

HEALTH AS A TRADE ISSUE: HOW THE CAMPAIGN FOR SOUTH AFRICAN ACCESS BROUGHT THE RIGHT TO HEALTH TO THE WORLD TRADE ORGANIZATION (WTO)

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ABSTRACT

Transnational advocacy networks played a crucial role in the acceptance of the right to health as a trade concern that takes precedence over intellectual property (IP) protections. The development and influence of this norm is reflected in international responses to the 1998-2001 South African litigation over access to medicines. In the process of pressuring an army of pharmaceutical firms to back down from an unjust legal challenge, the transnational advocacy network surrounding access to AIDS medicines transformed the case from a largely trade-focused issue to a human rights issue. The right to health was thus brought to the world of international trade.

“[N]o priority should be given to health over intellectual property considerations...”

European Commission Directorate General in response to WHO’s Revised Drug Strategy, October 5, 1998

“If the industry did seriously think it could reap large rewards from the poor, then presumably it would be busy producing medicines for developing country diseases – which everyone here agrees it abjectly fails to do... Focus on prices and patents and you miss the real issues... We need to keep new medicines coming on stream through the pipeline. I would argue that you don’t get that through tinkering with TRIPS.”

David Earnshaw, Director of European Government Affairs and Public Policy for SmithKline Beecham, at the 1999 Amsterdam Conference on Increasing Access to Essential Drugs, November 29, 1999

its Medicines and Related Substances Control Act in 1997, its healthcare system was dangerously poorly equipped to address the spread of HIV/AIDS.¹ A legacy of the apartheid era, the racially bifurcated system made access to medicines highly unequal, with wealthy whites the only demographic able to afford the small, exorbitantly priced stock of antiretroviral drugs (ARVs) available, even when the country had one of the highest rates of HIV infection in the world.² The South African amendment aimed to help the country cope with the growing AIDS crisis by permitting compulsory licensing and parallel imports, which allowed certain drugs to be manufactured locally and others to be imported from the cheapest sources available internationally.³ This effort to increase access to affordable medicines was framed by patent-holding pharmaceutical companies as a theft of their intellectual property (herein IP) and a threat to the profits needed to fund future innovation.⁴ In February of 1998, the South African

1 Lisa Forman, “A Transformative Power?” Order No. NR27989, University of Toronto (Canada), 2007. <http://search.proquest.com/docview/304751804?accountid=14771>. 269. See also: Alison Brysk, *Human Rights and Private Wrongs*, New York: Routledge, 2005, 95.

2 Alison Brysk, *Human Rights and Private Wrongs*, 95.

3 Ibid. Parallel imports may be done without the permission of the patent-holder, undermining tiered pricing mechanisms. See also: Ellen ‘t Hoen, “TRIPS, Pharmaceutical Patents and Access to Essential Medicines: Seattle, Doha and Beyond,” *Medecins Sans Frontieres Access Campaign*, July 24, 2003, 43. http://www.msfaccess.org/sites/default/files/MSF_assets/Access/Docs/ACCESS_article_TRIPSPatentsDohaBeyond_ENG_2003.pdf.

4 Susan K. Sell . and Aseem Prakash. “Using Ideas Strategically: The Contest between Business and NGO Networks in Intellectual Property Rights.” *International Studies Quarterly* 48:1 (2004): 160. http://resolver.scholarsportal.info/resolve/00208833/v48i0001/143_uistcbnniipr.xml. See also Ellen ‘t Hoen, “TRIPS, Pharmaceutical Patents and Access to Essential Medicines,” *Medecins Sans Frontieres Access Campaign*, 48.

Pharmaceutical Manufacturers Association and 40 international pharmaceutical companies took legal action against the South African government in order to have the law repealed on the grounds that it violated the South African Constitution and article 27 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).⁵ Though the plaintiffs initially had the support of their home governments, this support was gradually reduced over time as public outrage mounted against the lawsuit, directed by the efforts of a transnational advocacy network of NGOs and patients' rights groups (herein NGO network).⁶ By April 19, 2001, the pharmaceutical companies terminated their legal action after the steadily escalating public relations crisis culminated in protests in 30 cities across the globe.⁷ The leaders of the NGO network framed their position on the South African case in the context of a new standard in international trade, one in which the right to health takes precedence over IP protection.⁸ By emphasizing the links between the right to

health, access to medicines, and drug patents, the NGO network was able to frame the South African amendment as supportive of patients, rather than destructive of patents.

In her work on norm development, Annika Björkdahl indicates that the influence of norms in international relations can be determined by examining patterns of behaviour and rhetoric in a given area.⁹ In this way, the impact of the emergence of the norm of the right to health taking precedence over IP protection can be seen reflected in changes to the US response to the case over time. The change in the way the US pursued the case against South Africa's alleged TRIPS violation changed to reflect the emergence and acceptance of the right to health as a trade concern that takes precedence over intellectual property protection, and serves as a barometer for the norm's development up to and following the legal battle.

Before TRIPS, intellectual property disputes were either handled domestically within countries or brought to the World Intellectual Property Organization (WIPO), but these were deemed insufficient by companies who believed that WIPO supported developing country policies at their expense, causing them to lose market share and profits abroad due to weak IP protections throughout the 1970s and 80s.¹⁰ In the 1980s, a network of corporations with an interest in a strong, coherent set of internationally binding IP protections began to link IP to fair trade, innovation, and prevention of counterfeiting and piracy, and pushed the US government to strengthen its stance against IP violations both domestically and around the world.¹¹ These efforts succeeded in part because many groups and commissions responsible for advising the US government on trade issues were headed by the leaders of

port-struggle-medicines-south-africa.

⁹ Annika Björkdahl, "Norms in International Relations: Some Conceptual and Methodological Reflections," *Cambridge Review of International Affairs* 15:1 (2002), 19; <http://go.utlib.ca/cat/7692839>.

¹⁰ Susan K. Sell and Aseem Prakash. "Using Ideas Strategically," 158. http://resolver.scholarsportal.info/resolve/00208833/v48i0001/143_uistcbnniipr.xml.

¹¹ Sell, Susan K. and Aseem Prakash. "Using Ideas Strategically," 155. http://resolver.scholarsportal.info/resolve/00208833/v48i0001/143_uistcbnniipr.xml.

5 Article 27 states that "patents shall be available and patent rights enjoyable without discrimination as to the place of invention... and whether products are imported or locally produced." General Agreement on Tariffs and Trade. *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on April 15, 1994. Accessed March 25, 2015. https://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPS.

6 Ellen 't Hoen, "TRIPS, Pharmaceutical Patents and Access to Essential Medicines," 43. The number of companies was reduced to 39 after a merger.

7 Alison Brysk, *Human Rights and Private Wrongs*, 96; Rachel L Swarns, "Drug Makers Drop South Africa Suit over AIDS Drugs," *The New York Times*, April 20, 2001. <http://www.nytimes.com/2001/04/20/world/drug-makers-drop-south-africa-suit-over-aids-medicine.html>; "5 March 2001: International Day of Action against Pharmaceutical Company Profiteering," *Treatment Action Campaign*, Accessed March 27, 2015. <http://www.tac.org.za/Documents/Other/mar5act.htm>; "Aids Activists Disrupt AI Gore's Announcement Of Presidential Candidacy: Protestors Demand Global Access To Anti-HIV Drugs And An End To Vice-President's Bullying Of South Africa" ACT UP, Accessed March 27, 2015. <http://www.actupny.org/actions/gorezaps.html>.

8 "39 Drug Companies vs South Africa: People die for lack of affordable drugs as inhumane industry ignores reality," MSF Access Campaign, March 5, 2001, <http://www.msfacecess.org/about-us/media-room/press-releases/39-drug-companies-vs-south-africa-people-die-lack-affordable>; "Drop the Case! Support the Struggle for Medicines in South Africa." March 8, 2001. <http://www.msfacecess.org/about-us/media-room/press-releases/drop-case-sup>

IP-reliant companies, like the Advisory Committee for Trade Negotiations (ACTN), which was chaired by the CEO of Pfizer, and which created a task force on intellectual property rights (herein IPRs) that included the leaders of IBM, Merck & Co, and the Motion Picture Association.¹² This created greater opportunity for interest groups with IP concerns to gain influence over US policy.

In 1984, the International Intellectual Property Alliance (IIPA) was formed to represent 1,500 IP-reliant companies under eight trade associations in lobbying for amendments to the 1974 Trade Act, making the case for IP protection as a matter of fairness in international trade, and arguing that the US economy was losing billions of dollars to counterfeiting, piracy, and unfair foreign laws.¹³ The IIPA, partnering with the Pharmaceutical Manufacturers of America, also argued that IP protections were necessary to promote innovation sustainably in the future.¹⁴ Throughout the late 1980s, a series of domestic and international actions were taken to promote greater IP protection in international trade.¹⁵ Domestically, the US made several amendments to Section 301 of its 1974 Trade Act to allow for the US Trade Representative (USTR) to impose restrictions on foreign governments whose policies restrict IP protections, and added a “Special 301” provision that requires the USTR to identify and report on countries whose policies create inadequate IP protection, listing the worst violators as “Priority Foreign Countries” and putting them on watch lists for potential sanctions.¹⁶ These changes extended

beyond American borders with the inclusion of IP matters on the agenda of the Uruguay Round of trade negotiations at the General Agreement on Tariffs and Trade (GATT), which culminated in the inclusion of TRIPS in an annex of the Marrakesh Agreement Establishing the World Trade Organization in 1994.¹⁷ The TRIPS Agreement, by establishing common international standards for IP protection, facilitated what the US was doing with the 301 mechanism, pressuring countries to repeal unfavourable policies in order to improve conditions for US companies operating abroad.¹⁸ The Pharmaceutical Research and Manufacturers in America (PhRMA) brought the South African amendment to discussions of bilateral trade between the US and South Africa, putting pressure on the American government to take a strong stance against parallel importation and other perceived violations of intellectual property rights and compelling the US Trade Representative (USTR) to put South Africa on a 301 watch list that made the country easier to sanction.¹⁹ Further, in October of 1998, a law was passed in the US that conditioned development assistance on whether steps were being taken to repeal the Amendment act.²⁰

In his work on the influence of norms on state behaviour, Audie Klotz highlights the role of non-state actors and transnational movements in driving norm development.²¹ The spread of HIV/

cial 301 watch lists to put sanction threats on developing countries like India, Brazil, Thailand, and Taiwan, whose emerging pharmaceutical sectors were beginning to compete with American ones for market share. See: Lisa Forman, “A Transformative Power?” 2007. 87-88. See also Alan Dunn and Bill Fennell to the Film and Television Action Committee, April 23, 2004, http://ftac.net/7-Special_301.pdf.

17 General Agreement on Tariffs and Trade. *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on April 15, 1994. Accessed March 25, 2015. https://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPs.

18 Susan K. Sell . and Aseem Prakash, “Using Ideas Strategically,” 159.

19 William W Fisher III, and Cyril Rigamonti, “The South Africa AIDS Controversy,” 7.

20 Ibid. 7-8.

21 Audie Klotz, “Norms reconstituting interests: global racial equality and U.S. sanctions against South Africa,” *International Organization* 49:3 (1995), 452; <http://go.utlib.ca/cat/7719858>.

12 To help build their case, ACTN made use of a paper commissioned by IMB CEO John Opel and written by an economist named Jacques Gorlin to frame IP protections as a necessary part of setting trade standards. See Susan K. Sell and Aseem Prakash, “Using Ideas Strategically,” 156, 158.

13 The 309 percent trade deficit between 1980 and 1985 may have made the US more open to taking measures to protect trade. Sell, Susan K. and Aseem Prakash, “Using Ideas Strategically,” 156. See also: Preslava Stoeva, *New Norms and Knowledge in World Politics: Protecting People, Intellectual Property and the Environment*, New York: Routledge, 2010, 92.

14 Susan K. Sell . and Aseem Prakash, “Using Ideas Strategically,” 156. See also: Preslava Stoeva, *New Norms and Knowledge in World Politics*, 92.

15 Preslava Stoeva, *New Norms and Knowledge in World Politics*, 94.

16 After these amendments, the USTR made use of the Spe-

AIDS was an experience shared across the world, and access to antiretroviral drugs (ARVs) to treat the disease was central to the transnational movement that brought an end to the South African suit, resonating with the concerns of AIDS patients and their advocates everywhere.²² The NGO-led transnational advocacy network against the South African case founded their opposition to the suit on the right to health, which necessitates access to essential medicines.²³ The NGO network leveraged this existing norm's relevance in the South African case and linked the right to health to TRIPS implementation in their campaign. In South Africa, local groups established the Treatment Action Campaign (TAC), who attended the case as an *amicus curiae*²⁴ to frame the suit as a matter of profits being put before people while raising awareness publicly.²⁵ Abroad, MSF/Doctors without Borders led the Access Campaign, a multinational coalition that lobbied for the suit, as well as drug prices, to be dropped.²⁶ By connecting with relevant authorities, running public education initiatives, and making appeals to the existing normative framework, activist groups were able to effectively challenge the po-

sition of the pharmaceutical companies and generate support for the supremacy of the right to health over IP concerns.²⁷

Activists appealed to the existing normative framework, which included the right to health as embodied in Article 25 of the Universal Declaration of Human Rights, and drew connections between the right to health and trade-related aspects of IP in the context of access to AIDS medications in the South African case.²⁸ The South African amendment, which was first framed in terms of a theft of property and a barrier to innovation, would be framed as a matter of human equality and the right to health, norms that fit tightly within the existing normative framework in the US and the international community. The NGO network loosened support for the suit by framing the position of the pharmaceutical companies as being based on greed, as opposed to support for future innovations. The NGO network weakened the case for patents being the "lifblood"²⁹ of the pharmaceutical industry by seeking out information regarding whether or not it was truly feasible to reduce the price of drugs, concluding that much of the USD 10,000 price tag attached to a year's supply of HIV/AIDS medicines was unnecessary mark-up, as evidenced by Cipla, an Indian drug manufacturer that was willing to offer the same treatment for just USD 350.³⁰

Alongside efforts to undermine the pharmaceutical manufacturers' case through fact-finding, the NGO network made use of its resources, including its high-profile members such as Ralph

22 The co-founder of ACT UP, Eric Sawyer, was both an AIDS patient and a patient advocate who lobbied American Congress for better research funding and better drugs. See Sabin Russell, "New Crusade to Lower AIDS Drug Costs/ Africa's needs at odds with firms' profit motives," *SF Gate*, May 24, 1999. <http://www.sfgate.com/health/article/New-Crusade-To-Lower-AIDS-Drug-Costs-Africa-s-2929307.php>.

23 "Pharmaceutical Industry Must Stop Obstructing Access to Medicine in South Africa," MSF Access Campaign, Mar 1, 2001.

24 A friend of the court – a party with an interest in influencing the outcome of a legal action who offers valuable information or expertise without being a party to the case. See: "Amicus Curiae," Legal Information Institute, Accessed April 1, 2015. https://www.law.cornell.edu/wex/amicus_curiae.

25 Lisa Forman, "A Transformative Power?" 2007, 280.

26 Alison Brysk, *Human Rights and Private Wrongs*, 96. The Access Campaign, which brought together MSF, Oxfam, TAC, Health Action International (HAI), the Consumer Project on Technology (CPT), and numerous other groups, took the right to health to the trade negotiations table, highlighting TRIPS flexibilities and emphasizing that the right to health ought to take precedence over the right to patent protection. See Colin McInnes et al, *The Transformation of Global Health Governance*, New York: Palgrave Macmillan, 2014, 83.

27 The founders of CPT drew attention to their findings that many drug companies, notably Bristol-Myers Squibb, relied heavily on public funding in the research and development of new drugs. See Preslava Stoeva, "New Norms and Knowledge in World Politics," 92; and Susan K. Sell and Aseem Prakash, "Using Ideas Strategically," 164.

28 Ellen 't Hoen, "TRIPS, Pharmaceutical Patents and Access to Essential Medicines," 2003, 61.

29 As David Warr, associate director of tax and trade for drug maker Bristol-Myers Squibb put it. Sabin Russell, "New Crusade to Lower AIDS Drug Costs/ Africa's needs at odds with firms' profit motives," 1999.

30 Susan K. Sell .and Aseem Prakash, "Using Ideas Strategically," 162.

Nader, to get the attention of relevant authorities.³¹ In 1998, the leading NGOs in the network attended World Health Assembly (WHA), where they introduced some of their normative ideas, with the WHA quickly passing a new resolution supporting the idea that trade agreements should not threaten equitable access to medications.³² This validated the new norm and gave the network authority to spread it further.³³ The 2000 American presidential elections also offered an opportunity to raise the profile of the access to medicines issue in US policy.³⁴ Al Gore, who began his presidential campaign with a negative stance on the Amendment Act and the hope of winning campaign contributions from PhRMA, had a number of his campaign appearances visited by noisy protesters bearing slogans such as “Gore is killing Africans – AIDS drugs now.”³⁵ Soon after, Gore sent a letter to the Black Congressional Caucus indicating that a change of policy was in order, and that he supported the South African Amendment Act.³⁶

The NGO network also staged numerous public events and conferences, including one in Amsterdam in 1999 to parallel the World Trade Organization’s (WTO) Seattle ministerial meeting, which attracted activists and lobbyists from 50 countries, and produced a public statement that called for greater consideration of the impact of trade policies on health in developing countries, and for a working group to be established in the WTO to address TRIPS and access to medicines.³⁷ Over time, the network won further support

from the World Health Organization (WHO), who brought together the WHA to discuss a revised drug strategy in May of 1999.³⁸ Upon learning about the possibility of a revised drug strategy paving the way for future weakening of patent protections, the US sent not health policy experts, but trade negotiators to the discussions.³⁹ The NGO network predicted that this would happen, and met in advance to prepare their own negotiators to deliberate, bringing in evidence of compulsory licensing practices within the US that made the USTR’s position seem hypocritical.⁴⁰ On March 5, 2001, TAC led an international day of action against pharmaceutical profiteering that was joined by protest groups in a dozen countries.⁴¹ On March 8, MSF began circling an international petition calling on the plaintiffs to drop the suit.⁴² The petition garnered 250,000 signatures in a little over a month as MSF persuaded the EU, Dutch, German, and French governments to withdraw support for the suit and call for it to be dropped.⁴³ Throughout, the WHO helped provide legal assistance to aid South Africa’s defense, and Nelson Mandela’s criticisms of the plaintiffs made world news.⁴⁴

Throughout 1999, the US government removed South Africa from its watch lists and stopped pressures to repeal the amendment, while South Africa in turn assured the USTR that it would implement Section 15C in accordance with what was permitted by TRIPS.⁴⁵ In the same year, South Africa was removed from the Special 301 watch list, and at the WTO Ministerial in Seattle, President

31 Nader led the Consumer Project on Technology and was Al Gore’s political rival in the 2000 presidential bid. See Susan K. Sell and Aseem Prakash, “Using Ideas Strategically,” 162.

32 Ibid. 163.

33 Ibid. 163.

34 Ibid. 164.

35 “Aids Activists Disrupt Al Gore’s Announcement Of Presidential Candidacy: Protestors Demand Global Access To Anti-HIV Drugs And An End To Vice-President’s Bullying Of South Africa” ACT UP, Accessed March 27, 2015. <http://www.actupny.org/actions/gorezaps.html>. See also: Susan K. Sell and Aseem Prakash, “Using Ideas Strategically,” 165.

36 William W Fisher III, and Cyril Rigamonti, “The South Africa AIDS Controversy,” 8.

37 Ellen ‘t Hoen, “TRIPS, Pharmaceutical Patents and Ac-

cess to Essential Medicines,” 2003, 46.

38 Susan Sell and Aseem Prakash, “Using Ideas Strategically,” 163.

39 Susan Sell and Aseem Prakash, “Using Ideas Strategically,” 163-4.

40 Check Mate! Ibid.

41 “International Day of Action,” Treatment Action Campaign. Accessed March 27, 2015. <http://www.tac.org.za/Documents/Other/mar5act.htm>.

42 “Drop the Case! Support the Struggle for Medicines in South Africa.” *MSF Access Campaign*, March 8, 2001.

43 Lisa Forman, “A Transformative Power?” 2007, 286.

44 Ibid. 286.

45 William W Fisher III, and Cyril Rigamonti, “The South Africa AIDS Controversy,” 9.

Bill Clinton publicly announced plans to change US policy to improve access to AIDS medications in Africa, along with plans for the USTR to work more closely with the Department of Health and Human Services to ensure that US IP policy would become “flexible enough to respond to legitimate public health crises.”⁴⁶ Soon after, in May 2000, Clinton issued executive order 13155, which prohibited the US from seeking “through negotiation or otherwise, the revocation of any intellectual property law or policy of a beneficiary sub-Saharan African country, as determines by the President, that regulates HIV/AIDS pharmaceuticals or medical technologies.”⁴⁷ This represents a complete reversal of the US’s stance on the South African case and is indicative of a response to the normative pressures leveraged by the NGO network and the widespread public support it had gained for its cause.

After all this, the pharmaceutical companies capitulated, agreeing to end the suit and to cover South Africa’s legal expenses.⁴⁸ Leading up to the withdrawal, the CEO of GlaxoSmithKline met with UN Secretary General Kofi Annan to help broker a deal with the President of South Africa on behalf of the pharmaceutical group, with the EU and WHO firmly supporting South Africa.⁴⁹ With South African agreement to ensure TRIPS compliance moving forward, the lawsuit was dropped and AIDS activists celebrated the success of their efforts to frame the conflict as a matter of corporate greed impinging on the right to health for the poor.⁵⁰

Throughout the proceedings, the norm of the right to health taking precedence over intellectual property protection had emerged and been developed to reach a critical mass of support internationally. The NGO network used a variety of means to

create pressures from above, such as those created by WHA validation, and pressures from below, in the form of public protest and lobbying, which, given widespread support for the norm, reversed the US’s stance on the issue, bringing the norm to its tipping point into acceptance. According to the reflections of the 2004 president of the International Federation of Pharmaceutical Manufacturers and Associations on the reputation of the pharmaceutical industry, the AIDS epidemic was accompanied by the first conflict in which organized groups of patients and their supporters confronted companies about how much they would be allowed to charge for medications.⁵¹ This normative victory is reflected well in the provisions for global health and HIV/AIDS medicines in the Doha Declaration, which links the right to health to intellectual property and international trade, granting WTO members the right to grant compulsory licenses, permission to allow parallel imports, and the freedom to determine what constitutes a public health emergency that would justify making use of TRIPS flexibility⁵². The TRIPS agreement’s Article 30 permitted compulsory licensing in emergencies, but it was only after the Doha Ministerial in 2001 that public health crises were explicitly included as a national emergency that warranted Article 30 protection.⁵³ The acceptance of the right to health as an issue that warrants a place at the table in trade negotiations was explicit at Doha, which represented the institutionalization of the norm of the precedence of health over IP concerns, indicating that never again would violators be able to take for granted the unqualified support of their home government or of the WTO where their IP interests clashed with the health needs of a population.

46 Susan K. Sell . and Aseem Prakash, “Using Ideas Strategically,” 166. See also: William Clinton, Remarks to the luncheon in honor of the Ministers attending the Meeting of the World Trade Organization, December 1, 1999, White House Office of the Press Secretary, Found online at: <http://www.staff.city.ac.uk/p.willetts/PIE-DOCS/CLNT1299.HTM>.

47 See 65 Federal Register 30521 (May 10, 2000). <https://federalregister.gov/a/00-12177>.

48 William W Fisher III, and Cyril Rigamonti, “The South Africa AIDS Controversy,” 9.

49 Ibid. 9.

50 Ibid. 10.

51 William W Fisher III, and Cyril Rigamonti, “The South Africa AIDS Controversy,” 19.

52 William W Fisher III, and Cyril Rigamonti, “The South Africa AIDS Controversy,” 15.

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