

**REFRAMING THE ISSUE:
THE WTO COALITION ON
INTELLECTUAL PROPERTY AND PUBLIC HEALTH, 2001**

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Introduction

In November 2001 the World Trade Organization's ministerial conference in Doha adopted a Declaration on the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Public Health. The process that led to this declaration is one of the most interesting episodes in recent international economic negotiations. A coalition lacking obvious power achieved significant, unexpected gains despite careful opposition from powerful transnational corporate firms and their home governments. This paper seeks both to explain this puzzling outcome and to consider whether it suggests any generalizations that are likely to be useful in other cases as well.

Like all negotiation outcomes, this one has two dimensions: whether agreement was reached and the agreement's terms. Given the chasm between the two camps' perspectives, this agreement itself is surprising. Given the great power disparities, the gains of the weak are also surprising. These gains are defined relative to the status quo prior to the 2001 talks. The 1994 TRIPS agreement established obligations of WTO member states to comply with certain international rules protecting the rights of owners of patents and copyrights. Many national laws allow the government to violate patent rights under some conditions. Thus TRIPS too permitted countries to seize patents and issue compulsory licenses (for example authorizing a domestic firm to produce and sell generic equivalents of a brand name drug without permission from the foreign inventor) under "a national emergency or other circumstances of extreme urgency" and for certain other uses. Patent holders must be compensated and such licenses were subject to a number of conditions. Nevertheless, when Brazil, Thailand, and South Africa, facing the catastrophic HIV/AIDS pandemic, sought to avail themselves of these flexibilities, the United States and its global pharmaceutical firms brought intense coercive pressure to bear against their measures. Washington cited their obligations under the TRIPS agreement and implicitly threatened penalties against their trade. Although these complaints were eventually withdrawn, this pressure had a chilling effect on others who might contemplate using the exceptions. In campaigning for the Doha Declaration a large coalition of developing countries sought explicit assurance that they would not be subject to WTO penalties under TRIPS for addressing health crises. Some of them probably also hoped to weaken the unpopular TRIPS agreement more generally. This bargaining coalition used what we call the mixed distributive strategy (defined in the introductory chapter). The US, Switzerland, and their pharmaceutical firms defended against this initiative with a mixed distributive strategy of their own. They sought to ensure the narrowest possible interpretations of these flexibilities, lest developed country markets become flooded with cheaper generic versions of lucrative brand-name drugs, and to increase the level of property protection where possible. The final 2001 Declaration was much closer to the developing countries' initial position and, according to most observers, moved the WTO status quo significantly toward their objectives (Abbott, 2002; Charnovitz, 2002; Garcia-Castrillon, 2002; 't Hoen, 2002; Love, 2001; but see Gillespie-White, 2001, and Elouardighi, 2001).

This outcome was not readily predictable from simple international relations theories based on asymmetrical political or market power. We conclude that this

outcome was not inevitable because of exogenous conditions but instead resulted from a sequence of rational choices that also could have gone in other directions. The negotiating process including those choices played a key role.

Our main specific point, stated as a possible generalization, will be that a weak-state coalition¹ seeking to claim value from dominant states in any regime will increase its gains if it captures the attention of the mass media in industrial countries and persuades the media to reframe the issue using a reference point more favorable to the coalition's position, other things equal. During the GATT's Uruguay round, powerful transnational firms and their governments had framed intellectual property protection as a trade issue. They had argued that strong patent protection promotes trade and investment for mutual benefit and that the alternative is tolerating piracy. More recently, TRIPS critics attempted to frame intellectual property protection as a public health issue, arguing that strong protection could be detrimental to public health provision. Reframing in this case was a tactic in a distributive strategy (for gaining at the expense of the US and other property owners' positions.)² This case suggests three additional hypotheses that receive some but less emphasis here.

We use the single case study method, since our purposes are to interpret an interesting instance, to trace a process, and to generate hypotheses for wider investigation. Our purpose is not to test a hypothesis. At this stage there are no quantitative data measuring negotiation strategies or other elements of this process. Developing such data would be a worthy but a large-scale undertaking, and case studies should be valuable prerequisites for efforts to create valid measures and models. This case of negotiation, like every case, was unique, and we do not claim that any instance can prove any theory decisively. But uniqueness is not necessarily a barrier to generating new possible generalizations that are worthy of checking in other cases.

The next section of the paper lays out the reasoning behind four hypotheses. Subsequent sections use them to interpret this case through a chronological narrative. The paper concludes by considering possible objections to these interpretations and looks beyond this case to others.

The Main Arguments

Our argument that outcomes will vary with reframing attempts is based on the assumption that human beings, including trade negotiators, legislators, newspaper editors, and constituents, make decisions using bounded rather than classic unbounded rationality, as explained in the introductory chapter. Actors are rational in the sense that they use their minds to the best of their abilities to attain their goals. They attend to their material

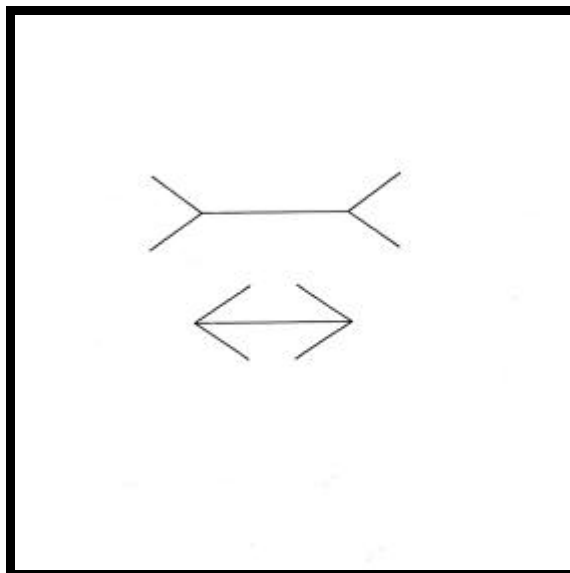
¹ A coalition is a group of governments that defend a common position in a negotiation through explicit coordination. This concept excludes sets of governments that meet only to exchange information and those that act in parallel without explicit coordination. Coalitions vary from relatively informal and short-term groupings to those that last longer, have a recognized title and a regular meeting schedule.

² In other cases parties or mediators might promote a new frame to build support for an integrative outcome (in which all parties are better off or at least no worse off).

interests. But facing the great complexity and uncertainty of a two-level negotiation among more than one hundred states, grappling with multiple technical issues, they are far from having complete political-economic information and from being able to compute exact reservation values or optima, even in the most developed countries. Given this overwhelming complexity and residual uncertainty, they have no alternative but to rely on mental short cuts, estimates and judgments, which inevitably are partly subjective. Their beliefs are influenced in part by the social milieus in which they move. Rather than optimizing, they use less demanding but reasonable decision rules like satisficing. Furthermore we, in contrast to most economics and some political science, do not assume that state preferences are based entirely on material conditions exogenous to the negotiation process and are stable. Instead, preferences are determined partly through domestic political processes and are also malleable--subject to the influence of advocacy and persuasion (These points are developed in Odell, in Andrews et. al., 2002).

This argument is also based more specifically on the premise that the human choice process consists of two phases. In the first, a preliminary analysis of the decision problem “frames the effective acts, contingencies and outcomes. . . . Framing is controlled by the manner in which the choice problem is presented as well as by norms, habits, and expectancies of the decision maker” (Tversky and Kahneman 1986, 73). Only then does the person evaluate the framed prospects and chose one. The well-known Müller-Lyer illusion provides a simple visual demonstration of how presentation can make a difference. In figure 1, which horizontal line is longer?

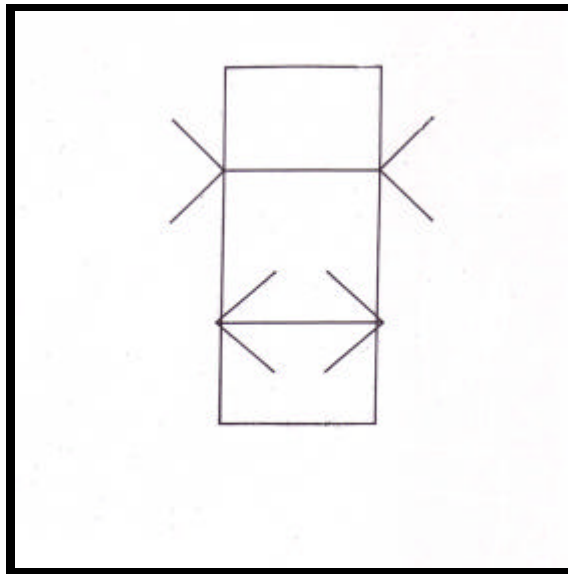
Figure 1. The Müller-Lyer illusion



Source: Tversky & Kahneman, 1986

The two lines are framed to give the impression that the top line is longer. Figure 2 demonstrates that this is an illusion; the top line is shorter.

Figure 2. A transparent version of the Müller-Lyer illusion



Source: Tversky & Kahneman, 1986

People transform information into knowledge by employing different normative frames (Comor, 2001). Given bounded rationality, actors – individual or corporate -- cannot absorb and process all accessible information. Actors employ filters to identify useful and interesting information (Tversky and Kahneman, 1981; Jones, 2001). Frames have also been defined as “specific metaphors, symbolic representations and cognitive clues used to render or cast behavior and events in an evaluative mode and to suggest alternative modes of actions” (Zald, 1996: 262).

Constituents’ expressed preferences over national trade policies are subject to framing. It is common to assume that a business manager’s preferences can be deduced from what the firm makes. Companies facing import competition will favor protection and vice versa. Bauer, Pool, and Dexter (1972) surveyed a sample of U.S. businessmen (no respondents were women) in 1954 and 1962. They did find a correlation between political behavior and objective self-interest (as rated by an expert panel), but also found that this simple hypothesis failed to account for significant data. Other factors independently changed who wrote to Congress on behalf of higher or lower tariffs. For instance, respondents who had traveled abroad tended to formulate their views “with an eye to the self-interest of the United States rather than to the self-interest of a single product (225).”

Organized advocacy framed this choice for some business executives. The National Coal Association worked hard to restrict fuel oil imports in 1953 and 1955. “But it was by no means clear that the self-interest of the small oil companies and particularly of the railroads lay in combining with the coal industry in opposing oil imports” (373). The railroads did transport coal, depending significantly on an industry that stood to benefit from restrictions on competing fuel oil. Yet the railroads were also converting their own engines from coal to diesel, and thus stood to benefit in another way

from oil imports and lower prices. The coal association was the first to approach the railroads, however, asking them to sign a statement favoring the quota bill. The railroads went on record as unified in support of the protectionist side. The evidence at the individual level showed, however, that railroad executives did not have a deep commitment to this position. They had not engaged in full deliberation and classic optimization.

WTO negotiators attempt to frame proposals to make them sound as favorable as possible. They attach rationales promising benefits and downplaying costs and they emphasize the negatives of rival proposals. In experiments, negotiators framed with the goal of avoiding losses make fewer concessions and reach fewer agreements than negotiators framed to achieve gains, even when the monetary consequences of an agreement are identical between the two groups (Bazerman and Neale 1972, 39). Framing is also relevant for attempts to resolve conflicts and reach mutual-gain outcomes. Deliberate framing is carried out in many cases by posing a reference point for measuring the outcome that is favorable for the speaker's side. In the oil example, the Coal Association might have argued, "If quotas are not imposed, oil imports will drive us out of business." The unstated implication was that the best reference point for evaluating public policy was whether it keeps the coal industry in business. A standard counter-tactic is to pose a different reference point favorable for a different conclusion, for example how well the policy or agreement will restrain inflation or protect the natural environment. Questions like these call for answers that are partly consequentialist and partly evaluative: the policy or agreement will have certain effects and, at least implicitly, these effects will be good or bad. Explicitly ethical arguments can also be part of framing. According to Crawford, "ethical arguments are characterized by the use of prescriptive statements that rest on normative beliefs" (2002: 41). For example, patent rights should be upheld because it is wrong to steal. Alternatively, patent rights should be relaxed to prevent unnecessary deaths. Clearly these subjective frames of reference imply different policy responses.

In a boundedly rational world, then, part of the normal negotiation process will be a contest of partisans each attempting to establish the dominant subjective frame of reference. Studying framing effects means that the researcher must examine the substance of negotiators' arguments and how counterparts respond to them. The more a weak-state coalition does to win this subjective contest, the greater its negotiated gain will be, according to this first argument.

Constructivist theorists of international relations offer insights that are consistent and can be integrated with a bounded rationality perspective. What constructivists refer to as "social construction" is also strategic (Sell and Prakash, 2004; Finnemore and Sikkink, 1998: 909-11). "The concept of framing draws attention to the fact that power results not only from military and economic resources as Realists assume, but also, as constructivist approaches suggest, from the power to (re-)define and (de)legitimize" (Joachim, 2003: 269). Thinking about preferences as malleable opens the door to more constructivist notions of argumentation (Risse, 2000) and persuasion (Crawford, 2002; Mueller in Fierke et. al., 2001).

The second hypothesis is that in any regime, a weak-state coalition will gain more if the coalition's internal bargaining prevents the group from fragmenting. This is part of a distributive strategy insofar as it is aimed at achieving maximum gain through credible threats. It is defensive, to maintain strength in the face of one's counterpart's efforts to weaken coalition solidarity. Collective action theory predicts that the larger the group, the more each member will feel an incentive to take a free ride. Furthermore, outsiders with conflicting preferences can be expected to attempt to divide and rule, unless the coalition is regarded as insignificant. States in significant coalitions can be expected to be tempted by offers of separate payoffs or threatened with retribution to get them to drop out, at least up to a point. Whether any coalition remains united behind its common position depends, according to this hypothesis, on the negotiation process within the coalition. If a leader or others make offers or threats to fellow members to keep them from jumping ship, or if members offer arguments to persuade other members that their interests will be served better by rejecting these outside offers and threats, the group will gain more, other things equal, than groups that do not actively manage internal coalition dynamics.

The third hypothesis is simply that the larger the coalition, the less it will lose and the more it will gain, provided that it manages the fragmentation problem (hypothesis 2). In the WTO in particular, decisions are made by consensus, almost never by voting. A consensus is defined to mean that every member either assents or remains silent. Even the weakest state has the authority to block a consensus, which could in principle be a tactic for shifting the distributional outcome in its favor. But alone, a weak state's credibility will be low, since all will be aware of its vulnerability to pressures inside and outside the organization and its need for agreement on other issues. Forming a coalition is a tactic supporting a distributive strategy because it increases credibility, and according to this hypothesis, credibility will rise with numbers, other things equal.

Fourth, a weak-state coalition will probably gain more in any regime if it employs what we call a mixed-distributive strategy than if it adheres to a purely distributive one, other things equal. The pure distributive strategy has been defined in the introductory chapter as a set of tactics that are functional for claiming value from others and defending against such claiming, when one party's goals are partly in conflict with those of others. It comes in both offensive and defensive variants. For delegates of a weak state surrounded by giants whose goals may conflict with theirs in part, it may often seem safest and most natural to act defensively to protect against claiming by the strong. It may well be wisest in many cases at least to open with such tactics. Opening with a high demand, delaying concessions, and offering arguments to persuade others to make unrequited concessions are tactics belonging to a strict distributive strategy. It can at least buy time for learning more about one's interests, forming coalitions, and reducing or delaying losses. A stronger variant would also take others' issues hostage, threatening to block agreement on those issues if one's own position is not satisfied. An even more severe variant would add threats to penalize others outside the trade realm as well.

But the effect of any threat depends on its credibility, which is where the weak are at a disadvantage by definition. Giants generally have far better alternatives to an

agreement, by virtue of their market size, technological lead, global corporations and strong domestic political institutions. A threat by the weak is less likely to be believed in general, at least considering these objective power indicators alone. And if a coalition forms but fragments prior to the end, then an individual member will end up making concessions in return for nothing, unless its government is prepared to take the risks of blocking the entire WTO by itself. Having passed up opportunities to gain some concessions by offering others, it reaps only losses. If the coalition's threat is credible, another risk is that if the other parties also refuse to back down this would produce a stalemate with no gains.

More generally, parties' objectives in international negotiations are almost never perfectly opposed. Often there are also opportunities for deals that will make multiple parties better off than before. To be sure, these possibilities are not always easy to identify. Many rational negotiators work strenuously to claim value from others where they disagree, especially at the beginning, and are careful to conceal their capacities to fall back to true reservation values, to enhance the credibility of their positions. They may also attempt to conceal their priorities across issues. But when parties' private objectives actually are partly consistent, integrative tactics sometimes achieve gains by either discovering and exploiting common interests, or uncovering differences that can be exploited for mutual benefit, as in commercial trade itself. Integrative tactics include asking other parties to identify their priorities, proposing an exchange of concessions, and proposing to redraw the issue space itself in a way that benefits some without costing others. These tactics require a minimal level of trust and a greater openness with information about one's own position. A mixed-distributive strategy is dominated by distributive tactics but is diluted with integrative moves. A common mixture is sequential--beginning with the distributive and switching to some integrative near the end.

Adhering exclusively to distributive tactics works against this mutual-gains process, reducing the odds that the whole body will discover and realize these opportunities. If party A refuses to engage in any integrative tactics, it encourages B and C to manipulate information, delay, take their own hostages, make threats, and develop alternatives to agreement with A. Party A discourages B and C from initiating integrative moves and fails to discover what gains for itself might be achieved through logrolling or reframing.³ Even when A makes a credible threat and B and C are considering yielding, the odds of settlement would be higher, goes the argument, if A's strategy mixes in some integrative elements that give the others some gains to deliver to their frustrated constituents.⁴ At least in common conditions if not all conditions, then, a weak-state coalition is likely to gain more using a mixed-distributive strategy.

³ In a situation where the parties believe their objectives are completely opposed, we would not expect resort to integrative tactics since they can only expose the actor to exploitation. But any pair of states that value their long-term relationship have at least one common objective.

⁴ This applies to powerful countries too. Quad negotiators also run the risk of forcing an impasse if they reject all integrative moves.

This paper's analysis highlights choices that intervened between initial preferences and power asymmetries on one hand and outcomes on the other. The story of the Doha Declaration is a story of many choices that were not fully determined by material conditions. The paper will identify them in sequence.

TRIPS, the AIDS pandemic, and a Fight over Access to Medicines

The TRIPS agreement dramatically extended intellectual property rights and instituted a legally binding global regime for intellectual property protection. In the past, many countries chose not to offer patents for pharmaceuticals, in the interests of keeping down the costs of necessary medicines. The earlier multilateral agreement, the Paris Convention for the Protection of Industrial Property, offered generously permissive conditions for issuing compulsory licenses (Sell, 1998). TRIPS changed this by requiring states to offer patent protection for pharmaceuticals and by sharply restricting the conditions under which compulsory licenses could be granted. Additionally, many developing countries previously had adopted regulations stipulating that patents had to be "worked" in their countries, and mere importation of a patented item did not satisfy the working requirement. TRIPS changed this as well, stipulating that importation "counts" as working the patent. All these changes redounded to the benefit of the patent holder and reflected the interests of the powerful lobby of global corporations based in the US who sought a legally binding, enforceable global intellectual property agreement (Sell, 2003). Pharmaceutical companies such as Merck and Pfizer actively participated in the process that led to TRIPS and had a significant hand in shaping the final provisions.

After the Uruguay Round these corporations pursued an aggressive campaign, with the help of the USTR, to ensure compliance with TRIPS, to speed its implementation prior to the negotiated deadlines, and in many countries to negotiate still higher levels of property protection (known as "TRIPS Plus")⁵. This campaign resulted from several choices that could have gone otherwise.

Meanwhile the AIDS crisis, an exogenous event as far as WTO negotiations were concerned, was spreading. Thailand and South Africa chose to make use of TRIPS provisions that permit compulsory licensing under national emergencies. Articles 30 and 31 permit compulsory licensing under restricted conditions. When a state grants a compulsory license, rights to produce a product are licensed to another party without the patent holder's permission. Compulsory licensing allows states with manufacturing capacity to produce generic drugs that are more affordable. One of the conditions is that licenses must be used in domestic markets and not for export (Maskus, 2000: 178). Countries in the grip of the HIV/AIDS crisis also seek exceptions so that countries with generic capacity could export products produced under compulsory license, so the many countries with small domestic markets could also benefit from economies of scale.

⁵ "TRIPS-Plus" refers to conditions that restrict options available under TRIPS, require particular forms of protection not mandated by TRIPS, or eliminate flexibilities afforded by TRIPS. See Drahos (2001).

In 1997 and 1998 after Thailand planned to produce a generic version of the AIDS drug ddI, US trade officials, on behalf of the US-based Pharmaceutical Research and Manufacturers Association (PhRMA), decided to threaten sanctions on core Thai exports. With Thailand's generic manufacturing capacity PhRMA feared Thailand's potential to undercut its markets. Thailand subsequently dropped its compulsory licensing plans. Compulsory licensing, permitted under TRIPS, "was intended as a lifeline. But in practice, any country reaching for this lifeline has been handcuffed by US trade negotiators" (Vick, 1999: 1).

In December 1997, South African President Nelson Mandela signed the South African Medicines and Medical Devices Regulatory Authority Act (Medicines Act hereafter). The Medicines Act allowed the Minister of Health to revoke patents on medicines and to allow for broad-based compulsory licensing to manufacture generic versions of HIV/AIDS drugs. Article 15c permitted parallel importing so that South Africa could take advantage of discriminatory pricing policies and import the cheapest available patented medicines. PhRMA was outraged and wrote to USTR Charlene Barshefsky and Commerce Secretary William Daley denouncing the South African Act (Gellman, 2000).

In February 1998, forty-two members of the Pharmaceutical Manufacturers of South Africa (mainly local licensees of global PhRMA) chose to sue Nelson Mandela, challenging the Act's legality in Pretoria High Court. They maintained that the Medicines Act was unconstitutional because it violated constitutional guarantees of property rights (Visser in Warner, 2002: 721-2).⁶ They also argued that it violated TRIPS by authorizing uncompensated compulsory licensing. PhRMA saw South Africa as a bellwether. It is PhRMA's most important African market, "where all the patents are" (Love, in Warner et. al., 2002: 704), with 41% of the region's GNP, and a large population of HIV/AIDS patients. It also has generic manufacturing capacity and economies of scale. PhRMA feared South Africa's potential for becoming a competitive generic supplier undercutting PhRMA's markets. PhRMA also objected to parallel importing as "downright dangerous," not only risking public safety with counterfeit medicines, but also diverting low-priced medicines from low-income to high-income countries and thus diminishing profits available to finance new research (Finston, in Warner, et. al 2002: 727). When the litigation began "the drug companies could rely on the support of their home governments" ('T Hoen, 2002: 30).

In its February 1998 submission to USTR, PhRMA recommended that South Africa be named a "Priority Foreign Country" and argued that the South African law posed a direct challenge to the achievements of the Uruguay Round (PhRMA, 1998a: 10-11). In response, the USTR placed South Africa on the section 301 "Watch List" and urged the South African government to repeal its law. Throughout 1998, US government pressure intensified. In June 1998 the White House announced a suspension of South Africa's duty-free treatment under the US Generalized System of Preferences program.

⁶ Pharmaceutical Manufacturers' Association of South Africa v. President of the Republic of South Africa, Case No. 4183/98 (High Court of South Africa), available at <http://www.cptech.org/ip/health/sa/pharmasuit.html>.

(Bond, 1999: 771). While hindsight is 20:20, this aggressive campaign actually hastened the mobilization of opposition to it.

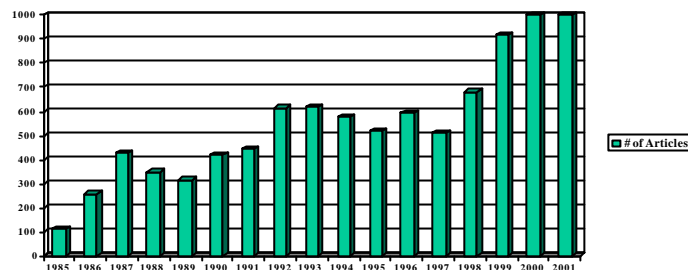
Northern NGOs, Northern Attention, and Reframing

In this case, it was Northern nongovernmental organizations that chose to spearhead an effort to gain attention in Northern mass media. (NGOs could have spent their efforts on other issues. States' exogenous material interests alone did not generate this element of the process.) These organizations attempted to reframe the issue by advancing a different reference point for evaluating TRIPS. In the 1980s TRIPS advocates had framed it as an alternative to tolerating piracy of private property, and in that frame TRIPS looked like a clear improvement. Many developing country governments opposed adding these rules to the WTO, since they would shift money from south to north. But the US and the EU made TRIPS an inseparable part of the Uruguay round package, and opting out of the whole would have had devastating trade consequences.

Now the NGOs compared TRIPS to a different reference point--saving the lives of poor people suffering from HIV/AIDS. In this new frame TRIPS as it applied to medicines was far more vulnerable to objection. The critics' basic argument was that medicines that could save or prolong lives were available, but their makers were refusing to sell them at marginal cost, choosing to let people to die in order to hold up profit margins. Not only that, but Washington was also trying to use the WTO to discourage countries from exercising the emergency exception to save lives. The moderate version of the argument acknowledged a public interest in protecting intellectual property rights in general but insisted that in a conflict, health must come first. While TRIPS' architects never intended for the agreement to lead to unnecessary deaths, post-1994 pressure on Thailand, South Africa, and Brazil provided opportunities for opponents to claim exactly that.

After 1997 Northern mass media greatly expanded their coverage of the AIDS crisis in Africa. Figure 3 reports a rough measure of this increase in international media attention.

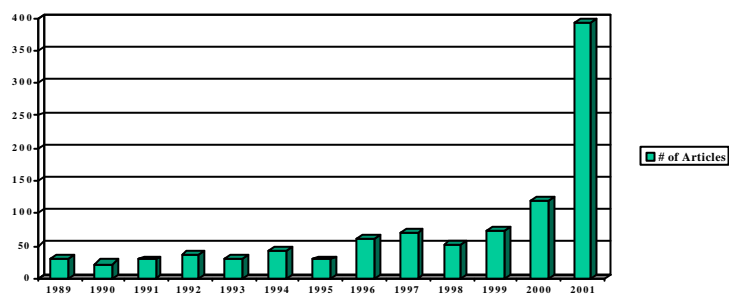
Figure 3: Number of of Articles in major newspapers on “HIV” and “Africa” as reported in Lexis-Nexis



Source: Sell and Prakash, ISQ 2004

Progressive activists who had always opposed TRIPS and the WTO astutely recognized popular attention to this crisis as an opportunity to force a wedge into this trade regime and perhaps discredit it more generally. The NGO campaign contributed to a sharp spike in media discussion of possible connections between patent protection and health problems in 2001 (Figure 4).

Figure 4: Number of Articles in Major Newspapers on “Patents” and “Public Health” as reported in Lexis-Nexis



Source: Sell and Prakash, ISQ 2004.

Critics used U.S. Vice President Albert Gore’s nascent presidential campaign in the summer of 1999 as an occasion to draw attention to the issues. Go re had been maintaining a PhRMA-friendly stance in part to attract PhRMA campaign dollars. NGOs called AIDS Coalition to Unleash Power (ACT UP) Philadelphia and the Ralph Nader affiliated Consumer Project on Technology (CPT) repeatedly disrupted Gore’s campaign

appearances with noisemakers and banners that read “Gore’s Greed Kills”. These stunts gained media attention.

The political results were nearly immediate. “The Clinton Administration withdrew two years of objections to the new South African law in June, the same week that Gore declared his intent to run for president and AIDS activists began tormenting his campaign” (Gellman, 2000). In September 1999 the US removed South Africa from its 301 Watch List. CPT wrote to USTR Barshefsky praising this decision and recommending that the same treatment be extended to all developing countries. NGOs actively provided assistance to the South African government in the continuing private PhRMA litigation; for example, Love drafted some important affidavits on its behalf. Meanwhile the NGO coalition was growing and included, among others, Health Action International, OXFAM, Médecins Sans Frontières, ACT UP Paris, and Treatment Action Campaign.

South Africa remained steadfast in its refusal to alter its law despite the PhRMA litigation. The government had been careful to investigate the bill’s legality under TRIPS prior to enacting it. During the trial it came to light that Article 15c was based on a “draft legal text produced by the WIPO (the World Intellectual Property Organization) Committee of Experts”, which undermined PhRMA’s claims that the law was inconsistent with international law (’T Hoen, 2002: 31). The South African case underscored that developing countries would need clarification of the interpretation of TRIPS flexibilities for public health, so that they could proceed confidently without the specter of political and legal challenge (’T Hoen, 2002: 31). For northern politicians the visible protests also raised the domestic political costs of supporting PhRMA’s position.

Brazil also exercised leadership in the access to medicines issue. Despite relentless pressure from the US and its pharmaceutical firms, in 1996 Brazil chose to pass a patent law that provided that “local working” of the patent is required for a patent holder to enjoy patent rights in Brazil. TRIPS stipulates that importation of a patented item constitutes “working”, but Brazil’s law states that only local production, not importation, satisfies the working requirement. Brazil’s law permits the government to issue compulsory licenses for goods that are not manufactured locally within three years of receiving patent protection. Brazil has maintained that the threat of compulsory licensing has helped it negotiate reasonable drug prices with global pharmaceutical companies; it has used this threat effectively against Roche and Merck in the quest for affordable AIDS drugs. PhRMA sees the provision as a threat in so far as it may inspire other developing countries with pharmaceutical manufacturing capacities to follow suit and insist upon an interpretation of TRIPS Article 27(1) that would limit the rights they enjoy on the basis of importation.

Developing countries looked to Brazil as a beacon of hope in strategies to combat the HIV/AIDS crisis (Rosenberg, 2001). Brazil provided anti-retroviral therapy free to HIV/AIDS patients as a matter of public policy. For example the Brazilian generic manufacturer FarManguinhos produced a version of the anti-retroviral Nevirapine, that reduced mother-to-child transmission of HIV (Drahos with Braithwaite, 2002: 9). The

Brazilian program dramatically cut the rates of infection and death from HIV/AIDS. The government stood firm in the face of US challenges. In February 2000 at the behest of PhRMA, USTR petitioned the opening of a panel against Brazil in the WTO for alleged violation of TRIPS Article 27(1) on importation and working the patent. Brazil countered with evidence that US law was in violation of TRIPS precisely on the same grounds. For example, “under Article 204 of the U.S. Patent Code, small businesses and universities must manufacture their inventions ‘substantially in the United States.’ Article 209 of the U.S. Patent Code also establishes a local work requirement for federally owned patents” (Viana, 2002: 312). Brazil filed a request for WTO consultations with the US over US law.

The Brazilian government mobilized extensive NGO support in defense of its policies, and *The New York Times* ran a magazine cover story praising Brazilian HIV/AIDS policy (Rosenberg, 2001). Brazil publicly offered to “support developing countries to help them increase manufacturing capacity by transferring technology and know-how. NGOs feared that the US action could have a negative effect on other countries’ ability to accept Brazil’s offer of assistance” (T Hoen, 2002: 33; Viana, 2002: 311). But Brazil’s refusal to back down and the groundswell of support led the US ultimately to withdraw the case in June 2001. As US Trade Representative Robert Zoellick stated, “litigating this dispute before a WTO dispute panel has not been the most constructive way to address our differences, especially since Brazil has never actually used the provision at issue” (Yerkey and Pruzin, 2001). Brazil’s policies and its commitment to extensive generic production helped to create a market for high quality generic drugs. The government has purchased HIV/AIDS drugs from Indian, Brazilian, Korean, and Chinese generic drug suppliers. The resulting competition between suppliers drastically reduced drug prices. In just three years the per-kilo price of 3TC, “the most patented anti-retroviral drug in Africa,” dropped from \$10,000 in 1999 to \$700 in 2002 (Love, in Warner, 2002: 700).

The Indian generic drug manufacturer Cipla also was an important player in altering the market. In September 2000 at an international meeting in Brussels, Cipla’s CEO Dr. Yusuf Hamied “publicly stated the prices at which he could provide anti-retrovirals to developing countries... The pharmaceutical executives of major companies ‘listened agog to Hamied’s matter-of-fact price list for chemical equivalents of Glaxo’s Epivir, Boehringer’s Nevirapine and Bristol-Myers’ Zerit’” (Drahos with Braithwaite, 2002: 9). CPT and Cipla collaborated to make a dramatic offer; in early 2001 Hamied announced that Cipla would provide anti-retroviral drugs to Médecins Sans Frontières for \$350 a year, or about \$1 a day per dose. The February 7, 2001, announcement, featured on the front page of *The New York Times*, “shocked the world, and completely transformed the global debate on treatment for HIV in Africa. At this price it was clear that many would die needlessly, if steps were not taken to remove barriers to access to medicines.”⁷

Changes in market conditions altered the firms’ BATNA. The Brazilian strategy created a large market, and generic competition spurred further price reductions. These

⁷ E-mail message from James Love, March 26, 2002 (on file with author).

market changes highlighted the benefits of pursuing developing countries' strategies to address public health emergencies, and fueled the increasing characterization of PhRMA as heartless and profit-hungry. PhRMA reacted by offering to supply certain drugs for free or at reduced prices to sub-Saharan Africa.

They also responded to this transnational campaign by repeating their original arguments, countering their critics' claims, and making another tactical retreat. Their dominant argument all along had been that enforcement of drug patents globally was essential to the process of discovering new medicines. They claimed that the cost of inventing a new drug averaged more than \$400 million (Grabowski 2002:851-52). Pricing these products at only the marginal cost of producing each new pill would fail to recover development expenses and thus drain the well. The basic reason for all patents was to create an incentive for invention, in the public interest. It was not simply a matter of private greed. Undoubtedly these managers, like counterparts in other industries, resented companies in other countries copying and selling their inventions without compensating them.

The firms disputed critics' efforts to blame patents and TRIPS for poor people's lack of access to needed drugs. Many developing countries did not provide patent protection and under TRIPS were exempt from this requirement until 2005. India, to take a major example, did not enforce drug patents, a large generic industry produced copies of antiretroviral drugs, and yet thousands of people were dying of AIDS every year in India. Obviously poor people face many obstacles to good health, from lack of clean water to lack of skilled caregivers and hospitals to the stigma that many societies attach to AIDS victims in particular. The medicines campaign forced PhRMA to become defensive about intellectual property enforcement and its implications for the HIV/AIDS crisis. In May 2001, PhRMA posted a new item on its web site explaining all the activities it was undertaking to help poor countries facing the HIV/AIDS pandemic. PhRMA further argued that the WTO should instead focus on reducing developing countries' high tariffs and on corruption in government procurement, that raise the drug prices there.⁸ The firms objected that the NGOs were distorting the patent issue for their own political purposes by blowing it out of proportion. More quietly they complained that governments like Brazil and India were simply reflecting the economic self-interest of their own producers. They and US officials added that the Uruguay round package was a balance of rights and duties, and that any effort to roll back a part of it without making compensating concessions in other parts would be unfair.

Meanwhile, however, in March 2001, PhRMA also chose to end its legal case against the South African government. PhRMA claimed it had always preferred a negotiated settlement and claimed victory insofar as South Africa pledged to abide by TRIPS and its own Constitution (European Federation of Pharmaceutical Industry Associations, 2001). In view of the unanticipated political backlash, however, it was difficult not to see this suit as a major blunder from the firms' own standpoint. Choosing to file and aggressively pursue this case, even after USTR had backed off, exacerbated their public relations problem. (Business leaders also have only bounded rationality.)

⁸ *International Trade Reporter*, October 25, 2001, 1687.

Forming A Large Geneva Coalition with a Mixed Distributive Strategy

The US challenge to South Africa's medicines law catalyzed the formation of a bargaining coalition in the WTO to seek gains at the Doha ministerial.⁹ First WIPO experts had advised that the proposed legislation was consistent with TRIPS and then the US said it was not. The African Group decided to lead a coalition seeking a ministerial interpretation in its favor. The African Group was a standing organization of 41 WTO member states that had defended common positions in WTO talks since 1999. In 2001 Zimbabwe chaired the African Group as well as the WTO TRIPS Council. In April the Zimbabwean Ambassador Boniface Chidyausiku requested a special WTO TRIPS Council session on access to medicines. Chidyausiku argued that "the WTO could no longer ignore the access to medicines issue, an issue that was being actively debated outside the WTO but not within it" (T Hoen, 2002: 38). Zimbabwe had led important access to medicines efforts in the World Health Organization (WHO) and had been deeply involved in the issues at least since 1998 (Sell, 2003: 148). Quickly other developing countries signed on and eventually the coalition numbered 60 member states—far too many to be ignored if they remained united. Brazil had been pressing the issue in the WHO and the UN Commission on Human Rights and became a leader of this WTO coalition especially at the end. India was particularly active at the technical level.¹⁰ Brazil and India both had sizeable generic drug industries that stood to gain export revenue from free parallel imports. Other members included Pakistan, Bangladesh, Indonesia, Thailand, Sri Lanka, the Philippines, and 11 other Latin American and Caribbean states. Norway and the Netherlands also provided tangible support to the coalition. The TRIPS Council agreed to hold a meeting in June.

At the outset, one coalition diplomat recalled, "We did not immediately visualize what we should demand, our objective. One possible outcome was a [ministerial] declaration but we were not sure what its content should be."¹¹ There was some thought of attempting to amend TRIPS formally, perhaps Article 8, 27 or 31. But this would have required ratification by national legislatures including the American. "The price would have been pretty high, so little energy was spent on that."¹² If this coalition had insisted on a more radical negotiating objective and a less flexible strategy for Doha, its gains might well have been smaller, like those of the Like Minded Group of countries discussed in a companion paper.

Before the June meeting, the African Group requested assistance from the Geneva-based International Centre for Trade and Sustainable Development (ICTSD) in preparation for the TRIPS Council meeting. ICTSD hosted an informal roundtable on TRIPS, biological resources and public health for the African negotiators based in

⁹ Interview with an African leader of the coalition, Geneva, November 4, 2002.

¹⁰ Interview with a participating NGO representative, Geneva, November 13, 2002.

¹¹ Interview with a Latin American member of the coalition, October 21, 2002.

¹² Ibid.

Geneva. ICTSD also invited several experts to speak about the topics (ICTSD, 2001). The experts included a representative from Malaysia's NGO Third World Network.

On the eve of the TRIPS Council meeting, Oxfam, MSF, and the Third World Network held a press conference and issued the following statement:

Governments need a permanent guarantee that they can put public health and the welfare of their citizens before patent rights, without having to face the kind of legal pressures or threat of trade sanctions experienced by South Africa and Brazil.... People all over the world will be watching whether WTO member countries meet the challenge of tackling the global health crisis, and demonstrate their commitment to the prevention of further unnecessary deaths. (ICTSD, 2001: 63).

The June 20th 2001 TRIPS Council meeting on the medicines issue was devoted to presentations of prepared statements. Zimbabwe's delegation presented the Africa Group Statement proposing that "members issue a special declaration on the TRIPS Agreement and access to medicines at the Ministerial Conference in Qatar, affirming that nothing in the TRIPs Agreement should prevent Members from taking measures to protect public health" (Africa Group Statement in ICTSD, 2001: 47). The African Group, Barbados, Bolivia, Brazil, the Dominican Republic, Ecuador, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, the Philippines, Peru, Sri Lanka, Thailand, and Venezuela presented the lead paper (IP/C/W/296 in ICTSD, 2001: 50-57). It documented in a "detailed and concrete way the difficulties that were created for Members by various provisions of the TRIPS Agreement" (Abbott, 2002: 481-482). It included specific concerns and presented concrete and detailed remedies. It can be described as reflecting an offensive distributive strategy (distributive in the sense of claiming value from others' positions and offensive in the sense of representing the demandeur rather than the defender).

For its part, the U.S. was caught somewhat off-guard. According to Abbott, "the U.S. and the like-minded group (Australia, Canada, Japan, and Switzerland), as well as the WTO Secretariat, appeared to have underestimated the intense concern among developing Members on this set of issues" (2002: 482). The U.S. and its supporters' response can be described as defensively distributive, advocating "policy positions that sought to discount the fact that problems existed, drawing battle lines rather than establishing bases for further discussion" (Abbott, 2002: 482-3). The U.S. position echoed PhRMA's standard response that poverty, not patents, are the barrier to access. The U.S. focused on inadequate health infrastructure in developing countries and urged a "comprehensive approach" to deal with health problems. The TRIPS Council agreed to reconvene in July for further discussion.

At the July 25th follow-up meeting, the African Group presented a "Statement by the Africa Group: TRIPS and Public Health Informal Session of the WTO TRIPS Council" expressing its displeasure with the U.S. efforts to deflect attention away from the role that TRIPS might play in obstructing access to medicines. Referring to the U.S.

and like-minded group's statement of June 20th urging a "comprehensive approach" the statement read:

It is not within the mandate of the TRIPS Council to talk of the infrastructure in different countries, in terms of hospitals, doctors and nurses. Nor will [it] be useful for this forum to discuss the global funds and other initiatives for the purchase and distribution of medicines. These issues belong and are being addressed in their appropriate fora and institutions.... We must be clear about the mandate and objective of our exercise in this forum; that is, to examine the various provisions of the TRIPS Agreement and issues of public health and access to medicines, and most importantly, to ensure that the implementation of the TRIPS Agreement does not amount to an obstacle to the promotion of access to affordable medicines and the protection of public health (ICTSD, 2001: 59).

Throughout the summer the developing country coalition intensively worked on its positions in collaboration with a supportive World Health Organization (WHO), NGOs, and a number of legal and economic experts whose presentations were coordinated through the Quaker United Nations Office (QUNO). QUNO provided a venue for several important meetings, and posted relevant expert papers on its web site.¹³ Developing country delegations made use of this research in preparing their proposals.¹⁴

On 19 September the TRIPS-health coalition tabled a long joint proposal for a special ministerial declaration (IP/C/W/312 and WT/GC/W/450). The coalition members wanted a separate declaration because they feared the issue would get too little attention if it were folded into the main declaration.¹⁵ Paragraph one proposed that ministers establish the sweeping principle that "nothing in the TRIPS Agreement shall prevent Members from taking measures to protect public health." Its authors modeled this language on existing TRIPS provisions such as article 73 (b) that established a general exception for any measures a member feels are necessary for its security interests.¹⁶ The objective was a political declaration that "was not legally binding but would have a legal effect."¹⁷ It was expected to tip WTO panels and the Appellate Body to favor health goals when they were asked to apply the rules in particular disputes. The Brazilian delegation argued consistently to their coalition colleagues that getting agreement to this first paragraph should be the top negotiating priority.¹⁸

The proposal included numerous other technical demands as well, all of which would have tipped the regime more in favor of developing country health authorities and against foreign pharmaceutical firms. One provision would extend the transition period by another five years before developing countries would be required to provide patent protection. One of the most important specified that "a compulsory license issued by a Member may be given effect by another member." This rule would seem to authorize

¹³ <http://www.quno.org>

¹⁴ Interview, African coalition delegate, Geneva, 4 November 2002.

¹⁵ Interview, African coalition delegate, Geneva, November 4, 2002.

¹⁶ Interview, African coalition leader, Geneva, November 4, 2002.

¹⁷ Interview, Latin American delegate, Geneva, October 21, 2002.

¹⁸ Ibid.

India and Brazil to export generics to African countries lacking generic producers, overriding the TRIPS Article 31f qualification to the contrary. Paragraphs 4 and 8 of the proposal also look like ambitious efforts to amend TRIPS at Doha, in effect. Several of these greater technical demands might have resulted from logrolling among coalition members at the early stage. Or they might have been intended from the outset as elements of a mixed strategy, items that could be dropped during the endgame in return for US concessions on the top priority.¹⁹

The same day a counter-coalition of the US, Switzerland, Canada, Japan, and Australia tabled an alternative response to the public pressure. Objecting that the first proposal was too sweeping, their brief general draft (IP/C/W/313) for the preamble of the main ministerial declaration would have had WTO ministers recognize the problem of poor peoples' access to medicines to treat pandemics, affirm in general the appropriateness of using the flexibilities already in TRIPS, and also affirm that the existing agreement is part of the solution, on the familiar argument that patent protection is a necessary incentive for research and development. This language was narrower in all respects. It restricted the issue to access to medicines, maintaining that language extending to public health in general "could be used to justify broad exemptions to TRIPS rules beyond what is needed to address health emergencies."²⁰ It referred to medicines needed to treat pandemics such as AIDS, malaria and tuberculosis only and not other diseases. And it would not have widened any exceptions or settled any disputes over the rules' interpretation.²¹

In October the U.S., still reeling from the September 11th terrorist attacks on New York City and Washington, D.C., was gripped by anthrax attacks. In what was presumed to be another terrorist attack, powdered anthrax had been sent through the mail killing several postal and media workers. Numerous buildings on Capital Hill were evacuated when traces of anthrax were found. Some leaders in the U.S. and Canadian governments discussed issuing compulsory licenses for ciprofloxacin (Cipro) to ensure adequate emergency supplies of the drug. Ultimately these countries negotiated steep drug discounts with Bayer, just as Brazil had done with Roche and Merck. The irony was lost on no one. Developing country delegations also raised North American hypocrisy privately with U.S. negotiators in Doha face to face. One reported, "I asked, 'Why are 10 lives sufficient to [break a patent in your country] but 1 million lives in developing countries are not sufficient? What is the difference?'"²² Negotiators brought this exogenous development into the negotiating process.

In the fall USTR Zoellick made two lesser offers to subgroups presumably in the hope of splitting the coalition and burying their proposal. He offered to extend TRIPS transition periods for pharmaceutical products until 2016 for least developed countries. This would have practical and legal benefits for those countries but would do nothing to increase supplies of medicines where they were lacking. And it would not apply to

¹⁹ Interviews, WTO secretariat and delegates, November 2002

²⁰ *International Trade Reporter*, October 25, 2001, 1686.

²¹ *Inside US Trade*, September 28, 2001, 11.

²² Interview, Latin American WTO negotiator, London, 19 December 2002.

Brazil, India, or 18 African countries including the largest and most active in the WTO. Second, Zoellick offered to observe a moratorium on TRIPS dispute actions against all sub-Saharan African countries for measures they took to address AIDS.²³ The African Group was the leading demandeur and this would address their most pressing worry. If they accepted, the Bush administration could safely veto the more sweeping coalition proposal, leaving exposed the Asian and Latin American members including India, Brazil, and Egypt, which had substantial pharmaceutical industries and domestic markets.²⁴ In a boundedly rational world it was not obvious these moves would fail.

In Geneva, however, no coalition ambassador broke ranks. Ambassador Stuart Harbinson of Hong Kong-China, chair of the WTO General Council, tried informally to craft a compromise and made some headway. But neither side was willing to accept the other's language for the most important paragraph. On October 27th Harbinson issued a single negotiating text on TRIPS and health that presented two options in square brackets. Option 1 favored by the southern coalition read as follows:

Nothing in the TRIPS Agreement shall prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement shall be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to ensure access to medicines for all.

In this connection, we affirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement which provide flexibility for this purpose.

Option 2, favored by the U.S. and its supporters read as follows:

We affirm a Member's ability to use, to the full, the provisions in the TRIPS Agreement which provide flexibility to address public health crises such as HIV/AIDS and other pandemics, and to that end, that a Member is able to take Measures necessary to address these public health crises, in particular to secure affordable access to medicines. Further, we agree that this Declaration does not add to or diminish the rights and obligations of Members provided in the TRIPS Agreement. With a view to facilitating the use of this flexibility by providing greater certainty, we agree on the following clarifications.

As before, Option 2 narrowed the declaration, and the phrase "does not add to or diminish the rights and obligations of Members" sharply circumscribed any possible legal effects. This language had been borrowed from the WTO's Dispute Settlement rules ('T Hoen, 2002: 42).

²³ *International Trade Reporter*, October 25, 2001, 1687; *Financial Times*, October 25, 2001.

²⁴ *International Trade Reporter*, October 25, 2001, 1687; *Financial Times*, October 25, 2001,

Celso Amorim, the Brazilian ambassador, made clear that Brazil and the coalition would prefer no declaration to one that excluded their sweeping general principle. Amorim had had long experience negotiating over TRIPS issues from the Uruguay round and bilaterally with the United States, and he moved into a leading role for the coalition.²⁵ He reasoned that with all the popular attention to the issue in the North, the coalition would have a better chance with ministers at the political level than with Geneva ambassadors. He did not object to both options appearing in the single negotiating text, but threatened that if Harbinson omitted the coalition's version, Brazil would reopen the entire Doha package.²⁶ Evidently the threat was credible. Harbinson sent both to Doha.

The Endgame in Doha

The 146 ministers got down to business on November 10. The coalition negotiators fought off splitting tactics and maintained their unity, but also mixed some integrative tactics into their mostly distributive strategy to break the impasse and close the deal. The intense activity surrounding the medicines issue prior to the November 2001 Doha meeting prompted Mike Moore, WTO Director General, to declare at the start of the meeting that “the TRIPS and health issue could be the deal-breaker for a new trade round” (T Hoen, 2002: 42). Brazil signaled its determination by bringing its Health Minister (who was also a candidate for President) to participate; this was the first time that a developing country health minister had ever participated in a trade negotiation (Viana, 2002). Moore appointed Luis Ernesto Derbez of Mexico to serve as mediator to facilitate a settlement on the Trips/health issue, in parallel with other mediators working on five other outstanding issues.

Just before going to Doha the United States invited the African ministers to Washington, where they were again offered the moratorium. Reportedly Kenya's Trade Minister Nicholas Biwott, one of the most influential African leaders, was tempted to accept. But internal bargaining prevented him from defecting from the coalition. Biwott was serving at the time as head of another WTO coalition, the African-Caribbean-Pacific States. Geneva diplomats reportedly led by Zimbabwe had persuaded the ACP group to decline the moratorium offer—it did not apply to the Caribbean—and hold out for the more sweeping principle. This made it awkward for Biwott to take a different position, and in Doha he stayed within the fold.²⁷

In Doha Derbez called a meeting in which some 25 countries participated. NGO representatives were busy outside the room. By now the US attitude reportedly had changed. Having failed to open any cracks in this large coalition and preferring an overall WTO deal, Zoellick chose to fall back and negotiate on the basis of option 1 (Abbott, 2002: 488, interview, London), over the objections of his pharmaceutical industry. On the third day the US and Brazil, representing the two camps, reached final

²⁵ Interviews with delegates and Secretariat officials, Geneva, November 2002.

²⁶ Interview with a Latin American delegate

²⁷ Interviews, two WTO ambassadors, Geneva and London, November and December 2002.

agreement on language. The declaration (WT/MIN(01)/DEC/W/2) included a slightly amended version of the coalition's top principle:

We agree that the TRIPS agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment 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.

It affirms members' rights to issue compulsory licenses and the freedom to determine grounds for such licenses. US efforts to limit the Declaration's applicability to "pandemics" and "crises" failed; even the title of the Declaration underscores the developing countries' preferred, broader, reference to "public health." The US agreed to drop the language proposed to limit the Declaration's legal effects while still giving least developed members a ten-year extension of the deadline by which they must provide patent protection for pharmaceuticals.

The coalition, in exchange for this fallback on its top priority, agreed to fall back from several other demands, mixing integrative steps into their strategy. None of the most ambitious ideas in their formal proposal appeared in the final declaration. Perhaps the most significant retreat was to agree to postpone until 2002 discussion of how to resolve the problem of poor countries lacking drug production capacity. One coalition leader later said that at that time neither side's thinking about how to solve it was well advanced.

The outcome, the Doha Declaration on TRIPS and Public Health, reflects the coalition's core demand. "Our expectations were fully met," said Paolo Teixeira, Brazil's top AIDS official. "Even six months ago, this was unthinkable."²⁸ The Brazilian delegation was satisfied with its status as "soft law" that can guide dispute settlement panels.²⁹ Despite PhRMA's claims to the contrary (PhRMA, 2001), it is difficult to imagine that a Declaration that it fought so hard to prevent was a gain for PhRMA (see also Rozek and Rainey, 2001). The declaration largely embraced the view that TRIPS should not be a barrier to developing countries seeking access to medicines. The declaration provided more favorable guidance to dispute panels and encouraged governments to exercise their rights. It probably signaled that the U.S. would hesitate to file complaints when they do. It might also improve poor countries' leverage when negotiating with multinational pharmaceutical firms over prices during emergencies. The coalition was clearly better off than before 2001 and it gained more than the Like Minded Group, whose outcome is described in a companion paper.

²⁸ *Wall Street Journal* November 14, 2001.

²⁹ Interview with a WTO ambassador, London, December 19, 2002. The eventual value of this declaration will be determined as disputes are decided and policies and practices adjust. For diverse early assessments, see Abbott 2002: 489; Charnovitz, 2002; Garcia-Castrillon, 2002; Horlick, 2002; Schott, 2002; 't Hoen 2002: 43-44; Wolff, 2002).

Conclusions

One possible objection to the preceding analysis might be that the outcome could be explained without referring to the negotiation process at all, by referring instead to prior preferences of the players, their relative power, or the nature of the international institution. We began, however, by showing that this outcome was surprising to such a perspective. If the dominant powers' preferences had been sufficient to determine the outcome, there would have been no WTO declaration at all or one expressing sympathy for victims while reaffirming the status quo without qualification. Negotiations cannot be examined in a vacuum, but the external context does not fully determine negotiated outcomes.

Any attempt to explain this outcome without reference to the negotiation process would miss much of the answer. We have tried to demonstrate that familiar background variables such as prior preferences and power leave much leeway for choice in negotiations. We have highlighted several choice points where boundedly rational players could well have chosen differently, in which case the collective interaction probably would have proceeded along a different path. Developing country governments could easily have spent their extremely scarce trade negotiating resources on other issues. Obviously there would have been no WTO declaration if they had not proposed one, and almost certainly none had its authors not organized a governmental coalition to promote it. The global firms could have chosen not to file complaints against Nelson Mandela and developing countries on three continents. If they had not, their NGO opponents probably would not have mobilized against them as widely in the world, as quickly and as noisily. And unless governments had launched some public reframing campaign of their own, they probably would not have had the domestic Northern support to achieve a WTO declaration as early as 2001. During the Geneva preparations, many weak-state coalitions might have been reluctant to threaten to hold the entire WTO round hostage—a relatively bold distributive tactic. If this coalition had not threatened or if it had been smaller and less credible, the mediator would have been more likely to lean toward the US position in drafting the single negotiating text that framed the discussions in Doha. If this coalition had not actively managed its internal dynamics, it could well have fragmented as late as Doha, as the Like Minded Group did. In that scenario if all else had been as it was, the health outcome probably would have been lesser changes providing only limited benefits to some coalition members and not the more general change in soft law and the larger symbolic victory. On the other hand, had all else been the same except the coalition had adhered strictly to distributive tactics right to the end --refusing all offers at compromise short of its original proposal, as the Like Minded Group did--the Bush administration would have been much more likely to choose to accept a deadlock despite some public opinion costs at home. All this is not to say that bargaining is ultimately random. It is to say that researchers need to concentrate more theoretical and empirical work on discovering regularities in this process.

Looking beyond this particular case, this coalition benefited from exogenous conditions that would be difficult to duplicate in the same exact combination elsewhere. Most obviously, few trade issues present anything as compelling as the horrifying AIDS

pandemic to bring popular pressure to bear on dominant governments to make concessions. The anthrax scare and the quick consideration of breaking drug patents posed a timely opportunity to weaken the credibility of the US negotiating position in the WTO. The TRIPS/health coalition also enjoyed two institutional advantages in 2001 that might not always be present. The WTO had already suffered an embarrassing debacle in Seattle in 1999, which by this time was history. Leaders of at least the larger trading governments believed that a second failure would be devastating for the organization's credibility and legitimacy, which probably lowered somewhat the 2001 reservation values for governments that valued the organization. Furthermore, the 2001 talks were designed only to launch a new round. At the end, positions might be even firmer than they were.

Yet none of this guaranteed that the trade ministers would hand the weak countries a victory on health in 2001 regardless of what they and the NGOs did. External factors do not mean much unless negotiators make efforts to convert them into negotiating currency. Other crises—such as in Rwanda and Sierra Leone—have inflicted huge objective humanitarian costs but have not been followed by a significant agreed international response. What sometimes intervenes between exogenous conditions and outcomes is the process of framing and reframing, mobilizing concern and support, and negotiating. In this instance developing countries deftly highlighted the magnitude of the crisis, solicited NGO support and underscored North American hypocrisy when the opportunity presented itself. There is no reason why analogous intervening processes could not operate to some degree on issues less dramatic than drugs to save the lives of dying people. Our claim is not that the negotiation process is the only thing that affects outcomes, but that it makes a significant difference and needs more attention.

In this case, this set of mostly weak states managed to gain significantly from a WTO negotiation despite the unfavorable power asymmetry they faced. They worked together as an explicit coalition, and they made it larger than most, creating unusual credibility should they threaten to block the whole organization. They then did make such a threat and it was believed. Through internal bargaining they decided to spurn lesser offers that could have undermined their common proposal and their threat credibility. This group followed a mixed-distributive strategy, one that attempted mainly to shift value from the U.S. and its friends but was also prepared to drop demands in return for concessions in order to close the deal. The southern governments worked in tandem with a public NGO campaign to raise popular awareness of their problems in the North and reframe the existing regime in a manner more favorable to their proposal. In the public mind the NGOs framed the WTO rules in light of the AIDS disaster and raised the political cost for trade ministers who do nothing to help. Each of these aspects of this case suggests a hypothesis about the negotiation process that is worth checking in a variety of regimes.

In a world of bounded rationality, much of the negotiation process is a contest of partisans trying to establish the dominant frame of reference. The more a weak-state coalition can do to prevail in this subjective contest, the larger its gains are likely to be. Reframing efforts may take forms other than an NGO campaign. Analyzing negotiations

on this level shows that rationalist and constructivist insights are complementary and should be considered together more often.

But generally which arguments will prove to be persuasive, under which conditions? International relations scholars have not been able to establish much valid theory on this elusive issue. But we will conclude with speculations pertaining to ethical arguments in particular, about which some ideas are accumulating. Scholars agree about the general sequence of the process – problem definition, prescription, and politicization (Crawford, 2002: 102, 109; Joachim, 2003: 268; Keck and Sikkink, 1998; Price, 1998; Sell and Prakash, 2004), yet highlight different elements as being decisive in shaping outcomes. For example, Keck and Sikkink (1998) have argued that framing that emphasizes “bodily harm to innocents” is more likely to be successful. Richard Price (1998) has argued that framing works best when advocates are able to graft a new policy item or perspective onto an existing policy frame. Sell and Prakash (2004) highlight political opportunity structures and the role of agency. Joachim (2003) focuses on organizational capacities and access to institutions. Albin (2001) and Muller (2001) examine framing and ethical argument as a way to discover joint gains. As Albin points out:

Negotiators are ultimately motivated... to act upon grounds which others can accept as justified so as to reach and maintain cooperative agreements. Their frequent endorsement of impartial notions, such as justice as a balanced settlement of conflicting claims, means that a widely respected agreement can be reached. It entails that the voices and interests of weaker parties are taken more into account than if such values had not operated (229).

In this sense, analysis of ethical argument can be perfectly compatible with more utilitarian assessments of negotiation (Koremenos et. al., 2001). In a world of egoistic states in a condition of anarchy, negotiators must strive to make cooperation as self-enforcing as possible. When states need to rely on each other to achieve cooperative outcomes, “proposals which appear too self-serving and cannot be supported by some widely accepted principle rarely go far” (Albin, 2001: 227-228).

Constructivist theories of communicative action (Risse, 2000) also hold promise for negotiation analysis. These embrace a focus on process and reject the simplifying assumption of “mute” actors. Such theories allow “for the possibility that political actors may do things we expect of ourselves and of others in everyday life: allow ourselves to be convinced by a good argument, change our opinions, be able where appropriate to reconsider our goals, and not remain prisoners of established objectives and priorities” (Muller, 2001: 174). “Arguments that mobilize logic, empathy, or analogy” can serve to de-legitimize accepted practices (Crawford, 2002: 102).³⁰ For example, exposing hypocrisy or documenting unintended negative consequences of a policy can be powerful tools. Indeed, it is not even necessary that the negotiators themselves change their minds in the process. They may steadfastly cling to their original preferences, yet find the costs of acting on those preferences prohibitive if their counterpart’s framing efforts have

³⁰ On analogies and abstract reasoning see Breuning, 2003.

altered public perceptions of the meaning of those actions. By connecting patent protection to unnecessary death, the weak-state coalition and its NGO supporters made the USTR's BATNA increasingly unsavory.

By the same token, it is important to keep in mind that *all* is not argument and communicative action. Negotiations take place within a political, economic, cultural, and institutional context. Even the best arguments bump into irreducible material, political, or cultural realities that limit their impact. According to Coleman and Gabler, "engagement in truth-seeking or framing cannot always contain or change the tensions and severe social consequences that result from selecting, prioritizing, and acting upon one set of norms at expense of another" (2002: 483). These scholars examine the relationship between normative argument and institutional capacity and systematically begin to explore conditions under which communicative action will not result in change. This is promising work combining constructivist and materialist perspectives to arrive at general propositions. Negotiation analysis provides an excellent opportunity to combine these insights and expands opportunities to bridge analytical divides to explain important processes and outcomes in international politics.

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Abbreviations

ACT UP	AIDS Coalition to Unleash Power
BATNA	Best Alternative to Negotiated Agreement
CPT	Consumer Project on Technology
GSP	Generalized System of Preferences
HAI	Health Action International
ICTSD	International Centre for Trade and Sustainable Development
MSF	Médecins Sans Frontières
NGO	Non-Governmental Organization
PhRMA	Pharmaceutical Research and Manufacturers of America
QUNO	Quaker United Nations Office
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
USTR	United States Trade Representative
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization