

# THE POLITICS OF NATIONAL INTELLECTUAL PROPERTY POLICY DESIGN AND THE PROVISION OF HEALTH SERVICES IN SOUTH AFRICA

CAROLINE NCUBE\*

*Professor, Department of Commercial Law, University of Cape Town*

## 1. INTRODUCTION

The position that states take in the international sphere on health and intellectual property (IP) policy matters is influenced by their national experiences and positions. Similarly, the national arena is influenced by global health diplomacy.<sup>1</sup> This paper seeks to examine how this iterative relationship has played out in South Africa in relation to patents, pharmaceuticals and access to medicines. It has been shown how the main African health diplomacy perspectives may be classified around the narratives of ‘unity and ubuntu’, ‘liberation ethic and demands of nationhood’ and ‘development aid or development policy’ which are outlined in Part 2 below.<sup>2</sup> This paper focuses on how these narratives have found expression in national discourse. In particular, it considers a recent interchange between the Minister of Health and a pharmaceutical company association in relation to their views on the draft National Intellectual Property (IP) Policy’s chapter on IP and public health.<sup>3</sup> This incident was quickly dubbed PharmaGate and was the subject of much media and social commentary. However, it has not yet been subjected to scholarly analysis of the nature advanced in this paper. There are other lenses through which to view PharmaGate, such as corporate monopolisation

\* LLB (Zimbabwe) LLM (Cantab) PhD (Cape Town). This work is based on research supported by the National Research Foundation of South Africa (NRF). Any opinion, finding and conclusion or recommendation expressed in this material is that of the author and the NRF does not accept any liability in this regard.

1 ‘Global health diplomacy brings together the disciplines of public health, international affairs, management, law and economics and focuses on negotiations that shape and manage the global policy environment for health in health and non-health venues. It relates in particular to health issues that cross national boundaries, are global in nature and require global agreements to address them’ per I Kickbusch et al (eds) *Global Health Diplomacy Concepts, Issues, Actors, Instruments, Fora and Cases* (2013) vi.

2 Rene Loewenson et al ‘African perspectives in global health diplomacy’ (2014) 1(2) *Journal of Health Diplomacy*.

3 Draft National Policy on IP 2013 General Notice 918 of 2013 *Government Gazette* 36816 of 4 September 2013.

in the context of global capitalism. However, these are beyond the scope of this paper, which limits itself to the African perspectives mentioned above.

To foreground PharmaGate, it is important to note that the public, health professionals, pharmaceutical companies (pharma), civil society and government or political actors in South Africa have been engaged in patent law and access to medicine debates for a significant period of time. In some cases this engagement has resulted in litigation. For example, in 1998 the Pharmaceutical Manufacturers Association (PMA) and 39 international pharmaceutical companies brought an application in the high court to halt the implementation of part of the Medicines and Related Substances Control Amendment Act.<sup>4</sup> This legislation had been enacted in 1997 to amend the Medicines and Related Substances Control Act, 1965, in order to ‘ensure the supply of more affordable medicines’ through providing for parallel importation, generic substitution and setting up a pricing committee amongst other related measures.<sup>5</sup> The matter was set down for hearing on 5 March 2001 and a flurry of advocacy took place between February 1998 and March 2001.<sup>6</sup> The Treatment Action Campaign (TAC) was granted permission to join the litigation as *amicus curiae* by the court on 6 March 2001, despite opposition from the PMA.<sup>7</sup> The Office of the US Trade Representative (USTR) entered into the fray and tried to influence the outcome by listing South Africa in its annual hall of shame, the Special 301 list.<sup>8</sup> However, this matter was ultimately settled between the parties and withdrawn from court in April 2001.<sup>9</sup> An agreement was also reached between the South African and US governments that led to the removal of South Africa from the USTR 301 list.<sup>10</sup> Thereafter, the government promulgated the necessary parallel importation regulations,<sup>11</sup>

4 *The Pharmaceutical Manufacturers Association & others v The President of the Republic of South Africa & others*, case no 4183/98, High Court of South Africa (Transvaal Provincial Division).

5 Sections 15C, 22F and 22G of the Medicines and Related Substances Control Amendment Act 90 of 1997.

6 For a detailed account of these events see Mark Heywood ‘Debunking “Conglomo-talk”: A case study of the amicus curiae as an instrument for advocacy, investigation and mobilisation’ (2001) 5(2) *Law, Democracy & Development* 133–144. Also see William W Fisher III & Cyril P Rigamonti ‘The South Africa AIDS controversy: A case study in patent law and policy’, available at <http://cyber.law.harvard.edu/people/ffisher/South%20Africa.pdf> (viewed on 23 September 2015); Susan Cleary & Don Ross ‘The 1998–2001 legal struggle between the South African government and the international pharmaceutical industry: A game-theoretic analysis’ (2002) 27 *Journal of Social, Political and Economic Studies* 445; Solomon Frank Sacco ‘A comparative study of the implementation in Zimbabwe and South Africa of the international law rules that allow compulsory licensing and parallel importation for HIV/AIDS drugs’ (2005) 5 *African Human Rights LJ* 105.

7 Heywood (n6) 146–151.

8 Colin Darch ‘Politics, law and discourse: Patents and innovation in post-apartheid South Africa’ in Matthew David & Debora Halbert (eds) *The Sage Handbook on Intellectual Property* (2014) 8.

9 Heywood (n6) 156.

10 Caroline B Ncube ‘Enforcing patent rights against goods in transit: A new threat to transborder trade in generic medicines’ (2009) 21 *SA Merc LJ* 680–691.

11 The General Regulations, Medicines and Related Substances Regulations *Government Gazette* 24727 GN R510 of 10 April 2003 (date of commencement 2 May 2003).

and the Amendment Act came into force on 2 May 2003. Pricing regulations were promulgated.<sup>12</sup> This incident was a direct translation of the positions taken by parties to international public health and trade negotiations into the national sphere. However, on the national plane the engagement is not one of diplomatic negotiations, but of a more robust and confrontational nature that finds expression in litigation and media campaigns. It is noteworthy that even in this markedly different context, the arguments made by both sides were more or less arguments that had been advanced on the international plane.

Other litigation pertained to the creation of a national ARV programme to prevent mother-to-child HIV transmission (MTCT),<sup>13</sup> as a result of which the government rolled out a national antiretroviral (ARV) distribution scheme in 2003.<sup>14</sup> A final example is the deployment of competition law by civil society against pharma. In 2002, the TAC and others filed a complaint with the Competition Commission against GlaxoSmithKline (GSK) and Boehringer-Ingelheim (BI) on the ground of unlawfully excessive prices for ARVs, which is prohibited by South Africa's Competition Act 89 of 1998.<sup>15</sup> The Competition Commission investigated the matter and 'concluded that GSK and BI had both abused their dominance and contravened sections 8(a) (excessive pricing), 8(b) (refusing a competitor access to an essential facility) and 8(c) (an exclusionary act) of the Act'.<sup>16</sup> Both GSK and BI contested these findings, but rather than proceed to a referral to the Competition Tribunal, the parties settled the matter, on terms that included the issuance of licenses by GSK and BI. In terms of this settlement, a total of seven licenses were to be issued to generic manufacturers which would cover 'the manufacture in and importation into South Africa of the ARVs ... and permit the export of any ARVs manufactured in South Africa to all sub-Saharan African countries'.<sup>17</sup> In view of pharma's stance on patents and access to medicines prior to, and after, these competition matters, this settlement was probably motivated by expediency rather than altruism. The TAC and its allies have continued their activism in a number of ways, which cannot be recounted here. Instead, as stated above, this paper's focus is PharmaGate.

The paper will not focus on the formal documents prepared by government, pharma, civil society, academics and other interested parties in the policy formulation process, namely the draft National IP Policy and written

12 Regulations Relating to a Transparent Pricing System for Medicines and Scheduled Substances GN R1102 of 11 November 2005. For commentary see Kerry Williams 'Pharmaceutical price regulation' (2007) 23 *South African Journal on Human Rights* 1.

13 *Treatment Action Campaign v Minister of Health* [2002] ZACC 16. For an overview of this matter see Mark Heywood 'Preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign case against the Minister of Health' (2003) 19 *South African Journal of Human Rights* 278.

14 Darch (n8) 13.

15 Ncube (n10) 689; Tenu Avafia et al *The ability of select sub-Saharan African countries to utilise TRIPs Flexibilities and Competition Law to ensure a sustainable supply of essential medicines: A study of producing and importing countries* (2006).

16 Competition Commission 'GSK and BI issue anti-retroviral licences' (2004) 15 *Competition News* 1.

17 Competition Commission (n16) 2.

comments submitted on the policy.<sup>18</sup> Such technical documents are beyond the reach of the public and tend to be discussed in the cold sterile chambers of parliament or in conference rooms. Public consciousness is impacted more markedly by public discourse disseminated via radio stations and television, as well as print and digital media. It is this politico-legal public discourse that this paper considers. It is important to note, at the outset, that this discourse has not occurred in a theoretical vacuum, and much has been written already about the rhetoric of IP. This paper references some of this work, but a comprehensive theorising of IP rhetoric or discourse is beyond its scope. It is clear from such work that ‘pockets of resistance’ exist to the dominance of the primacy of private rights, which are generating a ‘counter-discourse’ based on human rights, equity and access.<sup>19</sup> This counter-discourse has lodged a wedge in the private rights discourse,<sup>20</sup> done by interrogating the manner in which the private rights discourse characterises infringement as piracy, without regard to relevant market forces and prevailing local conditions.<sup>21</sup> As will be shown below, the Minister of Health firmly located himself within this counter-discourse. In contrast, pharma’s position is clearly located in the dominant private property-centric or monopolistic discourse.

This paper consists of nine parts, of which this introduction is the first. Part 2 outlines the main African perspectives that have emerged in Africa’s international negotiations on public health-related matters. Part 3 provides a synopsis of critical discourse analysis, the lens through which the parties’ discourse is analysed. Part 4 provides a succinct overview of South African patent legislation and its incorporation of the flexibilities provided for by the Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (TRIPS).<sup>22</sup> Part 5 introduces the main actors in PharmaGate to contextualise their discourse. Part 6 recounts the factual scenario within which the actors spoke. Each party’s text and talk is the subject of Parts 7 and 8. Part 9 concludes the paper.

## 2. AFRICAN GLOBAL HEALTH DIPLOMACY NARRATIVES

Based on an analysis of literature written in the first decade of the 20th century, Loewenson, Modisenyane and Pearcey identified Africa’s key narratives to be

- 18 For example see LTC Harms ‘Comment: Draft National Policy on IP’; Tobias Schonwetter et al ‘Draft National Policy IP of South Africa, 2013: Comments’; Owen Dean et al ‘Comments on the Draft National Policy on IP, 2013’; MSF, TAC and SECTION27 ‘Joint Submission on the Draft National IP Policy, 2013’; Working Group on IP, Brazilian Network for the Integration of Peoples (GTPI/REBRIP) ‘Submission on National IP Policy, 2013’. All on file with author.
- 19 Debora J Halbert *Resisting Intellectual Property* (2005) 15.
- 20 For an overview of the shortcomings of this perspective and to move ‘beyond private and public’ see Michael Hardt & Antonio Negri *Multitude: War And Democracy In The Age Of Empire* (2004) 203–208.
- 21 For example, see Lars Eckstein & Anja Schwarz (eds) *Postcolonial Piracy: Media Distribution and Cultural Production in the Global South* (2014); Joe Karaganis (ed) ‘Media piracy in emerging economies’, available at <http://piracy.ssrc.org> (viewed on 23 September 2015).
- 22 Agreement on Trade-Related Aspects of Intellectual Property Rights (1999) 1869 UNTS 299, 33 ILM 1197 (1994).

those of ‘unity and ubuntu’, ‘liberation ethics and demands of nationhood’ and ‘development aid or development policy’.<sup>23</sup> These views are sketched broadly here as a preface to the examination of their expression in PharmaGate.

## 2.1 Unity and ubuntu

The metanorm of ubuntu places communal interests as a key component of individual, interpersonal and group relations and transactions<sup>24</sup> in its quest to achieve ‘humaneness, social justice and fairness’.<sup>25</sup> It has resonance across the continent and has been documented as a core value in Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe.<sup>26</sup> Similarly, unity is a prized core African value, which finds expression in continental regional organisations such the African Union (formerly the Organisation of African Unity),<sup>27</sup> and the numerous African regional economic communities. Informed by these perspectives on ubuntu and unity, African states have coalesced into an influential group (‘the Africa Group’) which is active at several international fora. At the World Health Assembly (WHA), one of the primary fora for global health diplomacy, the Africa Group has forcefully advanced a shared stance on access to essential medicines and other significant issues.<sup>28</sup> Global focus on the plight of the continent in the face of inaccessibility of such medicines has resulted in a ‘global counter-discourse on the appropriate regulation of intellectual property’.<sup>29</sup> The Africa Group has also made its presence felt at the World Trade Organisation (WTO)<sup>30</sup> and the World Intellectual Property Organisation (WIPO),<sup>31</sup> where it seems to have acted on the dual prerogatives of ubuntu and unity.

23 Loewenson et al (n2) 6–11.

24 Thomas W Bennet ‘Ubuntu: An African equity’ (2011) *PER/PELJ* 30 30–31, 35.

25 *S v Makwanyane* [1995] 3 SA 391 (Constitutional Court) 236.

26 Moeketsi Letseka ‘Ubuntu and justice as fairness’ (2014) 5(9) *Mediterranean Journal of Social Sciences* 544 547; Christian BN Gade ‘The historical development of the written discourses on ubuntu’ (2011) 30(3) *Afr J Philos* 303 309–315; S Samkange & TM Samkange *Hunhuism or Ubuntuism: A Zimbabwe Indigenous Political Philosophy* (1980).

27 Loewenson et al (n2) 7.

28 *Ibid.*

29 Ruth L Okediji ‘Africa and the global intellectual property system: Beyond the agency model’ in AA Yusuf *African Yearbook of International Law: Africa and the International Trading System* (2004) 215.

30 For a discussion, see Richard E Mshomba *African Yearbook of International Law* (2009); Edwini Kessie & Yvonne Apea ‘The participation of African countries in the multilateral trading system’ in AA Yusuf *African Yearbook of International Law: Africa and the International Trading System* (2004) 9.

31 Tshimanga Kongolo *African Contributions in Shaping the Worldwide Intellectual Property System* (2013); Dalindybebo Shabalala *A Citizen’s Guide to WIPO* (2007) 32; Sisule F Musungu ‘International intellectual property standard-setting: A review of the role of Africa in shaping the rules for the regulation of the knowledge economy’ in AA Yusuf *African Yearbook of International Law: Africa and the International Trading System* (2004) 169, 181.

## 2.2 Liberation ethics and the demands of nationhood

One of the reasons why African states unified was to fight colonisation and seek their liberation or independence.<sup>32</sup> Strong bonds of interdependence were built between states as they supported each other's liberation efforts through providing refuge for exiles, together with military training and other support for those actively involved in armed struggle.<sup>33</sup> One of the most oft-cited examples of such support came from the frontline states,<sup>34</sup> which supported South Africa's ousting of apartheid.<sup>35</sup> This mutual support has not ended with the demise of colonisation, but has continued to inform African states' continental initiatives and foreign policy positions.<sup>36</sup> In particular, there has been a sense that the world has failed to pay enough attention to meeting the medical needs of Africans, such as the provision of ARVs,<sup>37</sup> and that the global IP system has some regrettable neo-colonial aspects.<sup>38</sup> TRIPS bears the brunt of such critiques, as it is the primary articulation of the global IP system. No doubt spurred by the need to achieve liberation in this context too, the African Group played a prominent role in the passing of the Doha Declaration that sought to ameliorate TRIPS' harsh effect on access to essential medicines.<sup>39</sup> In the context of this narrative, the discourse of sovereignty becomes pivotal.<sup>40</sup> States assert their right to determine their own national policies and advance their chosen agendas at international fora. As will be shown below, any attempt to intervene in national policy formulation processes beyond accepted processes is considered to be an attack on sovereignty.

## 2.3 Development aid or development policy

Loewenson, Modisenyane and Pearcey found that African states' discourse had progressed from externally focused calls for development aid to an internally focused agenda for appropriate development policy.<sup>41</sup> In the former discourse, states bemoaned their health crises in order to raise funding for their public health initiatives. In the latter discourse they collaborated to seek and implement home-grown solutions. In order to facilitate this, they have to secure properly calibrated international norms that provide them with

32 Loewenson et al (n2) 8.

33 Gretchen Bauer & Scott D Taylor *Politics in Southern Africa: State and Society in Transition* (2005) 5.

34 Angola, Botswana, Mozambique, Tanzania, Zambia, and Zimbabwe.

35 Loewenson et al (n2) 8; Bauer & Taylor (n33) 5.

36 Leila J Farmer 'Sovereignty and the African Union' (2012) 4(10) *Journal of Pan-African Studies* 93-97.

37 Loewenson et al (n2) 8.

38 Andreas Rahmatian 'Neo-colonial aspects of global intellectual property protection' (2009) 12(1) *Journal of World Intellectual Property* 40-74.

39 Loewenson et al (n2) 9; Doha WTO Ministerial 2001 'Declaration on the TRIPS Agreement and Public Health', available at: [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm) (viewed on 25 January 2015).

40 Biong Kuol Deng 'The Evolving Concept and Institution of Sovereignty: Challenges and Opportunities' Africa Institute of South Africa (AISA) Policy Brief 28 (2010).

41 Loewenson et al (n2) 9-10.

the policy space within which to craft national frameworks. The following section outlines the methodology used to analyse the PharmaGate discourse in order to ascertain the extent to which, if at all, the above perspectives found expression in this incident.

### 3. CRITICAL DISCOURSE ANALYSIS

It is beyond the scope of this paper to present a comprehensive technical overview of critical discourse analysis.<sup>42</sup> Suffice it to say that it is an ambitious, established and normative methodology that explores ‘intricate relationships between text, talk, social cognition, power, society and culture’.<sup>43</sup> It seeks ‘to understand, expose, and ultimately resist social inequality’.<sup>44</sup> Typically, change is not wrought directly by the writing of critical discourse analysts; rather, such writings provide clarity and arguments that may then be used by the actors directly involved in a particular issue to seek change.

The main aim of critical discourse analysis is to engage in a ‘critique of social inequality’ by emphasising ‘the role of discourse in the (re) production and challenge of dominance’.<sup>45</sup> The critique is not necessarily negative in its perspective; rather, it examines the import of discourse.<sup>46</sup> In particular, it considers the discourse as shaped by those who control its content and, sometimes, access to it (the elites); how the speaker’s audience perceives it (social cognition) and how it then impacts that audience and society at large. In some instances, elites have been shown to misuse their powerful positions by framing and driving the discourse in a way that results in inequality primarily through eliminating or marginalising opposing voices. For example, critical discourse analysis has been used to examine parliamentary discourse on race relations in the Netherlands, UK, France, Germany and the US.<sup>47</sup> Parts 6 to 8 of this paper discuss how elites in the context of PharmaGate framed the debate and thus sought to influence its outcome.

The units of analysis in this exercise are text and (transcribed) talk. Generally, discourse analysis can be applied to ‘interviews, letters, diaries and public documents, to observations, movies, newspaper articles and professional literature’.<sup>48</sup> It is also applicable to policy and political strategies.<sup>49</sup>

42 For examples of detailed overviews see Norman Fairclough *Critical Discourse Analysis: The Critical Study of Language* (2013); Ruth Wodak & Michael Meyer *Methods for Critical Discourse Analysis* (2009); Norman Fairclough *Analysing Discourse: Textual Analysis for Social Research* (2003); Michael J Toolan *Critical Discourse Analysis: Leading Advocates* (2002).

43 Teun A van Dijk ‘Principles of critical discourse analysis’ (1993) 4(2) *Discourse and Society* 249–253.

44 Teun A Van Dijk ‘Critical discourse analysis’ in Deborah Schiffrin et al (eds) *The Handbook of Discourse Analysis* (2001) 352.

45 Van Dijk (n43) 249.

46 Ruth Wodak & Michael Meyer ‘Critical discourse analysis: History, agenda, theory and methodology’ in Wodak & Meyer (n42) 9.

47 Van Dijk (n43).

48 Jørn Cruickshank ‘The role of qualitative interviews in discourse theory’ (2012) 6(1) *Critical Approaches to Discourse Analysis Across Disciplines* 38–52.

49 Wodak & Meyer (n46) 3.

This paper considers a strategy document produced for pharma which spelt out their intended political strategy for countering the position taken by the South African government in the draft National IP Policy.

The main actors, pharma as the producer and distributor of medication, and the Ministry of Health, as the government department tasked with the provision of health care, broker their power relationships primarily through discourse. Some of this discourse is in private between themselves, but a significant part of it is aired publicly on various media. Such discourse involves society, has cultural dimensions and is fundamentally ideological and political in nature. As briefly shown in the introduction, the interchange between pharma and the Ministry of Health has a historical background, dating back at least fifteen years. Several actors, such as the media, academics, experts and activists, have mediated this interchange.

There have been extensive studies of the role of discourse in IP law-making in various jurisdictions. Examples include books on copyright law and the digital environment in the European Union by Farrand,<sup>50</sup> and in the United States by Reyman.<sup>51</sup> Darch has recently considered dominant and subaltern IP discourses in South Africa.<sup>52</sup> Prior to that, Haupt wrote on copyright and hip-hop,<sup>53</sup> music, media and film in South Africa.<sup>54</sup> In the same vein, but from a broader plane, that of an international law-making context, Ghafele discusses international policy discourse on IP, with a focus on patent law.<sup>55</sup> This paper continues such analytic work by focusing on PharmaGate. The following section provides a brief background of the prevailing patent framework in South Africa.

#### 4. THE LEGAL FRAMEWORK

Patents are regulated by the Patents Act 57 of 1978. To qualify for patent protection, an invention must be new, include an inventive step and have industrial application.<sup>56</sup> Further, the patent application must adequately disclose the invention. South Africa grants pharmaceutical patents, but excludes from patentability methods of treatment of the human or animal body by surgery or therapy or of diagnosis practised on the human or animal body.<sup>57</sup>

Applications for patents may be made through state or regional offices or the Patent Co-operation Treaty (PCT) system. If an application is made

50 Benjamin Farrand *Networks of Power in Digital Copyright Law and Policy: Political Salience, Expertise and the Legislative Process* (2014).

51 Jessica Reyman *The Rhetoric of Intellectual Property: Copyright Law and the Regulation of Digital Culture* (2009).

52 Darch (n8).

53 Adam Haupt *Stealing Empire: P2P, Intellectual Property and Hip-hop Subversion* (2008).

54 Adam Haupt *Static: Race and Representation in Post-apartheid Music, Media and Film* (2012).

55 Roya Ghafele 'Of war and peace: Analyzing the policy discourse on intellectual property' (2010) MPRA Paper No. 38091.

56 South African (SA) Patents Act 57 of 1978 s 25(1).

57 South African (SA) Patents Act 57 of 1978 s 25(11).

through the PCT system, an international search is conducted to establish patentability. National patent applications are administered by the Companies and Intellectual Property Commission (CIPC). The CIPC is a registration patent office that does not undertake substantive patent examination. This has been highlighted as a weakness of South Africa's patent system and various proposals have been made to ameliorate this shortcoming.<sup>58</sup>

#### 4.1 TRIPS flexibilities

TRIPS provides for a number of patent-related flexibilities, a full purvey of which is beyond the scope of this paper.<sup>59</sup> These include the determination of what constitutes inventive step, making a choice between formal and substantive examination of patents, parallel importation, compulsory licensing, exceptions and limitations and the use of competition law. Compulsory licenses became a contentious matter in PharmaGate and therefore the next paragraphs briefly outline the relevant TRIPS provisions.

TRIPS art 31 provides a series of conditions under which such licenses may be issued. Examples of these conditions include the following: art 31(h) provides that satisfactory remuneration must be paid to the patent-holder, paying consideration to the 'economic value of the license'. Article 31(f) provides that use of the medicines manufactured under compulsory license shall be 'predominantly for the supply of the domestic market'. This limitation prevents countries with the capacity to make generics under compulsory licenses from exporting a significant amount of those generics to other countries; this is to the detriment of those countries who wish to import such generics. This limitation has since been 'softened' by the 'paragraph 6 solution' of the 2003 Waiver Decision which was then incorporated into TRIPS as art 31*bis* by the 2005 amendment to the Agreement. The amendment will come into force after its acceptance by two-thirds of WTO members and, in the interim, the Waiver Decision applies. This solution is the rule-based waiver of the art 31(f) requirement. This removed the limit on exports under compulsory license to WTO member states which have a limited capacity to manufacture pharmaceutical products, provided that the relevant member states met certain conditions. For example, both the exporting and importing countries have to issue compulsory licenses and advise the TRIPS Council of the import and export of products. However, this solution is complex and impracticable and has only been used once by Rwanda and Canada. The para 6 solution is by no means the only recourse, and it should be kept in mind that

58 For example, see Caroline B Ncube 'The draft national Intellectual Property Policy proposals for improving South Africa's patent registration system: A review' (2014) 10 *Journal of Intellectual Property Law and Practice* 822.

59 For such an overview see Carlos M Correa 'Multilateral agreements and policy opportunities' in Mario Cimoli et al (eds) *Intellectual Property Rights: Legal and Economic Challenges for Development* (2013) 417; WIPO *Patent-Related Flexibilities In The Multilateral Legal Framework And Their Legislative Implementation At The National And Regional Levels* (2010) CDIP/5/4 rev; Sisule F Musungu et al *Utilizing Trips Flexibilities For Public Health Protection Through South-South Regional Frameworks* (2004).

the Doha Declaration provides a broad and flexible base from which countries can define (and extend) the grounds upon which compulsory licenses may be granted.

South Africa has incorporated some patent-related TRIPS flexibilities into its domestic legislation. As stated above, s 15C of the Medicines and Related Substances Control Act and s 45(2) of the Patents Act 1978 as amended, make provision for parallel imports. In addition, s 55 of the Patents Act provides for compulsory licenses for dependent patents and s 56 applies in the event of abuse of patent rights.<sup>60</sup>

Despite the domestic provisions outlined above, there is still some dissatisfaction with the current framework. In particular, perceived weaknesses pertain to the country's patent registry or depository system, which allows practices such as ever-greening to continue uncurbed. Therefore the draft National IP Policy suggested the introduction of substantive patent examination,<sup>61</sup> together with pre- and post-grant opposition processes,<sup>62</sup> so as to strengthen its system. The draft policy also suggested that the country's definition of 'inventive step' be revised upwards so as to make it difficult, if not impossible, to evergreen patents. Several other recommendations were made in relation to generic medication,<sup>63</sup> and competition law,<sup>64</sup> inter alia.<sup>65</sup> It is in the wake of these proposals that the main actors, who are introduced below, entered into public discourse.

## 5. THE MAIN ACTORS

### 5.1 Innovative Pharmaceutical Association South Africa (IPASA)

IPASA was established on 2 April 2013 with an initial membership of 24 pharmaceutical companies that had previously been members of Innovative Medicines SA (IMSA) or the Pharmaceutical Industry Association of South Africa (PIASA).<sup>66</sup> Eligibility for membership is limited to companies that are 'locally, and/or through their holding companies, directly and predominantly engaged in the activities of researching and developing new medications/indications; new modes of action; and/or new technologies'.<sup>67</sup> This criterion excludes South African companies because they are considered to be generic manufacturers as opposed to innovator companies. The 24 initial members were all multinational companies.<sup>68</sup>

60 For a brief overview of these provisions see Caroline Ncube 'Enforcing patent rights against goods in transit: A new threat to trans-border trade in generic medicines' (2009) 21 *SA Merc LJ* 680.

61 SA draft IP Policy (2013) 13–14.

62 SA draft IP Policy (n61) 12.

63 SA draft IP Policy (n61) 16.

64 SA draft IP Policy (n61) 16.

65 For a full list, see SA draft IP Policy (n61) 24.

66 IPASA 'New research-based pharmaceutical organisation IPASA launches', available at <http://www.sapj.co.za/index.php/SAPJ/article/download/1581/2481> (viewed on 25 January 2015).

67 IPASA Constitution 'Clause 4.1.1', available at <http://ipasa.co.za/wp-content/uploads/2013/07/IPASA-Constitution-08-May-2013-signed-email-v.pdf> (viewed on 25 January 2015).

68 IPASA 'Members', available at [http://ipasa.co.za/ipasa\\_members/](http://ipasa.co.za/ipasa_members/) (viewed on 25 January 2015).

IPASA is a member of the International Federation of Pharmaceutical Manufacturers and Associations (IFPMA). IFPMA is a Geneva-based non-governmental organisation that seeks to promote its members' financial and other interests by representing them 'in dialogue with intergovernmental bodies, nongovernmental organizations, Geneva-based missions of national governments, civil society organizations and others'.<sup>69</sup> One of IFPMA's core focus areas is IP protection.<sup>70</sup> Its agenda is animated by the priorities of its members. Consequently, it is no surprise that IPASA's constitution emphasises the importance of IP protection. IPASA makes eligibility for membership conditional on a company being able to satisfy the Executive Committee (EXCO) that it 'support[s] and agree[s] to the importance of the protection of intellectual property rights in South Africa, and adherence of South Africa to the TRIPS agreement of the WTO'.<sup>71</sup>

IPASA's membership makes decisions through its Membership Council, on which each member has one representative. IPASA was initially led by an EXCO of four that consisted of two persons each from IMSA and PIASA, the two associations that merged to form IPASA.<sup>72</sup> This interim EXCO was to remain in place until the association's first AGM, at which the substantive EXCO would be put in place. One of the four interim EXCO members served as president, whilst the other three served as deputies.<sup>73</sup>

The constitution also provided that the final EXCO would consist of a president, three vice-presidents and an executive director (ED) ex officio.<sup>74</sup> The ED would be appointed by the EXCO upon recommendation of an interview and recruitment panel established by the Membership Council.<sup>75</sup> The ED would be a non-voting member of the EXCO and Membership Council.<sup>76</sup> IPASA arranged itself into working groups to deal with the various aspects of its mandate. One of the vice-presidents was also the chair of IPASA's working group on IP. It is efficiently organised and has substantial financial and human resources from its membership and from the support of a powerful Geneva-based NGO. This clout, together with the sophisticated guidance of lobbying firms, is formidable.

69 IFPMA 'About IFPMA/Welcome', available at <http://www.ifpma.org/about-ifpma/welcome.html> (viewed on 24 January 2015).

70 Meir Perez Pugatch *The International Political Economy of Intellectual Property Rights* (2004) 113.

71 IPASA constitution, as amended per resolution of Membership Council as at Special General Meeting on 5 February 2014, clause 4.1.2.

72 IPASA constitution (n71) clause 12.1.

73 IPASA constitution (n71) clause 12.1.1.

74 IPASA constitution (n71) clause 13.3.

75 IPASA constitution (n71) clause 19.1.

76 IPASA constitution (n71) clause 19.2.2.

## 5.2 The Ministry of Health and Dr Aaron Motsoaledi

Whilst it has its challenges, the Ministry of Health is currently a relatively well-functioning department under effective leadership.<sup>77</sup> Under the presidency of Thabo Mbeki and the leadership of Dr Mantombazana Tshabalala-Msimang, the ministry was buffeted by strong winds of criticism for its failure to respond effectively to the HIV/AIDS crisis.<sup>78</sup> Indeed, there was a sad period during which it flirted with the ideas of AIDS-denialists.<sup>79</sup> Edwin Cameron, a South African Constitutional Court judge, describes this period as follows:

In late 1999, South Africa was estimated to have the highest number of people living with HIV/AIDS in the world ... Yet at this very time the country also entered a three-year nightmare period during which the cause and effect link between HIV and AIDS was officially questioned ... from the inner sanctum of governmental power in the country, and its domain was the entire spectrum of constructive political response to the AIDS epidemic.<sup>80</sup>

From then on, public debate on the matter was muted and government efforts to provide AVRs were sluggish.<sup>81</sup> However, they were invigorated by the Constitutional Court ruling, referred to in the introduction, which was handed down in July 2002. Thereafter the government established an ARV programme to prevent MTCT.

Dr Motsoaledi's first term as the Minister of Health commenced in May 2009 and his second term began in May 2014. He is an influential member of the ruling party, the African National Congress (ANC), and comes from a well-known family of anti-apartheid activists. His uncle, Elias Motsoaledi, was one of the eight Rivonia trialists who was sentenced to life imprisonment with Nelson Mandela in June 1964.<sup>82</sup> Dr Motsoaledi's political activities began in earnest in June 1976 when he was involved in the Soweto uprising as a seventeen-year-old high school student.<sup>83</sup> He studied medicine at the University of Natal and thereafter served the ANC, provincial and national governments

77 See, for example, Auditor-General *Consolidated general report on the national and provincial audit outcomes 2013–14* 164; Bongani M Mayosi & Solomon Benataar 'Health and health care in South Africa – 20 Years after Mandela' (2014) 371 *New England Journal of Medicine* 1344; S Benatar 'The challenges of health disparities in South Africa' (2013) 103(3) *South African Medical Journal* 154; Bongani M Mayosi et al 'Health in South Africa: Changes and challenges since 2009' (12/2012) 380(9858) *The Lancet* 2029; Aaron Motsoaledi 'Progress and changes in the South African health sector' (12/2012) 380(9858) *The Lancet* 1969.

78 For a scathing portrait of Dr Manto Tshabalala-Msimang's tenure as Minister of Health see Alexander Parker *50 People who Stuffed Up South Africa* (2009) 175–178.

79 Heywood (n13) 281–285.

80 Edwin Cameron *Witness to AIDS* (2005) 103.

81 Cameron (n80) 115.

82 Amandla Magazine 'Q & A with Minister of Health, Aaron Motsoaledi', available at <http://www.amandla.org.za/amandla-magazine/current-issue/1621-q-a-a-with-minister-of-health-aaron-motsoaledi> (viewed on 24 January 2014). Elias Motsoaledi is sometimes erroneously referred to as Dr Aaron Motsoaledi's father. For a brief overview of Elias Motsoaledi's life see Nelson Mandela *Conversations with Myself* (2010) 434.

83 Amandla Magazine (n82).

in a variety of positions.<sup>84</sup> He is passionate about health and social equality, speaks his mind and is recognised as an effective leader and implementer.<sup>85</sup>

### 5.3 Civil society and AIDS activism

South Africa has strong civil society organisations that are engaged in AIDS activism, the most prominent being the TAC, Médecins Sans Frontières (MSF) South African chapter and SECTION27 (formerly the AIDS Law Project), who collaborate through their joint ‘Fix the Patent Laws’ campaign. Each of these organisations has a sterling record of AIDS activism about which much has been written.<sup>86</sup> It is beyond the scope of this paper to provide an overview of their work. Suffice it to present one of them, the TAC, as an example. The TAC has achieved significant success, as evidenced by the court victories and settlements briefly outlined in the introduction to this paper. It has emerged as a strong moral beacon to the world on matters pertaining to HIV/AIDS medication and has received many endorsements, including a nomination for a Nobel Peace Prize.<sup>87</sup> TAC was supported by Nelson Mandela,<sup>88</sup> and is currently supported by Graca Machel and Archbishop Emeritus Desmond Tutu, some of the world’s most respected leaders.<sup>89</sup> The TAC has achieved an indisputable moral stature,<sup>90</sup> and when it censures an organisation, the public and government listen.

Some of TAC’s members and its allies’ leaders were anti-apartheid activists who have brought skills and knowledge, as well as networks built in that context, to bear in their AIDS activism. They have continued to build these networks and have spread their influence globally, exporting many of their campaign methods elsewhere. The role played by civil society in exposing PharmaGate is outlined below.

## 6. PHARMAGATE UNFOLDS

Many stakeholders, including IPASA,<sup>91</sup> responded to the call for comments on South Africa’s draft National IP Policy. This is to be expected as stakeholders

84 People’s Assembly ‘Dr Aaron Mostoaledi’, available at <http://www.pa.org.za/person/pakishe-aaron-motsoaledi/> (viewed on 24 January 2015); Executive Research Associates (ERA) 2012 *SA Government Reference Manual* (Part 1) 82.

85 ERA (n84) 83.

86 For example Mandisa Mbali *South African AIDS Activism and Global Health Politics* (2013).

87 Mbali (n86) 198.

88 See Cameron (n80) 129–130 for an account of a visit Nelson Mandela made to Zackie Achmat’s home in 2002.

89 NSP Review ‘Mandela, Machel and Tutu on HIV/AIDS’, available at <http://www.nspreview.org/2014/11/30/mandela-machel-tutu-hiv-aids/> (viewed on 26 January 2015).

90 Mbali (n86) 228; Thabang Poee and Tim Fish Hodgson ‘Op-Ed: TAC – We cannot ignore our moral responsibility’ *Daily Maverick* (South Africa, 11 November 2014); Steven Friedman & Shauna Mottiar *A Moral to the Tale: The Treatment Action Campaign and the Politics of HIV/AIDS* (2004).

91 IPASA ‘Submission on the draft national policy’, available at <http://ipasa.co.za/wp-content/uploads/2013/07/Copy-of-IPASA-submission-on-the-draft-national-policy-on-IP-final-131016.pdf> (viewed on 24 January 2015).

often seek to assert their demands on what an IP policy ought to contain.<sup>92</sup> After making its submission, IPASA received a proposal from Public Affairs Engagement (PAE), an American lobby outfit headquartered in Washington DC. When the contents of this proposal were publicly revealed, they sparked an outcry against the PAE/IPASA strategy. The *Mail and Guardian* carried the story on 17 January 2014.<sup>93</sup> A copy of the PAE proposal was posted online and linked to the media report.<sup>94</sup> IPASA immediately disavowed the report, stating that it had not appointed PAE, nor accepted its proposal.<sup>95</sup> However, an email written by the IPASA Vice-President, Michael Azrak, who chaired the IP working group, was leaked and subsequently published online by Knowledge Ecology International (KEI). It showed that PhRMA (the Pharmaceutical Researchers and Manufacturers of America) had worked with IPASA to select PAE, accepted its proposal and put a funding scheme in place.<sup>96</sup> There was an immediate response from civil society organisations, which included demonstrations,<sup>97</sup> decrying the strategy and calling for accountability from Merck and others involved in the strategy.<sup>98</sup>

The fallout was momentous. First Roche and Novo Nordisk withdrew their membership from IPASA in mid-January 2014 in protest of the strategy.<sup>99</sup> However, Novo Nordisk appears to have resumed its membership soon thereafter because its CEO was appointed to the new EXCO that was set up. In an apparent effort at damage control, IPASA decided to amend its constitution in order to dissolve the interim EXCO, expand its EXCO structure by

92 Meir Perez Pugatch 'Intellectual property policy making in the 21st Century' (2011) 3(1) *WIPO Journal* 71, 72.

93 Phillip de Wet 'Motsoaledi: Big pharma's "satanic" plot is genocide' *Mail & Guardian* (South Africa, 17 January 2014).

94 PAE 'A proposal prepared for PhRMA and IPASA: Campaign to prevent damage to innovation from the proposed draft National IP Policy in South Africa: Stage 1: Jan–Feb 2014', available at <http://cdn.mg.co.za/content/documents/2014/01/16/skmbt36314011511040.pdf> (viewed on 24 January 2015).

95 See IPASA 'Statement 17 January 2014', available at <http://ipasa.co.za/wp-content/uploads/2013/07/IPASA-Press-statement.pdf> (viewed on 24 January 2013); IPASA 'Statement 19 January 2014', available at <http://ipasa.co.za/wp-content/uploads/2013/07/IPASA-updated-Statement-website-140219.pdf> (viewed on 24 January 2015).

96 James Love 'New leaked Merck missive reveals deep drug, medical device company opposition to South African patent reforms', available at <http://keionline.org/node/1908> (viewed on 24 January 2015).

97 The TAC picketed outside MSD offices on 6 February 2014. See TAC 'MSD and others must be held accountable for PharmaGate plot', available at <http://tac.org.za/news/msd-and-others-must-be-held-accountable-pharmagate-plot> (viewed on 24 January 2015).

98 Love (n96) citing statements by TAC, SECTION27 and Médecins Sans Frontières (MSF) and an article by Brook Baker 'US PhRMA bares its fangs – South Africa's patent law reform and access to medicine at risk yet again', available at <http://www.fixthepatentlaws.org/?p=830> (viewed on 24 January 2015).

99 Adele Baleta 'Big pharma in the dock over patent law plot in South Africa' (2014) 383(9916) *The Lancet* 499; Tracy Staton 'Novo Nordisk quits South African pharma group over "satanic" PR campaign', available at <http://www.fiercepharma.com/story/novo-nordisk-quits-south-african-pharma-group-over-satanic-pr-campaign/2014-01-23> (viewed on 23 January 2014); Antigone Barton 'Follows on "Pharmagate" plot: South Africa activists picket Merck office, while two drug companies leave pharmaceutical association', available at <http://sciencspeaksblog.org/2014/02/11/follows-on-pharmagate-plot-south-africa-activists-picket-merck-office-while-two-drug-companies-leave-pharmaceutical-association/> (viewed on 24 January 2015).

introducing new members, create a quorum of four for EXCO meetings and reduce the number of vice-presidents from three to one.<sup>100</sup> It is obvious that the EXCO was disbanded; indeed, the relevant resolution states that the Members Council agreed to ‘the dissolution of the incumbent EXCO’. However, the media reported that the chief operating officer of IPASA had euphemistically said that ‘four of the incumbent IPASA EXCO declined to make themselves available to serve on a new expanded management structure’.<sup>101</sup> Since the EXCO change at IPASA, nothing further in relation to the draft National IP Policy has been heard from IPASA. Instead, the new EXCO has been at pains to build bridges between the organisation and the health ministry. For example, after the May 2014 elections, it issued a press release congratulating Dr Motsoaledi on his retention of the national health portfolio.<sup>102</sup>

## 7. THE LEAKED TEXT THAT STARTED IT ALL

The PAE strategy document entitled ‘A Proposal Prepared for PhRMA and IPASA: Campaign to Prevent Damage to Innovation from the Proposed Draft National IP Policy in SA’ outlined IPASA’s phased plan for countering the draft National IP Policy. The strategy document covered the period from 13 January to 15 February 2014 and was intended to be followed by two more stages. Its immediate action was to ‘delay the finalisation of the IP policy by the Cabinet followed by the passage of IP legislation through Parliament until after the 2014 election’.<sup>103</sup> The document set out a detailed strategy which would comprise getting support from within and beyond the country for its position,<sup>104</sup> actively countering civil society’s efforts in support of the draft National IP Policy,<sup>105</sup> and finding a ‘visible South African’ to be the national front for the campaign that would be directed from Washington by the PAE.<sup>106</sup> The PAE also intended to launch a media campaign and to energise the whole campaign so that it felt ‘like a political campaign’.<sup>107</sup> In addition to spelling out this general direction, the strategy was emphatic that they (ie pharma):

[D]o NOT want a debate over individual drug prices to become the focal point of the campaign. Lies and distortions should not go unattended, but the primary objective should be to set the NGOs back on their heels – to distract them from their own aggressive campaign.<sup>108</sup>

100 IPASA Members Council Resolution 5 February 2014; IPASA media release ‘A new era of excellence for pharmaceutical companies: IPASA announces the appointment of a new, expanded Executive Committee’, available at <http://ipasa.co.za/wp-content/uploads/2013/07/001-IPASA-Media-Release-140327.pdf> (viewed on 24 January 2015).

101 Tamar Khan ‘Ipsa axes committee in wake of patents row’, available at <http://www.bdlive.co.za/business/healthcare/2014/02/07/ipasa-axes-committee-in-wake-of-patents-row> (viewed on 24 January 2015).

102 IPASA ‘IPASA welcomes the appointment of the Ministers of Health: Dr Aaron Motsoaledi and Dr Joe Phaahla’ Press Release, 27 May 2014.

103 PAE *A Proposal Prepared for PhRMA and IPASA: Campaign to Prevent Damage to Innovation from the Proposed Draft National IP Policy in SA* (2014) 4.

104 Ibid.

105 PAE (n103) 5.

106 PAE (n103) 4–5.

107 PAE (n103) 4.

108 PAE (n103) 5.

Another portion of the strategy read:<sup>109</sup>

The IP [policy] draft is written in vague language, but there is no doubting its intent. It justifies a *weak IP regime* that allows the government to abridge intellectual property rights that are well established in the developed world. The health section of the draft *takes dead aim* at innovative pharmaceutical companies and the strategic Life Sciences sector in general. It approves of “compulsory licensing” – that is, allowing someone else to produce a patented product without the consent of the owner – and *states ominously* that IP protection “must not contradict public health policies”. Not surprisingly, the draft IP Policy won praise from the coalition that was formed to pressure the government into producing it in the first place, including Medecins San Frontiers (MSF, or Doctors Without Borders), the Treatment Action Campaign and Section 27. If the principles in the draft [IP Policy] are adopted, not only will South Africa become less hospitable to the Life Sciences sector, *it may also provide the model for other developing nations, inside and outside Africa, including such important aspiring economies such as India and Brazil. South Africa is now ground zero for the debate on the value of strong IP protection. If the battle is lost here, the effects will resonate. A robust public affairs program is necessary to create the environment for a sensible IP policy* to be adopted by the Cabinet and implemented through legislative processes. Without a *vigorous* campaign, opponents of *strong IP* will prevail – not just in South Africa but eventually in much of the rest of the developing world (my emphasis).

A number of comments can be made about this passage. First, it frames the debate on the draft IP Policy as a combative encounter, referring to it as a ‘battle’, in which the policy has taken ‘dead aim’ at IPASA members.

Second, the ground zero reference is bombastic. It immediately evokes the devastation wreaked by the terrorist attack on the World Trade Center on 9 September 2011 (9/11). The site very quickly became known as ground zero, harking back to ‘the Trinity Site, the place where the first nuclear bombs had been detonated in 1945’.<sup>110</sup> This imagery is used to reinforce the message that the draft National IP Policy has wreaked havoc on the profitability of the life sciences sector and that it must be remedied, or else the negative effects would spread to other lucrative emerging economies like India and Brazil. It is clear that it is very important to international pharma to ensure that states do not advance positions or take actions on the national plane that they consider to be detrimental to their cause.

Third, the passage is a call to arms to those who have been allegedly targeted by the policy to stand up and resist it vigorously and robustly. When responsible citizens are faced with devastation of the kind witnessed after 9/11, their civic duty behoves them to rebuild. The allusion to 9/11 is thus also an exhortation to IPASA members to stand up to the task and rebuild.

Fourth, the passage leaves its reader in no doubt who the enemy is. It achieves this by naming and othering those who are supportive of the draft. Othering is an ‘undesirable objectification of another person or group’ that stigmatises them and defines them ‘in a negative manner’, comparing

109 PAE (n103) 4.

110 Maarten A Hajer ‘Rebuilding ground zero. The politics of performance’ (2005) 6(4) *Planning Theory & Practice* 445, 462; also published as ‘Contested authority in rebuilding ground zero’ in Maarten A Hajer *Authoritative Governance: Policy Making in the Age of Mediatization* (2009).

them unfavourably to ‘one’s own positive anterior identity’ which is ‘always accompanied with essentialist assumptions about the other that are typically unexamined from a critical analytical standpoint’.<sup>111</sup> This is a common ploy in combative situations, and particularly in the war against terrorism.<sup>112</sup> The opponent is first othered, in order to overcome personal and social aversion to killing another, and then annihilated. The passage characterises ‘the other’ as ‘opponents of strong IP’ and ‘proponents of weak IP’. It also suggests that they are not sensible. It does this by proposing that a ‘robust’ and ‘vigorous’ campaign is required to ensure that a ‘sensible IP policy’ is passed by the South African government, thereby implying that the current draft, and by extension its proponents, are not sensible.

Othering has sometimes resulted in multinationals from developed countries pursuing profits in developing countries without regard for those countries’ needs or priorities. Further, these businesses and their home jurisdictions view themselves as part of a group to which they belong. Consequently they:

‘[O]ther’ those in the third world, ... [and] feel perfectly justified in protecting [developed world] businesses at the expense of those in developing countries. [They] lack a ‘global culture of solidarity attentive to the needs of the weakest and instead think of only parochial interests’.<sup>113</sup>

Finally, the passage makes some assertions about the substantive content of IP law and the place of compulsory licenses. It suggests that the South African government is seeking to ‘abridge’ well-established principles of IP law by approving compulsory licensing. This suggests that compulsory licenses are not a legitimate part of the internationally agreed IP regime when, in fact, they are and the country would be well within its rights to use them. Moreover, the passage gives the impression that ‘approval’ of compulsory licenses would be a new direction for the country to take. However, ss 55 and 56 of the South African Patents Act already provide for compulsory licenses in respect of dependent patents and the abuse of patent rights, respectively.

## 8. THE MINISTER TALKS BACK

Soon after the strategy was leaked, Dr Motsoaledi gave several media interviews, a few of which were reported in the print media and flighted on

111 Colleen MacQuarrie ‘Othering’ in Albert J Mills, Gabrielle Durepos & Eiden Wiebe (eds) *Encyclopedia of Case Study Research* (2010) 636. For postcolonial commentary of othering/otherness see Johannes Fabian ‘The other revisited: Critical afterthoughts’ (2006) 6(2) *Anthropological Theory* 139–152; Homi K Bhabha *The Location of Culture* (1994); Edward W Said ‘Representing the colonized: Anthropology’s interlocutors’ (1989) 15(2) *Critical Inquiry* 205–225; Frantz Fanon *Black Skin White Masks* (1967) (translated by Charles Lam Markmann).

112 Heather Widdows ‘Rediscovering the individual in the war on terror: A virtue and liberal approach’ in Bob Brecher et al (eds) *Discourses and Practices of Terrorism: Interrogating Terror* (2010) 5, 11; Helene Moglen & Sheila Namir ‘War and the Dis-eases of Othering’ (2006) 3(2) *International Journal of Applied Psychoanalytic Studies* 206–218; DOI: 10.1002/aps.100; Richard Jackson *Writing the War on Terrorism: Language, Politics and Counter-terrorism* (2005) 59–91.

113 Susan J Stabile ‘“Othering” and the law’ (2009) Paper No 08-37 *U of St. Thomas Legal Studies Research Paper*.

television by national and international broadcasters. This section highlights some of his statements in one of these interviews. For purposes of analysis, it is prudent to select one interview in order to have a block of talk that can be assessed in a manner akin to assessing one document, or portions of it, as was done in the preceding section (Part 7).

On 8 April 2014, Dr Motsoaledi was interviewed by Tembisa Marele on *Interface*, a political talk show, loosely modelled on the BBC's *Hard Talk*, which is aired by the South African Broadcasting Corporation's Channel 3 (SABC3).<sup>114</sup> The video of this interview is available online,<sup>115</sup> and has been transcribed for purposes of analysis in this paper. It has been selected above all other interviews with Dr Motsoaledi because *Interface* is a popular show which is broadcast on national TV at primetime (8.30 pm on Tuesday nights) and would have been viewed by many South Africans. It was more accessible to a South African audience than interviews aired by international broadcasters, which are generally only available via subscription-based digital satellite TV services or via the internet.

Discussing this interview serves two key purposes. First, in the absence of a written response by the government to the PAE strategy, it provides a comprehensive response on the government's behalf by the Ministry of Health. As the lead department when it comes to IP matters, it was expected that the Ministry of Trade and Industry would have responded on behalf of the state. However, as the Ministry of Health is also a key department in this domain, its response was appropriate. Second, it provides some insight into the views of some of the media on PharmaGate and how they understood the parties' positions. However, there are also two limitations that require acknowledgement. First, the interview was conducted by one journalist and as such cannot be said to represent the position of all in the media fraternity. It is thus merely representative of one, and perhaps some, journalists' views and therefore cannot be broadly generalised. Secondly, it is accepted that Dr Motsoaledi's statements in the interview were to a large extent guided by the interviewer's line of questioning and 'genre conventions for how the talk should be organised'.<sup>116</sup> However, it is clear from the transcript that Dr Motsoaledi had agency and ensured that he was given adequate time to raise the points he wanted to. He also drove the interview in the direction he wanted it to go, as shown by the following extract:

Extract 1

Interviewer	Very strong words there, about any attempts to block this policy being tantamount to genocide. We'll talk a little bit about that in a moment. But please just outline for us, what does this policy actually say?
-------------	--

114 For a view on the initial aspirations for the show, see TheMediaOnline 'Mckaiser: Why I resigned from SABC's Interface', available at <http://themediainline.co.za/2011/07/mckaiser-why-i-resigned-from-sabcs-interface/> (viewed on 27 January 2015).

115 SABC Digital News 'YouTube Channel', available at <https://www.youtube.com/watch?v=sCN2ATtVBDc> (viewed on 27 January 2015).

116 Fairclough *Analyzing Discourse: Textual Analysis for Social Research* (2003) 22.

Dr Motsoaledi Well let me start by mapping out the history of this whole issue. In 1995 the World Trade Organization was established, WTO. It gave birth to what is known as TRIPs, [the Agreement on] Trade Related [Aspects of] Intellectual Property Rights. Meaning it was a set of rules to guide patents and property rights and innovation by individual companies. Before 1995, every country used to do as they wished in terms of patents.

Now within TRIPs, they said, innovators that means somebody, who innovates something new, must be given a patent for a period of 20 years. So, in other words, during that 20 years the person has got the monopoly to sell that product and no other person, even those who have got the capacity, do not have any rights to manufacture. Now this is about any product.

Now in health, we're talking mostly here of pharmaceuticals. That's where the whole issue of genocide started. It's about pharmaceuticals. Remember that after being given a 20-year patent, after that 20 years, it means that anybody can manufacture that particular type of medicine.

Now the medicine that is manufactured in that way is called a generic. Now generics and the original product are exactly the same, exactly. There is no difference. The main difference is that the generic is much, much affordable.

To place this interchange in context, it is necessary to give the factual background pertaining to the genocide reference. Prior to this interview, it had been reported that, when talking to other journalists, Dr Motsoaledi had been quoted as saying that South Africans were being threatened with 'genocide' by PAE's proposal of 'satanic magnitude' and he urged them to fight back 'to the last drop of their blood'.<sup>117</sup> These statements are reminiscent of the oft stated accusation that developed countries poach health care workers from developing countries, and sub-Saharan Africa, in particular.

The extract above was the first question of the interview. Dr Motsoaledi's agency is evident from the way in which he refused to meet the interviewer's direct request to outline the contents of the IP policy. He chose to defer that request and to begin by providing the context of the relevant international IP framework. He gave a fairly long answer demonstrating his confidence and knowledge. He also took the opportunity to correct some misperceptions that may have arisen from the PAE strategy document, which seemed to imply that what South Africa was proposing was not aligned with the international IP framework. He also demonstrated his agency in various other ways such as repeatedly referring to the interviewer by her name and refusing to be interrupted by her, as shown in extract 2. The use of an interviewer's personal address, such as a first name, by an interviewee is a relationship-securing strategy that seeks to show that the interviewee is not intimidated but is comfortable with both the interview and the interviewer, whom he considers as friendly.<sup>118</sup>

117 Phillip De Wet 'Motsoaledi: Big pharma's "satanic" plot is genocide' *Mail & Guardian* (South Africa, 17 January 2014).

118 C Thimm et al 'Communicating gendered professional identity: Competence, cooperation, and conflict in the workplace' in J Holmes and M Meyerhoff (eds) *The Handbook of Language and Gender* (2003) 528, 541.

As the interview was an indirect response to the PAE strategy document, the paper now considers the following questions, which are based on the comments made above about the passage quoted from the strategy document:

1. How, if at all, did Dr Motsoaledi respond to its framing of the debate in fighting metaphors?
2. How, if at all, did Dr Motsoaledi counter the suggestion that South Africa would model its approach on the rest of the developing world, in particular India and Brazil?
3. What were Dr Motsoaledi's views on the PAE's campaign strategy?
4. How, if at all, did Dr Motsoaledi engage with the PAE's othering of those in support of the draft policy?
5. How, if at all, did Dr Motsoaledi seek to correct any misstatements of international IP obligations?

Each of these questions is addressed below.

### 8.1 Framing and South Africa's influence on other developing countries (questions 1–2)

Dr Motsoaledi decided to embrace the battle metaphor and use it to show that in fact it was pharma that was guilty of death and destruction ('genocide') rather than the South African government which it was trying to 'bully' or 'bulldoze' with 'idle threats'. Consequently, he felt justified in his exhibition of a righteous anger which he expressed using the fighting metaphor of 'exploding with anger' (see extract 5 below). This explosion in righteous anger stands in stark contrast to what he considered to be the contrived and fallacious assertion that South Africa had become ground zero. These views are evident in extracts 2 and 3 below. His answers in these extracts also referred to other developing countries and in so doing, simultaneously addressed the issue of South Africa (from pharma's perspective) negatively affecting these other countries.

Extract 2

Interviewer Minister I was just asking before the break, do you think that these companies are essentially doing what they wouldn't do in another country, here in South Africa, trying to bully the government into submission?

Dr Motsoaledi Precisely, Tembisa, and they are saying South Africa is ground zero. If they lose in South Africa, they are saying they are going to lose in the rest of the continent. Let me tell you what is happening in other parts of the world, Tembisa, to show that they are bulldozing us.

Brazil has got what is called a patent examination office. When companies try to evergreen, that office will examine the patent and tell them that no. No, this is not a new drug. We had given you a 20-year patent long ago. There is no new innovation here. We're not granting you a patent. Because of that, between 2003 and 2008, Brazil issued only 272 patents. But in South Africa every patent you apply for, every evergreening you do, you just get it, but in 2008...

Interviewer Why has it being left for so long minister? Why now?

Dr Motsoaledi Let me finish. In 2008, only South Africa issued 2,722 patents. We are aware that patents that are rejected in Europe and in America. Remember

Europe and America are very strong patent protections. They are very strong. But you are aware that 40% of the patents that are rejected there are actually granted in South Africa. That's why we want to come in line with the rest of the world.

Here Dr Motsoaledi intentionally drew the ground zero reference into his answer in order to refute it. His answer shows that it is in fact not South Africa that will influence India and Brazil, but rather that Brazil is already engaging in some of the practices that pharma sought to avoid in South Africa. Extract 3 shows how India has also already domesticated TRIPS flexibilities. Therefore the only reasonable inference is that the PAE was deliberately misinforming its readers. Indeed, at a later stage in the interview (extract 6 below), Dr Motsoaledi accuses them of lying.

Extract 3

India has already incorporated these TRIPs flexibilities into their laws. That's why at the moment India is called the pharmacy of the developing world, because in the whole world 8 million people are on ARVs. 6 million, Tembisa, are in sub-Saharan Africa. 80% of their drugs they get from India. That means all of us in Sub-Saharan Africa we are able to treat 6 million people, because of generic drugs of India. If that was not the case, we're finished. We're dead. That's why I used the word genocide. You can imagine 6 million people being exposed to a situation, where they've got no availability to drugs or erratic availability, simply because of expenses. What will have happened to those 6 million people?

Here Dr Motsoaledi explains why he considered the PAE's strategy's efforts to block parallel importation to be genocide. He uses affected population numbers and by so doing appeals to the humanity of his audience. He compares pharma's profit-making motivation to the government with his ministry's duty to save lives. In the extract below, Dr Motsoaledi specifically cites drug prices. Such information is very compelling and that is why the PAE had emphasised that a debate over individual drug prices was to be avoided.

Extract 4

We have got a cancer drug called Gleevec. The original drug costs R876 ... R876. But in India, because of TRIPs flexibilities, because it is a generic, they pay only R86. If this new law is not incorporated, we will keep on paying R876. We can't be able to get that R86 from India, which is easily available to many people, who suffer cancer. The second example is a TB drug called Linezolid. You know that we have got multidrug resistance to TB. These days TB is a big killer. Linezolid, the original drug costs R660 per tablet Tembisa. But in India it costs R10 per tablet, because of TRIPs flexibilities. So, in the interest of human being, if TB is No. 1 killer in the country and I want to save human beings, what do you expect me to do?

## **8.2 Views on the PAE's campaign strategy and engagement with the PAE's othering (questions 3–4)**

Dr Motsoaledi made it clear that he was angered by the strategy, which he considered to be a clandestine attempt by foreign multinationals to subvert a national democratic process. This stance flows from liberation ethics and demands of nationhood perspective, which were outlined at section 2 above. This effectively othered the authors of the strategy, painting them as foreign subvertors bent on undermining the sovereignty of South Africa. As he had

done with the fighting metaphors, Dr Motsoaledi was using the same tactics used by the PAE against them.

Extract 5

Interviewer So, are you concerned at all, minister, about reports that there is a US-based PR company that is running a counter campaign against this policy, trying to show that this policy, in fact, would be economically and socially detrimental to this country?

Dr Motsoaledi That's exactly what made me angry, Tembisa. We are a sovereign country. We've got a right, in terms of international law, to determine our own policies with our own citizens. That's why the Department of Trade and Industry issued that document for public comment, open public comment. If citizens say no, this is not okay. They should have come and said so. What made me explode with anger is that that company was trying to influence, in a clandestine way it was subverting a normal democratic process by a country. That normal democratic process is subverted from a company situated in another part of the world. I don't think any sovereign country can tolerate that.

Further, Dr Motsoaledi made it clear that he was not concerned about the implied threat that if frustrated, pharma would disinvest from South Africa, to the detriment of the nation's economy.

Extract 6

Interviewer But people that are manufacturing these drugs, minister, are in it for business. So, if you're going to now interfere with how much profit they can make in a country, then you get headlines, like we saw earlier this year, where they were threatening to withdraw their investments.

Dr Motsoaledi They can't. They are literally lying. In fact for your information, India after passing these laws and becoming our pharmacy international there is more investment in India. They are not pulling out. That is just but an idle threat to try and scare us off.

Tembisa, let me come back to this, because you keep on talking about people having to make profit. A meeting was held between the World Trade Organization, World Health Organisation and World Intellectual Property Organization. World Intellectual Property Organization was established, especially to protect manufacturers, who were for profit as you are saying. But the World Health Organization was established to protect the health of people. World Trade Organization was established to make trade rules. All these three organizations fall under the United Nations.

Interviewer Yes

Dr Motsoaledi All of them are established for the interest of humanity. They have met and made an agreement on these issues. One of the agreements is that any innovation must be to the mutual advantage of the producer and the user. So, that yes, it says so.

It must be for the mutual advantage, because what do you innovate a drug for, if you don't want me to use it, because it's too expensive for me to use? What was your initial reason of innovating, if it's beyond my reach? If it's beyond reach of all the citizens?

Interviewer Good point minister.

This extract exhibits elements of the unity and ubuntu perspective – South Africa was speaking up for herself and other developing countries in the spirit of unity and reciprocal support. In addition, Dr Motsoaledi was drawing

upon classic IP theory which posits that innovation is motivated by economic rewards. Consequently, inventions and their distribution are expected to be closely aligned to market forces. However, there is a balance to be struck between private property interests and what the minister refers to as the ‘interests of humanity’. This harks back to the extensive literature on the public interest in IP law,<sup>119</sup> which forms part of the counter-discourse against expansionist views of IP. The gist of this scholarship is that IP law ought to adequately serve the public interest by catering for societal needs and rights, such as access to knowledge and essential medicine. In this context, Dr Motsoaledi was speaking about access to medicines and the government’s duty to provide public health services within the global IP framework that permits compulsory licenses and other flexibilities, outlined above at section 4.

### 8.3 Correction of any misstatements of international IP obligations (question 5)

On several occasions, Dr Motsoaledi took care to set out the relevant law in detail to show that South Africa was well within her rights to make the proposals in the draft IP Policy. This approach also subtly refuted the implications by the PAE strategy document that the policy was not sensible and unlawful. The extract below is an example of this correction:

Extract 7

- |               |  |
|---------------|--|
| Interviewer   | Okay. Minister, let me just try and see if I can understand this correctly. Is the new policy now saying, instead of waiting the 20-year period, you can actually start patenting or breaking patents from the get go, to try and get the medicines cheaper?   |
| Dr Motsoaledi | No. The TRIPs itself provides for that. It provides for cases, where in the interest of the public you can, there are several laws called parallel importation, called compulsory licensing, called patent examination office. There are several laws that are inside TRIPs. But they do not apply automatically, Tembisa. A country, every country must incorporate them into their laws. That is what the Department of Trade and Industry has been trying to do in September, when they released the policy for public comment. |
| Interviewer   | Okay.  |
| Dr Motsoaledi | They were trying to incorporate the normal TRIPS flexibilities into the laws of the country, so that we’re able to apply them to the advantage of the citizens.  |

119 For example, Isabella Alexander *Copyright Law and the Public Interest in the Nineteenth Century* (2010); Johana Gibson *Intellectual Property, Medicine and Health: Current Debates* (2009); James Boyle *The Public Domain: Enclosing the Commons of the Mind* (2008); Anupam Chander & Madhavi Sunder ‘Is Nozick kicking Rawl’s ass? Intellectual property and social justice’ (2007) 40 *UC Davis Law Review* 563; Geoffrey Edwards *Defining the Public Interest* (2007) PhD Thesis, Griffith University; Gillian Davies *Copyright and the Public Interest* (1997) PhD Thesis, Aberystwyth University.

#### 8.4 Mediation by the interviewer

The above extracts provide some insight into the interviewer's mediation technique. In the absence of the other party to the debate, IPASA, the format of the interview was not the typical TV debate.<sup>120</sup> In this typical format, panelists are chosen to present their different views and the interviewer then 'orchestrates' the debate between them.<sup>121</sup> In this case, the interviewer presented the health minister with her perceptions of the other side's view in order to extract his views. She presented the PAE view to be that the South African government sought to 'break' patents and abridge international IP standards (extract 7 above) which would be tantamount to 'state-sanctioned theft'. It is difficult to state unequivocally which side of the debate she favoured. However, it is clear that she gave an accurate restatement of the PAE strategy's position.

#### 9. CONCLUSION

As shown by the discussion of PharmaGate outlined above, differing ideas, interests and institutions find themselves pitted against each other, which has a significant impact on policy formulation and implementation.<sup>122</sup> The main stakeholders operate in a 'profoundly political' context,<sup>123</sup> and the narratives that they employ to advance their positions are very telling. The discussion also shows that significant policy debates play out in the public sphere beyond formal submissions. The paper purposefully sought to illustrate this point by discussing a strategy prepared for pharma and by providing extracts of a media interview with the health minister. The strategy is not considered to be a formal response to the draft IP policy as it did not form part of the formal policy formulation process.

This paper has shown that elements of perspectives voiced by African states in global health diplomacy were evident in the Ministry of Health's position. In that sense, this incident was the play out of international debates on the national plane. Health Minister, Dr Motsoaledi, drew on the African perspectives of unity and ubuntu to advance South Africa's case for more robustly invoking TRIPS flexibilities in order to meet public health needs. In so doing, he incorporated the position of similarly placed developing countries, such as India, in a show of solidarity and reciprocal support. Further, in calling out what he considered to be clandestine manipulation of national policy formulation by global corporate actors, the minister drew on African liberation ethics with its emphasis on sovereignty. This entailed an insistence on the country being left to its own devices to carve out and implement its developmental policies and practices

120 Fairclough *Analysing Discourse: Textual Analysis for Social Research* (2003) 44.

121 Ibid.

122 Gwendolen G Eamer & Glen E Randall 'Barriers to implementing WHO's exclusive breastfeeding policy for women living with HIV in sub-Saharan Africa: An exploration of ideas, interests and institutions' (2013) 28 *Int J Health Plann Mgmt* 257–268.

123 Yair Zalmanovitch & Nissim Cohen 'The pursuit of political will: Politicians' motivation and health promotion' (2015) 30 *Int J Health Plann Mgmt* 31–44.

without interference. Substantively, Dr Motsoaledi's arguments drew from the counter-discourse that challenges an out-of-kilter IP framework that does not adequately serve public interest ends. On the other hand, pharma stuck to the monopolist capitalist script of the primacy of private rights.

The importance of imagery and rhetoric in IP discourse is undeniable, as evidenced by numerous studies on the framing of access to medicines as a human rights issue in the general context of developing countries,<sup>124</sup> and in South Africa specifically.<sup>125</sup> Arguments framed from this perspective are difficult to counter – who can openly dispute a person's right to health and ultimately life against the interests of profit? It is perhaps out of the force of such arguments that pharma took to a somewhat clandestine strategy, as outlined above.

Various ploys were used by both parties to control the discourse and influence social cognition. For example, they both used othering to marginalise opposing views and resorted to battle metaphors to make their case. It is difficult to make conclusive statements about who 'won' this bout, as the final policy is still outstanding. However, it is possible to venture that Dr Motsoaledi appeared to hold the upper hand due to being the champion of the unassailable duty to save lives from avoidable deaths. It became untenable for IPASA to adopt or pursue the PAE strategy after it had been exposed and shamed by extensive media coverage of civil society's and the Ministry of Health's opposition to it.

Besides the health minister and IPASA, several other voices spoke in support of either perspective. For instance, prior to, during and after PharmaGate, various stakeholders spoke or wrote in support of a strong IP system and warned against the hasty adoption of the draft National IP Policy's reforms. However, after media and other scrutiny of the PAE strategy, support for the strategy fell short of the intended energetic political campaign suggested by the PAE strategy. Indeed, not many were willing to publicly support the strategy after its disavowal by IPASA and its condemnation by Minister Motsoaledi.

On the one hand, those in support of a more nuanced patent law framework that is more supportive of the public health goal of ensuring access to essential medicines at affordable prices, were keen to see prompt finalisation of the policy formulation process. In fact, civil society pressured government to finalise the policy prior to the May 2014 elections. On the other hand, the PAE strategy expressly sought to delay its finalisation. On that aspect, the strategy appears to have been successful or, at the very least, accurate in its prediction of a delay, because at the time of writing, September 2015, the National IP Policy is still outstanding. However, with regard to the actual content of the policy with regard to patent law reforms, it is too soon to call the game and to say which perspective has prevailed.

124 Duncan Matthews 'When framing meets law: Using human rights as a practical instrument to facilitate access to medicines in developing countries' (2011) *WIPO Journal* 113.

125 Yousuf A Vawda & Brook Baker 'Achieving social justice in the human rights/intellectual property debate: Realising the goal of access to medicines' (2013) 13 *African Human Rights Law Journal* 55.