

Seattle Journal for Social Justice

Volume 1 | Issue 2

Article 2

November 2002

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Recommended Citation

Halbert, Debora (2002) "Moralized Discourses: South Africa's Intellectual Property Fight for Access to AIDS Drugs," *Seattle Journal for Social Justice*: Vol. 1 : Iss. 2 , Article 2.
Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol1/iss2/2>

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Moralized Discourses: South Africa's Intellectual Property Fight for Access to AIDS Drugs

Debora Halbert

INTRODUCTION

In 1997, the South African government passed the South African Medicines and Related Substances Control Act Amendments in order to address the problems associated with delivering AIDS medication to the millions of South Africans with HIV/AIDS. The scope of the act was modest, allowing the Minister of Health to make affordable medication available to protect public health.¹ However, the act was immediately interpreted as a threat to the patents of international pharmaceutical companies that provide AIDS medication on the international market. These companies responded by filing a lawsuit against the South African government, which sparked worldwide debate. The fight spawned a public relations campaign on the part of the world's most powerful corporations, which led to a concerted effort by the U.S. government to halt South Africa's attempt to provide AIDS medication to its citizens.

Despite resistance on the part of major pharmaceutical companies and the U.S. government, the issue of AIDS in South Africa will not be ignored. AIDS infection rates in Africa and the death tolls caused by this disease are mind numbing in scope. According to UNAIDS, approximately 28.5 million people in sub-Saharan Africa have HIV.² Of these millions of people, less than 25,000 are receiving antiretroviral treatment.³ It is estimated that 4.7 million people in South Africa alone have AIDS⁴ and almost 20% of adults in South Africa have HIV.⁵ Some communities have infection rates as high as 70%,⁶ and according to James Love, the Director of the Consumer Project on Technology, 20,000 people die each month in South Africa from AIDS.⁷ The number of children with AIDS is heartbreaking, with estimates

of at least 95,000 children in South Africa infected.⁸ While many children have the disease, even more have been left orphaned because of AIDS and the number of orphans is threatening to overwhelm communities.

Africa generally, and South Africa specifically, are facing a crisis of almost unimaginable proportions. African nations are experiencing shortages in teachers and health care staff as the virus takes its toll.⁹ The disease has hit all sectors of society, but women and the poor are the most likely to be affected.¹⁰ It is not an exaggeration to claim that entire nations are at risk of extinction if the problem is not systematically addressed.¹¹ The problem has been ignored for too long, and the social costs have reached crisis levels. Additionally, because risk of infection has been on the decline in the U.S., the perceived urgency of the problem for U.S. lawmakers has been reduced.¹² As a result, it has become easier for the developed world to ignore the problem. Thus, when the South African Medicines Act was introduced it quickly resulted in battle lines being drawn between patent rights and public health. While all parties acknowledged the scope of the AIDS crisis, how to go about solving the problem became the subject of significant moral and legal debate.

The South African AIDS controversy is important for many reasons. First, this debate finally brought world attention to the enormous impact of AIDS in Africa, a situation that has been ignored for far too long. Second, the use of treatment as a prevention strategy for solving the AIDS crisis is now considered legitimate. Previously, pharmaceutical companies had been successful in convincing many policy makers that treatment was an unworkable solution in Africa. Third, and the focus of this paper, activists have successfully opened a hole in the intellectual property discourse, and have begun the process of providing an alternative to the idea of strong intellectual property. This new language advocates parallel importation, compulsory licensing agreements, and a reinvigorated discourse asserting health care as a moral and human right.¹³

The rejection of the Medicines Act by the U.S. government and the pharmaceutical industry suggests that they are willing to extend patent law

to unconscionable levels. In contrast, AIDS activists around the world are not only trying to provide necessary medication, but are also trying to make it possible to evaluate access to medication as a human right instead of a property right. I will argue that within patent law, compulsory licenses and parallel importation allow for the protection of patent rights while also providing easier access to medication. It is necessary to include health care as a human right with the language of property rights. Instead of seeing the only alternatives as absolute patent protection or no protection at all, it is possible to develop a middle path that would promote the use of compulsory licenses and parallel importation to overcome the drug pricing problems. However, if parallel importation and compulsory licenses cannot provide necessary access to medication at an affordable price, then the paradigm of health care as a human right must prevail. In the U.S., trespass does not legitimate the death of the trespasser to protect the integrity of a property right; so too the death of millions from AIDS should not be the result of absolute intellectual property rights protection.

It is first necessary to understand the predominant paradigm associated with international intellectual property rights in order to understand the success of AIDS activists in developing an alternative paradigm with health care as a human right as its essential premise. In essence, the 1997 South African Medicines Act was necessary because international pharmaceutical companies had successfully scripted the discourse of patent rights to favor an absolutist position that made it impossible to provide medication to the poor throughout the global south. Thus, the narrative of access to AIDS medication has consistently been framed within the language of property rights. In the first section of the paper, I will investigate the structure of this narrative and the claims upon which it is based. Second, I will trace the significant events that contributed to the success of an alternative discourse emphasizing health care as a human right over the property rights of patent owners. Finally, I will assess the political implications of developing viable alternatives to a strong intellectual property model. The struggle between the competing interests details the variety of dimensions of intellectual

property law that fall between absolute protection and no protection at all, and these different perspectives should be explored.

CONSTRUCTING VICTIMS: THE POLITICS OF ACCESS TO MEDICATION

There are several strategies for addressing AIDS. There is a virtual consensus on the importance of education in preventing future infection, and that currently there is a lack of educational mechanisms regarding AIDS. However, controversy emerges over the use of medication to treat AIDS in Africa, and the developing world generally. Wealthier nations have brought AIDS under control through a combination of education and drugs. Much of the success of AIDS reduction in the United States has been attributed to the development of drug cocktails, a combination of AIDS medications that, taken together, allows someone with AIDS to live a fairly normal life.

The drug cocktail that has been so successful for Americans is a combination of antiretrovirals known as HAART. This mix of medications is a highly active antiretroviral therapy that reduces the virus to almost undetectable levels, thus helping reduce the risk of spreading the disease.¹⁴ These cocktails are very expensive, around \$12,000/year for an American.¹⁵ When the average African nation spends \$10/year/person on medical care,¹⁶ the \$12,000 price tag is simply too expensive for any but the most wealthy world citizens to afford. In addition to the combination of antiretrovirals necessary to fight the infection and reduce the transfer of the disease, there are AIDS medications that are also necessary—drugs required in order to reduce the impact of opportunistic infections and deal with pain.¹⁷ Given the expense involved in providing AIDS medication, most international strategies have focused on prevention and education instead of challenging the high costs of the drugs and providing treatment.

The debate over how to deal with HIV/AIDS in its present context must involve access to available medications. These medications have been proven to work in the Western world and many developing countries feel they should be made available at prices their citizens can afford. India and Brazil have

generic drug industries that are able to produce cheaper AIDS medication, and the South African legislation was intended to give them the power to develop access to these cheaper alternatives as well. The pharmaceutical industry's reaction to these attempts has been to assert their patent paradigm as the only viable way in which to produce medication to solve the world's most prominent diseases.

The South African example shows that the laws of intellectual property, and the assumptions used to justify strong intellectual property protection, take on the power of an ideology used to filter decisions. The pharmaceutical industry argues that they are in the business of producing life-saving drugs that will only be developed if the incentive to create new products remains intact. In this section, I will examine the narrative constructed by the pharmaceutical industry to claim ownership over patented drugs. At one level, this narrative is a struggle over who gets to define moral and immoral behavior. At another level, the basic assumptions about patents used by the pharmaceutical industry to justify their actions clearly illustrate how powerful intellectual property has become as an ideology. If you "steal" property, you are a thief and if you create a form of property that is a public good, you are a hero.

Over the past two decades, intellectual property owners have aggressively lobbied for domestic and international laws to protect intellectual property rights. The Trade Related Aspects of Intellectual Property (TRIPS) Agreement is one of the most recent and far reaching victories by intellectual property owners who wish to see their rights protected globally. The TRIPS agreement was the result of a strategy whereby pharmaceutical companies defined themselves as the "victims" of immoral and malicious "pirates" and "thieves." Developing countries that violated intellectual property rights were not only engaged in unfair trade, they were morally bankrupt. Within the intellectual property discourse, morality is defined as adhering to the law, and according to this definition, violating intellectual property laws is inexcusable.

The pharmaceutical industry was active in asserting their idea of intellectual property globally as early as the mid-80's. As Robert Weissman explains,

By 1985, the pharmaceutical industry was on the offensive, in an effort to force Third World countries to adopt U.S.-style patent laws. While the industry attempted to directly persuade Third World policy makers of the merits of guaranteeing strict patent protection, its main strategy was to persuade U.S. policy makers to coerce Third World countries to adopt restrictive patent rules.¹⁸

The industry successfully influenced U.S. policy by opening revolving doors between the patent and trademark office, key governing boards in the U.S., and industry jobs.¹⁹

The close link between industry and government influenced the development of the U.S. position on intellectual property, and was instrumental in getting IP rights included in the GATT negotiations.²⁰ Weissman argues that the industry gained significant traction on the issue of intellectual property by developing a "rights" discourse.²¹ Once the idea of "rights" to property in the global environment was accepted, the pharmaceutical companies solicited the help of the computer software and entertainment industry to assist them in shaping the international agenda as a quest to protect the victims of world piracy.²² Multinational corporations defined their own behavior as moral when they successfully claimed they were defenseless from the theft and piracy of immoral countries. The narration of victimhood and piracy used to support a strong international intellectual property regime is illustrated in the statements by Ambassador, and previous U.S. Trade Representative under Ronald Regan, Clayton K. Yeutter who testified before Congress in 1996 on the necessity of strong intellectual property protection. His testimony is worth reproducing at length:

Today, the market for new products and technology extends far beyond our shores. It has expanded into every corner of the globe. But if American firms are to take advantage of newfound global demand for their products, they must rely on foreign governments

to protect their valuable intellectual property rights. Often, foreign governments fall short, leaving U.S. owners of intellectual property defenseless against piracy. In these situations, the fruits of American innovation are lost, since it is a simple matter to copy most artistic works or technological advances in countries like India, Russia, or China.

In response to pleas from American companies, artists, and inventors for action to address proliferating global piracy, the United States a decade ago forced intellectual property rights onto the Uruguay Round agenda. But for our unremitting pressure, the more than one hundred countries who participated in the Round would not have negotiated stronger rules and disciplines. It was the United States which understood, more than anyone, that uniform protection of intellectual property rights around the world would promote the expansion of international trade, global economic growth, and job creation . . . And until the final stages of the negotiations, many of our trading partners wanted weak or non-existent global intellectual property standards, generous exemptions for developing countries, or the indefinite postponement of multilateral rules so that their local pirates could continue copying American pharmaceuticals, films, sound recordings, software, and books. Fortunately, the outcome was a disappointment for the “purveyors of piracy.”²³

Yeutter condenses a decade of negotiations into a clear morality play in which the United States is the guiding light to the world; the U.S. has understood, “more than anyone,” the importance of intellectual property rights and has prevailed against governments supporting “pirates.” In this narrative, there are no legitimate reasons for resisting the U.S. position, and in fact the reasons given by the developing world are not discussed as rational at all. Instead, it is assumed they are “purveyors of piracy.” Because of this one-sided narrative, the U.S. is in the heroic position of listening to the “pleas” of victimized innocents who are “defenseless” at the hands of foreign governments and pirates. From Yeutter’s statements, and others who share his perspective, the global narrative is established with the moral terrain staked out in favor of multinationals.²⁴

Monopolizing the language of victimhood has allowed the pharmaceutical industry to claim it suffers whenever laws sympathetic to public health and human welfare are passed. While millions of Africans are being discriminated against, it is the pharmaceutical industry that claims to suffer when attention is focused on making these medicines available. Even as pharmaceutical companies become the wealthiest corporations in the world,²⁵ they continue to position themselves as the victims of unjustified “piracy” and discrimination.

The U.S. government asserts, along with industry, that without strong protective measures there would be no incentive to produce new life-saving drugs.²⁶ The USTR publicly sided with strong intellectual property laws in May of 2001 when it reported to the President that AIDS should only be addressed within the framework of intellectual property rights.

The Administration has informed countries that as they take steps to address a major health crisis like the HIV/AIDS crisis in sub-Saharan Africa, they should be able to avail themselves of the flexibilities afforded by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), provided that any steps they take comply with the provisions of the TRIPS Agreement. The Administration is equally committed to a policy of promoting intellectual property protection, including for pharmaceutical patents, because of its critical role in the rapid innovation, development, and commercialization of effective and safe drug therapies.²⁷

While the statement recognizes the importance of intellectual property in creating drugs, it ignores evidence that publicly funded support for innovation is crucial to the development of most drugs. It assumes the government can do nothing to inspire innovation through funding and that research and development is solely in the hands of organizations that only create when absolute protection is guaranteed.²⁸

The industry implies that if their monopoly rights are threatened, they will not invest money in new research.²⁹ This not-so-subtle threat is present in the statements of Gerald J. Mossinghoff, President of PhRMA (the

primary pharmaceutical lobbying group), at a 1996 Senate hearing on pharmaceutical patents. Mossinghoff blames American laws and a competitive environment for weakening the incentive to pursue life-saving research:

One thing remains unchanged between then and now: the critical need of patients for cures that can only be developed through high-risk, high-cost pharmaceutical research. Cancer, AIDS, Alzheimer's and other diseases continue to take an unacceptable human and economic toll. Sustained innovation is really our only hope for reducing this toll. But because Hatch-Waxman, combined with a far tougher marketplace, has dampened the incentives for R&D investment significantly over the past 11 years, there is a danger that less innovation will occur in the future. The long lead time between R&D investment and the introduction of new drugs means that the effect of weak incentives today will be reflected in fewer new drugs in the future. A recent survey of leading pharmaceutical companies conducted by BCG as part of this study suggests that the share of revenue invested in R&D is expected to decline over the next four years. If this, in fact, occurs, the cutbacks will most likely be made in high-risk categories. Since these are the areas with the greatest potential for breakthroughs, a slowdown in research may deprive society of the next generation of "miracle" drugs.³⁰

Mossinghoff's statement is important for several reasons. It is clear that the pharmaceutical industry associates its work with the most moral of pursuits—reducing the human impact of disease. However, Mossinghoff makes it clear that such a pursuit has an economic framework and diseases will only be researched if the incentive remains high enough to off-set the risk. According to Mossinghoff, a weaker incentive structure caused by competition will lead to less R&D on life-saving drugs.³¹ Without strong patent protection, research for the most devastating of diseases will be ignored and focus will be put on diseases of the wealthy—like obesity.³²

The pharmaceutical industry maintains that only one in 4,000 drugs will make it to market, and because it will cost millions of dollars for each one, it is necessary to provide lengthy patent protection to recoup costs.³³ However, the fierce protection of patents is as much about control of the market as it is

about incentives to research and develop new drugs. If drug companies conceded the issue of compulsory licensing and parallel importation, then vital monopoly control would be lost. As economics professor Michael Engelke puts it, “[t]he South African law also would set a precedent that could lead to weakening of intellectual property laws in more lucrative markets, which could translate into more losses.”³⁴ Similarly, pharmaceutical analyst Richard Jarvis argued that “the danger with lots of countries breaking patents is not so much the immediate hit to sales—CSK and Roche both know that most of the money is made in the U.S., Europe, and Japan—but the loss of market control.”³⁵ Thus, even though sales to the Third World account for less than 2% of global sales, the industry takes this issue seriously because of the long-term impacts on their ability to monopolize price controls in the rest of the world.³⁶ The industry has decided to take the hard-line approach and attempt to resist any possible infringement. This road may make sense from an intellectual property perspective, but it leaves the industry open to claims of heartlessness.

The global pharmaceutical industry argues that the use of parallel imports and compulsory licensing will result in a significant loss of control. Compulsory licensing and parallel importation are therefore strictly regulated. The TRIPS Agreement provides patent protection for twenty years, during which time other entities are not allowed to manufacture the patented material without the permission of the patent owner.³⁷ Compulsory licensing is a mechanism through which a government forces a patent owner to license their patented product to another manufacturer before the expiration of the patent, presumably so that it may be produced at a cheaper price domestically.³⁸ TRIPS provides a mechanism for compulsory licensing in Article 31, but it also provides strict rules for the use of compulsory licenses.³⁹ The U.S. argued that South Africa misinterpreted TRIPS when it passed the South African Medicines Act. Instead of moving through the WTO,⁴⁰ the U.S. took unilateral action to make South Africa go beyond the protection provided in TRIPS and change their rules regarding compulsory licensing to better reflect the pharmaceutical industry’s perspective.⁴¹

Despite the U.S. position on international protection of patents, the U.S. itself allows compulsory licensing.⁴² Items that may be subject to compulsory licensing in the United States include many types of military technology and public health goods.⁴³ The Cipro/anthrax controversy is the most recent example in the U.S. Cipro is a patented drug owned by the German pharmaceutical company Bayer.⁴⁴ Neither American nor Canadian supplies of Cipro were sufficient to meet demand in the event of an anthrax epidemic. In response to the heightened sense of risk, the Canadian government ordered a million doses of Cipro from a generic drug manufacturer, violating Bayer's patent.⁴⁵ After threatening to follow the lead of the Canadians,⁴⁶ the United States government negotiated a reduced price in order to stockpile enough Cipro for a large attack.⁴⁷ In this case, the U.S. used the threat of compulsory licensing to lower the price of a medicine needed by U.S. consumers.⁴⁸ The U.S. has ignored this double standard as it works to protect the interests of U.S. pharmaceutical companies abroad.

There is significant evidence that when generic drugs are available, or other mechanisms are in place to provide competition, drug prices fall.⁴⁹ Losing control of the market would open the window for an evaluation of the pricing structures of many pharmaceutical products. Part of the rhetorical strategy of the drug companies has been to divert attention from the prices they charge for medication, and shift the debate into a framework where brand name manufacturers are again victims, this time of generic drug manufacturers. As Science Reporter Steve Buist puts it, "[i]n the eyes of the multinationals, these companies are deliberately trying to dodge the rules and suck the lifeblood from an industry that spends billions and billions of dollars bringing drugs to market under the protection of worldwide patents."⁵⁰ This line of argument suggests that generic manufacturers, which produce drugs that have fallen out of patent protection (or in the case of Brazil and India, produce patented drugs for domestic distribution), are the greedy and unprincipled ones.⁵¹ For example, in March 1998, PhRMA representative Tom Bombelles suggested that South Africa was a pawn used by India and Argentina to undermine TRIPS.⁵² This position shifts the focus away from

the enormous health crisis in Africa and suggests that in reality, the debate is really about whom will be able to sell South Africa medication.⁵³

Producers of brand-name pharmaceuticals have also argued that patents are irrelevant to why Africans do not have access to AIDS medication. The industry produced studies that illustrated most AIDS medication was not subject to patent protection in Africa, so it was impossible for patents to have caused the problems of access.⁵⁴ While technically it is true that patent laws *in Africa* have had little to do with access to medication, patent laws elsewhere in the world have made all the difference. Because most AIDS medications are patented in the U.S. or Europe, these companies establish the costs for drugs sold in Africa, regardless of the patent system in Africa. Because no one, including the world health agencies, seem willing to challenge the costs of brand name AIDS medications that could be made available legally under TRIPS, these medications remain outside the reach of virtually all individuals in Africa. Instead, health organizations and the pharmaceutical companies have focused on prevention and education instead of medication.⁵⁵

Throughout the debate, pharmaceutical companies have attempted to shift the focus away from compulsory licensing and parallel importation, and on to their claim that these actions will destroy the intellectual property system. They have attempted to shift the focus away from a middle path by continually asserting the debate is about the protection or destruction of intellectual property. They create a dichotomy in which the only positions are for or against the protection of patents. However, it is crucial to understand that the South African government did not void international patent law with the Medicines Act. Instead, the South African government argues that the government should be allowed to produce the needed drugs domestically for an affordable price through a licensing system; the drug companies still profit under compulsory licensing. The very volume of drugs necessary to treat the AIDS crisis in Africa will produce a substantial profit, even at the cheapest prices.

By resisting the pressure to give legitimacy to the ideas of parallel importation and compulsory licensing, the pharmaceutical industry has ensured that AIDS medications have remained inaccessible to all except the wealthy few. Because the industry has been instrumental in structuring international agreements regarding patent rights, most domestic and international bodies have been very slow to challenge the pharmaceutical companies. The industry seems to have had every reason to believe they would be successful in their litigation against the South African government. In the next section, I will provide an overview of the struggle surrounding the South African act and illustrate how the industry may have lost control over the language of property rights.

SOUTH AFRICA'S FIGHT FOR AIDS MEDICATION: A BRIEF HISTORY.

1997

In 1997, thinking that its legislation was consistent with TRIPS and desperately needing to do something to fight the growing AIDS epidemic, the South African government passed the South African Medicines and Related Substances Control Act Amendments. Of particular interest to the pharmaceutical companies was Section 15(c), which indicated that the South African government believed the TRIPS agreement allowed it to legally engage in compulsory licensing and parallel importation of drugs to provide access at prices affordable to its citizens if faced with a health crisis.⁵⁶

The United States feared South Africa might begin to engage in parallel importation, and circumvent the pricing structure of the pharmaceutical industry. However, while the U.S. banned parallel imports in 1987,⁵⁷ the fact that drugs are available in Canada and Mexico for prices substantially lower than those in the U.S. has created significant pressure to allow Americans easier access to these markets, a practice the pharmaceutical industry condemns.⁵⁸ Thus, at the same time the U.S. was resisting the possibility of parallel imports in South Africa, the U.S. Congress was considering legislation to make this practice legal in the U.S.⁵⁹

The passage of the 1997 Medicines Act sparked immediate condemnation on the part of the United States Government and the pharmaceutical industry. In July of 1997, then Deputy President Mbeki received letters expressing concern about intellectual property protection from a variety of U.S. Representatives, including Vice-President Al Gore.⁶⁰ Numerous meetings between South African officials, pharmaceutical representatives, and U.S. officials took place, at which parallel imports and compulsory licensing were condemned.⁶¹ Despite this significant pressure, President Nelson Mandela signed the amendments into law on December 12, 1997.⁶² Over the month of January, in response to the new law, the U.S. National Medical Association, the U.S. National Black Nurses Association, and the National Black Caucus of State Legislators all wrote letters to President Mandela expressing concern.⁶³

At the same time the U.S. was expressing concern over the South African law, the World Health Assembly recommended that “The Revised Drug Strategy” be adopted. This resolution requested that member countries “ensure that public health rather than commercial interests have primacy in pharmaceutical and health policies and to review their options under the Agreement on Trade Related Aspects of Intellectual Property Rights to safeguard access to essential drugs.”⁶⁴ Thus, while the U.S. and its’ European allies were condemning the actions of the South African government, the international health community was beginning to frame the issue in terms of commercial interests versus human rights.

1998

While controversy continued over the South African law, Brazil began manufacturing generic AIDS drugs in 1998. Faced with growing HIV infections and a relatively poor population, Brazil undertook a massive public health campaign to provide AIDS medication to all citizens. To do this, Brazil began manufacturing generic AIDS drugs, a policy that was successful in reducing infection, halting the spread of HIV, and extending life.⁶⁵ Thus, even as the U.S. government allied itself with the pharmaceutical industry

and continued to champion education over medication, Brazil was providing a powerful success story utilizing treatment. It was possible to overcome the barriers of poverty and an inadequate health care system in the fight against AIDS. Brazil's example gave others in the global south a model to follow. In 1999, for example, Thailand also attempted to produce generic AIDS drugs, but quickly ended their plans when the United States threatened to impose tariffs on Thai goods heading towards the United States.⁶⁶ Unfortunately, the Brazil model, despite its success in slowing the rates of death due to AIDS, has been challenged by the U.S., which began proceedings in the WTO claiming that Brazil's patent legislation is a violation of TRIPS.⁶⁷

Throughout 1998, U.S. diplomats, including Vice-President Al Gore, continued to pressure South Africa regarding the law. On February 18, 1998, the Pharmaceutical Manufacturers' Association of South Africa, along with forty-one other national and multinational pharmaceutical companies, filed a motion in the High Court of South Africa against the South African government, arguing that Section 15(c) of the Medicines and Related Substances Control Amendment Act of 1997 was unconstitutional.⁶⁸ On the American front, congressmen Mendez and Royce sent a letter to Secretary of State Madaline Albright requesting that Special 301 status be used against South Africa in April of 1998.⁶⁹ According to James Love, in May of 1998, the USTR placed South Africa on its Special 301 Watch List because of the Medicines Act⁷⁰ and in November of 1998, the South African government passed a new medicines bill, but the 15(c) provisions were identical to the original.⁷¹

1999

Pressure from the U.S. government and the pharmaceutical industry continued throughout 1999. However, because of a unique combination of events, the pressure became less one-sided and more public. For several reasons the AIDS crisis, and South Africa's battle to provide access to cheap drugs, became international news. First, Al Gore was running for President and the campaign allowed activists to focus public attention on Gore's role in the

South African negotiations over the previous three years.⁷² Second, the World Trade Organization (WTO) held its talks in Seattle in December of 1999 amidst tens of thousands of protestors. For the first time, the complex trade rules that governed the WTO, including TRIPS, were translated into their real world implications. Demonstrators were able to clarify that neo-liberal trade policies were doing little to help the poor or the sick around the world.⁷³ Such enormous political pressure not only disrupted the WTO meeting, but provided a jump start for the more specific campaign to provide cheap access to AIDS drugs. The combination of international media attention on TRIPS and a U.S. Presidential election allowed AIDS activists to set the stage for the next series of events.

In April of 1999, just months before the WTO meetings in Seattle, the USTR placed South Africa on the Watch List again.⁷⁴ In a press release, PhRMA supported the USTR policy towards South Africa.⁷⁵ While both sides in the South African lawsuit had filed briefs, the trial was delayed in hopes of negotiating a settlement with the new South African Government elected in June of 1999.⁷⁶ The threat of litigation could certainly be interpreted as a not-so-subtle incentive to redraft the law.

While the U.S. continued to pressure South Africa, the World Health Assembly passed a resolution that “declared public health concerns “paramount” in intellectual property issues related to pharmaceuticals.”⁷⁷ Even as the U.S. State Department was declaring that “all relevant agencies of the U.S. government . . . have been engaged in an assiduous, concerted campaign to persuade the government of South Africa to withdraw or modify” their Medicines law, the policy making body of the WHO was taking a stand in favor of the health concerns of world citizens.⁷⁸

Despite the fact that activists had been working on the issues of access to AIDS medications for years, the pressure on the South African government by the U.S. during an election year gave them an opportunity to bring the issues to the larger public. Throughout the summer of 1999, AIDS activists around the U.S. used the presidential campaign to publicly protest U.S. actions against South Africa, with a particular focus on the role Al Gore was

playing in the process. For example, the June 2-8, 1999 edition of the *Village Voice* ran an article condemning Gore's position on patents governing life-saving medicines.⁷⁹ In June of 1999, the organization Public Campaign ran a story on Gore's financial links with the pharmaceutical industry, documenting the campaign money Gore received from the drug industry that, they argued, explained why he was taking a hard line with South Africa despite pressure from AIDS activists.⁸⁰

AIDS activists did not let the pressure off Gore and sponsored protests at campaign rallies. ACT-UP was especially influential, and their actions were in part responsible for the Black Caucus asking Gore to clarify his position on AIDS medication for South Africa.⁸¹ In response to his critics, Gore stated that he supported "South Africa's effort to provide AIDS drugs at reduced prices through compulsory licensing and parallel importing, so long as they are carried out in a way that is consistent with international agreements."⁸² This statement was taken by the Black Caucus to mean that Gore was indeed in support of cheaper medication for South Africa; yet Gore was careful to remain committed to the notion that the South African government must act "legally."⁸³ At the WTO meetings in Seattle, President Clinton stated that "the United States will 'implement . . . trade policies in a manner that ensures . . . the poorest countries won't have to go without medicine they so desperately need.'"⁸⁴ In private, the U.S. continued to pressure South Africa to comply with the U.S. interpretation of the TRIPS agreement.

Meanwhile, the activist campaign against Al Gore continued. ACT-UP and AIDS Drugs for Africa appeared at Gore events and campaign rallies, and began linking U.S. policies to race and poverty.⁸⁵ Eric Sawyer, co-founder of ACT-UP in New York, said, "Britain and the Netherlands get 8-10 percent of their drugs through parallel imports, but the United States is not threatening them with trade sanctions or interfering with their affairs. . . . The U.S. is doing that only in South Africa, Thailand, and India. Why? Is it because they're poor countries of people of colour?"⁸⁶ In August of 1999, an open letter signed by over 200 people representing expertise around the globe was sent to Al Gore's office.⁸⁷ In August, activists locked Gore out of his office.

The lock-out was in response to the U.S. compromise that would allow South Africa to use parallel imports and compulsory licensing for AIDS related drugs, but for no other type of medication.⁸⁸ The negotiations only applied to AIDS drugs, and only to South Africa, leaving other life-saving medicines out of reach and the rest of Africa to fend for itself.⁸⁹

In September of 1999, two significant victories for AIDS activists were publicized. First, the U.S. government announced that it would back off its aggressive approach to South Africa, a move attributed directly to the pressure of activists on the administration in a campaign year.⁹⁰ The second major victory of September was the suspension of the legal action against the South African government. In a press release by PhRMA, the lobbying organization spun the event as the outcome of negotiations with South Africa who had agreed to redraft the Medicines Act.⁹¹ However, as James Love points out, despite reports that the new position was possible because South Africa “backed down,” the only “concession” South Africa made was a promise that it would adhere to the TRIPS agreement.⁹² In December of 1999, the U.S. government “announced a more ‘flexible’ U.S. position on this issue.”⁹³ These victories, while significant, were only a first step. South Africa still did not have drugs to administer.

2000

Because of the visible public relations battle over compulsory licensing in the South African case, the United States did seem to publicly change its position in 2000. As Sara Ford notes,

In the agreement, the United States agreed to relax its trade pressures on South Africa by acknowledging the special circumstances inherent in the AIDS epidemic. While both nations reaffirmed their policy objectives to mutual satisfaction, it is unclear if the United States’ position actually acknowledged the legality of compulsory licensing or whether it merely backed down due to harsh political pressure.⁹⁴

On May 10, 2000, President Clinton signed Executive Order 13155, which stated that the U.S. would not pursue unilateral negotiations to pressure

countries into changing their laws regarding AIDS and access to medication. However, while the U.S. would not use Special 301 status, it retained the right to pursue action in the WTO if governments violated the TRIPS agreement.⁹⁵ PhRMA immediately responded in a press release, arguing that the President's actions "set an undesirable and inappropriate precedent, by adopting a discriminatory approach to intellectual property laws, and focusing exclusively on pharmaceuticals."⁹⁶ Despite the public criticism, on May 11, 2000, five pharmaceutical companies began negotiating price reductions with African governments in association with UNAIDS.⁹⁷

Acknowledgement of the impact of AIDS led to two international conferences in 2000. Both the United Nations Security Council special session on AIDS and the World AIDS Conference in Durban, South Africa, highlighted the plight of millions of people around the globe.⁹⁸ These conferences were essential in clarifying the problems facing Africa. Despite the growing global understanding of the depth of the AIDS crisis, and a growing consensus over the need for AIDS medication (or perhaps because of it), the pharmaceutical companies reinstated their case against the South African government in July of 2000, the same month as the Durban conference.⁹⁹

The activist community began to turn its attention to the Bush campaign. ACT-UP planned protests outside the Republican National Committee's headquarters in Washington, D.C. for October 13, 2000. AIDS activists were afraid that Bush's links with the pharmaceutical industry (like Gore's) would influence his policy choices if he were elected.¹⁰⁰ Bush's approach to HIV/AIDS in Texas had given the AIDS community little assurance that his leadership on the issue would be progressive. Despite concerns, the Bush Administration announced in February of 2001 that it would continue Clinton's policy regarding intellectual property in South Africa.¹⁰¹

In October, the prominent international group *Medecines Sans Frontieres* (MSF) criticized the WHO approach to AIDS as "not aggressive enough."¹⁰² While the WHO had publicly supported a worldwide effort to halt the spread of AIDS, it focused on prevention and the availability of medicines to counter opportunistic infections.¹⁰³ However, claiming that antiretrovirals were too

expensive, the WHO stopped short of advocating access to these drugs to poorer nations. MSF continued to argue that pharmaceutical companies tend to invest their research on diseases impacting the wealthy nations of the world, and that it was up to global government agencies like the WHO to fill the void and provide cheap medication to African nations.¹⁰⁴

While MSF was pursuing a public relations war against the thinness of the WHO attempt to provide AIDS medication, the Treatment Action Campaign (TAC) decided to engage in civil disobedience. The Treatment Action Campaign imported 5,000 capsules of the AIDS drug Biozole into South Africa in October as part of their campaign “against ‘patent abuse’ and ‘AIDS profiteering’ by multinational pharmaceutical companies.”¹⁰⁵ Because the South African government had been immobilized by international pressure, TAC began establishing its own network of doctors and drug manufacturers to provide cheap drugs to South Africans.¹⁰⁶ The drugs were confiscated.¹⁰⁷ By December of 2000, the Health GAP Coalition had condemned the joint venture programs established by UNAIDS and the major pharmaceutical companies. While these programs were good public relations for the industry, the program itself was inherently flawed.¹⁰⁸ In some cases, prices were actually more expensive in the pilot programs than before and generic drug manufactures were kept out of negotiations.¹⁰⁹ Meanwhile, Brazil was able to document a 50% reduction in mortality because of “broad access to affordable generic antiretroviral medication” and access to “combination antiretroviral therapy.”¹¹⁰ MSF also published a report card on the UNAIDS program illustrating how the program was failing and demanding an immediate 95% price reduction in AIDS medication.¹¹¹

2001

On March 5, 2001, the trial began over the constitutionality of Section 15(c) of the 1997 Act.¹¹² The following day the pharmaceutical companies were granted a postponement until April 18, 2001.¹¹³ Each postponement delayed the implementation of the Medicines Act, but the debate over the morality of the issue remained in high gear.

Activists had been very successful in highlighting the morality of U.S. policy choices. Several important petitions followed the work of activists from academic quarters. In March of 2001, six hundred Yale researchers, including Professor William Prusoff, the original inventor of d4T, petitioned the University and Bristol-Meyers Squibb to “permit a generic version of its patented anti-retroviral drug d4T to be imported and distributed in South Africa.”¹¹⁴ Harvard University faculty followed with a “consensus statement” on April 4, 2001, in which they asserted that the world AIDS strategy should focus on medication, as well as education and treatment.¹¹⁵ The Harvard statement claimed that it was immoral to allow cost to outweigh the lives of human beings.¹¹⁶ These reports were published during the postponement of the South African lawsuit. In February, March, and April, Kofi Annan held meetings with pharmaceutical representatives, urging the necessity of access to medication.¹¹⁷

Despite the fact that “most observers” expected the South African law to be ruled unconstitutional because it was poorly drafted,¹¹⁸ on April 19, 2001 the lawsuit was dropped again due to immense public criticism.¹¹⁹ The hard work of the Treatment Action Campaign, Medecines Sans Frontieres, Oxfam, ACT-UP, the Consumer Project on Technology, and Africa Action, had made a victory for the pharmaceuticals impossible.¹²⁰ As Roslyn Park pointed out, the industry did not want to face the possibility that their actual expenditures and profit margins would be scrutinized during a trial.¹²¹

President Bush gave a Rose Garden speech on May 11, 2001, where he committed \$200 million to the global AIDS fund.¹²² However, Bush was quick to emphasize that the Global fund must “respect intellectual property rights, as an incentive for vital research and development.”¹²³ Thus, the framework of intellectual property protection remained in place. Despite years of pressure, the U.S. government continued to view the debate through the lens of intellectual property law. Public health concerns continued to come second to protecting intellectual property rights. Bush’s statements regarding AIDS and intellectual property were reiterated in June by Under Secretary of State for Global Affairs, Paula J. Dobriansky at a conference on “Curtailing the

HIV Epidemic: The Role of Prevention.”¹²⁴ She indicated that the U.S. position was that the protection of intellectual property rights provides an incentive to create.¹²⁵

In June of 2001, over 10 African countries finished their negotiations with pharmaceutical companies who were offering reduced pricing in conjunction with a UNAIDS program.¹²⁶ Patented AIDS drugs were becoming available at reduced prices, but availability was still limited to private clinics and small numbers of people.¹²⁷ In response to the continued lack of access, the Treatment Action Campaign and Oxfam called for a global protest against Pfizer unless it lowered the costs of Diflucan.¹²⁸

The developing world increased pressure in September when Brazil threatened to issue a compulsory license against Roche if it would not provide cheap access to Nelfinavir.¹²⁹ Brazil was successful in brokering a deal with Roche.¹³⁰ In September of 2001, Nigeria began importing antiretrovirals from Cipla, the Indian-based generic drug manufacturer.¹³¹ According to one source, “the pharmaceutical coalition now says it won’t oppose the South African government’s purchase of low-cost generics and, in some cases, the multinational companies have said they’d be prepared to provide the drugs either free or at cost.”¹³²

One could assume that the debate over South Africa’s access to AIDS medication was essentially over. At the level of public debate, it seemed like AIDS activists had been victorious. Pharmaceutical companies had agreed to lower prices and provide programs to administer drugs. But it was understood by those involved that if these concessions from the international pharmaceutical industry were not followed by revisions to international laws, the “victory” would be a shallow one. Therefore, the upcoming WTO meetings scheduled for September in Doha were of critical concern to AIDS activists and governments alike.

Doha

The events of September 11, 2001, significantly overshadowed the international negotiations leading up to the WTO Doha meetings. In a TRIPS

Council Special Discussion on Access to Medicines, the developing countries introduced a draft text they wanted to see endorsed at Doha. The proposal argued that TRIPS should be interpreted to “guarantee the ability of governments to ensure access to affordable medicines.”¹³³ Despite public assurances by the U.S. government that it would support easier access to medication, the U.S. position during these negotiations suggested that it continued to endorse the protection of intellectual property rights at the expense of public health. The United States and Switzerland led the resistance at the Special Discussion to changes in TRIPS. They contended that there were no problems with the agreement and it did not need clarification.¹³⁴ The U.S. also rejected language that would definitively allow for governments to take “measures necessary to protect public health.”¹³⁵

These discussions continued informally on September 21, when Australia, Canada, Japan, and New Zealand joined the U.S. and Switzerland in their opposition to a “separate Ministerial Declaration on TRIPS and public health.”¹³⁶ The United States also “sought to restrict the discussion and/or any declaration to only medicines for pandemics such as HIV/AIDS.”¹³⁷ Thus, the U.S. appeared ready to concede that intervention to halt AIDS may be necessary, but explicitly rejected a larger call for the needs of public health to supercede intellectual property. The U.S. position led many developing country diplomats to question the viability of TRIPS more generally. As one diplomat stated, “[i]f we are not even able to agree to address this life and death issue, the credibility of the TRIPS Agreement is at risk. Perhaps, in the near future, we will have to deal with the problem of the TRIPS Agreement as a whole.”¹³⁸

The irony of the U.S. position at the Special Discussion was that despite favoring the protection of patent rights over all but the most significant public health epidemics, it was only a matter of weeks before they were threatening to disregard Bayer’s patent for Cipro if Bayer did not lower the cost of Cipro for Americans threatened by anthrax.¹³⁹ While the U.S. was arguing that only epidemic diseases justified the subversion of intellectual

property rights to public health, they were willing to ignore their own statements when less than a dozen Americans became infected with anthrax.

The U.S. lost significant international legitimacy when the overwhelming hypocrisy of its own efforts regarding anthrax were juxtaposed against the efforts of developing countries to secure cheap access to AIDS drugs. For example, when Brazil pressured Roche into lowering the cost of Nelfinivir, “the Bush administration and U.S. corporate media accused it of violating international rules.”¹⁴⁰ Because of the anthrax controversy, Doha proved to be more successful for the developing world than it otherwise would have been.

Over 60 African, Latin American, and Asian countries, along with activists from around the globe, came to Doha with the goal of gaining concessions regarding AIDS medication.¹⁴¹ Despite its threat to Bayer, the U.S., along with Britain, Switzerland, and Germany came to Doha with a strong intellectual property agenda.¹⁴² Yet the developing world was able to win some concessions. In a December 25, 2001 article, *The Hindu* announced that the adoption of the Doha Declaration was a victory for countries seeking cheaper access to AIDS medication.¹⁴³ The Declaration “concedes 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 urgency . . . as provided for in Article 31.”¹⁴⁴ The Declaration gives each country the right to define a national emergency and affirms that compulsory licenses are an acceptable policy under TRIPS.¹⁴⁵

Despite this success, there are flaws with the declaration. Because it is not an amendment to TRIPS, the declaration only has moral force.¹⁴⁶ Further, the wording of the declaration may make it more difficult to actually amend TRIPS in the future.¹⁴⁷ The Doha declaration may allow countries like India and Brazil, which already have generic drug industries, to continue to manufacture such drugs after the TRIPS compliance deadline of 2005, but the benefits to countries like South Africa remain unclear.¹⁴⁸ While the issue of compulsory licensing is dealt with in the agreement, parallel importation is not.¹⁴⁹

The Pharmaceutical industry's response to Doha was not surprising. The drug industry opposed the Doha declaration and claimed that giving developing countries the ability to "promote access to medicines for all" was irrelevant to the AIDS crisis. Thomas Bombelles, now representing Merck, said, "This is a sterile, hypothetical, theological discussion which has nothing to do with why people are actually dying of AIDS today."¹⁵⁰ Again, while technically true—people are dying of AIDS today because the global community has been remiss in addressing the issue—this statement shifts the focus away from access to medication, a vital piece of the ultimate solution to the AIDS crisis.

Despite the advances made at the Doha meeting, the situation on the ground in South Africa did not change much. Access to AIDS medication remained difficult. In response, the Treatment Action Campaign and *Medecines Sans Frontieres* again began importing generic AIDS drugs from Brazil.¹⁵¹ While these generic versions are significantly lower in price than the brand-name drugs, it may still be a long time before most Africans have access. Despite the victories in Doha, the major world health organizations began linking themselves with the major brand-name pharmaceutical companies instead of helping fund the distribution of cheaper generic versions.¹⁵²

The years leading up to Doha were filled with drama and the clash of two distinct ideas about how to view life-saving drugs. The extended nature of this struggle illustrates that it is nowhere near over. If anything, these events illustrate how deceiving public officials can be as they announce flexible programs in public and negotiate for hard-line protection in private. Without the dedication of AIDS activists, a challenge to the dominant paradigm of strong intellectual property law would never have been possible.

In the process of changing the discourse, the activists helped transform the pharmaceutical industry from self-proclaimed "victim" of international piracy and theft, into victimizer of the poor and sick around the world. In reframing the debate, AIDS activists have made a crucial first step in transforming the world of intellectual property into a more humane one. In the final section of this paper I would like to examine the ways in which activists

were able to create such a powerful counter-discourse, and challenge the wealthiest conglomeration of corporate power on the planet.

ALTERNATIVES TO INTELLECTUAL PROPERTY

The moral force of the pharmaceutical industry as the creator of life-saving drugs was diminished by the contrary depiction of a greedy and aggressive industry that placed profits ahead of human life. By putting industry actions within a different moral framework, activists were able to undermine the legal and political superiority of the industry.

In the abstract world of TRIPS, where the implications of monopoly rights in terms of health are not central to the discussion, the moral discourse of theft and piracy established by the pharmaceutical industry was successful, but only as long as it remained in this abstract legalistic world. Because the implications of agreements like TRIPS were difficult for the average citizen to understand, and because much of what was negotiated was done without full public participation, most Americans and world citizens were unaware of the implications of TRIPS until after they were passed. The South African case was important as a forum for translating the abstract and legal world of TRIPS into the real world of human lives.

An important result of the process of developing an alternative to intellectual property law was the emergence of a growing global consensus that public health is a human right that should not be controlled by intellectual property decisions.¹⁵³ The UN Universal Declaration of Human Rights, the Constitution of the World Health Organization, and the International Covenant on Economic, Social and Cultural Rights have been instrumental in defining the right to health.¹⁵⁴ When the World Health Assembly describes access to medication as a human rights issue, it brings enormous moral weight to the argument.¹⁵⁵ Secretary General of the United Nations, Kofi Annan, has also weighed in on the side of access to medication by focusing on the role pharmaceutical companies need to play in providing cheaper drugs to those suffering from AIDS.¹⁵⁶ Gradually, a viable international consensus on the importance of access to medication and affordable prices has developed and

this access has been linked to health as a human right. Within this framework, actions taken by the pharmaceutical industry to protect their patents seem increasingly immoral.

The Treatment Action Campaign, a South African group, used the language of health as a human right to help frame the debate over the Medicine Act.

We argue, therefore, that when a conflict arises between human rights covenants and trade agreements, the rights to life and health-care take precedence. In concrete terms, if a government is a signatory to both the TRIPS agreement and any of the above-mentioned human rights covenants, by international standards it should be able to take action to enforce the protection of human rights, even if this means breaching the TRIPS agreement. Consequently, human health should not be subject to international law.¹⁵⁷

Aside from connecting the South African case to the larger emerging consensus on the importance of seeing health as a human right, this argument also brought international attention to the idea that issues of human health should not be commodified. Essential to the activist framework is the idea that human life should not be viewed through the lens of economic cost-benefit-analysis. By positioning the quality and length of human life outside the rational calculation of risk versus profit, activists rendered many of the arguments made by the pharmaceutical companies irrelevant. The TAC followed their words with deeds. The acting chairperson of the TAC, Zachie Achmat, has refused to take HIV medication until it is made publicly available by the government.¹⁵⁸

In a discussion paper for the Treatment Action Campaign, Nathan Geffen described the shift in perspective towards global human rights and away from the antagonistic attack on TRIPS:

In an advertisement to the *Economist* on 28 April, Dr. Harvey Bale, Director-General of the International Federation of Pharmaceutical Manufacturers Association (IFPMA), describes activist groups in conflict with organization as opponents of globalization. While TAC cannot speak for other activist groups, the attempt to caricature us in this way is quite wrong. . . . Indeed, most TAC members are not

in favor of eradicating the World Trade Organization (WTO), nor even the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement. However, unlike spokespersons for the pharmaceutical industry, TAC is consistent in embracing globalisation. Fifty-three years ago, the most important global treaty to date was adopted, the Universal Declaration of Human Rights, and has since been ratified by over 140 countries, more than the number of signatories to the WTO.¹⁵⁹

According to this perspective, if companies are unwilling to innovate without adequate monopoly protection, then the role of a government ought to be to protect public health instead of property by providing the necessary research and development when corporations refuse. Activists were quick to point out that the U.S. government already spends considerable money on R&D that is virtually ignored in the debate over patents. The de-commodification of human life requires more than government programs to provide loans for the purchase of brand-named drugs.¹⁶⁰

Within the intellectual property paradigm, a government who sought to provide cheap access to medication for its citizens was either undermining TRIPS or endorsing the actions of pirates. The assertion of the moral necessity for access to medication has been a long-standing criticism of TRIPS. As Sara Ford points out:

Developing nations generally believe that the economic injury complained of by the pharmaceutical companies in developed nations should have no bearing on the right to receive adequate health care. For these nations, compulsory licenses should be available for any health concern where there exists a pharmaceutical capable of either curing or postponing the disease. Thus, they believe that the moral exception argument should dictate the broad use and implementation of compulsory licenses under the TRIPS Article 31.¹⁶¹

With the new and more sympathetic world perspective, this argument became more than a smokescreen for piracy, as asserted by the pharmaceutical industry.

AIDS activists were able to highlight the importance of treatment and make it a morally required aspect of the campaign to fight AIDS.¹⁶² The

Vice President of the Republic of Malawi, in his keynote speech to the African Consultation Forum on the Global Fund to Fight AIDS, Tuberculosis, and Malaria, summarized the strangeness of the global position on treatment of AIDS:

It is a paradox that for the majority of diseases in the world, it is accepted wisdom that disease prevention, care, and treatment should be addressed in a comprehensive manner as prevention and treatment are complementary and have major public health benefits. None, for example would question the wisdom of treating Malaria, Tuberculosis or indeed any other common communicable disease. Indeed with the exception of childhood immunization, no major disease control programme focuses on prevention alone. However, it was only this year that consensus emerged that there is need to provide comprehensive treatment for HIV/AIDS.¹⁶³

Perhaps more than any other claim, the one that creation will wither and die if not protected by strong intellectual property is the most significant one to challenge. Certainly, challenges in the area of software, music, and books are already making headway. In the area of pharmaceuticals, the South African debate opens up the ground for change. As Cuba's production of a Meningitis vaccine indicates, a government with sufficient interest in protecting public health can do amazing things.¹⁶⁴ In the realm of pharmaceuticals, there is a viable role for governments to play in creating medication instead of working to protect patents. Activists for access to AIDS medication convincingly argued this perspective.

Throughout the events described above, AIDS activists skillfully used public pressure to gain concessions from the U.S. government and pharmaceutical companies that would not have otherwise been made. Without the vigilance of AIDS activists, the issues they made public would have been subsumed by the much better funded public relations campaigns of the pharmaceutical industry. Additionally, without the support of developing governments across the world, as well as the work of NGOs and activists, concessions at Doha would have been impossible.

Only when U.S. government actions were framed within the discourse of human rights was it possible to see an alternative to the strong intellectual property language. However, as the Treatment Action Campaign and other AIDS action groups point out, if they are not vigilant, nothing will stop the industry from raising prices again.¹⁶⁵ While activists were successful in transforming the debate over patents and AIDS medication, there is still work to do in order to avoid reverting to the status quo.

CONCLUSION: A CAUTIONARY LESSON

The lesson from the events surrounding the South African Medicines Act are instructive for those interested in alternatives to intellectual property for a variety of reasons. First, a committed group of activists were able to disrupt the political and legal agenda of some of the most powerful corporations in the world. Second, a viable human rights discourse centered on health as a human right was developed to help counter the economic rationality of the intellectual property rights paradigm. Third, the moral terrain surrounding AIDS medication was shifted from framing the pharmaceutical industry as the victims of piracy, to people with HIV/AIDS as the victims of a merciless assertion of patent rights. This was possible when the abstract world of TRIPS was rendered concrete in the South African case. Finally, a language of humanitarian care that does not necessarily reject completely the idea of intellectual property was developed. This language makes it possible to chart a third path through the polarizing rhetoric of the pharmaceutical industry. The development of a third, and more moderate path, is a significant step along the road to a world where intellectual property is not overemphasized at the expense of human life.

However, despite these important results, the battle over access to AIDS medication is not over. Success has been limited to South Africa and, to a certain degree, to AIDS medication. For example, Clinton's Executive Order was specific to South Africa, and while the industry has dropped the lawsuit against the South African government, there is little reason to believe these companies have adopted the language of access to medication as a

human right. While activists have pushed to expand access to *all* life-saving drugs, these more general claims have not been globally accepted. Certainly, there is a general moral commitment to providing medication, but the nature of the existing agreements limit access to most medications.

A second reason to be cautious stems from the fact that there has been a concerted effort on the part of the United States to retreat from the messy dilemmas imposed by discussing human rights. Instead, the United States prefers to discuss the more abstract concept of adhering to the already established legal regime. The United States has returned to pursuing patent claims at the level of the TRIPS agreement where actions can be filtered through “legal” and “illegal” instead of through their impact on human health. The language of this discussion is sanitized, avoids the reality of death, and treats the developing world as infringers who willfully violate the law.

Ultimately, while the seeds for a future effort to transform access to medication into a human right have been planted, there is still significant work to be done. Activists have been successful in developing an alternative to intellectual property, and though public opinion is on their side, the battle is long from over. They continue to argue that the role of government is to look after the public interest, not the corporate interest of the most rich and powerful.

The issue of the public interest is at the heart of the question of patents. What role should government play and what exactly is the “public” the government ought to protect? For whatever reasons, in the case of AIDS, the developing world has taken a stand in favor of its people, while the U.S. has taken a stand in favor of its corporations. This division will define the future of governmental relations as the U.S. attempts to transform the ideological makeup of the world in favor of “liberal” markets that only consider issues of public health and welfare through the lens of markets and intellectual property laws. The debate is about more than who should own information, it goes to the very heart of whom government is for and who ought to be protected. If the U.S. is successful in defining the public health programs of India, Brazil, and South Africa as immoral because they do not protect the

“rights” of corporate citizens, then the democratic principles that serve as the basis for our constitutional rights will have been seriously undermined. However, if activists can successfully offer an alternative, we will all live in a world that is richer, healthier, and more just.

¹ For the full text of 15c see James Love, Pharm-policy posting, [Pharm-policy] Section 15c of the South African Medicines Act (Jan. 23, 2001), at <http://lists.essential.org> (on file with the Seattle Journal for Social Justice).

² UNAIDS, REPORT ON THE GLOBAL HIV/AIDS EPIDEMIC 8 (2002).

³ JOINT UNICEF, UNAIDS SECRETARIAT, WHO/HTP, MSF PROJECT, SOURCES AND PRICES OF SELECTED DRUGS AND DIAGNOSTICS FOR PEOPLE LIVING WITH HIV/AIDS (2001) at 5, at <http://www.supply.unicef.dk/insideSD/HIVAIDSMay2001.pdf>.

⁴ Emad Mekay, *Pressure Builds for Affordable Life-Saving Drugs*, INTER PRESS SERVICE, Nov. 7, 2001.

⁵ Theodore C. Bailey, Note, *Innovation and Access: The Role of Compulsory Licensing in the Development and Distribution of HIV/AIDS Drugs*, 2001 U. ILL. J.L. TECH. & POL'Y 193, 195–196 (2001).

⁶ Steve Buist, *Generic AIDS-Drug Makers Weather Global Controversy*, HAMILTON SPECTATOR, July 25, 2001.

⁷ *Id.*

⁸ Bailey, *supra* note 5, at 195–196.

⁹ J.M. Spectar, *The Hybrid Horseman of the Apocalypse: The Global Aids Pandemic & the North-South Fracas*, 29 GA. J. INT'L & COMP. L 253, 260 (Winter 2001) (arguing that often it is areas like health care and education that are hardest hit by AIDS deaths).

¹⁰ Salih Booker & William Minter, *AIDS in Africa: Is the World Concerned Enough?*, GREAT DECISIONS 71, 72 (2002), available at <http://www.africaaction.org/action/aids2002.pdf>.

¹¹ Stephen Lewis, U.N. special Envoy for AIDS/HIV in Africa, said on *The Nature of Things*, “What in God’s name do you do if you pack up and decide that you can’t do anything. I mean, it may be that countries are facing extinction. While there have been numbers of heroic interventions by some governments like Botswana, Uganda, Senegal, we haven’t even scratched the surface of making a difference in Africa. The Herculean effort is about to begin. And I for one, will be darned if I’m not going to be part of the effort.” *The Nature of Things with David Suzuki: Race Against Time, the HIV/AIDS Pandemic in Africa* (CBC television broadcast, Nov. 27, 2001).

¹² See Anna-Marie Tabor, Recent Development, *AIDS Crisis*, 38 HARV. J. ON LEGIS. 515, 515 (2001) (arguing that declines in risk in the U.S. make the subject less reported).

¹³ See generally TRANSNATIONAL SOCIAL MOVEMENTS AND GLOBAL POLITICS: SOLIDARITY BEYOND THE STATE (Jackie Smith et al. eds., 1997).

¹⁴ RAYMOND W. COPSON, CONG. RES. SERV., AIDS IN AFRICA 9 (CRS Issue Brief, No. IB10050, updated Aug. 1, 2002), available at <http://www.fas.org/man/crs/IB10050.pdf>.

¹⁵ Bailey, *supra* note 5, at 196. See also JOINT U.N. PROGRAMME ON HIV/AIDS (UNAIDS) & WHO, GUIDANCE MODULES ON ANTIRETROVIRAL TREATMENTS, MODULE 1: INTRODUCTION TO ANTIRETROVIRAL TREATMENTS, U.N. Doc. UNAIDS/98.7 (1998), available at http://www.who.int/HIV_AIDS/antiretroviral_modules/mod1.doc (citing 1997 level costs for the most popular AIDS medications).

¹⁶ Matthew Kramer, Comment, *The Bolar Amendment Abroad: Preserving the Integrity of American Patents Overseas After the South African Medicines Act*, 18 DICK. J. INT'L L. 553, 553 (2001).

¹⁷ Rosalyn S. Park, Note, *The International Drug Industry: What the Future Holds for South Africa's HIV/AIDS Patients*, 11 MINN. J. GLOBAL TRADE 125, 127 (2002).

¹⁸ Robert Weissman, *A Long, Strange TRIPs: The Pharmaceutical Industry Drive To Harmonize Global Intellectual Property Rules, And The Remaining WTO Legal Alternatives Available To Third World Countries*, 17 U. PA. J. INT'L ECON. L. 1069, 1075–76 (1996).

¹⁹ *Id.* at 1076.

²⁰ *Id.*

²¹ *Id.* at 1087.

²² F. M. Scherer, *The Law And Economics Of Intellectual Property Rights: The Pharmaceutical Industry and World Intellectual Property Standards*, 53 VAND. L. REV. 2245, 2248 (2000).

²³ *Pharmaceutical Patent Issues: Interpreting GATT, Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 227 (1996) (statement of Clayton K. Yeutter, Ambassador). Ambassador Yeutter is a partner at Hogan & Hartson, L.L.P., which serves as counsel to Glaxo-Wellcome, Inc.

²⁴ See generally DEBORA HALBERT, INTELLECTUAL PROPERTY IN THE INFORMATION AGE: THE POLITICS OF EXPANDING OWNERSHIP RIGHTS (1999) (evaluating the language of victimhood).

²⁵ The pharmaceutical industry has grown in the past 12 years from under \$30 billion to over \$100 billion. *Hearing Before the S. Comm. on the Judiciary, supra* note 23, at 125 (Statement of John Klein, Chairman of the Generic Pharmaceutical Industry Association).

²⁶ Bailey, *supra* note 5, at 195 (describing the balance between the industry and AIDS patients; the debate is often framed in terms of a balance between patients' rights to medication and the need to preserve the industry incentive to create more public goods).

²⁷ OFFICE OF U.S. TRADE REPRESENTATIVE, 2001 COMPREHENSIVE REPORT OF THE PRESIDENT OF THE UNITED STATES ON U.S. TRADE AND INVESTMENT POLICY TOWARD SUB-SAHARAN AFRICA AND IMPLEMENTATION OF THE AFRICAN GROWTH AND OPPORTUNITY ACT 43 (May 2001) (the first of eight annual reports submitted to Congress by the President), available at <http://www.ustr.gov/regions/africa/growth.shtml> (on file with the Seattle Journal for Social Justice).

²⁸ Dean Baker, *Dying for Patents*, Center for Economic Policy & Research (Oct. 29, 2001), at http://www.cepr.net/columns/baker/dying_for_patents.htm (stating that the National Institutes of Health, other government funded groups, private foundations and charities make up a significant amount of the research into life-saving drugs).

²⁹ Copson, *supra* note 14, at 10.

³⁰ *A Decade Later: The Drug Price Competition and Patent Term Restoration Act, Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 125–125 (1996) (statement of Gerald J. Mossinghoff, President of PhRMA).

³¹ *Id.* In addition, PhRMA Attorney Charles J. Cooper insisted upon keeping the debate within the bounds of economic theory during his testimony before the U.S. Congress. *Id.* (statement of Charles J. Cooper, Attorney, PhRMA). Within this framework, drug companies retain the moral high ground by being able to claim harms done to them via generic drug manufacturing and piracy. They only mention the issue of availability of medication for people within the framework of R&D. Their contribution is not medicine, but research.

³² Carl Mortished, *Medical Patent is Bitter Pill for WTO Delegates*, TIMES (London), Nov. 5, 2001, at 23.

³³ Bailey, *supra* note 5, at 197.

³⁴ Karine Cunqueiro, *Hostile AIDS Activists Target Gore Over Patents*, INTER PRESS SERVICE, July 18, 1999, at <http://www.ipsnews.net/search.shtml>.

³⁵ Leo Lewis, *Can Drug Giants Swallow this Bitter Pill? As Brazil Threatens to Copy the AIDS Drug Viracept, Leo Lewis Asks how Pharmaceutical Research will Survive*, INDEPENDENT ON SUNDAY (London), Aug. 26, 2001, at 3.

³⁶ Richard Gwyn, *Big Drug Companies, Shameful Profits*, TORONTO STAR, Mar. 7, 2001, available at <http://www.commondreams.org/views01/0307-03.htm>.

³⁷ See Kramer, *supra* note 16, at 560–61 (defining the controversy of compulsory licenses).

³⁸ *Id.* at 561.

³⁹ See John A. Harrelson, Note, *TRIPS, Pharmaceutical Patents, and the HIV/AIDS Crisis: Finding the Proper Balance Between Intellectual Property Rights and Compassion*, 7 WID. L. SYMP. J. 175, 181–82 (2001) (describing compulsory licenses but arguing that in the case of pharmaceuticals it is not possible to use compulsory licenses under the TRIPS agreement).

Article 31 allows a member nation to offer compulsory licenses to the government or third parties under limited circumstances. Subject to Article 31(b), compulsory licenses can be imposed only for domestic use and restrictions exist on the process of granting such licenses. In order to grant a compulsory license under the TRIPS Agreement, each case must be considered separately on its merits. In addition, efforts must be made to obtain permission of the patent owner. This requirement may be waived in the case of a national emergency. A patent owner must also receive adequate compensation. The granting of compulsory licenses and the remuneration given is subject to judicial review. The license must be terminated when the original need for the compulsory license no longer exists. The WTO cautions that the compulsory license conditions ‘should be read together with the related provisions of Article 27.1, which require that patent rights shall be enjoyable without discrimination as to the field of technology, and whether products are imported or locally produced. Thus, a general requirement to allow compulsory licensing for a field, such as pharmaceuticals, appears to be outside what is allowed under TRIPS.

Id.

⁴⁰ See Bess-Carolina Dolmo, Note, *Examining Global Access to Essential Pharmaceuticals in the Face of Patent Protection Rights: The South African Example*, 7 BUFF. HUM. RTS. L. REV. 137, 146 (2001) (suggesting that the U.S. did not utilize the WTO dispute resolution framework because they knew the South African legislation did not technically violate TRIPS). *But see* Scherer, *supra* note 22, at 2252 (suggesting that WTO action was avoided because of activist pressure on Gore during the campaign).

⁴¹ Harrelson, *supra* note 39, at 184.

⁴² *Id.* at 191.

⁴³ *Id.*

⁴⁴ *Patent Problems Pending*, ECONOMIST, Oct. 27, 2001.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *France Suggests U.S. Double Standards over Generic Drugs*, AGENCE FRANCE PRESS, Nov. 2, 2001.

⁴⁸ See *id.* (because of its negotiating power, the U.S. was successful in getting Bayer to lower the cost of Cipro from \$1.77 per tablet to 95 cents).

⁴⁹ See Weissman, *supra* note 18, at 1116–17 (arguing that the evidence overwhelmingly supports the position that competition equals cheaper drugs).

⁵⁰ Buist, *supra* note 6.

⁵¹ See *id.* (quoting former Ontario health minister about the generic drug industry only going after the biggest markets).

⁵² Love, *supra* note 1.

⁵³ Mortished, *supra* note 32 (arguing that India and Brazil are arguing for reduced patent protection because of their own self-interest in protecting their generic drug industries). There is no evidence to suggest India manipulated South Africa, only that these countries share a similar perspective regarding the inequitable impact of intellectual property on access to medication. By blaming the Indian government as Bombelles does, the claim could be made that the South African controversy was really an issue of manipulative generic companies using the AIDS crisis to maximize their own profits at the expense of the brand-name industry.

⁵⁴ John Donnelly, *Patents Reportedly Do Not Cut AIDS Drug Access Study on Africa Cites Dearth of Global Aid*, BOSTON GLOBE, Oct. 17, 2001, at A3.

⁵⁵ See *infra* text accompanying note 163.

⁵⁶ James Love, *Appendix B: Time-Line of Disputes over Compulsory Licensing and Parallel Importation in South Africa*, Aug. 5, 1999, at <http://www.cptech.org/ip/health/sa/sa-timeline.txt> (A more detailed timeline of the communications that surrounded the change in the law can be found in James Love's timeline, which is available at the Consumer Project on Technology website. I rely quite heavily on this timeline and Love's excellent archival information surrounding this controversy).

⁵⁷ William Davis, Comment, *The Medicine Equity and Drug Safety Act of 2000: Releasing Gray Market Pharmaceuticals*, 9 TUL. J. INT'L & COMP. L. 483, 485 (2001).

⁵⁸ *Id.* at 485. (Congress, in response to the cheap availability of drugs across both borders, introduced the Medicine Equity and Drug Safety Act of 2000. This legislation suggests that members of the U.S. Congress believe it is time to reevaluate the differential price of drugs as well).

⁵⁹ Dolmo, *supra* note 40, at 146–47 (pointing out that numerous U.S. Congress people are looking into the possibilities of parallel importation for pharmaceuticals to decrease drug costs in the United States).

⁶⁰ Love, *supra* note 56.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Tina Rosenberg, *Look at Brazil*, N.Y. TIMES, Jan. 28, 2001, § 6 (Magazine), at 26.

⁶⁶ Harrelson, *supra* note 39, at 185–86. The U.S. government later backed down from its position against Thailand and the country was able to produce medication.

⁶⁷ Park, *supra* note 17, at 141.

⁶⁸ Applicant's Notice of Motion, In the matter between Pharm. Mfg. Ass'n. S. Africa et. al and Mandela et. al, High Court of South Africa (1998) (No. 4183/98). In part, the applicants argued that the Act was unconstitutional because it failed to "facilitate public involvement in the legislative process by which the Amendment Act was passed; conduct its business in an open manner; take into consideration the recommendations made to the Portfolio Committee on Health [National Assembly] and the Select Committee on Social Services [Council of Provinces] by the public, and, in particular; pay attention to scien-

tific, medical, pharmaceutical and legal submissions made to the aforesaid committees by members of the public, including the Applicants . . .” *Id.*

⁶⁹ Love, *supra* note 56.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Even before Seattle, these ideas were beginning to bubble to the surface. See DAVID KORTEN, *WHEN CORPORATIONS RULE THE WORLD* (Berrett-Koehler Publishers 1995).

⁷⁴ Press Release, Office of the U.S. Trade Representative, USTR Announces Results of Special 301 Annual Review (Apr. 30, 1999) (on file with Seattle Journal for Social Justice). The USTR stated, “South Africa’s Medicines Act appears to grant the Health Minister ill defined authority to issue compulsory licenses, authorize parallel imports, and potentially otherwise abrogate patent rights. . . . We call on the Government of South Africa to bring its IPR regime into full compliance with TRIPS before the January 1, 2000 deadline, ensure that all Government offices use only legitimate software, 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. We will continue to address these issues with the South African Government and will conduct an out-of-cycle review of South Africa’s progress towards addressing these concerns in September 1999.” *Id.*

⁷⁵ Press Release, Pharmaceutical Research and Manufacturing Association, PhRMA Supports USTR on South Africa, (Apr. 30, 1999).

⁷⁶ PHARMACEUTICAL RESEARCHERS & MFG. OF AM., *SUBMISSIONS OF THE PHARMACEUTICAL RESEARCHERS AND MANUFACTURERS OF AMERICA FOR THE NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS: SOUTH AFRICA* (1999), available at <http://www.cptech.org/ip/health/phrma/nte-99/safrica.html>.

⁷⁷ Robert Weissman, *AIDS and Developing Countries: Democratizing Access to Essential Medicines*, 4 FOREIGN POLICY IN FOCUS 23 (Aug. 1999) available at <http://www.foreignpolicy-infocus.org/briefs/vol4/v4n23aids.html>.

⁷⁸ U.S. DEP’T OF STATE, REPORT, U.S. GOVERNMENT EFFORTS TO NEGOTIATE THE REPEAL, TERMINATION OR WITHDRAWAL OF ARTICLE 15(C) OF THE SOUTH AFRICAN MEDICINES AND RELATED SUBSTANCES ACT OF 1965 (Feb. 5, 1999) available at <http://www.cptech.org/ip/health/sa/stdept-feb51999.html>.

⁷⁹ James Ridgeway, *Gore AIDS Scandal – Helps Drug Companies Nix Cheap Medicines*, THE VILLAGE VOICE, June 2–8, 1999, available at <http://lists.essential.org/random-bits/msg00107.html> (last visited Nov. 3, 2002).

⁸⁰ *Al Gore, AIDS Drugs and Pharmaceutical Money*, OUCH! #25, June 16, 1999, available at http://www.publiccampaign.org/ouch6_16_99.html (last visited Nov. 3, 2002).

⁸¹ Sonya Ross, *Gore Faces S. Africa AIDS Dilemma*, THE ASSOCIATED PRESS, available at <http://www.aegis.com/news/ap/1999/AP990616.html> (last visited Nov. 3, 2002).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Harrelson, *supra* note 39, at 186.

⁸⁵ Cunqueiro, *supra* note 34.

⁸⁶ *Id.*

⁸⁷ Press Release, Treatment-Access, Activists Lock Gore Out of His Office (Aug. 25, 1999) available at <http://www.hivnet.ch:8000/topics/treatment-access/viewR?574> (on file with Seattle Journal for Social Justice).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See Ed Vulliamy & David Beresford, *South Africa Beats U.S. Over Costs of AIDS Drugs*, THE OBSERVER, Sept. 21, 1999, available at <http://www.q.co.za/news/1999/9909/990921-uspolicy.htm> (on file with Seattle Journal for Social Justice). In addition, in a

release from the USTR, the U.S. government announced that this decision came in response to an agreement reached where the South African government made a new commitment to protecting intellectual property law. Press Release, Office of the United States Trade Representative, U.S. - South Africa Understanding on Intellectual Property, (Sept. 17, 1999), available at <http://www.ustr.gov/releases/1999/09/99-76.html> (last visited Nov. 4, 2002).

⁹¹ Press Release, PhRMA, Drug Companies Suspend Action Against South African Law (Sept. 9, 1999) (on file with the Seattle Journal for Social Justice).

⁹² James Love, *Five Common Mistakes by Reporters Covering U.S./South Africa Disputes Over Compulsory Licensing and Parallel Imports*, CONSUMER PROJECT ON TECH., Sept. 23, 1999, at <http://www.cptech.org/ip/health/sa/mistakes.html> (last visited Nov. 4, 2002).

⁹³ Press Release, ACT UP, AIDS Activists to Target Bush on Mass Protest Friday the 13th, (Oct. 10, 2000), available at <http://www.africaaction.org/docs00/drug0010.htm> (on file with the Seattle Journal for Social Justice).

⁹⁴ Sara M. Ford, Comment, *Compulsory Licensing Provisions Under the TRIPs Agreement: Balancing Pills and Patents*, 15 AM. U. INT'L L. REV. 941, 955-956 (2000).

⁹⁵ Exec. Order No. 13155, Fed. Reg. 30,521-23 (May 12, 2000).

⁹⁶ Statement from Alan F. Holmer, President, PhRMA, issued in response to President Clinton's May 10, 2000 Executive Order on Access to HIV/AIDS Pharmaceuticals (May 2000) (on file with the Seattle Journal for Social Justice).

⁹⁷ COPSON, *supra* note 14, at 9; see also Position Paper by Health GAP Coalition Presented at UNAIDS meeting in Rio de Janeiro, *Questioning the UNAIDS/Pharmaceutical Industry Initiative: Seven Months and Counting . . .* (Dec. 13, 2000), available at <http://www.globaltreatmentaccess.org>.

⁹⁸ Tabor, *supra* note 12, at 516.

⁹⁹ *Pharmaceutical Companies Reinstate South African Legal Challenge*, 1 S. AFRICA-EUROPE TRADE & DEV. UPDATE 2, Sept. 2000, available at <http://www.africaaction.org/docs00/drug0010.htm>.

¹⁰⁰ ACT UP, *supra* note 93.

¹⁰¹ COPSON, *supra* note 14, at 10.

¹⁰² Press Release, ACT UP, WHO's "Massive Effort" is not Aggressive Enough says *Medecins Sans Frontieres* (Oct. 4, 2000) (on file with Seattle Journal for Social Justice).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Marjolein Harvey, *Government has two Weeks Legalise Generic AIDS Drug - TAC*, ALLAFRICA.COM, Oct. 20, 2000, at <http://www.allafrica.com/stories/printable/200010200316.html>. (Site lasted visited Nov. 5, 2002).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Health Gap Coalition, *supra* note 97.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Press Release, Medecins Sans Frontieres, *Six-Month Report Card: Have AIDS Drugs Prices for the Poor Been Slashed?* (Dec. 1, 2000) (on file with Seattle Journal for Social Justice).

¹¹² Consumer Project on Technology, *Africa: Disputes Involving Intellectual Property and*

Health Care, at <http://www.cptech.org/ip/health/africa/> (last visited Nov. 5, 2002).

¹¹³ *Id.*

¹¹⁴ Press Release, *Yale Researchers Demand that University, Bristol-Meyers Squibb Give Up Patent Rights to AIDS Drugs*, Federation News (Mar. 16, 2001), available at <http://www.yaleunions.org/news/PR.htm#joint>.

¹¹⁵ Gregor Adams et. al., *Consensus Statement on Antiretroviral Treatment for AIDS in Poor Countries By Individual Members of the Faculty of Harvard University*, Nov. 19, 2001, available at <http://www.tac.org.za> (arguing that there are many compelling reasons to focus on treatment despite the fact that it may cost).

¹¹⁶ COPSON, *supra* note 14, at 10.

¹¹⁷ Barbara Cochrane Alexander, *Lack of Access to HIV/AIDS Drugs in Developing Countries: Is There a Violation of the International Human Right to Health?*, 8 No. 3 HUM. RTS. BRIEF 12, 12 (Spring 2001).

¹¹⁸ Richard Gwyn, *Big Drug Companies, Shameful Profits*, TORONTO STAR, March 7, 2001.

¹¹⁹ Buist, *supra* note 6, at A1.

¹²⁰ [. . .]

¹²¹ Park, *supra* note 17, at 147–148.

¹²² President George W. Bush, Remarks by the President During Announcement of Proposal for Global Fund to Fight HIV/AIDS, U.S. Department of State (May 11, 2001), available at <http://www.state.gov/g/oes/rls/rm/index.cfm?docid=2869>.

¹²³ *Id.*

¹²⁴ Paula J. Dobriansky, *The Fight Against HIV/AIDS: The Bush Administration's Integrated Approach*, Remarks to a Conference on Curtailing the HIV Epidemic: The Role of Prevention (June 22, 2001), available at <http://www.state.gov/g/rls/rm/2001/index.cfm?docid=4147>.

¹²⁵ *Id.*

¹²⁶ COPSON, *supra* note 14, at 9.

¹²⁷ *Id.*

¹²⁸ *SA AIDS Groups Call for Global Protest Against Pfizer*, SOUTH AFRICAN PRESS ASSOCIATION (July 19, 2001); *Calls for Pfizer to Cut Drugs Cost*, SOUTH AFRICAN PRESS ASSOCIATION (July 19, 2001).

¹²⁹ John Donnelly, *Brazil Wins Big Price Cut in AIDS Drug Trade-Law Tactic Could Be Model*, *Health Chief Says*, BOSTON GLOBE, at A1 (Sep. 1, 2001).

¹³⁰ *Id.*

¹³¹ COPSON, *supra* note 14, at 10. See also Kate Miller, *AIDS Epidemic Underscores Impact of Discrimination: UNAIDS*, AGENCE FRANCE PRESSE, Sept. 5, 2001.

¹³² Buist, *supra* note 6.

¹³³ Joint Press Release, Medicines Sans Frontiers (MSF), Oxfam and Third World Network, TRIPS Council Special Discussion on Access to Medicines, Sep. 19, 2001, available at <http://www.africapolicy.org>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Cecilia Oh, *Report on TRIPS Council Special Discussion on Access to Medicines (September 19, 2001) and TRIPS Informal Meeting*, THIRD WORLD NETWORK, Sept. 21, 2001, available at <http://www.africapolicy.org>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ ECONOMIST, *supra* note 44.

¹⁴⁰ Mekay, *supra* note 4.

¹⁴¹ *Id.*

¹⁴² Mortished, *supra* note 32.

¹⁴³ Dubey, *Implications of Doha for India - II*, HINDU, Dec. 25, 2001.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Celia W. Dugger, *A Catch-22 on Drugs for the World's Poor*, N.Y. TIMES, Nov. 16, 2001, at W1.

¹⁴⁹ Geoff Dyer, *Activists Point to Flaws in Declaration of Drug Patents*, FINANCIAL TIMES (London), Nov. 16, 2001, at 13.

¹⁵⁰ *Id.*

¹⁵¹ Sarah Boseley, *Aids Drugs Bring Hope to South Africa*, THE GUARDIAN, Jan. 30, 2002, at 14.

¹⁵² *Id.*

¹⁵³ NATHAN GEFFEN, TREATMENT ACTION CENTER (TAC), PHARMACEUTICAL PATENTS, HUMAN RIGHTS, AND THE HIV/AIDS EPIDEMIC 4 (May 2001) (Discussion document presented to the World Business Council for Sustainable Development Project on Innovation and Technology, Workstream on Intellectual Property Rights in Biotechnology and Information Technology), available at <http://www.tac.org.za/>.

¹⁵⁴ Alexander, *supra* note 117, at 13 (Arguing for an interpretation of health as a universal human right).

¹⁵⁵ It is important to note that the United States was the only veto on the UN Human Rights Commission declaration on access to medication to treat HIV/AIDS. Park, *supra* note 17, at 151.

¹⁵⁶ Alexander, *supra* note 117.

¹⁵⁷ GEFFEN, *supra* note 153, at 7.

¹⁵⁸ IT'S MY LIFE (First Run Icarus Films 2001).

¹⁵⁹ GEFFEN, *supra* note 153, at 3.

¹⁶⁰ Harrelson, *supra* note 39, at 186. Such a program has several obvious flaws from an activist point of view. First, it does nothing to challenge the high cost of these drugs in Africa and perpetuates the injustice inherent in the pricing structure. Second, such an action acts as a subsidy for the pharmaceutical companies that are already making millions on medication. Third, Africa doesn't need additional loans. In fact, the burden of debt has made it impossible for Africa to effectively fight AIDS in the first place.

¹⁶¹ Ford, *supra* note 94, at 964.

¹⁶² The Harvard Consensus statement on the moral reasons for providing AIDS medication helped clarify the point that despite the economic costs, treatment was a necessary part of a viable AIDS strategy. Adams et al., *supra*, note 115.

¹⁶³ The Right Honorable Justin Malewezi, Vice President of Malawi, Statement at The Consultation Forum on Global Fund to Fight AIDS, Tuberculosis and Malaria (Nov. 12–13, 2001), available at <http://www.africaaction.org/>.

¹⁶⁴ Sandra W. Key & Daniel J. DeNoon, *Cuba Upbeat on Vaccine Deal*, WORLD DISEASE WEEKLY PLUS, Sept. 9, 1999, at 17.

¹⁶⁵ GEFFEN, *supra* note 153, at 18.

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