

Spring 2002

International Intellectual Property, Access to Health Care, and Human Rights: South Africa v. United States

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Recommended Citation

Winston P. Nagan, *International Intellectual Property, Access to Health Care, and Human Rights: South Africa v. United States*, 14 Fla. J. Int'l L. 155 (2002), available at <http://scholarship.law.ufl.edu/facultypub/596>

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INTERNATIONAL INTELLECTUAL PROPERTY, ACCESS TO
HEALTH CARE, AND HUMAN RIGHTS:
SOUTH AFRICA v. UNITED STATES

*Winston P. Nagan**

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I. INTRODUCTION**

A PATENT IS NOT A HUNTING LICENSE¹

As early as 1841, Justice Story, America's most sophisticated thinker on private international law, directed his formidable power of analysis to the nature of legal institutions and the juristic character of intellectual property. According to Story, "Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent."² Intellectual property claims and entitlements in the context of global health care concerns may well be the burial ground of Justice Story's evanescent property distinctions.³

** Although there is an internal discourse on this topic within South Africa, this Article is only concerned with the international intellectual property implications of South Africa's AIDS crisis.

1. *Brenner v. Manson*, 383 U.S. 519, 535 (1966).

2. *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901) (Story, Cir. J.).

3. Under the U.N. Charter system, general international law and international economic order have traveled in parallel, but not always complementary, trajectories. Politics and economics are specialized matters, and their scientific and intellectual universes are both distinct and discrete. The U.N. Charter's major purposes are primarily matters of international peace and security. However, the U.N. Charter also contains a hidden assumption that peace and security are important bases for the achievement of other global world priorities, such as respect for the rule of law, human rights, global economic equity, development, and progress. If the mandate of general international law was unclear about the interdependence of peace, political economy, and human rights, the key institutions of Western economic order sought to insulate players such as the International Monetary Fund and the World Bank from being contaminated by both world politics and general international law. In contrast, newly emancipated states were strident in defending their permanent sovereignty over their natural resources and sought to integrate a new economic global agenda. Labeled the North-South Discourse and rooted in general international law, this novel economic agenda was the center piece of a new world order framework.

The demise of the U.S.S.R. weakened the new model of international economic order as the forces of globalism, emerging markets, and the political culture (which separates law and politics from economic ordering) gained ascendancy. The new battleground is the requirement that globalism and its neo-liberal animating principles have a human face; a face that has a political and juridical side to it. As the AIDS crisis affects development and human rights issues, this condition has surfaced explicitly. Not only does this problem concern general international law and the world order, it also impels us to re-examine global economic ordering in light of the U.N. Charter's broader mandates, values, policies, and imperatives. A fortiori, it is true that there are strong tendencies to insulate trade law in international law and intellectual property law, particularly from the broader values of global, constitutional, and public order. In a modest way, this Article seeks to bridge that gap. See generally James Thuo Gathii, *Rights, Patents, Markets and the Global AIDS*

When we consider that the economic consequences of globalization amount to a process of political and economic ordering, a particular statistic stands out. Over the past thirty years the disparity between the richest and poorest parts of the planet has doubled.⁴ The poorest one-fifth of the planet receives 1.4% of the global income; the richest one-fifth of the planet receives 85% of the world's income.⁵ This widening gap significantly exacerbates the problem of the practical realization of the economic, social, and cultural rights which are part of the International Bill of Rights⁶ and a vital component of the aspiration to universal dignity in the promise of human rights for all. According to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997): "It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights."⁷

These economic, social, and cultural rights are thought to include obligations that the state respect (no arbitrary deprivations), protect (secure them as existent rights), and fulfill them in terms of reasonable — attainable expectations.⁸ Health care and property interests are also a part of the idea of socio-economic entitlements as human rights priorities.⁹ International intellectual property law, when serving as a complement to these socio-economic norms, can facilitate the effective realization of these rights. Once conceived in terms of special versus common interest standards, and construed apart from the strictures of human rights law and basic morality, intellectual property law may functionally serve only the few, causing the detriment of the many.

The AIDS crisis of sub-Saharan Africa has served as the lightning rod for a broader point of conflict between the haves of the developed societies and the have-nots of the underdeveloped world. The AIDS crisis is a health care crisis. According to the findings of the United Nations and the

Pandemic 14 FLA. J. INT'L L. 261 (2002); Shubha Ghosh, *Pills, Patents, and Power: State Creation of Gray Markets as a Limit on Patent Rights*, 14 FLA. J. INT'L L. 217 (2002).

4. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, § I(1), Jan. 22-26, 1997, available at <http://www.law.uu.nl/english/sim/instr/maastricht.asp> [hereinafter Maastricht Guidelines].

5. *Id.*

6. The International Bill of Rights consists of three international agreements: 1) Universal Declaration of Human Rights; 2) International Covenant on Civil and Political Rights; and 3) International Covenant on Economic, Social, and Cultural Rights.

7. Maastricht Guidelines, *supra* note 4, at § I(4).

8. *See id.* at § II(6).

9. *See id.* at § II(7).

World Health Organization (WHO), twenty-eight million people currently have AIDS in sub-Saharan Africa, where it is the leading cause of death.¹⁰ In 2001 alone, 3.4 million sub-Saharan Africans were infected with HIV/AIDS, while an estimated 2.3 million died of AIDS in the same region.¹¹ These figures illustrate the world's gravest AIDS epidemic.¹²

This high death rate is no mystery. Widespread personal and public impoverishment or regional poverty make it virtually impossible for individual patients to afford AIDS drugs and states do not have sufficient public resources to provide drug therapy as a public health obligation. South Africa, a country which has experienced an astonishing political and juridical transformation, finds itself facing a health crisis as the AIDS epidemic infects millions of its newly enfranchised citizens. As South Africa considered its public health options, the United States watched the evolution of South Africa's AIDS policy with growing apprehension verging on outright hostility. Because Section 15(C) of the South Africa Medicines Act¹³ permitted the South African Minister of Health to take measures to protect the public health, the U.S. congressional and executive branches reacted by designating South Africa a Section 301 Priority Watch State.¹⁴ Actions by the United States and interested pharmaceutical corporations implied that South Africa was in violation of international intellectual property law. Two issues not specifically addressed were:

10. AIDS Epidemic Update — Dec. 2001, Joint U.N. Programme on HIV/AIDS (UNAIDS) and the World Health Organization, *available at* UNAIDS/01.74E-WHO/CDS/CSR/NCS/2001.2, at 1 [hereinafter UNAIDS Update].

11. *Id.* at 14. This statistic is a gross estimate because many AIDS deaths in Africa are not reported. Moreover, deaths caused by AIDS-related opportunistic diseases, such as malaria and tuberculosis, are rarely reported as having been associated with AIDS.

12. *Id.*

13. S. Afr. Medicines and Related Substances Control Act No. 101 of 1965, Amendment No. 70, Section 15(C) (1997), *available at* <http://lists.essential.org/pipermail/pharm-policy/2001-January/000607.html> [hereinafter Section 15(C) of the S. Afr. Medicines Act]; *see also infra* text accompanying note 34.

14. Press Release, Office of the U.S. Trade Representative, U.S.T.R. Announces Results of Special 301 Annual Review (Apr. 30, 1999) (placing South Africa on the United States's Special 301 Watch List, because it was infringing on TRIPS). However, in December 1999, the U.S. Trade Representative formally announced that it was removing South Africa from the Special 301 Watch List after the countries had reached an understanding whereby South Africa reaffirmed its obligations under TRIPS, and the United States agreed to help address South Africa's health issues. Press Release, Office of the U.S. Trade Representative, The Protection of Intellectual Property and Health Policy (Dec. 1, 1999).

- (1) Whether the United States would consider the South African legislation permitting the Minister to authorize parallel imports¹⁵ of certain pharmaceutical drugs a violation of international law; and
- (2) Whether the Minister's broad power to authorize either parallel imports or compulsory licensing¹⁶ of essential pharmaceutical drugs would be a violation of international law.¹⁷

These issues are not only important for the specific matter of HIV/AIDS drugs. In a broader sense, they also question whether other essential drugs, available in generic form or as a result of international norms governing parallel imports and compulsory licensing practices, might undermine the economic foundations of intellectual property law itself. Even more importantly, these issues raise questions about the relationship of intellectual property law to international human rights law, and to international law in general. The problem, as it relates to South Africa, has also implicated important domestic law issues (as current litigation indicates),¹⁸ such as the constitutional basis of administrative

15. The AIDS Law Project defines "parallel imports" as "importing a drug or product from another country where it is sold cheaper than in the local market with the permission of the patent holder." AIDS Law Project, *We Can Use Compulsory Licensing and Parallel Imports: A South African Case Study*, available at <http://www.hri.ca/partners/alp/tac/license.shtml> (last visited Dec. 12, 2001) [hereinafter AIDS Law Project].

16. "Compulsory licensing refers to an order by a court or government body that allows any person or the government to use a patent legally without permission from the patent holder in the public interest." *Id.* Basically, compulsory licensing is used and warranted to broaden access to intellectual property in order to advance legitimate public interests. However, because international intellectual property rights are created in the public interest via state law, it is only logical that they be limited by state law also adopted in the public interest. The Paris Convention for the Protection of Industrial Property clearly holds that, "Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work." Paris Convention for the Protection of Industrial Property, July 14, 1967, art. 5(2), 21 U.S.T. 1538, 828 U.N.T.S. 305 [hereinafter Paris Convention]. TRIPS provides for compulsory licensing, but restricts its use. TRIPS, *infra* note 21, art. 31. NAFTA also permits compulsory licensing, although it appears to limit the state more than TRIPS. See North American Free Trade Agreement, Dec. 17, 1992, art. 1709, 107 Stat. 2057, 32 I.L.M. 289 [hereinafter NAFTA].

17. "Compulsory licensing and parallel imports are tools that must be considered by all governments, generic manufacturers, and health activists to promote access to essential medicines." AIDS Law Project, *supra* note 15.

18. Pharm. Mfrs. Ass'n v. President of the Republic of S. Afr., No. 4183/98 (Transvaal Provincial Div., filed Feb. 18, 1998) (whereby forty-two global pharmaceutical corporations brought suit against South Africa in an attempt to prevent the country's granting of compulsory licenses on their AIDS medications via Section 15(C)).

justice,¹⁹ the nature and scope of the property clause of the South African Constitution²⁰ and how far and to what extent that clause may be conditioned by the right to health (a constitutional and human right), as well as by general human rights standards. Therefore, the challenge that AIDS in a developing society poses is extraordinarily rich in both complexity and potential for clarifying the meaning and scope of the relevant law in ways that reconcile contending interests, and yet elucidate the common concern of the larger international community.

This Article examines the question of access to patented medicines in international law. It analyzes the extent to which international agreements may lawfully limit affordable versions of these medicines that may be available through parallel imports or compulsory licensing procedures. It considers the concept of intellectual property rights from a national and international perspective to determine how these rights must be sensitive to matters of national sovereignty when extraordinary, life-threatening diseases afflict societies in catastrophic ways. This Article suggests that viewing property (including intellectual property) as a human right requires that its scope be delimited and understood in the context of other human rights. In short, property and human rights should be understood as complementary, rather than antagonistic ideas. This Article also reviews the Agreement on Trade-Related Aspects of Intellectual Property Rights

19. S. AFR. CONST. ch. II, § 33 (Just Administrative Action):

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effects to these rights, and must
 - a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - c. promote an efficient administration.

20. *Id.* at ch. II, § 25. The property clause of South Africa's Constitution (market driven and induced compensation; willing seller-willing buyer) has always been in the interests of the historically advantaged, and necessarily disadvantaging the poor.

(TRIPS)²¹ in light of the contemporary standards of construction and interpretation applicable to agreements of international human rights law.

II. AIDS AND WORLD PUBLIC ORDER — THE RELEVANT CONTEXT

AIDS is a disease of pandemic proportions. There is, as yet, no cure for it and the best that science can offer is that its symptoms will be sufficiently suppressed in order for the patient to lead a relatively normal life. AIDS medicines are expensive and their regimens are somewhat complex. The most important population fact about AIDS is that it is a catastrophic plague often analogized to the Black Death in Medieval Europe. The disease is unevenly distributed worldwide and bears a strong correlation to poverty and underdevelopment. For example, it is estimated that close to 1.3 billion people on the planet live on less than one U.S. dollar per day.²² On the other hand, the developed, prosperous, mainly Western democracies, hold twenty percent of the Earth's population, and nonetheless consume eighty percent of the world's resources.²³ These figures would probably be mirrored in the context of the consumption of medical goods. Moreover, studies estimate that every three seconds a child dies of diseases whose causes are rooted in endemic poverty.²⁴

Approximately, thirteen million people die annually from infectious diseases, many of which are effectually Third World diseases.²⁵ Because they are Third World diseases, they do not represent a lucrative market for global pharmaceutical corporations to invest the necessary resources to secure their control or elimination. Thus, for example, a recent report in the *Bangkok Post* stated, "The production of drugs for diseases like African sleeping sickness has been stopped because it is a major problem for people in developing countries, who are not a major source of revenue for pharmaceutical business."²⁶

21. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, art. 31, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994), available at <http://www.wto.org> [hereinafter TRIPS].

22. WORLD HEALTH ORGANIZATION, REPORT ON INFECTIOUS DISEASES: REMOVING OBSTACLES TO HEALTHY DEVELOPMENT, ch. 1, WHO/CDS/99.1 (1999) [hereinafter WHO]; see also SELECT COMM. ON INT'L DEV., SEVENTH REPORT, 1999, Minutes of Evidence, Mar. 23, 1999, at #338.

23. See *Earth Summit +5*, U.N. GAOR, Special Sess., at "Consumption," U.N. Doc. DPI/SD/1910 (1997).

24. UNICEF, STATE OF THE WORLD'S CHILDREN 2000 (2000).

25. WHO, *supra* note 22.

26. *The High Costs of Free Trade*, BANGKOK POST, Feb. 12, 2000.

Other notorious diseases have similarly fallen into the pharmaceutical vacuum of inaction. For instance, malaria, elephantiasis, dengue fever, and others, ravage Third World countries, but the unprofitability of producing cures and vaccines has discouraged any appropriate, therapeutic, medical actions. This of course, raises a complex question about the conceptual justification of why the patent holders' exclusive right to property is almost exclusively protected. It is because of the assumed policy that the incentive of such protection will stimulate greater research and therapeutic benefits for the public in the long run. However, when we come to the issue of AIDS, the figures are absolutely alarming. Currently, forty million people live with HIV, a disease that is proven to be highly infectious.²⁷ When this fact is considered, the conceptual justification for the patent holder's exclusive protection weakens and possibly breaks down because the incentive to innovate while denying public access to the innovation has no therapeutic benefit for the world community at large.

If the AIDS pandemic has taught us anything, it is that AIDS is no respecter of territorial boundaries. It is, therefore, in the national interest of every state to pursue all possible measures to arrest the spread of AIDS through education and to help the victims of AIDS in leading relatively normal lives. This not only makes medical and economic sense, but is also the politically wise policy. Moreover, subsidiary infections like tuberculosis are also highly contagious and carry the added risk of drug-resistant strains that do not respect territorial boundaries as well.

Recent statistics indicate that sub-Saharan Africa accounts for twenty-eight million of the earth's AIDS patients.²⁸ Since the region represents one of the poorest areas of the world, the impact of AIDS is catastrophic. Although efforts are made at community-wide education,²⁹ the fact is that access to AIDS medications in the current economic structure is derisory. In South Africa, within a short period, millions of citizens have been infected with AIDS and estimates indicate that the loss of these human resources will increase poverty, potentially causing the South African economy to lose approximately twenty percent of its GDP within twenty years.³⁰ This does not take into account that under current pricing mechanisms, affordable AIDS drugs are simply not available to those South African citizens who need them.

27. UNAIDS Update, *supra* note 10, at 1.

28. *Id.* at 2.

29. For example, in Uganda slogans like "Zero Grazing" and more focused forms of public and civic education have helped bring some degree of control over the spread of AIDS.

30. See UNAIDS Update, *supra* note 10, at 7.

The problem that AIDS presents for South Africa is paradigmatic of the AIDS pandemic's impact on other underdeveloped or emerging market economies globally. Within South Africa, twenty percent of the adult population and twenty percent of pregnant woman have tested HIV-positive, with the black population experiencing the brunt of this plague.³¹ As a result, South Africa has the world's fastest growing HIV infection rate.³² It is therefore important that we examine carefully how South Africa has sought to respond to the AIDS crisis and whether its response is consistent with its responsibilities, obligations, and rights under international law.

The most important element of conflict in regards to South Africa's bilateral relationship with the United States lies in the scope of patent protection under general and specific international law; in particular, the international obligations under relevant treaty law, especially TRIPS, as well as the general obligations under international law. These are matters of great controversy and the legal issues they encompass are complex with the stakes being extraordinarily high.

III. SOUTH AFRICA RESPONDS TO THE AIDS CRISIS

There are essentially two ways in which states might respond to the issue of access to AIDS drugs on an affordable basis. These strategies are well known in patent law and are variously described as compulsory licensing and parallel imports. Both schemes are technically permissible under TRIPS and related international intellectual property instruments,³³ but neither are unqualified. Current South African legislation effectually empowers its Minister of Health to use both parallel imports and compulsory licensing to protect the public health. In 1997, South Africa amended its basic statute regulating medicines, namely the South African Medicines and Related Substances Control Act No. 101 of 1965. The amendment to this act, specifically Section 15(C), was viewed with alarm by pharmaceutical multinationals. And in turn, these multinational special interests brought pressure on the U.S. administration to provide a vigorous and effective response to the threat that Section 15(C) posed. Because the

31. See South Africa: Epidemiological Fact Sheets on HIV/AIDS and Sexually Transmitted Infections — 2000 Update (revised), Joint U.N. Programme on HIV/AIDS (UNAIDS) and the World Health Organization, at 3-4.

32. Patrick Bond, *Globalization, Pharmaceutical Pricing and South African Health Policy: Managing Confrontation with U.S. Firms and Politicians*, 29 INT'L J. OF HEALTH SERVS. 1, n.4 (1999).

33. TRIPS, *supra* note 21, arts. 6, 28, 31; Paris Convention, *supra* note 16, arts. A.1, 2; NAFTA, *supra* note 16, art. 1709.

legal battle lines have thus been drawn around Section 15(C), that section is reproduced in full as follows:

Section 15(C)

The minister may prescribe conditions for the supply of more affordable medicines in certain circumstances so as to protect the health of the public, and in particular may —

1. notwithstanding anything to the contrary contained in the Patents Act, 1978 (Act. No. 57 of 1978), determine that the rights with regard to any medicine under a patent granted in the Republic shall not extend to acts in respect of such medicine which has been put onto the market by the owner of the medicine, or with his or her consent; prescribe the conditions on which any medicine which is identical in composition, meets the same quality standard and is intended to have the same proprietary name as that of another medicine already registered in the Republic, but which is imported by a person other than the person who is the holder of the registration certificate of the medicine already registered and which originates from any site of manufacture of the original manufacturer as approved by the council in the prescribed manner, may be imported;
2. prescribe the registration procedure for, as well as the use of, the medicine referred to in paragraph (b).³⁴

In December 1997, forty-two pharmaceutical corporations joined the South African Pharmaceutical Manufacturers Association and filed a law suit in the High Court of South Africa.³⁵ Claiming that Section 15(C) violated South African intellectual property law, the South African Constitution, and TRIPS, the plaintiffs sought an interdict³⁶ to prevent the Minister of Health from implementing Section 15(C).³⁷ Although the suit was put on hold for a short period while the parties sought a settlement, it ultimately resumed when the settlement attempt failed.³⁸

34. Section 15(C) of the S. Afr. Medicines Act, *supra* note 13.

35. Pharm. Mfrs. Ass'n v. President of the Republic of S. Afr., No. 4183/98 (Transvaal Provincial Div., filed Feb. 18, 1998).

36. An interdict is roughly equivalent to an injunction.

37. Pharm. Mfrs. Ass'n, No. 4183/98.

38. However, on April 19, 2000, facing immense international pressure, the pharmaceutical corporations dropped their lawsuit against South Africa. *Drug Firms Drop Their Attack on SA Law*, STAR (S. Afr.), Apr. 19, 2001, at 1; Andrew Pollack, *Defensive Drug Industry: Fueling Clash over Patents*, N.Y. TIMES, Apr. 20, 2001, at A6; Ann Simmons & Bruce Japsen, *Firms Clear Way for Cheaper AIDS Drugs; S. Africa Patent Suit Dropped*, CHI. TRIB., Apr. 20, 2001, at 4.

To persuade South Africa to repeal the legislation, the U.S. government responded vigorously, involving the U.S. executive branch, the U.S. Trade Representative, the U.S. Patent and Trademark Office and the U.S. Congress. The U.S. response was equivalent to what in basketball is known as a “full court press.” To illustrate, the U.S. Trade Representative stated in her report on this matter: “We call on the Government of South Africa to bring its [intellectual property rights] regime into full compliance with TRIPS before the January 1, 2000 deadline . . . and clarify that the powers granted in the Medicines Act are consistent with its international obligations and will not be used to weaken or abrogate pharmaceutical patent protection.”³⁹ The U.S. Trade Representative also indicated that in its view, the act “appear[ed] to grant the Health Minister ill defined authority to issue compulsory licenses, authorized parallel imports, and potentially otherwise abrogate patent rights.”⁴⁰

On June 25, 1999, Vice-President Al Gore appeared to take the sting out of the U.S. trade policy regarding access to affordable, essential medicines in impoverished nations. Addressing South Africa, the Vice-President declared, “I support South Africa’s efforts to enhance health care for its people — including efforts to engage in compulsory licensing and parallel importing of pharmaceuticals — so long as they were done in a way consistent with international agreements.”⁴¹ But this concession must be given a stricter level of scrutiny. The central point of the concession was substantially related to the U.S. Trade Representative’s constructions of the relevant TRIPS provisions. Indeed, public interest groups charitably considered U.S. interpretations as controversial. However, a closer reading of the relevant international agreements clearly demonstrates that the United States had gone beyond Justice Story’s evanescent view of property distinctions, which are difficult to discern in the patent context.

The first and most unambiguous point is that, on their face, parallel imports are generally not prohibited by TRIPS.⁴² There are two relevant articles: Articles 28 and 6. Article 28 holds that the patent owner has exclusive rights to import a product into a country.⁴³ But, inelegant as the term “exclusive” is, it is subject to Article 6.⁴⁴ That is to say, exclusivity is conditioned on Article 6. And under Article 6, if a patent is sold and a

39. U.S.T.R. Announces Results of Special 301 Annual Review, *supra* note 14.

40. *Id.*

41. Letter from Al Gore, Vice-President, United States, to James E. Clyburn, Chairman, Congressional Black Caucus, U.S. House of Representatives (June 25, 1999).

42. TRIPS, *supra* note 21, art. 28.

43. *Id.* art. 28(1)(a).

44. *Id.*

country deems the selling to be exhaustive of exclusivity (the first sale principle), then the state's decision to resort to parallel imports is not subject to sanctions under the World Trade Organization (WTO) agreement or the WTO's dispute resolution institutions.⁴⁵ In short, parallel imports are licit under TRIPS. Moreover, they are valid under domestic U.S. patent law and are common practice in the European Union. Thus, if the United States seeks to impose some form of bilateral sanctioning against South Africa, it must make its case under general international law and not under the *lex specialis* of international intellectual property law.

The other area of legal dispute relates to the issue of compulsory licensing. From the perspective of the pharmaceutical corporations, a state's ability, under both domestic and international law, to issue a compulsory license for a patent to a third party is a major loophole in the international protection of patent rights. Such compulsory licensing conflicts with the notion of exclusivity covering patent holders' ostensible property interests.⁴⁶ According to the U.S. Patent and Trademark Office, Article 31 of TRIPS must be narrowly construed or it will effectively undermine the international security of patent-holder interests.

Representing the U.S. Patent and Trademark Office, Lois Boland stated that the practice of compulsory licensing must be strictly limited to situations of market failure, or when the state has officially declared a state of emergency.⁴⁷ In short, only these circumstances qualify as exceptional and make a state's use of compulsory licensing lawful in international law.⁴⁸ Ms. Boland has also claimed that, under TRIPS (Article 31), invoking the power of compulsory licensure requires an "authorization" that "shall be considered on its individual merits."⁴⁹ This latter principle is a more plausible argument in the context of South Africa's internal regime, which requires that the exercise of administrative competence be accompanied by supporting reasons. Having conceded this point, it is unclear whether this standard is fully defined in practice under TRIPS, or

45. *Id.* art. 6.

46. Taking intellectual property in international law is usually done lawfully by fair use exclusions and compulsory licenses. However, when used to place and expand restrictions on the patent holder, such exceptions to the Western ideology of private property in international law become points of trade tension and conflict. These mechanisms test the limits of a state's public interests on the one hand, and the scope of private ownership rights in intellectual property on the other.

47. U.S. Pat. and Trademark Off. Rep. Lois Boland, Presentation at an NGO meeting in Geneva (Mar. 26, 1999).

48. *Id.*

49. *Id.*; see also TRIPS, *supra* note 21, art. 31(a).

whether it must be evaluated and appraised under general international law standards.

Under Article 31, a state has the competence to issue licenses of patents to third parties.⁵⁰ In normal practice, the state will establish standards for patent owners to obtain royalties. Clearly, South Africa and most states in the health care context will routinely do this. In South Africa specifically, the setting of reasonable royalties would find support in the new constitution's property clause.⁵¹ Furthermore, Article 31 also provides other safeguards to reasonably protect patent owners' interests.⁵² However, WTO rules permit the sovereign a very broad measure of discretion in issuing compulsory licenses. According to the WTO, Member states are not constrained on the reasons with which they may grant a license without the patent holder's authorization. In actuality, only the Member state's choice of procedure is regulated.

Nevertheless, the position, as expressed by the U.S. Patent and Trademark Office, does not represent U.S. practice. Examples given by critics of the U.S. position include the compulsory licensing provisions of the Clean Air Act (42 U.S.C.S. § 7608)⁵³ and compulsory licensing patents concerning nuclear energy.⁵⁴ Also, European practice does not support this position.⁵⁵ Moreover, to effectively give its people access to HIV/AIDS drugs, Brazil has also frequently employed the compulsory licensing technique.⁵⁶ Perhaps it is a sufficient comment on the U.S. position that President Clinton's Executive Order lets the United States off the hook on a hypocritical and unpopular, not to say fanciful, construction of the *lex specialis* of intellectual property in this matter.⁵⁷ Even more importantly, although President Bush sought a review of Clinton's executive order

50. TRIPS, *supra* note 21, art. 31.

51. S. AFR. CONST. *supra* note 19, at ch. II, § 25.

52. TRIPS, *supra* note 21, art. 31(b-j).

53. Clean Air Act, 42 U.S.C.S. § 7608 (2001).

54. See 42 U.S.C.S. § 2183 (2001).

55. EUR. PARL. STMT., *Access to Medicines for AIDS Patients in the Third World*, Mar. 15, 2001 (2001).

56. In 1998, Brazil began a national program to fight AIDS by using compulsory licensing to make affordable, generic AIDS drugs. Tina Rosenberg, *Look at Brazil*, N.Y. TIMES, Jan. 28, 2001, § 6 (Magazine), at 28. Consequently, today Brazil has managed to stabilize its AIDS epidemic and cut its national AIDS death rate by fifty percent. *Id.* at 29. Although the United States had launched a patent complaint against Brazil and its use of compulsory licensing in the WTO, it ultimately dropped its suit and agreed to settle. Barbara Crossette, *U.S. Drops Case Over AIDS Drugs in Brazil*, N.Y. TIMES, June 26, 2001, at A4; *U.S. Backs Down from Lawsuit against Brazil at WTO*, O GLOBO (Brazil), June 26, 2001, at 1.

57. Exec. Order No. 13155, 65 Fed. Reg. 305,201 (2000). The order was titled "Access to HIV/AIDS Pharmaceuticals and Medical Technologies."

under pressure from the pharmaceutical corporations, he too found that retreating to a legally defensible posture (as was implicit in Clinton's Executive Order) was in the national interest of the United States. Apparently, the U.S. Trade Representative and the U.S. Patent and Trademark Office lost the bureaucratic battle at the bar of public opinion. Were he still alive, M.K. Gandhi would doubtless find solace in the verity of one of his pearls of wisdom, namely, that there is more than enough for everybody's needs, but there simply is not enough for everybody's greed.

A. *South African Action and Relevant International Law Standards (General and Particular)*

Section 15(C) of the South Africa Medicines Act has two distinguishable parts. The first part gives the Minister plenary power to prescribe conditions for the supply of affordable medicines.⁵⁸ The purpose of this authority is to protect the public health. The preamble clause concludes with the wording "in particular,"⁵⁹ although it is unclear whether the term refers exclusively to this ministerial power or merely to illustrate possible forms of exercising it. Following the text of Section 15(C), the phrase "in particular" essentially designates a scheme of parallel imports. Furthermore, in parts (a) and (b), Section 15(C) simply recites the relatively conventional terms and understandings that make parallel import exceptions to the exclusive character of patent rights.⁶⁰

To the extent that Section 15(C) was the subject of litigation in the Pretoria High Court, it appeared that the lawfulness of parallel imports under that section is what was contested. However, the preamble passage can be read so as to not exclude other forms of action by which legitimate exceptions to patent rights might be made. This could include the other widely acknowledged exception, namely, compulsory licensing. It should be noted that compulsory licensing is a power already prescribed in current South African legislation.⁶¹ Moreover, the international law arguments for parallel import or compulsory licensing exceptions involve similar indicators of reasonableness relating to the interpretation of the relevant TRIPS provisions and general principles of international law. Although these two concepts are markedly different, they essentially have a comparable juridical consequence in that they may be construed as exceptions to the general norm of protecting ownership in a patent.

58. Section 15(C) of the S. Afr. Medicines Act, *supra* note 13.

59. *Id.*

60. *Id.* at (b), (c).

61. S. Afr. Patents Act No. 57 of 1978, arts. 4, 56 (1978).

One of the key restrictions on parallel imports is found in the process of contract formation itself. It is a standard practice that the contract of sale for the purchase of a patentable widget may come with a condition that it not be transferred to another country. This limitation finds support in a maxim of ancient Roman law: *Nemo plus juris ad alium transfere potest quam ipse habet*.⁶² Thus, the main constraint on parallel imports is essentially a standard, contractual stipulation that what is put in State A's stream of commerce is subject to the condition that it cannot be exported to State B, where it will be sold at a lower price. The operative assumption is that the patent holder, or his licensee, is actually selling the product in State B for a higher price.

The critical legal question is whether the parallel imports provision of Section 15(C) falls within the Article 28 framework of TRIPS, and indirectly in Article 30 and Article 31 of the same treaty as well. Even though Section 15(C) seems to be inelegantly drafted, on its face, it is consistent with TRIPS. There are two grounds where TRIPS clearly permits a difference. First, Article 30 clearly permits an exception to the regime for protecting the patent holder's rights.⁶³ And second, Article 31 provides a narrow basis within which the exception might be used and also permits a variance in the context of national emergencies, or in situations of "extreme urgency."⁶⁴

Using terms such as, to "protect the health of the public,"⁶⁵ Section 15(C) is broader than Article 31 of TRIPS. At the very least, this implies that in national emergencies or situations of extreme urgency, the Minister of Health would clearly be acting under the meaning of Article 31 in exercising the right to protect the public health. By any standard, South Africa's AIDS epidemic epitomizes a catastrophic public health crisis. Therefore, Section 15(C), which authorizes the procedures of parallel imports in paragraphs (a), (b), and (c) would be in compliance with TRIPS.⁶⁶ However, this does not mean that the South African Parliament may not revisit Section 15(C) later, and redraft it for a tighter fit into TRIPS.

Of course, this is the narrow version of the exception, and the broader question is whether the power to protect public health would go beyond "the case of a national emergency or other circumstances of extreme

62. "No one can transfer to another more authority than he himself has." DIG. 50.17.54 (Ulpian, Ad Edictum 46).

63. TRIPS, *supra* note 21, art. 30.

64. *Id.* art. 31(b).

65. Section 15(C) of the S. Afr. Medicines Act, *supra* note 13.

66. *Id.*

urgency”⁶⁷ For instance, if South Africa faced a declared, serious health crisis that did not reach the pandemic dimensions of the AIDS epidemic, would Article 31 of TRIPS grant its Minister of Health the power to protect the public health at the expense of the patent holder’s right to property? It seems, that the power of the Minister of Health does indeed extend to the concept of a serious health crisis which would require him to protect the public health. As a technical matter, in such a context parallel imports would essentially have to abrogate the contractual rights stipulated in the original contract of sale, bringing us to the possible value of private international law principles.

This scenario suggests that the axioms of private international law, which generally give preference to the sanctity of contracts, would have to be limited by recognized legal principles to ensure that the Minister of Health acts reasonably and not arbitrarily. One of the main concepts drawn by analogy from private international law is the understanding that public policy (*ordre publique*) may trump the normal operation of a private international law rule such as the *lex validates*, or the proper law of the contract.⁶⁸ In effect, given sufficient grounds based on the public policy interest and in order to protect public health, the Minister of Health may decline to honor the normal rule. If the Minister of Health invokes the private international law exception based on public policy to block the

67. TRIPS, *supra* note 21, art. 31(b). However, this question was partially answered during the WTO’s last meeting in Doha, Qatar. Expanding the rights of developing countries to grant compulsory licenses for drugs needed to combat their AIDS epidemics, the WTO “recognize[d] the gravity of the health problems afflicting many developing and least-developed countries,” and “affirm[ed] that the [TRIPS] Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ rights to protect public health and, in particular, to promote access to medicines for all.” *Declaration on the TRIPS Agreement and Public Health*, WTO Ministerial Conference, 4th Sess., ¶¶ 1, 4, WT/MIN(01)/DEC/2 (2001). Specifically, the WTO broadened the compulsory licensing conditions of TRIPS’ Article 31, declaring that, “Each member has the right to determine what constitutes a national emergency or other circumstances of extreme emergency, it being understood that *public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme emergency.*” *Id.* at 5(c) (emphasis added); see also Paul Blustein, *Getting WTO’s Attention: Activists, Developing Nations Make Gains*, WASH. POST, Nov. 16, 2001, at E01; Joseph Kahn, *Nations Back Freer Trade, Hoping to Aid Global Growth*, N.Y. TIMES, Nov. 15, 2001, at A30; Frances Williams, *Declaration on Patent Rules Cheers Developing Nations*, FIN. TIMES (London), Nov. 15, 2001, at 11 (reporting that the WTO clearly stated the rights of poor countries “to override patents in the interests of public health”).

68. This concept of law is commonly called the “public policy exception” or the “public interest exception,” and it may be defined as “the principle that a person should not be allowed to do anything that would tend to injure the public at large.” BLACK’S LAW DICTIONARY 1245 (7th ed. 1999); see also *Mertz v. Mertz*, 271 N.Y. 466 (1936); *Loucks v. Standard Oil Co.*, 224 N.Y. 99 (1918).

assertion of contract rights, the use of such legal power would indicate that the Minister of Health is acting reasonably from a public international law perspective. Perhaps this is a novel use of the private international law doctrine to lawfully support the Minister's claim under public international law that in certain situations a contractual limitation on the parallel importing of certain drugs conflicts with public policy. This idea builds on the notion that there is a residual rule of international law rooted in reason which mediates between states' claims in making and applying international law. Therefore, from an international law point of view, the use of a public policy analogy drawn from private international law is based on the assumption that the Minister's construction of Section 15(C), in light of TRIPS, passes a test of interpretive reasonableness as seen from the perspective of an objective third party appraiser since the public policy exception is a reasonable exercise of a legal power.

Formulated by Professor H.A. Smith, the standard of reasonable construction and interpretation of international law reads:

The law of nations, which is neither enacted nor interpreted by any visible authority universally recognized, professes to be the application of reason to international conduct. From this it follows that any claim which is admittedly reasonable may fairly be presumed to be in accord with law, and the burden of proving that

it is contrary to the law should lie on the state which opposes the claim.⁶⁹

It should be noted that the exceptions conferred in Article 30 should not "unreasonably conflict with a normal exploitation of the patent . . ." and "not unreasonably prejudice the legitimate interests of the patent owner . . ." ⁷⁰ Additionally, one must also take into account the legitimate interests of third parties. Of course, meeting a reasonableness standard here would make the Minister's action lawful under TRIPS. In other words, the Minister of Health must ensure that the protection of health, security, and safety is reasonable while also considering the relevant, competing interests.

From an international, constitutional perspective, the reasonable exercise of such ministerial powers may be viewed as one of the inherent functions of sovereign competence and international responsibility. The leading case in international law is the *Lotus case (France vs. Turkey)*.⁷¹

69. H.A. SMITH, *THE LAW AND CUSTOM OF THE SEA* 20 (1950). The rules relating to the operations of treaties are set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties, May 23, 1969, arts. 31, 32, 1155 U.N.T.S. 331. The General Rule of Interpretation stipulates:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Id. art. 31.

70. TRIPS, *supra* note 21, art. 30.

71. S.S. *Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

In the *Lotus case*, the Permanent Court of International Justice held that limitations on state sovereignty could not be presumed in international law in circumstances less critical to public order and safety.⁷² When given an interpretive gloss and applied to Section 15(C), the *Lotus case* holds that in the absence of clear and unambiguous language in a treaty, the treaty cannot be construed so as to restrict the state's concern for public order, security, health, and safety.⁷³ Therefore, from an international law point of view, Section 15(C) carries an imprimatur of presumptive reasonableness unless specific language in a treaty or other concrete source of international law circumscribes or limits that presumption.

This traditional international law standard is strengthened when recourse is had to the U.N. Charter itself. For example, there is an analogy in the law of self-defense, Article 51, that a state has an inherent right to defend its public order and security.⁷⁴ Although normally invoked in the context of armed or potential armed conflicts, via analogy, this provision can certainly be used to support the reasonableness of a state's claim to protect its public health and security. Finally, reference may also be made to Article 2(7) of the U.N. Charter which leaves domestic matters, such as health and security, to be determined by the sovereign state itself unless explicitly limited by treaty or custom.⁷⁵ It is true that TRIPS and related agreements modify the scope of sovereignty over intellectual property, but the crucial issue is whether the exceptions which limit central features of sovereignty can easily be overridden without good justification.

In short, general international law and its standards of construction and interpretation provide the Minister of Health with strong legal support, ensuring that action under Section 15(C) complies with international law. However, this does not address the particular question of whether the actions of the Minister of Health to specify exact conditions under which the TRIPS exception might be exercised actually meet the standard of reasonableness required by international law. It would seem that outside of instances of national emergencies or extreme urgencies, the non-commercial use of parallel imports must meet a higher standard of justification, for in the absence of such reasoning, it would be difficult to protect the interests of the patent holder. Moreover, such practices could conceivably be seen as sanctioning unlimited use and unjustifiable taking of the rights of the patent holder. Indeed, Article 31(c-j) makes it clear that

72. *Id.*

73. *See id.*

74. U.N. CHARTER art. 51.

75. *Id.* art. 2, ¶ 7.

there are standards that must be met to determine what is reasonable and unreasonable in certain contexts.⁷⁶

As indicated earlier, in terms of law, what is reasonable must conform to the constitutional basis of the system which is built on the state's sovereign equality.⁷⁷ But it must also account for other, more general, standards of international law as critical indicators of what is and what is not reasonable. For example, there are human rights standards and policies reflected in both treaty-based law and customary international law that are clearly implicated in drawing the judicial line between the rights of the patent holder and the obligation of the Minister of Health to protect the public health.

For a moment, let us reconsider the situation regarding the AIDS epidemic in South Africa. This epidemic threatens the right to life. Found almost universally in every major human rights instrument, the right to life is a standard human right. It is written in the Universal Declaration of Human Rights⁷⁸ (UDHR) and the International Covenant on Civil and Political Rights,⁷⁹ as well as within all regional covenants on human rights.⁸⁰ Of course, the state's obligation is not exactly clear in regards to the protection of life as a positive rather than a negative right. However, the policy supporting the right to life suggests that the state should do what it reasonably can to protect the life, health, and security of its citizens. Sometimes it is hard to specifically pin down what the positive aspect of the human right to life actually encompasses because global conditions vary. Nevertheless, what can be said with some confidence, is that when acting reasonably to protect the right to life as a component of its responsible sovereign prerogative, the state may be complying with the general obligation imposed by international law and its own internal law that it does what it can to secure that right. Accordingly, when the right to life is so construed, the Minister's construction of the exceptions under

76. TRIPS, *supra* note 21, art. 31(c-j).

77. See U.N. CHARTER art. 2, ¶ 1.

78. See Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Pt. I, Res., at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR].

79. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

80. See generally American Declaration of the Rights and Duties of Man, Mar. 30 — May 2, 1948, O.A.S. Res. XXX, O.A.S. Off. Rec. OEA/Ser.L/V/I.4 Rev. (1965) [hereinafter American Declaration]; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]; American Convention on Human Rights, Nov. 22, 1969, 1114 U.N.T.S. 123 [hereinafter American Convention]; African Charter on Human and Peoples' Rights, June 26, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 [hereinafter African Charter].

Articles 30 and 31 of TRIPS is strengthened. Even if we assume that in the context of the human right to reasonable health care the right to life must be seen as an example of international soft law, the right to life is still an important indicator as to what counts as reasonable or unreasonable conduct under TRIPS.

South African case law adds another dimension to this inquiry. In *Soobramoney v. Minister of Health (KwaZulu-Natal)*, the Appellant demanded access to a dialysis machine in a state hospital.⁸¹ The Appellant argued that without access to the machine he would die.⁸² The South African Constitutional Court determined that the hospital's procedures for allocating access priorities to the machine were reasonable and found that Soobramoney did not have an absolute claim, but one of reasonable access.⁸³ In justifying the juridical quality of the constitutional test, Justice Chaskalson said,

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.⁸⁴

In short, the hospital's allocation of a scarce resource was neither arbitrary nor unreasonable.

One final indicator of whether a state is acting reasonably in the protection of public health may be found by using statistics to figure how much of its GNP a state can rationally afford to allocate towards the delivery of health care services. This could certainly be a factor in determining whether a state is acting reasonably in invoking the power to appropriate compulsory licenses or implement a parallel imports policy. However, the numbers and statistics in sub-Saharan Africa and elsewhere would make such a demonstration unnecessary because AIDS drugs are

81. *Soobramoney v. Minister of Health (KwaZulu-Natal)*, 1998(1) SA 765 (CC) ¶ 1.

82. *Id.*

83. *Id.* ¶¶ 22-36.

84. *Id.* ¶ 8.

simply beyond the means of the overwhelming majority of patients, even when patent holders allow massive price cuts.

B. Obligations Beyond Treaty Law

The use of parallel imports and compulsory licensing in order to provide access to cost effective medical therapies must be put in the larger context of the global economic order. From the perspective of the United States, the abuse of patent, trademark and copyright entitlements affects the efficiency and fairness of the world's trading market. The experience of widespread fraud made both manufacturers and technology-exporting countries sensitive to what is perceived as the theft of intellectual property (often with state support). But the reaction to countries like India, Thailand, Brazil, and possibly South Africa, producing and distributing cheap generic drugs is regarded as more than a simple response (supported by humane considerations) to a health crisis. Rather, it is seen as a loophole or slippery slope. In other words, the manufacturers and technology-exporting countries believe that if AIDS is the bridgehead, theft-driven invasion forces will soon follow.

C. The Relationship Between South Africa and the United States

The South African-U.S. relationship is a vital case study of conflicting perspectives. South Africa's efforts to provide some kind of serious, medical response (apart from public education) for its AIDS victims required some action and Section 15(C) of the South Africa Medicines Act was the outcome. In turn, this prompted the global pharmaceutical lobby to prod the United States into taking a tough stand on the Section 15(C) bridgehead. The stage was set for a major economic showdown between a new, vulnerable African state and the world's only superpower. On the surface, it appeared that Section 15(C) was simply a violation of an international treaty obligation. South Africa seemed to be technically and formally wrong, and therefore, it was a potential violator. However, more careful scrutiny of the U.S. position would reveal that the situation was less juridical than it was political.

U.S. congressional legislation mandating that the U.S. executive branch attempt to negotiate a repeal of Section 15(C) illustrated the most important reaction. In the absence of an appropriate response by the South African government, the legislation decreed that South Africa effectually be subject to a form of economic sanctions. Meanwhile, domestic pressures on the Clinton administration were escalating, and widespread commentary defended the lawfulness of Section 15(C) under TRIPS. But ultimately, the Clinton administration retreated on this matter. Although

the South African government did not rescind the legislation, it arrived at a garbled, face-saving understanding with the Clinton administration that eliminated the need for economic sanctions targeted at South Africa.

It should also be understood that a great deal of the conflict was driven by the power of the pharmaceutical industry. Even U.S. officials later admitted that while taking into account the problems regarding patent ownership, hardly any attention was paid to the public health implications of the U.S. trade policy's support for the pharmaceutical industry.⁸⁵ Responding belatedly, the pharmaceutical industry has attempted to supply a reduced form of access to its products on a limited basis. But it remains unclear whether the scope of the AIDS problem itself renders this conciliatory move a sufficient basis to remove governmental policies from the exceptions provided in TRIPS.

One of the issues highlighted by the U.S. effort to suggest that because TRIPS represents only a minimal standard relating to the respect for patent rights in international law implies that there is a broader standard of protection of property rights under international law. This suggests that the concept of property under U.S. law may be the base for residual property or ownership rights as understood in the United States.⁸⁶ A further legal implication would be that this residual, U.S. property concept would also have extraterritorial reach, permitting the United States to sanction states who violate defined property rights, regardless of technical compliance with TRIPS via parallel imports or compulsory licensing. This represents a different legal question. The problem is significant as an issue of law because if it can be resolved by legal means, it may limit the pressures for political tensions and coercive economic initiatives that undermine the principle of cooperative sovereignty in international law.

In order for the United States to unilaterally impose sanctions on states using compulsory licensing or parallel imports outside of TRIPS, the United States must essentially demonstrate that the property interests in securing the patent holder's ostensible entitlements are permissible under general international law. The *Lotus case's* principle, that in a decentralized system a state may project its law as far as it can without infringing upon another state's law, is an important legal concept. However, when the projection of that state's law clashes with another state's law, the matter falls within the class of problems known as conflicts

85. Rosenberg, *supra* note 56, at 52.

86. The implication that property rights are protected by a broader standard of protection under international law also creates conflicts within the Erie Doctrine and constitutional law.

of jurisdiction.⁸⁷ Ultimately, the international law standard that the United States generally adopts is reflected in the Restatement of Foreign Relations

87. The United States addresses conflicts of jurisdiction via the Jurisdictional Rule of Reason, which is stated in § 403 of the Restatement:

- (1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.
- (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
 - (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
 - (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
 - (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
 - (d) the existence of justified expectations that might be protected or hurt by the regulation;
 - (e) the importance of the regulation to the international political, legal, or economic system;
 - (f) the extent to which the regulation is consistent with the traditions of the international system;
 - (g) the extent to which another state may have an interest in regulating the activity; and
 - (h) the likelihood of conflict with regulation by another state.
- (3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987) [hereinafter RESTATEMENT (THIRD)]; *see also* S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7); *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 472 U.S. 1032 (1985); *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945); *see generally* CHRISTOPHER L. BLAKESLEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 134-166 (5th ed. 2001); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 262-267 (1966).

Law.⁸⁸ Sections 402 and 403 spell out the bases of jurisdiction and refer to the so-called “Jurisdictional Rule of Reason,” respectively.⁸⁹

The essence of the Jurisdictional Rule of Reason is to determine whether the exercise of extraterritorial jurisdiction may actually be limited when its purported use is unreasonable. The first and most important criticism of the U.S. position is that it may, in effect, be reading its domestic concept of patent property as if it were a universal datum. However, the patent statute’s definition of property may be theoretically obsolete.

The nature of patents does not follow the U.S. Restatement’s view that the notion of property is in fact relational. Moreover, the U.S. position does not acknowledge that the complex web of relationships which constitutes property in terms of jural opposites and correlatives is a view also affirmed by the U.S. Supreme Court in *Shaffer v. Heitner*.⁹⁰ Considering the kinds of claims to patent rights that infringe on the cultural patrimony of others, it would stand to reason that a more flexible conception of property from an international point of view is simply more appropriate, as indicated in the Bellagio Declaration.⁹¹ The second objection relates to the human rights and theoretical implications of the nature of property itself, which is explored in the following section.

IV. THE NATURE OF PROPERTY AS INTELLECTUAL PROPERTY

In order to explore the above implications more fully it may be worth spelling out the sources of property entitlement in U.S. law. There are two primary sources of intellectual property rights in the United States. The founding fathers and drafters of the U.S. Constitution appeared to have understood the value of intellectual property for an emerging, mercantilist political economy, thus its control and regulation was given a specific federal imprimatur in Art. I, Section 8 of the U.S. Constitution: “The Congress shall have power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the

88. RESTATEMENT (THIRD), *supra* note 87, at Introduction.

89. *Id.* at §§ 402, 403.

90. *Shaffer v. Heitner*, 433 U.S. 186 (1977); *cf.* the Restatement’s definition of judicial jurisdiction: “the phrase ‘judicial jurisdiction over a thing,’ is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS, ch. 3, topic 2, Title A, § 56 Introductory Note (1971).

91. The Bellagio Declaration from the 1993 Rockefeller Conference “Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post-Colonial Era,” Mar. 11, 1993, available at <http://users.ox.ac.uk/~wgtrr/bellagio.htm> [hereinafter Bellagio Declaration].

exclusive Right to their respective Writings and Discoveries.”⁹² This provision implies a right to property delimited by science and useful arts, and states that the right is exclusive for limited times. However, it is unclear what actually was the core, conceptual basis of this right. Consequently, legislative action was required.

The first U.S. Patent Act was promulgated in 1790, and during the following 200 years it was rarely amended.⁹³ Today, the U.S. Patent Act is codified in Title 35 of the U.S. Code Service (35 U.S.C.S. § 101).⁹⁴ However, Section 101 of the U.S. Patent Act does not provide a clear or sophisticated conception of the nature of the property interests that require protection under the statute or the constitutional predicate which presumably inspired it.⁹⁵ According to Section 101, “Whoever invents or discovers any new and useful process, machine, manufacture or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title.”⁹⁶

Of course, the critical analyst may wish to know whether there is a federal concept of property inherently exclusive and distinctive to Article I, Section 8, and if so, how it is identified and given effect. Clearly, this may be important, as the concept of property in Article I, Section 8 is one that is federal and must therefore transcend the particular concepts of property in the federal union’s individual, sovereign states. Furthermore, to the extent that we can discern a coherent concept of property in the U.S. Patent Act itself, or in its myriad applications, there may be an issue as to whether this standard meets the implicit requirement of Article 1, Section 8. More importantly, the key interpretative element of what property might represent in these instruments must also confront the possible extraterritorial (international) reach of the property definitions in the U.S. Patent Act and the U.S. Constitution.

The existence of a cluster of international instruments regulating international property suggests that the reach of both constitutional and statutory rules are to be limited by territorial considerations. In other words, in the absence of an explicit, international agreement giving U.S. commercial interests property rights on the international plain, there can

92. U.S. CONST. art. I, § 8, cl. 8.

93. In fact, the U.S. Patent Act has only been amended in 1793, 1836, and 1952. U.S. Patent Act of 1793, ch. 11, 1 Stat. 318 (1793); U.S. Patent Act of 1836, ch. 357, 5 Stat. 117 (1836); U.S. Patent Act of 1952, ch. 950, 66 Stat. 792 (1952).

94. U.S. Patent Act, 35 U.S.C.S. § 101 (2001).

95. *Id.*

96. *Id.*

be no reliance on the extraterritorial constructions of U.S. law. With this view, one may conclude that U.S. conceptions of property in Article 1, Section 8 and the U.S. Patent Act are territorially limited. If the United States were to predicate intellectual property takings and related compensatory issues on purely domestic sources of law, it may have to assume that there is a residual, international law, common concept of property which includes intellectual property. Moreover, the United States would have to accept that this further property construct is entitled to extraterritorial protection from arbitrary or discriminatory takings. Finally, the United States may also claim that there is a broader, international law, public interest standard to which it is entitled and that provides a juridical basis for seeking the protection of its nationals. Insisting on this international/U.S. concept of the property right combines the property right with all the benefits and burdens of general international law. Metaphorically, the property tail would go with the international law hide.

Of greater and more immediate concern are the asserted justifications for the protection of patent interests as property. From our survey of U.S. literature, there appears to be two theories that support the concept of property as a legally protected interest. First, the pragmatic or utilitarian premise works on the assumption that protection provides an incentive for future inventive creativity. Thus, the pragmatic or utilitarian form of property protection rewards initiative as an implicit contract. The second incentive is based on property as a natural right. As a natural right, property would presumably be unlimited by territorial restraints. Although natural law is sometimes seen as unfashionable, the secular version of natural law is reflected in the fundamental precepts of the U.N. Charter, as well as in the International Bill of Rights.⁹⁷ It is from this point of view that we explore the nature of property.

Juxtaposing the U.S.-centered view with a cross-cultural perspective on property may be useful. From a cross-cultural, international perspective, intellectual property law reflects many contrasts and tensions, although the conflicts are played out in the very technical arena of draftsmanship, as well as in the interpretation of relevant legal standards. Perhaps the most concrete expression of these concerns is reflected in the Bellagio Declaration of 1993.⁹⁸ According to the drafters of this Declaration, "Contemporary intellectual property law is constructed around the notion of the author, the individual, solitary and original creator, and it is for this figure that its protections are reserved."⁹⁹ This

97. International Bill of Rights, *supra* note 6.

98. Bellagio Declaration, *supra* note 91.

99. *Id.*

specific view represents one particular version of the nature of property, despite its potential, theoretical problems. Nonetheless, ideologically, it is strongly promoted by Western, capitalist-oriented democracies on the basis that private property is one of the surest vehicles toward economic growth and prosperity.

The Bellagio Declaration also states that there are other ways of managing interests besides the particular ideological gloss reflected in the first view. On this topic, the Declaration reads, "Those who do not fit this model — custodians of tribal culture and medical knowledge, collectives practicing traditional artistic and musical forms, or peasant cultivators of valuable seed varieties, for example — are denied intellectual property protection."¹⁰⁰ Apart from the general question of cultural patrimony, which is communitarian in tenor and private in patrimony, there are the specific issues of how the control of private patrimony might impact fundamental human rights issues.

A. Theoretical Aspects of Property Relevant to the Interpretation of Intellectual Property Entitlements in International Law

Generally, the concept of property has been viewed as a construct, or creature of the sovereign. Thus, lawyers do not only determine whether a property right exists, but they also seek to discover what the extent of its reach means for litigants who are required to consult the sources of national law. This idea was a serviceable notion when political authority was defined by the imperium exercised over territory and could determine matters of dominium within the territorial framework. The connection between imperium and dominium provides juridical architecture meant to manage a very basic, psycho-sociological fact: in the real world, there are things of value. Consequently, because human beings often appropriate things of value, the psycho-social issue, namely, this *res* is mine and that *res* is yours,¹⁰¹ becomes the foundation for one of the most elemental of human associations, the relationship of human beings with each other through things. In moving things from the corporeal to the incorporeal, and from the incorporeal to things styled intellectual property, a legal system will be seriously challenged to determine exactly what the new forms of property are, the circumstances under which they are created, and the extent of the rights thus created. When these forms of property are used in the vast flow of production and exchange across state, national, and

100. *Id.*

101. Translated from latin, a *res* is a thing. More specifically, a *res* is "an object, interest, or status, as opposed to a person." BLACK'S LAW DICTIONARY 1307 (7th ed. 1999).

sovereign lines, the basic comprehension of why some things are mine and some things are yours will require greater skills and insights into the nature of what property is, not from a national perspective, but from a multinational, multicultural, and even global point of view.

Provoking conflicts between different cultures represented by distinct sovereignties with diverse property traditions, the problems of property can emerge in various ways. One significant issue which has a deep impact upon the idea that certain property forms are exclusively mine and not yours, illustrates the concept that property is really only property when ingenuity and intellect combine in its appropriation and exploitation. Ingenuity in this sense is thought to be an individual attribute, not a characteristic necessarily shared with others.

On the other hand, there are those who see the notion of the individual as an ineluctable relationship with others who constitute the community of the past, present, and future. In this view, the individual's ingenuity is not wholly atomized and completely distinct from the history and circumstance of the community that produced and nurtured her. Although individuals may ingeniously improve upon the intellectual product of the culture, their own ideas of property (what is mine and what is yours), indeed, the very perception of property, is that it is a construct in relation to others and to the political system which constitutes the community.

Sometimes these divergent stances stress the theory that one form of social organization is individualistic, while the other is communitarian. But, it is difficult to imagine any society that is not both individualistic and communitarian. In actuality, individualism and communitarianism are elements of the framework of social process. Characterized by patterns of both collaboration and conflict, this framework of social process determines where to draw the line, when to draw the line, and what normative standards encased in the phrase "common interest" must guide the line drawing.

B. Human Rights and the Idea of Property

Like other legal precepts, the concept of intellectual property may, in Holmesian terms, be labeled the skin of a real living thought. Because living thoughts are not exactly limited, the connection between living thoughts, ideas of property, and ownership makes these juridical constructs incredibly expansive and complex. When mapped onto operating legal systems, this insight discerns several overlapping, but nonetheless discrete, conceptions of property and interest. For instance, there is the notion of property in the common law or civil law system, the theory of property as affected by constitutional development, the view of property in multi-state

law, and the perception of property in comparative, international, and for our purposes, human rights law.

To some extent, these concepts all correspond with the psychological reality which by law or right holds that this res is mine and that res is yours. When law intervenes in the process to protect what is yours and what is mine, the tendency to reify rights and duties relating to things means that these rights and duties become abstracted from operative reality. Of course, law wishes to conserve entitlements in the form of rights, and in doing so it runs into the paradox of intellectual property. From an observer's perspective, intellectual property stretches as far as the human, inventive imagination extends. Thus, the logical paradox is that all is property or all is non-property. More realistically, from a legal perspective, property is a cluster of complex, conditional, relational interests which are recognized as differing from one legal culture to another. Indeed, it is a paradox that the common law idea of ownership and property is almost disinterested — analytically — in title. But this common law perception is more practically and theoretically concerned with both the nuanced expression, and the differentiation of protectable interests regarding things in their relations with others. Perhaps it is for this reason that the Restatement adopted an essentially Hohfeldian concept of property. Hohfeld's scheme of correlatives and opposites of a jural nature are essentially jural interests. Thus, Charles Donohue, Jr., notes with blunt realism, "a thing cannot bring or defend a lawsuit."¹⁰²

Property, in the form of legal interests, begins in the interstices of the human imagination and is transmitted into a cluster of juridically recognizable, relational interests by public or social intervention. Thus intellectual property, as property, is created in the human imagination and finds juridical expression in the relational context of the social process itself. In this sense, the term intellectual property, conditions, defines, mutates, and evolves novel forms of interest which are subsequently protected as property. Consequently, a reasonable prediction of the future may be that property, rather than being inherently vested or reified, will in fact only constrain its forms and interests when human associations cease themselves. This provides the ultimate constraint on property, intellectual or otherwise. Putting human capacity at the center of intellectual property is an indirect means of putting human rights concerns at the heart of the radiating relationships of interests and public concern generated by the structure and process of intellectual property itself.

102. Charles Donohue, Jr., *The Future of the Concept of Property Predicted from Its Past*, in NOMOS XXII, YEARBOOK OF THE AMERICAN SOCIETY FOR POLITICAL AND LEGAL PHILOSOPHY 28, 30 (J. Roland Pennock & John W. Chapman eds., 1980).

C. Human Rights Aspects of Intellectual Property

Intellectual capital is an economic and cultural resource. Property is an evolving, mutating institution. The interaction in the social process between resources and institutions is meant, in the best of circumstances, to facilitate the production and distribution of desired goods and services (including health care) so that production and distribution (shaping and sharing) are an optimal social consequence. How successful this process actually is, is the benchmark of how just, fair, or workable a particular society is.

Of course, there are many important human rights interests tied to the issues of property: housing, food, security, water, sanitation, health, employment, communications, and often life itself. The Special Rapporteur on The New International Economic Order and the Promotion of Human Rights: Realization of Economic, Social, and Cultural Rights, in examining the land-resources issue, suggested that land/property reform was "central to the realization of human rights."¹⁰³ The Special Rapporteur also recognized that, "no question is more central to power relations within society or to issues of equality and income distribution than land."¹⁰⁴ Many ideas concerning land (resource) issues have relevance to intellectual property and human rights development issues. The Special Rapporteur's assessment of the human rights dimension of land reform builds upon a wide variety of international instruments dealing with the topic. For example, in the U.N. Declaration on Social Progress and Development, Article 17(d) indicates the importance of appropriate supervision for the "utilization of land in the interests of society."¹⁰⁵ Article 18(b) suggests that a democratic society includes a commitment to land reform to achieve the objectives of "social justice and economic development."¹⁰⁶ Substituting intellectual property for the terms land and property echoes the same policy conclusions concerning the relationship of material and intellectual resources to human rights and development.

The concept of a right to property, from a constitutional and even a customary international law perspective, often avoids defining the nature

103. *Report of the Special Rapporteur on the New International Economic Order and the Promotion of Human Rights: Realization of Economic, Social and Cultural Rights*, ESCOR, U.N. C.H.R., 42d Sess., Agenda Item 7, at ¶ 121, U.N. Doc. E/CN.4/Sub.2/1990/19 (1990) [hereinafter *Report of the Special Rapporteur*].

104. *Id.*

105. *Declaration on Social Progress and Development*, G.A. Res. 2542 (XXIV), U.N. GAOR, 24th Sess., Supp. No. 30, at art. 17(d), U.N. Doc. A/7630 (1969).

106. *Id.* art. 18(b).

of property. These areas of law implicitly assume there is a relevant thing in law called a "res," or property. In human rights law, the interpretative gloss on the notion of property does not endorse the idea that one has a right to, rather it is that one should not be arbitrarily deprived of the right. Therefore, the meaning of property is in part contingent upon the rules of natural justice, what forms of national and international processes are due, whether rights are relationally determined by unfair discriminations, and whether other basic freedoms or human rights are actually implicated in the right to property notion.

The relational nature of human interests in valued things has often been seen as implicating a major divide between systems of social organization based on individualistic precepts and those based on shared or collectivist precepts. In short, at the fundamental level, there is an irreconcilable conflict between the individual and the community — a dualist outlook deeply ingrained in Western ideas of moral and legal order. In international law, this dualism expresses itself in the degree to which foreign economic rights or entitlements are protected by law, and in whether permanent sovereignty over matters of vital socio-political salience in the public interest are also to be secured. Moreover, the profound international impact of intellectual property claims and entitlements has in turn given added importance and complexity to this classical problem.¹⁰⁷

The various human rights instruments provide further normative guidance, although the definition and scope of the concept of property and entitlements is disputed to some degree. The UDHR refers specifically to property. Article 17 holds that, "Everyone has the right to own property . . ." ¹⁰⁸ and that, "No one shall be arbitrarily deprived of his property." ¹⁰⁹ In contrast, the Protocol to the European Convention on Human Rights and Fundamental Freedoms does not use the word property in terms reflective of the UDHR's Article 17. Indeed, it does not specify a right to acquire property at all. But, it is worth quoting the relevant part of this provision:

Every natural or legal person is entitled to the peaceful enjoyment of his *possessions*. No one shall be deprived of his possessions except in the public interest . . . The preceding provisions shall not,

107. As demonstrated by *Pharmaceutical Manufacturers Ass'n v. President of the Republic of South Africa*, the WTO complaint the United States launched against Brazil's compulsory licensing of AIDS drugs patents, and the successful campaign of developing countries to expand the compulsory licensing conditions of TRIPs at the WTO meeting in Doha, Qatar.

108. UDHR, *supra* note 78, art. 17(1).

109. *Id.* art. 17(2).

however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest¹¹⁰

The provision does not add up to a human right to ownership. Rather, it assumes possessory rights.¹¹¹

Article 21 of the American Convention on Human Rights holds that everyone has the “right to the use and enjoyment of his property,” but that this interest may be subordinated in the common interest:¹¹² it also indicates that the dispossession of property entitles the person deprived to have “just compensation.”¹¹³ The American Declaration on the Rights and Duties of Man anticipates the relationship of property to second generation human rights. Article XXIII states that: “Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”¹¹⁴ The Special Rapporteur on the New International Economic Order and the Promotion of Human Rights concludes that Article XXIII, more than any other human rights-property provision, “approaches the issue of property from the perspective of a necessary entitlement to fulfil the needs of decent living and dignity.”¹¹⁵

Let us return briefly to the UDHR. Article 17 of the UDHR is both controversial and ambiguous.¹¹⁶ Must this Article’s prescription be read in conjunction with the other UDHR provisions, including the economic, social and cultural entitlements, as well as the developing human right to development? Or must it be read disjunctively, in isolation, standing alone without the interpretive guidance of the UDHR’s other provisions? And what, in any event, is property for the purpose of the UDHR or human rights in general?

If the right to property is read disjunctively, standing apart from the UDHR’s other provisions, the following consequence might occur. Because property has a close affinity with effective power, and is by itself an important base of power, an unqualified right to property could disparage the other rights in the UDHR. Consequently, we are left with the

110. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 18, 1954, art. 1, 213 U.N.T.S. 262 (emphasis added).

111. Possessory rights consist of a property interest conditioned by regulation in the public interest.

112. American Convention, *supra* note 80, art. 21(1).

113. *Id.* art. 21(2).

114. American Declaration, *supra* note 80, art. XXIII.

115. *Report of the Special Rapporteur, supra* note 103, at ¶ 132.

116. *See* UDHR, *supra* note 78, art. 17.

unenviable task of holding that the definition of property in Article 17 must be read in light of all the other provisions in the UDHR. In other words, the meaning of the right to property cannot be read disjunctively; it must be derived from the relevant context — the communal environment within which all the other enumerated rights function. The scope of the right will then be a variable one, subject to interpretative standards and intellectual dexterity, but it will be guided by the overriding goal values implicit in the concept of human dignity.

Relating to the human right to property, the trend in prescription has retreated from the bland literalism that might be used to construe this provision. The European Convention focuses on possessory interests in property.¹¹⁷ In contrast, the American Convention focuses on use and enjoyment interests in property.¹¹⁸ The American Declaration, which is the instrument most consistent with the evolving understanding of the so-called human right to property, constrains the human rights property interest to the realization of economic, social and cultural rights, or in contemporary terms, a right to development at least in terms of basic needs or interest.¹¹⁹ But the deeper meaning of property in this context is that it must be construed relationally, specifically in connection to other human rights values. Relationally and contextually, the general property right in human rights law does not entrench a right to property independent of other human rights standards. Furthermore, the scope of this right is highly challenged in international human rights law. However, its relational and contextual limits provide powerful normative guidance to interpretations of the reach of TRIPS provisions, as well as to understandings of the state's scope of reasonable prescription to either extra-territorially secure its property interests or protect its health, security and related human rights concerns.

V. THE RIGHT TO HEALTH CARE

The question of whether Section 15(C) and its related provisions might find international support requires a reasonable exercise of the prescriptive competence of the Republic of South Africa. From an international perspective, South Africa must not only explore the scope of human rights on the right to property under general international law, it must also determine whether the right to health, as found in the International Bill of Rights and other international instruments, supports the principle that the

117. See generally European Convention, *supra* note 80.

118. American Convention, *supra* note 80, art. 21.

119. American Declaration, *supra* note 80, art. XXIII.

delegation of power to the Minister of Health allows her to protect the public's health by making necessary medicines affordable and available.

The international literature on the right to health or health care is vast and unsettled. According to Van Boven, health care in human rights terms means, (i) a declaration that the right to health is a basic human right; (ii) that there is an expectation that there will be a prescription of standards aimed at meeting the health needs of specific groups; and (iii) that there is the application of a prescription as the vehicle for concrete implementation.¹²⁰ But this may be too simplistic and avoids giving a more coherent definition of the scope of the right or the nature of the obligations the human right to health care entails. In Ruth Roemer's study, *The Right to Health Care*, there is the suggestion that health care itself is relational.¹²¹ Thus the right to health care is said to include "protective environmental services, prevention and health promotion, [and] therapeutic services . . ." as well as "related actions in sanitation, environmental engineering, housing, . . . and social welfare . . ."¹²²

In different terms, when health care is an objective demand that is sought, it depends on other basic values to secure its realization. These values may include power, wealth, skill, enlightenment, solidarity and caring, commitment to respect, and a system of moral or spiritual rectitude that appreciates dignity. But regardless of these values, health care is a codified human right, as illustrated in Article 25 of the UDHR: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of . . . sickness [and] disability."¹²³

Because the right here is tied to social policy, it is often thought that this is not a right at all, but a policy objective. Hence, it has no trumping power, as would be inherent in a real right. However, this provision can be used to justify the reasonableness of national legislation and administrative action seeking to give the right juridical effect. The Preamble of the WHO Constitution contains stronger language and at least implicit normative guidance for its application. The relevant part reads as follows: "The enjoyment of the highest attainable standard of health is one of the

120. Theo Van Boven, Lecture at the U.N. Workshop on "The Right to Health" (1979).

121. See Ruth Roemer, *The Right to Health Care*, in *THE RIGHT TO HEALTH IN THE AMERICAS* 17 (Hernan Fuenzalida-Puelma & Susan Scholle Connor eds., 1989).

122. *Id.*

123. UDHR, *supra* note 78, art. 25(1).

fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."¹²⁴

Mentioning the "highest attainable standard," the WHO Preamble implies that the attainable is what can be reasonably secured. Moreover, this is qualified by the notion that the right is fundamental. The highest, or best, attainable standard is also indicated in the International Covenant on Economic, Social and Cultural Rights, Article 12(1);¹²⁵ The Convention on the Rights of the Child, Article 24(1);¹²⁶ and the African Charter on Human and Peoples' Rights, Article 16.¹²⁷ Additional references are found in the International Convention on the Elimination of all Forms of Racial Discrimination, Article 5(e);¹²⁸ the Convention on the Elimination of all Forms of Discrimination Against Women, Article 12(1);¹²⁹ and the American Declaration of the Rights and Duties of Man, Article XI.¹³⁰ Furthermore, as earlier indicated, in *Soobramoney*, the President of the South African Constitutional Court held that there was a juridically enforceable right to health care under the new South African Constitution, but that in the reasonable allocation of scarce medical resources, the right would be correspondingly delimited.¹³¹ This case also supports the highest (reasonably) ascertainable standard of the WHO's Preamble as well.

The South African Constitution also legitimizes a right to health care. Section 27(3) of the 1996 South African Constitution provides that, "No one may be refused emergency medical treatment."¹³² Section 11, which has extremely significant implications for the nation's health policy holds that, "Everyone has the right to life."¹³³ A major purpose of the new constitutional dispensation in South Africa was to establish a society based on democratic values, social justice, and fundamental human rights. Section 27(2) holds that the state jurists take reasonable legislative and non-legislative measures for the progressive realizing of, inter alia, the

124. WORLD HEALTH ORG. CONST. pmb1.

125. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 12(1), 993 U.N.T.S. 3.

126. Convention on the Rights of the Child, Nov. 20, 1989, art. 24(1), G.A. Res. 44/25 (Annex), U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/Res/44/49 (1990).

127. African Charter, *supra* note 80, art. 16.

128. See International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, art. 5(e), 660 U.N.T.S. 195.

129. See Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, art. 12(1), 1249 U.N.T.S. 13.

130. See American Declaration, *supra* note 80, art. XI.

131. *Soobramoney v. Minister of Health (KwaZulu-Natal)*, 1998(1) SA 765 (CC) ¶¶ 22-36.

132. S. AFR. CONST., *supra* note 19, at ch. II, § 27(3).

133. *Id.* at ch. II, § 11.

right to "health care."¹³⁴ Specifically, Section 27(1)(a) implements a right of access to health care services.¹³⁵

VI. CONCLUSION

General international law, including human rights law, provides a standard by which problems falling outside the *lex specialis* regime of intellectual property treaty law may be judged. Interpretive questions involving normative ambiguity may be answered by recourse to general principles of international law, including human rights law. But the implications of international law are broader. They force us to elementally reexamine our fundamental institutions, such as property, and how those might be construed to complement, rather than undermine, the primary goals of world order.

Intellectual property entitlements cannot be insulated from the larger discourse about the nature of property itself. A central feature of the epistemology of property is that it presupposes a social context that in turn implies a complex web of relational interests. These interests and relational ties operate in the local and global dimensions of law and the social process. Consequently, the meaning of property is in part context-dependent. What the human rights focus provides is a window into just how far-reaching and challenging this web of relational interests actually is. A similar complexity attends the accepted datum that human rights are in fact complicated, interdetermining, and interdependent processes.

The reality of human rights is defined by social interaction which encompasses complex webs of relationships. At a normative level of analysis, there is an insistence in the interpretation of human rights instruments as comprehensive and indivisible. The right to life and the right to health care certainly present such a challenge. However, what is clear is that the interpretation of the relevant international standards in the *lex specialis* (the treaty-based regime) does not, by any means, exhaust the scope of defining international obligations in international intellectual property law. If it did, the state of world order would be in poorer shape than it currently is.

134. *Id.* at ch. II, § 27(2).

135. *Id.* at ch. II, § 27(1)(a).

