

NEW YORK CITY BAR CLIMATE CHANGE INITIATIVE

Presentation of Jaipat S. Jain, March 2, 2010

- **Carbon-dependent growth path has resulted in global warming**
- If developing countries use Environmentally Sound Technologies (“EST”) to support their development path, it will help all
 - Energy efficiency will also help all
 - Technologies and systems that mitigate effects of green house gas emissions, such as carbon capture and storage, or carbon cap and trade, will also help all.
 - If and how New York can be carbon trading center of the world
 - Technologies that help adapt to climate change – such as new forms of crop rotation, or climate-resistant crops – will help all too
- Technologies and know-how for all this – ESTs, energy efficiency, mitigation, and adaptation – are owned principally by developed countries
- **Developing countries are the newest and fastest growing polluters. If they use the same carbon-dependent growth path, it will be disastrous**
- **It is everybody’s interest that ESTs are made available to developing countries**
- This point has been emphasized in several international forums, for example: Agenda 21, 1992; UNFCCC (Article 4) 1994; Kyoto Protocol 1997; Marrakesh 2001 (Technology Framework); Bali Action Plan 2007; Copenhagen 2009; and many others
- Arguments supporting technology transfer in these forums have often revolved around theories of equity, fairness, duty of developed nations to help those in need, and so on
- **A common refrain – developed countries should actively assist developing countries by**
 - transferring ESTs and making the fruits of technology available
 - financing
 - helping create an enabling environment of laws, incentives and institutions
 - loosening the agreement on Trade Related Intellectual Property Rights
 - TRIPs was a result of more than a decade of sustained work by developed countries. Under the 1995 WTO agreement, members agreed to phase-in a uniform regime for protection of IPRs. The thinking was that better protection for IPRs results in more innovation and trade

- **There is today a controversy as to whether TRIPs facilitates or hinders diffusion of ESTs**
- The controversy received world-wide attention when big pharma was seen as reluctant to make AIDs and other life-saving drugs available at affordable prices to poor countries in Africa and Asia
- A parallel is therefore drawn between the pharmaceutical sector and the renewable energy sector
- **What did we learn from the pharma controversy?**
 - IPRs are not owned by developed countries but private players in developed countries. Private players control economic activity throughout the world
 - Less likely to be motivated by altruistic, fairness or equity notions
 - Economic beings given to rational thinking – the same thinking that they bring to bear when they conduct business
 - They do not just “transfer” technologies. They expect to be remunerated
 - Recipients, on the other hand, are governmental entities in developing countries
- **Is there a Best Practice lesson here? There is -**
 - The model that has worked in the pharmaceutical sector is what is popularly called public-private partnership. The private player:
 - Out-licenses technologies that are not being pursued
 - Obtains back-end rights to market resulting products in developed countries
 - Allows manufacture and sale in developing countries only
- **So – what can we do as lawyers in New York City?**
 - Here’s my 2 cents:
 - Let’s all of us get together and draft and contribute a Model Public-Private Partnership Licensing Agreement to the world of commerce
 - Make New York the place for resolution of disputes
- There may be other suggestions. Let us discuss them all in our working group.

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