

Inter-American Law Review

Symposium: Focus on Brazil

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On February 9, 2008, the University of Miami Inter-American Law Review hosted its annual symposium. This year's event, called "Globalization and the Pharmaceutical Industry: Brazilian Intellectual Property Law and US Policy Implications," was brought about by a controversial article written by law school alumnus Lawrence Kogan. In his article, *Brazil's IP Opportunism Threatens U.S. Private Property Rights*, Kogan criticized the Brazilian government's policies relating to intellectual property rights, especially in regards to pharmaceuticals, and argued that these policies not only threaten Brazil's internal development but also American private property rights. A crowd of about 120 people, including our own President Donna Shalala, attended the resulting symposium, which was a debate not only on the Brazil's behavior, but on the desirability of the modern intellectual property rights system itself.

There were many highlights of this debate. Among them, Catherine P. Bennett, Senior Vice President at the National Foreign Trade Council in Washington, D.C., lauded the Lula government in Brazil for fostering intellectual property and innovation by being one of the first nations to enact legislation implementing the Agreement on Trade Related Aspects of Intellectual Property Rights agreement (TRIPS) in 1996. This agreement was reached during the Uruguay round of the General Agreement on Tariffs and Trade and set international minimum standards for intellectual property protection. However, Bennett contrasted this with some of Brazil's other actions, such as its compulsory licensing of AIDS medications, under which it produced itself and bought from overseas pirated versions of currently patented drugs. Bennett noted that while such behavior may seem advantageous in the short term, it leads to predicaments such as those that countries like China find themselves in, with only low quality, low value foreign direct investment. "Brazil is getting the reputation as an obstructionist in multilateral circles which leads investors to wonder what impact this will have on its domestic economic policies," said Bennett.

A lively, fast paced discussion broke out during the symposium over whether Brazil's compulsory licensing of AIDS medications was not only bad for its economy, but also

over whether this action itself violated TRIPS agreement. Daniel Pinto, First Secretary of the Brazilian Embassy, made clear that Brazil's position was it had not violated the agreement. Pinto welcomed debate about the relative merits of Brazil's compulsory licensing, but insisted Brazil's behavior was not illegal.

Keynote speaker, Professor Frederick Abbot of the Florida State College of Law, agreed with Pinto that what Brazil did was legal. Bennett, however, expressed greater skepticism. "Brazil is technically accurate," she said. "It can also be argued, however, that the Paragraph 6 amendment was not intended for use by Brazil, the 8th largest economy in the world."

Robert Sherwood, an expert on judicial systems in developing countries, added another dimension to the debate. Sherwood worried that while a focus on strong intellectual property rights is important to development in Latin America, that their weak judicial systems will effectively neuter such laws. Until Latin Americans learn to rely more upon the formal court system instead of what he called "social network transacting," economic development will be severely constrained.

Judit Rius, a foreign law expert with Knowledge, Ecology, and Studies, a Washington based group focused on the management of knowledge resources, provided symposium participants with a possible solution to the problems of the current intellectual property system. Rius doesn't think private intellectual property rights will help developing nations. She said "we can all agree the system is broken and that now we need to discuss how to fix it." Her ideal solution would be to replace the current intellectual property system with a prize system. Under one version of her solution, individuals or groups would finance their own development of new pharmaceuticals and technology and would compete for prizes as a reward. A panel of experts would judge which new developments were most beneficial to society and award prizes accordingly. In return for their prize, the developers would give up any exclusive property right in their new invention. Under this system, "we only pay for successful performance and allow generic competition from day one," said Rius.

In strong disagreement with Rius, however, was John Kilama, President of the Global Bioscience Development Institute in Wilmington, Delaware. Kilama argued instead that "the winners of the new economy will be those countries that understand that IP is the cornerstone of this new economy of the 21st century." Otherwise, Kilama thinks that developing nations will never receive the high quality foreign direct investment necessary to compete in the global marketplace. Kilama, a native of Uganda, said that even where they exist, intellectual property laws are not the reason the poor in developing nations lack basic medicines. He explained that most useful drugs are not even patent protected and it is the lack of free markets and the rule of law that keep their availability low in

certain places. “We can’t say the [IP] system is broken, in fact, it has never really even been tried in the developing world, but has worked quite well in the developed world.”

During his presentation, Kogan focused on a defense of private property rights. Kogan called private property a “fundamental natural right” of all people, and said that the balance struck in the United States between individual rights and societal rights, with a preference for the former, is unique even among Western, developed countries. The purpose of his article was “to bring to light what is happening in international forums.” He touted Brazil’s experience with compulsory AIDS drug licensing as an example of governments becoming bolder in their disregard for patent rights and as part of the global struggle “to define the role, scope and extent of government vis-à-vis individuals and society in general in the coming eras.”

Other speakers at the symposium included our own Professor Keith Rosenn as moderator, Dean Janet Sterns, who gave the opening remarks, and Dr. Susan E. Webster, Executive Director of Florida International University’s Office of Intellectual Property Management. Dr. Webster counsels universities across the world on the marketing of their intellectual property, and explained that once American universities were given the rights to intellectual property created on their campuses, an explosion of discovery occurred.