Third World Network submission for the update of the "Assembly Document" (FCCC/AWGLCA/2008/16)

6 December 2008

1. Comments on Section II B paragraph 30 on "contribution by different groups of countries to the achievement of the long-term goal"

TWN proposes that the following be included:

Agreement on the long-term global goal for emission reductions should not result in a residual emission reduction target for non-Annex I Parties, once the Annex I target or share is agreed.

The following paragraphs on page 2 of the TWN submission on 'Shared Vision and Burden Sharing in the "Global Goal"' are relevant:

"The issue of "Long-term goals" has major development and equity implications.

One concern on process is that the "long-term goals" above may be negotiated in one forum (the AWG-LCA under the Convention) whereas the reduction commitments of Annex I parties are negotiated in another forum (the AWG on further commitments of Annex I Parties under the Kyoto Protocol).

Yet the two aspects have important links. In particular, developing countries could be indirectly committing themselves to a cut of a certain percentage in their emissions without directly being aware of this. For instance, if a global goal of 50% emission cut by 2050 is agreed to, and the AWG agrees on a reduction by Annex I countries of 70% (mid-point of 60-80%), the implication is that developing countries have to undertake the residual emission cut."

The explanations of Scenario A, B and C and the Annex (page 2-3, and 5) further elaborate on the different possible residual implications for non-Annex I Parties.

On page 4, the following paragraph is relevant:

"This is only one methodology of looking at the question of burden sharing in the context of a "global goal" of emission reduction. This methodology is useful in showing that when there are two variables (global goal, annex I goal) that are determined, the implication is that there is a residual goal or target for the other party (i.e. non Annex I countries)."

2. Comments on Section III A paragraph 35 on "quantification of national actions and commitments by developed countries"

TWN proposes that the following be included:

Annex I Parties should undertake commitments to reduce their GHG emissions by well over 100% in order that developing countries can fulfill their right to sustainable

development and their poverty eradication goals, taking into account the historical responsibility of developed countries for GHG emissions.

The following paragraphs on page 3-4 of the TWN submission on 'Shared Vision and Burden Sharing in the "Global Goal"' are relevant:

"Scenario C asks the question: what if the target is to have the per capita emission of developing countries remain the same between 1990 and 2050? Even this would be a great challenge for developing countries, to have GNP growth of 6% (or per capita GNP growth of 4%) while keeping per capita emission at zero growth.

In this Scenario C, the developing countries' per capita emission remains at 5 tonnes. Their total emissions would almost double (grow at 95%) from 20 to some 40 bil tonnes in 2050. But the global target is a 50% cut to only 19.3 bil tonnes in 2050. For this global target to be met, the developed countries would need to have ***negative emission*** *of 20.5 bil tonnes, i.e., to go from 18.2 bil tonnes in 1990 to minus 20.5 bil tonnes in 2050.*

The implications of this need to be explored, with regard to whether a great increase in sinks is possible in both developed and developing countries, and whether developed countries can transfer resources to developing countries to carry out some of the "negative emission" activities.

In Scenario C, the figures are possible targets of commitments. As in the present system under the Kyoto Protocol, as a possible option, developed countries could meet part of their target by a transfer of funds or resources to developing countries to undertake emission reduction activities. Since the quantity of negative emissions for developed countries in this scenario is large, then there is scope for the flexibility of transferring resources to developing countries to effect emission reduction, which is far higher than can be envisaged if the commitment of developed countries were to be 70% or 80% or even 100% emission reduction by 2050 compared to 1990.

Thus the concept of negative emission should be further explored, including in the context of the discussion on financial transfers. Such transfers or payments need not necessarily be within the framework of the Clean Development Mechanism, but could be made to a multilateral climate fund or funds within the UNFCCC."

Scenario C in the Annex (page 5) of the TWN submission on 'Shared Vision and Burden Sharing in the "Global Goal"' also states that *"negative emission of 20.5b tones required, i.e., 100% cut plus +113 % offset of greenhouse gases" by industrial countries."*

<u>3. Comments on Section V A paragraph 124 on "Mechanisms to address intellectual property right issue"</u>

TWN proposes that the following be included:

The types of technologies can be classified as: (1) existing technologies in the public domain; (2) patented technologies (publicly and privately owned); and (3) new technologies.

To the extent that intellectual property rights are identified as an important barrier to technology transfer, Parties may consider: 1) a mandatory exclusion from patents world-wide; 2) a mandatory exclusion from patents in developing countries; 3) discretionary exclusions from patents in developing countries; 4) a collective global Technology Pool; 5) compulsory licensing in individual developing countries; 6) regulation of terms of voluntary licenses; 7) an International Declaration on IPRs and Access to Climate-Related Technology; and 8) means to ensure sharing of know-how and trade secrets.

The following paragraphs on page 4-6 of the TWN submission on 'Possible Elements of an Enhanced Institutional Architecture for Cooperation on Technology Development and Transfer under the UNFCCC' are relevant:

"15. A range of measures are available to Parties to improve the accessibility and affordability of climate-related technologies.[i] These can be classified according to the type of technologies, including: (1) Existing Technologies in the public domain; (2) Patented Technologies (publicly and privately owned); and (3) New or Future Technologies:

- ***Public domain technologies.*** *For technologies in the public domain the action should be on identifying needs and technologies, and establishing an international cooperation system to ensure that the cheapest prices are offered to developing countries (a system of differential pricing) and the financial terms to transfer the equipment to developing countries. Also required is a system of transferring the know-how of (1) how to use and maintain the technologies; (2) how to adapt them to local conditions. For developing countries that have the capacity or ambition, there should be the transfer of know-how on how to produce these technologies and not simply import the equipment.*
- ***Patented technologies****. Patented technologies may be owned in the public or the private sector. Many technologies are owned by public research institutions, agencies and other governmental bodies. As acknowledged in a presentation by the government of the United States, there is a need for a "global effort to share government-developed and owned technologies at low or no cost".[ii] The sharing should also include the know-how. Fully-owned government technologies should be transferred at no cost. Where governments partially fund research and development, they should have partial ownership of any resulting patent. When a license is issued to a developing country firm, a corresponding proportion of the cost of the license should be waived, thus reducing the overall cost to developing countries.[iii] Incentives can also be given to companies (that are publicly funded) to make the patented technology with its know-how available to developing countries. To support no- and low-cost transfer, developed country governments should compile a* ***Publicly-Owned Technology Inventory****.*
- *For privately owned technologies, various mechanisms can be examined to make them more accessible and affordable for developing countries. A range of measures relating to compulsory licensing and low-cost voluntary licensing as well as technology pooling and the sharing of know how can be examined. (See section below). The Technology Fund could support the financing of compensation to be paid by developing countries into a technology pool, and also the meet the cost of negotiation and purchasing of licenses at a very reasonable cost with a view to facilitating transfer. As discussed below, complementing the fund is a range of other ways to reduce the costs associated with intellectual property rights, in order to ensure they are not a barrier to transfer, and to strike an appropriate balance between rewards for innovators and the public good. Both developed and developing countries can also consider incentives to stimulate technology transfer within companies,*

with a view to strengthening capacity in subsidiary companies located in developing countries.

- ***Future technologies**. National/regional technology excellence centers should be established to promote technology development, deployment and transfer, stimulate capacity building, improve access to information and establish an appropriate international cooperation environment. Also required are efforts to reinforce north-south, south-south and triangular cooperation, including Joint Research and Development. As part of future international cooperation, some research and development programmes should be jointly planned and coordinated by governments (developed and developing). If certain products are wholly publicly funded, they could be placed in the public domain, or else made available through affordable licenses. This will make the future technologies more accessible and affordable, especially to developing countries.*

Measures relating to intellectual property and climate technologies

16. For climate related technologies, whether intellectual property rights constitute an important barrier depends on several factors, such as whether or not the particular technology is or will be patented, whether there are viable and cost-effective substitutes or alternatives, the degree of competition, the prices at which it is sold, and the degree of reasonableness of terms for licensing, and so on. To the extent they are identified as an important barrier to technology transfer, there is a variety of ways to relax intellectual property rights in relation to climate friendly products and technologies. These include:

- ***A mandatory exclusion from patents world-wide** of climate friendly technologies and products. Because most of the technologies required to address climate change already exist, and climate change represents a grave and potentially irreversible threat to human societies, the international community could consider requiring all climate friendly technologies to be free of intellectual property rights to ensure their widest availability. Just as intellectual property rights are relaxed in wartime, the threat of climate change could justify a systemic relaxation of intellectual property rights to strike an appropriate balance between the private interests and the global public good.*

- ***A mandatory exclusion from patents in developing countries**, while patents can still be granted in developed countries. Both this and the world-wide exclusion would require an amendment of TRIPS Agreement. It is, however, a justifiable demand if climate change is considered a serious challenge. Developed countries cannot justify business as usual in the old system while also demanding a radical departure by developing countries from business as usual in their emissions pathways.*

- ***Discretionary exclusions from patents in developing countries**. The TRIPS Agreement permits individual countries to "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".*

- ***Technology pooling through a collective global approach.** In situations where patents are granted, a collective or global approach could enhance access and affordability. A global technology pool, for example, could be developed in which patent owners of climate friendly technologies are obliged to place their patents in a pool, and developing country firms can have access to the technologies by paying a compensation that is low and on standard terms (that are to be negotiated). This will make it administratively and financially easier for access to take place, while the patent system continues to be respected, while ensuring the*

system is regulated, and the flexibilities in the TRIPS Agreement (including compulsory license) are systematized in terms of operation.

- ***Compulsory licensing in individual developing countries**. The WTO TRIPS Agreement provides countries with significant flexibilities to grant compulsory licenses. These grounds are not restricted, as confirmed by the WTO Ministerial Declaration on TRIPS and Public Health (Doha 2001). It is not necessary to declare a state of emergency, for example. Developed countries regularly exercise compulsory license – or in the case of the United States, powers of "eminent domain" – to use patented technologies. Developing countries, similarly, can and should grant compulsory licenses over technologies required to meet their climate objectives.*
- ***International Declaration on IPRs and Climate Technologies**. It is also useful to establish such a Declaration in order to clarify the ability of countries (especially developing countries) to have maximum affordable access to climate technologies, and that IPRs should not be a barrier, making use of the WTO Doha Declaration on TRIPS and Public Health as an example. The need to modify TRIPS for specific purposes (as in the case of pharmaceutical and health related products) should also be looked into.*
- ***Regulation of terms of voluntary licenses.** Another measure could be the regulation of the terms of voluntary licenses to ensure that the cost is affordable, and that there are no anti-competitive conditions (such a high price of licenses, restrictions on markets, or insistence on taking a majority share of the company to which license is provided, which have all happened in recent cases, etc).*
- ***Sharing of know-how and trade secrets.** Parties may also consider a global cooperation system for sharing know-how and "trade secrets", which is also important as the lack of this is another serous barrier to technology transfer. This should be a component of a technology transfer framework. Even if a technology is not patented, the withholding of "trade secrets", or how to make the technology, can prevent the development of endogenous technology in developing countries.*

17. The level of ambition for sustainable development could be raised by proposing that environmentally-friendly technology should be held in the public domain (so that the process of compulsory licensing etc is not even required). There is a strong rationale for this, at least for climate-friendly technology and products:

The processes of negotiating with the patent holder and of issuing compulsory licenses can be quite cumbersome to countries not familiar with the procedures. In light of the imminent challenges posed by climate change, it is thus better that developing countries be allowed to exempt such technologies from patenting.

If climate change is truly the serious crisis threatening human well-being, and there is only a few years left to start very strong action, then the situation is similar to emergency war-like conditions. In such conditions, individual commercial interests such as patents are suspended so that there can be concerted national action in the most effective way to face the common threat.

Developed countries should not treat intellectual property rights as sacrosanct and to be upheld at all costs. Doing so would signal that climate change is not a serious threat, as commercial profits for a few are more important on the scale of values and priorities than are the human lives that are at stake due to global warming. Technology transfer to developing countries to enable them to combat climate change should be the higher priority.

Developed countries should also not treat climate technology as a new source of monopoly profits, as this would damage the ability of developing countries to phase in existing or new climate-friendly technologies for both mitigation and adaptation.

18. In light of these factors, the post-Bali process should adopt the principle that developing countries can exempt climate-friendly technologies from patents. Such a principle would demonstrate that developed countries are serious about resolving the global climate crisis and about assisting developing countries. It would also help developing countries to take on mitigation and adaptation measures, which are dependent on the technologies."

In addition, the following paragraphs on page 2-3 of the TWN submission on 'Some Key Points on Climate Change, Access to Technology and Intellectual Property Rights' are relevant:

"9. For technologies that are in the public domain, international cooperation is also required to facilitate its transfer. Importantly, the space for technology in public domain should be expanded. Governments in developed countries play an important role in funding R & D programmes. The programmes are implemented by government institutions or are in partnership with the private sector. About 40% of annual national R & D spending within some OECD countries was publicly funded (UNCTAD 1998). In addition, governments sponsor a range of R & D that underpin private sector investments in developing environmentally sound technologies (ESTs) (IPCC 2000, Chapter 3, page 95). A paper for UNFCCC surveyed government R & D funding of ESTs in the US, Canada, UK and Korea. It found that in most countries, governments allocated their rights (patents, copyrights, trademarks etc.) to the recipient research institutions to a significant degree. As a result, the diffusion of climate-friendly technology would "typically be along a pathway of licensing or royalty payments rather than use without restriction in the public domain." (Sathaye et al 1995). The IPCC study (2000) calls on OECD countries to influence the flow of such technology directly through their influence on the private sector or public institutes that receive funding from government for their R & D to be more active in transferring technologies to developing countries. It cites Agenda 21 (chapter 34, paragraph 34.18a) that "governments and international organisations should promote the formulation of policies and programmes for the effective transfer of environmentally sound technologies that are publicly owned or in the public domain." Products that emerge from publicly funded R & D should be placed in the public domain. Those that are partially funded should be in the public domain to the extent to which it is publicly funded.

10. As part of international cooperation, there can be R & D programmes jointly planned and coordinated by governments (developed and developing). If certain products are wholly publicly funded, they could be placed in the public domain, or else made available through affordable licenses. This can make the technologies much more affordable.

11. For technologies that are patented, there must be an understanding that patents should not be an obstacle for developing countries to have access to them at affordable prices. According to the World Trade Organisation (WTO) Trade-Related Intellectual Property Rights (TRIPS) Agreement, if there is a patent on a product, a process or a technology, a firm or agency in a country in which the patent is operating can request for a voluntary license from the patent holder, in order for the firm to make or import generic versions of the patented product or technology. The patent holder will normally charge a price (royalty or license fee) for granting the license. If the patent holder refuses to give a license, or if the price charged is too high, the firm or agency can apply to the government to grant it a "compulsory license". Alternatively, a government that wants to have access to generic versions of a product or technology can itself take the initiative to issue a compulsory license.

12. The firm or agency granted a compulsory license would normally have to pay a royalty or remuneration to the patent holder. In the case of pharmaceutical drugs, the royalty rate offered in recent compulsory licenses by developing countries such as Malaysia, Indonesia, Thailand, ranges from 0.5 to 4 per cent of the price of the generic drug.

13. Under the TRIPS Agreement, there is considerable flexibility provided to WTO member states on grounds for issuing compulsory licenses. These grounds are not restricted, as confirmed by the WTO Ministerial Declaration on TRIPS and Public Health (Doha 2001). It is not necessary to declare a state of emergency, for example. Certainly the fact that a country requires a product or technology in order to meet its objectives or responsibilities to mitigate climate change or to adapt to climate change is a most valid ground for compulsory licensing.

14. Compulsory licensing is not a unique or exceptional policy. In developed countries like the US and the UK, there have been many compulsory licenses granted by the government to facilitate cheaper products and technology in the industrial sector. In many developing countries, compulsory licenses have been issued for the import or local production of generic drugs. There is a type of compulsory license known as "government use" which many developing countries have made use of. This is when the product to be imported or produced in a generic version is to be for public, non-commercial use, for example for medicines distributed by the government in clinics and hospitals. In such cases, prior negotiation with the patent holder is not necessary, although remuneration or royalty to the patent holder is required.

15. Thus, compulsory licensing is an option that developing countries can seriously consider for those patented climate-friendly technologies for which they have a need for, which are expensive, and in cases where negotiations with the patent holder does not yield results in lowering the prices to reasonable levels . The Brazilian Foreign Minister Mr. Celso Amorim, in his speech at the plenary of the Bali climate conference in December 2007, said that inspiration should be drawn from the case of TRIPS and medicines, and that a similar statement regarding TRIPS and climate-friendly technologies should be considered. Strictly speaking, it is not necessary for such a statement to be made by Ministers before a country exercises rights that it has to issue compulsory licenses for climate technologies. The flexibility rights already exist in TRIPS. However, when countries exercise these rights, they may be penalised by other countries. Therefore, developing countries find it useful that an international declaration is made, so that when they exercise their rights they are to some extent more protected politically, which adds to their confidence in exercising what is already their rights under international law (i.e. TRIPS). However, there is no guarantee that the political declaration will protect a country that exercises its rights – Thailand has been placed on the IP Watch List of the USA (which implicitly carries a threat of future trade sanctions) following its issuing compulsory licenses on some drugs.

16. Another value in a TRIPS and Climate Change Technologies declaration may be in extending the lifting of the restriction under TRIPS for compulsory licensing (i.e. that it be restricted to production of products "predominantly for the domestic market") from pharmaceutical drugs to climate-friendly technologies and products as well. This will enable a more adequate supply of "generic" technologies and products to countries that lack productive capacity to produce their own such products.

17. It is also possible to raise the level of ambition for sustainable development, by proposing that environmentally-friendly technology should not be patented in the first place (so that the process of compulsory licensing etc. is not even required). There is a strong rationale

for this, at least for climate-friendly technology and products. If climate change is truly the serious crisis threatening human survival, and there is only a few years left to start very strong action, then the situation is similar to emergency war-like conditions. In such conditions, individual commercial interests such as patents are suspended so that there can be concerted national action in the most effective way, to face the enemy. Developing countries require technologies at the cheapest possible prices. If they obtain the needed technology at one quarter the price, they can increase the rate of change to put into effect mitigation and adaptation measures many times faster and more effectively.

18. There can be many variations for the relaxation of IP in relation to climate-friendly products and technologies. For example: (a) An exemption for patents on climate-friendly technologies and products; (b) An exemption on patents in developing countries only, while patents can still be granted in developed countries, to allow for recovery of innovation cost, and provide incentives; (c) Developing countries, if they so desire, are allowed to exclude patents on climate-friendly technologies and products; (d) Voluntary licenses must be automatically granted on request, which will be free of royalty; (e) Voluntary licenses are automatically given and compensation is provided."

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[i] Brazil, "Brazilian Views on Technology Transfer", 3 June 2008, Workshop on Technology Transfer during UNFCCC Climate Change Talks, AWG-LCA, Bonn, Germany (Brazil's Technology Presentation)

[ii] US Government, White House Power-point Presentation describing goals of Major Economies Meeting (on file with author). For a summary of home country measures relevant to securing technology transfer see also, UNCTAD, *Facilitating Transfer of Technology to Developing Countries: A Survey of Home-Country Measures* (UNCTAD/ITE/IPC/2004/5) available at http://www.unctad.org/en/docs/iteipc20045_en.pdf

[iii] Parties could, for instance, agree on a "Principle of No-Cost and Proportional Cost Transfers" for all technologies that are fully or partially government owned or funded.