

Patents Versus Patients: Global Governance and the Role Of Civil Society in South Africa's Quest for Affordable Drugs

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Declaration

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

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Abstract

This thesis is an explanatory study into civil society's increased influence in global governance. More specifically this situation is examined by looking at the generic medicine debate that came in the wake of the passing of the Medicines and Related Substances Act by the South African government in 1997. This debate gained worldwide attention and touched some of the prevailing inequalities between the developed world and the developing world in our globalised society. The research question that is addressed here is to what extent did civil society influence the signing of the Doha Declaration of the TRIPS Agreement and Public Health by the members of the World Trade Organisation (WTO) in 2001? In doing so, this thesis looks at the role of the US government, the South African government, the pharmaceutical industry, the WTO's TRIPS Agreement and civil society in the form of non-governmental organisations like Treatment Action Campaign (TAC), Oxfam and Medecines Sans Frontieres (MSF).

The study applies a constructivist approach in order to analyse how civil society used global advocacy networks to inform and communicate the normative concerns regarding South Africa and developing countries' lack of access to HIV and AIDS drugs. Moreover, it examines how civil society's use of moral authority challenged the regulative power of the WTO.

The study concludes that civil society played a vital role in influencing the WTO member states' decision to sign the Doha Declaration on the TRIPS Agreement and Public Health. However, it was not only civil society's ability to set the agenda concerning the HIV/AIDS pandemic, but also the content of the normative concerns themselves that help explain its success. Consequently, the study further concludes that civil society's success in this specific case must be seen in light of its growing influence in challenging global governance.

Opsomming

Hierdie tesis is 'n verduidelikende studie van die burgerlike samelewing se groeiende invloed in globale regering. Hierdie situasie word meer spesifiek ondersoek deur te kyk na die generiese medisyne debat wat gevoer is na die Suid-Afrikaanse Regering die Medisyne en Verwante Stowwe Wet van 1997 goedgekeur het. Hierdie debat het wêreldwye aandag geniet en het geraak aan sommige van die bestaande ongelykhede wat daar heers tussen die ontwikkelde en ontwikkelende wêreld in die geglobaliseerde samelewing.

Die navorsingsvraag wat hier aangespreek word is tot watter mate die burgerlike samelewing die ondertekening van die Doha Verklaring van die TRIPS Ooreenkoms en Publieke Gesondheid deur lede van die Wêreld Handelsorganisasie (WHO) in 2001 beïnvloed het. Deur dit te doen, sal hierdie tesis kyk na die rol van die Amerikaanse regering, die Suid-Afrikaanse regering, die farmaseutiese bedryf, die WHO se TRIPS Ooreenkoms en die burgerlike samelewing in die vorm van nie-regerings organisasies soos die Treatment Action Campaign (TAC), Oxfam en Medecines Sans Frontieres (MSF).

Die studie maak gebruik van 'n konstruktivistiese benadering om 'n analise te doen van hoe die burgerlike samelewing globale ondersteunings netwerke gebruik het om die normatiewe besorgdhede wat heers oor die tekorte in Suid-Afrika en die ontwikkelende lande ten opsigte van toegang tot MIV en VIGS medisyne, toe te lig en te verkondig. Verder ondersoek die studie hoe die gebruik deur die burgerlike samelewing van morele gesag die regulerende mag van die WHO uitgedaag het.

Die studie kom tot die gevolgtrekking dat die burgerlike samelewing 'n uiters belangrike rol gespeel het in die WHO lidlande se besluit om die Doha Verklaring van die TRIPS Ooreenkoms en Publieke Gesondheid te onderteken. Dit was egter nie net die burgerlike samelewing se vermoë om die agenda daar te stel ten opsigte van die MIV/VIGS pandemie nie, maar ook die inhoud van die normatiewe besorgdhede self wat bygedra het om hierdie sukses te verduidelik. Gevolglik kom die studie tot die verdere gevolgtrekking dat die burgerlike samelewing se sukses in hierdie spesifieke geval gesien kan word in die lig van sy groeiende invloed in die uitdaging van globale mag en gesag.

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ABBREVIATIONS

GATT	- General Agreement on Tariffs and Trade
IPR	- Intellectual Property Rights
MNC	- Multinational Corporation
NGO	- Non - Governmental Organisation
R&D	- Research and Development
TRIPS	- Trade Related Aspects of Intellectual Property Rights
US	- United States of America
WTO	- World Trade Organisation
IR	- International Relations
IP	- Intellectual Property
MAI	- Multilateral Agreement on Investment
HIV	- Human Immunodeficiency Virus
AIDS	- Acquired Immunodeficiency Syndrome
PMA	- Pharmaceutical Manufacturers Association

Chapter 1

Aim, scope and method

1.1 Introduction

Towards the end of the 1990s there was a growing focus on the trade-off between patent protection and access to affordable medicines. This became an important societal issue attracting the attention of a broader public as gruesome pictures of the Sub-Saharan AIDS crisis appeared on Western television screens and caused a civil society controversy over “patents versus patients” in which developing countries and many non-governmental organisations (NGOs) increasingly held patent protection responsible for the non-availability of essential medicines to poor patients. At the same time the pharmaceutical companies and the intellectual property community underlined the need for adequate patent protection to allow the recuperation of huge investment costs and maintain a continuous focus on research and development (Van Thiel, 2003: Internet). International Trade Rules on Intellectual Property Rights (TRIPS) had moved centre stage in the international political debate concerning the relationship between the protection of intellectual property rights and access to affordable medicines. The debate had turned into a controversy over the right to profit versus the human right to health care.

Balaam and Veseth (2001: 325) argue that the wealth and political influence of multinationals, often backed by home-based governments, have given them great power and ability to control international markets. This was arguably the case concerning South Africa’s quest for cheaper drugs. Backed by the US government, the American pharmaceutical companies wanted to prevent any means by the South African government to facilitate local production or imports of generic drugs without adequate compensation.

In 1997 more than four million people were infected with HIV/AIDS in South Africa alone (Oxfam, 2000: Internet). The devastating effects of this pandemic led to the passing of the Medicines and Related Substances Act, also known as the Medicines Act, that same year. This act was supposed to allow the Health Minister to respond more appropriately to the crisis. Two important changes were made. The first one was that South Africa could seek the cheapest world price for a drug through “parallel importing” and the second allowed “compulsory drugs licensing,” a law that granted rights to make copies of patented drugs without the approval of the patent holder (Bond, 1999: Internet).

The Medicines Act was the Health Minister’s attempt to provide affordable HIV/AIDS medicines to South Africans. She argued that international pharmaceutical pricing was “discriminatory based on extremely high levels of market concentration and which hence prevented South Africa from having access to drugs” (Bond, 1999: Internet). The pricing of pharmaceuticals was under the control of the rules and regulations set out in the TRIPS Agreement as of 1 January 1995. This Agreement was a part of the World Trade Organisation, an institution that, according to Balaam and Veseth (2001: 324), was “largely controlled by and influenced by the developed countries”.

As a result of South Africa’s Medicines Act, the Pharmaceutical Manufacturers Association of South Africa (PMA), backed by the international pharmaceutical industry, moved quickly to halt the implementation of the Act. It filed a lawsuit in the Pretoria High Court, a suit that was suspended for a time while the PMA and the government tried to negotiate (*The Lancet*, 2001: 243). Four years later, on 5 March 2001, 39 pharmaceutical companies took the South African government to court, wanting to block it from enacting the law they claimed infringed their intellectual property rights as set out by the WTO and the TRIPS Agreement (Baleta, 2001: 775).

However, in April that same year the South African government won a victory against the 39 pharmaceutical companies, as they decided to drop their lawsuit against the government. Only months later, in November 2001, the Doha Declaration on the TRIPS Agreement and Public Health was adopted at the Doha ministerial meeting of the WTO. Van Eeckhaute (2002: 12) argues that the declaration marked an important milestone in the debate on intellectual property and medicines. The text clarified the relationship between the TRIPS Agreement and public health policies of WTO members and re-balanced its interpretation. Furthermore, it

made it clear that the TRIPS Agreement should not stand in the way of government policies aimed at guaranteeing the supply of affordable medicines to the neediest and it confirmed the flexibility of the Agreement, in particular with regard to patents.

1.2 Problem statement

Following this, one important question arises. Why did the World Trade Organisation (WTO) agree to re-evaluate the existing TRIPS Agreement? This thesis argues that this happened not necessarily because those involved had a change of heart, but because domestic and international pressure from civil society became too strong for the WTO to ignore. The study examines the role of civil society, represented by domestic and international non-governmental organisations (NGOs), in influencing the outcome the Doha Declaration on the TRIPS Agreement and Public Health. The focus of this thesis is on how norms and moral concerns influenced the outcome and by what means civil society managed to mobilise for their cause. Through the theoretical framework of constructivism, this study attempts to show how civil society managed to communicate its concerns regarding South Africa's quest for affordable drugs in order to influence the main political players in this case. Civil society's concern was that the TRIPS agreement was an obstacle to providing cheaper drugs to the developing world, because it was perceived as unfairly favouring the North.

This study will attempt to demonstrate that "norms and rationality are intimately connected" (Finnemore & Sikkink, 1998: 888). One cannot rule out the one or the other. In today's world pure self-interests will be much harder to pursue, due to the rise of civil society. The growing importance and influence of moral concerns are related to modern means of communication and well-established civil society networks that have come in the wake of globalisation, and seek to make people aware of the abuse of power.

The scope of this thesis will be limited to the major actors involved, namely the Western-based pharmaceutical industry, the US government, the South African government and civil society. Civil society, which will be conceptualised later, is represented by three NGOs: the Treatment Action Campaign (TAC), Medicines Sans Frontieres (MSF) and Oxfam. Besides the pharmaceutical industry and the South African government, the other actors have been chosen due to their high profile and strong involvement and influence in the case. The involvement of these actors will be discussed in relation to the WTO's TRIPS Agreement.

1.3 Why is there a need for this study?

The signing of the Doha Declaration on the TRIPS Agreement and Public Health was a victory for the developing world. Fourie and Vickers (2002: 83) argue that the declaration “was hailed by some states and societies, including South Africa, as an important victory for a more flexible, progressive and contextually sensitive global intellectual property rights (IPRs) regime.” This event not only gave hope, but it also changed some of the assumptions that people might have held about the relationship between the developed and the developing world and the role and influence of civil society in international politics. As such, the study poses interesting questions about the nature of global governance.

The concept of governance is defined by Rosenau (Zoninsein, 1999: 39) as “activities backed by shared goals that may or may not derive from legal and formally prescribed responsibilities and that do not necessarily rely on police powers to overcome defiance and attain compliance”. Gordenker and Weiss (Zoninsein, 1999: 39) define global governance as “efforts to bring more orderly and reliable responses to social and political issues that go beyond capacities of states to address individually....[It] implies an absence of central authority, and the need for collaboration or co-operation among governments and others who seek to encourage common practices and goals in addressing global issues”. According to Smouts (Zoninsein, 1999: 39), the concept of global governance “emphasises the interaction of a multiplicity of state and non-state actors and their co-ordination, which leads to a high degree of democratisation on the multilateral level”. The concept of global governance does not represent a set political structure. Global governance can be seen as the interaction of, amongst others, nation states, MNCs and global civil society at the international level. Global governance deals with issues of global concern that go beyond the political structure of the nation state. Global governance today has arguably left more room for non-state actors like global civil society to exercise a greater influence than previously.

The rise of global civil society networks has in no sense brought an end to the territorial state, national loyalties and party politics. The state remains the most important player in IR. However, Scholte (1999: 17) argues, that global civic activism has contributed to the contemporary turn toward multilayered governance. As a result of globalisation came a less exclusive focus on national-level laws and institutions. Government has traditionally referred to the centralised territorial state. But there has been a trend during the last few decades

towards devolution, regionalisation and globalisation. This has resulted in agencies at sub-state and supra-state levels having obtained greater initiative and impact in international politics. As Scholte further observes, “Governance has shifted from a unidimensionality of statism to a multidimensionality of local, national, regional and global layers of regulation” (Scholte, 1999: 17). The contemporary growth of global civil society has encouraged several important shifts in political institutions and processes. Van der Westhuizen (2002: 172) argues that, “if the shift of power from states to markets represents [...] “globalisation from above,” the counter –reaction by transnational social movements represents “globalisation from below”. Khagram, Riker & Sikkink (2002: 4) argue that this globalisation “from below” challenges “the authority and practices of states and international institutions that shape the parameters for global governance”. Global civil society has changed the global political structure. Political institutions and processes have left room for global civil society to exercise influence.

With this changing global structure, Miller (1994: 75) argues that there is a need for analysis with a greater sensitivity to normative factors than has been the case to date in the study of international politics. She states (Miller, 1994: 75), that “the need exists to correct the dominance of power-oriented analysis in much of the literature of international politics in recent decades, a dominance that may have biased our understanding of the important trends and possibilities that are removed from a grasp of immediate empirical reality”. Maybe it is time to re-analyse the global world of politics? With the lack of economic and military powers, how is global civil society able to exercise influence?

Neufeld (2000: 42) argues that, “global thinking represented by mainstream International Relations theory has long marginalised normative questions”. The idea of using a normative approach is to further investigate how the use of knowledge, ideas, culture, and language can deepen our understanding of political behaviour. During the last decades civil society has played an increasingly important role and been successful in bringing new issues to global attention, such as the environment, sustainable development, population, food security, urbanisation, women’s rights and human rights. These are all complex matters and substantive global issues that have not only appeared on the global horizon, but they have also been integrated into public policy thinking, university education, media attention and intergovernmental negotiations. According to Khagram, Riker and Sikkink (2002: 4), “scholars and policymakers [...] assert that international non-governmental organisations and

transnational social movements are emerging as a powerful new force in international politics and are transforming global norms and practices”.

Civil society has on many occasions showed its strength as an important actor in influencing international politics. There are several examples of civil society’s successful intervention in international affairs. For instance, as Krut observes (2000: Internet), “the boycott of Nestle because of its marketing of breast-milk substitutes resulted in a change in the way international corporations understand and manage public policy.” He continues, “the boycott of international companies with investments in South Africa was a major factor in the external pressures that resulted in the collapse of apartheid ”. These are all separate incidents. The interesting question is: why were they successful? There is a need in this study to look at why civil society was successful in the case concerning South Africa’s quest for affordable drugs. Such a study will help increase our understanding of civil society’s influence in global governance.

The success in the case concerning South Africa is according to Sell and Prakash (2004: 149), due to civil society’s ability to set the agenda rather than the very nature of the moral concerns themselves. They argue that global advocacy networks superior abilities to “make the most of political opportunities by exploiting a crisis, constructing a problem, mobilising a coalition, and grafting its agenda on to policy debates” were the reasons for civil society’s success. They further argue that both civil society and the pharmaceutical companies had their core constituencies to serve. Therefore their objectives were the same, only with different foci. Success or failure to achieve the network’s desired outcome critically depends on how effectively the network is able to shape the agenda” (Sell & Prakash, 2004: 151). In sum, Sell and Prakash (2004: 152) argue that one is not to assume “that NGO networks differ from business networks based on the notion that the former pursue policies with non – excludable benefits while the latter do not”.

Keck and Sikkink (1998: 25) argue that in order to assess the influence of civil society, there are several different levels to look at in terms of goal achievements. They identify the following types or stages of influence: “(1) issue creation and agenda setting; (2) influence on discursive positions of states and international organisations; (3) influence on institutional procedures; (4) influence on policy change in ‘target actors’ which may be states, international organisations like the World Bank, or private actors like Nestle Corporation; and

(5) influence state behaviour.” Moreover, they argue that civil society “generate attention to new issues and help set agenda when they provoke media attention, debates, hearings, and meetings on issues that previously had not been a matter of public debate” (Keck & Sikkink, 1998: 25).

Lanoszka (2003: 193) says that the idea of fairness “should govern the dialogue between the developed and developing countries”. By focusing on fairness, it further “entails sensitivity to the special needs of developing countries and one important dimension of this sensitivity is the recognition of the problems posed by human needs, such as health” (Lanoszka, 2003: 194). Health, or rather the right to health care is central to this case. Finnemore and Sikkink (1998: 907) argue that “norms about legal equality of opportunity and protecting vulnerable groups from bodily harm will have more transnational resonance than other norms”. This argument is challenging Sell and Prakash's (2004: 149) argument that the moral concerns themselves are of lesser importance. So was it the content of the moral concerns, or the way these moral concerns were put on the agenda that can help explain civil society's success? Chapter two will look at how people perceive power relations differently by discussing some of the dominant theories of IR. Firstly however, the concepts used throughout this study and research design and method will be dealt with.

1.4 Conceptualising actors

The vocabulary of politics is today strewn with terms such as “civil society,” “social movements,” “non-governmental organisations” (NGOs) and “non-profit organisations”. In order to understand so-called “global civil society”, it is helpful to have a basic comprehension of domestic civil society. Central to early notions of civil society was the fact that the legal code, according to which citizens interacted with each other, was supported by a broader set of norms and values that permeated throughout society. In short, the idea of civil society originated in an attempt to articulate the experience of living as a citizen in a well-ordered community (Wapner, 2000: 264). The so-called transnational civil society can be seen as a “political project that crosses the global/local divide” (Kaldor, 1999: 209). Global or transnational, civil society does not need to be political, though. The international Chess Association is just as much a part of global civil society as the transnational group Aryan

Nations. Scholte (1993: 2) sees civil society as “non-official, non-governmental and not formally part of the state apparatus. Nor does it seek to gain control over state office”.

The concept of civil society has a long history, well documented by scholars. The concept has been understood very differently across different time periods, places, theoretical perspectives and political persuasions. For example, Hegel, an academic philosopher in Prussia and Baden in the early nineteenth century, had very different understandings of “civil society” than a grassroots eco-feminist group in India in the late twentieth century. Therefore, a strict definition, according to Scholte, is not needed but rather a notion of civil society that, with “due regard for cultural and historical contexts, promotes insight and effective policy in the contemporary world” (Scholte, 1999: Internet). Moreover, what links the current concept of civil society to that of previous theorists is the notion of individual responsibility for respect for, amongst other things, human rights, through public action (Kaldor, 1999: 211).

1.4.1 Civil society

Perlas (2000: Internet) argues that civil society, in its modern form, means “the active and organised formations and associations in the cultural sphere. Moreover, he says that ” culture deals with the realm of “ideas in its various forms including worldviews, knowledge, meanings, symbols, identity, ethics, arts, and spirituality, among others.” Culture is that social space where meaning and identity are generated. Both give human beings their “cognitive, affective and ethical orientation” (Perlas, 2000: Internet). As a result, the discovery of meaning creates greater creativity, compassion and productivity. By controlling meaning and identity, civil society controls behaviour that again affects the direction and affairs of domestic and global society. According to Brown and Kalegaonkar (1999: Internet), civil society is playing an increasingly important role in social, political and economic activities. Civil society is seen to be separate from the state and the market. The state is concerned with mobilising resources through state authority while the market is concerned with producing private goods. Civil society, by contrast, is to a larger extent concerned with values and norms. In this sense, civil society can be seen as a counterweight to the role and influence of states and MNCs in global governance.

1.4.1.1 The concept of global advocacy networks

Global (also known as transnational) advocacy networks are central to the understanding of how this global civil society works. With the emergence of globalisation came a global civil society that again created a sophisticated global advocacy network. According to Deibert (2000: 257), “such networks have shown the ability to create new issues and categories, persuade, pressurise and gain leverage over much more powerful organisations and governments”. Even though opinions are divided about the influence of such networks, the more optimistic observers believe that global advocacy networks “have increasing power and authority in world affairs.” (Deibert, 2000: 257). Moreover he (Deibert, 2000: 257) argues that gramscians see these networks as “a potential source of “counter-hegemony” to the unleashing of global market forces and neo-liberal economic ideologies”. Such networks are not officially part of the political or economic system.

Khagram, Riker and Sikkink (2002: 7) discuss different forms of transnational collective action. They see information exchange as the dominant modality of a transnational network. Such a network is based on informal contacts. Civil society uses joint mobilisation in order to bring about social change. However, these forms do not work separately. Civil societies are joined together by shared values and ideas but use a transnational advocacy network to exchange information and communicate opinions, concerns, and the like. As we shall see, through a global advocacy network, civil society managed to communicate, pressurise and influence the moral issues related to this case.

Even though global advocacy networks are not always equally successful in their efforts, they have proven to be important players in policy debates. The prominent role that civil society plays in these networks is often inspired by an international voluntarism that is largely unaccounted for in international relations theory (Keck & Sikkink 1998; Boli & Thomas 1999). According to Boli and Thomas (1999: 14), international NGOs are transnational bodies exercising a special type of authority they call rational voluntarism. NGOs “employ limited resources to make rules, set standards, propagate principles, and broadly represent ‘humanity’ vis-a-vis states and other actors.” (Boli & Thomas, 1999: 14). Unlike states, NGOs lack the rational-legal authority to make or enforce law. And unlike global corporations, they have few economic resources. Arguably where the state fails, civil society picks up and uses other

channels to influence the direction of national or international politics. Deibert (2000: 256) argues that global advocacy networks have facilitated a “genuine democratic participation in world arenas that for too long have been monopolized by states and [...] corporations”.

The term “transnational social movement” is used to describe “sets of actors with common purposes and solidarities linked across country boundaries that have the capacity to generate co-ordinated and sustained social mobilisation in more than one country to publicly influence social change” (Khagram, Riker & Sikkink, 2002: 8). Price (1998: 615) describes transnational civil society as “a set of interactions among an imagined community to shape collective life that are not confined to the territorial and institutional spaces of states”. Civil society knows no national borders as localised civil societies are joined together by common values and norms.

1.4.1.2 NGOs – a part of civil society

Non-governmental organisations (NGOs) make up a part of civil society. In this thesis, the two concepts will be used alternately. “Non- governmental organisation” is a very broad term that carries some implications in the sense that it can loosely describe any association of people from youth groups to the Mafia, from the Russian Catholic Church to Greenpeace, from the international Chamber of Commerce to an agricultural co-operative in rural India. The term makes “no distinctions between broad membership-based organisations and small ones led by inspired individuals. Nor does it distinguish between associations of citizens and organisations of capital or between NGOs that work in co-operation with the state or those who seek to overthrow it” (Krut, 1997: Internet).

This analysis adopts Jordan and Van Tuijl’s (2000: 2052) definition of NGOs that describes them as “self-governing, private, not-for-profit organisations that are geared toward improving the quality of life of disadvantaged people”. According to these authors, NGOs have come to be a force that has gained experience and credibility by recognising that national and international policies as well as commercial market forces often undermine the grassroots attempts to participate in public or private policy decisions that will affect them. They argue further that NGOs have “come to mobilise, articulate and represent people’s interests or concerns at different levels of decision making, locally, nationally and internationally. This

advocacy work is increasingly seen by NGOs as an integral part of the role they play in civil society” (Jordan & Van Tuijl, 2000: 2052).

1.4.2 Nation states and MNCs

The thesis will, besides NGOs’, also be analysing international actors such as the governments of South Africa and the United States as well as non-state actors like multinational companies (MNCs). Even though several Western governments were strongly in favour of patents, analysing the US government is justified by its strong involvement and central role in supporting the pharmaceutical industry since the passing of the Medicines Act in 1997. According to Thomas (2002: 251), South Africa has been “obstructed from pursuing legitimate strategies to secure drugs for their people at affordable prices by the combined might of the pharmaceutical industry and the US government”.

Non-state actors can be political leaders, private investors and business concerns (such as banks and other private credit institutions). However, an important sub-group consists of businesses that play a significant role in international interaction and governance like multinational companies (MNCs) (McGowan & Nel, 2002: 14). MNCs discussed in this thesis are limited to pharmaceutical companies residing in the US. This is due to US-located companies being strongly involved in lobbying their concerns with the US government as well as pressuring the South African government not to implement the Medicines Act.

1.5 Research design and method

The purpose of this study is to provide an explanatory analysis of civil society’s growing influence in international relations by looking specifically at South Africa’s quest for affordable drugs in relation to the rules and regulations of the TRIPS Agreement and Public Health.

The analysis will use the theoretical framework of the evolution and influence of norms by Finnemore and Sikkink (1998) when examining the facts of this case. Finnemore and Sikkink’s theoretical framework is relevant to this study because it explains “what origins, the

mechanisms by which they exercise influence and the conditions under which norms will be influential in world politics” (Finnemore & Sikkink, 1998: 888).

The major aim of an explanatory study is to indicate causality between variables or events (Babbie & Mouton, 2001: 81). Explanatory research builds on exploratory and descriptive research and goes on to identify the reasons why something occurs. Going beyond focussing on a topic or providing a picture of it, explanatory research looks for causes and reasons (Neuman, 2000: 23). As Blaikie (2000: 61) observes, “why questions ask for either the causes of, or the reasons for, the existence of characteristics or regularities in a particular phenomenon. They are directed towards understanding or explaining the relationships between events, or within social activities and social processes”. Answering the “why question” (why did things happen the way they did) involves developing causal explanations. Causal explanations argue that phenomenon Y is affected by factor X (De Vaus, 2001: 2). In this case the Y can be seen as the Doha Declaration on the TRIPs Agreement and Public Health and X can be seen as civil society. It is the goal of this study to explain how civil society affected the signing of the Doha Declaration in November 2001 which re-evaluated the existing TRIPS Agreement concerning public health. This will be done in a constructivist vein, as the central argument of this thesis is that civil society exercised moral authority when influencing the outcome of the Doha Declaration on the TRIPS Agreement and Public Health. In the process, the present study will demonstrate the growing significance of ideational power in international politics.

Constructivism has been slow in developing as an alternate approach to IR. This does not mean, however, that the theory has not been central to the study of international affairs. According to Finnemore and Sikkink (1998: 889), norms and normative concerns have influenced the study of international politics for at least two millennia. However, the turn away from such concerns “began with the behavioural revolution and its enthusiasm for measurement.” Normative and ideational phenomena were pushed aside for methodological reasons. Despite many literary contributions, the theory has “lacked the specification of causal mechanism and scope conditions” (Shannon, 2000: 294). Checkel (1999: 85) argues that, while constructivism has broadened our understanding of the role played by norms, it has two weaknesses. The first one is based on its neglect “to explore in a systematic manner the mechanisms through which international norms reach the domestic arena.” There is a lack of causal explanations as to how norms are transmitted to states and have constitutive effects.

The second weakness is that constructivism cannot explain why “the same norm will have a dramatic constitutive impact in one state, but fail to do so in others” (Checkel, 1999: 85). It is the aim of this study to explain why civil society was successful in this case.

The research will be of a qualitative nature. This type of research involves “looking at a sequence of events and paying attention to what happened first, second, third and so on” (Neuman, 2000: 148). As Newman (2000: 148) points out, qualitative researchers tend “to use a case-oriented approach that places cases, not variables, centre stage. They examine a wide variety of aspects of one or a few cases.” A case study focuses on analysing a “messy” natural setting in the form of many specific factors and events as they co-occur. This study will focus on the time period between the passing of the Medicines Act in 1997 up until the meeting in Doha, Qatar, November 2001. This time period has been chosen because it was after the passing of the Medicines Act that the pharmaceutical industry and the US government got involved with South Africa’s HIV/ AIDS policies. The Doha Declaration on the TRIPS Agreement and Public Health can be seen as the culmination of all the events that came in the wake of this Act.

The data used in this thesis consists of internet resources, books, journal articles, and newspaper articles covering the topic. The author will use the opinions and facts found in these resources to analyse the topic.

Chapter two will briefly look at some of the dominating theories in IR in the last century. It will continue to discuss the role of normative theory through the theoretical framework of constructivism.

CHAPTER 2

Normative concerns in IR

2.1 Three theoretical approaches to international relations

How is theory helpful when analysing international relations? Viotti and Kauppi (1993: 3) argue that theory dealing with international relations is the task “of making the world or some part of it more intelligible or better understood”. Moreover, they argue (Viotti & Kauppi, 1993: 3) that “theory is explaining and predicting. One goes beyond mere description of phenomena observed and engages in causal explanation or prediction based on certain prior occurrences or conditions”. In other words, theory can be seen as a tool to better understand and predict how international actors interact with each other. However, there is a great discussion about which theory is the best tool to understand the world of politics. In relation to this, an important question has always been: who has the power? According to Guzzini (2000: 53), this concept has been of particular importance because it deals with two critical issues: “who (one or more) can be expected to win a conflict? And related to this, who (one or more) governs international politics?” He defines power as the capacity to affect or control events. Likewise, a general capacity to control outcomes has been used as an indicator for the ruling of the international system. He is, however, critical of this analysis, emphasising (amongst other aspects) the need to address non-materialistic aspects of rule or governance. These non-materialistic aspects are what this thesis will deal with through the theoretical framework of constructivism. However, firstly, the role of realism, neo-liberalism and structuralism will be discussed due to their significance in IR thinking.

Since the end of the 1930s, realism has dominated much of IR thinking. E. H. Carr’s book published in 1939 was a counter critique to the utopian thought of idealism that had dominated international relations in the inter-war years (Hollis & Smith, 1991: 21). E. H. Carr (Hollis & Smith, 1991: 21) argues that IR is a science and that the subject has to lose its normative character. Realists see “international relations as state centric and structure-oriented” (Newman, 2001: 247). Traditional realists have always argued that states are the principal actors, and the study of international relations focuses on these units. Non-state actors such as multinational companies and other transnational organisations are decidedly less important. In Rosenau’s words “the state is said to be unitary because any differences of

view among political leaders or bureaucracies within the state are ultimately resolved so that the state speaks with one voice” (Rosenau, 2000: 35). According to the realist, military and related political issues dominate world politics (Viotti & Kauppi, 1993: 7).

Neo-liberal theory focuses on economics when analysing the world of politics. Importance is given to the growing number of economically and politically powerful international actors, such as multinational corporations (MNCs) (Kegley & Wittkopf, 1995: 32). This theory assumes international co-operation and interdependence in terms of international law, economic interests and political conflicts. Neo-liberalism incorporates into its analysis the contribution of a variety of international and sub-national actors. Neo-liberalism seemed to adapt to a changing world of politics with an increased number of international institutions and multinational companies challenging the powers of national states.

Both theories have aspects of a normative approach, even though these are of very little significance. Shannon (2000: 296) argues that, for realism, norms are of “trivial importance in explaining world politics”. According to this theory, norms carry little independent causal weight. States comply with norms when it suits their interests and violate norms when these conflict with defined interests. Nations define national morality to coincide with the demands of national survival and thus norms “are peremptory only when national interest is not endangered” (Shannon, 2000: 296). The US invasion of Iraq is an example of this. Despite international protests, the US invaded Iraq claiming it was a matter of national security. Realism clearly states that self-interest comes first and normative concerns are of less importance. They will only guide states in their actions as long as they do not interfere with national interests.

Neo-liberal institutionalists, on the other hand, are not as “harsh” in their evaluation of the influence of norms. They do share the assumption, though, of rational, selfish actors in an anarchic world. However, they argue that norms, institutions and regimes have power in constraining actors. Norms, with the help of international institutions, rather facilitate commitments and compliance through monitoring and sanctions as well as “non-power factors” of transparency and communication (Shannon, 2000: 296). In other words, norms constrain the behaviour of states (agents), but do not affect their identities/interests. Norms are dependent on underlying power distributions (Checkel, 1999: 84).

The third theory dealt with in this chapter is Susan Strange's structuralist approach that was introduced in the 1980s. The theory introduced a new way of looking at the study of international political economy. She argued that it was impossible to study IR without giving close attention to the role of power in economic life. In her theory she argued that in the study of political economy "it is not enough to ask where authority lies – who has the power. It is important to ask why they have it, what is the source of power?" This source of power could be related to the possession of great wealth, coercive force or moral authority. Moral authority could derive from the proclamation of powerful ideas that have a wide appeal and has been accepted as valid and legitimate to the proclaimers. Strange's major contribution to IPE was the introduction of, what she referred to as "structural power". This referred to the power to decide how things should be done, meaning the power to shape the framework within which states relate to each other, relate to people, or relate to corporate enterprises (Strange, 1988: 22).

All these theories are unique and contribute different explanations of why international actors behave the way they do. The influence and importance of global actors are perceived differently. However, this study argues that the lack of normative concerns in these theories fail to capture the complexity of a world in which normative concerns do play an important role. Due to a changing global world of politics, the theoretical framework of constructivism is used in this study to facilitate a better understanding of civil society's role in shaping international politics.

2.2 The normative approach

Normative theory describes a norm or standard of behaviour that ought to be followed as opposed to one that actually is followed. Normative theory differs fundamentally from empirical theory. "Propositions in normative theory that deal with what ought to be are not subject to the formal empirical tests of hypotheses about what is, which is the realm of empirical theory" (Viotti & Kauppi, 1993: 532). Realism, for example, that is considered to by its supporters to be science, "deals with human nature as it is and not as it ought to be, and with historical events as they have occurred and not as they should have occurred" (Hollis & Smith, 1991: 23). This means that according to realists, the world is unchangeable. Humans,

or in this case, states will always act in self-interest using military power if necessary. Weber (2001: 61) argues that this is a problem with rational thinking. He argues that “it takes the identities and interests of states as given, thereby welcoming questions about changes in states behaviour but not being open to questions about changes in state identities and interests”. Shannon (2000: 294) defines norms as “collective expectations for the proper behaviour of actors within a given identity. Norms can regulate behaviour as well as be constitutive of actor identity and interests”. As norms change, so does the identity and interests of states. This study argues that civil society's focus on the normative concerns regarding lack of affordable medicines in developing countries helped change the identities and interests of, amongst others, the US. The lack of empirical evidence in normative theory should not underestimate its importance. Viotti and Kauppi (1993: 532) argue that “choices among competing alternatives made by policy makers are informed not just by knowledge of what *is* or could be but also by a rationale for what *ought* to be. Developing the basis for such value choices is the domain of normative theory”.

According to Zehfuss (2002: 2), the significance of constructivism as a normative theory is established more easily than its identity. It is a phenomenon that has become inescapable. The growing importance of constructivism in IR can be related to the increasing number of scholars who claim to study international affairs in a constructivist vein. The debate between rationalists and constructivists either is, or is to become, the most significant one in the discipline. The focus and interest in normative international relations have intensified after half a century of neglect and marginalisation. The effect of this increased effort, emerging from many different branches of the discipline, has been to fold ethical concerns into modern scholarship and use them to fashion intellectual support for a more humane world. Many scholars no longer feel the necessity to hide their moral commitments (Wapner, 2000: 1), as a normative approach is often seen as an important entry into the study of international affairs.

Constructivists see norms from a sociological perspective and argue that they exert a powerful influence on the shaping of state behaviour, making understandable what is acceptable in international society. The present study will extend this theory to include MNCs by arguing that norms also have a strong influence on such international political and economic actors. Constructivism relates to the idea that reality is socially constructed. Humans see the world through perspectives, which are socially constructed and consequently reality is social and what we see “out there” (and within ourselves) is developed in interaction with others (Palan,

2000: 216). This means that the “real world” is nothing more than a product of a world that humans themselves have “constructed”. The constructivist approach seeks to explain interest and identity formation in these terms.

Constructivism embraces a vision of change and, by doing so, challenges the solely materialistic theories of international relations. Constructivist international relations theory is not a single unified approach. There are different dimensions to this theory. However, according to Newman (2001: 247), “the underlying argument is that behaviour, interests, and relationships are socially constructed, and can therefore change. Values and norms can have an impact upon international relations”. Wendt’s famous phrase, “Anarchy is what states make of it,” marked the return of normative concerns into IR. He argued (Weber, 2001: 61) that the social world is constructed, not given. He believes that states may be self-interested, but what that means is continuously (re)defined. States’ identities may change. According to Zehfuss (2002: 4), “norms help define situations and hence influence international practice in a significant way”. Moreover, as Newman (2001: 247) puts it, “the system is not deterministically given, it is socially constructed. Thus, the building blocks of international reality are ideational as well as material”. The emergence of norms, thus, can make states, as well as international actors like transnational companies, undergo a change of policy. Knowledge, values and ideas are constantly changing, therefore, so will the power distribution among national and international political actors.

The constructivist believes that, in order to understand this world of meaning, one must interpret it. The “inquirer must elucidate the process of meaning construction and clarify what and how meanings are embodied in the language and actions of social actors. To prepare an interpretation is itself to construct a reading of these meanings; it is to offer the inquirer’s construction of constructions of the actors one studies” (Schwandt, 1994: 118). This means that previous or existing constructions are the result of ideas, knowledge, language, and the like, at the time of construction. Constructivism offers an understanding of international politics in a historical context. Structures are created within the framework of, among others, the ethical and moral concerns at the time. “[W]hat we take to be objective knowledge and truth is the result of perspective,” Schwandt argues. He continues, “knowledge and truth are created, not discovered by mind” (Schwandt, 1994: 125).

But how do we encounter and identify a norm? Finnemore & Sikkink (1998: 892) argue that there is only indirect evidence of norms just as there is only indirect evidence of most other motivations for political action (interests and threats, for example). However, because norms by definition embody a quality of “oughtness” and shared moral assessment, norms prompt justification for action and leave an extensive trail of communication amongst actors that can be studied. Norms have an influence on how people act. If norms did not have an impact on people’s actions there would be no need to mention, explain or justify civil society’s “outrage” towards patent rights favouring people living in the North. This will be discussed further in chapter two.

2.2.1 Constructivism – moral authority in IR

Power is central to the understanding of global politics. The question, ‘who has the power?’ can only be answered if one knows what power is. Miller (1994: 74) argues that moral authority is a form of power. Power and normative orientations go hand in hand. She argues that nowhere is this more apparent than in the political dimension of our lives. “Politics is about the exercise of power and control over human societies to further specific social values or ideals. Our lives assume a political dimension only with the wedding of capability (power) and value (normative) factors relevant to human society” (Miller, 1994: 74). The concept of power is seen by a constructivist as something more than brute force. Ideas and knowledge are also regarded as a form of power. It is this idea that justifies the use of a constructivist approach in this analysis.

Viotti and Kauppi (1993: 532) want to recognise normative international relations theory building as a legitimate enterprise worthy of more scholarly efforts than has been the case in recent years. This can undoubtedly be related to the emergence of a more globalised world which has changed the way people, states and companies interact across borders. The rise of civil society has also played a vital role in how people perceive international politics. According to Rosenau (2000: 35), students of international affairs have come hesitantly to appreciate the inextricable links between their normative perspectives and their empirical observations and theories. Comprehending these links has been a difficult struggle, though, hindered by a past in which extreme positions dominated. These have been positions that have

ruled out normative concerns as an important factor when trying to understand international affairs.

In chapter three, the thesis will deal with the moral concerns related to South Africa's quest for affordable drugs. It will also specifically look at what tactics civil society used to communicate their normative concerns. Chapter four is the concluding chapter trying to explain why civil society was successful in this case and how this is related to the challenges of global governance.

CHAPTER 3

From patent rights to patient rights

Constructivism gives an understanding of how normative factors play an important role in global politics. This chapter will further analyse the normative concerns that were relevant in this particular case. In order to grasp how TAC, MSF and Oxfam were able to influence the re-evaluation of the existing TRIPS Agreement, a comprehension of how norms emerge, and gradually gain acceptance, is essential. This chapter will consequently be guided by Martha Finnemore and Kathryn Sikkink's (1998) theoretical framework of the evolution and influence of norms. First, however, an overview of the moral concerns that were related to this case is called for.

3.1 Background to GATT, WTO and the TRIPS Agreement

When trying to get an idea of the moral concerns that affected this case, it is natural to start with the core of the debate, namely the TRIPS Agreement. This trade agreement was issued by the World Trade Organisation. The decision to establish the World Trade Organisation (WTO) was taken in April 1994 in Marrakech, Morocco, as a completion of the eight-year "Uruguay Round" of re-negotiations of the General Agreement on Tariffs and Trade (GATT). The WTO is the successor of the GATT. GATT had been established at the end of the Second World War. The purpose of GATT was to promote trade liberalisation. However, by the time the Uruguay Round discussions started in 1986 GATT was regarded as "insufficient to meet the needs of the world trade environment" (Loff & Heywood, 2002: 623). "Faced with the impossibility of enforcing its intellectual property rights under the existing WIPO treaties and the growing economic value of intellectual property, the US began to look for an alternative system for more efficiently policing intellectual property entitlements" (Loff & Heywood, 2002: 622). With the establishment of the WTO, two important changes were made. The WTO had an institutional foundation and WTO commitments were seen as full and permanent (Koivusalo, 2003: Internet). This meant that once ratified by member countries, the rules and

regulations were legally binding. The TRIPS Agreement that came with the establishment of the WTO ensured “that the participating countries agreed to adopt a set of universal minimum standards on intellectual property right (IPR) protection” (Lai & Qui, 2000). These minimum standards applied equally to developed countries and developing countries.

For the developed world this was not a huge effort. In Juma’s (1999: 3) words “most of the key elements of the intellectual property systems of the United States, Europe and Japan were similar and could be easily harmonised.” These countries also represented the largest source of Research and Development (R&D). So why did the developed world want to harmonise intellectual property rights? This has to do with the “‘across-the-board’ liberalisation of a variety of cross-border markets due to regional and inter-regional free trade agreements and protocols” (Dunning & Narula, 1997: Internet). According to Grossman and Lai (2002: Internet), the United States and several European countries expressed strong dissatisfaction with what they saw as inadequate protection of intellectual property in many developing countries. They saw the need to harmonise rules and obligations along with emerging markets that came as a result of increased globalisation. The developed countries therefore made the upgrading of intellectual property rights (IPR) protection one of their highest priorities for the Uruguay Round of trade talks. Developed countries feared that without IPR protection, the danger of generic production would undermine future profits as well as investments into R&D. At the same time, the need for medicines for prevention and treatment were more urgent than ever before.

In 1998, one year after the South African Government’s attempt to change its HIV and AIDS policies, AIDS killed more than 2.2 million people in Africa alone, making the disease ten times more lethal than wars (Boone & Batsell, 2002: Internet). Joseph (2003: Internet) explains how the disease at the same time is causing major breakdowns in Third World societies. HIV/AIDS is not a mere health problem. The pandemic affects all sectors. The problems are related to a whole generation being wiped out, leaving behind a generation of orphans and various social problems. The damage is also economic, as the people dying from the disease are the ones that make up the workforce. In the year 2000, it was estimated that 4,7 million South Africans (2,5 million women and 2,2 million men) between the ages of fifteen and forty – nine years old were HIV infected (Delius & Walker, 2002: 5). Taking into account the problems that the lack of essential medicines created in South Africa and other developing countries, how could the pharmaceutical industry defend upholding patent rights?

3.2 Patents and medicines

Patents constitute an incentive for the development of the private sector pharmaceutical industry. The rationale for granting exclusive rights on patented medicines is that, while the development of new drugs is a costly process, it is relatively easy to copy an existing drug (Cullet, 2002: Internet). The continuous R&D into new medicines is very important and should not be underestimated. According to Scotchmer (2003: 1), the economic rationale for intellectual property is that it encourages the development of new products and thus generates consumer surplus. The net profit that accrues to investors is also a social benefit, since it is a transfer from consumers. Scotchmer (2003: 1) thus argues that profit is a necessary evil, since “the flip side of profit is deadweight loss”. On the other hand, Henry and Lexchin (2002: 1590) argue that despite having high costs associated with the production of drugs and the fact that pharmaceutical companies may not be especially big in terms of revenues, they are very profitable. For example, in 2001 Pfizer was ranked 127th in the world on total revenues (US\$ 32,2 billion) but 7th in terms of profit. It is the most profitable business sector with an average of 16% ahead of financial companies. On top of this, the US-based companies together with their “Western allies” owned close to 97% of all patents (Cheru, 2002: 307). The signing of the TRIPS Agreement enhanced the power of Western pharmaceutical companies and created a monopoly that hindered health sectors, especially in the developing world, from participating in the introduction of new and life-saving drugs. The problem lay in finding a balance between ensuring the pharmaceutical industry’s profit, while at the same time ensuring that affordable drugs are available to millions of sufferers in the developing world. This was not a simple task.

It meant that the pharmaceutical industry had to reduce their profit margins severely, or allow South Africa to produce or import generic drugs. This way affordable drugs would be within reach. However, another obstacle was that in terms of the TRIPS Agreement, in the case of pharmaceuticals, patent protection was extended for a minimum of 20 years. Developing countries were given a deadline of the year 2000 (least developed countries until 2006) to bring their national policies into line with this (Thomas, 2002: 254). This can arguably be an underlying cause for South Africa’s decision to initiate means to solve the HIV/AIDS crisis.

The Pharmaceutical Manufacturers Association (PMA) initially argued that the Medicines Act was a breach of the TRIPS Agreement. As a result, the world's largest pharmaceutical companies led by the Pharmaceutical Manufacturers Association of South Africa (PMA) wanted the SA government to block the Medicines Act, which they said infringed their intellectual property rights. This was despite the fact that South Africa represented only about 0,6% of the global market and 1-2% in terms of value (Baleta, 2001: 775). However, it was important for the pharmaceutical companies to stop the South African government from resorting to use of the Medicines Act, because this would send a signal to other developing countries that compulsory licensing and parallel importing was acceptable. But according to Correa (2001: Internet), complying with TRIPS rules for South Africa was a special challenge and raised serious concerns from a public health perspective. Firstly, the patent holder could exclude direct competition and charge higher prices than would have been the case in a competitive market. Secondly, most developing countries were excluded from taking part in R&D due to the lack of capital and scientific infrastructure. While the WTO is supposed to enhance the principle of free trade, what South Africa experienced was the opposite. The developed world did not want to allow for generic drug production as this meant higher competition and reduced profits for Western based pharmaceutical companies. The pharmaceutical industry's quest for upholding huge profit margins created some moral concerns. Was the industry allowed to put its right to profit above the human right to health care?

3.3 The right to profit versus the right to health care

The WHO's former director, Gro Harlem Brundtland, stated in 2001 that, "[to] suffer from a disease with no treatment or cure is tragic. To know that a treatment exists, but is too expensive, brings the ultimate despair" (Baleta, 2001: 775). Companies selling patented drugs have an important say in the pricing of drugs. Cullet (2002: Internet) argues that, as a result, these drugs are much more expensive than generic drugs (copies). There are several factors linked to the pricing of drugs, like the distribution and dispensing of drugs. However, these factors influence the final price of the drugs to a much lesser extent than patents do. This means that developing countries' access to drugs was directly affected by the pharmaceutical companies' pricing of the drugs. Due to patents, the pharmaceutical industry to a large extent controlled the market for pharmaceuticals.

It was the control of the market that was challenged by the content of the Medicines Act that the South African government introduced in 1997. According to Bond, the most controversial clause in the Medicines Act was clause 15(c). It was this particular clause that allowed South Africa to seek the cheapest world-price drug through “parallel importing” and “compulsory drug licensing” (Bond, 1999: Internet). These measures would allow the government to legally bypass the monopoly granted to companies holding the patents in South Africa. Therefore compulsory licensing functioned “as a significant instrument to protect public interests and promote innovation” (Sun, 2002: Internet). The government argued that this was necessary to ensure access to life-saving drugs, particularly AIDS drugs, which were priced far beyond what most South Africans could afford (*The Lancet*, 2001: 243). The access to affordable drugs was essential for South Africa as a part of its ability to provide prevention and treatment through its health care system (Watal, 2000: 2). However, the possibility for the South African government to determine the extent to which rights applied was a direct challenge to the industry, which reacted by launching a challenge in the High Court (Cullet, 2001: Internet). Heywood (2002: 226) argues that the court case was an attempt by the pharmaceutical industry to try to annex additional powers and safeguards for intellectual property rights as a part of the Constitution of the Republic of South Africa, in order to sort out some of the ambiguities and vagueness around parallel importation and compulsory licensing. The move by the pharmaceutical industry to challenge the South African government in court for taking measures to provide help to its millions of HIV/AIDS sufferers, received worldwide attention. The pharmaceutical industry soon received negative publicity and came under public scrutiny.

According to Kabori, this led to a “growing concern and resentment” that the TRIPS Agreement was limiting access to drugs in the developing world. The protection of pharmaceutical patents was seen as the leading barrier to access essential medicines (Kabori, 2002: 12). It did not help that the pharmaceutical companies “were especially opposed to methods that would most likely result in a sustainable solution for South Africa” and the developing world in general (Thomas, 2002: 258). This did not mean, however, that the industry refused to help South Africa with its HIV/AIDS pandemic. The only problem was that, as Schuklenk and Ashcroft (2002: 186) put it, the “help offered was fraught with conditions.” These especially had time and quantity limitations. This meant that medicines would only be given for a few years and not everybody would have access. This constituted a continuing dependence of a developing country’s health care planning on the generosity of

commercial organisations. The pharmaceutical companies' unwillingness to help South Africa facilitate compulsory licensing raised questions concerning the human right to health care.

With a focus on "the right to profit versus the human right to healthcare" (Van Thiel, 2003: Internet), activists opposing patent protection aimed at raising awareness about the moral complications of the case. People saw prescription drugs to be different from other commodities. Profits could be seen as morally justifiable when there was a willing buyer and a willing seller (Joseph, 2003: Internet). In this case there was a willing seller and an unwilling buyer. Henry and Lexchin (2002: 1590) argue that markets work well for society when there is price competition. The markets need to be "comprehensive and provide accurate information about the products with an adequate supply of drugs, where consumers are able to make informed unpressured choices between competing products, and few market barriers". The South African Government and civil society did not see the access to essential drugs to be fair. South Africa found itself in a health crisis and the need for affordable drugs was urgent. However, its access to drugs was controlled by the rules and regulations of the TRIPS Agreement. According to Wapner (2000: 261), the international drug market that developed as a result of economic globalisation was not directly responsible for the human suffering caused by HIV/AIDS, but it was advancing the profit-making potential of corporate actors. But the question was, as the impact of patent rights on developing countries became clearer, was it morally right to continue fighting for continuous patent protection?

This concern can be seen as one of the main issues for those opposing patent rights. Access was hindered by international trade laws despite the fact that the devastating effects the pandemic had on developing countries' economies and social structures had become well known. According to Muchlinski (2001:31), there was an upsurge of concern over the relationship between human rights and MNCs' corporate rights. He argues that MNCs are businesses and that their only social responsibility is that of making a profit for their shareholders. As he points out further, "[i]t is not for them to act as moral arbitrators in relation to the wider issues arising in the communities in which they operate. They don't have any positive duty to observe human rights as their only duty is to obey the law". It is evident that MNCs are interested in making a profit for their shareholders. But there are commitments that follow in the wake of being a transnational company. For example, "MNCs have for a long time been expected to observe socially responsible standards of behaviour. This has been expressed in numerous codes of conduct drawn up by intergovernmental organisations"

(Muchlinski, 2001: 36). As a result, a purely non-social role for themselves through the adoption of corporate and industry-based codes of conduct is not rejected. This means that, even though these codes of conduct are not legally binding, accepting them imposes moral commitments and expectations. Audrey Chapman in Loff and Heywood, 2002: 628 states that:

Human rights are inalienable and universal claims belonging to individuals, and in some situations, to communities, but never to corporations. Human rights are understood to exist independently of recognition or implementation, while intellectual property rights are granted by the state according to criteria defined by national legislation. In contrast with human rights, which establish permanent and irrevocable entitlements, intellectual property rights are temporary; they exist for a limited period and can be revoked, licensed or assigned to someone else.

The problem, however, was that the TRIPS Agreement was adopted as a “stand alone” agreement, which left out mentioning the impact it might have, for instance, in the field of health. The TRIPS Agreement seemed to work only in the interest of corporate rights and undermined the fact that WTO member states were also parties to human rights treaties. According to Cullet (2001: Internet), this meant that they “should not implement WTO obligations without considering their compatibility with other international obligations, such as human rights commitments.” The UN Committee on Economic, Social and Cultural Rights specifically indicated in the right to health that states should not agree to measures that were manifestly incompatible with their previous international legal obligations (Cullet, 2001: Internet). This, however, was easier said than done. The pharmaceutical companies were willing to fight for continuous and universal patent protection.

While the large debts among most African countries hindered their capacity to provide health care for their people, the rules governing international trade had become the second most important obstacle to the promotion of the right to health care (Cheru, 2002: 306). It was an obstacle that conflicted with the fact that health is one of the fundamental basic needs of all human beings. In legal terms fundamental human rights treaties recognise the right to the “enjoyment of the highest attainable standard of physical and mental health” (Cullet, 2001: Internet). Health policies encompass a number of elements, from prevention to cure to access to drugs. All these elements are important in order to enhance health. The question of access

to drugs, however, is the essential aspect that stood out in the context of the TRIPS Agreement.

The moral concerns that grew in the wake of the conflict were expressed in the first chapter of the World Health Organisation's World Health Report in 2000. Here comments were made about human health as a cause for reflection. The focus was on whether or not health, "or factors that directly affect health, should not be the subject of more explicit and enforceable human rights protection" (Loff & Heywood, 2002: 627). Access to drugs would be a huge step forward to ensure that the right to health was being upheld. However, access was determined by availability and affordability. Patent protection was seen as controlling both these factors. While most people living in the developed world had access to life-saving drugs, "less than 10 per cent of people living with HIV/AIDS in developing countries had access to antiretroviral drugs" (Cullet, 2001: Internet). The conflict between the pharmaceutical industry and the South African government was more than simple questions related to international trade laws; they were questions about the prevailing inequalities between the developed and the developing world.

3.4 The North-South divide – a continuous problem

Thomas (2002: 252) argues that HIV/AIDS, like no other disease, reflects entrenched and growing inequality and exclusion, and the continuation of the North-South divide. The problem is overwhelmingly related to the South. Even though HIV/AIDS is a disease that is still incurable today, with the appropriate drugs, quality of life and life expectancy could be considerably enhanced. According to Delius and Walker (2002: 5), "life expectancy in many countries in the Southern African region has been cut by fifteen to twenty years as a result of the AIDS pandemic." The consequences of the disease are therefore very different depending on whether one's fate is to be born in a developing or a developed country. The inequalities are striking. One year's treatment for HIV infection in a developed country costs the equivalent of four to six month's salary. In a developing country one year's treatment would consume the equivalent of 30 years' income. While most of these expenses would be reimbursed in the developed world, this would most likely not be the case in the developing world (Thomas, 2002: 252).

Boone and Batsell (2001: Internet) argue that it is increasingly clear that the neo-liberal growth model that the WTO represents offers very dim prospects for much of the world's population. In many international arenas a creeping politicisation of North-South issues threatens to destabilise the entire process of globalisation and integration. As these authors put it, "the source to this problem is related to the 'haves' and 'have-nots'" (Boone & Batsell, 2001: Internet). This creates instability and discord in the international system. According to Khor (1998: Internet), the TRIPS Agreement has become the most important vehicle for "implementing economic and social policies across the world, policies that have been planned by the few developed countries for the developing countries to follow". Correa (2000: 3) points out that, "even though the TRIPS Agreement left some room to manoeuvre at the national level, it restricted the options available and ignored the profound differences in economic and technological capabilities between the North and the South". Even though the days of colonialism are over, this could easily appear to be nothing more than a form of neo-colonialism. It was a new form of dependence on the North. The North had 97% of all patents. South Africa and other developing countries found their health policies being limited to comply with international trade laws and regulations that the developed countries put forward. With no or little infrastructure or R&D, developing countries found themselves dependent on medicines produced in the developed world.

These huge differences between the North and the South had moral implications. It was not just a question about inequalities, but about human dignity. Patents did not only limit access to drugs, but limited the right to live. In the North thousands of people affected with HIV/AIDS were living healthy lives thanks to access to drugs through their health care systems. According to Thomas (2002: 252), the majority of people living with HIV/AIDS in the developing world received no medical treatment or only palliatives. As a result of the growing gap, there has been a reaction against the Western hegemony. The protests that erupted during the WTO summit in Seattle, USA in 1999 is an example. While the leaders of the 30 richest countries thought they could easily approve the Multilateral Agreement on Investment (MAI), civil society mobilised and defeated the agreement. This was an agreement that would allow MNCs "unparalleled access to the resources of a country with minimal obligations or responsibilities to that country." It would further have reduced the sovereignty of nations and citizens (Perlas, 2000: Internet). Bilateral and multilateral relations have often been interpreted through the paradigm of imperialism and enforced dependency (Boone & Batsell, 2001: Internet). The word "imperialism" may be out of fashion in the Western world,

but the experience of developing countries may be different. After all, the politics of HIV/AIDS interventions in Africa, for example, has been influenced by Western attempts to direct and influence the domestic policy-making process that deals with intellectual property rights.

So, was the TRIPS agreement unfairly favouring the developed world? One of the concerns in this case is related to the fact that the TRIPS agreement could be seen to be rather one-sided for developing countries. During the negotiations leading to the TRIPS Agreement, developing countries were promised a reduction in tariffs imposed on their exports (Henry & Lexchin, 2002: 1593). This can be seen as a poor exchange for large rises in the prices of imported drugs that would otherwise be sourced from low-cost generic suppliers. These were drugs that could prevent and ameliorate the situation for millions of sufferers, but were out of reach because of trade laws. Grossman and Lai (2002: Internet) argue that the developing countries were forced to accept the TRIPS Agreement by their economically more powerful trading partners. The move toward harmonisation of patent policies served the interests of the North at the expense of those in the South. A study by Das (Kohr, 1998: Internet) concluded that the Uruguay Round was a negotiation process in which the developing countries made most of the concessions without getting “anything but meagre concessions in return.” The study argued that it was not because “the negotiators or trade policy officials of developing countries ignored the interest of their countries, but the results were in fact characterised by the massive gap between the economic and political strengths of developed and developing countries” (Kohr, 1998: Internet). It should thus be evident that the TRIPS Agreement was not something that the developing world wanted. It was by far favouring countries with strong economies and R&D as an integrated part of these economies.

Developing countries showed their reluctance to accept stronger patent protection when, between 1986 and 1989, they refused to negotiate a trade agreement on intellectual property. The US, supported by Europe, Canada and Japan, examined at this time how trading principles could be extended into areas not previously included, such as intellectual property. These countries argued that such an agreement would result in more foreign direct investment, technology transfer and the promotion of local research and development. In the end there was a trade-off in which developing countries were to obtain access to markets for their agricultural and textile products, and intellectual property was to be incorporated into the world trade regime (Loff & Heywood, 2002: 623). In order for this to happen, developing

countries had to agree to the conditions concerning legal protection of intellectual property rights. The TRIPS Agreement was presented as a part of an overall WTO package (Koivusalo, 2003: Internet). Despite developing countries wanting no part of reforms to intellectual property laws, their concerns “were overcome by a US led effort to secure the interests of the developed country pharmaceutical sector” (Abbott, 2002: 470).

3.5 The moral implications of US involvement

The most powerful country, both militarily and economically, fought vigorously for stronger patent protection to be included as a part of the TRIPS Agreement. The US had its reasons, though, from an economic point of view. According to Kobori, the “net income earned from American patents in foreign markets was considerable,” and the main reason behind the growth of the US economy during the 1990 was related to profits from innovation. As early as the beginning of the 1980s the US became more and more involved in securing patents (Kobori, 2002: 12). In the 1980s and 1990s pharmaceutical companies, among others, demonstrated an impressive capacity to push their interests in Washington and Geneva. In 1986 the US trade negotiators did not know much about patents. However, by 1990 the institutionalisation of intellectual property rights had become one of the highest trade-related priorities of the US government. The pharmaceutical industry justified their lobbying on the basis of the potential for future foreign investment and sales (Heywood, 2002: 224). The US government pursued an aggressive trade policy to ensure a strict definition of international patent protection (Thomas, 2002: 258). The US involvement was observed with scepticism by many, since the gravity of the HIV/AIDS pandemic in South Africa was clear from the start. However, the pharmaceutical lobbies in the USA were incredibly powerful. The promotional spending by US companies in 1997 was US\$4.2 billion, equivalent to the total drug sales in Africa. The industry had an estimated annual worldwide budget for drug development of US\$6 billion. The market for prescription drugs in the USA was about US\$130 billion and in the UK about £7 billion. Some of the most successful companies employed a workforce of about 100 000 worldwide (Abraham, 2002: 1498). The pharmaceutical industry had ceased to be just a commercial entity and had become a strong political player. With no direct access to the negotiating table at the WTO, the US was its representative.

With the world's most powerful state, backed by one of the world's most powerful industries, the South African government had to think twice before following through with the Medicines Act. However, the South Africa government wanted to do what it thought the TRIPS Agreement left room for. According to Thomas (2002: 254), compulsory licensing of pharmaceuticals was clearly legal. However, the obstacle was "the political problem of whether they would face sanctions from the United States government, for doing things that they had a legal right to do, but which the US government did not like". The US, representing the pharmaceutical industry, had tried during trade negotiations to keep the interpretation as narrow as possible. It further frequently added wordings emphasising a public health crisis or graveness as prerequisites for its use (Koivusalo, 2003: Internet). As a result, the rules and regulations of the TRIPS Agreement were about interpreting the text; under what circumstances did the TRIPS Agreement allow member states to use measures such as compulsory licensing in order to access patented drugs? On paper it seems as if the TRIPS Agreement does not actually prevent developing countries from issuing compulsory licensing as Article 31b provides that:

Such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorisation from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a member in the case of national emergency or other circumstances of extreme urgency or in cases of public non commercial use (Schuklenk & Ashcroft, 2002: 182).

There was no doubt about the gravity of the pandemic in South Africa. It became increasingly difficult to overlook the fact that the African HIV/AIDS epidemic constituted a national emergency, in which case TRIPS allowed parallel importation and compulsory licensing of drugs (*The Lancet*, 2001: 1303). Given the rate of HIV and AIDS infections in South Africa, civil society encouraged the government to declare a national health emergency. However, the government refused to declare a national emergency as "such a declaration was thought to have dire economic consequences, particularly for South Africa's international credit ratings and foreign investment" (Fourie & Vickers, 2002: 93). The government believed that stating a national emergency would make matters worse. According to Scuklenk and Ashcroft (2002: 183), the reason why South Africa did not make use of the TRIPS provision was related to "perceived economic types of punishment that could be meted out by various players." The threat of job losses could have a substantial impact on South Africa, a country with an already high unemployment rate.

Despite the apparent crisis in South Africa, the US threatened bilateral sanctions against the South African government if the Medicines Act was implemented. In 1998, with the full support of the Department of State, the United States Trade Representative put South Africa on a Special 301 “Watch List.” This was done due to article 15(c) in the Medicines Act, which they argued undermined WTO principles. That same year the US decided to withhold preferential tariff treatment from certain South African exports. This was related to four items for which South Africa requested preferential tariff treatment under the Generalized System of Preferences (GSP) programme (Bond, 1999: Internet).

Ironically, after the anthrax scare that came in the wake of the terrorist attack on the US on 11 September, the US was willing to override a patent held by German pharmaceutical company Bayer on an anthrax drug (Clark, 2001: Internet). This arguably “highlighted the apparent hypocrisy of the developed world’s position on patents” (Beresford, 2001: Internet). While 4,7 million people were suffering from HIV/AIDS in South Africa, and nearly 300 died each day from this disease, only five people had died from anthrax and 13 had fallen ill (Singh, 2001: Internet). However, despite this low number, the US was willing to relax patent laws. This was because they were concerned about the cost of the drug (Siddle, 2001: Internet). This had also been the argument by the South African government for the passing of the Medicines Act. Loff and Heywood (2002: 627) argue that, as a result of the anthrax scare, this changed the international mood, leading to “greater sensitivity to the centrality of access to medicine to health. The parallels with the demand for AIDS medicines were unavoidable”.

3.6 South Africa sets the standard

It was the very moral nature of this debate that engaged civil society to mobilise against the rules and regulations set out in the TRIPS Agreement as well as the pharmaceutical industry and US involvement. As noted above, concerns about the right to profit versus the right to health care, and the prevailing inequalities between the North and the South as well as the US government’s support for strict patent laws, were the crucial circumstances that engaged civil society to take action. With this in mind, it is vital that an understanding of the evolution of norms is obtained as this particular case is investigated in the light of this phenomenon.

According to Finnemore and Sikkink (1998), the evolution of norms in this case is divided into three stages. The first stage deals with norm entrepreneurs' attempt to convince the public, states, and MNCs (norm leaders) to embrace new norms. The second stage is called "norm cascade." This comes from how norms "cascade" through the population as norm leaders try to socialise others to adopt the norm. The last stage is norm internalisation. This occurs when a norm is no longer subject to broad public debates, but has become institutionalised through laws and regulations. The norm has then completed its "life cycle." It has acquired a "taken-for-granted" quality (Finnemore & Sikkink, 1998: 895) and has become an integrated part of social thinking.

These stages can be identified in the case concerning South Africa's quest for affordable drugs. After the TRIPS Agreement had been signed, there was a general dissatisfaction in the developing world. As a result of this dissatisfaction, an organisation called Treatment Action Campaign (TAC) was created, that focused on the problems concerning international patent laws. It was this non-governmental organisation that on 10 December 1998, which is International Human Rights Day, protested in Cape Town and demanded medical treatment for people living with AIDS. This group of protesters collected over 1000 signatures calling on the government to develop a treatment plan for all people living with AIDS (TAC, 2003: Internet).

TAC entered a debate that until then had been dominated and motivated by technical experts, journalists, academics, drug company spin doctors and bureaucrats. Now it had been joined by activists (Bond, 1999: Internet). The organisation opened a new chapter in AIDS politics in South Africa. It came at a time when existing organisations were struggling with internal problems in the face of a growing epidemic a disinterested public. TAC activists used various methods to gain attention and communicate their concerns about the HIV/AIDS crisis in South Africa. After their first public demonstration, TAC continued their petitions as their members were distributed all across South Africa. In early 1999 about 100 TAC members wore T-shirts with "HIV-positive" written in purple letters on their chests, when the government's AIDS train arrived in Cape Town. In April that same year TAC wrote to Glaxo Wellcome, one of the world's largest pharmaceutical companies, asking them to respond to the national emergency posed by HIV/AIDS. This was followed by protests outside their headquarters. Moreover, TAC organised campaigns like "Fast to Save Lives" in Cape Town, Durban and Soweto and gained significant media coverage. The organisation also held an

inter-faith service in Cape Town where Jewish, Muslim and United Reform Church leaders called on the government and the international community to provide financial support. TAC also called for a global day of action as the organisation mobilised locally and globally against drug company power (TAC, 2003: Internet).

In July 1999 TAC mobilised a human chain at the US's Johannesburg consulate, issuing an ultimatum that if the US did not reverse its position by October, the group would co-ordinate international protests outside US embassies on International Human Rights Day (December 10) (Bond, 1999: Internet). TAC's activities soon attracted growing attention, both domestically as well as internationally. On 26 July 1999 TAC met with representatives of the US government. Their members were there to discuss the use of compulsory licensing and parallel importing. At this meeting TAC wanted a clarification of the US government's stance on the use of compulsory licensing and parallel importing, and also an exact clarification on how the article 15(c) of the Medicines Act violated any international trade rules. TAC also asked for a withdrawal of US government opposition to the Medicines and Related Substances Act (TAC, 2003: Internet).

TAC argued that "the US government is failing to take moral and political leadership in addressing the HIV/AIDS epidemic in developing countries" (AIDS Law Project, 2003: Internet). Even though TAC welcomed the proposed US\$ 100 million by the US government in the fight against the HIV/AIDS pandemic, the organisation did not see it as a sustainable solution. Only compulsory licensing and parallel imports would enhance that capacity. As a result, unless measures were taken to improve access to drugs for developing countries, TAC would call for increased public pressure against the US government internationally. In this regard, "the TAC will call for the World AIDS Day (01 December 1999) to be used as an international day of action against the US government. We will aim to have protests in at least 20 countries, and declare World AIDS Day a 'day of shame' for the US government" (AIDS Law Project, 2003: Internet). TAC also addressed the PMA and claimed the drug companies "have a moral duty to support lower prices for HIV/AIDS drugs" (AIDS Law Project, 2003: Internet). At the same time, TAC committed itself to "campaign, negotiate, pressurise, demonstrate, litigate and use every possible legal means at our disposal, including civil disobedience, to prevent losing any more lives in the interest of profit" (AIDS Law Project, 2003: Internet). TAC was clear on what measures would be taken. Civil society's pressure on developed countries seemed to have its impact.

In the US, for example, activists raised awareness about the issues concerning access to affordable drugs to the national media only months before the presidential election in 2000. Al Gore was afraid of the impact it would have on his candidature as activists further threatened to “dog the 2000 presidential campaign with its banners, ‘No Medical Apartheid!’, ‘Gore’s Greed Kills!’ and ‘AIDS Drugs for Africa Now!’ (Bond, 1999: Internet). Civil society’s involvement was necessary to bring about change in US policies. It soon became in Al Gore’s interest to support a re-evaluation of the existing TRIPS Agreement. Civil society’s approach that Comor (2001: 391) describes as, “compelling new ways of thinking that increasingly are divorced from territorially or nationally defined boundaries”, soon brought shame on the US government.

As a result of the US government’s central role in this case, national and international pressure was increasing. Further, “the US government was embarrassed into modifying its position” (Boone & Batsell, 2001: Internet). The Clinton administration, for example, was criticised for putting the export and investment concerns of American businesses above human rights. Moreover, in 1999, journalists started to ridicule Gore in his election campaign for his stance supporting the pharmaceutical industry. At the same time, NGOs protesters threatened to disrupt the political campaign by international demonstrations. As a result, the US government backed down from its threats first set out against the South African government (Abbott, 2002: 471). This did not mean that the US backed off completely, but it did decide to withdraw threats of bilateral sanctions. It took numerous demonstrations and lobbying efforts by a broad range of AIDS activist organisations for the Clinton administration to remove South Africa from the watch list in September 1999 (Bond, 1999: Internet). According to Cheru (2002: 307), it was the result of growing public criticism surrounding the South African case that made President Clinton sign an executive order directing the US to take a more liberal stance regarding IPRs relating to public health emergencies. Sensing negative publicity, several US pharmaceutical companies agreed to provide drugs at reduced prices although they were not competitive with generic drugs produced in countries like Brazil or India.

Despite the pharmaceutical industry’s protests, TAC was appointed as an *amicus curia* (friend of the court). This meant that TAC was accepted by the court to give evidence about brand name medicines being unaffordable for millions of people living with HIV in South Africa

(TAC, 2003: Internet). The chairperson of TAC, Zackie Achmat, said in the wake of this that “for the first time, the pharmaceutical industry will have to justify to South Africa and to the world why their drug prices are so high and why patents should be so aggressively protected, when millions of people are dying and cheaper drugs exist” (Global Treatment Access, 2001: Internet). As a result, the global media’s focus turned to the high prices of AIDS drugs and the patent power of the pharmaceutical industry. This again was seen as a justification for the South African government’s duty to take legislative measures to improve access to health care. The shaming of the pharmaceutical companies soon resulted in rapid and deep drops in the prices of patented anti-retroviral drugs (Loff & Heywood, 2002: 624). This did not, however, affect the court case as the South African government continued, alongside NGOs, to fight for the right to use compulsory licensing and parallel importing as a sustainable means for providing affordable drugs without the intervention of pharmaceutical companies. Moreover, TAC organised a Global March for Treatment before the international AIDS conference in Durban. The march was attended by thousands of people and gained worldwide attention. That same year, posters with a photograph of Pfizer chief executive officer, William Steere, naming him as an AIDS profiteer was distributed across Cape Town and Durban (TAC, 2003: Internet).

TAC saw patent protection as conflicting with the human right to health care. In early 2001, TAC wrote a letter to the new President of the United States, Mr Bush, asking him to “affirm the importance of South Africa’s efforts to obtain affordable medication for its 4,3 million citizens with HIV/AIDS” (Global Treatment Access, 2001: Internet). TAC saw the lack of access to medical treatment as conflicting with the human right to health care. With human rights concerns well established in people’s consciousness, TAC’s moral concerns in this case arguably became more powerful. Finnemore and Sikkink (1998: 893) argue that in cases where international norms seem to trump domestic norms, “what we often see is a process by which domestic ‘norm entrepreneurs’ advocating a minority position use international norms to strengthen their position in domestic debates”. With growing attention, especially in the media, citizens and activists across borders became involved. The normative concerns passed what Finnemore and Sikkink (1998: 890) refer to as the “tipping point”. This point determines the very future existence of a norm. Up to the tipping point, little normative change occurs. After the tipping point has been reached, however, a different dynamic begins. This new dynamic was seen when international non –governmental organisations like MSF and Oxfam got involved alongside TAC to fight for a common goal. Their involvement helped TAC

reach a new audience. Together they were fighting for a common goal. With different strategies, their goal was to allow developing countries like South Africa to produce or import generic HIV/AIDS drugs without having to fear sanctions from countries with strong R&D in medicines. This meant that health should be first priority and profits should come second.

3.6.1 MSF and Oxfam – international allies

MSF and Oxfam became TAC's international allies – two allies that demonstrate Salamon's (2000: Internet) argument that NGOs have pushed governments into a new role "as orchestrator and collaborator rather than monopoly provider of public services." He continues, "the impulse for this transformation has been both conceptual and practical. With the growing complexity of domestic and international solutions to social, economic and environmental problems, this has resulted in a commitment to rely more heavily on alternative arrangements to address public problems". Founded in 1971, MSF is an international humanitarian aid organisation that provides emergency medical assistance to populations in danger in more than 80 countries around the world. In carrying out humanitarian assistance, MSF also "seeks to raise awareness of crisis situations, to act as a witness and to speak out, either in private or in public about the plight of populations in danger for whom they work. In doing so, they aim to alleviate human suffering, to protect life and health. Further, to restore and ensure a continuous respect for human beings and their fundamental human rights" (MSF, 2003: Internet). MSF's "Access to Essential Medicines Campaign" (MSF, 2003: Internet) is an example of increased intensity and attention to the issues that governments have to a large extent overlooked. In 2000, one year after winning the Nobel Peace Prize, MSF embarked on a campaign to raise awareness and change existing policies regarding the limited access to essential life-saving drugs. Oxfam International, a federation of twelve organisations, did the same by starting an international campaign in 2001 to "revise the global patent rules of the World Trade Organisation so that they would favour public health over companies' patent rights" (Oxfam, 2001: Internet).

In 1996 MSF received US\$252 million from the OECD countries to use for humanitarian aid (Scholte, 1999: Internet). The use of MSF by these countries to channel a share of their development assistance can be seen as a verification of their influence and role in international politics. Further it can be seen as an example of NGOs' increased role, to that of

the state, as a provider of health services. MSF's role can be related to the "growing sophistication of international NGOs' coalitions and networks" (Callahan, 1999: Internet). MSF shows, especially in the Third World, how civil society has picked up where the state has provided insufficient social services. Abbott (2002: 478) argues that MSF was particularly successful in persuading at least a part of the European Commission to rethink close identification with the perspective of the large pharmaceutical company, Glaxo-SmithKline. As a consequence, the US was not always able to count on its Uruguay Round partner for unwavering support in WTO negotiations.

The links between NGOs and IGOs have in recent years become more substantial. When the UN was first founded in 1945, provisions were made to allow NGOs a very limited consultative status. Over time, this status has expanded dramatically (Callahan, 1999: Internet). NGOs today have a consultative role with a number of UN agencies. Civil society has in recent years been able to mobilise a significant amount of resources. In 2000 MSF and Oxfam each commanded about \$500 million of resources (Perlas, 2000). Kofi Annan said in July 1998 that "a true partnership between NGOs and the United Nations is not an option, it is a necessity" (Callahan, 1999: Internet). Kofi Annan's words illustrate the growing influence of civil society in global politics. It has become an actor that cannot be overlooked in the decision making process.

MSF became an important ally to, amongst others, TAC in raising awareness about the effects of limited access to medicines in developing countries. MSF wanted to address any violations of basic human rights encountered by field teams, violations perpetrated or sustained by political actors (MSF, 2003: Internet). This was done by confronting the responsible actors, amongst others, the pharmaceutical industry and the US government - through mobilisation of the international community and by issuing information publicly. According to Abbott (2002: 478), "NGOs have not limited their efforts to media campaigns. They are also involved in formulating policy positions and in offering guidance in regard to national legislative matters. This extends to an active participation with developing country governments in pursuing their interests at the WTO".

Oxfam was heavily involved in fighting for affordable drugs for developing countries. Oxfam's worldwide campaign to cut the cost of medicines for the poor called on the WTO to change patent rules. It further sought to change WTO dispute settlement rules, under which

disputes over the TRIPS Agreement and other WTO agreements are adjudicated. The organisation argued that relevant experts such as health professionals should have a stronger say. Moreover, organisations such as the World Health Organisation (WHO) should be set up when disputes had a significant non-trade dimension (ICTDS, 2001: Internet). Consisting of an international confederation of 12 organisations working together in more than 100 countries to promote solutions to poverty, suffering and injustice, Oxfam was a vital partner for TAC (Oxfam, 2001: Internet). Oxfam represented an already existing global advocacy network. The organisation promised their co-operation in strengthening the merging global citizen movements for economic and social rights. These were seen as a part of the wider perspective, human rights. Being mainly an organisation with a membership base in the North, their co-operation with TAC became an important step for both organisations to evolve and generate more attention concerning patents in global trade (Oxfam, 2001: Internet). TAC's co-operation with MSF and Oxfam can be seen as the link between civil society at the national and international level. The fact that MSF and Oxfam were organisations founded and based in the North, assured that the normative concerns reached people living in the developed world. This included not only ordinary citizens, but also the politicians of developed countries. The enormous attention that grew concerning patents versus health could no longer be ignored by countries in the North.

Oxfam demanded that developing countries be allowed to make cheap copies of drugs available to treat diseases such as AIDS, respiratory tract infections and childhood diarrhoea. It called on the US government and major pharmaceutical companies to drop legal actions against countries that are producing or wanting to produce cheaper drugs (Oxfam, 2001: Internet). The organisation further urged industrialised countries, especially the US, to support proposals put forward by African countries, to agree to an in-depth review of TRIPS, and to cease putting pressure on developing countries to implement unduly restrictive patent measures (Raja, 2001: Internet).

When the court case opened on 5 March 2001, Oxfam stated that the court case only symbolised the hypocrisy of the pharmaceutical industry. The NGO argued that when the industry was talking about improving people's access to medicines, it was only on their terms. This was justified by referring to the South African Government's effort to introduce the Medicines Act, when the pharmaceutical industry immediately stepped in to block it. It was a message from the drug companies to other developing country governments: "Play by our

rules, or face the consequences” (Oxfam, 2001: Internet). However, the US government and the pharmaceutical industry’s efforts to block the Medicines Act only united civil society to work harder to combat what they saw as unfair trade rules and human rights abuse.

When the PMA and 39 pharmaceutical companies on 3 March 2001 announced their decision to take the South African government to court, Oxfam and MSF sent them letters asking them to “immediately and unconditionally drop their legal challenge to South African law aimed at improving access to medicines.” (Oxfam, 2001: Internet). However, on 19 April 2001 the PMA and the 39 pharmaceutical companies dropped the lawsuit and paid all legal costs. Rarely had it been seen that “a less-developed nation, albeit with the help of campaigners, forced a mighty alliance of international corporations to its knees” (*The Lancet*, 2001: 1303). The outcome in South Africa taught the world an important lesson: “drug companies cannot put shareholder interests before their moral responsibility to take part in improving the world’s public health” (*The Lancet*, 2001: 1303).

The emergence of norms can make states, as well as international actors like transnational companies undergo a change of direction. This is what happened in this case. The signing of the Doha Declaration on the TRIPS Agreement and Public Health in November 2001 can arguably be what Finnemore and Sikkink (1998: 898) refer to as the third and last stage of a norm’s evolution. It means that a norm has become a part of official laws and regulations. With the signing of the Doha Declaration, it was made clear that patent rights should not stand in the way of developing countries gaining access to generic drugs. After a long battle, the WTO’s member countries realised the need to clarify the existing patent rules of the TRIPS Agreement, among other factors also as a result of civil society’s persistent work.

3.7 Chapter summary

Is the case concerning South Africa unique? Can the efforts by civil society generate the same impact in other political debates? These questions are what links this specific case to the debate about whether or not civil society is challenging global governance.

Chapter Three looked at the core of this conflict, namely the TRIPS Agreement. The TRIPS Agreement set the rules and regulations concerning patents and medicines. In the wake of this

agreement came an increased dissatisfaction in developing world regarding the limited access to affordable drugs. South Africa's quest for affordable drugs was hindered first and foremost by the pharmaceutical industry in the developed world. As a result, there were growing moral concerns. The right to live versus the right to health care, the continuation of the North-South divide and the strong US involvement were all moral concerns that were discussed in Chapter Three.

Chapter Three further discussed civil society's tactics in influencing the outcome of the Doha Declaration on the TRIPs Agreement and Public Health. The discussion was guided by Martha Finnemore and Kathryn Sikkink's (1998) theoretical framework of the evolution and influence of norms. Chapter Four will discuss whether or not civil society is challenging global governance. This will be done by looking at the content of the Doha Declaration, why civil society was successful and the ever changing process of global governance.

CHAPTER 4

Conclusion:

Civil society - challenging global governance?

4.1 Introduction

The case concerning South Africa must be seen as part of a more integrated world of politics. Even though this case is unique, it illustrates civil society's increased influence in global governance. The study argued that globalisation has changed the nature of global governance. The result is an alteration of the hierarchy among the instruments of power. The use of moral authority in international politics is challenging the traditional economic and military powers. As a result, a new political dimension has been added to that of the state and MNCs. The case concerning South Africa shows that global civic activism is demonstrating a remarkable creativity at keeping economic global power on the defensive and continually intensifying the focus on and awareness of issues that fall outside the scrutiny of traditional political structures. Indeed, as the case investigated here suggests, it may in fact signal an important step towards an end to the uneven distribution of wealth and power between the North and the South. Civil society's use of global advocacy networks to promote normative concerns can indeed represent the beginning of a drastic change in the traditional political and economic structures of international politics. However, some moral concerns have a greater impact on international politics, as will be discussed in this chapter.

4.2 The Doha Declaration – a victory for the developing world

In South Africa, on 10 December 1998, fifteen individuals protested and demanded medical treatment for people living with HIV and AIDS in Cape Town. Three years later, their biggest victory was won. In November 2001 the Doha Declaration on the TRIPS Agreement and Public Health was adopted at the Doha ministerial meeting of the WTO. However, not only was the Doha Declaration a victory for these activists or the millions of people living with HIV/AIDS in South Africa. As demonstrated by this study, it also represented a major victory

for the developing world from a more general perspective. There were a number of reasons for this.

First of all, their victory can be understood through the very content of the declaration itself. As we have seen, the developing world had unwillingly agreed to sign the TRIPS Agreement in 1994. It was an agreement that by far favoured the pharmaceutical industry rather than millions of people dying from HIV and AIDS. However, through persistent work from civil society, another agreement was signed seven years later, favouring the developing world. Abbott sees it as a turning point in political and legal relations at the WTO. The focus on health in international trade had become a top priority. So what steps were actually taken? The essence of the declaration is captured in paragraph 4, which states:

We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitments to the TRIPS Agreement, we affirm that 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 (Abbott, 2002: 470).

The Doha Declaration on the TRIPS Agreement and Public Health did not change the rules as set out in 1995. It is also important to note that the declaration is political and not a legally binding document (Kobori, 2002: 11). However, it was considered an important step because "the text clarified the relationship between the TRIPS Agreement and health policies of WTO Members and re-balanced its interpretation." (Van Eeckhaute 2001: 12). The text made it clear that the TRIPS Agreement should not stand in the way of government policies. This meant that poorer countries could make full use of the flexibilities in the TRIPS Agreement. Moreover, it proved that humanitarian concerns should not come second to those of trade. This clarification of the content of the TRIPS Agreement was the result of civil society's strenuous efforts to allow the developing world to produce or import generic drugs to its millions of HIV/AIDS sufferers. However, as Fourie and Vickers (2002: 91) point out, "the Doha Declaration nevertheless reaffirmed the developed world's utilitarian argument for strong IPR protection, stating that this was necessary for the development of new medicines and would encourage incremental medical innovation. This implies that the developing states can only resolve their public health crisis and service the 'public interest' through the WTO discipline of TRIPS and IP."

Despite this, it should thus be readily apparent that the Doha Declaration, and the circumstances that led up to it, had enabled the developing world to send a clear signal that “they would take steps to protect and advance their essential interests” (Abbott, 2002: 469). In other words, the developing world had discovered a way to exercise political power that was not dependent on economic or material superiority. This arguably represents the most important reason why the Doha Declaration has been seen as a victory for the developing world. The focus of this thesis has consequently been to demonstrate and explain *how* civil society was able to exercise such ideational power in this case.

Through the use of the media, demonstrations, hearings, debates and campaigns, civil society was able to influence the signing of the Doha Declaration. As Florini (2000: 3) argues, civil society is becoming a very important part of the larger problem of global governance. She does however point out that, “[t]he state system [...] has governed the world for centuries, and is not easily swept away.” But she claims that the state system is not well suited to deal with the world’s growing trans-border problems. Traditional international relations thinking assumes a hierarchy among the instruments of power. Traditionally one would find military force at the top, then economic resources and at the bottom such “soft” instruments as moral authority or the power of persuasion. However, are “soft” instruments such as moral authority or the power of persuasion still at the bottom of the instruments of power? This study argues that this is not the case.

4.3 Why civil society was successful

In today’s world of global politics, people communicate and interact in a different manner than before. As a result, global politics must be analysed in a different way than previously. The focus on normative concerns has a growing importance in international politics and should not be underestimated.

It was the aim of this study to show that “norms and rationality are intimately connected” (Finnemore & Sikkink, 1998: 888). Schuklenk and Ashcroft (2002: 185) argue that the pharmaceutical companies “recognise they have a moral responsibility to act to prevent the AIDS holocaust from happening”. Arguably, the pharmaceutical industry did not drop the lawsuit because they were worried about the millions of people infected with the virus and the

devastating effects this disease has had and will have in the future. On the other hand, due to civil society's shaming of the industry, it decided it had more to win by dropping legal actions. Shannon's argument that "norms are of trivial importance in explaining world politics" (Shannon, 2000: 296) clearly is not the case here.

The pharmaceutical industry was not able to "win" the court case because they only had power in the economic sense, but lacked moral power. They tried to legitimise their actions by arguing that, without profit, no one wanted to invest in future research on and development of life-saving drugs. So even though "there is a clear distinction between power and normative dimensions, they always coexist within the realm of politics" (Miller, 1994: 74). Unlike traditional material and economic power that has dominated realist and liberal theories, constructivism adds norms to an understanding of international politics. It does not separate rationality and morality, but sees them as two inseparable factors when explaining international affairs.

Hence, it was "rational" for the MNCs to abide by the normative constraints being imposed on them. The pharmaceutical industry was hurt by civil society's ability to put the normative concerns on the agenda. The focus on the human right to health care became bad for business. Muchlinski (2001: 38) argues that "business needs human rights and human rights needs business." This means that business cannot flourish in an environment where fundamental human rights are not respected. Further, "corporations that do not themselves observe the fundamental human rights of the individuals or communities among which they operate, will be monitored and their reputation will suffer". A consequence is that powerful corporations "have to be accountable to the public for the business decisions they make" (Perlas, 2000: Internet). To argue the right to profits when the consequence is millions of people dying, was not seen as a responsible act. Salamon (2000: Internet) argues that the importance of "reputational capital" has left them vulnerable to public relations campaigns conducted by civil society through the media. Especially MNCs cannot afford to be associated with negative publicity, because it will harm a company if its consumers turn away as a result. Companies are dependent on consumers buying their products. Therefore it is in their interest to avoid coming under public scrutiny. Global advocacy networks have made states and MNCs more vulnerable to bad publicity, because of the sophisticated means of communication, information travels fast and efficiently.

Moreover, the study disagrees with Sell and Prakash's (2004: 149) argument that "success in influencing policy processes lies not in claimed moral superiority of the agenda but in the networks' abilities to create and make the most of political opportunities by exploiting a crisis, constructing a problem, mobilizing a coalition and grafting its agenda onto policy debates". The success in this case is not only related to civil society's ability to put the normative concerns on the agenda, but also the inherent content of the normative concerns. Finnemore and Sikkink, (1998: 907) argue that norms involving "(1) bodily integrity and prevention of bodily harm for vulnerable or 'innocent' groups, especially when a short causal chain exists between cause and effect, and (2) legal equality of opportunity are particularly effective transnationally and cross-culturally". "The notion that norms about equality and protecting vulnerable groups from bodily harm will have more transnational resonance than other norms" (Finnemore & Sikkink, 1998: 907), can explain the success of "addressing, for the first time on a multilateral level, the problem of inaccessibility of medicines by the poor nations" (Lanoszka, 2003: 194). The case in South Africa was about bodily harm. Without cheaper medicines, millions of people would die. It was also a question about legal equality of opportunity as the majority of patents were residing in the North. Moreover, with the majority of the patents residing in the North, the question of fairness was brought centre stage.

Lanoszka (2003: 193) argues that "the leading countries must not overlook the social and economic needs of the developing world. Moreover, a change of attitude is needed. The idea of fairness should govern the dialogue between the developed and the developing world". The US's involvement in this case was not considered to be fair. This was due to the fact that some of the largest pharmaceutical companies reside in the US. The US's involvement and support of the pharmaceutical industry can further be linked to US hegemonic power and the growing concerns about a continuous North-South divide. US dominance in political, economic and cultural life has arguably helped to uphold the great inequalities between the developed and the developing world.

These issues have gained much attention in scholarly journals, newspapers and television. Perlas (2000: Internet) argues that the lesson learnt from Seattle is that "the fate of the world is no longer determined by the bipolar power struggle between large MNCs and powerful nation states. The defeat of the WTO in Seattle [...] shows that a third global force has emerged with elemental strength to contest the monopoly of world economic and political leaders over the fate of the earth. This third force is what we now know as global civil

society". Khagram, Riker and Sikkink (2002: 3) argue that, "the protests in Seattle were not an isolated, spontaneous event but rather a conscious tactic of an increasingly coordinated and powerful movement. Transnational advocacy groups gave a visible and startling manifestation of their power". The events in Seattle show that protests and civil action can influence global politics. Moreover, they show that politicians and CEO's of big companies cannot do what they want, without the public knowing and taking action. By communicating the outrage of observers as well as shaming the pharmaceutical industry, civil society thus possessed a powerful weapon of persuasion. Its moral authority proved impossible to ignore.

The theoretical framework of constructivism allowed for an understanding of how civil society's influence relied on a global mobilisation of various NGO's in expressing, and raising awareness of, certain ideas and shared values, or so-called normative concerns. By applying Finnemore and Sikkink's theory about the evolution of norms, we were able to identify the different stages of the process in this particular case. Here, the relevant normative concerns – human rights, the devastating effects of the HIV/AIDS pandemic, and the unfairness of the North-South divide and the hegemony of US power – were already well established in people's consciousness. This is also another reason for civil society's success. According to Krut (1997: Internet), because of strong lobbying, respect for human rights was accepted in the UN Charter in 1945 as one of the purposes of the UN. In the last 60 years human rights groups have succeeded in overcoming substantial national government antipathy, or opposing violations by using moral authority. This was done by communicating the outrage of observers as well as by shaming perpetrators of such abuses. As a result, a legitimate space for NGOs to present cases of human rights had been created. Due to consistent pressure, the post of UN High Commissioner for Human Rights was created in 1994. Risse (2000: 203) argues that, due to the activities of NGOs lobbying international organisations, national governments and domestic civil society, human rights are among the most densely regulated international norms. With a focus on international human rights, civil society in South Africa and internationally demanded that intellectual property protection should serve the objective of human well being, to which the international human rights instruments already gave legal expression.

4.4 Global governance - an ever changing process

Civil society's role in influencing the signing of the Doha declaration on the TRIPS Agreement and Public Health challenges the view that "international relations are state centric and structure oriented" (Newman, 2001: 247). This analysis shows that the state has had little influence in influencing the outcome of this case. Moreover, this fact can further question the relevance and accuracy of, for example, realist and neo-liberal theories in IR today. Neo-liberal institutionalists argue that norms constrain the behaviour of states (agents) but do not effect their identities/interests (Checkel, 1999: 84). This study would disagree with such a view. The identities and interests of, for example, the pharmaceutical industry have changed. Due to the shaming of the industry during the course of this case, it became in their interest to change their policies. The enormous pressure from civil society led to this change of identity. The pharmaceutical industry did not want to be perceived as putting profit before people's right to live. From fighting strongly to uphold patent rights, the industry changed its policies towards finding a solution and further by giving donations of money, drugs and price reductions.

Moreover, this study has showed that Realism's idea that self-interest comes first and normative concerns are of less importance is not necessarily the case. WTO member countries saw the need to re-evaluate the existing rules of the TRIPS Agreement due to the power of moral authority as exercised by civil society. By using a constructivist approach, the concept of power in international politics has been redefined. Miller's (1994) argument that moral authority is a form of power has been examined in this study.

The outcome of this case can not be used as a universal explanation on how civil society influences political processes. However, the study has explored explanations to why civil society was successful in the case concerning South Africa. Hopefully, this study will contribute knowledge and understanding to further investigate and analyse the growing influence of civil society and moral authority in global politics.

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