# Affirmative Case

**I affirm. Resolved: The member nations of the World Trade Organization ought to reduce intellectual property protections for medicines.**

### Part 1: Framework

#### I value morality because ought implies a moral obligation.

#### The criterion is maximizing well-being. Prefer this framework for a couple reasons.

#### Utilitarianism is the only moral system available to policymakers.

**Goodin 95’ Robert E. Goodin 95 professor of government at the University of Essex, and professor of philosophy and social and political theory at Australian National University, “Utilitarianism as a Public Philosophy”, Cambridge Studies in Philosophy and Public Policy, May 1995 HSLA//SC**

**Consider, first, the argument from necessity. Public officials are obliged to make their choices under uncertainty, and uncertainty of a very special sort at that. All choices – public and private alike – are made under some degree of uncertainty, of course. But in the nature of things, private individuals will usually have more complete information on the peculiarities of their own circumstances and on the ramifications that alternative possible choices might have for them. Public officials, in contrast, are relatively poorly informed as to the effects that their choices will have on individuals, one by one. What they typically do know are generalities: averages and aggregates. They know what will happen most often to most people as a result of their various possible choices. But that is all. That is enough to allow public policy-makers to use the utilitarian calculus – assuming they want to use it at all – to choose general rules of conduct. Knowing aggregates and averages, they can proceed to calculate the utility payoffs from adopting each alternative possible general rule. But they cannot be sure that the payoff will do to any given individual or on any particular occasion. Their knowledge of generalities, aggregates and averages is just not sufficiently fine-grained for that.**

#### Because public policy makers act on behalf of a collective body they must look at util first.

**Woller 97’ Gary, Brigham Young University, “A Forum On The Role of Environmental Ethics in Restructuring Environmental Policy and Law for the Next Century”, Policy Currents, 1997 HSLA//SC**

**Moreover, virtually all public policies entail some redistribution of economic or political resources, such that one group's gains must come at another group's ex- pense. Consequently, public policies in a democracy must be justified to the public, and especially to those who pay the costs of those policies. Such justification cannot simply be assumed a priori by invoking some higher-order moral principle. Appeals to a priori moral principles, such as environmental preservation, also often fail to acknowledge that public policies inevitably entail trade-offs among competing values. Thus since policymakers cannot justify inherent value conflicts to the public in any philosophical sense, and since public policies inherently imply winners and losers, the policymakers' duty to the public interest requires them to demonstrate that the redistributive effects and value trade-offs implied by their polices aresomehow to the overall advantage of society. At the same time, deontologically based ethical systems have severe practical limitations as a basis for public policy. At best, apriorimoral principles provide only general guidance to ethical dilemmas in public affairs and do not themselves suggest appropriate public policies, and at worst, they create a regimen of regulatory unreasonableness while failing to adequately address the problem or actually making it worse. For example, a moral obligation to preserve the environment by no means implies the best way, or any way for that matter, to do so, just as there is no a priori reason to believe that any policy that claims to preserve the environment will actually do so. Any number of policies might work, and others, although seemingly consistent with the moral principle, will fail utterly. That deontological principles are an inadequate basis for environmental policy is evident in the rather significant irony that most forms of deontologically based environmental laws and regulations tend to be implemented in a very utilitarian manner by street-level enforcement officials. Moreover, ignoring the relevant costs and benefits of environmental policy and their attendant incentive structures can, as alluded to above, actually work at cross purposes to environmental preservation. (There exists an extensive literature on this aspect of regulatory enforcement and the often perverse outcomes of regulatory policy. See, for example, Ackerman, 1981; Bartrip and Fenn, 1983; Hawkins, 1983, 1984; Hawkins and Thomas, 1984.) Even the most die-hard preservationist/deontologist would, I believe, be troubled by this outcome. The above points are perhaps best expressed by Richard Flathman, The number of values typically involved in public policy decisions, the broad categories which must be employed and above all, the scope and complexity of the consequences to be anticipated militate against reasoning so conclusively that they generate an imperative to institute a specific policy. It is seldom the case that only one policy will meet the criteria of the public interest (1958, p. 12). It therefore follows that in a democracy, policymakers have an ethical duty to establish a plausible link between policy alternatives and the problems they address, and the public must be reasonably assured that a policy will actually do something about an existing problem; this requires the means-end language and methodology of utilitarian ethics. Good intentions, lofty rhetoric, and moral piety are an insufficient though perhaps at times a necessary, basis for public policy in a democracy.**

### Contention 1: Developing Countries

#### The TRIPS agreement itself was negotiated and passed in an exclusionary manner, which ultimately makes IP Protections difficult to achieve in developing countries.

**Drahos 1 Peter Drahos; Australian professor, academic, and researcher specializing in the areas of intellectual property and global business regulation amongst others.; "Developing Countries and International Intellectual Property Standard-Setting." Journal of World Intellectual Property, vol. 5, no. 5, September 2002, p. 765-790. HeinOnline,** [**https://heinonline-org.prx.law.columbia.edu/HOL/P?h=hein.journals/jwip5&i=753**](https://heinonline-org.prx.law.columbia.edu/HOL/P?h=hein.journals/jwip5&i=753)**; accessed 7-29-2021; JPark**

**The first condition of democratic bargaining requires that developing country interests were represented at the TRIPS negotiations. On the face of it, this condition seems to have been met. Not all developing States participated in the TRIPS negotiations, but key developing country leaders on intellectual property, most notably India and Brazil, did send negotiators. Lying behind representation in democratic bargaining is the idea that the representatives have some continuity of voice in the process. In other words, exclusion must not be practised. Here, the track record of the GATT was not very good from a developing country perspective. This was one of the reasons why the United States had chosen it as a forum for intellectual property. In the Tokyo Round, the European Economic Community, the United States, Japan, Switzerland, New Zealand, Canada, the Nordic Countries and Austria on 13 July 1978 released a "Framework of Understanding" setting out what they believed to be the principal elements of a deal. Developing countries reacted angrily, pointing out that they had been left out of a process that was laying the foundations for a final agreement. The then-Director-General of the GATT, Olivier Long, recognized the problem of exclusion in his report but defended this behaviour as a practical necessity.'8 The deeper problem with this process was that it involved a strategy in which a non-representational inner circle of consensus was expanded to create larger circles until the goals of those in the inner circle had been met. The TRIPS negotiations saw the use of circles of consensus reach new heights.19 GATr negotiations had developed a traditional pattern, known as the "Green Room" process: "In the 'Green Room' process, negotiators from all engaged countries face each other across the table (traditionally in the Green Room on the main floor of the WTO Building) and negotiate. Drafts are exchanged and progress is noted as differences are narrowed and brackets are removed in successive drafts."20 This Green Room process had, in the case of TRIPs, been profoundly shaped by the consensus-building exercise that the private sector had undertaken outside of the Green Room. The European Commission was brought around to the U.S. view on the importance of securing a code on intellectual property. The Quad States (the United States, the European Community, Japan and Canada) were all enrolled in support of the U.S. business agenda, as were their business communities. Then there were the meetings of the Friends of Intellectual Property Group in such places as Washington, D.C., where the United States circulated draft texts of a possible agreement. After the negotiations on the details of TRIPs began in 1990, and especially after the breakdown of the Uruguay Round talks in Brussels over agriculture in 1991, further groups were created within the TRIPS negotiations to move the process towards a final deal, most notably the "10+ 10" Group, which consisted of a mix of developed and developing countries. As the TRIPs negotiations descended into higher levels of informality, the "10+10" was contracted or expanded to "3+3" or "5+5" or a Group of 25, depending on the issue. It was in these informal groups that much of the real negotiating was done and where the consensus and agreement that mattered was obtained. A list of these groups in roughly their order of importance would be: 1. The United States and the European Community. 2. The United States, the European Community and Japan. 3. The United States, the European Community, Japan and Canada (Quad). 4. Quad "plus" (membership depended on issue, but Switzerland and Australia were regulars in this group). 5. Friends of Intellectual Property (a larger group that included the Quad). 6. "10+10" (and the variants thereof such as "5+5" and "3+3"). The United States and the European Community were always part of any such group if the issue was important. Other active members were Japan, the Nordic States, Canada, Argentina, Australia, Brazil, Hong Kong, India, Malaysia, Switzerland and Thailand. 7. Developing country groups. For example, the Andean Group-Bolivia, Colombia, Peru and Venezuela; Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, Nigeria, Peru, Tanzania and Uruguay combined to submit a draft text in 1990. 8. Group 11: the entire TRIPS negotiating group. About forty countries were active in this group. It was the first three circles of consensus that really mattered in the TRIPS negotiations. Through the use of these circles, the TRIPS process became one of hierarchical rather than democratic management. Those in the inner circle of groups knew what TRIPS had to contain. They worked on those in the outer circle until the agreement of all groups to a text had been obtained. TRIPs was much more the product of the first three groups than it was of the last five. LDCs were not a part of any of the groups that mattered.**

#### That leads to inequalities within nations. Politicians create a hierarchy of access, which feeds racism, classism, and corruption. Vaccines prove.

**Seklala et al 21 – Sharifah Sekalala, Warwick Law School, University of Warwick, Coventry, UK; Lisa Forman, Dalla Lana School of Public Health, University of Toronto, Toronto, Ontario, Canada; Timothy Hodgson, International Commission of Jurists, Johannesburg, South Africa; Moses Mulumba, Center for Health, Human Rights and Development, Kampala, Uganda; Hadijah Namyalo-Ganafa, School of Law, Makerere University, Kampala, Uganda; Benjamin Mason Meier, Department of Public Policy, University of North Carolina at Chapel Hill, Chapel Hill, North Carolina, USA (“Decolonising human rights: how intellectual property laws result in unequal access to the COVID-19 vaccine,” 2021, pg. 4-5) julian**

**The high costs of vaccines also propagate inequalities within nations, as desperate countries try to recoup some of the costs by charging their people for vaccine access or using complex arrangements that prioritise some people over others. Egypt, for instance, is charging for the COVID-19 vaccine, which is likely to exclude the poorest people, who have already been severely affected by the crisis.43 In reality, it also means that wealthier individuals are prioritised, as they usually find it easier to pay for access. Those able to access vaccines in these countries, very often a small economic and political elite, are often in positions of power precisely along the lines of existing global inequalities and often to the prejudice of groups marginalised on the basis of gender, race and other grounds of discrimination prohibited under international human rights law. Facilitating vaccine access for more affluent members of society reinforces power structures at the expense of marginalised populations. In South Africa, conservative non-governmental organisations aligned closely with the interests of the white minority and elite corporate interests launched a court challenge in order to procure private supplies of vaccines, bypassing the nationwide mechanisms set up by the government to ensure equitable vaccine access. However, having faced opposition from human rights activists and the South African government, this litigation was ultimately withdrawn. (For more information on this litigation see ref 44 45.) Kenya has also prioritised diplomats for COVID-19 vaccination at the expense of health workers, and Indonesia has suggested that the ‘more productive’ members of society be vaccinated first.46 47 In other countries, such as Peru, political elites and their families and friends were secretly vaccinated before the broader populations. (See as examples ref 48 49.) An important issue at the boundary of national and international concerns is the potential use of ‘vaccine passports’.50 Free movement of goods is integral to one of the core objectives of the IHR, and yet many governments are proposing the use of COVID-19 vaccination passports as a mechanism for reopening their economies, which would discriminate against those who have not been vaccinated. The EU introduced vaccine passports in the summer of 2021 for entry into the eurozone and excluded vaccines that were made from the Serum Institute in India which is responsible for the majority of vaccines provided in the Global South.51 Vaccination disparities both within and between countries mean that many people in LMICs are unlikely to be vaccinated until 2023; therefore, vaccine passports would only further exacerbate both national and global inequalities and disproportionately restrict the rights of large swathes of the global population from exercising their right to freedom of movement on an equal basis.**

#### Reducing IPR is necessary to empower less resourced countries to develop publicly beneficial medicines and resolves big pharma’s inefficiencies.

**Chaudhry 17 Faisal Chaudhry; Assistant Professor of Law & History; Hanley Institute Sustainability Scholar; 12-1-2017; Intellectual Property And The Global Crisis Of Non-Communicable Disease (December 1, 2017). North Carolina Journal Of Law And Technology, Vol. 19, No. 2, 2017, Available At Ssrn: Https://Ssrn.Com/Abstract=3192074"; accessed 7-30-2021; JPark**

**However, by implicitly envisioning access solely in terms of the availability to the world’s poor of treatments for conditions that only or primarily afflict them, we have allowed an otherwise remote possibility—of multinationals becoming altogether unable to deliver therapies to the market—seem as if it is acute. As with ostensibly context-free normative reasoning in general, the access incentivization dilemma has thus carried an inherent tendency to facilitate status quo arrangements and directions of movement in law and policy making. Indeed, it is because of this reason that this Article has eschewed simply taking a traditional path of a normative argument for or against drug patents. By highlighting how the legal and administrative conflict in the developing world has tracked the changing face of its public health crisis more closely than existing discussion in the developed world, it instead urges decision makers to capitalize on the dramatic natural experiment now unfolding before our eyes. It is thus crucial to see that there has never been a better way to gauge whether departing from a regime of strict IPR will really push us to the brink of a world without medicines. Indeed, as the one example of infectious disease drugs that are close in their economics to those for NCDs has already shown, harmonizing away from strict patent rights has hardly prevented new forms of HIV/AIDS combination therapy from materializing. In fact, they have actually proliferated—much to the benefit of individuals in both the developing and developed world. In the final analysis, therefore, this Article’s plea is for policy makers to ensure that the natural experiment that the NCD crisis has created comes to fruition. In so doing, decision makers will be encouraging solutions that add to or even improve upon the best existing proposals for solving the ongoing drugs-for-the-developing world dilemma as it advances into its second generation of visibility. This is because existing proposals have tended to focus on actions by international institutions subject to a great deal of internal inertia and political pressure from the major power holders within the international system than developing countries themselves face. Given the focus of these proposals, moreover, they also have the downside of tending to leave the supposed normative intractability of the access-incentivization dilemma intact. In contrast, the solutions this Article tracks are not only practical but also possibly more forceful insofar as they originate from initiatives that are already being implemented by ground level actors in the developing world. This Article has argued that it is those actors who have led the way in addressing the public health crises their countries face to reconsider the true ethical and economic burdens that remain if pharmaceutical patenting is the default. Of course, it may only be a coincidence that the shifting context of legal and administrative conflict in low and middle-income countries has ended up dovetailing with the unexpected popular support in high-income countries for renegotiating the terms of free trade liberalization. Yet, even so, law and policy makers would be remiss if they fail to see the great opportunity that exists within the seeming crisis the world order is now going through. As we garner better evidence about the consequences of deviating from strict IPR in the NCD drug context, we will only end up better positioned to rewrite the rules of our global innovation system in a way that makes sense for a twenty-first century that has moved well past its post-Cold War antecedents.**

### Contention 2: Public Health Emergencies

#### Current patents slow down pandemic response and make existing flexibilities insufficient to resolve inequities.

**Johri and Labonte 20 Mira Johri and Ronald Labonte; Johri is Professeure titulaire, École de santé publique, Université de Montréal, Labonte is Professor and Distinguished Research Chair, Globalization and Health Equity, L’Université d’Ottawa/University of Ottawa; 11-5-2020; "COVID-19 drug and vaccine patents are putting profit before people"; https://theconversation.com/covid-19-drug-and-vaccine-patents-are-putting-profit-before-people-149270, Conversation, accessed 7-21-2021; JPark**

**The TRIPS flexibilities are important policies but they are not perfect. Rules allowing compulsory licensing apply only on a case-by-case and product-by-product basis. This slows down the ability of countries to scale up production of needed COVID-19 products. Developing countries with laws that permit compulsory licensing, or that have used such laws in the past, have also come under criticism and trade-bargaining pressures from both the European Union and the United States — homes to companies holding most of the world’s drug and medical-supply patents. Parallel importation is even more complex. Importing countries need to negotiate formal contracts with an exporting country’s producer. The products must be uniquely packaged. Approval is only for a specific amount for a specific time and for a specific purpose. TRIPS waiver opponents also argue that voluntary licences should take care of most COVID-19 shortage issues. But the ability to agree to a voluntary licence rests with the patent-holder and represents only a second-best short-term solution. Waiver proponents counter that today’s pandemic situation is novel, one in which more than US$70 billion public funding has gone to support COVID-19 research and development, often with no strings attached. A few companies have voluntarily given up some of their IP rights. Moderna, a vaccine front-runner, has said it would not enforce its patents and would license its COVID-19-related patents with other vaccine manufacturers. Its trade secrets for its vaccine, however, would not necessarily be shared. AstraZeneca will make its Oxford-researched vaccine available on a cost basis until the pandemic is over, although stipulating that only applies until July 31, 2021. Eli Lilly, in an agreement with the Bill & Melinda Gates Foundation, will forgo royalties for low- and middle-income countries for its (still-experimental) COVID-19 antibody treatment. But these are all one-off arrangements with an aura of charity rather than of obligation. As of Oct. 15, not a single drug company has joined the World Health Organization’s COVID-19 Technology Access Pool (C-TAP), which encourages industry wide contributions of IP, technologies and data to allow global sharing and manufacturing scale-up of all COVID-19 health products. Pharma appears reluctant to give up future potential IP windfalls.**

#### Reduction of intellectual property protections would be key to preventing the spread of virus as medicine producers get direct government support.

**Lindsey 21 Brink Lindsey; Lindsey is a vice president at the Niskanen Center, where his research focuses on policy responses to slow growth and high inequality. Prior to joining Niskanen, Lindsey was vice president for research at the Cato Institute. From 2010 to 2012, he was a senior scholar in research and policy at the Ewing Marion Kauffman Foundation.; 6-3-2021; "Why intellectual property and pandemics don’t mix"; https://www.brookings.edu/blog/up-front/2021/06/03/why-intellectual-property-and-pandemics-dont-mix/, Brookings, accessed 7-31-2021; JPark**

**The situation is different in a pandemic. Here the government knows exactly what it wants to incentivize: the creation of vaccines to prevent the spread of a specific virus and other drugs to treat that virus. Under these circumstances, the decentralized approach isn’t good enough. There is no time to sit back and let drug makers take the initiative on their own timeline. Instead, the government needs to be more involved to incentivize specific innovations now. As recompense for letting it call the shots (pardon the pun), the government sweetens the deal for drug companies by insulating them from commercial risk. If pharmaceutical firms develop effective vaccines and therapies, the government will buy large, predetermined quantities at prices set high enough to guarantee a healthy return. For the pharmaceutical industry, it is useful to conceive of patent law as the default regime for innovation promotion. It improves pharmaceutical companies’ incentives to develop new drugs while leaving them free to decide which new drugs to pursue – and also leaving them to bear all commercial risk. In a pandemic or other emergency, however, it is appropriate to shift to the direct support regime, in which the government focuses efforts on one disease. In this regime, it is important to note, the government provides qualitatively superior incentives to those offered under patent law. Not only does it offer public funding to cover the up-front costs of drug development, but it also provides advance purchase commitments that guarantee a healthy return. It should therefore be clear that the pharmaceutical industry has no legitimate basis for objecting to a TRIPS waiver. Since, because of the public health crisis, drug makers now qualify for the superior benefits of direct government support, they no longer need the default benefits of patent support. Arguments that a TRIPS waiver would deprive drug makers of the incentives they need to keep developing new drugs, when they are presently receiving the most favorable incentives available, can be dismissed as the worst sort of special pleading.**

### Contention 3: Innovation

#### Innovation is never in the interest of public health—only profit.

**Chaudhry 20 Faisal Chaudhry; Professor of Law, University of Dayton; 1-28-2020; "A secret reason Rx drugs cost so much: A global web of patent laws protects Big Pharma"; https://theconversation.com/a-secret-reason-rx-drugs-cost-so-much-a-global-web-of-patent-laws-protects-big-pharma-122028, Conversation, accessed 7-30-2021; JPark**

**Since 1994, Big Pharma has imposed ever more severe requirements around patent rights. They have insisted that patent rights are necessary to “incentivize” the availability of drugs for conditions like tuberculosis and malaria that, having no markets in the developed world, require guaranteed premiums from whatever countries they are sold in. Yet for just as long, critics have alleged that Big Pharma typically uses inflated, misleading or otherwise opaque cost data to tout the billions of dollars it claims to spend on drug development. Likewise, critics have continuously called attention to the way that most drug development is built on publicly funded research. And, finally, critics have never stopped highlighting the fact that Big Pharma long ago largely abandoned research and development for drugs for infectious ailments in developing nations, and increasingly switched to spending on blockbuster noninfectious disease drugs. Yet as diseases such as cancer and heart disease begin to take an even greater toll in the developing world, patents will extract an ever greater toll on patient populations across the world. In a developing world where public health problems increasingly look similar to the developed world’s, in fact, multinational pharmaceutical corporations could become better – not worse – places to expand their profits by tapping new markets for drugs like insulin and beta blockers.**

#### Patent law is abused to artificially block free market competition

**IMAK 18 Initiative for Medicines, Access, and Knowledge (medical non-profit organization focusing on patents). “Overpatented, Overpriced: How Excessive Pharmaceutical Patenting is Extending Monopolies and Driving up Drug Prices.” 2018 Report. JDN. http://www.i-mak.org/wp-content/uploads/2018/08/I-MAK-Overpatented-Overpriced-Report.pdf**

**Our analysis reveals that drugmakers file hundreds of patents to extend their monopolies far beyond the twenty years of protection intended under U.S. patent law. This abuse of the patent system by drugmakers is used to introduce repeated and extensive price hikes and block generic competition for years or decades. Significant policy reform is needed to curb these patent abuses and restore free market competition needed to help alleviate the drug pricing crisis in America today.**

#### That stagnates the growth of actually effective medical treatments.

**Chaudhry 17 Faisal Chaudhry; Assistant Professor of Law & History; Hanley Institute Sustainability Scholar; 12-1-2017; Intellectual Property And The Global Crisis Of Non-Communicable Disease (December 1, 2017). North Carolina Journal Of Law And Technology, Vol. 19, No. 2, 2017, Available At Ssrn: Https://Ssrn.Com/Abstract=3192074"; accessed 7-30-2021; JPark**

**First, some of the most effective existing therapies for treating infectious diseases are insulated by patent protection. This allows patent holders to price these therapies at a cost that the world’s poor are not able to afford. Second, the new therapies that are greatly needed for treating these same infectious diseases are few and far between. As discussed earlier, firms are more focused on creating drugs that are functionally similar to lucrative equivalents already on the market or instead focused on creating new drugs for treating diseases that are most prevalent in high-income countries that generate more revenue. 123 Therefore, with regard to drugs for neglected diseases in low and middle-income countries, the market has proven incapable. There is no coordinating a proper overlap between the willingness (due to the underlying inability) of the afflicted to pay for existing therapies and the prices at which drug makers are allowed to set their willingness to accept payment. In turn, the market has been incapable of generating new therapies for infectious diseases that are already undersupplied. We can further restate both halves of this two-sided failure for treating infectious diseases in terms of conventional economic theory. In the language of information economics, the failure to broaden access to communicable disease drugs corresponds to what Stiglitz calls the “static inefficiency” that IPRs create.124 Strict patent rights exclude end users or competitors from capturing the additional utility value that their increased consumption of (medicinal) goods would otherwise make possible. This is because the main input to such goods is knowledge, the use of which carries no marginal cost. If consumers were permitted to consume more knowledge-based goods, or, if competitors to the patent holder were able to consume more knowledge for production, then more welfare would materialize. Accordingly, with knowledge-based goods, there is not a prior reason to think increasing output will lead to rising costs and increases in consumer prices. Indeed, there also is ample reason to think they would actually decrease due to more robust competition and market expansion.125**