 level of greenhouse gases.⁷⁵ The Kyoto Protocol provides for flexible market-based mechanisms including emission trading, a Clean Development Mechanism (CDM) and Joint Implementation (JI) options for greenhouse gas reduction.⁷⁶ The CDM allows developed countries to invest in emission reduction projects in developing countries and to receive credit for the emission reduction or removal achieved. The resulting emission allowances can be used by developed countries to meet their emission

71 Conference of the Parties on its 15th Session, Copenhagen, Denmark, Dec. 7-19, 2009, Decision 2/CP.15 Copenhagen Accord, UNFCCC Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010).

72 U.N. Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, June 17, 1994 33 I.L.M. 1328 [hereinafter UNCCD].

73 *Id.* at art. 18.

74 Kyoto Protocol to the UNFCCC, *adopted* Dec. 10, 1997, 37 I.L.M. 22 (*entered into force* Feb. 16, 2005) [hereinafter Kyoto Protocol].

75 Conference of the Parties on its 3rd Session, Kyoto, Japan, Dec. 1-11, 1997, Decision 2/CP.3 Methodological issues related to the Kyoto Protocol, UNFCCC Doc. FCCC/CP/1997/7/Add.1 (Mar. 25, 1998).

76 Kyoto Protocol, *supra* note 74 at art. 12.

targets. CDM projects may also include transfer of green technology from developed countries to developing countries.

B. Compatibility with TRIPS Flexibilities

1. Technology Transfer Obligation under TRIPS Articles 7, 8(1) and 66(2)

The TRIPS Agreement includes provisions for creating favourable conditions in developing countries to attract technology through trade and investment (pull factors).⁷⁷ However, TRIPS also recognizes LDCs' special need for flexibilities with respect to their national laws in order to allow them to establish "a sound and viable technological base."⁷⁸ To list a few TRIPS provisions that emphasize such equilibrium between rights and obligations, Article 7 provides that the protection and enforcement of IP should "contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users."⁷⁹ Article 8(1) allows Members to "adopt measures necessary to protect public health and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that those measures are consistent with TRIPS."⁸⁰ Article 66(2) also provides, as a basis for the active transfer of technology to developing countries, that developed country members shall provide incentives (monetary or otherwise) to institutions to encourage transfer to LDCs for their technology base.⁸¹

2. Exceptions to Rights under TRIPS Article 30

To cure potential market inefficiencies occurring as a result of exclusive rights, the scope of patents may be balanced out mainly through two mechanisms:⁸² (i) ex-

77 *Supra* note 56 (by setting strong minimum standards of protection on patent terms, exclusive rights and national treatment).

78 TRIPS Agreement, *supra* note 8 at the Preamble.

79 *Id.* at art. 7.

80 *Id.* at art. 8(1).

81 *Id.* at art. 66(2). *Cf.* TRIPS Article 66(1) provides an extendable transition period of ten years for LDCs.

82 WIPO Standing Committee on the Law of Patents 13th Session, Exclusions from Patentable Subject Matter and Exceptions and Limitations to the Rights, Mar. 23-27, 2009, Paras. 10-11, WIPO Doc. SCP/13/3 (Feb. 4, 2009).