Summer 2006


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Cover Page Footnote
International Law; Commercial Law; Law
I. Introduction: Morality and International Trade

Many foreign policymakers have a deep-rooted and long-standing belief that it is inappropriate and perhaps even dangerous for nations to pursue moral objectives such as human rights. According to this view, because such pursuits expose altruistic nations to exploitation by powerful states acting purely in their own self-interest, "states cannot afford to be moral." Although,
from a "realist" perspective, it is imprudent to pursue moral instead of more conventional objectives such as economic gain and military advantage, the use of moral persuasion to advance Realpolitik\(^2\) concerns is not at all problematic. One can argue that the most effective way to achieve global action and change is by combining force or economic pressure with compelling moral arguments that win over the hearts and minds of people of all nations.

The major developments in intellectual property (IP) rules over the past two decades illustrate the significant role moral suasion plays in global affairs. At two critical junctures in particular, moral arguments were decisive factors in negotiation breakthroughs and legal transformation. During the debates preceding the founding of the World Trade Organization (WTO) in 1995, IP became a part of trade law for the first time in history, representing a clear victory for rich nations and large multinational corporations.\(^3\) The second instance of morality playing a key role occurred when poorer third world countries won important concessions mollifying some of the more regressive aspects of the WTO’s IP regime in the 2002 Doha Declaration.\(^4\)

After describing the moral discourse and economic considerations that led to the integration of IP provisions into the WTO, this article examines the highly variegated moral discourse leading up to the Doha Declaration. The objective of this article is two-fold: first, to demonstrate the role of moral discourse in shaping legal transformation; second, to demonstrate the variety of moral arguments, in addition to those founded on human rights

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with the post-World War II writings of Hans Morgenthau, Henry Kissinger, and George Kennan, among others, and continues in the writings of "neo-realists" such as Kenneth Waltz. See Jack Donnelly, Twentieth Century Realism, in TRADITIONS OF INTERNATIONAL ETHICS 85 (Terry Nardin & David R. Maple eds., 1992).
principles, which lead to the conclusion that citizens of poor countries should have access to affordable HIV/AIDS drugs and that pharmaceutical patents should be subjected to compulsory licensing and parallel importing to accomplish this aim.

II. The Uruguay Round of Trade Negotiations: How Intellectual Property and International Trade Became Interlinked

Beginning in the mid-1980s, a coalition of entertainment, pharmaceutical, and software companies based primarily in the United States (but cooperating with similarly situated companies in Europe and Japan) waged a multi-faceted global lobbying effort that eventually resulted in the introduction of IP protection into what is now the WTO. Prior to the inception of the Uruguay Round of global trade talks at Punta del Este in 1986, no one had ever contemplated that IP rights in the form of patents, copyrights, and trademarks would become a part of the world trading system. Previous global trade negotiations focused exclusively on reducing tariff and non-tariff barriers. Existing international treaties—such as the Paris Treaty and the Berne Convention—specifically permitted signatory nations to adopt whatever IP laws they wished, so long as those laws were applied in a non-discriminatory manner to foreign and domestic actors. Similarly, Article XX (d)

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5 Among the companies that formed this coalition were Pfizer, IBM, Merck, General Electric, Du Pont, Time Warner, Hewlett-Packard, Bristol-Myers, Johnson & Johnson, and Monsanto. See Lynn Sharp Paine & Michael A. Santoro, Pfizer: Global Protection of Intellectual Property (Harvard Business School, Case No. 9-392-073, 1995).

6 Id. at 10.

7 Id.

8 The Paris Convention (to which there were 101 signatories) specified the conditions under which a contracting state could provide by law for compulsory licensing or, in rare instances, the revocation of a patent (such as in the case of an unjustified failure to work). As to matters not covered by the Convention, each contracting state was free to legislate to, e.g., exclude certain fields of technology, or fix the duration of patents. There were no specific enforcement mechanisms or dispute resolution procedures under the Paris Convention. See Paris Convention for the Protection of Industrial Property, Paris Convention, Mar. 20, 1883, as revised at the Stockholm Conference, July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 305; see also Berne Convention for the Protection of Literary and Artistic Work, Sept. 9, 1886, as last revised July 24, 1971, amended Oct. 2, 1979, S. Treaty Doc. 99-27, 828 U.N.T.S. 221.
of the General Agreement on Tariffs and Trade (GATT) specifically left the nature and extent of IP protection to the discretion of contracting nations, provided that their laws were not discriminatorily applied against other nations or otherwise in conflict with GATT.9

Many third world countries strongly resisted the very idea of linking trading privileges with a country's adoption of a prescribed IP regime, particularly in the case of pharmaceutical patents. Typical of third world opinion was the view of a Latin American Association of Pharmaceutical Industries official who argued that strong IP protection was "not possible because of poor economic conditions. . . . It is impossible for us to invest in research because we have no resources, and it is very important for public administrators to buy medicine for the social security system at affordable prices."10 Third world leaders also believed that a WTO trade provision would violate their sovereign power to make crucial health care decisions on behalf of their citizens.11

The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)12 effected a significant transformation in the existing international legal framework. It was also a major victory for large multinational corporations based in the United States, Europe, and Japan. Although there was a phase-in period for less developed economies, TRIPS made, for the first time, a member nation's right of export to other member states contingent upon the adoption and enforcement of laws enforcing IP according to a WTO-prescribed minimum standard.13 Without a doubt, the predominant factor leading to the WTO's adoption of the TRIPS agreement was the irresistible economic pressure applied by rich countries against poor countries. Arguably, however, moral arguments about property rights and social benefits of IP effectively complemented those pressure tactics.

10 Paine & Santoro, supra note 5, at 17.
11 Id.
13 Id.
Reeling from the manufacturing challenge from Japan in the 1970s and 1980s the American—and to a certain extent the European—economies were in the process of reinventing themselves as driven by the entertainment, pharmaceutical, and information technology industries. Global IP protection was an indispensable part of this economic transformation. With timely appreciation for the ascending importance of IP protection to American companies, the U.S. Congress passed the Trade and Tariff Act of 1984\textsuperscript{14} and later the Omnibus Trade and Competitiveness Act of 1988.\textsuperscript{15} Taken together, these statutes authorized the United States Trade Representative (USTR) to relegate countries that provide inadequate IP protection to U.S. firms to Section 301.\textsuperscript{16}

The USTR's activities and threats to deny access to U.S. markets under Section 301 plainly violated Article XX(d) of the GATT, which specifically allowed signatories to engage in the very practices that Section 301 was addressing.\textsuperscript{17} Not surprisingly, the bullying tactics employed by the USTR engendered widespread distaste and criticism from other nations.\textsuperscript{18} Not even close American allies were immune from the threat of unilateral trade sanctions—in 1991, Europe and Australia wound up on the "Priority Watch List."\textsuperscript{19}

The economic leverage applied through Section 301 worked. Faced with the threat of having U.S. markets closed to them, nations such as the Philippines, Panama, and Thailand negotiated bilateral IP agreements with the United States.\textsuperscript{20} By the time the

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\item \textsuperscript{16} Under Section 301, countries are categorized, in increasing order of severity, as "Watch List," "Priority Watch List," or "Priority Foreign Country." Paine & Santoro, supra note 5, at 14.
\item \textsuperscript{17} GATT, supra note 9, art. XX(d).
\item \textsuperscript{18} See generally AGGRESSIVE UNILATERALISM (Jagdish Bhagwati & Hugh T. Patrick eds., 1990).
\item \textsuperscript{19} Paine & Santoro, supra note 5, at 14.
\item \textsuperscript{20} Peter Drahos, Bilateralism in Intellectual Property, tbl.1, http://www.make tradefair.com/assets/english/bilateralism.pdf (listing the countries which have negotiated bilateral IP treaties with the United States).
\end{itemize}
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WTO came into existence on January 1, 1995, the cumulative force of U.S. bargaining power and the threat of Section 301 sanctions proved to be extremely influential as TRIPS became part of the WTO.\textsuperscript{21} Although there was a phase-in period for adherence by countries with developing economies—and a "national emergency" exception that would later prove to be the toehold for important gains by third world countries—there can be no denying that the very inclusion of an IP agreement in the WTO represented a major tactical victory for multinational corporations (MNCs).

MNCs offered two moral arguments to complement the economic leverage made possible by Section 301. One was a utilitarian argument based on the putative economic benefit of adopting strong IP protection.\textsuperscript{22} MNCs argued that patents are not only good for corporate profits, but also the adoption of strong IP laws would help third world countries to develop their own high technology industries and products in the same manner that such laws spur innovations in developed countries.\textsuperscript{23} The pharmaceutical companies argued that third world leaders could increase the welfare of their own citizens even—\textit{mirabile dictu}—as pharmaceutical companies gained higher profits.\textsuperscript{24} This utilitarian/economic argument has sparked a debate among economists that persists to this day about whether the adoption of strong IP protection in less developed economies is a net gain for those countries.\textsuperscript{25}

The other, and ultimately more influential, argument advanced by the pharmaceutical industry was based on the view that patents were the inventor's "natural right" or just reward for inventive

\textsuperscript{21} TRIPS, \textit{supra} note 12.
\textsuperscript{22} Paine & Santoro, \textit{supra} note 5.
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} \textit{Id.}
activity. According to this view, often associated with the seventeenth century English philosopher John Locke, the inventor is entitled to exclusive property rights to an invention by virtue of having labored to produce it. At the same time, others are morally obliged to recognize the rights of inventors by not copying their creative ideas without permission. Perhaps the most telling indicia of how successful the pharmaceutical companies were in advancing this argument is the highly charged moral language that is now commonly used to describe situations when pharmaceutical products are not accorded strong IP protection. For example, companies manufacturing pharmaceutical products protected by a patent in the United States in countries without the appropriate license are said to be engaged in "piracy" and "stealing." When Arthur Dunkel, then Secretary-General of GATT, expressed concern about the importance of access to health care in developing countries, the high cost of drugs, and the sovereignty of nations to regulate costs and access to drugs, one pharmaceutical industry executive responded as follows: "I asked him to consider whether stealing drugs was any more acceptable than stealing food. We certainly don't condone stealing food as a means of dealing with the hunger problem."

While the powerful economic leverage employed by U.S. trade negotiators constituted the main reason that TRIPS made it into the WTO, this pressure was very subtly, but crucially, enhanced by the utilitarian and Lockean arguments advanced by pharmaceutical executives. When the Doha Declaration was adopted six years later, third world leaders and AIDS activists were able to marshal their own persuasive moral arguments to effect another significant transformation of the international IP legal regime.

III. The Doha Declaration

In November 2001, a WTO Ministerial Conference issued a

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26 See Paine & Santoro, supra note 5, at 5.
27 Id.
29 Paine & Santoro, supra note 5, at 13.
30 Doha Declaration, supra note 4.
declaration (the "Doha Declaration") which proclaimed a simple but important victory for AIDS activists and third world nations. The Doha Declaration underscored and clarified the sovereign power of third world countries to use the flexibility already built into the TRIPS Agreement. The ministers also agreed to extend exemptions for pharmaceutical patent protection for poor third world countries until 2016.

While re-iterating the commitment of member countries to the WTO's IP regime, the Doha Declaration provided that "each member has the right to determine what constitutes a national emergency . . . it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency." In effect, this meant that third world nations could determine for themselves when a national health emergency existed. Moreover, during such emergencies nations would retain "the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted."

The Doha Declaration left open the question of parallel imports. Article 31(f) of the TRIPS Agreement provides that products made under compulsory licensing must be "predominantly for the supply of the domestic market." As a result, the very few third world countries, such as Brazil and India, that possess the capacity to manufacture drugs were limited by TRIPS in the volume of drugs they could export to other third world countries. The vast majority of third world countries do not have the industrial capacity to manufacture drugs even if they were to invoke the compulsory licensing contemplated by the Doha

31 Id.
32 Id.
33 Id. para. 7.
34 Id. para. 5, subpara. c.
35 Id. para. 5, subpara. b.
36 See generally id. (making no mention of parallel imports in the Declaration).
37 TRIPS, supra note 12, art. 31(f).
In August 2003, WTO members agreed to make it easier for countries that could not themselves manufacture drugs to import cheaper generics manufactured under compulsory licenses in countries such as India and Brazil.\footnote{Id.}

How do we account for the sea change in attitudes about intellectual property that occurred between 1995 and 2001? First and foremost, it is important to note that during this period of time the magnitude of the AIDS pandemic in sub-Saharan Africa and other parts of the third world first impressed itself fully on the global consciousness. Moreover, AIDS activists and third world leaders brought a highly focused and effective IP lobbying effort to bear upon the Doha meetings.

As far as the developed world was concerned IP issues were not at the forefront of their priorities. By 2001, Europe and Japan were concerned with maintaining agricultural subsidies and promoting environmental initiatives. In the United States, the steel industry mounted a strong internal lobbying effort and thus the USTR was concerned with maintaining the anti-dumping protections used to protect the industry.\footnote{Id.} Moreover, because the preceding WTO ministerial meetings in Seattle fell apart amidst sometimes violent street protests claiming that the global trading system unduly favored rich nations, the trade ministers in Doha were determined to put trade negotiations back on a forward track.\footnote{Id.} It was from the wholesale horse trading on these diverse issues that the Doha Declaration emerged. In sum, while the developed countries were principally preoccupied with other concerns, third world countries and AIDS activists were highly focused on the issue of pharmaceutical patents—although expansion of textile export quotas was also high on the agenda of third world countries. As Egyptian trade minister Youssef Boutros-Gali commented on the compulsory licensing issue, “rich countries knew the only way they would get anything was if they

\footnote{See Geoff Winestock & Helene Cooper, \textit{WTO Envoys Agree to EASE Access to Key Drugs—Public Health Outweighs Patents as Deal Paves Way for Broader Trade Talks}, WALL ST. J., Nov. 13, 2001, at A17.}
The efforts of third world nations to achieve greater latitude on compulsory licensing were emboldened by the anthrax scare of 2001. Faced with the threat of letter-born anthrax attacks in the United States, Health and Human Services Secretary Tommy Thompson threatened to break the patent rights of Bayer, the German manufacturer of the anthrax antidote Cipro. Leaders from developing countries could not resist pointing out the irony—or perhaps better said, hypocrisy—that the United States was willing to break a patent when it had suffered a handful of deaths while denying the same flexibility to third world countries where tens of millions of people suffered from HIV/AIDS and other diseases.

It is fair to say that while the initial TRIPS agreement was a product primarily of Realpolitik economic leverage complemented by moral arguments, the Doha Declaration represented the converse. Lacking the economic leverage of rich countries, third world countries were able to achieve their goals by relying on compelling moral arguments coupled with effective strategic focus and bargaining tactics. But exactly what moral principle did the Doha Declaration uphold? Was the Declaration an affirmation or foreshadowing of a human right to health care in general and to drugs in particular? Or might the justification of the Doha Declaration hinge on some alternative moral precept?

IV. Rights, Needs, and Supererogatory Duties: Alternative Paths to Moral Betterment

The Doha Declaration represents moral progress of the highest order. The principles enunciated therein helped to ameliorate a formidable obstacle—that is, high prices due to pharmaceutical patents—preventing millions suffering from HIV/AIDS in the third world from obtaining access to life-saving and life-enhancing

43 Id.


45 Id.

46 Winestock & Cooper, supra note 41.
drugs. To be sure, many obstacles still practically thwart access to these drugs, including inadequate distribution systems and a shortage of trained medical professionals and technicians. Moreover, many poor countries cannot afford to pay for HIV/AIDS drugs even at reduced prices. Responding to this tragedy of global proportions, many private, public, and non-governmental organizations have provided funding and technical resources to help meet these challenges and make access to antiretroviral drugs a reality for citizens of poor countries.

How can we characterize the moral sentiments that lead to such human betterment? There is great temptation, particularly among lawyers, to regard the Doha Declaration as a harbinger of an emerging human right to health care generally and to pharmaceuticals in particular. There is indeed some basis for viewing the Doha Declaration in this light. However, there are moral claims other than those emanating from human rights for achieving human betterment. If one examines the discussion and debate that occurred before and after the Doha Declaration, it becomes evident that the power of these other moral ideas contributed as surely as the power of the idea of human rights to establish the principle that citizens of third world countries should have affordable access to antiretrovirals.

V. Supererogatory Acts

A supererogatory act is one where an action goes beyond the


49 Compare id. with Gathii, supra note 47.

50 See infra notes 59-63 and accompanying text.
demands of duty.\textsuperscript{51} The performance of supererogatory acts properly deserves praise.\textsuperscript{52} However, a person does not deserve blame for not performing such acts. For instance, heroic acts of valor fall in this category.\textsuperscript{53} It should be pointed out that some philosophers do not admit the existence of supererogatory acts.\textsuperscript{54} For example, strict act-utilitarians believe that it is impossible to perform acts that exceed the demands of duty.\textsuperscript{55} Other moral philosophers believe that what some call supererogatory acts involving aid to others are merely instances of what Kant refers to as imperfect duties.\textsuperscript{56} For Kant, imperfect duties are always imperfectly satisfied because we must select which ones to perform, and we have some discretion as to how much we should do to help someone.\textsuperscript{57} Nonetheless, for Kantians, imperfect duties are still duties.\textsuperscript{58}

Despite the controversial nature of supererogation in philosophical circles, many private, public, and non-governmental actors in the global arena would certainly wish to characterize their own actions as charitable examples of supererogation. After the principles of the Doha Declaration went into effect, a number of pharmaceutical companies have not merely passively watched as generic companies subject their patents to compulsory licensing. Some companies, both within and outside of the pharmaceutical industry, have taken significant action to address the health care crisis caused by the AIDS pandemic. A good example is Merck’s participation in the Masa (“New Dawn”) program of the African Comprehensive HIV/AIDS Partnership (ACHAP).\textsuperscript{59} ACHAP is a public-private partnership among the

\begin{itemize}
  \item \textsuperscript{51} See DAVID HEYD, SUPEREROGATION: ITS STATUS IN ETHICAL THEORY, at 1-11 (1982).
  \item \textsuperscript{52} Id. at 7.
  \item \textsuperscript{53} Id. at 2.
  \item \textsuperscript{54} Id. at 3.
  \item \textsuperscript{55} Id. at 3.
  \item \textsuperscript{56} Id. at 62-65.
  \item \textsuperscript{57} HEYD, supra note 51, at 62-64.
  \item \textsuperscript{58} Compare id. with MARCIA W. BARON, KANTIAN ETHICS ALMOST WITHOUT APOLOGY (1995) (presenting two views of the possibility of supererogatory duties).
  \item \textsuperscript{59} See generally Joan Stephenson, “New Dawn” for Botswana: Offering Free HIV Treatment—and Hope, 292 J. AM. MED. ASS’N 2565 (2004) (interviewing
Republic of Botswana, the Bill and Melinda Gates Foundation, and the Merck Foundation.\textsuperscript{60} Thanks in part to ACHAP, Botswana became the first African nation to implement widespread distribution of antiretroviral drugs through its public health system.\textsuperscript{61} Pfizer has made substantial free donations of its antifungal medicine Diflucan\textsuperscript{®} (fluconazole) for the treatment of opportunistic infections associated with HIV infection.\textsuperscript{62} Additionally, Coca-Cola, working with the Global Business Coalition, extended antiretroviral therapy benefits to employees of all of its forty bottlers in Africa.\textsuperscript{63}

The putative existence of supererogatory acts does not imply that there are no moral minimums. However, sometimes moral progress and human betterment occur because people and companies go beyond what is required of them by duty and become moral leaders. We want to leave room in our moral language and our moral sentiments to capture this notion. Our ability and willingness to praise companies and individuals that go beyond the fulfillment of minimum duties can be an integral part of a complete moral system that provides solutions for global social problems such as the AIDS pandemic.

VI. Needs, Distributive Justice, and the Duty of Rescue

*The United States has worked intensively to find a solution that will provide life-saving drugs to those truly in need, and will continue to work towards that end. We urge others to join us... to help poor countries get access to emergency life-saving*

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\textsuperscript{61} Merck, *supra* note 60; Bill and Melinda Gates Foundation, *supra* note 60.


drugs.
—Robert Zoellick, U.S. Trade Representative\textsuperscript{64}

The public has a position on this issue: poor people need those drugs. The need is to deliver affordable drugs in the most efficient way to the poorest of the poor. If we don’t resolve this, the W.T.O. will be judged very harshly.

—Sergio Marchi, Canadian Trade Representative\textsuperscript{65}

Another alternative to conceiving of access to HIV/AIDS drugs as a right is to regard such access as a basic human need that under certain conditions would justify and indeed morally require others to act. Fundamentally, the moral obligation to act when others are in need is rooted in utilitarianism.\textsuperscript{66} Peter Singer, in his classic essay “Famine, Affluence, and Morality,” argued that individuals should donate money to alleviate global poverty on the grounds that “if it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought morally to do it.”\textsuperscript{67}

Sometimes referred to as the “duty of rescue,” needs-centered theory depends on two utilitarian premises.\textsuperscript{68} One premise is that “the more profound the need, the more evident the directness and immediacy of needs in activating moral agency will be.”\textsuperscript{69} It is difficult to imagine a more pressing or significant human need than that of persons suffering from HIV/AIDS. A second premise of the duty of rescue is that the cost to the rescuer or others must


\textsuperscript{66} Peter Singer, \textit{Famine, Affluence, and Morality}, 1 PHIL. & PUB. AFF. 3, 229, 231 (1972)

\textsuperscript{67} Id.; see also T.M. SCANLON, \textit{WHAT WE OWE TO EACH OTHER} (1998) (presenting the contractualist view that thinking about right and wrong is thinking about what we do in terms that could be justified to others and what they could not reasonably reject).

\textsuperscript{68} See, e.g., GARRETT THOMSON, \textit{NEEDS} (1987).

not be so great as to (in the extreme case) outweigh the benefit to the person being rescued.\textsuperscript{70} The less burdensome it is for the rescuer and the greater the benefit to the person being rescued, the more compelling is the obligation to act.\textsuperscript{71}

Applying the duty of rescue to drugs, Nien-hê Hsieh has argued that pharmaceutical companies are in a position to help those suffering from HIV/AIDS by relaxing their patents to allow for production of generics by rival firms, by reducing prices, and in some cases by donating drugs for free.\textsuperscript{72} Hsieh argues that all this can be accomplished without fundamentally altering the property rights of pharmaceutical companies.\textsuperscript{73} This is critical to the application of the rescue theory in two respects: (1) it suggests that the financial costs to the pharmaceutical companies are reasonable given the benefits produced for those who suffer from HIV/AIDS, and (2) it ensures that applying the duty of rescue to HIV/AIDS patients will not result in diminished innovation to serve others persons who in the future might suffer from as yet unknown pandemics.\textsuperscript{74}

If one examines the discourse surrounding the Doha Declaration, needs-based moral reasoning figures prominently. Consider the view of Daniel Berman on behalf of Médecins Sans Frontières: "The victory in Doha is really for people who need or will need access to life-saving or extending medicines."\textsuperscript{75} Richard

\textsuperscript{70} THOMSON, supra note 68.

\textsuperscript{71} The classic example is the duty to rescue a small child in shallow water. Here, the benefit to the child is great, the risk and inconvenience to the rescuer slight by comparison. If the waters are deep, the ebb tide strong and the drowning person is large and flailing about desperately, the duty of rescue becomes less compelling.

\textsuperscript{72} Nien-hê Hsieh, Property Rights in Crisis: Managers and Crisis, in Santoro & Gorrie, supra note 47, at 379.

\textsuperscript{73} Id.

\textsuperscript{74} Id. Compare Sidney Taurel, The Campaign Against Innovation, in Santoro & Gorrie, supra note 48 (the CEO of a major pharmaceutical company writing to defend the connection between pharmaceutical patents and innovation), with Patricia H. Werhane & Michael E. Gorman, Intellectual Property Rights, Access to Life enhancing Drugs, and Corporate Moral Responsibility, in Santoro & Gorrie, supra note 48 (arguing for a weakening of patent rights on the grounds that discoveries are based on "networks" of knowledge).

\textsuperscript{75} Daniel Berman, MSF Reactions to Doha TRIPS Agreement, MSF, Nov. 15, 2001.
Elliot, a spokesman for a consortium of activist groups added that "[a]llowing developing countries to put reasonable limits on the patent rights of pharmaceutical companies (which already has the highest profit margins of any industry) will have little impact on overall company profits or on research and development."76

Finally, consider a funding proposal made by Zackie Achmat of the South African Treatment Action Campaign to the 14th International AIDS Conference in Barcelona in July 2002:

To be able to deliver drugs to people, to be able to save the lives of the millions with HIV and AIDS, we need effective public health care systems. We can only start by endorsing . . . [the view] . . . that regards health care as an essential public good. Not just an essential public good, but an absolute essential not only for dignity and life but as a component of a sustainable development strategy for most developing countries. We therefore endorse the request for additional funding for health care systems across the globe by the World Health Organization to ensure that public health care systems are effective and that they deal with HIV and AIDS, with TB, with malaria and with all the diseases of poor people.77

As the foregoing statements illustrate, powerful moral claims can be asserted on the basis of need. Moral arguments routinely appeal to considerations of need as an explanation and justification for action. In the discourse surrounding the Doha Declaration, appeals based on need and the duty of rescue offered moral weight to the principle that pharmaceutical patents should be relaxed to enable citizens of poor third world countries to obtain affordable access to HIV/AIDS drugs.


77 Zachie Achmat, Message from Zackie Achmat—Treatment Action Campaign (South Africa) to the 14th International AIDS Conference—Barcelona (July 10, 2002) (transcript available at http://www.tac.org.za (select “Documents” link, then “Other Documents,” then “Transcript (Word Document) of Zackie Achmat’s Barcelona speech (which was delivered via video”))

VII. The Human Right to Affordable HIV/AIDS Drugs

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.

—Article 25, Universal Declaration of Human Rights

At this point in the analysis, lawyers might understandably be impatient with all this talk about moral persuasion. For a lawyer, the best way to assure an outcome is through rights and correlative duties. Speak all you want of a person’s needs, many lawyers might say, but to call something a right is the most powerful kind of moral claim one can make. If that moral claim can be transformed into a legal claim with corresponding legal duties, then one really has something. Even on the moral, hortatory plane that human rights occupy, many lawyers would argue that speaking in “rights talk” (as Mary Ann Glendon not altogether approvingly terms it) is more compelling than speaking about human needs. For example, Jeremy Waldron has written: “Both rights and needs amount to a demand that certain interests be attended to; but only rights-talk presents those interests in the voice of one who would be a full-fledged member of society, who is not going away, and who expects to be taken seriously as an enduring source of continuing demands.”

Undeniably, some of the most powerful and persuasive moral rhetoric surrounding the Doha Declaration casts the issue of access to HIV/AIDS drugs under the mantle of human rights. Consider the moving words of Milly Katana of the Ugandan Health Rights Action Group:

We are angry. Our people are dying. We can no longer accept millions of needless AIDS deaths simply because we are poor


79 See generally MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991) (tracing the evolution of the language of rights in America and arguing that the political tendency to frame issues in terms of individual rights impedes understanding and compromise, resulting in coerced and unsatisfying social arrangements).

Africans. We know antiretroviral (ARV) treatment is feasible in our countries and are launching a movement to demand ARV treatment that won't take no for an answer. . . . We want to make sure that policy makers and international agencies have the issue of treatment on their agenda and look at it from the human rights perspective.  

Any right to pharmaceuticals must, of course, derive from a more general right to health care. The human right to health is enunciated, among other places, in Article 25 of the Universal Declaration of Human Rights. But what is the moral source of this right? Some philosophers have attempted to bootstrap the right to health care onto John Rawls's theory of distributive justice. According to Norman Daniels, for example, since disease impairs normal human functioning, it restricts a person's range of opportunities to pursue a career. By preventing, curing, or ameliorating disease, therefore, adequate health care helps to guarantee fair equality of opportunity. Unlike negative rights that require the duty holder simply to forbear from interfering with the right holder, positive rights (such as the right to health care) require someone to act for, or provide something to, the right holder. This, in turn, raises the question of who exactly has a duty to honor the human right to drugs.

In the case of the duty to make HIV/AIDS drugs available to poor citizens of the third world, there is an understandable tendency to point the finger squarely at the

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84 Norman Daniels, Health Care Needs and Distributive Justice, 10 PHIL. & PUB. AFF. 146, 158-59 (1981).
85 Id. at 160; see also John C. Moskop, Rawlsian Justice and a Human Right to Health Care, 8 J. MED. & PHIL. 329 (1983). In later writings, Daniels became concerned with the question of how governments and health maintenance organizations with limited resources should allocate scarce resources among competing health priorities. See Norman Daniels et al., Who Should Get Access to Which Drugs? An Ethical Template for Pharmacy Benefits, in Santoro & Gorrie, supra note 48, at 206; see also Joel Hay, The Application of Cost-Effectiveness and Cost-Benefit Analysis to Pharmaceuticals, in Santoro & Gorrie, supra note 47, at 225.
pharmaceutical industry. However, the pharmaceutical industry is not solely responsible as many other global actors, including national governments, non-governmental and intergovernmental organizations, and others share collective responsibility. It is only through the cooperative efforts of many actors with diverse capacities that we can hope to make a significant impact on the complex global problem posed by the AIDS pandemic. As Dr. Bill Foege, a longtime leader in global health campaigns and most recently a medical director for the Gates Foundation, has commented:

[L]eadership is no longer the result of someone having a title, but rather leadership goes to that person who develops an effective coalition. . . . Not one of us is as powerful as all of us in improving the health of the world. To improve global health by effectively controlling AIDS requires us to develop seamless cooperation between public and private efforts.

Despite the conceptual and practical issues inherent in any positive human right, defining HIV/AIDS drug access as a human right issue taps into a profound moral reservoir. In the case of the Doha Declaration, there is no doubt that invoking human rights gave powerful voice to the suffering of millions of poor and disenfranchised people. If the foundation of human rights is a moral ideal, then it would be a hollow ideal if there were not room in it to give dignity and hope to those suffering from the scourge of AIDS.

86 One aspect of the question of who owes a duty is how to allocate such duties when multiple parties might be said to bear some responsibility. For an analysis of how corporate social responsibility is affected by the existence of other responsible public and non-public actors with duties, see Michael A. Santoro, Profits and Principles: Global Capitalism and Human Rights in China (2000) (describing the “Fair Share Theory of Corporate Responsibility”). See also Claire Dickerson, Human Rights: the Emerging Norm of Corporate Social Responsibility, 76 Tul. L. Rev. 1431 (2002); Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics (Larry May & Stacey Hoffmann eds., 1991) (presenting philosophical analyses of moral, political, and legal responsibility of groups and their members).

87 William H. Foege, Blurring the Lines: Public and Private Partnerships Addressing Global Health, in Santoro & Gorrie, supra note 48, at 386. For a pharmaceutical industry perspective on public-private partnerships, see Thomas M. Gorrie, Evolving Approaches to Health Care Challenges, in Santoro & Gorrie, supra note 47, at 369.
VIII. Conclusion

This article has attempted to demonstrate two propositions. The first objective of this article has been to show the power of moral discourse to affect the transformation of international trade law. In the case of the inclusion of the TRIPS Agreement during the founding of the WTO, moral discourse played a complementary role to Realpolitik economic leverage. Introducing such language as “stealing” and “piracy” into the IP debate helped the pharmaceutical industry to change the global perception of the moral and economic status of IP and thereby contributed to the enactment of the TRIPS Agreement. In the case of the Doha Declaration, however, moral discourse played a more prominent role and helped relatively weak third world countries and AIDS activists to obtain important concessions on relaxing patents in times of national emergencies and on parallel importing issues.

A second objective of this article has been to demonstrate that the appeal to human rights is not the only form of moral discourse that can lead one to the view that poor citizens of third world countries should have affordable access to AIDS/HIV drugs. While there is great moral power to human rights, there is also great power in other forms of discourse. For example, utilitarian principles such as the theory of rescue and even the philosophically controversial notion of supererogatory acts have also proven to be morally persuasive. As demonstrated by the power of the moral discourse that helped engender the Doha Declaration, an appeal to human rights is not the only way to inspire decisive action and achieve human betterment.