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Do the WTO's rules on patent protection worsen the plight of people with AIDS in poor and developing countries?

AIDS, Intellectual Property Rights, and the WTO

Or is patent protection essential to promote innovation and research into new AIDS drugs?

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The Free Trade Agreement of the Americas: Is free trade possible in the post-Seattle world?

In recent years, violent protests against globalization have forced decision-makers and the public to question the benefits of greater world integration, and have also raised questions about entities and concepts which supposedly embody globalization, such as the World Trade Organization (WTO) and open trade. Despite these concerns, leaders of almost every country in the Western Hemisphere met in Quebec City, Canada, in April 2001, to continue an effort to promote the world's largest free trade agreement – which would create the Free Trade Area of the Americas (FTAA).

The process of negotiating and actually implementing an FTAA is hardly assured. Many question whether an FTAA will actually help the US economy and those of its neighbors. Others say that the US doesn't have the political will and public support needed to join an FTAA. Opponents argue that the FTAA will simply be an extension of the North American Free Trade Agreement (NAFTA) which, they claim, has hurt the environment and driven down labor standards. The process of negotiating an FTAA could determine whether globalization will continue to be a driving force in the world or an idea whose time has peaked.

FTAA: An Agreement Begins to Take Shape

If successfully implemented, an FTAA would cover over 800 million people in every nation in the Western Hemisphere (except Cuba). The FTAA would have a combined income of over $11 trillion and its trade figures would exceed $3.4 trillion. NAFTA is currently the largest free trade agreement in the world but only includes three nations – Canada, Mexico, and the US. An FTAA would progressively eliminate restrictions on trade such as tariffs and would also create common trade and investment rules among its members. Unlike the Economic and Monetary Union within the European Union (EU), an FTAA would not create a single currency governed by centralized economic institutions or allow for the free movement of people within the FTAA. (For significant differences between a free trade agreement, a common market, and other economic arrangements, see page 9.)

Although political leaders have talked about creating an FTAA for over a decade, the idea gained momentum during the first "Summit of the Americas" in Miami, Florida, in 1994, where all of the democratically-elected leaders of the Western Hemisphere met to discuss areas of mutual concern such as drug interdiction, liberalization of capital markets, sustainable development, and the eradication of poverty. Although it represented just one of several proposals discussed by world leaders, the FTAA became the Summit's best-known initiative.

A favorable economic climate also pushed forward the creation of an FTAA. During the 1990s, in an attempt to strengthen their economies, many Latin and South American countries began to lower their trade barriers, liberalize their markets, and increase trade with the US and other trading blocs such as the EU. According to one think tank: "Trade and investment dominate the agendas of nearly every Latin American country in their relations with the US. Nothing is considered more important to the region's economic future than expanded access to US markets and investment capital."

Actual negotiations to create an FTAA began after the Second Summit of the Americas in Chile in 1998, when trade ministers agreed to produce draft FTAA agreements in areas such as market access, agriculture, competition policy, intellectual property, and investment. Despite growing protests against globalization, starting at the WTO Seattle meeting in 1999, talks to create an FTAA moved forward.

Benefits from an FTAA

Why do many governments support the creation of an FTAA? They say that by lowering trade barriers across the region, an FTAA agreement will allow member countries to sell their products in more markets, which, in turn, could create more jobs. Some economists estimate that an FTAA will open $1.5 trillion in markets for the US alone, and many US officials cite NAFTA as the prime example of the benefits of joining a free trade agreement. They say that NAFTA has increased US exports to Canada and Mexico by 78 percent and 114 percent, respectively; supported 2.7 million jobs in the US since 1993; and that an FTAA agreement will surely bring even more benefits.

Business leaders point out that countries in the FTAA region already buy 36 percent of all US exports and that this percentage could increase if trade barriers were brought down further through FTAA negotiations. Many policymakers also argue that the US will make fewer

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Founded in 1996, the Center for International Law supports teaching and research in all areas of international law, and concentrates on the law of international trade and finance. The Center organizes events whereby students, faculty, and guests of New York Law School may interact with experts who link theory and practice.

Will anti-globalization protestors curb people's appetite for the world's largest free trade agreement in the post-Seattle world? Or will globalization continue its driving force? KIRK ANDERSON © 2001

concessions than other countries during FTAA negotiations because the US already has an economy open to trade. On the other hand, other countries in Latin America would have to shoulder the burden of liberalizing their economies, lowering their tariffs, and undertaking regulatory reforms in order to open their economies to competition. Policymakers also point to the high cost of not joining an FTAA. Many countries in the region, such as Mexico, have already signed bilateral trade agreements with the EU which will give preferential treatment to the products of those countries.

Other supporters say that improved trade relations could also lead to greater cooperation in other areas such as curbing drug trafficking and improving human rights. And some activists even believe that an FTAA would help to strengthen democracy in the hemisphere because it would contain a "democracy clause" which bars from negotiations any country which curbs or retreats from democracy (which is the main reason why Cuba has been excluded from FTAA discussions).

Is the FTAA another WTO? Another NAFTA?

Opponents of an FTAA argue that the agreement would bring about the exact opposite of what supporters predict. Using virtually the same arguments when protesting against the WTO, opponents say that free trade agreements such as the FTAA will benefit only corporate interests by weakening environmental, labor, and worker safety standards; send American jobs overseas; and do nothing to help the poorest in our societies.

Citing NAFTA as their prime example, many activists say that the US has lost over 395,000 jobs because of free trade, and that new jobs created through NAFTA pay 27 percent less on average than previous jobs. Critics also argue that an FTAA will increase corporate power throughout the entire Western Hemisphere through "investor protection provisions." These provisions (which appear in the NAFTA agreement) have been criticized for allowing corporations to challenge health and environmental regulations as infringing on their "investor rights." Several companies have filed more than a dozen cases against the US, Canadian, and Mexican governments, claiming damages in the billions of dollars due to government regulations. Activists say that the US has been pushing to include these provisions in an FTAA agreement.

Finally, opponents charge that FTAA negotiations are undemocratic because the agreement is being drafted in secret. They claim that their input to a government-sponsored "FTAA Committee of Government Representatives on the Participation of Civil Society" has been consistently ignored.

The Key Question: Will the US join an FTAA?

An FTAA faces many substantial hurdles in the near future. Unlike NAFTA where only three countries had to negotiate a free trade agreement, the FTAA negotiations will involve 34 countries each at a different level of development (from the poorest countries in the hemisphere to the world's most technologically-advanced). According to the US Government Accounting Office, "the sheer scope and complexity of the trade rules contemplated and the number and diversity of countries participating will make it difficult to reach consensus." Furthermore, many developing countries such as Brazil believe that the US will never allow sensitive sectors of its economy, such as agriculture and textiles, to face full-blown competition from more competitive foreign imports.

Despite President Bush's support for an FTAA agreement, a continuing debate over whether future trade agreements should include provisions protecting labor and environmental standards has cooled public support for an FTAA. Opponents point out that recent polls show less and less support for free trade agreements. In one poll, 44 percent of respondents say that NAFTA helps the US while 30 percent believes otherwise. This debate has all but prevented President Bush (and former President Clinton) from receiving "trade promotion authority" (TPA) from Congress to negotiate free trade agreements.

TPA (once known as "fast track authority") allows the President to negotiate international trade agreements with other countries and submit them to Congress for an up-or-down vote without any amendments. TPA expired in 1994 and has yet to be renewed by Congress because of the impasse over the environmental and labor standards debate. (NAFTA was the last free trade agreement ratified by Congress.) While Democrats generally favor the inclusion of legally-enforceable labor and environmental standards in all future trade agreements, Republicans want to exclude these standards. Most other nations in the Western Hemisphere dismiss labor and environmental standards as a disguise for protectionism.

Without TPA, which has been described as an "essential precondition of any meaningful talks," many countries will not want to make serious concessions during FTAA

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The WTO and Intellectual Property Rights: Obstacles or Innovators in the Fight Against AIDS?

Critics of an agreement under the jurisdiction of the World Trade Organization (WTO) have accused it of impeding the global fight against AIDS. They say that this agreement on intellectual property rights has worsened the plight of people with AIDS in poor and developing countries by allowing the pharmaceutical industry to charge prohibitively high prices for AIDS drugs. But others respond that the protection of intellectual property rights promotes innovation and research into new medicines, including drugs that fight AIDS.

In recent months, a high-profile lawsuit pitting the pharmaceutical industry against South Africa's plan to provide low cost medicines revealed that neither less expensive drugs nor attacks on intellectual property rights alone will alleviate the AIDS epidemic.

Unaffordable drugs for a worldwide epidemic

Approximately 36 million people around the world are infected with the human immunodeficiency virus (HIV) which causes AIDS. This disease weakens the immune system to the point where the body can no longer protect itself from other diseases. Almost 22 million people around the world (including 400,000 Americans) have died from AIDS since the epidemic began in the early-1980s, and health officials estimate that approximately 5.5 million people are infected every year. By the year 2020, many experts believe that "HIV will have caused more deaths than any other outbreak in history."

According to the UN Program on HIV/AIDS (UNAIDS), the AIDS epidemic is particularly severe in Africa where over 26 million people are infected with the HIV virus (representing over 70 percent of the world's HIV cases) and where AIDS is now the leading cause of death. Particularly hard hit is South Africa where 20 percent of all adults carry the virus, more than any other country in the world. The World Health Organization (WHO) reports that serious illnesses such as AIDS are "a major reason why poor populations remain trapped in poverty" as more and more working adults succumb to the disease.

In order to treat AIDS, drug companies have created "anti-retroviral" drugs which limit the virus's ability to replicate itself in the human body. But the yearly cost of these drugs, ranging from $10,000 to $15,000 per person, makes them inaccessible to 95 percent of the world's people infected with HIV, says Doctors Without Borders, a health advocacy group. The WHO estimates that annual government spending on health care in developing countries averages $10 per person. The high cost of AIDS drugs has drawn fire from activists who say that a WTO-related agreement on intellectual property rights is contributing to the growing AIDS epidemic. What exactly is its role?

Intellectual property and patents under TRIPS

The Agreement on Trade-Related Aspects of Intellectual Property Rights (popularly known by its acronym "TRIPS") is a comprehensive multilateral agreement on intellectual property rights, covering such areas as patents, copyrights, and trademarks. It is one of the WTO-related agreements that came into effect in 1995. It is binding on the 142 member nations of the WTO.

The TRIPS agreement does not require all WTO members to have the same intellectual property laws. Instead, the TRIPS agreement sets out the minimum standards that each member nation must employ in its own legal system to protect and enforce intellectual property rights. A member nation may "implement laws that give more extensive protection than is required in the agreement." In terms of patents, the TRIPS agreement requires member nations to provide patent protection for any invention for at least 20 years from the filing date of the patent.

But patent protection is not absolute under the TRIPS agreement. For example, under TRIPS, a government may issue to individuals and companies a "compulsory license" which would allow them to make a patented product without the patent holder's permission, so long as the patent holder receives adequate compensation. Although the TRIPS agreement does not list the circumstances that justify giving out compulsory licenses, experts say that they may include cases where the public interest may be served (such as national emergencies). Since the inception of the TRIPS agreement, no member nation has ever issued a compulsory license because it is considered an extreme measure.

Many WTO members also engage in "parallel importing" which occurs when a *patented* product sold in one country is imported by another country where the same product is more expensive, all without the approval of the patent holder. The TRIPS agreement deals indirectly with parallel imports through a legal principle called "exhaustion" which says that once a company has sold a patented product, it "exhausts" or surrenders any rights over its further use. The agreement states that trade disputes concerning issues of exhaustion cannot be brought to the WTO for resolution. The Director General of the WTO recently added: "If governments authorize parallel imports of a patented drug from countries where it is sold more cheaply, this cannot be challenged at the WTO."

The pharmaceutical industry argues that compulsory licensing and parallel importing discourage innovation and research and do not guard against imports of counterfeit and substandard drugs. Critics respond that the drug industry views the use of compulsory licenses and parallel imports as the first steps to weakening their profitability.

Is TRIPS responsible for high AIDS drugs prices?

According to the AIDS Law Project, a legal advocacy group in South Africa, TRIPS and its patent protection rules require developing country members of the WTO to enforce drug patents which then allow companies "to set [drug]

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Are drug patents, pharmaceutical companies, and a World Trade Organization-related agreement responsible for the worsening AIDS epidemic in the developing world? KIRK ANDERSON © 2001

prices at artificially inflated levels." Were it not for these patents, they argue, other manufacturers would be able to produce generic versions at a fraction of the cost charged by the original manufacturers. Analysts say that the drug industry is one of the most profitable in the world with about $400 billion in annual sales.

Drug manufacturers vigorously deny these charges. The Pharmaceutical Research and Manufacturers of America (PhRMA), a lobbying group for the industry, says that it takes an average of 12 to 15 years at a cost of $500 million to discover and develop a new medicine. Of every 5,000 medicines tested, it says, only one is eventually approved for patient use. With such tremendous resources spent on research, the industry argues that it needs to set prices accordingly to recoup its costs. What incentive would drug companies have to make new medicines if patent laws don't protect their investments, said a spokesman.

PhRMA also argues that a poor health care infrastructure in many developing countries (including the lack of roads, clinics, trained professionals, and utilities) is a significant factor in limiting the availability of drugs. According to the AIDS Coordinator at the World Bank, "even if the [AIDS] drugs were free, we would still have a horrendous problem getting this to work," referring to the lack of a distribution system for medicines in many countries.

Political observers also assert that many developing country governments have essentially ignored the AIDS epidemic. Of all the governments in Africa, critics describe the South African government as "the most indifferent and recalcitrant in the face of the AIDS epidemic." They point out that its government spends about $4.2 billion a year on defense compared to $279 million on *all* drugs. Until recently, South African President Thabo Mbeki maintained that HIV does not cause AIDS, which critics say has prevented a more vigorous response to the AIDS epidemic.

The pharmaceutical industry also argues that "it would be overly simplistic, as well as wrong, to blame the TRIPS agreement" for the lack of access to AIDS drugs. They point out that since more than half of all developing nations have not yet implemented the TRIPS agreement, then it cannot be wholly responsible for the lack of access to drugs. PhRMA also says that many developing countries do not even manufacture or import in substantial quantities generic drugs deemed "essential" by the WHO (i.e. "those drugs that satisfy the health care needs of the majority of a country's population").

Although there is general agreement among the heads of several major international organizations that the protection of intellectual property rights through the TRIPS agreement is needed for the fight against AIDS, a new government policy in South Africa to lower drug prices brought the matter to a head.

South Africa deals with the AIDS crisis

According to the South African Ministry of Health, drug prices in South Africa are the fifth highest in the world. In an effort to make drugs more affordable (especially those for AIDS), the South African parliament, in 1997, passed legislation called "The Medicines and Related Substances Amendment Act" (also known as the "Medicines Act") which would require pharmacists to sell generic drugs unless a doctor indicated otherwise and would also establish a pricing committee with the power to set prices for medicines.

The most controversial part of the Medicines Act, Section 15(c), would authorize the Minister of Health to establish certain circumstances allowing for parallel imports of drugs in spite of existing South African patent laws which prohibit parallel imports of drugs already being manufactured in the country. After then-President Nelson Mandela signed the Medicines Act into law in December 1997, the Pharmaceutical Manufacturers' Association of South Africa and 39 pharmaceutical companies filed a lawsuit seeking to prevent the South African government from carrying out the provisions of the Medicines Act.

The pharmaceutical industry argued that Section 15(c) was unconstitutional under South African law because it would give the Minister of Health overly broad powers to authorize parallel imports without any guidelines or provisions for compensation to the patent holder. The pharmaceutical industry also argued that the Medicines Act would undermine their patent rights under TRIPS which, they point out, "guarantees the [exclusive] rights of patent holders to prevent third parties from selling or importing the patented good without the right holder's permission."

South Africa quickly responded that these patent rights were subject to limits under TRIPS in the forms of parallel importing and compulsory licensing. According to an observer, the South African government saw the Medicines Act as "a rather modest effort" to introduce cost savings on drug purchases. But the dispute soon came down to whether

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Trouble at the Border: Is NAFTA opening roads to unsafe trucks?

When the North American Free Trade Agreement (NAFTA) was implemented in 1994, supporters envisioned a free flow of goods and commerce unimpeded by national borders. But in a running six-year dispute, the US has restricted entry for Mexican trucks and their cargos of goods, citing safety concerns. Is this a genuine effort to stop unsafe trucks from traveling on American roads or protectionism simply disguised under the mantle of safety?

Under NAFTA – the world's largest free trade agreement – the US, Mexico, and Canada agreed to progressively eliminate tariffs and other barriers to trade. According to analysts, American and Mexican trucks transport over 75 percent of the $196 billion in goods traded every year between the two nations.

Under the current system, a long-haul truck from, say, Mexico will unload its freight to a "drayage" (or short-haul) truck waiting at the US-Mexican border. Once this drayage truck crosses the border, it transfers its freight onto an American long-haul truck which takes the cargo to its final destination. Trucking officials estimate that the transfer process at the border can cause delays of up to two days. Under current Department of Transportation regulations, Mexican trucks and carriers can also unload and pick up freight within a limited commercial zone in California, Arizona, New Mexico, and Texas (extending 20 miles north of the border), once they meet certain safety requirements.

Economists say that the NAFTA agreement will, in theory, save consumers millions of dollars in transportation costs by allowing US and Mexican trucks to deliver their goods straight to their destinations in either country rather than having to unload them several times. Beginning in December 1995, Mexican trucks should have been able, under NAFTA, to operate freely within the four border states (and not just in designated commercial areas), once the Interstate Commerce Commission approved their applications to operate in these states. And by January 1, 2000, trucks from all three NAFTA nations were supposed to operate freely within all countries.

The Teamsters union filed a motion in court to delay the implementation of the NAFTA cross-border trucking provisions by arguing that Mexican vehicles failed to meet US safety standards. Later citing a US Department of Transportation (DOT) report, the Teamsters said that 41 percent of Mexican trucks inspected at the US-Mexican border were turned away, in 1998, because of safety violations, which included defective brakes, broken lighting, and worn tires. Labor activists also believe that lower-paid Mexican drivers will take away jobs from American drivers. The DOT later suspended reviews of all applications from Mexican trucking companies to operate in the US.

Transportation experts say that the DOT safety statistics are misleading because they refer only to the short-haul drayage trucks which are deliberately less well-maintained and are used only to transfer goods across the border. They also claim that American drayage trucks are not always in better condition, citing a 45 percent failure rate in some US cities. Experts also argue that there are no conclusive data showing that Mexican long-haul trucks and drivers are any more dangerous than their American counterparts.

Businessmen from both sides of the border also argue that only the best-financed professional trucking companies can take advantage of the NAFTA provisions. So far, only two percent of all Mexican trucking companies have submitted applications for long-haul operations in the US. Ironically, many Mexican trucking companies are opposed to NAFTA cross-trucking provisions, saying that their trucks will be unable to compete with the "larger, more modern, and better-financed" American trucking fleets.

In January 2000, the DOT announced that it would continue its policy of blanket restrictions on all applications from Mexico until that country created safety regulations for trucks that met US standards. As of today, Mexican carriers are still confined to the designated commercial areas within the four border states.

Mexico challenged the US policy under NAFTA dispute settlement procedures. In February 2001, a NAFTA dispute settlement panel – composed of two Mexicans, two Americans, and one Briton – unanimously ruled that while the US had a right, under NAFTA, to set its own vehicle safety standards and to ensure that Mexican carriers met those standards, its restrictions on all Mexican carriers violated NAFTA obligations. Instead, said the panel, the US should have processed the applications on a case-by-case basis to see if each applicant met US safety standards.

President Bush announced that the US intended to comply with the panel's ruling but did not give more detailed information. Mexico responded that if the US didn't comply with the ruling, it could (under NAFTA provisions) impose sanctions on certain US imports in an amount equal to the business lost by Mexican carriers because of current US policy. Mexican truckers have claimed over $2 billion in lost business since 1995.

Despite the NAFTA ruling, the US Congress later passed several provisions which would prohibit the DOT from using any money to process trucking applications from Mexico and would impose safety and insurance restrictions on Mexican trucks operating in the US. ❖

NYLS Alumnus Profile

Name and Year: James H. Rodgers '89

Employer and Title: L'Abbate, Balkan, Colavita & Contini, L.L.P. (New York), Associate.

Describe your exposure to international law: My exposure has been three-fold: (1) working as corporate counsel for a multinational corporation; (2) practicing litigation in law firms; and (3) undertaking *pro bono* work and writing law review articles.

For most of my career to date, I have practiced admiralty and maritime law. Recently, I served as Associate Counsel at the American Bureau of Shipping & Affiliated Companies (ABS) which is one of the world's leading ship classification societies. ABS's affiliated companies also provide structural engineering and management system consulting services to industry, business, and governments worldwide. My experience at ABS put me full-time into the area of international law, since with ABS offices in over 60 countries, I was managing lawsuits commenced in foreign jurisdictions, negotiating contracts with foreign corporations, and evaluating European Union (EU) law and foreign law on a regular basis. The very nature of the maritime field ensures that the practitioner will be involved in international law, either because the firm's clients are foreign or the dispute involves international treaties or dispute resolution in foreign venues. I was fortunate enough to meet with foreign lawyers in Europe and become involved with both strategy and substantive law in foreign jurisdictions, including the UK, France and Italy. This actual involvement is invaluable for American lawyers because, through that process, a lawyer learns the common ground (and crucial differences) between US law and the law of other jurisdictions.

I continue to work in some aspects of international law at my current law firm where I am involved in commercial litigation which includes international cargo disputes.

In my *pro bono* work, I recently drafted a legal brief on behalf of an Irish *pro se* litigant (i.e. a litigant representing himself in court) who had sued the Irish government, asserting that the 1998 Good Friday Agreement was unconstitutional because the Irish Constitution was being changed without a proper referendum. Although the litigant lost his appeal before the Irish Supreme Court, the experience was worthwhile because our efforts put the Irish Constitution to the test which is always beneficial in a constitutional democracy. The Chief Judge later asked for and received a copy of a law review article I had written on the appeal.

To stay abreast in the field of international law, I continue to write law review articles for such publications as the *UCLA Journal of International Law and Foreign Affairs* and the *UC Davis Journal of International Law & Policy*. I also obtained an LL.M in international business and trade law from Fordham Law School.

Career advice for NYLS students: For those students interested in the practice of international law, my advice is first to learn the law of your own jurisdiction and become a good lawyer. If you understand the basic principles and doctrines of your own jurisprudence, you are in a better position to understand the dynamics of foreign and multinational law.

For those whose goal is to work as in-house counsel, seek multinational companies where there will be opportunities to become involved with either foreign law or foreign entities. Ultimately, it does not matter how or where you obtain international legal exposure. It is only important that you get this exposure and obtain a comfort level in dealing in an area of law which is often vague, murky, and without any definitive guideposts. That, of course, is what makes international law both challenging and rewarding.

I recommend that students take advantage of the international law courses at NYLS. In my case, Professor Lung-chu Chen was a huge influence on how I perceived international law, transnational law, and human rights. Prior to law school, when I served as a US naval officer, my perspectives in these areas were limited to those of the US and its strategic allies. The study of international and transnational law from a legal perspective educates the student as to the whole picture, not just the interests of Americans. Understanding what motivates not only other countries, but national as well as cross-border political groups is essential in the development of negotiating skills.

I recommend an LL.M for those students who are interested in working within the EU or dealing with issues of EU law. Most American lawyers do not have a full understanding of either substantive or procedural EU law. Areas of law that the EU lawyer needs to know include employment, antitrust ("competition law"), and cross-border banking and insurance. The legal system in Europe resembles the US system of state and federal law. So a lawyer needs to know the law of local jurisdictions and when EU law preempts such local law. This knowledge is essential when advising US corporations with offices in Europe or corporations doing business in Europe. I would also recommend an LL.M for those students interested in public international law as well as international trade law where knowledge of the World Trade Organization is important.

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the South African government had the legal right to implement the provisions of the Medicines Act.

Pressure on South Africa turns into publicity

Soon after the filing of the lawsuit, the US and other parties pressured South Africa to rescind its Medicines Act. Analysts estimate that American pharmaceutical companies control nearly half of the $2 billion a year South African drug market through its subsidiaries. Former President Bill Clinton reportedly lobbied his counterpart, Nelson Mandela, concerning the Act. Congress later passed a requirement that the State Department report on its efforts to curb the Medicines Act before South Africa received any US aid. Several drug companies such as Bristol-Myers Squibb closed their South African factories and canceled their investment plans, citing the new law.

AIDS activists, health officials, the WHO, and other supporters of the Medicines Act began a campaign to publicize the lawsuit. Public opinion soon turned in favor of South Africa. Political observers noted that the Clinton administration changed its AIDS policy when hecklers attacked Vice President Al Gore during his primary campaign for the Democratic presidential nomination. President Clinton later signed an executive order directing government agencies not to challenge intellectual property laws in African nations that seek to promote access to HIV/AIDS-related drugs. Several drug companies soon announced that they would dramatically reduce the prices of their AIDS drugs from $41 per day to $16 per day to eventually $1 per day.

In April 2001, after facing mounting public pressure and negative publicity, the drug industry settled its lawsuit against the South African government. A spokesman conceded that the Medicines Act (including its provisions on parallel imports) complied with the TRIPS agreement, and that the Act could be enforced by the South African government as written. But the drug industry noted that the settlement would allow them to form a working group with the government in drafting the regulations designed to implement the act.

Will the Medicines Act bring down AIDS drugs prices?

Even though the Medicines Act won't take affect until the end of the year, many doubt that it will increase access to AIDS drugs. The South African health minister stated that the government would not make the distribution of AIDS drugs a priority and, instead, urged people to treat AIDS through "improved diet and counseling." One activist said that the minister's remarks felt "like a stab in the back."

The UN estimates that a more effective strategy to fight the AIDS epidemic will require $7 to $10 billion a year. In 2000, the world spent about $2 billion on AIDS programs worldwide. Many AIDS activists and health officials are concentrating their efforts in creating a "Global AIDS and Health Fund" which will accept contributions from governments, foundations, and wealthy individuals (under the aegis of UNAIDS) to help individual nations build an effective health infrastructure and also to buy AIDS drugs. Total contributions from various countries and private foundations have totaled over $500 million to date (with $200 million coming from the US). ❖

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negotiations if Congress will be able to amend an FTAA agreement at a later date.

The future of the FTAA

In April 2001, during the Third Summit of the Americas in Quebec City, Canada (amidst thousands of anti-globalization protestors), trade ministers from 34 FTAA nations consolidated their draft agreements from the previous summit and began the process of working out differences on the actual text of an FTAA agreement.

At the conclusion of the summit, the FTAA heads-of-state agreed to: (i) hold a fourth summit in Argentina in 2003 where they will try to complete a second draft of an FTAA agreement; (ii) complete all FTAA negotiations by January 2005 and have all nations sign and ratify the final agreement by the end of that year; (iii) release a draft copy of the FTAA agreement to the public to encourage transparency; and (iv) continue to uphold the "democracy clause." The World Bank and the Inter-American Development Bank also committed more than $20 billion to "strengthen foundations in the Americas and prepare for free trade despite disparate levels of development."

Still, much work remains, and the process of negotiating, implementing, and administering an FTAA agreement remains an immense undertaking. The trade ministers must resolve significant disagreements in the draft agreements; agree on actual market concessions; and agree on the structure of the institutions which will administer the FTAA.

Critics point out that the leaders at the Summit provided no detailed plans on how to protect labor and environmental standards under an FTAA agreement. Although President Bush explored an option where countries would be subject to fines (instead of facing trade sanctions) if they did not protect labor and environmental standards, most of the other countries voiced opposition to such an idea.

As of July 2001, FTAA supporters in Congress conceded that they did not yet have the votes to approve an FTAA agreement (or even TPA). For example, the administration needs at least 218 votes in the US House of Representatives in order to ratify an FTAA agreement. Even if the President were to receive TPA, the American public still may not be convinced that another free trade agreement is in the best interests of the US. Many trade experts say that because FTAA participants have to work through many contentious issues, a 2005 deadline to sign and enter into force an agreement may be unrealistic. Negotiations could drag on for much longer or even break off in the future. ❖

A Concise Guide to Major Trade Agreements

Name of Agreement: Agreement Establishing the World Trade Organization (WTO)
Date Entered into Force: January 1, 1995
Member Nations: 142 member nations ranging from the least-developed countries to the most industrialized nations of the world. Over 30 nations are currently negotiating to join the WTO.
Description of Treaty: The WTO is the premier organization which sets the rules for international trade and the settlement of trade disputes. Contrary to popular belief, the member nations themselves (and not the staff of the WTO) decide on the rules and enforce them through consensus. The WTO operates on a most-favored nation basis (i.e. if a member grants a trade benefit to another member, it must do so for all other members). The WTO's three main agreements – the General Agreement on Tariffs and Trade (which covers trade in goods); the General Agreement on Trade in Services; and the Agreement on Trade-Related Aspects of Intellectual Property Rights (which covers trade in intellectual property) – serve as the foundation for the regulation of international trade. Under WTO rules, member nations must also hold periodic global trade talks to reduce further barriers to trade.
Statistics: The WTO encompasses 90 percent of world trade.
Dispute Settlement Provisions: If initial consultations fail to end a trade dispute among member nations, the WTO creates a dispute settlement panel to resolve the dispute under an established timeline. A panel's ruling may be appealed to the Appellate Body whose decisions are final. If a losing party does not comply with a final ruling, the WTO can authorize the winning nation to impose sanctions and other penalties. The WTO itself does not impose sanctions.

Name of Agreement: North American Free Trade Agreement (NAFTA)
Date Entered into Force: January 1, 1994
Member Nations: Canada, Mexico, and the United States
Description of Treaty: NAFTA, the world's largest free trade agreement, is designed to increase trade and investment among its member nations by progressively eliminating almost all barriers to trade by the year 2003 for its members only. Unlike a common market (such as the European Union), a free trade agreement does not establish common legislation among its members; allow unimpeded labor mobility; or establish a common external tariff for non-members. Also, in contrast to the European Union, NAFTA does not have central institutions which set economic and monetary policies for all of its member nations.
Statistics: NAFTA member nations have a combined gross domestic product (GDP) of $11 trillion and encompass over 360 million people. Total trade across North America surpassed $561 billion in 1999. With trade reaching $365 billion in 1999, Canada is the US's largest trading partner followed by the European Union with over $347 billion in trade. Mexico is the US's third largest trading partner with $196 billion in trade in 1999.
Dispute Settlement Provisions: NAFTA directs its member nations to resolve trade disputes first through consultations. If these efforts fail, NAFTA may create a special panel to resolve differences. Members that don't comply with a panel decision may face sanctions from the winning country. NAFTA itself does not impose any sanctions.

Name of Agreement: European Union (EU or the "Common Market")
Dated Entered into Force: March 25, 1957
Member Nations: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom
Description of Treaty: The EU is treaty-based, with an elaborate institutional framework. Member nations cede their sovereignty in many areas of governance to certain institutions (such as the European Council of Ministers, European Commission, European Parliament, and the European Court of Justice) in return for greater economic and political integration. The EU is also known as a "common market" where, in direct contrast to a free trade agreement, members have adopted a common tariff applicable to non-members. In 1993, most members of the EU decided to create a single currency (the euro) and a European Central Bank to coordinate monetary policies among its member nations. There are also policies for facilitating the

Continued on next page

movement of people within the EU. During trade negotiations or in the event of a trade dispute with other countries, the EU acts as one political entity.
Statistics: With a population of over 375 million people, EU member nations had a combined GDP of over $8 trillion in 1999. The EU accounts for 18.2 percent of world trade.
Dispute Settlement Provisions: The European Court of Justice (based in Luxembourg) was created to uphold EU law; ensure that each member nation interpreted and applied that law in the same manner; and settle disputes among members. In the event that a member nation does not comply with the Court's ruling or fails to fulfill its obligations under the EU treaty, the Court may impose fines and other penalties.

Name of Agreement: MERCOSUR (Spanish acronym for "Common Market of the Southern Cone")
Date Entered into Force: January 1, 1995
Member Nations: Argentina, Brazil, Paraguay, and Uruguay
Description of Treaty: MERCOSUR is a common market which supposedly allows for the free movement of goods, capital, labor, and services among its four member nations. Despite its name, MERCOSUR more resembles a customs union, which is an agreement a step below a common market – nations agree to remove trade barriers and to establish a common external tariff on non-member nations. MERCOSUR does not call for the creation of a single currency or supranational institutions to coordinate economic policy.
Statistics: MERCOSUR is the third largest trading bloc in the world after NAFTA and the EU, and represents 25 percent of total world trade. The combined GDP of its members exceeds $1 trillion, and it covers a population of over 220 million people. In 1997, trade with the US exceeded $141 billion.
Dispute Settlement Provisions: Trade disputes are resolved through direct negotiations among member governments. If the disputing parties cannot reach a settlement, a Common Market Group will make recommendations on how to resolve the dispute.

Name of Agreement: Association of Southeast Asian Nations (ASEAN)
Date Entered into Force: August 8, 1967
Member Nations: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Viet Nam
Description of Treaty: First formed as an association of countries to promote political, economic, and social cooperation, ASEAN later instituted a system of preferential tariffs for member nations on basic commodities and raw materials. ASEAN members have had few summit meetings among their heads-of-state but have sometimes spoken with one voice when negotiating with other trading blocs. In 1992, the members of ASEAN agreed to create a free trade agreement within 10 years, though most political analysts believe that such an agreement will not come to fruition.
Statistics: ASEAN encompasses a population of over 500 million people with a combined GDP of over $1.8 trillion.
Dispute Settlement Provisions: A voluntary ASEAN Law Association interprets existing rules and helps to negotiate settlements among disputing ASEAN members.

Don't these trade agreements violate WTO membership?

Almost every nation listed in every trade agreement above is a member of the WTO which calls for member nations to treat one another on a most-favored nation (MFN) basis (i.e. if one member grants a trade benefit to another member, it must do so for all other members). But don't these regional and free trade agreements violate the MFN principle by extending preferential treatment to only certain countries? Yes and no. While regional and free trade agreements do violate MFN treatment, the WTO allows its member nations to create and join other trade agreements under strict conditions. According to the WTO, these trade agreements should help trade flow more freely among members of these specific agreements, but should not create more restrictions on countries that are not members. Almost every WTO member participates in a regional trade agreement separate from the WTO. ❖

Global trade round-up

Agreement Mends Banana Split

The US and the European Union (EU) reached a settlement over a nearly decade-long fight over bananas that strained trade relations on both sides. Since 1993, EU trade rules and quotas have favored bananas imported from former European colonies located in Africa, the Caribbean, and the Pacific over bananas grown by American and independent companies operating in Latin America.

In 1997, the World Trade Organization (WTO) ruled that the EU's banana regime unfairly discriminated against Latin American bananas. After the EU failed to comply with the WTO's ruling, the US imposed retaliatory sanctions on $191 million worth of EU exports (the amount of damages suffered by the US as a result of the EU's banana rules) on products ranging from European cheeses to handbags.

The settlement, reached in April 2001, calls for the EU to phase in a temporary system of banana licenses (based on "historic reference points") which would increase market access in Europe for Latin American banana distributors. By 2006, the EU will completely replace its quota system for banana imports with a tariff-only regime. The US later lifted its sanctions after determining that the EU had begun to implement its new licensing system. ❖

Next WTO meeting many miles from Seattle

Members of the WTO will be meeting in Doha, Qatar, from November 9-13, 2001, in the hopes of launching a new round of global trade talks at the organization's fourth Ministerial Conference.

WTO member nations are currently in the process of working out their differences on an agenda for these talks. While the EU and Japan are pushing to include many broad topics, including the environment, social development, and labor issues, the US is concentrating on specific issues such as better access for services. Developing countries, which make up over 80 percent of the WTO membership, have threatened to oppose a new round of talks unless the WTO addresses their problems in complying with certain WTO agreements.

Human rights and labor activists argued that Qatar should not host the talks because its government prohibits public protests and bans political parties. The WTO responded that Qatar will allow accredited NGO representatives to attend the talks as observers. The last WTO meeting held in Seattle in 1999 gained notoriety for its failure to begin a new round of trade talks amidst tens of thousands of anti-globalization protestors who disrupted the meeting and caused millions of dollars in damage. ❖

Spare a Dime to the WTO?

In May 2001, the WTO announced it would accept contributions and donations of goods and services from private individuals, foundations, and nongovernmental and non-profit organizations to help fund WTO activities. According to the organization's Director-General, Mike Moore, the WTO's current budget resources cannot adequately cover the level of services demanded by its member nations, especially in the growing areas of dispute resolution, trade policy reviews, and compliance and implementation activities. "Every year, we are being asked by Members to do more than the year before," he said. "If the WTO members want the services they are demanding . . . . . they will have to pay for it."

The WTO's annual budget is capped at its 1995 level (when the organization first came into operation). Its current budget of $83 million comes from contributions made by member nations and is indexed for inflation. Under WTO rules, contributions are weighted according to a member's share of world trade. The US pays the largest share (almost 15 percent) or $12 million a year.

Without a larger increase in its operating budget, argued Mr. Moore, the WTO would be put under further strain. As an example, he noted that the release of dispute settlement reports is delayed by an average of three months due to translation backlogs. Last year, 32 percent of the WTO's budget were in arrears (i.e. several member nations were late in making their payments).

To help avoid conflicts of interest and to maintain the impartiality of the organization's dispute settlement process, all donations will be subject to approval from the WTO's Committee on Budget, Finance, and Administration before being placed in a trust fund. The WTO will not accept donations from for-profit organizations and companies. In addition to funding important areas of the WTO such as dispute settlement, Mr. Moore plans to use donations to support WTO reference centers in developing countries; training activities for the WTO's poorer members; and for seminars on trade-related issues. ❖

Center for International Law Symposium:

The Greening of the World Trade Organization?

Critics of the WTO have long accused the organization of promoting trade above all other concerns, including the protection of public health and the environment. In a recent landmark decision, however, the WTO Appellate Body affirmed a French ban on asbestos imports, thus allowing a member nation to restrict trade on public health grounds. What is the significance of this decision? Does the WTO need more explicit rules in protecting matters such as public health and the environment? What implications will this decision have on other trade disputes dealing with such issues? The faculty will discuss these and related questions.

Steve Charnovitz
Director, Global Environment and Trade Study, Yale University, 1995-1999

Petros C. Mavroidis
Professor of Law, Université de Neuchâtel, and Visiting Professor, Columbia Law School

Robert L. Howse
Professor of Law, University of Michigan Law School

Amelia Porges
Senior Counsel for Dispute Settlement, Office of the US Trade Representative, 1995-2000; and Senior Legal Officer, GATT Secretariat, 1990-1994.

Sydney M. Cone, III
C.V. Starr Professor of Law and Director,
Center for International Law, New York Law School

Wednesday, October 3, 2001
7:00 pm - 9:00 pm

The Association of the Bar
of the City of New York, 42 West 44th Street

International Law Career Panel

How difficult is it to break into this area of practice? Are there many opportunities in the public sector? What are the hot topics in private practice? Is an advanced degree necessary? How does one prepare for a career in this area of law? Come and ask the experts.

Jeffrey E. Jacobson '80
Jacobson & Colfin, PC
International
Entertainment Law

Eileen McCrohan '96
O'Malley & Associates
Immigration Law

Darlene Prescott '90
Office of Legal Affairs, United Nations
Public International Law

Rick Van Arnam, Jr. '87
Barnes, Richardson & Colburn
International Trade and Customs Law

Sydney M. Cone, III
C.V. Starr Professor of Law and Director,
Center for International Law, New York Law School
International Trade and Finance Law

Thursday, October 4, 2001
Room C-400, 12:45 pm – 1:50 pm

Lunch and beverages
will be served to the first 20 people