

Commission on Intellectual Property Rights

CONFERENCE

***“HOW INTELLECTUAL PROPERTY RIGHTS COULD WORK
BETTER FOR DEVELOPING COUNTRIES AND POOR
PEOPLE”***

TRANSCRIPT

**Session 1: Opening Addresses by
Hugh Laddie and Clare Short**

21st – 22nd FEBRUARY 2002

**THE ROYAL SOCIETY
6 Carlton House Terrace, London SW1Y 5AG**

SESSION 1: Introduction and Opening Addresses by Hugh Laddie and Clare Short

John Barton: Chair, Chair of the Commission

Good Morning. I am very delighted to welcome you here. I am John Barton and I have the privilege of chairing the Commission on Intellectual Property Rights. The Secretary of State, Clare Short, created the Commission in a farsighted move, and I hope it proves far-sighted, to better understand the IP issues to be dealt with by the international development community. This meeting isn't only an opportunity to explore these issues together; it is our last planned step in our fact-finding as we begin to put our report together. I will have a chance to tell you more about the Commission later after we have had an opportunity to hear from both Sir Justice Laddie and the Rt. Hon Clare Short. Justice Laddie is one of the UK's leading International Property Lawyers. He has been a judge at a High Court of Justice Chancery Division since 1995. Before that he was a QC and he has played a major role in European Patent Law, as well as UK Patent Law. I am very honoured to present him to you.

Hugh Laddie: IP Judge

Secretary of State, ladies and gentleman, I am honoured to have been invited by the Commission to be the warm up act for the Minister. I notice from the introductory notes to the conference programme that participants are required not to make inflammatory statements so I was surprised that I had been invited to address you first. Over the next two days there will be much discussion of Intellectual Property Rights, IPR's. Before addressing the purpose of this Conference, I would like to say something about those rights. To a greater or lesser extent, most countries in the world now follow the free market model competition is king. Supplies of goods and services compete with each other to attract customers and what is good for the customers is said eventually to be good for the suppliers and most importantly for the economies of the countries in which this system holds sway. It is a Darwinian model, survival of the fittest and destruction of the weakest. A good example of the benefits of competition can be seen, for example, in the case of Germany. Look at what you would get for your money if you bought a car before unification. On one side, where competition was king, you could buy a Mercedes or an Audi or a BMW or a Volkswagen and on the other, where competition was suppressed, you could buy a trabant. From our perspective in East Germany neither the customer nor the manufacturers were winners. That is the competition system that we adhere to in this country and in most countries. IPRs, of course, are intended to have a dramatic effect on the free market. In place of competition, there is monopoly. And the justification for this suppression of competition is that it is said to deliver greater long-term economic good. In some cases, important high tech industries could not exist without this suppression of competition. Now the usual but in a way extreme example of the effect of IPRs is the pharmaceutical industry. Most in the developed world accept that the increased profits obtained from high prices to be charged for patented medicines provide the pharmaceutical industry with the financial resources

to fund R&D. And it is quite simple that because of the length of time it takes both to find new drugs and to prove that they are efficacious, to prove that they are safe and to get them through regulatory approval, the cost of that and the length of time taken on the one side and the cheapness of making them in bulk on the other, without a patent system it may well be that most modern drugs would not have been developed. So, without the suppression of competition, research based pharmaceutical companies would never recover their costs. They couldn't pay back the costs of developing what they have already got and they couldn't pay for the research and development in the future. That's one example. But, of course, even if you concentrate on the effect of IPRs in the developed world, it is not as simple as this. I look at this from the perspective of someone who was a practicing barrister for 25 years in this field and have nearly 7 years experience as a patent's judge. The fact is that the benefits of patent monopolies are so great that companies don't only try to patent inventions. I have no doubt at all that if somebody thought they could get away with it, or if people thought they could get away with it, they would have a queue kilometres long outside each patent office with people trying to re-patent the wheel. That is a fact of life. I have had the benefit not just of having had experience in this field from practice but, over the last few years, I have lectured quite a lot on IP laws in the developing world. And I must say, what has struck me is the resentment, and I don't think that's too strong a word, felt in many of those countries about the methods deployed by rich countries to get them to incorporate IPRs in their domestic laws. That resentment of the methods adopted has spilt over into a deep scepticism of the motives of the developed world. On the other hand the developed world has persistently said that IPRs do you good and the more the merrier. As developing countries are frequently reminded, it is a common feature of all countries with highly developed economies and thriving high tech industries that they have highly developed IP laws and developing countries are told these two things are inseparable. The equation is simple, if you have the IP laws you will acquire the highly developed economy and the high tech industries. When I put this down in my notes for the lecture this morning, suddenly a well-known film crossed my mind. I hope I won't offend too many people here if I tell you about a film called "When Harry Met Sally". And there is in it a very well known scene. Harry and Sally were friends and there is a point where they are in a cafeteria and they are arguing about various things. And at one point Sally says I could pretend I am having an orgasm and she then proceeds to pretend that she is having an orgasm and she makes a terrific noise and throws her arms around and eventually slumps exhausted in her seat and there is silence in the rest of the cafeteria. Then a very elderly woman on an adjoining table called the waiter over and says, "Can I have whatever it was that she is eating". And it was very funny for two reasons. First of all you laugh because, isn't it silly to think that just what that woman was eating was having that effect, and secondly, it's rather droll that this very elderly woman was thinking that eating the same thing would do her as much good as obviously it was doing Sally. And in a way it illustrates something that you have to consider in relation to IPRs. It's not that we talk about IPRs as aphrodisiacs, although as a practicing lawyer I can tell you it came a close second but they certainly are put forward as a pick-me-up for the economy, and I suggest it is legitimate to ask two questions. First of all, is it true that the IPR diet gives you a developed economy and high tech industries and, secondly, if it is, is it true that all countries will benefit or benefit to the same extent? So it's a parallel, as I say, with when Harry Met Sally. It is possible to be over impressed by the arguments that IPRs are wonderful and that IPRs are terrible. The debate has

not been helped by the extreme position taken by some advocates. Let me tell you a little story. About three years ago, I was lecturing in a developing country and it was a conference that lasted three days and one of the other lecturers was a retired senior international diplomat who had very close connections with IP work and he was giving the standard lecture on IPRs are wonderful for everybody. Then somebody in the audience put up her hand and said, "Could you tell me, is it not true that if we take on board patent rights that new drugs will cost a lot more in this country". And he said, "Absolutely not, I can prove statistically that bringing in patents wont have any effect on the cost of new drugs". It was absurd to say that, because if you can't charge higher prices for new drugs, the patent system is not working. The whole point is to give a monopoly to increase your profits to pay for research and development. And that type of response, though it was an extreme example, is the sort of thing that has three bad effects. First of all, it devalues the arguments in favour of IPRs. Secondly, I think it insults the audience to which it is directed and, thirdly and perhaps most importantly, it contributes to the deep cynicism of those in the developing world who are already suspicious of IPRs and the motives behind those who promote them. Even now, there are in Europe, in Europe, intelligent, reasoned disputes as to whether we've got too many IPRs or we've got too few IPRs. There is a dispute as the moment as to whether software should be protected by patents, for example. And in my view, it is legitimate to consider whether for individual developing countries IPRs do them good, or harm, or how much good and how much harm and what the balance should be. As you may appreciate, I am **not** a member of the school that believes that all IPRs are both good and necessary to the commercial health or are of equal benefit to all people. It is likely that some are of benefit to developed countries, others not so. Furthermore, the study of history shows that they are not necessarily a pre-cursor to the economic growth of countries. There are countries that are now of great economic strength, which in their periods of youthful economic growth, showed a very marked disinclination to honour International IPRs. It is possible to argue that IPRs are more effective at preserving the technological status quo by keeping the technological high ground in the hands of those who are already occupied and it is more effective of doing that than electing new members into the high tech club. Nevertheless, at least on the developed world's side, there has been a one size fits all message and a reluctance to listen to other points of view. Occasionally, this has even gone to the extent of stifling voices of those who dissent. Whether developing countries believe the message that one size fits all and have readily accepted it or have had no choice but to accept it under pressure, that is what has been presented to them. Under TRIPS, it is what they have taken on board. The result is, as it seems to me, that the world is faced with a legal reality and a promise. The legal reality is that developing countries have implemented into their domestic laws all those IPRs set out in TRIPS. The promise persistently reiterated by the developed world is that IPRs will help to improve their economies. It seems to me that it is incumbent on the developed world to make good on its promise, which brings me to the Commission on Intellectual Property Rights and this Conference.

The Commission describes its mission in its website as follows: "The Commission has been set up by the British Government to look at how Intellectual Property Rights can work better for poor people in developing countries. It is due to report to the Secretary of State for International Development in 2002". Now I know there is a perception encouraged by the media that in this country the Government and the

judiciary are frequently in conflict. It is said that judges spend a disproportionate time trying to tell Government how to govern and politicians spend an equally disproportionate time trying to tell judges how to judge. But, after all, this may be true because this is the country that honours enthusiastic amateurs. But whatever the perception, and speaking personally, I think the Government here is to be congratulated on taking seriously the problems which developing countries may well face in implementing IPR laws. Instead of simply accepting at face value the twin articles of faith, namely all IPRs do you good and one size fits all, the Government has decided to set up the Commission and ask it to look critically at IPRs and to see how best they can be turned to the advantage of those who most need help. Perhaps I can express it in the language of the marketplace. We, who have been parties to selling IPRs to developing countries, now are offering a bit of after sales service. The Government, and particularly Clare Short, is to be applauded for trying to look at this difficult and politically sensitive issue from the viewpoint of the developing world. In my view, it is both morally and economically right to do so, but it goes further than that. To the extent that the Commission's work helps us to help the developing world, it will do good to both sides. There has never been a time when it has been more important for the developed world to act in the interests of their poorer neighbours.

Thank you very much.

John Barton

Let me add my thank you for getting this Conference off to an excellent start. I would now like to introduce the Secretary of State, Clare Short. She is an MP, has been in both the shadow Government and the existing Cabinet and most of all, has played a major role in attempting to rethink the way development policy should be conducted in an open, globalising economy and she did that by commissioning a White Paper two years ago, and by producing a paper which really provided new insights into development policy and which is being followed in the Department for International Development. We are, I hope, following in that tradition. We have clearly received a challenge to begin to deal with the IP issues the same way, but let me simply turn it over to her at this point. Thank you.

Clare Short: Secretary of State for International Development

Thank you very much and thank you for those kind words. I very much welcome this conference and welcome all of you to the Conference of the Commission on Intellectual Property Rights. I am very pleased so many people from such a wide variety of backgrounds and places have wished to be here today, because we need a more intelligent debate on the best way of organising IP rules to promote development, the sharing of knowledge and capacity across the world. There is a polarised debate, either IPRs are good for you and you've got to have them or many people, who claim to speak on behalf of developing countries, say IP law is a trap, it has been forced on you, it is bad for you, TRIPS is quote "exploitation" and you should get rid of it. When I was preparing my remarks this morning in bed, I was thinking about Marx's concept of false consciousness. I am very, very struck all the time by the enormous creativity of industrialisation at the beginning of the industrial

revolution and the parallels between that era and this. It began, really, the industrialisation in my city. You know it generated squalor and masses of poor people coming in from the countryside, living in squalid conditions, child labour, illiteracy, dirty water and so on and Blake denounced it and we still sing the hymn, but it was generating massive new wealth that had the capacity to lift up the life of the people and what you needed was a parallel political process to ensure that the wealth of that technology was used in a way that was shared by all and not monopolised by some. Now I think globalisation, with the speed with which knowledge capital can be moved around the world, is a similar global era and the question is not the technological plenty, there plenty of capital now, no shortage, there's lots of technological capacity, we've got lots of knowledge about what promotes very rapid development, but we haven't got global political institutions and global rules that share it equitably and use that opportunity to really lift up those in the world who are excluded and don't have access to the wealth that comes from that technology. I think it's a highly parallel period and I think it's not just IP rules, its trade rules, its how we organise rules on fisheries, on environment, we need to go globally in our mindset in order to have a safe world and also to ensure that the technological and capital and knowledge plenty of the era that we are living in is shared in a way that enables all of humanity to have a better life. I think the challenge is right across the board and I think we are living in a time of enormous opportunity and risk and we have in our politics worldwide, not surprisingly, a kind of intellectual lag because people are still thinking about the nation state, is the instrument of their politics and, you know, some global institutions being reluctantly necessary. To my thinking in this area, as in all others, we need to shift our mindset round in order to manage this era in a way which is both sustainable and safe for the future and more just and we might do it well and we might do it badly, and I think we are just in one of those eras when there is enormous opportunity for humanity, but also a risk and it isn't inevitable that this era will bring benefits. It is down to us politically across the world to shape the era to bring benefits to humanity. Our first speakers talked about some of the crudity with which rules on IP was pushed on the developing world and the resentment that was felt, but I am very conscious, partly because I was at Seattle, of the noisy voices that claimed to speak on behalf of the developing world that said, "You don't want the opportunities to trade, you want to be behind protected barriers, there's something noble about the sort of closeness to God and nature that people have in the developing world, a claim with a lot of emotion to speak for the interests of the poor that I think was a false consciousness and I think was speaking against their interest. So this argument goes either way. We've all got to have humility and intellectual curiosity and push out the boundaries and look, genuinely look, for rules that will enable the poor of the world to have a better life. And we are living in a world of enormous plenty, but one in five of the 6 billion of us who share the planet are still living in abject poverty in conditions of life expectancy of in their forties, lots of illiteracy, high rates of infant and child mortality, high levels of maternal mortality, 500,000 women a year die in childbirth for lack of very simple interventions and millions are permanently disabled thus generating poverty and damage in their family life and to the quality of their life. So one in five of us is still living in those conditions yet we have got the knowledge and experience that we have got, and half of humanity is living in poverty on less than \$2 a day. So this is an era of great riches, great possibility, enormous poverty and inequality. The Commission was set up in order to have a more intelligent debate and not be struck by the polarisation either way, to try to look really intelligently and honestly for a

system of IP rules across the world that would bring benefits to developing countries and would enable the poor of the world to share in the knowledge and plenty that is available in order to have a better life. And I think it is interesting, when we set out to recruit the Commission it was absolutely crucial that it be representative of people across the globe. It wouldn't be any good, would it, if it was just UK people trying to say here is a strategy for the world, but what was enormously impressive was the quality of the people who were interested in serving on the Commission and the enormous quality of the people you will meet in the course of this conference and the range of their experience and background. And that shows it was timely and there were many people thinking we need to get together and try to get this thing right and I am enormously grateful and impressed by the quality of our Commission and their willingness to serve and to travel the world and to listen carefully and to think and I gather they have started to draft the report and I look forward to enormously to the fruits of their labour. The context is, as I have said, globalisation, the capacity for capital and knowledge to flow across the world. For technology to be transferred very rapidly and it doesn't take long for a generation of people to be educated and to grow up and to share the knowledge of the world. All of this is possible but how well can we do it and how can we shape this area, not our trade rules, our rules on agriculture, our rules on fisheries, our rules on the environment and so on, but our rules on Intellectual Property to help to generate the best possible distribution of our knowledge and technology for the benefit of humanity. In my view, the question of the appropriate global framework for IP protection raises very similar and complex issues as for globalisation as a whole. This isn't one off, something where everyone works in their own sector and tends to think the challenge of environmentalism or the challenges for health etc, but actually we are facing very similar challenges right across the board in all sectors in this globalising era and it is a challenge and an excitement that if we can rise to it as a generation we could have an enormous advance for humanity. I believe that IP regimes need to be looked at in a global context, taking into account what would most benefit developing countries and poor people. There was a previous Development Minister, who said to me, a few years ago, that people who work in development think more intelligently, and he was working in development obviously, about globalisation and most others. I think there is truth in it. For example, in my Department we have been, since we were established in 1997 with a bigger remit, given the analytical capacity and the remit to think about global trade rules that would be just. And we have got in our Department of Trade and Industry dedicated public servants with enormous knowledge of trade rules but they have only ever been asked to think about the UK's trading interests, and then along come us and because if we want the poor of the world to have any chance of a decent life we have to look at the whole global system. And at first they resented us like fury, if you can imagine, and then they became very, very interested and their mindset expanded and by the time we got to Doha I think the British team acquitted our country enormously well because they had been asking themselves difficult questions. Of course, what's the global system that will include Britain's interests, but will be safe and sustainable for the planet not just how do I look after my own national interests. And I think it is on every virtual matter of public policy the mindset needs to shift in that kind of way in order to have a globe that will be better run and safer. Now in the context of IP the TRIPS Agreement, of course, has become a particular focus of concern regarded on one side as an essential underpinning of Intellectual Property Rights and on the other as an attempt to impose a framework of responsibilities by developed countries on developing

countries whose circumstances may be radically different. I am sure there will be lots of passion and discussion in the course of this conference. I hope so. But I would like to put a few points for you and the Commissioners to consider to start us off. Now whatever problems may be perceived with the TRIPS Agreement and its implementation, I think it must be accepted that the protection of IPR's has a significant role to play in stimulating investment, research and innovation in developing countries. It is notable that even before TRIPS had any impact on them there were only one or two least developed countries in Africa that did not offer patent protection on pharmaceuticals. The more technologically advanced developing countries are now, of course, enthusiastically taking out US and European patents. In my view it is neither practical nor desirable that developing countries should opt out completely of this aspect of the globalisation process. It runs the risk of marginalizing developing countries and ultimately harming poor people more than it helps them. And there are lots of poor people who speak up for their developing countries and say they shouldn't have any framework of investment law or competition law or IP protection because we have got to protect them and the other risk there is complete marginalisation, and that is a danger and a risk for some of the poorest countries in the world that globalisation will pass them by and their people will remain marginalized and impoverished. Of course, many developing countries who lack the strong scientific and technological infrastructure, it may well be that the immediate benefits of IP protection are not obvious while the immediate costs are apparent. This is a real problem as recent debates of access to medicines demonstrate. The issues are complex and I hope the Commission will help us to devise IP rule regimes that are more suited to the needs of the poorest countries. In that context, I hope the Commission will take a long-term and strategic view of what is in the interests of poor people and developing countries and help to chart a course accordingly. We also need to remember that there are flexibilities in the current system, as illustrated by the Declaration on Public Health at the Doha Ministerial Meeting, which clarifies what is permitted under TRIPS in respect of parallel importing and compulsory licensing. This was welcomed widely as an indication of political will by the international community to ensure that the TRIPS Agreement is used to support rather than thwart public health policies in developing countries. It also seems to me that we need to look at the reasons why developing countries do not make the maximum use of the flexibilities that do exist. We've both got rules on how they are interpreted, how they are policed and whether the people who could use them to their benefit understand the flexibilities and are capable of using those flexibilities for their benefit. We are, as a Department, funding a project with UNCTAD, which is seeking to provide expert guidance to developing country governments and negotiators on how they can use IP rules to their best advantage. I hope that the Commission will have something interesting to say on how the IP system can be better used to support public health policies, including the issue of compulsory licensing for export but, of course, not all countries, even if they are legally entitled to compulsory licensing, have the capacity to do that within their own country. So then, in order to exercise their right they need to make an agreement with someone else and then be able to compulsory license and import what they need from elsewhere. But it should also look at other ways in which IP systems can meaningfully support other important development policies such as improving technology transfer and stimulating local innovations. The world of IP can seem incredibly arcane to outsiders. More than most other subjects the Devil really is in the detail. (I am sure you are going to enjoy yourselves but I'm sure it is going to be

a headache too as you draft over the next few weeks and months). Some of the debates that have arisen are based on factual misunderstandings, inadequate data and a failure to analyse properly what data is available. I very much hope the Commission will contribute to a better informed debate by dispelling some of the confusions surrounding this subject and provide a state of the art analysis of the impact of IP systems on developing countries. I am sure you will, but that is a really intelligent exposition of the arguments and the alternatives will be an enormous service in itself. I am a great believer that good and authoritative analysis is an important means of moving policy forward and shifting bureaucratic mountains. I do believe that knowledge is power, especially in an era of great change. When ideas are changing we can make dreadful mistakes, unless we can get our thinking to fit the times that we are living in. I am sad that, I think because we have got more and more media outlets and more and more knowledge flowing about, respect for the truth and accuracy is lessening, just at a time when we have got great change and we need it more, we need knowledgeable discussion more than we have ever needed it and I think accuracy through the media through which knowledge flows across the world more rapidly than ever before is declining and that's a worry but we have to do what we can to get through the babble and get to the truth and continue to respect the truth. Campaigners and people who work in the media, I think everyone should be a little careful.

I'd also like to make a few specific comments in the context of the forthcoming trade round that you may like to discuss and the Commission consider. While Doha was, in my very serious view, a big step forward there is still much that needs to be resolved in the new trade round. In particular, we need to find a solution to the question of how poor countries without, as I have just said, manufacturing capacity, can exploit the flexibility in TRIPS. The TRIPS Council is supposed to find an answer to this by the end of this year. I hope that with the legal expertise at its command, the Commission could provide an authoritative analysis of the way to resolve this. I am sure you will have views and that could be very important and very influential. I also think that the Commission could be very useful in helping us understand better the development impact of geographical indications made in x, y and z and all these arguments about champagne only coming from one region in France, but South Africa not being able to export port and all of that, as you know, its all fantastically important and we have got to try to get this right and I am pretty sure that the interpretation of the current laws is quite biased and we need an intelligent discussion of that. This is a subject where views differ amongst both developed and developing countries and where the Commission could again play an enormously useful role. Another subject, which was highlighted at Doha and is specifically in the Commission's Terms of Reference, was the whole question of the relationship between formal Intellectual Property Systems, access to genetic resources and Traditional Knowledge. I think I read in the newspaper and no one has explained this to me that the Government of Iceland sold some kind of access to the genetic bank of its (pause) there will be people here who understand this but isn't that extraordinary. I would love to know why and what the potential benefits of that is, but genetic resources, Traditional Knowledge, you'll know there is an enormous passion about these matters in developing countries and we have got to get our thinking right on that too. There is plenty of scope here for good analysis to take things forward.

Finally, while we are talking specifically about IPRs at this Conference, it is important to see the subject as part of the wider context, so IP might be a necessary but not a sufficient condition. It is ludicrous to say if all you had was an IP regime and nothing else, that would guarantee your economic development, but it might be that not having one could be a barrier. It may be round that discussion that the answers probably lay. We ourselves, just as an example, are working closely with the international community and international organisations on subjects where intellectual property is part of the solution, but by no means the whole one. For instance, we are working with the World Health Organisation and the pharmaceutical industry in the UK and with representatives of the WTO also to try and facilitate some discussion and agreement on differential pricing for pharmaceuticals where IP plays a role, but there are many other considerations. We need some agreement globally, it seems to me, on differential pricing but we need some kind of partnership between the public and the private sector to use the research base that's in the private pharmaceutical sector to generate new drugs and medicines for diseases like malaria, multi drug resistant TB, HIV, AIDS and so on that is relevant and useful in the developing world where there is lots of scientific possibility, for example, microbicide that women could use to protect themselves from being infected by HIV, AIDS. The science says its really quite simple. The market doesn't produce it because those poor women don't have the material power to generate the market to bring the product to market. But what we need then is the public sector kicking in and helping to fund some of the research or the clinical trials that are necessary to bring a drug to market. We then need some kind of agreement that the private sector will help us bring it to market, because they can only do it with a kind of skill and quantity and quality that we need, but we need an agreement that they can charge different prices in richer markets than in poorer markets and then that there wont be exporting out of the poorer markets otherwise they wont get their rate of return, at least, this is the thesis on which this committee is working, that they wont get their rate of return and, therefore, wont do the research. So in understanding that there is differential pricing, they are deliberately getting their profits back from richer markets and providing drugs more cheaply into poorer markets. And we also have to agree, in our National Health Service and all our health pharmaceutical pricing systems in our countries, that if they put cheaper prices into poorer countries we don't take that into account and therefore demand a reduction in the price that we ask of the pharmaceutical companies in our own countries. But we know on top of that, if lots of these drugs were free, most of the poor of the world wouldn't get them because there aren't basic health care systems in place, so we need another partnership too with governments and with development organisations to bring in the drugs at a decent price but also to they help generate the basic healthcare systems that will deliver the drugs to the people in need. That's a new way of looking at the world. What people in the private sector can bring, what developing country governments can bring, what public sector development institutions can bring, and the kind of leadership and support that developing countries can bring in. So it seems to me the answers are lying in partnerships like that that bring public, private, international, local together in new ways and new partnerships. Its complex but its doable. We are living in an era when enormous advance is possible. My greatest fear is that we will fail to reach out for what is possible for the world and we will have a world of ever growing inequality, poverty and suffering at a time when knowledge is distributed across the world more fully than ever before, so the poor of the world see

how the rest live and become more and more angry and frustrated and that will be an..... – **end of tape.**

John Barton

The Secretary of State, Clare Short and Justice Laddie have given us both a challenge and have set a tone for us for this meeting. Let me begin by introducing my colleagues, Daniel Alexander, an IP barrister here in the UK, Carlos Correa, Professor of Economics at the University of Buenos Aires in Argentina, Raghunath Mashelkar, Director General of Council for Scientific and Industrial Research in New Delhi, Gill Samuels, Senior Director of Science Policy and Scientific Affairs at Pfizer and Sandy Thomas, Director of the Nuffield Council on Bioethics here in London and in my other life I am a Law Professor at Stanford University in California and I should add we have an excellent Secretariat also, headed by Charles Clift who is sitting next to me and comes from the Department for International Development. It has been a joy and a privilege to work with this group of people. We are doing the best we can with our mandate. We decided early on that the task was not to find a compromise among all the pressures that are pushing in this area but to do the best we could to find out what is really happening in the world and to develop our recommendations based on the real needs and understandings that we find. A real effort at evidence based recommendations. We have been to a number of developing nations. We have visited members of at least seven governments in their offices and talked with many more in our meetings here. We have talked with officials from the European Union, from WIPO and the WTO, with industry and the critics of industry. We have talked with lawyers, economists and historians and we have held eight small workshops here in London, many based on Commission papers. The sessions here at this Conference will generally follow the same subjects as the workshops and will give us a chance to obtain broader input and ask questions on points on which we hope to obtain help. In each area, we have asked speakers to give us all a number of starting points. We will then turn to comments and questions, including our questions. Depending on whether there are two or three speakers we are asking the speakers to hold themselves to ten or fifteen minutes and questions from the floor to be restricted to three minutes. We are, indeed, recording the Conference and will produce a report from this. I want to add one more point about our sense of what we hope to accomplish here before turning it over for any questions you may have for The Secretary of State or Justice Laddie. I think it is very easy to criticise the existing IP system and to say that one or another part should be reformed. It is hard to describe possible reforms, to produce constructive suggestions that are detailed enough for us to actually evaluate them and to develop the facts to evaluate which of these proposals make sense. Hence, we are especially interested in concepts for constructive reform, the hard ideas needed for reform and the facts that will help us in evaluating them. We look forward to our discussions and any further thoughts and materials that you may be able to give us.

Thank you very much for taking your time with us today and tomorrow.

With that as background to give you a sense of the Commission and what we hope to do these two days, I will open it up to any questions you may have for either of our honoured speakers.

Jamie Love: CPTech (NGO), USA

This is in response to both the comments by Justice Laddie and also Clare Short. The whole idea that this one size fits all makes sense, I think in some sense to us one of the problems is the cost of resolving disputes and the difficulty in developing countries. Justice Laddie made some reference to the long line of people that seek IP claims that are sometimes not justified. Those are obviously very expensive to litigate. Even getting compulsory licensing can be expensive if you take a European Patent Law or the UK legal traditions you are imposing on an African country. In the South Africa compulsory licensing case that is cruelly going on, a company told me that they have to spend US\$750 per hour to be in a courtroom to litigate a compulsory licensing request and if they lose they have to pay the other side's legal fees. Now, in the trademark area on the Internet when big companies had a problem protecting their trademarks in cyberspace, they galvanised WIPO to create an alternative dispute resolution process to give people rough, fast and cheap justice, so that they didn't have to burn up huge amounts of the corporate resources to protect their trademarks and domain names. And they are very proud at WIPO with this system and they have called in a new patent agenda for new applications of ADRs and suggestions for what view and some of the suggestions they had would created an alternative dispute resolution process, particularly like regional type systems that could be the administrative workup on a compulsory license as is currently done for patents. Patents themselves are filed in many African countries through a regional patent office that does the workup and it goes into effect if you don't reject it at the office. So they are redoing the patent filing that way but if you did the compulsory licensing workup that way you would actually lower the cost and the presumption that the procedural stuff was all done right and you'd get the job done. I think the reason that it is not getting done is that there are 6,000 people dying a day of AIDS and the fast gap between the cost of the brand of the generic versions of drugs like combivir which is patented in 37 African countries. But those things aren't really as pressing a problem to the technical assistance people in the world global organisations like WIPO as the problem IBM had in pursuing and protecting its trademark interest in domain names. So what I would like to know is can you support the call people have made to WIPO to create a compulsory licensing system that is TRIPS consistent, that actually gets the job done and works and people can afford? Thank you.

Hugh Laddie

About four years ago I was lecturing for WIPO in New Delhi at a meeting of judges, and there was an extremely clever Malaysian judge, Bill Shanker, who has now retired from the court of appeal, and he said "You know, in TRIPS it says that all countries should put in place provisions which would allow IPRs to be enforced at reasonable cost. Tell me do you think the UK and America are complying with their

obligations.” He had heard that it was very expensive to litigate these things in the UK and US. As a former patent barrister I felt a bit embarrassed. There are two separate things. First of all its getting the balance right, that is the substantive law right, making sure that TRIPS doesn't become a ball and chain to developing countries but actually helps developing countries. That's the substantive law. Secondly, is the matter of how you put into operation the legal system that you put in place. And that's what Mr Love is talking about, more the second point. That actually does involve looking rather carefully at procedures and trying to find ways that enable you to resolve disputes quickly and cheaply. I am afraid to say, looking at this from a UK judge's perspective, I don't think we are in a terribly strong position in advancing ideas from our own experience and how to make procedures cheap and fast. I think we would learn as much, or more than most, from any suggestions on how to make litigation or procedures cheaper and faster.

Clare Short

I would like to add another point. Obviously we have got to get the framework of law conceptually right. Make it feasible for countries to come into the system when it is beneficial to them in the right kind of structures and then enforce them. It is better to have a rule of law than no rule of law. Without a rule of law the bullies and the rich dominate, we know that. But you can have a rule of law the poor can afford. We have that issue in our own countries. And we had an enormous argument about setting up the legal advisory centre in the WTO to function alongside the WTO, so that developing countries could get their legal rights through the WTO. The UK negotiates all its WTO positions through the European Union. It's a familiar concept here, a law centre funded by the Government or the local authority, so that poor people who can't afford a lawyer or would be scared to go and see one can go and get some advice and get their entitlement through the legal system and it was exactly the same kind of concept in a number of countries agreeing to fund it. It was someone in South America who first proposed it, the Columbian Ambassador to the WTO, I think. But we came in behind it and thought this was absolutely about poor countries being able to exercise their rights. The European Unions said “What, you are going to provide aid money so that poor countries could take a legal action against us.” And they were horrified and we had an enormous battle, and said that in our country murderers get help from the taxpayer to represent themselves in the courts. We've got there now, but its very interesting all of this and it is part of the discussion, both getting the framework right and then the countries can use it properly and their rights will be in practice protected. But we can do it. But I haven't heard about the WIPO simple system, but that sounds like a good idea and I would like to know more about it.

John Barton

The same issue occurs if you are a scientist in a developing country. Maybe you can afford to file a patent in the US or Europe, you certainly can't afford to litigate it.

Michael Blakeney: University of London

This question is for the Minister about national interest and IP. In 1967, the developing countries sought to have a protocol added to the Berne Convention to protect IPRs in relation to Folklore. The UK Government led the opposition to the incorporation of that protocol. This was resuscitated in 1971 in Stockholm and again the UK Government distinguished itself from among all delegations in opposing that. This was again revived in 1996 in a meeting in Phuket. Again other UK representatives took a pretty negative position on recognising IPRs in Folklore. I had the occasion to speak to one of the UK delegates and I asked what does the UK have to lose in recognising IPRs in folklore and he said to me, "That's the wrong question. The question is what do we have to gain. And the answer is nothing." Does the creation of this Commission indicate that the UK Government might be adopting a new perspective of national interest in relation to Intellectual Property Rights?

Clare Short

I think the answer to your question was in some of the remarks I tried to make earlier. And it's not just the UK. Most nations have looked at all our global institutions narrowly from the immediate self-interest of their own nation, but we all have an interest in an equitable, sustainable and just set of global rules. It isn't true that the UK should just look to its own selfish and immediate self-interest and its actually protecting its self-interest even. The UK has an interest in a fair system and this is a mindset shift that is primed to find its way through the international system in relation to.. *(pause) then goes on:...* we all know, for example, that when we didn't have rules that encouraged world trade, we got ourselves the 1930s and the horrendous world depression that generated Hitler and the rest. So after the Second World War, we got the GATs negotiating reduction in tariffs and that's broadly good for humanity to not have very high tariffs, because led us to the 1930's. But it was big rich countries and blocks that dominated the GATs, so it was fundamentally a good thing, but it was hardly inclusive and then when we got the establishment of the World Trade Organisation at the end of the Uruguay round with decisions to be made by consensus countries in membership, one country one say and I think we had a profound shift to a more democratic system, but having rights and being able to exercise them isn't the same things. Countries then need the capacity to send out their negotiators to have some sense of their interests and we need more and more of our countries to be looking at our self interest in a global system that's equitable. Now in our Government, this argument is going on and the strength that is being given to my Department, you know the story I told of the change in the Department of Trade and Industry and it really is remarkable how much leading figures in that Department who have now retired hated my Department starting to have a say on what the UK should advocate in international trade negotiations and daring to say that we should think about the interests of other countries but over a period of four or five years we now have a Department that is quite enthusiastically embraced. That shift in mindset doesn't mean we don't have battles about particular instances and I think this isn't just the UK. This is the very kind of shift to the globalising world that we need to manage in a different way, but I think we have all got to make right across the world. So I cannot account for '67, I was having rather a nice time with a young person in the 60s, but we are changing now I can assure you.

John Lindsay: Kingston University

The Government is often reported as saying that poor people not only have rights but that they have obligations. So my question is to Clare Short. It seems fairly obvious to me that in the context of health, for example, I have an obligation to manage my own health, but I therefore need to be informed about what is going to promote my health and what is going to be against the interests of my health. So if we are going to defend IPRs for organisations, and we are dependent on a system of nation states, so to do, wouldn't it seem reasonable that we, therefore, need to have a framework of IP obligations that are incurred as a consequence of being able to achieve those rights?

Clare Short

Well, most of the very poorest people in the world have access to very, very poor healthcare and spend, as all the studies show, a very high proportion of their very tiny incomes purchasing very poor quality healthcare. The principle you elaborate is fine, but it is making that real for people. Of course, we have global systems that are not fair, global distribution of income and knowledge that isn't fair and we've often got very poor governments in poor countries with very rich and powerful elites who don't have a deep concern about the poor of their country. If you look across the world at the poorest countries at levels of health spending and the distribution of health spending, you will often find the elite in the capital wants a state-of-the-art modern hospital and the whole of the international communities more and more mobile and expects that at home, and the rural poor have no healthcare systems whatsoever. So clearly morally what you say is we all have rights and obligations and everybody has entitlements, the very conceptual base of the Universal Declaration of Human Rights written just after the Second World War says everyone has a right to healthcare. It describes the conditions that every human being needs to fundamentally enjoy their humanity and says that every country and all of us as citizens of the world have a duty to do all in our power to bring about the realisation of all these rights for all people and the obligations for first on the country in which people live. But that's the conceptual base and that's really my answer to you, but there are a lot of players in the system and we are now in a position to say put on HIV/AIDS drugs, partly because of the campaigns, partly because of the science and the price coming down, that very cheap drugs are available in the international system, but most poor people have got no chance of getting hold of them, and so the campaign to embarrass the pharmaceuticals into saying they would deliver them was successful, but it is not delivering to poor people. So you are right in principle, but making that real means building just and competent states across the world, which is really what international development should be now, not charitable handouts but creating competent transparent states and institutions that will deliver to their people wherever those people might live.

David Bramley: World Health Organisation

I particularly liked Justice Laddie's warm up act, as he called it, and when I get home I am certainly going to be renting the video "When Harry Met Sally" to seek more inspiration on this subject. I have a question, however, for Clare Short. You talked about the technological and knowledge plenty and you compared the situation today with the industrial revolution and, I think, one of the comments you made was that we really don't have the global institutions at the moment to share that technological and knowledge plenty, it stays in one place, perhaps in the West, and if it is shared its maybe shared with the media, which may not be the most reliable way of sharing it. I wondered if you could say anything more about that, particularly about the future of global institutions in this area, whether you yourself had any thoughts about that. You are not a profit I guess, but I assume you have some views?

Clare Short

Some people sit around designing perfect structures of global architecture to rule this era and that's an interesting thing to do and people should do it, but in my profession I am more interested in trying to shape the world that we are in in a way that can deliver in the relatively near term to people. And I do believe that we can modify our existing global institutions to deliver more readily. There is a major reform and enhancement of the institution in which you work taking place. The leadership from the top and the ideas and analysis is now superb and impressive. The WHO recently commissioned a very important and seminal study that demonstrates clearly that investing in basic healthcare for poor people promotes much more rapid economic development. It isn't something that you afford only out of economic development. The poor get ill, but being ill impoverishes you and, therefore, impoverishes your nation. There is one example. But the delivery mechanisms of the WHO across the world could be strengthened. They have the capacity to ensure that countries put those primary healthcare systems in place. So there's the UN system, very precious. With all the development organisations that really need to be made more coherent, more effective, more output driven. We are working on all of that. I think the WTO is a very precious global institution because of this one country one vote, decisions by consensus. No Security Council even. Seattle was completely wrong in denouncing the institution. The GATs had been much less democratic. That doesn't mean countries are realising their power but I think we saw in Doha the beginning of countries realising their power through their institutions, so I think that is a good structure for trade rules. My great fear is that it will break down and the rich regional blocks will find it easier to make their own bilateral and regional deals. We need to preserve The World Bank and the IMF but change the interpretation of successful economic policy to be a systematic and measurable reduction of poverty because that's the purpose of encouraging economic reform and so on. That's where I am coming from. I think if the world would just ask itself the question, "How do we manage this era, how do we strengthen and build on the global institutions we have and can't we all see that both morally and in our self interest we need to manage the world more equitably." I think we could make enormous gains and I think most of public opinion wants that, certainly in this country, but I think much of the rhetoric is all about blame, division, that its not possible, that poverty is getting outrageously worse which it actually isn't globally but we've got more people than ever so we need to do better. I think we need to use the institutions we've got, change our mindset about what the challenge is and then look for positive outcomes

rather than denouncing each other about injustices that then don't bring forward any solutions. That is my hope and I think we can do it if we can generate more positive energy. And your institution has an important part to play.

Martin Khor: Third World Network (NGO), Malaysia

I would like to congratulate Justice Laddie for his very stimulating speech and also Secretary of State, Clare Short, for her comments but especially for establishing this Commission. As you point out, I think there is a lot of concern worldwide on whether the IPR system is meeting the needs of the poor and also the developing countries. I think all of us share the view that IPRs are needed. There is justification for it. The question is whether the balance is right between the owner, the IPR and the consumer, and between the owner, the IPR and other producers, especially smaller firms and between the rich and the poor countries and we hope the Commission is trying to address whether this kind of balance has been struck and whether this balance is being undermined by systems like the TRIPS Agreement that perhaps makes it much more difficult for the appropriate levels and types of IPRs that may be appropriate for different countries at different times in their history. For example, many of the rich countries, when they were at a stage of development, did not have the kind of strict standards that are now required by the developing countries. I would like to raise two or three points. One is, of course, the whole issue of consumer access to basic needs like medicines, which has been made more difficult by the high level IPRs that we are now seeing. The second is whether the small producers, especially in developing countries, can absorb modern technology as the companies, for example, in Japan or Switzerland or even Germany did when they were at the stage of development, because they did not have either strict IPRs or they could exclude certain things like pharmaceutical drugs and chemicals from their IP system right until the 1970s or 1980s. And finally, whether the poor countries, because of their having now to take on patents, for example, for medicines, for food and so on which they could have excluded earlier but, at the same time, as Justice Laddie has said, many companies will try to patent what are not inventions if they are given the chance to do so and, of course, this is the issue of bio piracy that has arisen, that things that are not inventions are now being asked to be patented or to be compulsorily patented under the micro organisms part of Article 27.3b. My final question really is the issue of the TRIPS and its role. Because TRIPS, due to its being put in an organisation with TRIPS sanctions, is a very convenient vehicle by which the high standards IPRs in TRIPS is disseminated to the developing countries in an inappropriate way. I don't know whether you read the recent letter by Jagdish Bhagwati who is, of course, the doyen of free trade economists and at that time the advisor to the Director General of the WTO and he has said that, at that time, during the Uruguay round we, including himself, he was the advisor, were turning the WTO, thanks to powerful lobbies, into a royalty collection agency by pretending, through continuous propaganda that our media bought into, that somehow the issue of IPRs was trade related. Today he is saying that the TRIPS Agreement should not belong to the WTO but should be taken out because it has been inappropriately put in under the guise that it was trade related. Thank you very much.

Clare Short

Martin is one of those people who were at Seattle and didn't think the WTO was any good and didn't think there should be any rules. He sincerely believes all this. I think his policies would lead to the marginalisation of the poorest countries. I completely disagree with him. (*Inaudible exchange between Clare Short and Martin Khor*).

Hugh Laddie

The one word that came out of Mr Khor's intervention which I think is important is the word "balance", getting the balance right and that is the one of the wonderful underlying principles of the establishment of this Commission. If you look at the world from the point of view of just the patent owners you view it one way, and if you look at it from the point of view simply of the poor countries you will view it another way, and drugs are an extremely good example. We all know that high priced drugs are out of the reach of poor countries. The simple solution is to say "Oh well, there shouldn't be any patents for drugs", but then you don't get any drugs. You have got to find a method of meeting in the middle the interests of both sides, so that there is not a warfare with some people saying, "Everybody's got to do the same thing" and other people saying "We won't do anything at all." You've got to try to find a middle ground, and that is exactly what the Commission, I think is the great strength of the Commission, is trying to let voices from different ends of the spectrum be heard, to find something which is tolerable for all and of benefit to all.

Felix Addor: Swiss Federal Institute of IP

I have a question to John Barton on the agenda of the Commission. Having seen that the Commission is identifying nine main topics, I am asking why is the geographical indication issue not discussed in relation to this general problem. As you may know, this is an issue that is debated at the TRIPS Council and there is, for once, no sales gap between the countries which are in favour of an extension of protection for geographical indication or which are against such an extension. I am deeply convinced that this is an issue being in the interest of all countries of the world and that there is a lot of relation to the Traditional Knowledge problem because both the geographical indications and the Traditional Knowledge would preserve interests of a group of owners of knowledge and no chance of an individual. So I would be very much interested in knowing why this is not in and whether there is a possibility to discuss this issue too. Thank you very much.

John Barton

As I understood it, this is one of the areas that, in fact, we are considering. This is not in our discussion and, indeed, exactly the points you mentioned of the relation between geographic indicators are terms like basmati rice and patents in the United States on basmati rice, all these are parts of the issues that are before us. It is also clear that there are significant differences within the developing world as to what the

appropriate response is to the geographic indicators question. That's one specific part of the issue. It has all kinds of parts to it.

Maureen Duffy: British Copyrights Council and Author

I wanted to ask the Commission, and I hope the answer is a strong yes, whether it will be also considering the value of copyright to developing countries in preserving cultural diversity against the dangerously globalising and potentially sterile monoculture that we might perhaps wish to impose economically from the developed countries.

John Barton

This is one we are certainly facing in terms of what the future of copyright should be in questions like the Internet and everything of that type. We are clearly also facing the questions of traditional knowledge, folklore, sacred knowledge. Now, how far are we going to be able to go to say a particular copyright regime contributes to a particular structure of the media industries throughout the world? At some point I think we are going to get caught in the uncertainties of what is going to be predictable. But, certainly, you will see this afternoon when we are going to be talking about copyright and also traditionally knowledge, we are seriously considering certainly the core issues on all the associated questions and then the sets of questions for owning access to copyright and educational material, data base kind of data, what happens with the Internet as the Internet becomes a basic medium of distribution of information throughout the world. It seems to me that these issues are currently a portion of our remit. As I will say, when I have the privilege of chairing that session, it is the pharmaceutical issue which, of course, has been politically in the peoples' minds right now. It isn't at all clear to me that there won't be another issue that's going to be the important one in five years and I think we would make a terrible mistake if we didn't at least try to provide some warnings and some guidelines for some of the issues that we think are coming up.

Clare Short

I just want to say in all these issues we should look for positive ways forward. It is so easy to concentrate on what's wrong and the dangers and the divisions, but the challenge for our generation is to find some answers and drive this forward and share the knowledge and technology that we have got in the world and I am convinced we can find ways forward and I am enormously grateful for the work you have done and look forward to the outcome.

John Barton

We are certainly aware and are grateful for the opportunity. Thank you for starting us off today.

