



**British Institute of
International and
Comparative Law**

Report on the Seminar Global Health Law

21 March 2013



On 21 March 2013 the British Institute of International and Comparative Law hosted the event entitled 'Global Health Law'. The discussion was chaired by Professor Duncan Matthews of Queen Mary, University of London. The speakers were Professor John Harrington from the University of Liverpool and British Institute in East Africa, Dr Chamundeeswari Kuppuswamy from the University of Sheffield and Trevor Cook, a Partner at Bird & Bird LLP.

While the discussion touched on a number of aspects of intellectual property, the preponderance of the evening's remarks centred on patents and their impact on the global health law landscape. In his introductory statement, aimed at providing some context for the forthcoming presentations, event chair Professor Matthews suggested that it was with the development of the WTO's TRIPS Agreement that the international and global health implications of the patent system became an issue of wide debate, one that has centred primarily on the impact that patents can have on access to medicines and by extension, on the right to health. He explained that the impact of TRIPS was derived from Article 27 of the Agreement which enjoined all States Parties to make available patent protection in all fields of technology. This requirement affected the legal regimes of a number of countries from the developing world which had previously excluded pharmaceutical products from patent protection on policy grounds in order to ensure access to low-cost generic medicines within their territories. Professor Matthews advanced that post-TRIPS many developing country members of the WTO have advocated the utilisation of the full range of flexibilities available in the TRIPS Agreement in order to ameliorate the adverse effects of pharmaceutical product patent protection for access to medicines.

Professor Harrington focused on the political discourse in Kenya surrounding patents and human rights, especially as it relates to access to medicine. In particular, he set out to investigate how the idea of the 'nation' was deployed by actors on different sides of the preceding debate and the reasons why such an approach was successful within the Kenyan context. To illustrate this discourse Professor Harrington examined two recent episodes in Kenyan legislative history: (1) the enactment of the Industrial Property Act which implemented TRIPS in Kenya in such a way that it secured access to generic drugs; and (2) the Anti-Counterfeit Act, 2008 which addressed sanctions for intellectual property violations and had a regressive impact on access to medicine initiatives. Beginning with the Industrial Property Act, Professor Harrington advanced that the success of activists in securing legislative concessions stemmed from the strides made in their lobby efforts vis-à-vis powerful state entities like the Ministry of Trade. He suggested that the rhetorical component of their strategy was important: namely, activists framed the debate as one in which the health of Kenyan citizens was being threatened by businesses interests. He advanced that these arguments were able to gain traction because of the political climate at the time. Specifically, the incumbent government, resisting pressure from donor institutions, was engaged in a campaign to defend Kenya's national interests. Turning his

attention to the Anti-Counterfeit Act, Professor Harrington noted that the passage of this legislation marked a rhetorical shift toward the enforcement of rights. In this vein, he noted that a central argument employed by the government in support of the legislation was the notion that counterfeiting was costing the government money and that as a young nation trying to industrialize, the legislation was imperative to protect Kenyan industries and ensure access to markets.

Dr Kuppuswamy addressed the broader human rights issues ingrained in the debate surrounding intellectual property and access to essential drugs. She divided her remarks into three parts. In the first instance, she discussed the human rights principles that enjoin pharmaceutical companies. In this vein, she framed her discussion around the “Ruggie – Hunt Principles”, a framework developed by John Ruggie, former UN Special Representative on the issue of Human Rights and Transnational Corporations, and then further elaborated and applied to the right to health by Paul Hunt, former United Nations Special Rapporteur on the Right to Health. The Principles address the right-to-health responsibilities of pharmaceutical companies in relation to access to medicines. Dr Kuppuswamy focused her attention on those aspects of the framework that consider the WTO TRIPS Agreement. In her view, they endorse a broad interpretation of the treaty that generally favours rights-holders, and further, demonstrates that TRIPS can be employed in a fashion that is human rights compliant. The second facet of Dr Kuppuswamy’s remarks sought to address current trends in the enforcement of intellectual property rights and their potential impact on generic medicines. To this end, her comments centred on the Anti-Counterfeiting Trade Agreement (ACTA), a multilateral treaty that aims to establish international standards for intellectual property rights enforcement. To achieve these ends, the agreement establishes enhanced civil and criminal remedies for counterfeit with respect to generic medicines, copyright infringement and counterfeit goods. Dr Kuppuswamy suggested that by incorporating generic medicines into regimes such as ACTA, some of the global health developments achieved during the DOHA round on TRIPS have been circumvented. In her final remarks, Dr Kuppuswamy advanced that an international development law framework could serve as a useful tool to assess intellectual property rights and enforcement in post-TRIPS era. Finally, she advanced that it could also serve to guide pharmaceutical companies in their efforts toward compliance with human rights instruments.

As the last speaker and discussant, Mr Cook framed his remarks largely as a response to the various issues that were highlighted by the other panellists. Beginning with the Kenyan experience, he advanced that the Industrial Property Act demonstrates the inherent flexibility of the TRIPS Agreement and asserted that it could serve as a model for other developing countries attempting to balance their obligations pursuant to multilateral intellectual property agreements with access to medicines concerns. He disagreed with Professor Harrington’s assertion that the Anti-Counterfeit Act (ACA) was, as it pertains to access to medicines, regressive legislation. In his view the ACA was constructed to govern counterfeit, an issue that is markedly distinct from

patent infringement, an area of the law more appropriately linked to generic drugs, and by extension, access to medicine issues. Mr Cook also suggested that the partisan rhetoric which had coloured the debate surrounding the passage of the ACA was hardly unique in the area of intellectual property regulation. To this end, he pointed to the current discourse which surrounds copyright holders and those who host their content on internet servers. Turning his attention to the broader human rights issues, he noted that at present very few essential medicines are subject to patents. He also advanced that many of the challenges surrounding access to essential drugs is tied to administrative and governance issues that are State responsibilities (e.g. poverty, finance, duties, taxes) as opposed to being vested in intellectual property rights. Mr Cook's remarks also addressed the broader issue of societal consensus and its manifestation in intellectual property regimes. He suggested that patents are not arbitrary gifts, but rather they reflect a balance that society struck which recognizes that there is some benefit to giving a limited monopoly to companies in order to incentivise innovation. He concluded that undermining the patent system places this delicate ecosystem at risk.

Questions from the audience continued to highlight the issues addressed by the panel. Queries touched upon topics such as the right to intellectual right property in human rights law, the application of the nodal governance approach to other African countries, and the European Court of Justice as a forum for the debate surrounding access to medicines and intellectual property.

Report prepared by Cynthia Morgan

Charles Clore House
17 Russell Square
London WC1B 5JP

T 020 7862 5151
F 020 7862 5152
E info@biicl.org

www.biicl.org

Registered Charity No. 209425



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