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978-0-521-11656-5 - Incentives for Global Public Health: Patent Law and Access to Essential Medicines

Edited by Thomas Pogge, Matthew Rimmer and Kim Rubenstein

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INCENTIVES FOR GLOBAL PUBLIC HEALTH

This portrait of the global debate over patent law and access to essential medicines focuses on public health concerns about HIV/AIDS, malaria, tuberculosis, the SARS virus, influenza and diseases of poverty. The essays explore the diplomatic negotiations and disputes in key international forums, such as the World Trade Organization, the World Health Organization and the World Intellectual Property Organization.

Drawing upon international trade law, innovation policy, intellectual property law, health law, human rights and philosophy, the authors seek to canvass policy solutions that encourage and reward worthwhile pharmaceutical innovation while ensuring affordable access to advanced medicines. A number of creative policy options are critically assessed, including the development of a Health Impact Fund, prizes for medical innovation, the use of patent pools, Open Source drug development and forms of 'creative capitalism'.

THOMAS POGGE is Leitner Professor of Philosophy and International Affairs at Yale University, Professorial Fellow at the ANU Centre for Applied Philosophy and Public Ethics (CAPPE), Research Director at the Oslo University Centre for the Study of Mind in Nature (CSMN) and Adjunct Professor at the University of Central Lancashire.

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CONNECTING INTERNATIONAL LAW WITH PUBLIC LAW

This series of books flows from workshops bringing public and international lawyers and public and international policy makers together for interdisciplinary discussion on selected topics and themes. It aims to broaden both public and international laws' understanding of how these two areas intersect. Until now, international and public law have mainly overlapped in discussions on how international law is implemented domestically. This series is unique in consciously bringing together public and international lawyers to consider and engage in each other's scholarship.

Series Editors

Professor Kim Rubenstein, Australian National University

Professor Thomas Pogge, Yale University

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SERIES EDITORS' PREFACE

The idea for this series began in June 2005 when Kim Rubenstein applied for the position of Professor and Director of the Centre for International and Public Law at the ANU College of Law. The Centre is recognized as the leading Australian academic centre bringing together public lawyers (constitutional and administrative law broadly, but also specific areas of government regulation) and international lawyers from around the world. Established in 1990 with its inaugural director Professor Philip Alston, the impact of the Centre and its work can be seen further at law.anu.edu.au/cipl/.

In discussing with the law faculty ideas for the Centre's direction, Kim raised the concept that underpins this series. Each volume flows from workshops bringing public and international lawyers and public and international policy makers together for interdisciplinary discussion on selected topics and themes. The workshops attract both established scholars and outstanding early scholars. At each of the workshops participants address specific questions and issues, developing each other's understandings and knowledge about public and international law and policy and the links between the disciplines as they intersect with the chosen subject. These papers are discussed and reviewed at the workshop collaboratively. After the workshop the papers are finalized for the editing phase for the overall manuscript.

The series seeks to broaden both public law and international laws' understanding of how these two areas intersect. Until now, international and public law have mainly overlapped in discussions on how international law is implemented domestically. While there is scholarship developing in the area of global administrative law, and some scholars have touched upon the principles relevant to both disciplines, the publications to date contain only a subset of the concept underpinning this series. This series is unique in consciously bringing together public and international lawyers to consider and engage in each other's scholarship.

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SERIES EDITORS' PREFACE

Beyond the first topic of sanctions, the other four topics in the series (including this second volume on health), draw from the research themes underpinning the International Alliance of Research Universities ('IARU') which is made up of the ANU, Berkeley, University of Cambridge, University of Copenhagen, ETH Zurich, National University of Singapore, Oxford University, Peking University, the University of Tokyo and Yale. The remaining three topics and volumes will be around environment, movement of people and security.

The Alliance has also supported the funding of participants from the IARU in some instances so that they can attend in person at the ANU. This does not preclude non-IARU academics from participating, as will be seen in the rich array of participants in the first two volumes.

After the first successful workshop was complete, Professor Rubenstein contacted Professor Thomas Pogge to co-host the second workshop and, in addition to doing that, he has enthusiastically joined with Professor Rubenstein as a joint series editor. His contributions to each volume are an expression of his cosmopolitan outlook, which is a theme engaged with throughout the series.

*Kim Rubenstein
and
Thomas Pogge
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EDITORS' PREFACE

As explained in the Series Editors' Preface, this series is a result of workshops bringing together public and international lawyers. From this second volume onwards, the topics revolve around the International Alliance of Research Universities' (IARU') thematic research topics.

When Kim Rubenstein began thinking about organizing the second workshop around the theme of health, she was encouraged to contact her ANU colleague Thomas Pogge in the Centre for Applied Philosophy and Public Ethics. Thomas responded enthusiastically and work began to brainstorm the call for papers.

This second workshop was entitled: 'Incentives for Global Public Health: Patent Law and Access to Essential Medicines.' This title is inspired by Professor Pogge's research programme, which explores institutional mechanisms that would create additional incentives to develop essential medicines while also ensuring real access to the resulting new products even for the world's poorest populations.

This topic provides excellent material for the themes the series is meant to explore. A majority of human beings are endangered by serious diseases for which advanced medicines are either not being developed at all or are inaccessible to them. To explain this huge healthcare deficit, we must study the relevant parts of international and public law together and examine their interplay. To judge these national and international rules – and those who formulate, promulgate and enforce them – we need to relate these rules to internationally recognized human rights and ask, for example, whether it is not a violation of human rights legally to prevent generic manufacturers from supplying essential medicines cheaply to poor patients. To lift, through institutional reforms, the great disease burden from the world's poor, we need to take a broadly holistic approach that takes advantage of the fact that innovation is cost-free at the margin: the cost of pharmaceutical R&D is the same regardless of whether access to its products is confined to the affluent or extended to

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all. The existing regime of national and international intellectual property rules can then be criticized not merely as immoral, but also as irrational insofar as there are great collective benefits to be unlocked through a more efficient system of rules governing pharmaceutical innovation.

Our workshop took place on 26–28 May 2008 at the Australian National University. The twenty paper presenters and a further eleven participants, who had read all the papers, enjoyed vigorous discussion, engaging fully with each other and the material. We thank Professor Simon Bronitt, former Director of ANU's National Europe Centre, for providing us with a dynamic venue. We thank Chikosa Banda, Clancy Kelly, Dr Luigi Palombi and Antony Taubman for presenting stimulating papers at the workshop even though they were unable to contribute to the resulting book. Dr Kieran Donaghue, Professor Peter Drahos, Associate Professor Anna George, Dr Ian Heath, Dr Janet Hope, Professor Sarah Joseph, Teresa Lawler, Hafiz Aziz ur Rehman, Dr Michael Selgelid, Professor Judy Whitworth and Renata Zanetti either participated in discussions or chaired various sessions and we thank them for their valuable contributions to the workshop. The event was ably organized by the redoubtable Kavitha Robinson.

The call for abstracts was sent out to the Law Deans of the IARU and we thank the respective universities for their support to their participants (in particular Cambridge University for supporting Chikosa Banda's travel and the National University of Singapore for supporting Elizabeth Siew-Kuan Ng's travel), and to the ANU, IARU secretariat for its support in covering the IARU participants' costs at the ANU. This was in addition to other financial support from the ANU, including the Vice Chancellor's travel fund in supporting Professor Dreyfuss and Professor Novogrodsky's participation and the remaining expenses which were split evenly between the Centre for International and Public Law and the Centre for Applied Philosophy and Public Ethics.

We are also grateful to Teresa Lawler, who was a CIPL intern at the time of the workshop and continued to help us develop the resulting papers. Special thanks are due to Trevor Moses for the effort he has put in for both volumes in the series, providing outstanding support, particularly in the final stages of bringing the entire volume together. We thank him immensely! We also thank Jennifer Braid from the ANU College of Law for her assistance in the early stages of putting this volume together, before she moved from the ANU to work at the High Court of Australia. Matthew Peterson also provided sterling research assistance. Kim and

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Thomas thank their co-editor Matthew for doing the lion's share of the day-to-day managing of the project.

And all three of us thank the staff at Cambridge University Press, and especially Finola O'Sullivan for her enthusiasm in getting this volume and series off the ground. We are grateful for Kate Ollerenshaw's impeccable copy-editing.

Finally, we would like to thank our colleagues at the ANU College of Law and the Centre for Applied Philosophy and Public Ethics and our respective families and friends for their support and inspiration in all that we do.

*Thomas Pogge,
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and
Kim Rubenstein
June 2009*