THE RHETORIC OF "BALANCE":

NEOCOLONIALISM AND RESISTANCE

IN THE GLOBAL BATTLE FOR GENERIC DRUGS

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The Rhetoric of "Balance:" Neo-Colonialism and Resistance in the Global Battle for Generic Drugs

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Since the 1990's there has been a major effort to standardize intellectual property laws around the world. Instigated largely by the US through trade agreements and international law, this development has been welcomed by exporters of easily reproduceable works such as software, entertainment, and pharmaceuticals, looking for stronger protection abroad. However, these laws have proven controversial: critics maintain that they inadvertently price life-saving medicines outside the reach of people in the world's poorest countries. This exploded into a global controversy in the late 1990's during the HIV/AIDS crisis in Sub-Saharan Africa, when the countries hit hardest by the epidemic were unable to afford patented medicine to keep people with HIV/AIDS alive. When South Africa passed a law which bypassed international patent agreements to make medicine more affordable, the pharmaceutical industry tried to overturn the law in court. This proved disastrous for the industry, as public opinion swiftly turned against. As the backlash grew, the international patent system fell too under greater scrutiny. Advocates of strong global IP protection and the international organizations such as the World Trade Organization began calling for a "balance" between strong IP protection and accessibility of life saving medicines. But what does "balance" really mean? Is there a substantive compromise to be reached, or is this simply a placeholder solution concealing a fundamentally irreconcilable conflict? In this thesis we analyze the rhetoric of "balance" in global IP debates. First this thesis examines the ideological commitments of two organizations pushing for stronger IP protection abroad: the office of the United States Trade Representative, and the United States Chamber of Commerce. Secondly, this thesis will examine the rhetoric of those resisting the standardization of IP, specifically, Treatment Action Campaign, the South African HIV/AIDS activists who fought against the pharmaceutical industry's lawsuit and tried to make generic treatments available in Africa. Finally, this thesis will examine the calls for "balance" as a response to the controversy, studying the multiple circulating understandings of "balance" during the Doha round of WTO negotiations, when these conflicts finally came to a head.

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INTRODUCTION

The HIV/AIDS Crisis and the Battle for Generic Drugs

In 1998, during the height of the HIV/AIDS crisis in sub-Saharan Africa, forty of the world's largest pharmaceutical manufacturers tried to sue the government of South Africa in its own supreme court. Roughly 20 million people were suffering from HIV/AIDS on the continent of Africa, and fewer than 10% were receiving treatment (Fisher et al.). However, the drug companies' problem was with a new law that would utterly reshape the pharmaceutical market Signed into by Nelson Mandela and driven through parliament by fierce grassroots activism, the "Medicines and Related Substances Control Amendment Act" of 1997 proclaimed: "a medicine shall, notwithstanding the fact that its components are identical to those of any other medicine…not be regarded as being the same medicine as that other medicine if registration thereof is not applied for…" ("Medicines" 3-4). In other words, the authority to declare two medicines the same rested solely in the hands of an appointed government official.

This bill directly challenged intellectual property (IP) rules established by the World Trade Organization (WTO), which South Africa had just joined in 1995. The day South Africa's membership became official (Jan 1), a treaty called the TRIPS agreement went into effect. TRIPS (Trade Related Aspects of Intellectual Property Rights) ensures that WTO member states grant the same rights to IP holders that they would expect in their home countries (TRIPS). If a US pharmaceutical company patented a new prescription drug, for example, South Africa would be obligated to grant the patent holder exclusive rights of production, preventing other companies from selling the "same" drug. South Africa's new amendment didn't overturn the TRIPS agreement, it offered a workaround. By shifting the criteria by which generic drugs would

be considered the "same" as patented drugs, the bill gave South Africa wide discretion in declaring which drugs could be covered by patents. If the drugs weren't *legally* identical, then international patents wouldn't apply.

This bill was the result of intense pressure from activists demanding cheaper access to HIV/AIDS treatment. In 1997, the annual cost for triple therapy—a cocktail of three medicines used to prevent opportunistic infections—was close to US$12,000 per patient in South Africa. The nation's GDP per capita was around US$31,000, meaning that a year of regular treatment would cost more than a third of the average person's salary (Fisher et al). Since HIV/AIDS typically struck the more impoverished parts of the country, almost no one in South Africa was receiving any treatment whatsoever (Burger). International patent protection blocked competitors from producing cheaper alternatives, and therefore health activists targeted IP in their bid to make HIV/AIDS treatment more available for those afflicted.

Despite the obvious health crisis, multinational pharmaceutical companies saw the new law as first and foremost a threat to their intellectual property rights, and therefore their revenue. The Pharmaceutical Manufacturer's Association (PMA), initiated the lawsuit and the US government pressured South Africa to change their laws. The United States Trade Representative (USTR) threatened South Africa with economic sanctions, and US Vice President Al Gore travelled to South Africa to advocate for the bill to be overturned ("*1998"*; Fisher et al). Gore wrote:

> Clearly, there is a global consensus on the need to protect intellectual property…The Administration has shared its own concerns with South Africa over the more vague provisions of the Medicines Act. We have asked the Government of South Africa to clarify the actions it would take under the Act, and assure us the actions would comply with international agreements and not undermine legal protection for patent holders. (Fisher et al. 38)

Given that the US was one of South Africa's most important trade partners, the nation faced significant international pressure to fall in line on patent policy.

However, health activists began to take notice. Treatment Action Campaign (TAC), a South African HIV/AIDS advocacy group, organized a march of over 5,000 people to publicly challenge the lawsuit. Solidarity protests broke out around the globe. A picket line formed outside the British offices of GlaxoSmithKline, the producer of the "Retrovir" antiretroviral treatment (Nessman). Nelson Mandela, former South African president and hero of the movement to bring down apartheid, condemned the lawsuit, as did then-U.N. Secretary General Kofi Annon. The World Health Organization (WHO), publicly recognized strict patent protection as a potential barrier to life-saving treatment (Swarns). News media caught on to the story, often highlighting the plight of the AIDS-stricken poor. Articles in the *Independent* (UK), the *Economist* (UK), and the *New York Times* (US) all identified high drug prices as a barrier to access that could cause unnecessary deaths ("Drugs"; "Protest").

Pharmaceutical companies suddenly found themselves managing a public relations disaster. A 2016 retrospective in the *Guardian* referred to this event as "Big Pharma's Worst Nightmare" (Bosely). Pharmaceutical companies tried to contain the damage, desperately trying to call attention to their efforts to lower prices in developing countries, but the perceived callousness of the lawsuit proved impossible to dodge. Recognizing their limited options, the companies quietly dropped the lawsuit in 2001 and tried to put the incident behind them.

However, the scandal had immediate consequences for public attitudes towards the WTO and the role of intellectual property in global trade. Backlash against organized global trade came to a head in the 1999 Seattle protests, when health activists joined environmental and labor activists and over 40,000 people swarmed the streets of Seattle, culminating in a series of highly

publicized clashes between protesters and police. The TRIPS agreement itself came under heavy fire in the next round of WTO negotiations, when a coalition of nations from the Global South, led by India and Brazil, held out for looser standards of enforcement (Hopewell).

Knocked on their back foot, IP advocates tried to strike a magnanimous tone. Public conversations surrounding intellectual property swiftly consolidated around a new concept: "balance." Recognizing that that health activists had legitimate concerns, those seeking to uphold international IP protection began to wonder out loud about how the accessibility of medicine could be "balanced" with strong global patent protection. Law Journals, Public Health Journals, and public statements from the WIPO (World Intellectual Property Organization) started publishing pieces like, "Protecting IP: Striking a Balance" ("Protecting"), "Balancing Intellectual Monopoly Privileges and the Need for Essential Medicines" (Martin et al.), and "Balancing Health and Wealth: The Battle over Intellectual Property Rights" (Dreyfuss et al.) The list goes on. "Balance" was "well qualified for the buzzword of intellectual property (IP) law of the current decade" (the early 2000s) (Wechsler 1). Answering definitively if or how balance can be achieved between intellectual property and human rights on the international stage is beyond the scope of this thesis. Instead, the project will seek to understand how the idea of "balance" functions rhetorically. What does this buzzword achieve? What unspoken lines of reasoning does it contain? Who potentially benefits when "balance" is invoked, and who might lose out?

Intellectual Property

Intellectual property (IP) creates exclusionary rights of use for cultural goods such as symbols, inventions, and creative works. The institution is largely supported by Lockean justifications for private property (Yar). Locke contended that:

> The earth and everything in it is given to men for the support and comfort of their existence…[but]…before they [the fruits of nature] can be useful or beneficial to any particular man there must be *some* way for a particular man to appropriate them…The labour of his body and the work of his hands, we may say, are strictly *his.* So when he takes something from the state that nature has provided and left it in, he mixes his labour with it, thus joining to it something that is his own; and in that way he makes it his property. (Locke 11)

In other words, you have exclusive rights to use what you have worked for. If you carve a tree branch into an axe handle, you have earned the right to exclude others from using the axe handle without your permission, having endowed it with your own creative energy and labor. If you plant a tree, this labor earns you the right to exclude your neighbor from carving its limbs into axe handles. So by extension, by coming up with an invention, logo, or creative work, you would then have exclusive rights to its use.

IP is divided into three main subcategories: trademark, copyright, and patent, each covering different areas of concern and economic purpose. Trademark, in principle, guarantees exclusive rights to reproduce logos and brand names and is supposed to create predictability and consistency in consumer markets. If customers can be sure that each bottle of Mountain Dew is the same as every other, they can consistently exercise their preference, buying Mountain Dew every time they want it, and never buying it by accident under the label of some other soft drink. In principle, the distinguishing power of trademark serves both the interests of companies and of consumers; customers know that they are buying the same product each time, and companies don't have to worry about losing customers to other companies selling a similar or even inferior product (Vaidhyanathan). However, companies have abused this system to protect their reputation, aggressively using trademark law to protect their brands through lawsuits and to intimidate critics, parodists, and organizations perceived to dilute the brand (McLeod). Unlike

copyright and patent, trademarks can last indefinitely, so long as the holder renews every ten years.

Copyright covers literary and artistic works, including books, movies, and songs. The express purpose of copyright is to ensure that those who produce easily reproduceable works are, for a limited period of time, fairly compensated for their labor. If I were to sell this thesis as a book, I would be selling the unique arrangement of the words themselves, not the paper, cardstock, and ink used to produce the book, much less the "idea" of a thesis. My labor in this work lies not in chopping down and pulping trees, but in selecting the arrangement of the words, which are then immediately reproduceable. The original purpose of copyright is to ensure the exchange value of that labor.

The current duration of US copyright is 70 years after the author's death, or 95 years after publication for works of corporate authorship. The original US term was only 28 after publication (14 years, renewable for an additional 14). In the United States, the duration of copyright has been extended four times since it was initially installed in 1790, each time with considerable lobbying pressure from the publishing and entertainment industries (McLeod). Copyright has found itself in the crosshairs of public debate as digital technology has dramatically lowered the cost of reproduction for words, music, and video. In the 1980's, hip-hop artists began experimenting with collages consisting of ostensibly copied music. Online file sharing platforms have broken down paywalls, giving consumers unrestricted access to copyrighted works, potentially eating away at entertainment revenue across the industry. A loose coalition of hackers, academics, and tech entrepreneurs have organized around the banner of "free culture," a social movement that contends copyright, ironically, has become an obstacle to creativity, limiting the ability of cultural producers to repurpose sampled material for the creation

of original works (McLeod). Limiting reproduction becomes an important factor to our case study, as we move on to the final main body of laws and standards governing IP, patent law.

Patents guarantee an exclusive, time-limited right to profit from new inventions and technology. Operating on a similar logic as copyright, here it is the creative, mental labor involved in conceiving of and designing a new technology whose exchange value must, according to the law, be protected. The ostensible purpose of patent protection is to incentivize innovation. In the US, patent protection is enshrined in the Constitution, in which congress is granted the power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (US Const. article I section 8). The idea is that you're more likely to invent something if you can then enjoy a competition-free market. In the pamphlet "What is Intellectual Property," the World Intellectual Property Organization (WIPO) contends, the "progress and well-being of humanity rest on its capacity to create and invent new works in the areas of technology and culture…the legal protection of new creations encourages the commitment of additional resources for further innovation" (WIPO 3). The current US duration of patent is 20 years, also increased from a maximum of 14 years when the country was founded.

Patents are arguably the oldest form of intellectual property. The first patent law was the "Patent Statute" declared by "the Most Serene Republic of Venice" in 1474. The decree went as follows:

> There are in this city, and because of its grandeur and virtue there come to us from other places, men of great genius, apt to invent and discover a variety of ingenious devices. And if it were provided that the works and devices discovered by such persons could not be imitated by others who may see them, stealing away the inventor's honor, such men would exercise their genius and invent and make devices of no small utility and benefit to our commonwealth. Therefore, it is decreed by the authority of this Council that any person in this city who invents any novel and ingenious device, not made previously in our dominion, as soon as it is reduced to perfection, so that it can be used and exercised,

> shall give notice to the office of our Provisioners. It being forbidden to all others in our land to make any other device which imitates and resembles the invention, without the consent and license of the author, for up to ten years ("Italian").

The function and rationale for patents has changed relatively little in the past 500 years. The purpose is still to enrich the "commonwealth," so to speak, by incentivizing innovation. However, the earlier emphasis on "men of genius" having their "honor" stolen suggests the patent system also grew out of highly individualistic, masculinist ideals that were developing in Europe in the Early Modern period. Publicly receiving recognition for one's ideas was at least as important as the development of new technology that would, in principle, benefit all.

Much like copyright, patent protection has also become the object of intense scrutiny. Often, modern patents are not owned by the actual inventor of a product but by the company that financed its development. Some patent holders have no intention to market their inventions themselves and wish merely to collect licensing fees from those who manufacture and sell a derivative technology. This becomes an even thornier problem in so called "patent thickets," when a complex machine contains multiple patented components owned by multiple companies; that machine can become prohibitively expensive to produce and can even create barriers for entry that further limit competition (Vaidhyanathan).

Furthermore, the patent system incentivizes companies to patent components of technologies that haven't even been fully developed yet. For example, Siva Vaidhyanathan argues that there has a been a rush to patent basic components of nanotechnology (e.g., microscopic carbon tubules) in the hopes that patent holders will strike it rich once broader uses for nanotechnology are implemented. However, if producers of nanotechnology must pay off multiple patent holders, the technology could become so expensive to produce that it becomes unmarketable. In fact, this almost happened to the sewing machine. Since many of the

components were patented by different companies before anyone put all the pieces together into a finished product, sewing machines were too expensive for any of the early sewing machine companies to market. Eventually, several of the main patent holders came together and formed a patent pool—basically an agreement to hold their intellectual property in common and not sue each other (Vaidhyanathan).

Packet thickets don't only increase the cost of goods and the difficulty of marketing them. They can also place constraints on innovation. Consider this example: you have a great idea for how to change the smartphone. To market your technological breakthrough, you would need a team of patent lawyers to navigate the dozens of patents on its various components, as well as piles of capital to pay off relevant rights holders. Your best chance at revolutionizing the way we use handheld devices would simply be to get a job as an engineer at Apple or Samsung or any of the other companies with the capacity to actually develop your big idea. This gives intellectual property holders control, not only of their current portfolio of inventions, but of future developments in their industries (Lessig). Research and development are then channeled through a small number of viable—often highly capitalized—conduits, giving industry executives the power essentially to veto technological innovations. Law scholar Lawrence Lessig gives the example of AT&T, which held a monopoly on telecommunications technology and infrastructure for most of the twentieth century and shot down innovations that would make telecommunications systems much more efficient and closer to the modern internet. He argues, "there is a possible—and in this case actual—conflict between the interests of a centralized controller of innovation, and of innovation generally" (Lessig 32).

Patent thickets thus can impede research and development itself, the very thing that they are supposed to incentivize. McLeod, for instance, calls our attention to the process by which

genetic information can be patented (also highly controversial). A research firm isolates a given gene from the human body, and then patents, not the gene itself, but the process of its isolation. This means that they can then charge other research firms "rents" on isolating that gene for study. McLeod quotes the Chief scientific officer at the research institute Bristol-Meyers Squibb: there are "more than fifty proteins possibly involved in cancer that the company was not working on because the patent holders either would not allow it or were demanding unreasonable royalties" (McLeod 43). In other words, a major cancer research institute is prevented from researching plausible causes of cancer because doing so would require paying off too many patent holders.

Ideas, objects, etc. that are not owned are said to be part of the "cultural commons." The commons are important because we all depend on these resources. The English language, for example, is a cultural resource held in common, as are all the other symbols and values circulating in our discourse that allow us to express ourselves and coordinate our actions. Furthermore, each of us benefits from the use of commonplace technology and design elements, such as bricks, roads, and shoes, all of which had to be invented at some point. What happens if the reach of intellectual property continues to expand? Furthermore, what happens when systems of intellectual property, which arose with respect to the liberal tide of Western modernity, are transplanted all over the world? Is intellectual property a universal good, compatible with every culture, or does it help and harm unevenly around the world?

Intellectual Property Goes Global

Several efforts have been made to create a homogenous IP system for the whole planet, beginning with the Paris Convention for the Protection of Industrial Property in 1883. However,

these efforts have accelerated significantly since the 1990s, particularly with the rise of economic neoliberalism. The US, specifically, has led the way in terms of helping to spread Western-style IP regimes around the globe. Across administrations, both Republican Democrat, the United States government has made recognition of US intellectual property a mandatory requirement for favorable trade terms (Marcellin 15). Losing favorable trade terms with the US could provide a significant blow to countries with smaller economies. The US is currently the largest consumer market in the world, the largest supplier of foreign aid, and one of the world's largest exporters of foreign direct investment ("Top 10"; "25 Largest"; "World"). As this thesis will demonstrate, the US also hasn't hesitated in its use of punitive economic sanctions to pressure other nations into changing their IP laws for the benefit of US exporters. This means that countries with smaller economies are often caught between a proverbial rock and a hard place when they must choose between determining their own IP laws and maintaining favorable relations with the world's largest economy.

America's role in standardizing global IP laws is no accident. During the second half of the 20th century, the US export economy shifted heavily from commodities and manufactured goods to industries such as software, entertainment, and pharmaceuticals, all of which are easily copiable and rely heavily on IP protection. Law and media scholar Siva Vaidhyanathan writes: "Not coincidentally, the export of film, software, and the spread of brands like Starbucks around the world followed a period of de-industrialization. If the United States could not sell as many Chevrolets to the rest of the world, at least it could get people to sit through Spider-man movies" (Vaidhyanathan 14). Political economist Sherry Marcellin points out that "in 1947…IP accounted for less than 10% of all US exports…by 1994, well over 50%" (Marcellin 2). US President Donald Trump went so far as to call the US tech industry's IP the "crown jewels" of

America ("China"). The amount of money riding on other countries' protection of American IP cannot be understated. One estimate maintained that US firms lost $2.5 billion a year in the pharmaceutical industry alone in lost sales on account of patent infringement. (Marcellin). However, some observers have pointed out a certain historical hypocrisy, in that while the US has long had strong IP protection for American IP holders, the nation didn't recognize other nations' IP until the Paris Convention in 1883 and made liberal use of copyrighted works and patented technology from Europe during its own industrial revolution (Vaidhyanathan; Kasson).

In addition to pushing IP protections though bilateral trade agreements, the US and its firms have successfully pushed for IP-favorable policy in large multilateral trade organizations, notably the World Trade Organization (WTO). Since the WTO's trade policy provided the basis for the lawsuit in the case study of this thesis, it's worth taking a closer look at the organization. The trade federation grew out of a treaty called Global Agreement on Tariffs and Trade (GATT), signed in 1948 by 23 countries[1]. Prior to World War II, most of the world's major Western economies preferred protectionist trade policies, like tariffs and subsidies, to keep foreign competition out of their domestic markets, and retaliatory trade wars were prevalent (Hoekman). As Western economies developed greater surpluses to export, however, they realized that they could unlock more economic growth by coaxing their fellow countries to lower their import barriers.

As political scientist Clara Park succinctly puts it, "Trade agreements are essentially about promoting domestic firms abroad and protecting domestic firms at home against foreign competition" (Park 31). Since lowering your own trade barriers would make your country more

[1] Original GATT signatories: Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, United Kingdom and the United States.

vulnerable to foreign competition, it would only be advisable if they agreed to lower their trade barriers for your exporting domestic firms as well. It is important to note that this arrangement is better for wealthier countries capable of generating large surpluses of goods to ship around the world. The GATT treaty essentially created a trade war ceasefire and a set of standards for lowering trade barriers among its signatories ("Fiftieth"). However, the treaty lacked a clear enforcement mechanism. If you felt another country violated your trade rights, you would basically be left to work it out on your own. The WTO was then created in the "Uruguay Round" of negotiations (1986-1993), to provide a consistent, stable institution for negotiating and enforcing trade agreements that would lower export barriers among member countries (Hoekman & Mavroidis). The trade network has now grown to 159 countries since its formal launch in 1995 (Hoekman & Mavroidis). But does it serve all their interests evenly?

According to the WTO website, "The [organization] is run by its member governments. All major decisions are made by the membership as a whole…Decisions are normally taken by consensus" (WTO). While in theory, consensus sounds like the fairest possible standard for making decisions, it's much harder to pull off in practice. Consensus here doesn't mean "jury consensus," where everyone gets an anonymous vote and you keep deliberating until all agree. It's more like "wedding consensus" where you stop the ceremony partway through and ask, "if anyone objects to this union, speak now or forever hold your peace." Much of the actual negotiating takes place in highly exclusive "green room meetings" (so called because the original room was in fact painted green), and then prepackaged decisions are offered to the rest of the member countries to ratify. If a nation's interests will be negatively affected by the decision, the burden is on them to force the issue (Hoekman & Mavroidis).

Capacity also creates barriers to equal negotiations. Smaller and less wealthy countries like Uganda can often only afford to send a handful of negotiators to advocate for their interests, while the US and other wealthy countries often send over a hundred. Furthermore, if a nation's treaty rights have been violated by a member country, initiating a dispute requires considerable documentation and negotiating capacity, creating barriers for less economically developed countries (Kim). Lastly, countries with vastly different economic resources are never really in equal negotiating positions. All the leverage previously mentioned that America possesses for bilateral negotiations is still in play for large multilateral agreements.

Therefore, it was largely through the lopsided influence of the US that the WTO made IP an important feature of global trade policy. The TRIPS agreement, mandatory for all WTO members, maintains that each of the member states must recognize the IP claims of other member states. In strictly economic terms, this clearly benefits some countries more than others. Net exporters of intellectual property, like the US, stand to gain from their entertainment and tech industries, whereas poorer countries that mainly export commodities or are net-importers of technology will bear the high costs of paying for the monopoly prices of patented and copyrighted goods without gaining much benefit themselves. The economist E. Penrose, writing in 1951, summed this up succinctly:

> …any country must lose if it grants monopoly privileges in the domestic market which neither improve nor cheapen the goods available, develop its own productive capacity nor obtain for its producers at least equivalent privileges in other markets. No amount of talk of about the 'economic unity of the world' can hide the fact that some countries with little export trade in industrial goods and few, if any, inventions for sale have nothing to gain from granting patents on inventions worked and patented abroad except the avoidance of unpleasant foreign retaliations (quoted in Marcellin 5-6)

In other words, global patents represent a "win-lose" rather than a "win-win" situation, with wealthy IP exporters gaining the benefits and IP importers paying the price. Furthermore,

research and development (R&D) in cutting-edge industries requires both a highly educated workforce and surplus investment capital, which are typically only found in the industrialized nations of the Global North. The following map (see Appendix, fig 1.) shows each nation according its number of international patents, as of 2006. Together, the US, the EU, Japan, and South Korea practically eclipse the entire rest of the world. The only significant change since 2006 is that, now (2019), China would be significantly larger. However, this map still clearly demonstrates that R&D is highly localized within a handful of the World's wealthiest nations and follows the "Brandt Line" said to separate the Global South and Global North.

The transplantation of intellectual property systems is even further complicated by the fact that not all cultures share the set of values on which Western IP is founded. As legal scholar Akalemwa Ngenda argues, intellectual property is based on Western conceptions of property that are "individualistic- commodity- and incentive based," presuming that cultural works are the product of one author, that their worth lies in their exchange value, and that their creators are self-interest maximizers driven by the profit incentive (Ngenda 66). He points out that many cultures have their own systems of governing the proprietary rights of cultural reproduction that are directly at odds with IP. For example, in Australian Aboriginal cultures, knowledge tends to be communally owned, and its value is derived from its religious use, placing it at odds with the concept of an individual creating a commodity to be sold. Furthermore, the right of reproducing certain cultural works may come with "custodial obligations—for instance, the obligation not to allow reproduction of a work without a full appreciation of its ancestral meaning or power" (Ngenda 68). Significantly, this approach is also at odds with the idea of a "free for all" cultural commons, what many of IP's Western critics push for, and what happens to cultural works whose copyrights expire (Ngenda).

Thus, transplanting Western standards of intellectual property can create both cultural and economic conflicts, and, as demonstrated by the case of HIV/AIDS medication in South Africa, barriers to accessing vital technology. The World Health Organization (WHO) has even identified strict enforcement of patents across borders as a barrier to accessing essential medicines. All the problems that patent thickets can create for manufacturing high-tech goods can only be amplified in countries with less economic means. Lastly, this practice benefits the Global North at the expense of the Global South, reproducing colonial relationships that privilege powerful (mostly Western) countries at the expense of poorer and often formerly-colonized states. These power relationships will be discussed in the following section.

Neocolonialism

The second half of the 20th century marked a profound shift in the global political order, as, one by one, most of the African, Asian, and Middle Eastern colonies of the old European empires began winning independence, officially ending a geopolitical structure in which legal authority for much of the planet resided solely with Western elites. The 1950s through 1970s saw not only the dissolution of sometimes centuries-old European empires, but the consequential emergence of newly independent nation-states like India, Algeria, and Kenya. The world suddenly appeared much more pluralistic and decentralized. However, many critics have argued those appearances are deceiving. While no longer directly administering the governments of the Global South, Western industrialized nations have continued to benefit from the historical legacy of colonialism and from vast asymmetries of economic and military power, often using this power to continue influencing life in the former colonies.

Kwame Nkrumah, revolutionary and first president of independent Ghana, writes that "neo-colonialism…represents imperialism in its final and perhaps its most dangerous stage" (Nkrumah ix). "Neo-colonialism" is a critique of political relations that implies either a new form of colonialism or a continuation of colonial relations. Nkrumah goes on to define the term: "the essence of neo-colonialism is that the State which is subject to it is, in theory, independent and has all the outward trappings of international sovereignty. In reality its economic system and thus its political policy is directed from the outside" (Nkruma ix). While this "direction" can take a variety of forms, Nkrumah argues that it is most often "exercised through economic or monetary means" (Nkrumah ix).

Neocolonialism can include powerful nations using foreign aid to prop up administrations willing to give favorable trade terms in return for support. It can also take the form of nations from the Global North using their leverage in trade agreements and international financial institutions such as the World Trade Organization, World Bank, and International Monetary Fund to create policies and laws which favor their economies at the expense of the Global South. The TRIPS agreement, I argue, is such a neocolonial law because it privileges the economic interests of the Global North at the expense of people who need medicine (to say nothing of other products) in the world's poorer countries. This thesis will demonstrate how global IP enforcement has been a site of neocolonial domination, particularly the ways in which the US has directed other countries' policies from the outside using various forms of economic coercion.

While these relationships of dominance and coercion may be enacted through mostly economic means, they must be publicly legitimized or concealed to continue. To excavate the role that rhetoric specifically plays in reinforcing and upholding neocolonial power relations, we turn to de/post-colonial theory. Western thinking about non-Western cultures is historically built

on a foundation of colonialism, one in which there is a fundamental division between "the West" and "the Rest" (Hall). Writing specifically about the West's relationship to Asia and the Middle East, Said writes: "Orientalism is a style of thought based upon an ontological and epistemological distinction made between 'the Orient' and (most of the time) 'the Occident'" (Said 10). He goes on to argue that "European culture gained in strength and identity by setting itself off against the Orient as a sort of surrogate and even underground self" (Said 11). We begin with a relationship of division. If Burke argued that "identification" is the essential feature of rhetoric, here we have an example of "dis-identification," of creating a clear set of categories by which cultures should be understood as different (Ott et al.).

Western discourse of the colonial era emphasized this division as a duality between "civilization" and "savagery." The discourse has changed, but its basic conceptual framework has in many ways remained the same. Civilization has been replaced with "modernity" and "development," the opposite of which are their absence—"backwardness," "underdevelopment," the "third world," etc.. Something is only modern in relationship to something purportedly antiquated and retrograde. Mignolo argues that "idea of modernity" is constitutive of its "darker side, coloniality" (Mignolo 2). In other words, the idea of "modernity" needs a foil against which to define itself, much like Said argued about "the Occident." Dutta critiques discourses of development for portraying non-Western culture as "a passive placeholder of backward traits of traditionalism and as a relic of the past" (Dutta 126). Neocolonialism is legitimized in public discourse because the former colonial powers are still understood to be leading the world into the future of modernity, making them the rightful leaders of the Global South. My research will show how rhetorics advocating the harmonization of IP law around the world reproduce these discourses by presenting Western-style IP as a universal standard to which all countries should

aspire, while presenting countries with alternative policies as backwards and retrograde. This reframes coercive policies as being for the benefit of the nation under control, lending an air of nobility to economic dominance.

However, no matter how the neocolonial pressure is framed, it rarely needs to be publicly justified at all. Nkrumah argues, "Neo-colonialism is also the worst form of imperialism. For those who practice it, it means power without responsibility and for those who suffer from it, it means exploitation without redress. In the days of old-fashioned colonialism, the imperial power had at least to explain and justify at home the actions it was taking abroad" (Nkrumah xi). As long as publics buy into the conception that we live in a world of sovereign, independent nations making policy decisions in a vacuum, then no real "domination" can take place. If the pluralistic international order holds sway in the public imagination, these power relationships are concealed and no justification for neocolonial exploitation must be made. This brings us to the rhetoric of "balance" in the WTO. By suggesting that the interests of pharmaceutical companies and the Global North can be "balanced" with the needs of people dying of HIV/AIDS in the Global South, these rhetorics conceal the fundamental power asymmetries enacted through this conflict, hiding domination behind a cheery veil of international cooperation. In this thesis I will argue that "balance" legitimizes the WTO and the TRIPS agreement, allowing the perpetuation of neocolonialism through the imposition of IP policies that benefit Western industrialized nations at the expense of people living in the former colonies of the Global South.

Thesis Overview

This thesis will attempt to understand how "balance" is rhetorically deployed in IP discourse. The term is intended for multiple stakeholders, and therefore my thesis must study the

perspective of multiple audiences. My first chapter will focus on the perspective of IP holders—particularly that of the nation advocating most strongly for strict IP enforcement, the US. I will begin by discussing the US advocacy for strong IP enforcement and the pharmaceutical industry's influence campaign to make this a top policy priority. I will be studying the public documents of organizations who are explicitly attempting to influence policy to create stronger IP protections abroad, United States Trade Representative and the US Chamber of Commerce. These documents frame an absolutist conception of IP rights as a "universal" standard to which the rest of the world must conform, justifying the use of disciplinary action against countries such as punitive sanctions. IP owners are framed as the primary stakeholders in the conflict, and nations which don't uphold US standards are framed as either derelict or retrograde, reinforcing the colonial tropes of modernity and backwardness.

Chapter Two will take a closer look at the controversy over antiretroviral treatment for HIV/AIDS in South Africa. This chapter will provide an overview of the controversy, including a history of the Sub-Saharan African HIV/AIDS crisis and a discussion of the barriers of access to treatment. It will examine the problem of international IP policy from the perspective of IP users affected by this policy—namely, sick people unable to access medical technology due to the high costs imposed by temporary monopolies. In this chapter I will specifically analyze the activism of Treatment Action Campaign (TAC) and its mobilization around the cause of lowering treatment costs for people living with HIV/AIDS, a course which brought them into conflict with global IP enforcement. This chapter will provide a rhetorical analysis of protest actions such as wearing "HIV Positive" T-Shirts to combat stigma, refusing treatment to signal moral urgency and gain media attention, and challenging the pharmaceutical companies' lawsuits with mass demonstration. Finally, I argue that these protests reframed the debate as a conflict

between healthcare for the sick and profits for the wealthy, shifting he primary stakeholders to patients.

Finally, chapter three will focus explicitly on "balance" as it appears in official WTO discourse during the Doha Ministerial round of negotiations (2001), in which the IP conflict between the Global North and Global South finally came to a head. I will analyze the use of the term "balance" in the TRIPS Agreement, WTO press releases giving during the Doha negotiations, position papers submitted by coalitions from both the Global North and Global South, and finally the Doha Declaration itself, the document intended to finally "resolve" the conflict. Ultimately, I argue that "balance" serves largely to maintain the legitimacy of the TRIPS agreement and the WTO. However, as my analysis will show, the term as been adopted by both sides and has itself become a site of conflict, a contested signifier caught up in the struggle between property and health.

CHAPTER 1

US-Led Efforts to Globalize Intellectual Property

While all IP-exporting countries may, in principle, benefit from a globalized IP system, no nation has pushed more aggressively for its adoption of late than the United States (US). As this chapter will demonstrate, the US has used its economic power to coerce other nations into changing their policies and has campaigned vigorously for the inclusion of IP protection in international law. This chapter will identify the key actors in this campaign and explore their rhetoric. How the world came to have such strong IP laws is a story of both corporate influence on the US government and the US government's influence on foreign countries. Consequently, this chapter will take a multi-pronged approach to this history, analyzing rhetorics from both government and lobbyists.

First, I will discuss the United States Trade Representative (USTR), an office of the federal government instrumental in advocating for stronger Global IP protection, examining its IP related public facing documents and the laws which shape and enable its powers. I will then summarize the history of the pharmaceutical industry's influence campaign on the US government, largely responsible for making global IP standards a US foreign policy priority. The chapter will then discuss the USTR's response to South Africa's Medicines Act of 1997, demonstrating the agency's opposition to the legislation and its rhetorical framing of states who defy US demands. I will then analyze the USTR's 2018 report, exploring the ideological commitments both manifest and latent there and discussing the ways in which the organization's rhetoric has both changed and stayed the same. Finally, the chapter will turn its attention to the lobbying perspective, briefly summarizing the history of the United States Chamber of

Commerce (USCOC) and analyzing its 2017 pamphlet "The Roots of Innovation," which makes a strong case for strengthening IP protection in foreign markets. I will conclude the chapter by discussing the common themes and parallels between these documents. Ultimately, I argue that the ideology supporting this push to align the South African IP regime (and, indeed, those of the Global South more broadly) with those of the United States draws on a neo-colonial conception of world relations, one in which Western standards are understood as universal, modern, and moral.

The United States Trade Representative and the Legal Authority to Impose Laws on Foreign Nations

Established in 1962, the United States Trade Representative (USTR) is the office of the executive branch that advises the President on foreign trade policy, and whose purpose is to grow the US economy by maximizing exports. Its purpose is to identify nations' policies which may impede US exports, such as tariffs or flexible IP laws, and then recommend a course of action to change other nations' laws, either negotiation or punitive economic pressure. For IP protection, the USTR is mandated by law to identify "those foreign countries that deny adequate and effective protection of intellectual property (IP) rights or deny fair and equitable market access to United States persons that rely upon intellectual property protection" (2018 82). The office meets this obligation by preparing, every year, a "Special 301 Report," which names "those foreign countries" and lists their transgressions, from governments using unlicensed software to countries that fail to invest enough (by US standards) in the destruction of counterfeit goods.

The "Special 301 Report" derives its name from Section 301 of the US Trade Act of 1974, which gives the US government broad discretion to unilaterally impose trade sanctions on

foreign countries for the explicit purpose of coercing them into changing their laws. Consider the following excerpt:

> If the United States Trade Representative determines that—(A) the rights of the United States under any trade agreement are being denied; or (B) an act, policy, or practice of a foreign country—(i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or (ii) is unjustifiable and burdens or restricts United States commerce; the Trade Representative shall take action…to enforce such rights or to obtain the elimination of such act, policy, or practice (US Trade Act. Sec. 301).

This passage clearly states that the USTR may "take action" to "obtain the elimination" of the offending law. These actions may include:

> (A) suspend, withdraw, or prevent the application of, benefits of trade agreement concessions to carry out a trade agreement with the foreign country referred to in such subsection; (B) impose duties or other import restrictions on the goods of, and… fees or restrictions on the services of, such foreign country for such time as the Trade Representative determines (US Trade Act. Sec. 301).

The Act gives a clear mandate for the US to use economic pressure to direct other nations' laws from the outside. Remember that under Nkrumah's definition of neocolonialism, "the State which is subject to it is, in theory, independent… In reality its economic system and thus its political policy is directed from outside" (Nkrumah ix). Here, US law explicitly directs the USTR to do exactly that. Notice also that the mandate for when such actions will be taken is extremely broad: not only do violations against treaties with the US trigger a response, but indeed any action that "burdens or restricts US commerce" or that is deemed "unjustifiable" (US Trade Act. Sec. 301). This standard allows broad leeway for interpretation, so that any policy that interferes with a US exporters' abilities to maximize profit is legal grounds for punitive sanctions.

Furthermore, by placing any "burden" or "restriction" on US trade on equal footing with a treaty violation, this law implicitly creates an equivalence between "illegal" actions (under

international law) and actions that simply interfere with the profit-driven agendas of US corporations abroad. This equivalence essentially "criminalizes" foreign laws that contradict the wishes of US firms. As the analysis of the "2018 Special 301 Report" will demonstrate, policies that deviate from US demands are framed using the language of dereliction and criminality.

Updates to the US trade act have added provisions to section 301 that make it clear that a nation's compliance with the TRIPS agreement does not exempt them from punitive sanctions. As this chapter will demonstrate, US government and pharmaceutical lobbyists have pushed for even stricter standards of enforcement than those outlined in the TRIPS agreement. The following passage of the law defines "unreasonable" policies:

> (B) Acts, policies, and practices that are unreasonable include, but are not limited to, any act, policy, or practice, or any combination of acts, policies, or practices, which—(i) denies […] (II) provision of adequate and effective protection of intellectual property rights *notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights* referred to in section 101(d)(15) of the Uruguay Round Agreements [italics mine] (US Trade Act. Sec. 301).

If a country is in full compliance with the TRIPS agreement, the US may still legally impose sanctions if this nation's IP law in any way "restricts United States commerce" (US Trade Act. Sec. 301). This stipulation will become important in Chapter Three, when we discuss the hesitancy of nations in the Global South to use flexibilities for medical technology available in the TRIPS agreement.

The Pharmaceutical Industry's Influence Campaign

While several industries may benefit from strong IP laws abroad, few have pushed for them more adamantly than pharmaceuticals. Beginning in the 1980's the US pharmaceutical industry launched a massive campaign to make international IP protection a top priority of US

foreign policy. According to Weissman, the Pharmaceutical Manufacturer's Association (PMA) became "one of the most aggressive and high profile trade groups in Washington" (Weissman 1076). The PMA had a knack for integrating itself with the executive branch. In 1984, it hired Gerald Mossinghoff, the Commissioner of Patents and Trademarks under the Reagan administration (Weissman 1076). Furthermore, PMA vice president Harvey Bale Jr. had worked at the USTR for 12 years before joining PMA in 1987 (Weissman 1076). Executives from chemical and pharmaceutical firms such as Dow Chemical, Johnson & Johnson, and Merck joined a trade advisory group to the president, while high ranking officials from the PMA, Pfizer, Immunon Technologies, Monsanto, and Proctor and Gamble joined a special advisory committee to the USTR on IP rights (Weissman 1076). Furthermore, the PMA funded academic papers touting the benefits of strong IP protection, and representatives from the group frequently testified before congress (Weissman 1076-7).

While the pharmaceutical industry initially made some effort to persuade governments of the Global South on the benefits of stronger IP protections, the industry's most successful efforts lay in convincing the US government to simply coerce other nations into changing their laws with economic pressure. In 1987, the PMA petitioned the Reagan administration to pressure Brazil into granting patent protection for US pharmaceuticals. According to the USTR's "Super 301" report, "the President determined Brazil's policy to be *unreasonable* and a *burden* and a *restriction* on US commerce [italics mine]," echoing the language of section 301 ("Super 301"). After unsuccessful negotiations, the US imposed 100% tariffs on thirty-nine million dollars worth of Brazilian goods (Weissman 1078). Brazilians were outraged. *Veja,* a leading Brazilian magazine, titled a story on the sanctions "The Empire Strikes Back" (Weissman 1079). The South American nation resisted for several years, but finally the economic pressure achieved its

purpose. Brazil capitulated in 1990, accepting IP policies that benefited a foreign power to the detriment of its own citizens' ability to buy generic medicines (Weissman 1079). The PMA didn't stop there. In 1988, it filed a similar petition against Argentina, and in 1991 against Thailand ("Super 301"). Even without direct coercion, by making an example of Brazil, the US was able to exert neocolonial pressure with just the threat of sanctions. Eventually, the coordination between the PMA and USTR reached a point where the PMA would no longer have to petition the government, as the USTR had adopted its priorities as its own. In 1991, the USTR "self-initiated" an investigation into India's IP practices, determining that "India's denial of adequate and effective protections of patents is [also] unreasonable and burdens or restricts US commerce" ("Super 301"). During this time period, the USTR also took action against Taiwan and Pakistan. While India, with its greater economic clout, has simply withstood the pressure, many of the countries with smaller economies capitulated to US demands (Weissman 1080).

Now that the US government was firmly on the side of the pharmaceutical industries, the next campaign would come through international treaties. The crusade began with the North American Free Trade Agreement (NAFTA) (1994), which compelled both Mexico and Canada to change longstanding patent laws. Canada was particularly resistant, having used a compulsory licensing scheme for medical technology, an IP policy in which patent holders can collect fees from competitors, but lose their monopolies and therefore control of the price. But in 1993, after a bitter political fight, the Conservative Majority pushed the bill through the Canadian Parliament, whereupon the nation adopted US-style patent laws (Weissman 1080). While the US government was leading the effort, pharmaceutical firms hardly sat on the sidelines. Six major pharmaceutical companies pledged to increase research conducted in Canada if the bill were passed, and the Intellectual Property Committee (IPC), a coalition of 13 major US companies,

wrote a private letter to the USTR giving specific demands for provisions to be included in NAFTA. The letter was eventually leaked in Canada, provoking considerable outrage (Weissman 1082).

Having triumphed over its neighbors, the US then set its sights to the world. A global agreement on US-style IP protection would achieve far more than investigating and sanctioning one country at a time. The aggressive push for US-style IP law abroad found a new outlet in the Uruguay round of GATT negotiations (1986-1994). Recall that it was the Uruguay round of the GATT negotiations that lead to the creation of the World Trade Organization. During these negotiations, the IP position of much of the Global South was that the world already had an international organization dedicated to IP protection, the World Intellectual Property Organization (WIPO), and that any disputes over policy could already be negotiated through this channel (Weissman). Furthermore, many wished that any agreement on patents could be negotiated separately from agreements on counterfeit goods, given important considerations of health and access. The US adamantly rejected both propositions and refused to sign any deal that didn't meet its demands. This belligerent strategy won out. The TRIPS agreement was signed by all 162 WTO member states, and went into effect on January 1, 1995, securing a major victory for pharmaceutical companies and imposing US style patent laws on most of the world, such as 20 year patent durations and a broad scope of patentability including medicines and even biological organisms (Weissman 1084).

Even this watershed victory for the US and its pharmaceutical industry has not slowed down the campaign for building even stronger global IP protections. The TRIPS agreement contains *some* flexibilities for health-related policies and provides a ten-year grace period for poorer countries in the Global South to change national laws and establish administrative

resources for enforcing IP protection. Yet, as this chapter will demonstrate, the US and its pharmaceutical lobbyists consider the TRIPS agreement, a "floor—rather than a ceiling" for IP protection abroad ("Roots" 12). At the 1999 Seattle round of WTO negotiations, the US even tried pushing for a "TRIPS plus" enhanced version of the agreement that would reduce exceptions and create higher standards for enforcement. Bilateral trade agreements with the US since have built in much higher standards, reducing exceptions, including those for patenting lifeforms ("TRIPS Plus").

South Africa and the "Special 301 Report"

Given the influence of the pharmaceutical industry on US government and the broad powers granted to the USTR, it shouldn't surprise anyone that the agency took an interest in South Africa. After implementing the Medicines Act of 1997—the one that allowed a health minister to bypass the TRIPS agreement and prompted 40 pharmaceutical giants to sue—South Africa was placed on the USTR's "Watch List" of countries allegedly denying adequate protection to US IP exporters. In 1998, the USTR's report asserted that "the new law appears to empower the minister of health to abrogate patent rights for pharmaceuticals" and complains that "it would also allow parallel importing," a practice in which pharmaceuticals priced for one national market are re-exported to other nations, often at lower prices than those available in the importing market ("1998 Special 301" 21). By framing this as an "abrogation" of "rights," the document casts South Africa as a government without respect for "rights." The USTR report reinforces this perception with careful framing of the pharmaceutical companies' lawsuit. The report simply states: "Implementation of the law has been suspended pending the resolution of a constitutional challenge in South African courts" ("1998 Special 301" 21). By omitting who was

challenging (the PMA), it implies that concerned South African citizens rose up against the bill, that the challenge was a result of the policy overstepping its bounds, rather than a product of the pharmaceutical industry's campaign to police the world's patent laws.

Then in 1999, South Africa continued to be placed on the USTR's "Watch List." The second entry further criticized the Medicines Act for granting the Health Minister "ill defined authority" to "abrogate patent rights" ("1999 Special 301" 22). By criticizing the Act as "ill defined" the USTR insinuates that the legislation granted too-broad and potentially abusable powers, reinforcing the image of South Africa as a country without respect for "rights." The USTR Report points out that "During the past year, South African representatives have led a faction of nation's [sic] in the World Health Organization (WHO) in calling for a reduction in the level of protection for pharmaceuticals in TRIPS" ("1999 Special 301" 22). Not only was the USTR concerned with laws that might restrict US trade, but advocacy for changes in international law were equally grounds to be placed in the crosshairs.

The 1999 USTR Special 301 Report makes clear and concrete demands, calling on the government of South Africa, "to bring its IPR regime into full compliance with TRIPS before the January 1, 2000 deadline…and clarify that the powers granted in the Medicines Act are consistent with its international obligations and will not be used to weaken or abrogate patent protection" ("1999 Special 301" 22). Here the USTR openly attempts to direct South African policy from the outside—a clear instance of neocolonial coercion, following Nkrumah's definition. Now we will take a closer look at the rhetoric of the USTR and the ideological commitments driving their policy.

United States Trade Representative's "2018 301 Special Report"

While the purpose of Special 301 Reports hasn't changed much since their initial implementation thirty years ago, the character and tone of these documents has shifted dramatically. The first Special 301 Report came out in 1989, around the time the US hit Brazil with 100% tariffs on 39 million dollars-worth of goods. The document is only eight pages long and reads more like a memo: the language is neutral and most often written in bullet points with bland passages like "The Special 301 authority was designed to enhance the Administration's ability to negotiate improvements in foreign intellectual property regimes through bilateral and/or multilateral initiatives" ("1989 Super 301"). Make no mistake, these euphemistic statements conceal a willingness to impose crippling economic sanctions. However, the contemporary reports strike a much more accusatory tone and go far more in depth about countries' alleged trespasses against US IP holders.

For starters, the USTR 2018 Special 301 Report is 85 pages long, not eight. Not only are there 36[2] countries listed (as opposed the previous 25[3]), but instead of three or four bullet points with recommendations, the entries for each nation are often more than a page in length, enumerating the ways in which foreign nations could better protect US IP. This makes the 2018 report a rich document for rhetorical criticism; as this chapter will demonstrate the ideological commitments are explicitly spelled out. The shift in tone and level of detail may also suggest a

[2] Countries identified in 2018: Priority Watchlist: China, Indonesia, India, Algeria, Kuwait, Russia, Ukraine, Argentina, Canada, Chile, Columbia, Venezuela. Watch List: Thailand, Vietnam, Pakistan, Tajikistan, Turkmenistan, Uzbekistan, Egypt, Lebanon, Saudi Arabia, United Arab Emirates, Greece, Romania, Switzerland, Turkey, Mexico, Costa Rica, Dominican Republic, Guatemala, Barbados, Jamaica, Bolivia, Brazil, Ecuador, Peru.

[3] Countries identified in 1989: Priory watchlist: Brazil, India, Mexico, People's Republic of China, Republic of Korea, Saudi Arabia, Taiwan, Thailand. Watchlist: Argentina, Canada, Chile, Colombia, Egypt, Greece, Indonesia, Italy, Japan, Malaysia, Pakistan, Philippines, Portugal, Spain, Turkey, Venezuela, Yugoslavia.

wider circulation, as earlier reports read much more like internal documents than public declarations.

The 2018 Special 301 Report makes no effort to conceal its objectives. Addressing an audience presumed to share its values on IP, the document proclaims:

> A top trade priority for the Administration is to use *all possible sources of leverage* to encourage other countries to open their markets to U.S. exports of goods and services, and provide adequate and effective protection and enforcement of U.S. intellectual property (IP) rights…ensuring that U.S. owners of IP have a full and fair opportunity to use and profit from their IP around the globe [italics mine] (5).

The USTR clearly stakes out its commitments: maximizing exports from US companies by any available means. Little justification for this stance is offered, a key difference between this public document and those of the US Chamber of Commerce, to be discussed shortly. The 2018 Special 301 Report further delineates this goal in strident terms:

> The Report reflects the resolve of this Administration to *call out* foreign countries and *expose* the laws, policies, and practices that *fail* to provide adequate and effective IP protection and enforcement for U.S. inventors, creators, brands, manufacturers and service providers…[and] The Administration's *aggressive* efforts to *defend* Americans from *harmful* IP related trade barriers [italics mine] (5).

Here the authors identify their purpose as a "call out," a rhetoric of accusation and shaming designed to "expose" other nations' practices. Furthermore, there is no compunction in referring to the Administration's efforts as "aggressive," a word typically reserved for critiques of belligerent nations overstepping social norms. (Compare, for example, the same document calls out the EU for their "aggressive" promotion of protecting geographical indicators, said to undermine US trademarks on common names such as Parmesan and Feta, etc.) (20). In its own words, the 2018 Special 301 Report names "those countries that have the most onerous or egregious acts, policies, or practices" and who have "the greatest adverse impact (actual or potential) on…U.S. products" (82). The tone of this document presumes an audience outraged by

the lax protection of American IP in foreign markets, and one supportive of bringing these nations in line.

The 2018 Special 301 Report consistently presents U.S. IP holders as victims to be protected from the harmful actions of derelict foreign actors. This positioning is ironic, given the historic power imbalances between the US and most of the countries on the list. The report frames three sets of stakeholders as potential recipients of harm: US workers, US healthcare consumers, and US small- to medium-sized businesses. It estimates that "45 million American jobs" rely on "IP intensive industries" (12). IP protections in the healthcare industry also "promote affordable healthcare for American patients today and innovation to preserve access to the cutting edge treatments and cures that they deserve tomorrow…" (15). By claiming the moral high ground of protecting "access," this statement indirectly attempts to counter criticism that the TRIPS agreement blocks access to pharmaceuticals. Lastly, the report makes several mentions of "micro-, small-, and medium -sized enterprises (MSMEs)" (31). Even though IP exports include those from some of America's largest corporations, like Apple and Microsoft, they are strategically omitted from the stage, curating the impression that these policies exist primarily to protect the livelihood of the vulnerable rather than the profits of some of the world's most powerful industries.

The picture of victimization and harm is completed by the framing of disfavored IP policies, which are presented as deleterious and motivated by bad faith. Trade policies are described as "unfair" (3) "unreasonable" "non-transparent" (14) "insufficient" (26), "discriminatory" (17) "unjustifiable" (15), "imposed," and "burdensome" (36). Conversely, US approved IP policies are "pro-innovation and creativity" (6) and "significant achievements" (34).

Overall, this contrast presents a clear worldview in which US IP holders are framed as innovators taken advantage of by illegitimate technology thieves from the rest of world.

In this world of patent "thieves," the US is tasked with bringing the Global South into line. Preferred policies are framed as a modern standard to which the rest of the world must catch up. Nations are criticized for policies that are "outdated" or that have made a "lack of meaningful progress" (5-6). Changes in IP policy around the world are often described as "steps," a term that appears 44 times in the document, and disfavored policies are described as "troubling steps backward" (39). Countries who haven't complied with U.S. requests have "*yet* to take steps," [italics mine] implying that IP policy changes have one natural direction in which they flow towards an inevitable future of "modern" IP protection (49). This invokes the colonial language of "modernity" and "development," in which nations in the Global South are presented as lacking and must conform to directives handed down from the US.

Countries who have not lived up to US expectations for changing their policies are also typically described in terms of deficit and failure. Phrases such as "lack of observable progress" (67) and "failure to implement" (38) presume that nations ought to be pursuing these goals, and any deviation from US recommendations represents a deficit either in competency or morals—again presenting other nations as lacking in important benchmarks for "civilizational" development and therefore in need of intervention. Trade partners are either incapable or unwilling to provide protection to US IP holders and are therefore framed as retrogressive or delinquent, or both. This positioning provides a normative force, as economically developed nations that don't comply are represented as outliers. For example, the report contends that Canada "remains the only G7 country identified" (60). Not only is it portrayed as an outlier but calling attention to its G7 status suggests that US style IP protections are the norm of highly

developed “modern” economies, and that Canada’s policies may not be living up to its economically developed status.

We see all these strategies come together in the following passage about China:

> The United States, other countries, and the private sector have stressed the urgent need for China to embrace meaningful and deep reform as it proceeds with a years-long overhaul of its IP-related legal and regulatory framework. Yet, results to date have disappointed, as China enacts measures that fail to reflect priority recommendations of the United States and others. China’s shortcomings in this respect suggest that China intends to continue business as usual. For these reasons, as elaborated below, China remains a hazardous and uncertain environment for U.S. right holders hoping to protect and enforce their IP rights. (38)

The passage begins by asserting normative force. “The United States, other countries, and the private sector” makes it sound as if these are the admonitions of a broad coalition of political actors. The need is “urgent,” the reforms required “meaningful and deep.” China’s “failure” frames the country’s choices as a deficit. This passage also attributes a motivation: intending to continue “business as usual” framing China as unrepentant, a “repeat offender” and therefore a delinquent nation in the normative framework of IP.

Overall, this rhetoric produces a clear dichotomy between a “modern,” highly developed world that must lead, and a “backwards,” underdeveloped world that must be policed in order to maintain order. Recall that Mignolo argues that modernity is constitutive of coloniality (Mignolo 2). Something can only be “modern” in contrast to what is backwards and retrograde, recalling the old colonial dichotomy between “civilization” and “savagery.” The rhetorics of the USTR’s “Special 301 Report” constitute a colonial worldview because they present a world in which the US must police and lead these nations towards modernity, towards civilization.

When China’s IP environment is described as “hazardous and uncertain,” the language recalls colonial discourses on the dangerous world beyond the gates of “civilization.” There is a relationship in which the colonizer culture understands the colonized culture as its opposite,

something that must be brought into line. While some may be skeptical at the claim that the US is capable of "colonizing" China today, the recalcitrant colonial language of "the other" still serves to justify combative economic sanctions against a nation "deserving of punishment." Overall, the neocolonial discourse of the USTR's Special 301 Report draws on a duality between a "moral modernity" and a "retrograde criminality" to justify putting the interests of multinational corporations ahead of the health and well-being of citizens of the Global South.

US Chamber of Commerce

The second document we will examine represents the perspective of a corporate lobbying group advocating for stronger global IP protection: the US Chamber of Commerce (USCOC). Like patents themselves, chambers of commerce have a long history extending back into Europe, the first being founded in France in 1599 ("Chamber of Commerce"). A chamber of commerce is essentially a consortium of local businesses who join forces to lobby governments and advance their mutual interests. Most chambers of commerce operate at the local level, but in 1911, US President William Howard Taft called for all the local chambers in the United States to connect on a national level, appealing for a "central organization in touch with associations and chambers of commerce throughout the country and able to keep purely American interests in a closer touch" ("U.S. Chamber's History"). Over the past century, the US Chamber of Commerce (USCOC) has become the largest lobbying organization in America, spending over US $132 million on lobbying in 2010, more than the second, third, and fourth largest lobbying organizations combined ("The U.S. Chamber"). USCOC's website proudly describes the organization as a "lobbying and political powerhouse with expanded influence across the globe" ("Thomas"). In the words of Alyssa Katz, author of *The Influence Machine*, "The U.S. Chamber

of Commerce is not just a lobbying group, and not just a massive political spending apparatus, and not just a policy shop, and not just a prolific combatant in the courts. It is, rather, all of those things wrapped into one—a well-funded influence machine seeking to build an economy where government becomes a tool of big business" (Katz xiii).

USCOC has taken several controversial stands throughout US history: opposing the New Deal, opposing US involvement in World War II, opposing portions of the Civil Rights Act, the Americans with Disabilities Act, and the Clean Air Act, as well as supporting McCarthyism (McKibbon; "The U.S. Chamber"). The organization has drawn criticism for allowing member corporations to lobby for unpopular positions without paying a reputational cost. Since its books are not public, nobody knows who funds the Chamber; however, as of 2010, 55% of its funding came from just 16 businesses ("U.S. Chamber"). Because corporations can lobby through them anonymously, the organization has often drawn companies whose business interests are not in line with what the public wants. Katz goes on to write that the USCOC,

> …has built its recent success in large part by advancing the interests of industries whose prosperity is threatened… by emerging trends in human history—by the evolution of our values, technology, scientific knowledge, and notions of environmental stewardship. Its constituents…are mature industries that provide vital goods and services but at mounting costs to society…What unites all these industries…is that achieving business success depends on inflicting collateral damage on public well-being… By doing their political and lobbying spending through the Chamber, beloved brand names are never sullied with the causes they finance (Katz xiii-xiv).

While not trying to insinuate that everything the USCOC advocates is detrimental (consider their current opposition to President Trump's trade war, or their support for a new infrastructure spending bill), I would concur with Katz that overall, this organization is an extremely well-funded, organized lobbying force advocating primarily for companies that would rather not be seen supporting their unpopular causes.

Katz goes on to argue that the USCOC "frames the objectives of these specific companies and industries as those of 'business' generally…the causes of 'free enterprise'" (Katz xiv). The rhetorical move of cloaking specific interests behind broad platitudes about progress and free enterprise will be an important part of USCOC rhetoric calling for IP "harmonization." While the USCOC may claim to speak for all US businesses, a growing movement of US firms have disavowed the USCOC as an organization that does not speak for them, especially because the organization's current stance against addressing climate change. Apple, Microsoft, and Nike have left positions in the USCOC, while local chambers of commerce in Seattle, San Francisco, and New York have cut ties with the national organization ("U.S. Chamber"). While cutting into its public image as an organization that speaks for all US businesses, these defections have not slowed down the USCOC's lobbying efforts.

"The Roots of Innovation"

While the industries funding the USCOC are officially secret, lately the organization has shown considerable interest in enforcing strong standards of IP protection around the globe, taking up the longtime campaign of the US pharmaceutical industry. In 2017 the USCOC published an "index" on the "strength" of IP protections in 45 countries, ranking nations on 35 measures divided into 6 categories: patent protection, copyright protection, trademark protection, protection of trade secrets, enforcement, and ratification of international treaties. Ranking each country with an index lends the project an appearance of objectivity: presenting ratings as an official standard representing much more than the policy preferences of the firms they represent. Flipping through the document gives the sense of reading a catalog, as if these were product reviews—only the product in this case is an export environment for IP holders.

The USCOC titled this report "The Roots of Innovation," suggesting that Western style IP protection is a necessary condition for innovation, a "root" from which it grows. By connecting certain economies to "innovation," already we see this pamphlet drawing on a similar discourse of modernity as the 2018 Special 301 Report. This index is not only directed towards the US government but also at foreign governments looking to "enhance their competitiveness through stronger IP" (IV). The pamphlet describes itself as a "playbook for those looking to attract the best and brightest" (IV) and a "roadmap for any economy that wishes to be competitive in the 21st century knowledge-based economy" (3). This represents a key difference in rhetorical strategy from the 2018 USTR Special 301 report. Instead of "calling out" and shaming the governments that manage foreign markets, this document offers itself to those governments as a kind of self-help guide, ranking their market policies and offering personalized coaching for their improvement. They are trying to "sell" IP protection to foreign countries as something that will increase foreign direct investment and grow their economies. By far the more audience-conscious of the two documents, "The Roots of Innovation" provides a clear example of how IP policy is framed, sold, and understood by key policy influencers—corporate lobbyists working on behalf of US firms exporting IP.

In a stark contrast to the 2018 Special 301 Report, "The Roots of Innovation" attempts to establish a warm, nonthreatening tone. The cover image depicts a tree standing in a grassy field with a low sun shining through its branches. The image of dawn suggests a sense of restoration and renewal provides the visual motif for the document. Committed to its extended metaphor of IP as the "roots" of innovation, the first page contains a diagram of a tree with the word "IP" as its roots, and branches labelled with attractive sounding terms like "Access to venture capital," "Attractiveness to Foreign Direct Investment" and "cutting-edge clinical research," implying that

these positive outcomes grow naturally out of a commitment to strong IP protection. The index opens with a personalized letter from David Hirschmann, President and CEO of the Global Intellectual Property Center of the USCOC. The warm aesthetic is complemented by a photo of him smiling in a light blue suit and tie against a light blue background. The growth metaphors continue to establish the gentle, positive tone. The foreword ends: "The roots are well established—let seven billion flowers of innovation and creativity bloom" (I).

The foreword also works hard to establish IP as a universal value, not simply a Western idea or a benefit to developed economies. The foreword refers to "…countries of every region, size, and income level" and "countries all around the globe—from the most established markets to fledgling new governments" (I) The pamphlet declares IP policy choices "are not simply a matter of East versus West, developed versus less-developed, or rich versus poor" (I). By flattening the differences between countries, this universalism attempts to counteract the perception that IP policies are imposed on the Global South by Western countries for their own benefit. In his work, *Designs of the Pluriverse,* decolonial scholar Arturo Escobar argues against universality as a colonial project, advancing a concept of "pluriversality" instead, one which allows for competing systems of values and knowledge. The "Roots of Innovation" seems unaware of its parochialism, or at minimum, reluctant to acknowledge other perspectives on IP as anything but misguided.

The document also refers to "sovereign policy choices" (I), emphasizing the role of nations in choosing their own IP regimes and downplaying foreign influence. Furthermore, the universalism implies a commitment and concern for "for the collective welfare of all the world's citizens" (I), a sentiment echoed in the previously mentioned passage about letting "seven billion flowers of innovation and creativity bloom" (I). Lastly, the sense of universalism is reinforced by

the editorial choice in presenting the index rankings: countries are listed alphabetically instead of from highest to lowest ranked, or by region. The apparent arbitrariness of the organization suggests a neutral relationship between the content and the countries, as compared to the USTR Special 301 Report in which nations are divided into a "watch list" and a "priority watch list." Yet, this apparently neutral set of relationships can conceal international relationships of dominance and coercion. As long as publics accept the idea that we live in a world of sovereign, independent nations making policy decisions in a vacuum, then no real "domination" can take place. Recall that Nkrumah, however, argues that "[n]eo-colonialism is…the worst form of imperialism. For those who practice it, it means power without responsibility and for those who suffer from it, it means exploitation without redress. In the days of old-fashioned colonialism, the imperial power had at least to explain and justify at home the actions it was taking abroad" (xi). By emphasizing national sovereignty and choice, this document contributes to the concealment of neocolonial domination, such as when the US coerced Brazil into changing its patent laws.

"The Roots of Innovation" also explicitly responds to criticisms of globalizing uniform IP standards. The pamphlet recognizes that:

> The debate on intellectual property (IP) rights and their impact on innovation, access to technologies and economic growth raged on in 2016, with developments underscoring ongoing skepticism at both the multilateral and national levels regarding the utility of IP rights and a persistent view that IP protection amounts to a tax on access to innovation. A United Nations High-Level Panel on Access to Medicines report that encouraged broad use of TRIPS "flexibilities" to work around IP rights was but one high-profile example…
>
> …in September 2016, the UN High-Level Panel on Access to Medicines released its final report and recommendations, based on a premise that IP rights are inimical to human rights. Unfortunately, the panel's mandate and thus the resulting report had a narrow, misguided focus on perceived inconsistencies between IP rights and access to medicines as opposed to the wider political, health infrastructure, and socioeconomic factors that are the true access barriers to medicines. (7; 17)

This passage demonstrates a recognition of criticisms as well as the USCOC's response. Here, barriers to accessing medicine are displaced onto "wider political, health infrastructure, and socioeconomic factors that are the true access barriers to medicines." This move disperses responsibility, evidently leaving it out of the hands of IP policymakers and pharmaceutical companies alike. Overall, this document is far more aware of criticisms against global standards for IP protection than the 2018 USTR Special 301 report: responding to criticism, adopting a nonthreatening tone, and attempting to obfuscate power dynamics between nations behind a cheery universalism.

Much like the 2018 USTR Special 301 report, "The Roots of Innovation" tries to establish IP protection as an "elite" standard, represented by "the most innovative and competitive economies in the world" (16). While the pamphlet goes to great lengths to present IP as a universal value, it is difficult not to read between the lines of coded language referring mainly to the West. Consider the following: "the world's most competitive and most innovative economies are also those in which the protection of IP is not viewed as a necessary evil but, instead, as a fundamental building block for a prosperous, modern, knowledge-driven economy" (18). Also, like the USTR report, the authors deploy this elite Western standard to exact normative force and "call out" Western countries that aren't adhering to the norms of the group as in the following passage: "[a]s in years past, Canada and New Zealand continue to stand out as examples of developed high-income economies closer to the score of middle-income economies than that of the U.S. and EU. Indeed, Canada is just over 4 points ahead of Mexico and Malaysia" (20). Pointing out that Canada is "just over 4 points ahead of Mexico and Malaysia" draws on the expectation that economically developed Western countries are

"supposed" to be ahead of these nations, suggesting that Canada and New Zealand have fallen behind the standards of their "class" of nations by choosing to adopt for flexible standards of IP.

Similarly, "The Roots of Innovation" also takes up the language of modernization and progress. Nations that have adopted more flexible IP regimes are described in terms of "regression" and "deterioration" (21). Early on in the pamphlet, we see a graph that takes a full two pages, in which all the nations measured are arranged from lowest to highest, from left to right, superimposed over a slightly faded version of the tree with the sun in its branches. The gradual slope, image, and left to right orientation work together to suggest that countries "grow" from low IP protection to high IP protection. This suggests an inevitability of IP standards, as if those with more flexible IP protection are simply lagging behind or haven't hit their "growth spurt" yet. Countries don't make policy choices based on their national policy interests and attempts to mediate between stakeholders. Change in policy is presumed unidirectional.

Conclusion

This chapter has demonstrated how the pharmaceutical industry and US government have embarked on a neocolonial campaign of domination to coerce sovereign nations into adopting US style patent laws for the benefit of US firms. The rhetorics advocating this effort have demonstrated a consistently colonial worldview, one in which "the West"—and America in particular—are presented as superior to and a point of orientation for the rest of the world—made up of the most competitive economies because they possess the most "innovation." Apropos, much like Said's *Orientalism*, the rest of the world is a negative mirror image, a "surrogate and even underground self" that lags not only technologically (and therefore intellectually), but morally as well, for their predatory "theft" of American IP and their "failure"

to catch up to “modern” standards, a theft which justifies the discipline imposed by economic sanctions (Said 11).

Western nations’ IP standards are portrayed as modern, universal, and objectively beneficial laws which other nations adopt because they have the moral and intellectual resources to recognize the unambiguous truth of their value, thereby affirming Mignolo’s assertion that modernity is “constitutive” of coloniality, that to invoke the modern is to imply and condemn its opposite (Mignolo 2). In the 2018 Special 301 Report, the United States was both the noble victim of property theft and the authoritative voice reluctantly telling other countries what was best for them. In “The Roots of Innovation” the US was the standard bearer, the champion, the highest ranked country on the list. Neither document acknowledges that other stakeholders are impacted by IP policy, such as AIDS stricken healthcare patients in South Africa. Ultimately, this chapter demonstrates that the US led global push for IP protection is undergirded by a colonial ideology of Western superiority and a near total erasure of non-Western stakeholders in the “balance” of global IP. In the next chapter, we will examine some of those voices pushing back, and resisting the colonialist standardization of IP regimes.

Chapter 2: Rhetorical Resistance:

The Embodied Rhetoric of Treatment Action Campaign

Introduction

On December 10, 1998, International Human Rights Day, a group of roughly 10-15 protesters gathered on the steps of St. George Cathedral in Cape Town, South Africa to demand that South Africans living with HIV/AIDS have access to antiretroviral treatments (Heywood 314). So began Treatment Action Campaign (TAC), an advocacy group that, within just a few years, would grow into a national organization with thousands of members and the strength to challenge both the multinational pharmaceutical industry and the government of South Africa. Having first examined the rhetoric of US lobbyists and government agencies advocating for strong global patent laws, we now turn to some of the voices and practices of those who resisted this push. This chapter will examine the protest actions and rhetoric of TAC in its resistance to the Pharmaceutical Manufacturer's Association (PMA), who attempted to strike down South Africa's Medicines Act of 1997, the bill that would allow domestic production of generic pharmaceuticals.

This chapter will first provide the background and context for TAC's activism, discussing the HIV/AIDS epidemic in sub-Saharan Africa, the stigmatization of people living with the disease, and the legacy of Apartheid in South Africa before providing an overview of TAC's organization and activism. It will then analyze strategies used by TAC to combat the stigma of people living with AIDS, specifically the sartorial reclamation of HIV-positive identity. Secondly, we will examine the treatment strike of TAC chairperson Zackie Achmat, who drew international media attention with his refusal to buy medication for his own HIV/AIDs treatment until it was affordable and available for the rest of South Africa. Finally, we will study specific

protest actions taken by TAC in challenging the PMA's lawsuit and defending South Africa's right to produce generic pharmaceuticals, ultimately showing how their rhetoric reframed the debate on global healthcare and access to patented medicines.

Context: HIV, Apartheid, Intellectual Property, and Treatment Action Campaign

The spread of HIV (Human Immunodeficiency Virus) since the 1980s is widely considered the worst public health epidemic of our time. According to the World Health Organization (WHO), over 70 million people have been infected all around the world, and 35 million have died from the disease (WHO). Although its origins are contested, HIV is currently believed to have first spread to humans early in the 20th century, sometime between the 1920s and 1940s ("History"). HIV/AIDS kills by weakening patients' immune systems, allowing them to slowly succumb to opportunistic bacterial and fungal infections. By the early 1980s, when medical researchers first recognized this virus as the cause of AIDS (Acquired Immunodeficiency Syndrome), the disease had already spread to five continents. However, as this chapter will demonstrate, the development and disbursement of treatment became highly politicized: the response to the epidemic was slowed by a public perception that the disease only impacted gay men, drug users, prostitutes, and other marginalized contingents, all of whom were seen as bringing the disease upon themselves (Patton). AIDS struck developing countries especially hard, particularly in Sub-Saharan Africa. In 2001, Sub-Saharan Africa was home to 28.5 million people living with HIV/AIDS, over 70% of the world's AIDS afflicted population at that time ("Status").

The HIV/AIDS crisis hit South Africa during a period of intense social and political upheaval. In 1994, South Africans liberated themselves from the Apartheid government and held the nation's first multiracial elections under universal enfranchisement. Apartheid, which

literally meant “apart,” was a form of governance founded on principles of white supremacy that had ruled the nation since 1948. All citizens were forced to register by race; not only were public facilities segregated, but black South Africans faced stern legal limitations on where they could live and work, and with whom they could interact. When HIV/AIDS was first discovered in South Africa in 1992, white elites spared little concern for a disease believed to affect primarily black second class citizens. Apartheid governance was brought down gradually by a combination of opposition at home and pressure from the international community. In 1987, the Apartheid’s National Party began negotiating with the African National Congress (ANC), an organization dedicated to establishing democracy in the black-majority nation. Apartheid laws were overturned in 1991, shortly after the activist Nelson Mandela was released from prison. The country was finally freed from white supremacist rule by its first free elections in 1994, the year in which Mandela was elected. However, Apartheid’s complex legacy would help set the stage for the conflict to come.

Apartheid left the country economically divided between a wealthy white minority and an impoverished black majority, compounding the impact of the HIV/AIDS crisis. As I noted in the introduction, in 1997, the annual cost for protease inhibitor therapy—a “triple cocktail” of three prescription drugs used to treat opportunistic infections— in South Africa was close to US$12,000 per patient. The high prices were heavily attributable to a complete lack of market competition for important anti-retroviral treatments, most of which were protected under patents pursuant to the TRIPS agreement. South Africa’s GDP per capita was around US$31,000, meaning that a year of regular treatment cost more than a third of the average person’s salary (Fisher et al). However, in post-apartheid South Africa, this figure was heavily skewed by the higher incomes of a white elite, with black South Africans, who made up 75% of the population,

averaging less than US$24,000 per year. Half their yearly income would then go to treatment. Since HIV/AIDS typically struck the more impoverished parts of the country, almost no one in South Africa was receiving treatment (Burger).

International patent protection blocked competitors from producing cheaper alternatives, and therefore health activists targeted IP in their bid to make HIV/AIDS treatment more available. To lower prices, President Nelson Mandela signed the Medicines and Related Substances Control Act of 1997, which allowed for domestic production and parallel importation of patented essential medicines. This law placed South Africa in conflict with the international pharmaceutical industry, which profited from monopoly prices in the developing world. Represented by the Pharmaceutical Manufacturer's Association (PMA) (yes, the same one that petitioned the Reagan administration to sanction Brazil), 40 of the world's largest prescription drug companies tried to sue South Africa in its own supreme court to overturn the bill, arguing that this law stood in violation of South Africa's commitment to the TRIPS agreement. (Fisher et al.).

By some estimates, however, these companies actually had very little to gain in South African markets. In the year 2000, North America, Europe and Japan accounted for 88% of all drug sales. The entire rest of the world, including South Africa, made up only 12% (Marcellin). Furthermore, by 2001, the combined revenue of the international drug industry reached US$400 billion, surpassing the collective GDP of all nations in Sub-Saharan Africa combined (Marcellin). The South African market would unlikely have been an important source of revenue. Fisher et al. argue that the world's largest pharmaceuticals sought to overturn the bill largely because they feared a "domino effect" in which they lost control of global pricing (Fisher

et al. 5). Keeping life-saving medicines unaffordable in the most HIV/AIDS-stricken parts of the world was apparently part of a long-game strategy for broader market control.

In the context of post-Apartheid South Africa, the challenge of making medicines available was further compounded by the fact that Western scientific discourses surrounding HIV/AIDS came freighted with historical baggage. Attempts to diagnose the disease and understand its spread were initially inflected through racist colonial discourses in which black Africans were read as dangerous disease carriers. Patton writes that much of the US possessed a "conviction that it was 'virtually impossible for 'ordinary people' (now encompassing straight, native-born, white, and probably middle class folks) to contract HIV during 'ordinary intercourse'" (Patton xiv). Marginalized groups were disproportionately impacted by HIV/AIDS, and so, in attempts to explain and warn people about the disease, blame was often attributed to morally stigmatized lifestyle choices associated with marginalized groups (homosexuality, prostitution, intravenous drugs, etc.) (Patton). In Africa, the blame was placed on sexual promiscuity. Mbali writes that, "African sexuality was constructed in colonial medical discourse as primitive, uncontrolled and excessive, and as representative of the darkness of the continent itself" (Mbali 115). In colonial and Apartheid medicine, programs intended to address sexually transmitted diseases may have propagated the idea that, "African sexuality is inherently diseased" (Mbali 112).

This stigma attached to black Africans living with HIV/AIDS had far-reaching consequences. In Africa, "NGOs and local activists in Africa promoted a 'return to monogamy'" as the real solution to the crisis (Patton xii). The stigma inspired apathy and further discrimination in the West, as the epidemic was configured as "remote and unpreventable" (Patton xv). As Patton argues, in US media, "the image of an African continent of seething sex

and rampant death was simply relocated to describe America's black communities, now said to be 'like' villages in Africa" (xiii). The racialized stigmatization of HIV/AIDS led to discrimination in both Africa and the West: Mbali writes that,

> Real discrimination against Africans and those of African descent did arise in Europe and America in the 1980s out of the notion that Africans were AIDS carriers/victims. Africans and those of African descent, especially Haitians were turned down for apartments, forced to have AIDS tests before being accepted for certain academic scholarships and people with HIV or AIDS were not allowed entrance into America… Prejudice and discrimination also informed early policy responses to AIDS in late apartheid South Africa in the 1980s. In South Africa regulations were proposed to force foreign mine workers to have HIV tests and deport them if they were found positive (114).

The stigmatization therefore created a pretext under which to further discipline already marginalized bodies, suggesting that HIV/AIDS discourse contributed to and reinforced racist and colonial power structures.

This created two serious problems for South Africans living with HIV/AIDS. The first is that the stigmatization made it much harder for people living with HIV/AIDS to organize around their shared vulnerability and need. In the next section, this chapter will discuss the rhetorical methods used by TAC activists to challenge this stigma. The second problem came as a direct result of some well-intentioned but frighteningly misguided attempts to combat the stigma. In South Africa, there was a movement that HIV/AIDS treatment activists dubbed "AIDS denialism," a set of discourses which sought to combat racist and colonialist stigma by rejecting the science of HIV/AIDS altogether, including evidence-based knowledge on its causes, treatments, and preventions (Mbali).

AIDS denialism became a potent force in South Africa during the late 1990s and early 2000s, largely because of its influence on government and policy. In 1999, South Africa elected Thabo Mbeki as its second president after Apartheid. Well-liked as the former deputy president

under Nelson Mandela, Mbeki frequently expressed skepticism that AIDS was caused by HIV and required antiretroviral medication. He is on record as having made the following statement to parliament: “does one virus cause a syndrome? A virus cannot cause a syndrome. A virus will cause a disease” (Guardian). Mbali argues that Mbeki’s AIDS denialism “rests on the historical legacy of racist discourses of Africans as being in possession of a diseased sexuality”; she goes on to argue that “[Mbeki’s] calls for an African Renaissance operate self-consciously in relation to a history that has,” in his own words, “created an image of our Continent [Africa] as one that is naturally prone to an AIDS epidemic caused by rampant promiscuity and endemic amorality” (Mbali 112). Further driving the point, Mbali quotes an AIDS denialist paper written by Peter Mokaba and circulated to the executive committee of the ANC, Mbeki’s political party. In an acerbic tone, the paper reads: “Yes we are sex crazy! Yes we are diseased! Yes we spread the deadly HI Virus through our uncontrolled heterosexual sex! Yes among us rape is endemic in our culture! Yes, what we need and cannot afford because we are poor, are condoms and anti-retroviral drugs!” (Mokaba, quoted in Mbali 114) This clearly demonstrates that the rejection of HIV/AIDS science was at least partly driven by a perception that it denigrates indigenous African people and their sexuality.

After centuries of colonialism and decades of Apartheid, one can certainly understand Mbeki’s hostility to the West and Western medicine. However, that doesn’t make his policy mistakes any less lethal. The South African president withdrew government support from clinics using AZT, a drug used to prevent pregnant women from transferring the disease to their children. He restricted the use of donated supplies of nevirapine and delayed the launch of an important anti-retroviral program, claiming “that the drugs were toxic and an effort by the West to weaken his country” (“the Cost”). He appointed a controversial minister of health named

Manto Tshabalala-Msimang, who promoted treating HIV/AIDS with herbal remedies, including beetroot, African potato, and garlic ("Mbeki Defends"). Ultimately, the Zimbabwean health researcher Chigwedere blames Mbeki's AIDS denialist policies for at least 330,000 preventable deaths and 35,000 preventable parent-to-child infections ("the Cost").

As if this weren't enough, effective HIV/AIDS treatment in South Africa was waylaid by rampant misinformation. Under Apartheid, black South Africans were the only group for whom schooling was not compulsory, and those who did attend school suffered from vast inequalities in a segregated school system ("Apartheid Education"). Education and scientific literacy were lowest among those populations most affected by the disease, and widespread fake cures and misinformation made the disease harder to treat and contain. By far the most pernicious superstition held that the disease could be cured by having sex with a virgin, a belief that led to multiple accounts of teenage girls and even children being raped by HIV positive men ("Fake Cures"). Leclerc-Madlala, writing in the *African Journal of AIDS Research*, argues that this belief was rooted in virgins' alleged "purity," and that "virgin cleansing as a therapeutic option against AIDS…may have acquired popular currency due to the fact that modern biomedical treatments have not been readily available to the mass of people infected and affected by HIV/AIDS" (Leclerc-Madlala 94). As sexual assaults in South Africa were generally underreported, it is difficult to ascertain the actual scale on which this took place. However, a nationwide survey of 9,000 participants reported 13% of the population granting some credibility to this belief (Leclerc-Madlala 94). This suggests at minimum a highly problematic degree of medical misinformation related to the disease.

Perhaps illustrative of the general conditions for those seeking treatment as a whole, when volunteer rape counselors sought to distribute antiretroviral drugs to rape survivors (most

of whom could never afford them in the first place at prices set by pharmaceutical giants), an Mbeki-appointed health minister ordered the volunteers out of Mpumalanga province hospitals, accusing them of trying to poison black people and "overthrow the government" ("Fake Cures"). A grimmer set of conditions for those seeking treatment is hard to imagine. Between 1990 and 2010, the average life expectancy in South Africa would fall by 20 years (Fisher et al.) AIDS treatment activists found themselves waging a war on all fronts: thrown into a pitched battle with the multinational pharmaceutical giants and their US backers, international law, the South African government, and rampant misinformation.

Fortunately, the intense democratic struggle to end Apartheid left behind a citizenry capable of organizing and willing to take direct political action. Treatment Action Campaign (TAC), coalesced around growing pressure from people living with HIV/AIDS who could not afford treatment (Heywood 31). Many of TAC's organizers were veterans of the struggle to overthrow Apartheid, including chairperson Zackie Achmat, who had been a member of the ANC and had been arrested on multiple occasions for participating in anti-Apartheid protests (Steinglass). More than just an advocacy organization, TAC sought to create a support community for people living with AIDS and to spread knowledge of effective treatment and prevention. TAC trained volunteers to be "Treatment Literacy Practitioners," who could return to their respective communities and spread vital knowledge to people living with the disease. Providing strong support to their members, TAC quickly grew into a National organization waging a battle for healthcare on several fronts at once. At a community level, TAC established over 100 branches throughout South Africa. The groups would meet monthly, conducting much of the work in administering education and treatment. TAC had a strong presence in 6 out of 9 South African provinces, and leaders of community branches would meet at the provincial level

to provide leadership training and coordinate campaigns. Finally, at the National level, TAC had a National Executive Committee that would lead the organization and develop campaign strategy (Heywood 31).

TAC leveraged this massive organization to fight a comprehensive campaign against treatment barriers. Between 1999 and 2003, it organized marches of 5,000 to 20,000 people (Heywood 32). During these mass demonstrations, the group fought the stigma around AIDS by wearing T-shirts proudly emblazoned with the phrase "HIV Positive." Chairman Zackie Achmat, dubbed the "most important dissident" in the country since Nelson Mandela, drew attention to the cost of pharmaceuticals by going on a "treatment strike," refusing to accept treatment for his own HIV until drugs became more affordable for his fellow South Africans. "I will not take expensive treatment until all ordinary South Africans can get it on the public-health system," Achmat declared. "That probably means I will die a horrible death, even though medical science has made it unnecessary" (Power 56). This chapter will discuss his stance at length.

While these actions made a powerful public statement, TAC also worked behind the scenes on legal fronts. On multiple occasions, its members organized meetings with South African health officials to lobby its case in the federal government. In the Supreme Court case in which the PMA tried to sue the South Africa, TAC members served as *amicus curiae* to the South African government—an official advisory role that allowed them to actively participate in the court proceedings, where they argued their right to health, and that the magnitude of the HIV/AIDS crisis demanded competitive price reductions (Heywood). Finally, TAC even engaged in direct civil disobedience, importing 5,000 capsules of generic AIDS drug Biozole to South Arica and "establishing its own network of doctors and drug manufacturers" (Heywood 276).

While much of TAC's success lay in its size and persistence, public messaging played a critical role in reframing the international debate about IP and pressuring key political actors. The rest of this chapter will furnish examples of its messaging in public protests and analyze key rhetorical moves. Ultimately, this controversy reveals both a clash of ideology and a resistance movement's effective forms of public address.

Stigmatized Bodies

As previously discussed, colonial and apartheid medicine significantly stigmatized black South Africans living with HIV/AIDS as being dangerous disease carriers whose illness is a mark of a primitive, undisciplined sexuality. This section will discuss how this stigma operated as a form of oppression, and how TAC subverted this oppression to reclaim HIV positive status as a viable public identity.

The word "stigma" originally comes from ancient Greece, where it referred to brands or scars used to mark criminals and traitors. To be "stigmatized" was to permanently wear a signifier of community disfavor, to live with a marked identity. Goffman divides stigma into three broad categories: tribal stigma "of race, nation and religion"; moral stigma, or "blemishes of individual character"; and physical stigmas, such as disease, disfigurement or disability (Goffman 4). South Africans living with HIV/AIDS were afflicted by all three: tribal stigma, because this disproportionately impacted South Africans who were poor, black, and/or gay; moral stigma, because the disease was presumed to be the result of promiscuous or homosexual sexuality; and finally physical stigma, because people with AIDS were presumed to highly contagious and therefore in need of quarantine.

Stigma has a powerful ability to impact people's lives. In *the Epistemology of the Closet,* Sedgewick writes that, "the closet is the defining structure for gay oppression in this century" (Sedgewick 71). Being "in the closet" means concealing gay identity from community and peers. Homosexuality is a concealable identity that one must choose to disclose, much like HIV-positive status. Sedgewick illustrates the coercive mechanism of stigma by outlining a US court case in which a woman is fired for coming out to her coworkers as bisexual. The court rejected the assertion that the firing infringed on her right to free speech, because being bisexual is not a matter of "public concern" (Sedgewick 70). There is a clearly delineated boundary between "public" and "private," with certain identities relegated exclusively to the "private" realm. This creates a structure of oppression because political action mostly takes place in the "public" realm. If a certain class or group of people is perpetually marginalized from the public sphere, then it is more difficult for them to collectively advocate for their rights and/or redress of grievances. In this case, the stigma placed on South Africans with HIV/AIDS would have made it extremely challenging for them to advocate for access to life-saving medicines.

It is all the more powerful then, that TAC chose to assert HIV-positive identity into the public realm with an article of clothing that became almost synonymous with the movement: a T-Shirt with the words "HIV Positive" proudly emblazoned on the front. The colors of the T-Shirts varied, but the text was always prominent and immediately visible; these were largely worn en mass by crowds at major protests. Zackie Achmat, the chairperson and cofounder of TAC, would wear this T-Shirt during almost all his public appearances, including press conferences and court appearances. In a documentary entitled "This is My Life," Achmat even jokes with his partner that he wouldn't go to the beach unless he could find an "HIV Positive" speedo (Tilley). In 2002, the effort to destigmatize HIV/AIDS in South Africa was boosted by a

highly influential endorsement. Nelson Mandela, hero of the revolution against Apartheid and first president of democratic South Africa, put on the T-shirt in solidarity and was photographed with Zackie Achmat. Mandela had been publicly reticent on the AIDS crisis out of solidarity with his political party, ANC, then led by his former deputy president and AIDS denialist President Thabo Mbeki. However, addressing the Johannesburg *Sunday Times*, Mandela declared:

> We must encourage our relatives who are HIV-positive to disclose their status so they can be helped and attended to. There is no shame to disclose a terminal disease from which you are suffering, and HIV is no different. In prison, I suffered from tuberculosis and outside I suffered from cancer of the prostate. I went public in regard to both and nobody shunned me. We call upon everybody not to treat people who are HIV-positive with a stigma. We must embrace and love them (Quoted in McGreal).

While not HIV positive himself, Mandela claimed ownership of living with life-threatening diseases and sought to reframe HIV-positive status from a moral problem to a medical one. By connecting the survival of illness with his imprisonment under Apartheid, Mandela associated illness with heroism rather than shame. He role-modeled the self-disclosure of illness, and by wearing the "HIV Positive" T-Shirt, endorsed people living with HIV/AIDS as an identity that does not deserve to be shunned.

Writing on the rhetoric of clothing, Entwistle argues that, "Fashion is about bodies: it is produced, promoted and worn by bodies. It is the body that fashion speaks to and it is the body that must be dressed in almost all social encounters" (Entwistle 1). In this case, the purpose of the T-Shirt as a mobile, reproduceable rhetoric is not necessarily to adorn the body, but to identify it as a body living with HIV. What was a concealable identity is now strikingly and deliberately revealed. Wearing the T-Shirt is a rhetorical act of reclaiming the identity of a person living with AIDS as a viable public identity rather than a source of shame or a source of fear to one's community. By gathering in large crowds and wearing "HIV Positive" T-shirts,

marginalized publics create a powerful statement normalizing HIV-positive status. For those who were HIV positive but kept it to themselves, this message invited them to step out into the open. For the general public, this rhetoric of visibility challenged the narrative in which having HIV/AIDS is a source of discredit, the product of a primitive or amoral sexuality. The act of wearing the T-Shirt in public asserts that AIDS afflicts members of their community whose needs must be addressed and taken seriously in the public sphere.

The Dying Body: The Rhetoric of Zackie Achmat's Treatment Strike

The dying body holds a special place in protest rhetoric. Buddhist monk Thich Quang Duc famously set himself on fire in 1963 to protest the treatment of Buddhists by the US backed Diem regime in South Vietnam. Irish Republicans, early 20th century Suffragettes, and Guantanamo detainees have all participated in prison hunger strikes to protest either the conditions leading to their arrests or their treatment in prison. In 2012, seven striking workers from a GM plant in Columbia posted videos of themselves sewing their mouths shut with string: a protest of the company's negligence towards injured workers (McGeough & McGeough). These public acts of risk and self-harm exert a powerful captivating force. McGeough and McGeough argue that, "Deliberate self-harm – self-immolation, chopping off one's fingers, or, as we argue, hunger strikes – are extreme communicative acts designed to draw attention to situations needing redress" (100). The dying body commands attention. One presumes no one would take this risk without reason. Therefore, self-harm as protest communicates moral urgency and importance.

Furthermore, the dying body creates "a spectacle intended to shock and affect viewers" (McGeough & McGeough 100). These acts have a powerful affective power because they invoke

pity for the person dying as well as admiration for a "hero" willing to die for a cause (Yang 12). This style of protest serves powerfully to dramatize harm. Yang writes of Quang Duc's immolation that it, "helps construct this indictment by serving as a visual representation of the violence and oppression that the South Vietnamese Buddhist monks and nuns suffered at the hands of the Diem regime. By enacting violence against himself, he illustrates the violence done by an 'other'" (3). In other words, Duc's self-immolation exposed the violence of the Diem regime by publicly displaying it on his own body. Similarly, in the case of striking workers in Columbia, McGeough and McGeough write, "Disabled, jobless, and homeless, the ex-workers once again called upon their bodies, this time using their vulnerable bodies as public argumentation to attract media and to provide visual and physical evidence of their claims" (McGeough & McGeough 101). The dying body not only grabs attention and creates affect, it also makes a powerful argument against injustice.

Arguably one of TAC's most powerful embodied rhetorics came from the "treatment strike" of chairperson and co-founder Zackie Achmat, who suffered from HIV/AIDS himself and made a conscious decision to refuse antiretroviral medications—even though he could afford them—until the drugs were available for all South Africans through the public sector.

Abdurrazack (Zackie) Achmat was born in 1962 to a Muslim family of Indian descent, and he experienced South African Apartheid firsthand has a person of color. His conservative family wouldn't accept his homosexuality, so he left home at the age of 14. Achmat began his career as an activist as a teenager, frequently getting arrested at anti-Apartheid protests throughout high school. He worked as an activist for ANC during the 1980s, contributing to the eventual overthrowal of Apartheid and establishment of democracy in 1994. He turned towards LGBT rights activism in the 1990s, founding the National Coalition for Gay and Lesbian

Equality, and initiating several important court cases that would successfully overturn anti-Sodomy laws and other forms of legal discrimination. In 1998, Achmat co-founded TAC after announcing that he had tested positive for HIV ("Biography"; "Zackie's Story"; Steinglass).

Achmat's treatment strike was unusual in one respect. While the striking GM plant workers posted graphic videos of themselves sewing their lips shut to turn the stance into a spectacle, Achmat was, in the words of one reporter, "curiously reluctant to publicize" his refusal to treat his own AIDS (Steinglass). There was no formal announcement or dramatic rollout. Already a public figure on account of his activism, Achmat dropped the bomb quietly, after journalists "began to ask why he was so sick" (Steinglass). When questioned about it, Achmat has even deflected attention away his stance; he once told one South African reporter, "I don't think it's noble, I think it's dumb" (Steinglass). His partner even criticized the approach, stating during a documentary interview,

> My only criticism would be that if you're then going to take the stand…then you have to go all the way and exploit it unmercifully, pulling on every flipping emotional heartstring that you can get. Because to die in silence or to get extremely sick to the point of death in silence while maintaining this superiorly morale position, that would seem to me to be really throwing your life away. (Tilley 01:09:50).

Perhaps Achmat trusted it would come out eventually. Perhaps it all was part of an ethos-building strategy: if audiences perceived this as a personal stand rather than a publicity stunt, they would be even more moved to admire him for the strike. Maybe he really did want to stick to the conviction of doing this for purely moral and personal reasons, rather than political ones. In the end, it scarcely mattered. Word got out, and in Western media, Achmat quickly became the heroic face of the movement, drawing numerous laudatory profiles in major media outlets, even starring in a documentary called *It's My Life*, which portrays both his activism and his slow deterioration as opportunistic infections began to take hold.

The *New York Times* writes: “It’s not unusual to sense urgency in a dying man. For Abdurrazack Achmat, every emotion -- rage, fear, pride -- feels magnified by a factor of five million. That is the estimated number of people in South Africa infected with the virus that causes AIDS, one of the largest H.I.V.-positive populations in the world” (Thompson). In this excerpt, “dying” is the first thing we know about Achmat, his most salient identity. That his emotions are “magnified by a factor of five million” suggests that he represents all South Africans who are dying of AIDS-related infections, building a martyr’s image of self-sacrifice for the greater community. *The Guardian* offers a similar frame, writing, “A charismatic and galvanising figure, Achmat suffered lung infections and weight loss, just as thousands of poor South Africans without access to drugs saw their HIV infection progress towards full-blown Aids [sic]” (“Treatment”). Once more, his dying body is foregrounded, this time with weight loss and lung infections, and once more, the article places his individual dying as a representation of all South Africans dying of AIDS. This became widespread in profiles of Achmat. Another in the *Boston Globe* mentioned that his voice was hardly above a whisper on account of an infection of thrush in his throat, and that “he has been near death several times and continues to get infections easily. He cannot travel much and has little energy to work” (Steinglass).

The strategy of foregrounding Achmat’s dying body to amplify his message would reach its apotheosis in Brian Tilley’s 2002 documentary, *It’s My Life*. The film follows Achmat as TAC challenges the PMA in the South African supreme court, and as he stages two protests, one against the pharmaceutical companies, and one against Mbeki’s AIDS denialist health policies. The documentary includes scenes of Achmat discussing his symptoms, getting an infected wart removed, speaking in a soft voice due to the thrush in his throat; looking sickly, unshaven, and tired; and lying in bed while his sister and partner bring him bowls of soup and cups of tea. There

are several scenes where he visits his doctor, who sometimes encourages Achmat to drop his stance. Consider the following dialogue:

> Zackie Achmat: I had breakfast, which was pronutro, and I took my vitamins... And I had cramps all the time. And suddenly I got out of bed, I rushed to the bathroom, and for about ten minutes I was in the toilet shitting. And the pain became so bad, I had a moment, I had to lie down on the floor in the bathroom and momentarily just lost what felt like losing consciousness.
>
> Dr. Steve: You're travelling too much, you're stressing yourself too much. The other thing that we might have to reconsider and we're sort of getting closer to the issue is the consideration of anti-retrovirals. Okay, once again I don't think I lost blood count, you're not in that sort of ball park yet. But definitely closer than when we started this about 18 months ago. So you have to, you have to give some thought to that again. Um, and, I'm just a bit worried… (Tilley 54:15)

Including unsavory details such as having trouble on the toilet creates a visceral reaction in the viewer, while hearing a professional doctor try to talk him out of the decision lends credibility and authority to his status as a "dying body."

McGeough and McGeough argue that "about to die photos," or in this case, a video, constitute a "visual enthymeme" in that they leave the viewer to supply the conclusion. (102; see also Zelizer). These images create a clear choice for viewers in that they "testify to death but still allow viewers the possibility of imagining alternative possibilities" (McGeough & McGeough 102). Images of Achmat's ailing body present viewers with a clear moral choice: if drug companies and government policies continue to make anti-retrovirals unavailable to South Africans, this man will die. The dying body is therefore a call to action. This strategy of using a dying body to present audiences with a clear cut-moral choice becomes evident in an Op Ed Achmat wrote for *The Guardian,* hoping to inspire UK readers to support the cause. He foregrounds, not himself, but the dying body of a fellow TAC activist. He begins the Op Ed:

> Christopher Moraka's throat and mouth were covered with thrush when he died. He was in excruciating pain and was wasted away from diarrhoea. Chris was a volunteer with the Treatment Action Campaign (TAC), South Africa's leading Aids organisation. Two

> months before he died he testified before a South African parliamentary committee on the exorbitant cost of pharmaceutical drugs. Chris could not afford the drug fluconazole to treat his thrush. Only the patented version is sold in South Africa and at the time of his death, it was 50 times the price of safe, effective generic versions sold in India, Thailand and Brazil (Achmat).

He begins by foregrounding the body and its morbidity. Achmat then shows the dying body resisting, and makes it clear what should be blamed for the death, specifically mentioning patents. This is the first choice framed by the enthymeme of the dying body. He ends the Op Ed with the following anecdote:

> Christopher Moraka's partner, Nontsikilelo Zwelidala, was sicker than Chris a few weeks before he died. We thought she would die first. There was little left of her scrawny body and, like Chris, she had thrush all over it. Even fluconazole could not cure her thrush because her immune system was so impaired. Yet she turned up for every TAC demonstration and made it clear that she would not give up to the disease easily. A few months ago, she was fortunate enough to be placed on an antiretroviral drug trial. She has regained weight, recovered completely and the virus is no longer detectable in her body. Her young daughter has a real hope of becoming an adult with her mother still alive (Achmat).

Here we finally see the dying body restored to life, bringing resolution to the urgent moral conflict it produced. The resolution makes the solution clear: antiretrovirals must be made available to the wider public. The reader is presented with a harsh binary between life and death, a choice in which there is only one moral option. For the audience, the dying body is a violent confrontation insisting on resolution; it calls the viewer to action, simplifying the moral choices and demanding a decision.

Finally, Achmat's stand drew formidable rhetorical power from his own framing of his motivations. The film *It's My Life* features a scene in which Achmat is on a conference call with other members of TAC leadership, one of whom tries to talk him out this stance. Here is Achmat's response:

> Our politics generally has become empty of any moral content. HIV politics specifically…What you [do] have is you had a lot of sentimentalism, where people feel

> sorry for you if you have HIV and they'll hold your hand and cry with you, but that there was no action. And at the same time there's a whole industry of people who survive on consultancy fees and that whole range of things to keep the epidemic going. In addition to which there were people who, people with HIV, were leaders were getting medicines from drug companies and from government, and maintaining their quietness about other people…And for me personally... in terms of the majority of people with HIV; they don't have a face, they don't have a political understanding, they're desperate, they're poor, they're alone. And to advocate for their medicines is a very difficult, is a difficult task… for all of us. That's all of our job. But me personally, with HIV, as someone who could access medicines through friends and through medical aidance [sic] on, for me *I can't look them in the eye when I take medicines and I know they're going to die because they can't get medicines. And I cannot lead them if that is the case.* So, my position is based on an understanding that… I want the right to life for myself… and I want the right to live in a political community in which that right is extended to every person. *If such a political community does not exist and the only reason that you die… is because you're poor…then I do not want to be part of such. On a conscience basis and on a moral basis, I couldn't be part of such a community* [italics mine] (Tilley 01:05:45).

Achmat's statements to fellow TAC leadership frames his decision as based in a deep moral commitment to South Africans living with HIV/AIDS. Because of his privileged position, he can choose not to take antiretrovirals, and everyone will know about it. Meanwhile, thousands of South Africans didn't have that choice. They would go without treatment because of circumstance, and they would suffer and die anonymously. Achmat uses his privilege to choose risking his life. He frames his actions as a moral decision to reject a political community in which he could access life-saving medicine while other bodies were dying because they could not. This message of self-sacrifice combined with the image of his dying body made Achmat a compelling subject for Western and international media, making his case to the world.

TAC Challenges to the PMA's Lawsuit

In addition to challenging the stigma surrounding HIV/AIDS, TAC mounted a significant challenge to the PMA and the 40 pharmaceutical companies they represented during their attempt to sue the South African government over the Medicines Act of 1997. TAC enacted this

campaign on several fronts: serving as *amicus curiae* during the court proceedings, constant picketing outside the courthouse, and finally organizing a mass demonstration. This section will examine how each of these contributed to reframing the terms of the debate about the enforcement of international pharmaceutical patents in South Africa, changing the conversation from a trade issue and a property rights issue to a health issue and a matter of life and death.

The South African Supreme Court hearings over PMA's contestation of the Medicines Act began on March 5, 2000. TAC showed up in force. In collaboration with COSATU (Congress of South African Trade Unions), the largest federation of trade unions in South Africa, TAC organized a march through the streets of Pretoria, the city of the trial. Over 5,000 people showed up to march on the courthouse, carrying banners and wearing their "HIV Positive" shirts (Heywood 32). A mass demonstration on this scale creates what Delicath and Deluca call, an "image event," or an event whose purpose is to create a spectacle that can travel through media (Delicath & Deluca 321). "Image events," according to Delicath and Deluca are a "form of argumentative practice, the rhetoric of subaltern counterpublics who have been purposely excluded for political reasons from the forums of the public sphere" (321). In this case, the reason for exclusion would be stigmatization. While image events may not necessarily make a clear, coherent argument in the conventional sense, they are "propositional in that such acts advance claims about the practices in question"; in this case, assembling 5,000 people outside of the courthouse, many of whom claimed HIV positive identities, advances the proposition that the pharmaceutical companies' demands would harm a great number of people.

Corporeal rhetoric can help us shed light on the persuasive force of mass demonstrations. Deluca argues that, "Often, image events revolve around images of bodies-vulnerable bodies, dangerous bodies, taboo bodies, ludicrous bodies, transfigured bodies" (Deluca 10). He argues

that an image event "deploys bodies as a pivotal resource for the crucial practice of public argumentation" (Deluca 10). How does a body work as a discursive resource? For a parallel case, consider Pezzullo's analysis of the Toxic Links Campaign (TLC), an environmentalist movement dedicated to exposing the links between breast cancer and pollution. Pezzullo describes a scene in which a protester, "had walked in front of the police line, unbuttoned her dress, pulled out her right arm, and exposed her mastectomy scar" (Pezzullo 356). This "evoked strong and sensual reactions from others…difficult to ignore and perhaps even more difficult to forget" (Pezzullo 356). Here, the exposure of the body makes a bold claim about the unacceptability of carcinogenic pollutions. In TAC's mass demonstration in Pretoria, the bodies made a similar argument. By claiming HIV positive status through the T-shirts, the bodies served as mass evidence, a testimony to the great need for affordable treatment and the unacceptability of any policy which kept medicines out of sick people's hands.

Furthermore, this gesture makes a powerful claim on the right to public space, a right which isn't guaranteed for a society's vulnerable and marginalized. Speaking on Arab spring protests in Cairo, Judith Butler argues:

> Now, it would be easier to say that these demonstrations or, indeed, these movements, are characterized by bodies that come together to claim a public space, but that formulation presumes that public space is given, that it is already public, and recognized as such. We miss something of the point of public demonstrations, if we fail to see that the very public character of the space is being disputed and even fought over when these crowds gather (Butler 1).

In other words, spaces presumed to be public might not equally belong to everyone. Considering the "private/public" dichotomy of the "closet" as Sedgewick articulates, one can presume that public spaces belong to the stigmatized less than they belong to those considered "normal." There are unspoken social rules determining who belongs in public. The gesture of laying claim to public spaces takes on additional resonance in post-Apartheid South Africa, considering that

HIV/AIDS disproportionately impacted the black majority. When TAC and COSATU took to the streets of Pretoria, South Africa was only six years away from open white supremacist rule, when black leaders were routinely arrested for assembling and organizing protest actions. The disruptive nature of the protest would have taken on additional resonance given that, according to the 2001 South African census, while 79% of the country was black, Pretoria was 67.7% white (Census 2001). Ultimately this protest asserted that marginalized and HIV positive people have an equal right to public space, and therefore equal right to visibility. TAC not only called for better treatment of people with AIDS, but for a new post-apartheid paradigm in which society's most vulnerable mattered, one in which their lives and needs were taken seriously.

However, mass demonstrations were not the only card in TAC's hand. In January of 2000, the South African Supreme Court granted TAC the right to serve as *amicus curiae* for the government of South Africa's position against PMA's lawsuit (Heywood 32). This meant that TAC's legal team would be in the court during the trial and serve in an advisory role to the South African government. TAC used this opportunity to advance the argument that PMA's challenge infringed on the "right to healthcare" established in South African and international law (Cook). Though still hotly contested in the US, the right to health is well established in global agreements. The United Nations' Universal Declaration of Human Rights (1948) proclaims:

> Everyone has the right to a standard of living adequate for the health and well-being of himself [sic] and of his [sic] family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his [sic] control. (Art. 25)

Though co-authoring this treaty and signing it without objection, the US has never fully taken its obligations seriously. Doing so would significantly improve the lives of many US citizens at the expense of powerful businesses, going as far as to make "periodic holidays with pay" a right

(Art. 24). However, this right has also found its way into the constitutions of nations around the world, most notably South Africa, India, and Brazil. The South African constitution establishes that: "Everyone has the right to have access to—(a) healthcare services, including reproductive healthcare" (27(1)). This right may not always be realized in practice, yet still grants legal weight to TAC's claim.

Framing both healthcare and intellectual property as "rights" sets up this moral dilemma as a "clash of rights" problem, pitting the rights of IP owners against the rights of those in need of treatment. However, the two rights may not be on equal footing when it comes to enforcement or legitimacy. In his famous essay "Two Concepts of Liberty," Isiah Berlin argues that there are "positive freedoms" and "negative freedoms." A negative freedom is simply one's ability to "act unobstructed by others," and would include freedom from censorship in one's speech (Berlin 369). Conversely, a "positive freedom" has to do with being one's "own master"; it is the freedom to do something, rather than simply the freedom from having something done to you. (Berlin 373). This distinction gets taken up and modified in legal and human rights discourse as a difference between "positive rights" and "negative rights." Constitutional scholar David M. Currie spells out this distinction with the following legal case:

> In November, 1980, in Joliet, Illinois, a car turned over and caught fire. A policeman arrived and began directing traffic away from the scene. He made no effort to determine whether or not there were people in the car. There were, and they burned to death. The city was sued for damages on the ground that, by failing to save the occupants, the policeman and therefore the city had deprived them of life or liberty without due process of law. Relief was denied. Our Constitution, wrote Judge Posner, "is a charter of negative rather than positive liberties…The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them (Currie 864).

According to Judge Posner, the government has an obligation *not to do harm,* but it has no legal obligation *to provide benefits* to citizens. This gets us slightly away from Berlin's original

conception of a "positive freedom," but the distinction between positive and negative rights has gained considerable traction in discourses over whether positive goods such as healthcare, can be considered "rights" (Bradley). A negative right means freedom from certain forms of coercion, whereas a positive right, such as the "right to a standard of living" guaranteed in the Universal Declaration of Human Rights, must be provided.

Positive rights can prove tricky to uphold. The legal scholar Seymour J. Rubin writes,

> [I]t is easier to tell governments that they shall *not* throw persons into jail without a fair trial than that they *shall* guarantee a minimal standard of living. Except in the most extraordinary circumstances, governments need only their own volition to abstain from denial of social and political rights. To provide a decent living for all, however, may be beyond their capabilities, or may require major societal readjustments involving conflicts within national societies, as well as among nations (Rubin 82).

In other words, positive rights are inherently more difficult to enforce than negative rights, because it is much clearer when a "sin of commission" has taken place than a "sin of omission." How much healthcare is adequate? Do limitations of available healthcare resources change what counts as a "good faith" effort on behalf of the government to live up to its commitments? The case that a positive right has been violated is much harder to make.

However, while this may have been a clash of rights in the courts, TAC largely rejected this framing in their public rhetoric, choosing instead to frame it as moralized clash of interests between pharmaceutical companies' desire to profit and HIV/AIDS victims' desire to live. Those leading the Preteoria March Carried a banner that read "STOP DRUG COMPANY PROFITEERING/ TREAT HIV/AIDS" (Tilley 16:17). TAC members picketing outside the courthouse held printed signs with photograph of John Kearney, the CEO of pharmaceutical manufacturer Glaxo SmithKline in South Africa (Tilley 19:18). The poster labels Kearney an "AID$ Profiteer," an epithet that draws sharp contrasts to the typical public relations rhetoric of "innovators" creating "medicines of tomorrow." He is framed as a self-interested opportunist out

to take advantage of the sick, not a healthcare provider who is here to help through benevolent innovation. The poster goes on to declare him, "deadlier than the virus," framing pharmaceutical companies as an obstacle to treatment rather than the solution. The poster draws on the imagery of a "wanted poster," which Rachel Hall argues signals "emergency", "danger," and "cause for alarm" (Hall 1-2). By presenting pharmaceutical CEOs as a "danger" to society, TAC protestors give themselves the moral authority to determine "criminal" behavior. Finally, in a statement to the press during trial, TAC chairperson Zackie Achmat declared:

> Even if we lose in court, we'll succeed someday. There's no doubt in my mind because we've got right on our side. There's not a single major civil society body who has defended the right of the pharmaceutical companies to profiteer from peoples' lives. And so for us in the end, this case is just about a very simple thing. It's about life or greed. Nothing else; life or greed (Tilley 17:25).

This rhetoric presents the audience with a simple and self-evident moral choice. As Debra Halbert writes in her analysis of this debate, "Moralized Discourses," "At one level, this narrative is a struggle over who gets to define moral and immoral behavior" (261). In other words, neither side ostensibly viewed this as a clash of rights with good faith arguments to be made on either side. Within intellectual property discourse, "morality is defined as adhering to the law"; this allowed pharmaceutical companies to portray themselves as the "'victims' of immoral and malicious 'pirates' and 'thieves'" (Halbert 261). In TAC's moral framework, the "rights" involved are incidental; what matters most are the consequences. Life for the many is juxtaposed against profits for the few. The pharmaceutical companies are destructive, dangerous, and driven by greed, while people living with AIDS are asking to stay alive, to be recognized as human beings deserving of life and moral concern.

Conclusion

TAC's combined rhetorics demonstrated a remarkable ability to get their message out. Western News media caught onto the story, highlighting the plight of the AIDS-stricken poor. Articles in the *Independent* (UK), the *Economist* (UK), the *Guardian* (UK), and the *New York Times* (US) all identified high drug prices as a barrier to access that could cause unnecessary deaths ("Drugs"; "Protest"). TAC was able to take control of the public narrative of this controversy, making its frame the version which was most salient in the public eye. Solidarity protests broke out around the globe. On March 5, 2001, a picket line formed outside the British offices of GlaxoSmithKline, the producer of the "Retrovir" antiretroviral treatment (Nessman). According to the *New York Times*, "The European Union, the World Health Organization and France's National AIDS Council… had all publicly lined up to support South Africa's position in the lawsuit" (Swarns). Both U.N. secretary general Kofi Annan and Nelson Mandela called on the pharmaceutical companies to drop the case (Swarns). In 1999, AIDS activists joined forces with labor rights advocates and critics of globalization to protest WTO negotiations in Seattle. The American AIDS activist organization ACT UP began disrupting the campaign events during Al Gore's 2000 presidential campaign, calling attention to his stance in advocating on behalf of pharmaceutical companies to the government of South Africa. Debra Halbert writes, "In March of 2001, six hundred Yale researchers, including Professor William Prusoff, the original inventor of antiretroviral d4T, petitioned the University of Bristol-Meyers Squibb to 'permit a generic version of its patented anti-retroviral d4T to be imported and distributed in South Africa'" (Halbert 277). Amidst a storm of public criticism, the pharmaceutical companies dropped their lawsuit against South Africa on April 19, 2000. (Heywood 32). J.P. Garnier, CEO of GlaxoSmithKlein told the *New York Times*: "We don't exist in a vacuum… We're a very major

corporation. We're not insensitive to public opinion. That is a factor in our decision-making" (Swarns).

This legal victory secured South Africa's right to produce generic antiretroviral medication under a compulsory license plan, an achievement that would change the future of global IP protection. However, the Mbeki administration, entrenched in its AIDS denialism, would drag its feet for almost three and a half years before rolling out a plan to produce the drugs. Of course, they faced immense pressure from TAC and their coalition of international allies. In February of 2003, TAC led a march of over 20,000 people on the parliament building on the day of Mbeki's state of the nation address, demanding domestic production of antiretrovirals (Heywood 33). The next month, it launched a civil disobedience campaign resulting in hundreds of arrests (Heywood 33). After heated negotiations between TAC and ANC, the government of South Africa officially announced a cabinet plan to domestically produce generic antiretrovirals in August of 2003 (Heywood 33). In December of that year, TAC would reach out of court settlements with several drug companies resulting in the issuing of seven compulsory licenses (Heywood 33). Competitive generic production and importation in South Africa kicked in, and after five years of struggle, prices finally began to fall. Now that the drugs were available in the public sector, Zackie Achmat finally began treating his AIDS. *The Guardian* writes,

> At his home, Achmat displays his medications with relish, each pill a hard-won trophy. 'These medicines used to cost 4,500 rand (£385) per month if bought by their brand names, but the pills I'm taking cost just 300 rand (£25) per month,' says Achmat with pride. 'I take three pills a day, including generic drugs from India and one drug produced locally. The price can be brought down to 150 rand (£12.50). These drugs are affordable for the government to distribute and easy for people to take.'

At the time of this writing (2019), Achmat is still alive and presumably in reasonably good health.

In the face of overwhelming odds, TAC challenged significant barriers to affordable treatment presented by the US led international patent system. By claiming healthcare as a "right," TAC created moral legitimacy while changing the terms of the debate. TAC successfully foregrounded their vision of the conflict: one in which corporations sought to take advantage of the epidemic at the expense of the sick. The group asserted that its members' lives mattered in a society recovering from white supremacist rule, and garnered international support for their position. It effectively pressured powerful economic and political actors with targeted callouts, while building a nationwide community of education and support to empower people living with AIDS. TAC took the fight to the streets, the federal government, and the highest court in South Africa, ultimately changing the global conversation about intellectual property.

However, the end of this battle is only the beginning of the next global clash between the rights of intellectual property and the needs of the sick. The US dropped its conflict with South Africa but stopped well short of supporting any substantive change to international law. The next decade would bring about a pitched conflict over IP policy in which a coalition lead by India, China, and Brazil would directly challenge the status quo on global IP enforcement in the Doha round of WTO negotiations. This conflict would lead to calls for "balance" between the developing nations and Western IP holders. Now that we have explored both perspectives, we can finally turn to the rhetoric of "balance."

CHAPTER 3

"Balance" in the Doha Round

Introduction: What is "Balance?"

In the aftermath of the South African HIV/AIDS scandal, "balance" was widely taken up in WTO discourse as the best solution to the conflict between IP protection and access to medicines in the Global South. The WTO faced considerable pressure to "do something" about the international patent system's role in creating barriers to life saving medicines but was simultaneously beholden to the US and other wealthy IP-exporting nations. The idea that these interests could somehow be "balanced" appeared to offer a way out of the conundrum. IP law scholar Andrea Wechsler writes, "the term 'balance' is well qualified for the buzzword of intellectual property (IP) law of the current decade," judging by the "surge of research on the question of balance in IP law" (1). However, she goes on, "there is hardly any other term that is so much ridden with terminological obscurities" (Wechsler 1). "Balance" was left vague, a placeholder, a promise of solutions to come. This chapter will analyze the rhetoric of "balance" in the Doha round of WTO negotiations, where the conflict over pharmaceutical patents finally came to a head.

While definitions of "balance" may vary, almost all describe "a desirable equilibrium between at least two forces that is characterized by cancellation of all forces by equal opposing forces" (Wechsler 2). The term comes from the Latin "bilanx," referring to a scale with two pans, the prefix "bi" meaning two ("Balance"). The scale with two pans has long been the symbol of justice in Western culture, suggesting that a judge must "weigh" the evidence of a case to discover the truth, and as a symbol suggests rightful authority. From Wechsler's working definition, two points stand out for what they offer our analysis. A "desirable equilibrium,"

grants legitimacy to both sides, suggesting both sides can, indeed, be pleased. Furthermore, the "cancellation of…opposing forces" presumes the resolution of opposition, an end to the conflict. Rhetorically, balance seems to transform an "either-or" situation into a "both-and." It restores social harmony without creating winners or losers, a "win-win" situation in which the powerful must sacrifice nothing.

However, "balance" can also be an opportunity. If "both sides" are truly legitimate, if benefits are to be truly "mutual," then the Global South must too, have its day in court. My analysis will show that in the Doha round of negotiations, Nov. 9-13, 2001, there was not one conception of "balance" but multiple competing definitions, each serving separate stakeholders and goals. While the US and its allies advanced a concept of balance rooted in strong IP protection, the African Group and its coalition of allies assertively pressed for a conception of balance focused on the rights of governments to address the health needs of their people. Ultimately, the meaning of "balance" changes depending on who is speaking and, indeed, the standpoint from which they are speaking. As this chapter will show, "balance" is simultaneously a discursive resource for legitimizing neoliberal domination and a site of counter-colonial resistance for pushing back against that very dominance. "Balance" itself is a site of contestation, a debated signifier pulled at from both sides. It maintains the legitimacy of a neoliberal world order, but one in which US hegemony over institutions of global governance is no longer guaranteed.

I will begin this chapter by reviewing the geopolitical context in which the Doha negotiations took place, discussing the rise of a coalition of developing powers led by India, Brazil, and China, which challenged the US and its allies in the WTO member body. I will then provide information on three key health policies related to pharmaceutical pricing and IP

protection: compulsory licensing, parallel imports, and differential pricing, each of which played a significant role in the Doha round debates. Then I will turn to analyze the rhetoric of "balance" as deployed in a wide range of sources related to this context. First, I will examine "balance" in the TRIPS agreement itself, the first multinational treaty to mention the term (Wechsler). I will then analyze how "balance" is inflected in the press releases given by WTO officers during the Doha round, before turning my attention to the two major competing interpretations of the term: a position papers submitted by a group of industrialized nations advocating strong IP protection, and one from a broad coalition from the Global South, including the African Group, India, China, and Brazil, advocating the rights of governments to set their own healthcare policy. Finally, I will turn to the outcome of all these debates, the so-called "Doha Declaration," in which the WTO clarified the provisions of the TRIPS agreement in an attempt to "balance" strong IP protection with the need to respond to the HIV/AIDS pandemic.

Geopolitical Context of the Doha Round

As discussed in the introduction, global patent systems create winners and losers. Namely, net exporters of technology stand to gain by enjoying monopolies of limited duration in foreign markets, whereas net importers of technology lose money paying rents on their industrial (and pharmacological) revolutions. This political cleavage closely follows the division between the Global South and Global North, asymmetries forged through centuries of colonialism (Marcellin; Hall). For roughly the last half century, the US, the EU and their industrialized allies have dominated the global economy and its governing institutions such as the International Monetary Fund, World Bank, and WTO. The hegemony of the US and its allies has created

international laws and institutions that serve their interests at the expense of other nations, constituting a form of neocolonial domination.

The TRIPS agreement is itself a clear example of a neocolonial international law. As Rahmation argues, essential to the neocolonial project is "the establishment of a legal framework of international trade which confers legally enforceable rights that support and safeguard economic penetration and control" (Rahmation 3). In other words, the legal framework put in place protects the Global North's ability to profit from foreign economies while fostering economic dependence. Rahmation argues that the TRIPS agreement is "an essential device in the building and strengthening of an informal empire of economic colonialism by the industrialised nations in the non-Western world" (27). As this thesis has discussed, strong IP enforcement benefits wealthy IP exporters while harming the economies of nations in the Global South, restricting access to life-saving pharmaceuticals, and imposing Western cultural values on non-Western states.

Furthermore, as Kristen Hopewell writes, "the successful multilateralism of the past was predicated on highly unequal power relations" (14). The "neoliberal order" created by the US and its allies, while legitimizing its institutions and laws through appeals to universal freedom and fair trade, rarely applied these rules evenly when they would damage Western economic interests. For example, the US successfully lobbied to numerous poorer countries to eliminate agricultural subsidies on the grounds that they provided an unfair advantage to local producers over agricultural exporters. Meanwhile, the US maintained its own agricultural subsidies for years after the rule's implementation (Hopewell).

However, the economic power dynamic has shifted. In 1960, the Global North's share of world GDP stood as high as 80%, whereas by 2016, it had fallen to 40%. In that same timespan

China, India and Brazil had come to make up 25% of global GDP, whereas the Group of 7 countries (US, UK, France, Germany, Italy, Japan and Canada) made up only 33% (Hopewell 1). With greater economic clout and global connectedness, the rising non-Western powers have built themselves a stronger bargaining position. While the US remains the most powerful economy and militarily in the world, the rise of China, India, and Brazil led to the formation of a coalition that could challenge US Hegemony in the WTO forums. In the 2001 round of WTO negotiations in Doha, Qatar, this conflict would disrupt the presumed global consensus.

Keith Maskus, lead economist of the World Bank, argues that the Doha round "marked a new era in global trade negotiations" (1). For all eight previous rounds of negotiation, the US was "the primary *demandeur,* pushing other countries to open and liberalize their markets" for US exports (Hopewell 12). However, as Maskus writes, "governments of the developing countries are becoming increasingly assertive in criticizing the structure of the trading system and presenting their own positions" (1). In this round of negotiations, a coalition of developing countries advanced a wide range of positions, from the elimination of US agricultural subsidies to insisting on broad flexibilities in the TRIPS agreement to pursue critical public health objectives. In this context of emerging geopolitical struggle and increasing international pressure to address the AIDS crisis in sub-Saharan Africa, the WTO TRIPS Council gathered to negotiate the role of public health considerations in IP protection for the first time.

As Hopewell argues, the disruption of Western hegemony over the WTO didn't come because rising powers rejected the neoliberal order, but because they adopted it as their own and began claiming its benefits for themselves. "A broader acceptance of global neoliberalism—specifically, its embrace by rising powers—," writes Hopewell, "produced a crisis in one of its governing institutions" (13). As this analysis will show, governments from developing countries

claimed a right to negotiate assertively as equals in a historically Western dominated space, as well as the authority to set the agenda and interpret international law. Romano would consider this a "counter-colonial" movement, because the nations subjected to neo-colonial pressure began occupying previously Western dominated spaces, claiming them as their own (Romano 402). The coalition of countries in the Global South could then interpret "balance" as they saw fit. However, the US and its allies had no intention of relinquishing control. In Western media, the Doha round is typically written as a story of intractable gridlock, which left many points unresolved.

Healthcare Policies and IP

Three healthcare policies become important points of contention during the TRIPS Council negotiations of the Doha round. First, "compulsory licensing" refers to when a government authorizes "someone else to produce a patented product or process without the consent of the patent owner" ("Compulsory"). For example, if a government authorizes the domestic production of a pharmaceutical without the consent of its international patent holder, this would constitute a compulsory license. This policy doesn't negate the patent, only licenses a third party to be exempt from a given patent's exclusionary rights; this third party will still have to pay fees or royalties, depending on the policy. Because the patent holder doesn't need to consent, the license is considered "compulsory." This arrangement can allow for the production and sale of patented medicines at much lower prices and, perhaps unsurprisingly, it featured prominently in the developing countries' position on TRIPS flexibilities. However, the strategy has one key limitation: if a poorer country doesn't have the manufacturing infrastructure to

produce its own pharmaceuticals, it can be difficult to find someone to whom to award the license. This gets us to our next policy, "parallel importing."

Parallel imports, as Maskus defines them, "are goods produced genuinely under protection of a trademark, patent, or copyright, placed into circulation in one market, and then imported into a second market without the authorization of the local owner of the intellectual property right" (Maskus 2). Let's say a company exports a shipment of patented pharmaceuticals to Zimbabwe. It does so under the expectation that the companies importing them will sell them to healthcare customers in Zimbabwe. However, the importers decide instead to re-export the pharmaceuticals themselves, shipping them, say, to South Africa. This can create a more competitive healthcare market, because companies often charge a different price for the same medicine based on a variety of factors such as local market conditions. Parallel importing can then undercut the prices set for middle or even high-income countries by allowing those countries to simply import the same goods at a discount from poorer countries. This practice becomes particularly contentious when we consider our final policy: "differential pricing."

Differential pricing is essentially the practice of charging less for medicines in some countries for humanitarian reasons. As Danzon et al. explain,

> Under well-designed differential pricing, prices in affluent (and, to a lesser extent, middle income countries) exceed the marginal cost of production and distribution in these countries by enough, in aggregate, to cover the joint costs of R&D [Research and Development], while prices in DCs [Developing Countries] cover only their marginal cost. (Danzon et al. 184)

In other words, prices are lowered in the Global South without touching profit margins, because prices in wealthier countries are high enough to offset the costs. One can easily see why parallel importing would concern companies engaged in differential pricing strategies, as the lower priced drugs could be re-exported to undercut prices in other markets. This strategy for making

drugs accessible was initiated and facilitated primarily by the private sector and was offered by advocates of strong IP protection as an alternative to compulsory licensing and parallel imports. Much of the Doha round's conversations about "balance" hinged on which of these policies would be authorized under the TRIPS agreement. We now turn to the rhetoric of these debates.

The Rhetoric of "Balance"

Part I: Balance as Strategic Ambiguity: The TRIPS Agreement

"Balance" makes an important appearance in the TRIPS agreement itself, implemented in 1995. The three earliest attempts at global IP agreements—the 1883 *Paris Convention,* the 1886 *Berne Convention,* and the 1891 *Madrid Agreement*—make no explicit mention of balance, nor do they discuss public health as a policy objective (Wechsler 2). The TRIPS agreement then, is "the first major international treaty [on IP] to mention the term 'balance'" (Wechsler 2). Article 7 of the TRIPS Agreement establishes that:

> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the *mutual advantage of producers and users* of technological knowledge and in a manner conducive *social and economic welfare,* and to a *balance* of *rights and obligations* [italics mine] (TRIPS Art. 7).

This passage explicitly mentions a "balance of rights and obligations," in this case referring to the "right" to own intellectual property and the "obligation" not to interfere with "social and economic welfare." Furthermore, this passage demonstrates the "both-and/ win-win" conception of balance in its calls for IP enforcement to support the "mutual advantage of producers and users of technological knowledge." This implies that IP protection is supposed to advantage both sides of the equation, i.e., that it is not simply supposed to benefit IP owners at the expense of IP users, or vice-versa.

Article eight of the TRIPS agreement goes even further in establishing public health as a priority to be balanced with IP protection:

> *1*. Members may, in formulating or amending their laws and regulations, adopt measures necessary to *protect public health and nutrition*, and to promote public interest in sectors of vital importance to their socio-economic and technological development, *provided that such measures are consistent with the provisions of this Agreement.*
> 2. Appropriate measures, *provided that they are consistent with the provisions of this Agreement,* may be needed to prevent *the abuse of intellectual property rights* by rights holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology [italics mine] (TRIPS Art. 8).

Article eight provides that members may adopt measures "to protect public health and nutrition," implying that a balance must be struck between IP rights and health objectives such as the access to life-saving medicines. This passage also explicitly mentions the "abuse of intellectual property rights," suggesting that IP rights are abusable, and therefore not absolute. However, this section also introduces the central ambiguity at the heart of this debate. The language "provided that such measures are consistent with the provisions of this agreement" raises a complicated question. When the authors write "consistent with the provisions of this agreement," do they mean that "public health and nutrition" policies cannot infringe on the IP rights established by the rest of the treaty? Or are articles seven and eight and their protections for public health and socioeconomic welfare also to be equally considered "provisions of this agreement?" The language could plausibly be interpreted either way. When 40 pharmaceutical companies sued South Africa in 2001 for allegedly violating the TRIPS agreement by circumventing IP protection in pursuit of "public health and nutrition," both sides could have claimed the TRIPS agreement in support of their claim.

It's hard to imagine this ambiguity is merely an oversight, in a document that must have gone through numerous drafts; more likely, this is what Jazarbkowski et al. would call "strategic

ambiguity." "Strategic ambiguity" is a rhetorical strategy that "involves contested interpretations, in which different groups must be persuaded to act collectively" (Jazarbkowski et al. 220). Jazarbkowski et al. go on to argue: "Ambiguous goals have multiple, indistinct, incoherent or fragmented meanings, in which no single meaning is the 'best' or most coherent interpretation. Ambiguous goals are typically associated with particular characteristics, such as multiple constituencies that place legitimate demands upon the organization" (Jazarbkowski et al 220). Proponents and opponents of IP enforcement both make "legitimate demands" on the WTO. If this ambiguity was strategic, then it was designed so that multiple stakeholders could come away with their own interpretations. This may have helped achieve consensus to get TRIPS passed in the first place. The Global South wanted assurance that IP protections wouldn't interfere with public health initiatives, while IP exporters wanted reassurance that public health initiatives wouldn't interfere with IP protection. This strategic ambiguity concealed conflict and created an impression of consensus durable enough to get WTO members to sign the agreement into law; but, by wallpapering over the cracks in the constituency, the WTO only delayed the conflict's inevitable eruption. What exactly, do these articles allow? What does "balance" in this legal context actually mean? These questions would be hotly debated during the Doha round of negotiations.

Part II. Balance as Legitimacy: WTO Press Releases about TRIPS Negotiations

In examining the WTO's public-facing rhetorics during the Doha round, we see "balance" largely invoked to maintain the legitimacy of the TRIPS agreement in the face of controversy. WTO General Director Mike Moore, in a statement to the press, asserted that the TRIPS agreement, "strikes a carefully-negotiated balance between providing intellectual

property protection—which is essential if new medicines and treatments are to be developed—and allowing countries flexibility to ensure that treatments reach the world's poorest and most vulnerable people" ("Moore Stresses" 1). Here we see "both-and" universalizing rhetoric. The special aside connecting patent protection to the creation of future treatments grants equivalent moral standing to the protection of patents and the availability of medicine, an equivalency TAC would have certainly rejected. Furthermore, the language "carefully negotiated" builds TRIPS' credibility as a product of the values of all stakeholders involved, and therefore not something that simply privileges the interests of the Global North.

Maintaining the legitimacy of the TRIPS agreement in the face of this public criticism forms a common theme in WTO press statements and public-facing documents. The TRIPS Council Chairperson, Ambassador Boniface Chidyausiku of Zimbabwe, described the ongoing negotiations in a press conference: "There **were** some differences of view, but I think I can safely say that all members are determined to ensure that the TRIPS agreement is part of the solution and not part of the problem" ("WTO Members"; emphasis in original). The problem implied is accessing medicines in the developing world. Stating that the TRIPS agreement is "part of the solution" suggests that the barriers to accessing medicine are not caused by patents or high pricing. The statement also then places TRIPS as an agreement that plays a vital role in addressing HIV/AIDS and other global pandemics. This statement echoed sentiments put forth by WTO Secretary General Mike Moore, who asserted that "The WTO's TRIPS agreement plays a vital role in tackling these problems" ("Moore Stresses"). Chidyausiku goes on to assure the public that,

> The discussion on Wednesday was not an occasion for attacking the TRIPS agreement or the patent system. Members recognize that patents are important for public health policies because they provide incentives for research and development into new drugs ("WTO Members").

Here, again, the press statement puts IP protection and the ability to access medicine as morally equivalent—simply two different approaches to addressing the problem of HIV infection and AIDS-related mortality.

The WTO's public discourse addressing the negotiations over medicine and patents took care to build credibility for the WTO negotiations and their outcomes. The special round of negotiations was initiated by the African Group, a regional coalition in the WTO consisting of all African WTO member states. WTO Secretary General Mike Moore made it clear that he "welcome[d] this special discussion," which he described as "vitally important" (Moore). While this is certainly the response one would hope given the gravity of the situation, it is notable that after the South Africa controversy the WTO was highly sensitive public opinion and playing damage control, and that foregrounding its openness to this process did important rhetorical work in building its ethos as an organization concerned with public health. Chairperson Chidyausiku went on to say, "this was a rich discussion, with over 40 detailed and thoughtful presentations…I think all delegations were positive and constructive" ("WTO Members"). This rhetoric emphasizes unity over conflict, curating a public perception of engaged stakeholders working towards a shared, viable consensus.

This universalizing language was common in WTO press releases. They would frequently make statements referring to "some delegations," "many delegations" or "all members" rather than referring to specific countries or groups, such as the African Group ("Governments"). This language projects the impression that all participants in the negotiation share equal standing—legally, economically, and, it seems, historically. It also conceals the ways in which IP creates a broad conflict between the Global South and Global North. This is very similar to the strategy used by the US Chamber of Commerce in their pamphlet "The Roots of

Innovation," in which they sought to neutralize coalitions and cleavages by presenting nations in alphabetical order rather than by income or region.

WTO Director-General Mike Moore stressed that the TRIPS agreement already contained the flexibilities that countries needed in order to "ensure that treatments reach the world's poorest and most vulnerable people" ("Moore: Countries" 1). The problem, he asserts, is that "countries must feel secure that they can use this flexibility. The work started today in the TRIPS Council," he argues, "should reinforce that security" ("Moore: Countries" 1). The problem, according to his framing, is that countries aren't taking advantage of the "carefully negotiated" flexibilities, and that the solution lies in clarifying the scope of the provisions. This appears to shift the responsibility for change onto nations from the Global South, who for some reason aren't taking advantage of the available flexibilities.

However, he makes no effort to call out the likely cause of that insecurity, the willingness of the US and other powerful IP exporting countries to use punitive economic actions on countries whose IP protection they deem inadequate. Recall from chapter one, that section 301 of the US Trade Act authorizes the US to impose punitive sanctions, "notwithstanding the fact that the foreign country may be in compliance with the specific obligations" of the TRIPS agreement (US Trade Act. Sec. 301). This would come up in negotiations, as a summary of TRIPS council negotiations released by the WTO made it clear that, "Several delegations said governments should not be put under pressure bilaterally or in the WTO to limit their use of the flexibilities built into the TRIPS agreement" ("Governments"). Therefore, clarifying the TRIPS flexibilities could only go so far in getting countries to actually use them. The legitimate reasons why countries would not feel secure using these flexibilities were conspicuously absent from Moore's

public rhetoric. This again, conceals geopolitical conflicts and power asymmetries underlying the policy disagreements in the WTO.

Overall, The WTO's public-facing rhetoric reveals a strong concern for maintaining unity and legitimacy in the face of public crisis. The WTO Secretary General and the TRIPS Council chairperson both went out of their way to emphasize that the TRIPS agreement and the global patent system were not under attack, and they took care to frame the deliberations as a productive and mutually beneficial process in which all members could bring legitimate concerns to the table. The WTO consciously placed IP protection as equally important to the struggle for access to global health, on the grounds that strict IP protection incentivizes research and development, even though there are other ways of ensuring compensation for this work, such as the rents collected in a compulsory licensing scheme. The WTO sought to neutralize the appearance of political cleavages between the Global South and Global North by using purportedly neutral language to discuss the negotiations, while striving to present themselves as sympathetic to the concerns of global health. Ultimately, this rhetoric serves the ends of pharmaceutical companies more than the interests of activist groups like TAC, because it seeks to minimize the conflict and present a "win-win" as the best available solution, one in which the corporate interests are placed on equal footing with the needs of sick people. While some might see it as an improvement that nations of the Global South and Global North would negotiate on "equal footing," those who share TAC's perspective would respond that placing equal value on both healthcare and pharmaceutical companies' monopoly pricing schemes constitutes only a denigration of human life.

Part III: Balance as IP Protection: Papers Representing the Interests of Developed Nations

Prior to the negotiations, two papers were circulated among participants framing the stances of industrialized nations. One was submitted on behalf of the European Union, the other on behalf of several major IP-exporting nations, including the United States, Australia, Canada, Japan, and Switzerland. As this section will demonstrate, the EU's paper adopted a stance very similar to the WTO officers' press releases: one in which concern for the effects of the epidemic are met with a "both-and" desire for mutual benefit to IP holders and people living with HIV/AIDS. Since these papers would have been circulated first, it appears that the WTO officers may have been taking some of their cues from the EU, or at minimum, that they were influenced by the same discourse and ideas. However, in contrast, the paper from the US and its allies, the "Proposal from a Group of Developed Countries," as it's named in official WTO records (PGDC from hereon), sets itself apart from the EU and the WTO press officers by drawing a much harder line on the importance of IP protection and makes fewer concessions to the fact that it may create barriers to access.

The PGDC makes only one explicit mention of balance, in which its signatories recognize that "strong, effective, and *balanced* protection for intellectual property is a necessary incentive for research and development of life-saving drugs and, therefore, recognize that intellectual property contributes to public health objectives globally [italics mine]" (2). "Balanced" is largely invoked as a laudatory adjective to build up the credibility of IP protection. The passage places "balanced" on an equal footing with "strong" and "effective" in a list of desirable qualities for IP protection.—not quite equal, however, because "strong" and "effective" mean close to the same thing in this context, so that makes it two to one. Furthermore, the PGDC is never specific on what IP protection must be balanced against, only that the protection itself

must be "strong, effective, and balanced." Overall, this section works to establish that IP protection is an important part of the solution to the crisis of public health in the Global South, and therefore any infringement on IP protection will ultimately put lives in danger. Essentially, it seeks to claim the value of protecting life in as a discursive resource to debate against greater flexibility in IP protection, deflecting the criticism that IP protection creates barriers of access. This suggests that the US and its allies were defiant against the charge that IP protection can have harmful and destructive consequences, and that they didn't recognize the need to compromise. Furthermore, their framing suggests that nations in the Global South are the ones who are standing in the way of healthcare, recalling the USTR's stance developed in Chapter One, which framed non-Western countries as backwards, derelict, and morally deficient, countries that needed to be disciplined. The PGDC demonstrates an undaunted commitment to IP rights as a neocolonial project.

In contrast, the EU's paper argued that "The TRIPS agreement represents a delicate balance between the interests of rights holders and consumers" (5). Echoing WTO officials' language of balance, this statement acknowledges claims on both sides of the IP debate. However, the adjective "delicate" suggests that the TRIPS agreement is something that has already been carefully negotiated with health interests in mind, and that any change to the existing TRIPS agreement or its interpretation could disrupt or even destroy this fine "balance." This is in spite of the EU's paper itself acknowledging that the TRIPS Council meeting at the Doha Round represents "the first time that the TRIPS Council discusses intellectual property issues in the context of public health" (1). Overall, the approach is very much in line with the "mutual advantage" discourse put forward by the WTO press releases, displaying a sensitivity to public health concerns as well as a commitment to strong IP protection.

The EU's paper and the PGDC share a common strategy in framing the problem, and therefore the meaning of the South Africa's public opinion victory over the pharmaceutical companies. Each paper frames the problem at hand as the pandemic: as a crisis or state of emergency that may warrant a temporary exception to the rules. The PGDC begins by recognizing that "access to medicines for treatment of HIV/AIDS and other pandemics, such as malaria and tuberculosis, especially by the poorest populations of the globe, is one of the major challenges for the global community and sustainable development" (1). The EU's paper refers to the need for "some flexibility in cases of national emergency and other situations of extreme urgency" (3), while the PGDC reaffirms the "appropriateness of Members using the flexibility afforded by the Agreement…for the treatment of HIV/AIDS and other pandemics" (2). As my analysis of the developing countries' working paper will show, this represents perhaps the greatest point of contrast in the meaning of balance. The paper from the Global South maintains that the flexibilities offered by the TRIPS agreement provide a standing warrant to set public health policies as governments see fit, rather than an exception only to be used in the case of the most extreme health emergencies.

The solutions offered by these papers seeks to shift the attention away from IP protection and the serious barriers it can create. The PGDC writes that its signatories:

> *recognize* that an effective response to this challenge requires a mix of complementary social, economic, health policies and practices, including education and prevention programmes;
>
> *recognize* that it is, therefore, the common responsibility of international organizations, governments, non-governmental organizations and private actors, through their areas of responsibility, to contribute to the promotion of the most favourable conditions for improving access to medicines for treatment of HIV/AIDS and other pandemics;
>
> *recognize* that among the determinant factors for improving access to medicines are efficient infrastructure to distribute, deliver and monitor drug usage and provide necessary information and education; increased research and development particularly

> targeted at the major communicable diseases of relevance for developing countries; mechanisms to finance drug purchases, and affordable pharmaceuticals; and the implementation of effective and sustainable healthcare systems; … (1-2)

In this draft, the affordability of medicines is presented as simply one small part of a raft of various factors involved in achieving health care. This is not incorrect. However, the TRIPS council is not meeting to solve the HIV/AIDS crisis, they are meeting to determine whether changes need to be made to the TRIPS agreement or its interpretation. This rhetoric largely minimizes the role that IP may play in creating barriers to access, diffusing responsibility and shifting the focus.

The PGDC signatories also "pledge" themselves to "work with the private sector and with effected countries to facilitate the broadest possible provision of drugs" (2). This is largely a reference to differential pricing schemes, an attempt made by drug companies to lower prices in poorer countries by raising prices in wealthier countries. This is presented in the PGDC as an alternative to changes in the patent system, implying that changes to IP policy are unnecessary for addressing health crises like the HIV/AIDS pandemic. However, the paper appears equally concerned with profits that may be lost through these policies, encouraging members,

> …to take measures to prevent pharmaceuticals provided to the poorest populations of the globe under discounted pricing schemes or supplied under aid-schemes from being diverted from those for whom they were destined to markets for which they were not intended (2).

This is most likely a reference to parallel importing, the policy which seeks to lower drug prices by allowing medicines to be re-exported from one market to another. The US and its allies appear deeply invested in making sure that medicine exporters maintain control of global pricing.

Overall the PGDC, the paper submitted by major IP exporters, is mainly concerned with maintaining revenue in global pharmaceutical markets, while the EU's paper seems to recognize the potential for public criticism and presents a more sympathetic front. Despite the differences

on the surface, however, a consistent conception of "balance" emerges. Both papers frame the problem as a "state of exception" created by the pandemic, and the solutions as primarily policy and infrastructure initiatives unrelated to IP protection. The idea of a "state of exception" is founded on the ancient maxim "*necessitas legem non habet* [necessity has no law]" and is generally understood as a suspension of the normal legal order on account of an "imbalance between public law and political fact" (Agamben 1). Agamben writes, "exceptional measures are the result of periods of political crisis and, as such, must be understood on political and not juridico-constitutional grounds" (Agamben 1). In other words, if something must be understood as "political" rather than "legal," then not only does the "state of exception" allow a temporary suspension of the law, but the exception has no ability to inform the creation of new laws. It is totally outside the world of law. Historically, the term is fraught, as the powers taken during the suspension are not easily relinquished. This framing is important to the Global North because, if South Africa's Medicines Act of 1997 is a one-off response to an uncontainable crisis, then it cannot form a precedent for countries seeking to make affordable medications a permanent part of their health policy.

Part IV: Balance as Public Health: The Developing Countries' Group Paper

The Developing Countries' Group's Paper (DCGP) takes an unwavering stance on what balance is and isn't. Submitted by the African Group, Barbados, Bolivia, Brazil, Dominican Republic, Ecuador, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, Philippines, Peru, Sri Lanka, Thailand, and Venezuela, the DCGP makes an emphatic case for the sovereign right of nations to make their own decisions about healthcare. The paper begins:

The special discussion on TRIPS and Public Health at the TRIPS Council is not a one-off

> event. It should be part of a process to ensure that TRIPS Agreement does not in any way undermine the legitimate right of WTO members to formulate their own public health policies and implement them by adopting measures to protect public health (1).

This passage establishes two essential points. First, it shows developing nations taking ownership of the deliberation process. By demanding the issue becomes an ongoing conversation, developing countries are asserting their right to the forum and an agenda-setting role. Secondly, the above passage establishes the "legitimate right" of governments to set their own health policies, insisting that the TRIPS agreement cannot undermine this sovereign right "in any way."

This reveals the central difference in the conceptions of balance advanced by the Global South and Global North. The US and its allies' paper held "balance" as meaning that IP rights could be made flexible only in a state of urgency and exception. The coalition of the Global South advance a conception of "balance" in which governments always have a standing warrant to pursue public health policies that may require IP exceptions such as compulsory licensing or parallel imports. The goal of public health is enough by itself, pandemic or no. We see this stance reflected in passages like the following: "We strongly believe that *nothing* in the TRIPS Agreement reduces the range of options available to Governments to promote and protect public health, as well as other overarching policy objectives. The TRIPS Council must confirm this understanding as early as possible [italics mine] (3). By claiming "nothing" in the TRIPS agreement should "reduce the range of options" for governments to pursue their health agendas, the DCGP stakes out a position on "balance" that allows health to take precedence over IP rights. Drawing on a discourse of "rights," the DCGP insists that governments are rights holders whose rights include setting health policies based on the needs of their people, unencumbered by international IP protection.

The DCGP articulates a clear understanding of balance rooted the TRIPS agreement. The rhetoric draws on the provisions of articles seven and eight, which can be interpreted as granting broad flexibilities for public health. The DCGP states: "**Article 7** is a key provision…It clearly establishes that **the protection and enforcement of intellectual property rights do not exist in a vacuum.** They are supposed to benefit society as a whole and do not aim at mere protection of private rights" (6; emphasis in original). In this passage, the paper asserts that the TRIPS agreement does not support an absolutist conception of IP protection, arguing instead that the agreement intends IP rights to support "social and economic welfare" (TRIPS art. 7). Therefore, the paper argues, "the mere existence of IPRs, such as patents, do not necessarily result in the fulfillment of the objectives of the treaty" (DCGP 6). According to their reading, you can have strict IP enforcement and still be in violation of the TRIPS agreement so long as that enforcement doesn't promote the "mutual advantage of producers and users of technological knowledge…in a manner conducive social and economic welfare," at outlined by article seven of the TRIPS agreement. (TRIPS art. 7).

Furthermore, the DCGP's reading of the TRIPS agreement attempts to resolve the ambiguity between articles seven and eight and the rest of the treaty. Recall that the article insisting on the promotion of health and socioeconomic well-being also included the ambiguous caveat, "provided that such measures are consistent with the provisions of this Agreement" (TRIPS art. 8). Drawing on the 1969 Vienna Convention on the Law of Treaties, the developing countries argue that a *"treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in light of their object and purpose* (6; emphasis in original). Therefore, they contend that *every* provision of the TRIPS agreement should be read "in light of the objectives and principles set forth in articles 7 and 8"

(6). This claim reinforces the understanding that articles seven and eight provide broad flexibilities for IP protection. If a treaty must be interpreted "in light of [its] object and purpose," then one can easily argue that the purpose of articles seven and eight are to ensure that IP protection does not inadvertently harm a country's public health or socioeconomic well-being. Therefore, according to their reading, the TRIPS agreement should not require IP protection in cases where it causes demonstrable harm to public health. This is also an important counterclaim to the view put forward by the PGDC that IP inherently protects public health.

Complicating the analysis, the DCGP also draws on language of "mutual benefit" in the conception of balance advanced by their paper, much like the WTO officers and the TRIPS agreement itself. However, their understanding of the term asserts that benefits must actually be *proven* to be mutual and cannot simply be assumed. Consider the following passage:

> Under normal circumstances, the exercise of patent rights can encourage the creation of new drugs and promote sustainable availability to society, as part of the 'balance of interests' foreseen in the objectives of article 7. Nevertheless, in many instances, the owners of patented pharmaceutical products may abuse their exclusive rights, by selling or offering for sale drugs at prices beyond reasonable margins of profit, which prevents adequate access to medications by the general public (7).

This passage calls our attention to situations in which benefits are clearly not mutual, and in which an adequate balance has not been reached. It also reinforces the understanding that IP rights are not absolute, acknowledging that they can be abused to the detriment of public health. In this version of balance, any use of patent rights that keeps sick people from accessing medicine has tipped the balance too far.

The DCGP also stakes out a clear stance on policies to address public health concerns in the developing world. While the US and EU papers each emphasized the multivariate nature of public health solutions to address the HIV/AIDS pandemic, the DCGP deliberately limited their focus to policies in which IP is a relevant concern. They sought to make it clear that the purpose

of the TRIPS Council meeting is not to solve the HIV/AIDS crisis but to make sure the TRIPS agreement does not stand in the way of any solutions. The paper specifically lays out this case on the issue of differential pricing, a preferred policy solution in paper put forward by the US and its allies.

> Given that differential pricing (or tiered pricing) is not an intellectual property issue, we believe that it should not be covered by TRIPS, although Members might be interested in following the development of discussions in other competent international forums, such as the World Health Organization… **In no way should discussions of differential pricing be prejudicial to the right of members to make use of the provisions of the TRIPS Agreement, such as parallel imports and compulsory licensing** [emphasis in original] (9).

This passage makes it clear that the wide and diffuse range of policy options presented in the opposing papers are all viable options to be considered on their own, not in lieu of flexibilities allegedly offered in articles seven and eight of the TRIPS agreement. Furthermore, the paper takes a strong stand that the TRIPS agreement allows for parallel importing and compulsory licensing, policy solutions that are discussed in depth throughout the paper.

Overall, the DCGP outlines a conception of balance in which governments have an intrinsic right to pursue public health policies, and that the TRIPS agreement cannot prevent them from doing so. This conception of balance also draws its legitimacy from the TRIPS agreement, although from a reading that places greater emphasis on the role of articles seven and eight. It offers a conception of balance rooted in the language of mutual benefits, but the benefits must be proven to be mutual; they cannot be assumed. The paper recognizes that patent abuse can make medicines unavailable, and therefore an adequate "balance" requires that patent rights are not absolute. This version of balance maintains that governments have a right to decide for themselves when those times are. Now we have seen three major interpretations of balance, each doing slightly different rhetorical work. Finally, we will turn our attention to the ostensible result

of these deliberations, the famous "Doha Declaration," in which the WTO issued a statement intended to represent a consensus by the WTO member body as a whole.

Part V. "Balance" in the Doha Declaration

The Doha round of negotiations did not result in an amendment to the TRIPS agreement; instead, it produced a "declaration" clarifying some of the international law's most ambiguous provisions and planting IP policy firmly in conversation with public health considerations. The product of heavily gridlocked negotiations, the Doha declaration sought to split the difference between competing interpretations of balance, attempting to address the severity of the HIV/AIDS crisis while stopping well short of acknowledging that access to medicines deserves priority when placed in conflict with IP protection and profit for multinational pharmaceutical corporations. That said, the declaration does make several concessions to the Global South coalition. It seeks to "balance" the interpretations of "balance"—a balance of balances, so to speak.

The declaration begins with a recognition of "the gravity of the public health problems afflicting many developing and least developed countries, especially resulting from HIV/AIDS, tuberculosis, malaria, and other epidemics" (1). This opening positions the entire declaration as a response to these health crises, framing its goal as ensuring that the TRIPS agreement becomes, in the Declaration's words, "part of the wider national and international action to address these problems" (1). By framing the declaration as a response to a state of emergency, the document draws explicitly on the "state of exception" rhetoric from the PGDC, while simultaneously invoking the "part of the solution, not part of the problem" rhetoric of the WTO press releases.

The Declaration also draws heavily on the "both-and" rhetoric of the WTO press releases and the EU's paper. It flatly states: "We recognize that intellectual property protection is important for the development of new medicines. We also recognize the concerns about its effects on prices" (1). This statement seems to create an equivalence between the two concerns; however, it should be noted that in recognizing patent protection can have adverse effects on drug prices, it decisively goes one step further than the PGDC, which never acknowledges this fact.

That said, the declaration also draws significantly on language advocated by the emerging powers of the Global South in the DCGP. Significantly, the declaration affirms that

> …the TRIPS agreement does not and should not prevent Members from taking measures to protect public health…the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all (1).

Drawing directly on language from the DCGP, this statement does important work in setting values, making it clear that the purpose of the TRIPS agreement is not to interfere with the members' ability to set necessary policies for public health. However, this statement may not be as all-encompassing as it sounds; the declaration will soon get more specific about which health policies are included in the "right to protect public health" (1).

In a victory for the Global South, the declaration unequivocally confirms that each member "has the right to grant compulsory licenses and the freedom to determine the grounds on which such licenses are granted" (1). This draws heavily on the "rights of governments" discourse used by the DCGP. Furthermore, while the declaration uses the "pandemic-state of exception" language to describe the problem it attempts to address, it also clearly establishes that, "each Member has the right to determine what constitutes a national emergency," further

shoring up the rights of member states to make critical decisions about when to issue compulsory licenses.

However, while the declaration is clear in its support for compulsory licensing, it makes one very telling omission in avoiding any mention of parallel imports, a policy emphatically demanded by the DCGP. Recall that compulsory licenses allow governments to authorize domestic production of patented pharmaceuticals, whereas parallel imports allow them to import patented products produced in other countries. Wealthy IP exporting nations have a vested interest in preventing a competitive global trade in patented goods in which their firms could no longer control pricing on a nation by nation basis. This is a clear concession to the Global North's concern for medicines being "diverted" to "markets for which they were not intended" (PGDC 2).

Recall also, that compulsory licensing is only a limited solution to the problem of accessing patented drugs in poorer countries As the Doha Declaration explains: "We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement" (2). As long as a country doesn't have the means to produce the drugs, there is no one to whom the government could issue a compulsory license. So long as TRIPS restricts patented medicines from crossing international borders, compulsory licenses fall far short of addressing the need for patented medicines in countries that have little or no manufacturing capacity. In what is possibly the most depressing sentence of the Doha Declaration, the document goes on to offer, not a solution, but an instruction to the TRIPS Council to "find an expeditious solution to this problem and to report to the General Council before the end of 2002"

(2). In other words, these negotiations were not able reach a compromise, and so they simply left this for future negotiations.

Also conspicuously absent from the Doha Ministerial declaration is any language addressing the rights of countries who take advantage of these flexibilities and remain free from bilateral pressure for doing so. While one could easily argue that if the US chooses to impose sanctions on a country of their own accord, rather than initiate dispute proceedings through the WTO, then this doesn't necessarily concern the TRIPS agreement. However, given WTO secretary general Mike Moore's stated concern with countries "feeling secure" in taking advantage of these flexibilities, and given that the issue of "bilateral pressure" was raised as an obstacle to this security during the TRIPS Council negotiations, the absence of any language addressing this issue appears to be a hard concession to the interests of the US and its allies, allowing them to continue holding the threat of economic sanctions over any nation that takes advantage of the flexibilities granted by this declaration (Moore; "Governments").

Overall, the Doha declaration makes some significant concessions to the demands of the Global South's coalition yet stops well short of fully authorizing WTO Members to take full advantage of all public health policies that would put affordable medicines into the hands of their people. The declaration recognizes that it falls short and puts a pin in the issue until the next negotiation, having failed to create a suitable compromise between nations who profit from IP protection and nations who suffer from it. The results of these later negotiations will be discussed in the conclusion to this thesis. Ultimately, the Doha Declaration—and WTO policy in general—are constrained by the demand for a standard of consensus which leaves ultimate veto power in the hands of powerful nations profiting at the others' expense.

Conclusion: What does "Balance" Do?

In the context of the Doha round of negotiations, we see "balance" invoked towards several different ends. The TRIPS agreement invokes "balance" as a form of strategic ambiguity, attempting to please multiple stakeholders by allowing competing interpretations of the same international law to clear the procedural hurdles of consensus. The WTO officers and the EU's position paper invoked "balance" to build legitimacy for the TRIPS agreement, the deliberative process that produced it, and by extension, the global patent system itself. If the TRIPS agreement strikes a carefully negotiated balance between health and IP protection, then the current balance is presumed sufficient. The paper submitted by the US and its allies invoked "balance" only as a description of strong and effective IP enforcement, a passing nod to balance that ultimately served to build the moral credibility of their strong IP enforcement agenda. For the coalition of the Global South, balance means mutual advantage, but one that must be demonstrated. Their position did not presume the benefit of IP to public health outcomes and argued that when IP protection conflicted with public health outcomes, governments have a standing right to choose public health.

Balance is therefore a deeply contested signifier: both a site of neo-colonial domination, and a site of counter-colonial resistance. However, all these conceptions of balance have one thing in common. They all, in some way, reinforce the legitimacy of the TRIPS agreement and the WTO as a governing institution of the global economy. Though the DCGP openly challenged Western Hegemony of these forums, it did so by drawing on specific provisions of the TRIPS agreement and claiming a position as an authoritative interpreter of international law to which Western nations are (on paper) equally beholden. Instead of challenging the legitimacy of the WTO and TRIPS agreements, the governments of the Global South are claiming that legitimacy

for themselves in a counter-colonial push to assert themselves as equal governors and rights-holder of the neo-liberal world order. Though “balance” is typically invoked as a resolution to conflict, it is in fact the very site of that conflict it’s supposed to resolve.

CONCLUSION

I began my analysis in Chapter One by taking a close look at the ideological commitments of US organizations pushing for stronger patent laws around the world. In Chapter Two, I took a deep look at a striking case study illustrating the destructive impact of the TRIPS agreement in the Global South, and the rhetorics of a powerful social movement that rose up in resistance. Counterpoised, these two positions are incommensurate: the US and its corporate lobbyists present an absolutist vision of IP protection as an inalienable right, whereas TAC presents a right to health that transcends the ownership of ideas. Chapter Three demonstrates the superficial ways in which the WTO sought to "balance" these incompatible demands.

The result of the Doha negotiations was a product of bargaining in an attempt to please all stakeholders. Though making some concessions to the Global South, the agreement stopped well short of guaranteeing that healthcare takes precedence over exclusive rights of production. While there are many instances in which people can benefit from negotiation and compromise, I ultimately share TAC's perception that this is a compromise between justice and power, between life for the dying and money for the already well-off. I am not trying to claim that the interests of the Global South are always inherently good while those of the Global North are always inherently bad. However, I believe in a sharp moral distinction between economic "demand" and human "need"; that the conflict over pharmaceutical IP is a health issue before it is a trade issue. Ultimately, my thesis demonstrates that this alleged "balance" is in fact a site of conflict: simultaneously a means of legitimizing neocolonial domination and a means of counter-colonial resistance pushing back. In understanding "balance" in global IP conversations, we must first ask ourselves "balance for whom?"

Implications for Further Research

I recognize that there are many ways this research could be deepened and extended. First, the voice of the Pharmaceutical Manufacturer's Association (PMA) is largely absent from the analysis. While I maintain that the USTR and the USCOC are more than adequate to analyze US organizations advocating for stronger IP protection abroad, the PMA had a particularly important role in the "plot" of this thesis, not only as the organization whose influence campaign established IP protection as a high US trade priority, but also as the organization that sued the South African government on behalf of its members. Studying their rhetoric may prove difficult, as much of their advocacy happened behind closed doors. Nonetheless, any letters, internal documents or court papers could provide insight into the corporate capture of public institutions, namely how PMA's agenda became that of the US government.

There are also stones left unturned on the resistance side of the equation. I chose South Africa as an exemplary instance of the impact of TRIPS policies on the Global South and the resistance that rose up to meet it. While the South African situation may have provided the most explosive and attention-grabbing account of this conflict, it is by no means the only country to have experienced the high costs of patented medical technology; nor are TAC's the only voices pushing back. Notably, ASEAN (the Association of Southeast Asian Nations) published a report on the impact of the TRIPS agreement on pharmaceutical pricing, which highlighted the importance of flexibilities. The Argentinian economist Carlos Correa has also been an outspoken critic, along with allies in liberal-leaning publications in the West, particularly *The Guardian* (ASEAN; IP watch). Furthermore, there's more research to be done on TAC's activism. The essayist Rebecca Solnit writes that, "Positive social change results mostly from connecting more deeply to the people around you than rising above them, from coordinated rather than solo

action" (Solnit). The stories of movements, however, often become stories of individual heroes, belying the vast communities working together. While Zackie Achmat became the public face of TAC in international and Western media, for example, he was by no means the only South African contributing to the group's success. Further research could examine many untold stories of TAC, drawing perhaps on oral history and ethnographic research.

As I discussed in Chapter One, the US has argued that the TRIPS agreement doesn't provide adequate protection to US IP, and that US bilateral treaties with other countries contain much stricter provisions ("Trips Plus"; "Roots of Innovation). In bilateral trade agreements, there is plenty of opportunity to continue analyzing the rhetoric of neocolonial IP, and to parse out the ways in which "economic penetration and control" is secured (Rahmation 3). Furthermore, numerous international IP disputes have been negotiated through the WTO disputation process and through investor-state dispute arbitration courts. Pakistan, India, Portugal, Canada, Argentina, Brazil, the EU and the US have all been involved in patent disputes conducted through the WTO ("WTO Disputes"). Brazil and India both initiated complaints against the Netherlands, when a shipment of generic drugs was seized in transit ("WTO Disputes"). The pharmaceutical company Eli Lilly attempted to sue the government of Canada over its IP standards, which ultimately nullified the company's patents for the drugs Strattera and Zyprexa ("Eli Lilly"). Analysis of court documents and local contexts from any of these proceedings would provide an additional opportunity to study how IP laws are enacted and enforced in the world, along with their impacts on the health systems of affected countries.

As well as deepening this scholarship, there are numerous opportunities to springboard from this project into other avenues of rhetoric and communication research. Several communication scholars and rhetoricians are already doing important work in critiquing IP law

and practices, among them Anjali Vats, Ted Striphas, and Kembrew McLeod. However, much of the interest in our discipline has been focused on copyright and trademark instead of patents, because these are often understood to relate more directly to cultural production. However, as Bruno Latour famously argued, technology itself is a social product. "Each artifact," writes Latour, "has its script, its 'affordance,' its potential to take hold of passersby and force them to play roles in its story" (Latour 4). Technologies are designed to enable us to act in specific ways. In the construction of a speedbump, "the engineers' program of action, 'make drivers slow down on campus,' is now inscribed in concrete" (Latour 38). Perhaps there is room to analyze medicine as a kind of "script," or to delve into the socially constructed differences between a "name brand" medicine and a "generic."

Furthermore, like any form of intellectual property, patents themselves are cultural products; communicatively constructed and enforced, they rely on shared assumptions and beliefs, such as "individualistic- commodity- and incentive based" conceptions of property (Ngenda 66). There are many questions to be raised about the scope of patent, and what counts as technology. Boyle has argued that the scope of patentability has gradually broadened, leading to a greater privatization of knowledge. This is particularly evident in genetic biology, where if one is the first to isolate a gene, one can patent the method of its isolation, effectively patenting the gene itself. Boyle claims,

> There is an intellectual land grab going on, the unclaimed frontier 'land' in this case being the human genome: 'This is a quick and dirty grab-like the wild West, where everyone was trying to stake a claim,' complained one geneticist, who spoke on the condition of anonymity because he said he had several friends involved in genome companies. 'It's basically people with a lot of human genome money trying to cash in.' (Boyle 9).

Deepening the parallels between IP and colonialism, we see once again the idea of the colonial "frontier," referring to a part of the world that is suddenly up for grabs, able to become property, and therefore able exploited for economic gain.

Finally, there is much to be studied in the complex ways that Western IP policies interact with indigenous peoples' systems of knowledge. One of the most destructive ways that IP policies harm indigenous culture is through "biopiracy," or "bioprospecting," as proponents call it (Sarma). This practice involves Western firms patenting organisms or processes derived from indigenous knowledge, and then claiming ownership of the rights for themselves. Often this takes the form of medicines derived from traditional plants and herbs, but the practice can also extend to food. For example, the neem tree, tamarind, and Darjeeling tea, all native to India, have each been claimed by companies in the Global North (Rose). Sarma argues that by patenting compounds already known to indigenous peoples, the global IP system denies them their rights and profits from their discoveries.

However, some efforts have been made to integrate and even protect indigenous knowledge systems using Western-style IP systems. Aotearoa-New Zealand, for example, has added Māori advisory committees to their trademark and patent office in order to give recommendations on:

> [W]hether an image in a trade mark draws from Māori culture in a manner that could be offensive to Māori; whether an invention claimed in a patent application is derived from Māori traditional knowledge or from indigenous plants or animals; and whether commercial exploitation of an invention (producing, marketing and selling it) would be contrary to Māori values" ("Protecting").

These represent welcome first steps in decolonizing IP systems to prevent harm to indigenous cultures. However, in order to have their say, the Māori must become players in the game; they must, to a certain degree, "buy in" to the Western IP system. This could be a problem for some

cultures which don't hold Western conceptions of property, as they will inevitably have to meet the IP systems halfway. Na'puti and Frain highlight a similar quandary in their study of the Festival of Pacific Arts, a public festival intended to celebrate indigenous cultures of the Pacific, albeit one which may inadvertently end up commodifying them for a Western audience. On the one hand, the festival provides a platform for the expression of indigenous cultural traditions; on the other, it "provokes fear of culture and tradition loss, which perpetuates both a discourse of property rights and a view of culture as an economic resource subject to transaction." (Na'puti & Frain 19). Even meeting Western property systems halfway can reinforce conceptions of ownership in which "culture" is an available resource to be exploited for economic gain. The relationships between IP and indigenous knowledge systems are fraught, and the reach of IP is expanding, both in its geographical jurisdiction and in the forms of knowledge that can become property. IP will likely remain an important site of cultural conflict for years to come.

Epilogue

My analysis left off in the year 2001, when the Doha Declaration affirmed a nation's right to issue compulsory licenses for the domestic production of generic pharmaceuticals. While this was an important victory for healthcare advocates and countries in the Global South, by the WTO's own admission, this policy fell short of truly enabling people to get the medicines they need, as poorer countries who lacked the capacity for domestic pharmaceutical production could not take advantage of it. As stated in Chapter Three, the Doha Declaration encouraged members to, "find an expeditious solution to this problem and to report to the General Council before the end of 2002" ("Declaration" 2). The WTO would try to make good on this promise, at least on paper. The council reconvened in 2003, and on Aug. 30th, unveiled a new policy to that would

allow countries to import generic pharmaceuticals through a compulsory license. The policy was initially met with wide praise. According to Morin et al., UNICEF, the USTR, Pfizer, and the rock-star Bono all publicly welcomed the new plan. However, enthusiasm has waned over the years, as "the effectiveness… proved disappointing" (Morin et al. 564).

The new import scheme has been used exactly once. In 2007, Canada exported 260,000 packs of HIV/AIDS combination therapy to Rwanda (Morin et al. 564). However, the policy proved burdensome and tricky to enact. It ran into familiar problems: a country must be willing to import the drugs and risk bilateral pressure from powerful countries (namely the US) for doing so. After securing buy-in from Apotex, a Canadian generic pharmaceutical manufacturer, those arranging the trial run had a difficult time getting a country to sign up (Hestermeyer). When it was finally implemented, there were three rounds of legal red tape to be cleared: Canadian law, Rwandan law, and WTO policy. Hestermeyer concluded that, "The process proved cumbersome and the generic manufacturer has few incentives to go through with it. It is not economic to produce for merely one importing country, and it is difficult to convince countries to notify the WTO of their need to import" (Hestermeyer). A representative from Apotex concluded, "it's almost a miracle Rwanda may be getting any drugs under this law" (Quoted in Morin et al. 564).

Writing in the *European Journal of International Relations*, Morin et al. argue that the problem lay in the process by which the agreement was reached. True to form, the WTO insisted that a decision must be made by "consensus," giving those who profited from current conditions equal power to scuttle a solution. The negotiations, write Morin et al., were characterized by mutual cynicism and distrust (Morin et al. 564). Both sides, they conclude, "realized that the appearance of a solution rather than a functional solution, provided the only realistic outcome to a fruitless and publicly damaging continuation of debate" (Morin et al. 563). In other words, they

were trapped by the demands of "consensus." Much like the strategic ambiguity in the TRIPS agreement itself, only the appearance of "balance" between incompatible positions could bring negotiations to a close.

Since then, the conflict has simmered along without boiling over. On May 25, 2018, China and South Africa submitted a paper to the WTO promoting "public health through competition," and calling on nations to share policy options to keep prescription drug markets competitive in spite of IP protections ("Intellectual"). If the 2018 Special 301 Report is any indicator, the US has every intention of continuing to push in the opposite direction, insisting on even stronger IP protections than those currently in place. However, if there is one thing I hope this thesis has demonstrated, it's that there is no "win-win" solution that will leave both sides happy. The rhetoric of balance and consensus conceals a fundamentally irreconcilable conflict between IP importers and exporters, between the Global South and Global North, between the right to property and the right to health. Ultimately, international law will have to choose between those who manufacture medicine and those who just need it to live.

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Appendix: Map

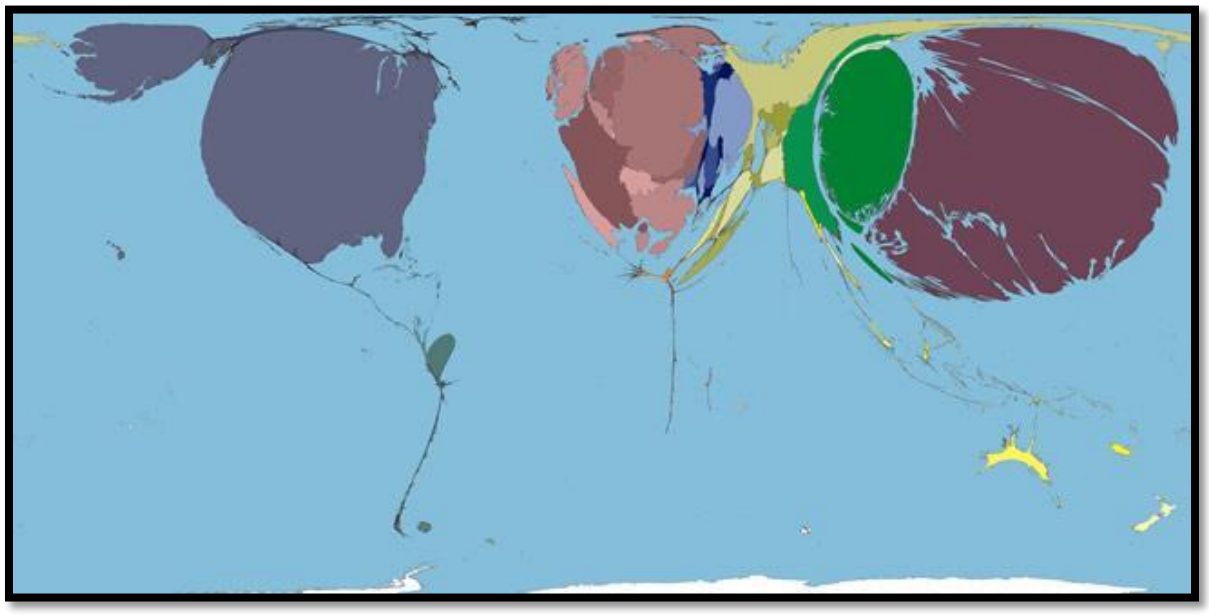

Figure 1. This map, created in 2006, has changed the size of each nation based on the number of international patents it has registered. The large gray blob on the left is the US, the pink blob in the middle is the EU, and green and purple blobs on the right represent South Korea and Japan respectively. The little strings are everyone else. ("Patent Laws")