

# Using Ideas Strategically: The Contest Between Business and NGO Networks in Intellectual Property Rights

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Whose ideas matter? And how do actors make them matter? Focusing on the strategic deployment of competing normative frameworks, that is, framing issues and grafting private agendas on policy debates, we examine the contentious politics of the contemporary international intellectual property rights regime. We compare the business victory in the establishment of the 1994 Agreement on Trade-Related Intellectual Property (TRIPS) in the World Trade Organization with the subsequent NGO campaign against enforcing TRIPS to ensure access to essential HIV/AIDS medicines. Our analysis challenges constructivist scholarship that emphasizes the distinction between various types of transnational networks based on instrumental versus normative orientations. We question the portrayal of business firms as strictly instrumental actors preoccupied with material concerns, and NGOs as motivated solely by principled, or non-material beliefs. Yet we also offer a friendly amendment to constructivism by demonstrating its applicability to the analysis of business. Treating the business and NGO networks as competing interest groups driven by their normative ideals and material concerns, we demonstrate that these networks' strategies and activities are remarkably similar.

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## Issues and Background

This paper contributes to the debate on the role of ideas in influencing policy agendas and policy outcomes. It employs constructivist insights to understand strategies of businesses to influence policy debates. It challenges the notion that non-governmental organizations (NGOs) are different from businesses because they pursue principled beliefs while businesses pursue material interests.<sup>1</sup>

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<sup>1</sup> For a similar challenge from a different perspective see Cooley and Ron (2002). Employing insights from the New Economics of Organization, they focus on NGOs and IOs as market actors.

Normative frameworks as well as instrumental objectives inform actions of both NGOs and businesses. On this count this paper also challenges “narrow versions”<sup>2</sup> of the rational choice perspective (e.g., Becker, 1976) that view actors as having instrumental objectives only. We contend that strategies of business and NGO networks should be examined through a common lens and the paper provides a framework for doing so. We are particularly interested in how interest groups employ ideas strategically to frame debates, capitalize on policy crises to create political opportunities, and graft their preferred goals onto debates as solutions to pressing policy problems.

Empirically, we focus on the politics of the establishment and enforcement of a key inter-governmental regime governing intellectual property rights (IPR). We examine why and how a transnational network of multinational corporations succeeded in grafting its agenda onto the 1994 Agreement on Trade-Related Intellectual Property Rights (TRIPS) negotiations of the Uruguay Round of the GATT (General Agreement on Tariffs and Trade; hereafter, the World Trade Organization—WTO). However, in the ongoing controversy over access to HIV/AIDS drugs, this same network is unable to get the U.S. government, hitherto its strongest supporter, to aggressively pursue alleged TRIPS violations against developing countries (notably, Thailand, South Africa, and Brazil). Another transnational network, this time led by NGOs, has succeeded in grafting its agenda onto U.S. policy.<sup>3</sup> What explains this variation in policy outcomes over time?

We contend that the politics of IPR regime formation and enforcement can be usefully viewed as a contest between two interest groups, without normatively privileging one group over another. Our analysis demonstrates that the similarities between business and NGO “campaigns” far outweigh their differences. Campaigns, in Keck and Sikkink’s terms,

are processes of issue construction constrained by the action context in which they are carried out: activists identify a problem, specify a cause, and propose a solution, all with an eye toward producing procedural, substantive, and normative change in their area of concern (1998:8).

Both campaigns engaged in agenda setting. They each established transnational networks and organized a coalition “for proselytizing to generate broad support for normative change within, across, and outside government channels” (Price, 1998:617). Each campaign grafted new normative frames onto existing ones; the business campaign grafted IPR protection onto free trade, while the NGO campaign grafted IPR onto public health. Both succeeded in producing normative and substantive changes in policy outcomes.

In the first section of this paper we present the argument for employing a common framework to examine strategies of business and NGO networks, and then identify elements of this framework. We present the TRIPS case in the second section. We examine how the business network influenced the provisions of the TRIPS agreement. In the third section we present the Access to HIV/AIDS Medicines case study. We compare the NGO strategy with the business strategy and explain how the NGO network gained ground. Finally, we offer conclusions of our comparative analysis and outline issues for further research.

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<sup>2</sup> The rational choice perspective has many variants with some key rational choice scholars recognizing the role of norms in influencing human behavior. For a review see Ostrom (2000).

<sup>3</sup> We focus on business and NGO activity in the U.S. because this is where the policy dynamics relevant to our analysis played out. The key reasons are the strength of the U.S. in the world economy and its ability to deny developing countries access to the U.S. market. Developing country governments are also a part of our narrative, especially in terms of their alliance with the NGOs in the Access Campaign.

### The Argument

Information plays an important role in policy processes. However, information is not knowledge (Comor, 2001). Given bounded rationality, actors—individual or corporate—cannot absorb and process all accessible information. Actors employ filters to identify useful and interesting information (Tversky and Kahneman, 1981; Jones, 2001). People transform information into knowledge by employing different normative frames. By frames we mean “specific metaphors, symbolic representations and cognitive clues used to render or cast behavior and events in an evaluative mode and to suggest alternative modes of actions” (Zald, 1996:262). Because agenda setting involves both the provision of information and of normative frames, it crucially influences policy debates and ultimately, policy outcomes (Cobb and Elder, 1983; Snow, Rochford, Worden, and Benford, 1986; Baumgartner and Jones, 1993; Tarrow, 1994; Kingdon, 1995; McAdam, McCarthy, and Zald, 1996; Prakash and Kollman, 2003).<sup>4</sup> Given that most policy debates feature competing agendas, it is important to examine whose agenda prevails. After all, politics is about who gets what and how.

This paper examines why and how the business network succeeded in setting the policy agenda in the TRIPS negotiations even while it seems to be losing ground in the recent, continuing controversy over access to HIV/AIDS medicines. This network successfully promoted the frame that “patents = free trade + investment = economic growth,” which became the normative building block of the TRIPS agreement. In 1994, the business network “won” by getting governments (specifically, the U.S. government) to adopt its private interests in codifying stringent IPR norms. Capitalizing on a major policy crisis,<sup>5</sup> the perceived loss of U.S. competitiveness, the network linked this crisis to weakly enforced IPRs in developing countries. As a policy solution, the business network proposed trade linkages (using access to U.S. markets as leverage) to encourage developing countries to adopt IPR norms as enshrined in the TRIPS agreement. The network opposed (then, and now) policies such as governments’ “compulsory licensing”—forcing companies to license patented medicines to generic producers—because it views them as IPR violations. Further, it attributes the problems in accessing HIV/AIDS medicines to poverty and governance issues in developing countries, rather than stringent IPR norms for HIV/AIDS medicines.

However, a transnational NGO network has proposed an alternative frame to interpret the implications of TRIPS patent laws on the HIV/AIDS crisis. Unlike the business network that attributes the HIV/AIDS crisis to poverty and poor governance, the NGO network constructs the policy problem as one of excessively stringent IPR norms that make HIV/AIDS medicines unaffordable, thereby working against public health objectives. As a solution, the NGO network supports developing countries’ desire to provide low-cost access to HIV/AIDS drugs by compulsory licensing of the local production of patented HIV/AIDS drugs—a solution that business networks claim violates their patents. ACT UP Paris, a health policy advocacy group, frames the NGO position as “copy = life.” This underscores the point that through copying (that is, not honoring IPRs of pharmaceutical firms) many lives can be saved.

<sup>4</sup> The processes of identifying and interpreting information may not be sequential or separable. Oftentimes actors search for information with a normative frame in mind. Normative frames may be embedded in the information that actors receive.

<sup>5</sup> Policy crises are events that can potentially disturb regular patterns of policy debate and policymaking. They can force attention to new problems or new dimensions of existing problems. Thus they can generate debates over new solutions and approaches to policy challenges. While policy crises create political opportunities, it is up to agents to take advantage of such opportunities. Interest groups may exaggerate the perceived intensity of the crisis and the costs it imposes on the society. In some ways, what constitutes a policy crisis is itself a function of framing and agenda setting. We do not differentiate between a real and a manufactured crisis because what seems “real” to one interest group may seem “manufactured” to other groups. We thank an anonymous reviewer for raising this issue.

To discourage developing countries from invoking compulsory licensing, the business network has aggressively pursued litigation. It has asked for trade sanctions (by the United States Trade Representative—USTR) against countries such as Thailand, South Africa, and Brazil for allegedly violating TRIPS. However, in early 2001, the business network abandoned its lawsuit that challenged South Africa's law on compulsory licensing. Several months later, the U.S. government, an ardent champion of IPR protection, withdrew its WTO case against Brazil over pharmaceutical patent issues. Further, due in part to the NGO network's partnership with generic pharmaceutical companies in developing countries, the price of a yearly dose of HIV/AIDS drugs has dropped from \$10,000 per patient to \$295. Additionally, at the November 2001 WTO Ministerial meeting at Doha, negotiators endorsed the Declaration on the TRIPS Agreement and Public Health (WTO, 2001). The declaration links IPR and public health, and affirms member countries' rights to protect public health and promote access to essential drugs. Clearly, there are substantive and normative changes in HIV/AIDS policy debates and outcomes that signal that the NGO perspective has gained considerable ground.

Comparing the corporate victory in TRIPS with the subsequent successful NGO "Access Campaign" highlights dramatic change in the power of the two competing networks over time. Our analysis focuses on how agents, whether firms or NGOs, create and exploit political opportunities. In doing so, we draw upon insights from sociology and public policy. Developed primarily by sociologists, the literature on political opportunity structures seeks to understand conditions under which social movements influence policymaking (Useem and Zald, 1982; Kitschelt, 1986; McAdam et al., 1996). Parallel literatures in public policy such as the advocacy coalition framework (Sabatier and Jenkins-Smith, 1993) examine conditions under which competing interest groups influence policy outcomes. The key insight from these literatures is that both structure and agency matter in influencing policy outcomes.

Although we focus on demonstrating similarities between business and NGO networks, this paper also speaks to the pluralism versus elitism debate (Kollman and Prakash, 2001; Potoski and Prakash, 2004).<sup>6</sup> Some argue that in market-based economies, because the state is structurally dependent on capital, businesses have a privileged position in political processes irrespective of which political party is in power (Lindblom, 1977; Block, 1987). Others, however, find no such dependence. They argue that there is a level playing field between businesses and other interest groups (Wilson, 1981; Vogel, 1987), and in any case, businesses seldom speak with a common voice (Ruigrok, 2000:320–331; for a critique see "class theorists" such as Miliband, 1969 and "power elite" theorists such as Dye, 1995).<sup>7</sup>

Quinn and Shapiro (1991) have examined the so-called Lindblom hypothesis and found no support for it. They estimated time series models of corporate taxation rates and redistribution of the tax burden from businesses to individuals. Contrary to the Lindblom hypothesis, they found that taxation policies were strongly influenced by partisanship with Democratic administrations increasing tax burdens on businesses. Smith (2000) reports that on policy issues on which businesses are united, and therefore presumably more influential, governmental

<sup>6</sup> There is also the "state autonomy" perspective that examines degrees of government autonomy from societal pressures (Evans et al., 1985). In IPE, this parallels the literature on "strong" and "weak" states and how variations in state strength map onto policy choices and policy outcomes (Risse-Kappen, 1994).

<sup>7</sup> The key issue here is one of institutional access. One could argue that businesses are structurally advantaged because they can buy influence through PACs and "soft money" contributions; the controversy over "campaign finance reform" is a case in point. Interestingly, some of the most vocal criticism on the ban of "soft money" has come from labor unions and civil rights groups. A leading civil rights legislator, Representative Albert Wynn (D-MD), even co-sponsored a bill with Bob Ney (R-OH) that almost derailed the Shays-Meehan Campaign Finance bill. Both the AFL-CIO and the Chamber of Commerce opposed campaign finance reform. For reference, in the 2000 election cycle, the AFL-CIO spent \$9.5 million on issue ads while the Chamber of Commerce spent about \$5.5 million (opensecrets.org, 2002).

decisions are influenced by constituent preferences and election outcomes. He concludes that businesses (and competing groups as well) could affect policy decisions through the indirect route of agenda control.<sup>8</sup>

This paper argues that structures alone do not determine political opportunities<sup>9</sup> and which perspective gets heard. We highlight how networks can leverage dominant policy concerns and exogenous events (or policy crises) to alter their relative power position, to get heard, and eventually to influence policy outcomes. In particular, we emphasize how agency was crucial in changing the power equation between competing networks through strategic deployment of information and normative frames. In doing so, we also highlight the role of key individuals, policy entrepreneurs, in shaping the network's strategy to exploit political opportunities.<sup>10</sup> We focus on the policy dynamics in the U.S. because it was the primary actor in establishing the TRIPS regime and the key actor in enforcing it through both the threat of unilateral sanctions and WTO actions in the Access to HIV/AIDS Medicines case.

In recent years numerous scholars have analyzed the role of NGOs in world politics. Some have suggested that a global civil society—organized social life and politics that are autonomous of the state and outside the state-centric system—is beginning to emerge (Rosenau, 1990; Lipschutz, 1992; Wapner, 1995; Florini, 2001). Scholars continue to debate the level of autonomy and power of such transnational actors vis-à-vis the state (Risse-Kappen, 1994, 1995; Clark, Friedman, and Hochstetler, 1998). Many constructivist scholars focus on actors, typically NGOs, whom they view as being marginalized in traditional IPE scholarship (Sikkink, 1986; Klotz, 1995; Keck and Sikkink, 1998; Price, 1998).<sup>11</sup> Keck and Sikkink (1998) have carefully defined the distinctive features of their “transnational advocacy networks” as opposed to other interest groups. They note that

world politics at the end of the twentieth century involves, alongside states, many nonstate actors that interact with each other. ... These interactions are structured in terms of networks. ... Some involve economic actors and firms .... Others are networks of activists, distinguishable largely by the centrality of principled beliefs or values in motivating their formations. We will call these transnational advocacy networks. (1998:1)<sup>12</sup>

<sup>8</sup> Unlike Smith (2000), Berry (1999) suggests that liberal think tanks get more media coverage. Thus it is difficult to assess which actor is structurally advantaged in setting agenda through more media coverage. The continuing controversy over the release of Energy Policy task force documents certainly suggests that businesses have privileged access to the Bush administration's decision-making processes. In the early 1990s a similar controversy arose over Healthcare Reform task force headed by Hillary Clinton where businesses complained about lack of access. Our position is that whether or not businesses have privileged access to the policymaking apparatus, and whether such access translates into tangible policy gains, are empirical questions. The answers may depend on several factors such as the nature of policy decision, levels of business unity, partisanship, electoral cycle, business cycle, etc. Speculation on these issues is beyond the scope of this paper.

<sup>9</sup> On this count, the term “political opportunity structures” becomes problematic because it overemphasizes the structural aspects of political opportunities while ignoring agency.

<sup>10</sup> Public policy scholars refer to these agents as “policy entrepreneurs,” who influence outcomes by coupling the “problem,” the “politics,” and the “policy” streams when the “policy window” opens up (Kingdon, 1984). They repackage issues by giving them new “policy images,” and move issues from one policy domain or subsystem to another, as well as from one institutional setting to a more hospitable one (Baumgartner and Jones, 1993; see also Riker, 1986). This literature emphasizes that structures alone do not determine policy outcomes; agency also matters.

<sup>11</sup> Constructivist scholarship in international relations has flourished in recent years. Some versions emphasize structure (e.g., Wendt, 1999), and others agency (e.g., Florini, 1996; Price, 1998). Some versions explicitly distance themselves from rational choice perspectives (e.g., Ruggie, 1998), whereas others acknowledge basic compatibility (e.g., Klotz, 1995; Fearon and Wendt, 2002). All versions share a commitment to analyzing the role of norms and ideas in international politics. For useful overviews see Adler (1997) and Ruggie (1998).

<sup>12</sup> Keck and Sikkink (1998:1) also identify a third type of transnational network, epistemic communities: “networks of scientists and experts whose professional ties and shared causal ideas underpin their efforts to influence policy.” They suggest that epistemic communities are motivated by professional norms (2). Because epistemic communities are not relevant for our analysis, we focus only on business and NGO networks.

They contrast such networks with business networks by noting that advocacy networks are “motivated by values rather than by material concerns (1998:2).”<sup>13</sup> Yet ultimately this distinction between various networks is unpersuasive and overstated. It is rooted in the analytical bifurcation of “ideas” and “interests” (Goldstein and Keohane, 1993) in which principled goals track with ideas or norms, and instrumental goals track with interests. This distinction mirrors the rationalist/materialist versus constructivist/normative “divide” in IPE scholarship (Katzenstein, Keohane, and Krasner, 1999). Analytically we do not privilege ideas over interests or vice versa. Behind every idea there is an interest (Hall, 1986) and interests are guided by normative ideas. Yet we are not claiming that everything matters. Rather, we seek to identify key competing ideas in a debate, whose interests they serve, how they are promoted, and how effectively they are deployed.<sup>14</sup> Even seemingly instrumental actors are motivated by normative considerations (Rocheffort and Cobb, 1994:176–177; Prakash, 2000). For example, while most people would characterize pharmaceutical firms as instrumental actors pursuing economic interests, this overlooks the normative foundation of their actions. Normatively, pharmaceutical firms believe in and promote the paradigm that “profits = research = cures.” Worldwide, pharmaceutical companies employ over 150,000 scientists (50,000 in the U.S. alone) who are researching compounds to treat or cure a variety of diseases and ailments (Standard & Poor’s (2002:7)). Non-generic pharmaceutical companies have more than tripled their R&D expenditures since 1990, spending \$30.5 billion in 2001. “Domestic company-financed R&D outlays in 2001 were equal to 17.7% of U.S. pharmaceutical sales and exports, compared to ... 11.9% in 1980” (S&P, 2002:16). Furthermore, many supporters of the pharmaceutical industry are people whose family members suffer from as yet incurable ailments. This non-material motivation is evident in the case of the president of PhRMA, Alan Holmer, whose son suffers from cystic fibrosis. In its commitment to research and its devotion of substantial resources to finding new cures the pharmaceutical industry exemplifies its share of principled beliefs.

Importantly, many NGOs are guided by instrumental concerns. For example, labor unions that Keck and Sikkink (1998:9) identify as one of the key actors in advocacy networks are obviously concerned with material objectives. They also identify environmental groups as key actors in NGO networks. Some environmental groups/NGOs seek confrontation (“thrive on controversy,” Keck and Sikkink, 1998:31) to drive up membership, clearly an instrumental objective.<sup>15</sup> Some actions are even more instrumental. In the U.S. environmental governance system, private plaintiffs can sue governments as well as private actors for the

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<sup>13</sup> NGOs include organizations, such as racist organizations, that have highly problematic objectives. Even established NGOs adopt ethically questionable strategies—e.g., Greenpeace’s falsification of information during the Brent Spar episode. Also, the Earth Liberation Front (which the FBI classifies as domestic terrorists) released a “year-end report” on its (illegal) eco-terrorism actions. The report identifies 137 such acts in 2001, including an act of arson at the University of Washington that resulted in \$5.3 million in damage and a \$1.5 million egg-farm fire in the state of Washington (Bernton, 2002). Hence, we do not seek to privilege NGOs ethically as a category over businesses or governments.

<sup>14</sup> To the extent that policy outcomes reflect state (U.S.) interests, we seek to explain how politics (through strategic use of ideas) shapes state interests. Therefore, one may consider domestic and international politics as independent variables, and state interests as our dependent variable. Whether or not states have interests, whether such interests have been shaped by ideas or norms, and whether policy processes reflect the interests of the state or of powerful individuals in the government are important issues but beyond the purview of this paper.

<sup>15</sup> Sharon Oster’s (1994) well-known survey volume of non-profits includes chapters such as: “non-profit organizations as franchise operations,” “profits and incentive compensation in nonprofit firms,” “competing for scarce resources,” and “competitive strategies for not-for-profit-agencies.” Most leading business schools offer non-profit management as a functional specialty. *Business Week* and *US News and World Report* annually rank business schools on their non-profit offerings along with traditional specialties such as marketing, finance, accounting, strategy, human relations, and international business. The business school rankings are based on several factors including the average compensation of the outgoing class.

enforcement of environmental laws and even collect fees for doing so (the provision of the so-called private attorney general). In examining the cases that environmental groups have litigated, Zywicki (1999, esp. pp. 879–886) concludes that such litigation has targeted private actors predominantly (as opposed to governments), and involved substantial payment to environmental groups in the form of legal fees. Thus, some actions of environmental groups certainly are motivated by material concerns.

The NGO campaign for low-cost access to HIV/AIDS drugs promotes morally lofty goals. Yet, like all consumer-based movements, so-called instrumental motives are implicated insofar as they promote competition, expanded consumer choice, and lower prices for goods and services. Further, Ralph Nader, the leading American consumer advocate and a key actor in the NGO campaign, clearly stood to gain in terms of boosting his 2000 presidential campaign. Nader claimed that only he represented the interests of the “common man” while both Democrats (particularly, candidate Gore) and Republicans served the interests of big business. His supporters used the Access Campaign to embarrass Gore, thereby serving Nader’s political objectives.

Further, Cipla Pharmaceuticals, a key member of the Access Campaign that promised to supply HIV/AIDS medicines at dramatically low prices, was clearly motivated by instrumental objectives. Like any other firm, Cipla seeks to make profits. It has been a beneficiary of the pre-TRIPS IPR regime in terms of manufacturing patented pharmaceuticals without a license by tinkering with the manufacturing processes. Because TRIPS would put an end to such practices by 2005, the HIV/AIDS debate provided Cipla with an opportunity to avoid this imminent constraint. Cipla had a clear material incentive to grab a share of the expanding market for HIV/AIDS drugs by collaborating with the Access Campaign.

Developing countries’ governments supportive of the NGO campaign also had instrumental objectives. Governments require money to provide for public goods but also to buy support, to pursue favored projects of politicians, and to reward their supporters. Without doubt, the HIV/AIDS epidemic has created a big strain on the government exchequer, depriving governments of the ability to undertake other projects. Hence, governments’ support for the NGO campaign is also rooted in instrumental concerns. As we will demonstrate subsequently, the U.S. government is no exception: although it opposes compulsory licensing abroad, in the wake of the anthrax episode, it openly signaled the possibility of compulsory licensing to bring down the price of Bayer’s Ciproflaxin.

Just as we reject the rigid separation between “principled” and “instrumental” motivations (or “ideas/norms” and “interests”), we reject the conception of transnational advocacy networks as something different in kind than interest groups. In this we follow Burstein (1999:19) who argues, “there is no theoretical justification for distinguishing between social movement organizations and interest groups.... There exist simple organizations—“interest organizations”—trying to influence public policy.” As we will demonstrate, the strategies of the competing networks examined here are similar. Insights derived from constructivist literature about transnational advocacy networks travel quite well when applied to the analysis of business networks. This opens up new avenues of inquiry beyond the extant constructivist repertoire. Importantly, our paper brings politics—which network gets what and how—back into focus in examining the contests between competing networks regarding IPR issues. Success in influencing policy processes lies not in claimed moral superiority of the agenda but in the network’s superior abilities to create and make the most of political opportunities by exploiting a crisis, constructing a problem, mobilizing a coalition, and grafting its agenda onto policy debates.

We argue that because business and NGO networks both have instrumental interests and normative concerns, their actions need to be understood through a common analytical framework. One could argue, however, that the networks have

different types of motivations.<sup>16</sup> One can distinguish between a broad conception of normative motivations and a narrower conception of motivations. Broad conceptions, which we endorse, would include any argued or constructed notion of reality. Narrower conceptions tend to focus and insist upon distinctions between instrumental and affective bases for action. For example, Keck and Sikkink (1998) adopt a narrow view of normative motivations when they emphasize the separation between transnational advocacy networks and the “intended beneficiaries” of their action. This separation is abundantly clear in the case of efforts to eliminate the Chinese practice of footbinding. The fundamentally “humanitarian” motivation of these advocates is revealed because they do not expect to benefit directly by the elimination of the disputed practice (Keck and Sikkink, 1998:40).

However, the notion of “direct beneficiaries” seems to imply a material motivation and a material reward. In this sense, Keck and Sikkink (1998) stress a distinction between instrumental (material) and affective (norm-based) rewards. Yet, “arguments about whether behavior is norm-based or interest-based miss the point that norm-conformance can often be self-interested, depending on how one specifies interests and the nature of the norm” (Finnemore and Sikkink, 1998:272). The narrower conception of norms seems to “smuggle in” a set of assumptions about being progressive or altruistic.<sup>17</sup> Those constructivists who subscribe to the narrower version routinely save the “norms” label for perspectives that they favor. Analytically, there is no basis for limiting the characterization of normative motivations for perspectives with which the analysts sympathize. We find the narrow view problematic because it both limits the constructivist menu, and renders the scholarship more implicitly normative than analytic. While Keck and Sikkink argue that “issues involving core values—ideas about right and wrong—arouse strong feelings and stimulate network formation among activists, who see their task as meaningful” (1998:201), Kratochwil reminds us that even so-called instrumental motivations are informed by normative appraisal. “An action or belief is commonly called ‘rational’ when it ‘makes sense’ to act in that way. At the same time rationality is bound up with normative discourse because ‘to call something rational means then to endorse it in terms of some norm or moral feeling that permits it’” (Zehfuss, 2001:65). We maintain that the business advocates constructed intellectual property as a trade and competitiveness issue, and that this construction was inherently normative in Kratochwil’s broader sense.

Analytically one can separate motivations, strategies, and outcomes. Such separation is necessary to evaluate the extent to which the “principled motivations” determine successful versus unsuccessful outcomes. Cooley and Ron (2002) and Keck and Sikkink (1998) accept the distinction between “normative” actors and “instrumental” actors. Therefore, Cooley and Ron (2002) accept the narrow version of norms. However, they find that normative motivations do not translate into outcomes, for two reasons. First, strategies are intervening variables. Second, strategies are determined by the external environment and not by the norms animating NGO actions. According to Cooley and Ron, the strategic environment eliminates any meaningful explanatory distinctions between so-called principled and instrumental actors (2002).<sup>18</sup> The environment leads both for-profit and non-profit actors to pursue similar strategies and blurs distinctions between “doing well”

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<sup>16</sup> Our argument holds for NGOs or businesses as a category, as defined by Keck and Sikkink (1998). One could always find examples of actors within each category that are acting primarily upon normative goals—an anonymous reviewer suggested that equity advocates do so. This may well be so. However, we are comparing NGOs as a category with businesses as a category (not equity advocates with businesses) and arguing that both categories pursue principled beliefs as well as material interests.

<sup>17</sup> We thank an anonymous reviewer for this point. See also Hall and Biersteker’s discussion of “moral authority” (2002:220–221).

<sup>18</sup> Although it should be noted that Cooley and Ron (2002) examine NGOs working in the field, delivering services, rather than strictly advocating positions.



(profiting) and “doing good” (promoting humanitarian goals). So-called humanitarian NGOs must “do well” (successfully negotiate contract renewal) in order to continue “doing good.” They further argue that this environment could lead to dysfunctional outcomes that actually undermine the original principles.

For Keck and Sikkink (1998) too, actors’ strategies are intervening variables between motivations and outcomes. They find that principled advocacy networks are most effective (that is, achieve their desired outcomes) when they campaign over issues involving either bodily harm to innocents or equality of opportunity. Even so, these networks only will succeed if they gain domestic champions and access to institutions (e.g., the World Bank) that they can leverage to alter outcomes. That is, outcomes are influenced by strategies. Therefore, in either case, it is not clear that the distinction between narrow and broad conceptions of norms directly affects outcomes because strategies are the intervening variables. For Cooley and Ron, motivations do not influence strategies, and therefore variations in norms do not lead to variations in types of outcomes. For Keck and Sikkink, motivations influence strategies, and therefore outcomes under certain conditions.

We find Keck and Sikkink implying that transnational advocacy networks are distinguished by their strategies to change existing power structures; they are proverbial Davids taking on Goliaths (1998:210). In other words, motivations influence strategies. We disagree. We find both business and NGO networks have principled as well as instrumental beliefs and cannot be distinguished on the basis of motivations. We also find the two networks employing similar types of strategies. Success or failure to achieve the network’s desired outcome critically depends on how effectively the network was able to shape the agenda.

Furthermore, one might claim that NGOs seek policies with predominantly non-excludable benefits while businesses seek policies with excludable benefits.<sup>19</sup> We maintain that this distinction is untenable. Every interest group has core constituencies that it seeks to serve.<sup>20</sup> Key issues in determining excludability of benefits are how widespread or encompassing are such constituencies and what entry barriers do non-members face in joining such constituencies. That businesses primarily seek to increase shareholder profits—the ultimate claimants of the residual—may give the impression that they pursue policies with excludable benefits. Since the 1980s the pattern of shareholding in the U.S. has changed with institutional shareholders becoming the largest shareholders. By the mid-1990s institutional investors held over 50% of corporate equities and accounted for over 80% of all share trading (Pomeranz, 1998). Directly or indirectly through institutions (particularly, IRAs), about 50% of American households have invested a part of their wealth in the stock market (Wolff, 2001). About 93 million Americans in 54.8 million households own mutual fund shares (Standard & Poor’s, 2002b:13). By serving shareholders, businesses indeed may be serving a very large section of the American population.<sup>21</sup> Further, because people can buy and sell shares at low transaction costs, especially with the onset of online trading, the entry barriers into the shareholder “club” (Cornes and Sandler, 1996) with excludable benefits are not significant.

<sup>19</sup> We thank an anonymous reviewer for raising this point.

<sup>20</sup> Olson’s (1965) argument for the importance of excludable benefits for organizing collective action holds for both business and NGO groups. However, literature in experimental economics suggests that collective action may take place even with non-excludable benefits—for a review see Ostrom (2000).

<sup>21</sup> Arguably, in firms, managers serve themselves, not the shareholders. At a conceptual level, any large organization or coalition where there is a separation of “ownership” and “control” witnesses “agency conflicts” (Berle and Means, [1932] 1968) whereby individuals seek to pursue their goals (such as misappropriating funds, gaining media coverage, creating a political constituency, laying groundwork to launch their own organization) at the cost of the organization’s or the movement’s objectives. Financial irregularities—whether in Enron, United Way Charities, or Teamsters—are a common manifestation of agency abuse. Whether such agency conflicts are worse in organizations with no well-recognized principals and where there is no clear bottom line to evaluate bureaucratic performance is an empirical question.

NGOs often have well-defined constituencies that reap excludable benefits from their activities. Labor unions agitate for excludable benefits for their members, and may even seek to preserve this excludability by opposing employment of a nonunion workforce—the 2002 strike by Longshoremen on the West Coast being a notable example. One can identify well-defined constituencies that reap excludable benefits for NGOs such as the American Association for Retired People, Gay and Lesbian groups, the National Rifle Association, Gun-Control groups, Pro-Life groups, Pro-Choice groups, and Environmental Groups. Although some NGOs may claim to agitate for the “public benefit,” one cannot dispute that there are different “publics” to be catered to. Some publics may give high salience to protecting forests, perhaps to protect the quality of their lives, while loggers may give salience to logging because their livelihood depends on it. To what extent entry barriers and individual preferences influence the costs of joining the NGO “club,” thereby reducing levels of excludability, remains an empirical question. In sum, one must not assume that NGO networks differ from business networks based on the notion that the former pursue policies with non-excludable benefits while the latter do not.

To clarify the scope of our argument, we will indicate what this paper does not do. It neither defends business networks nor criticizes NGO networks. It makes no claims about the relative accountability of NGOs, governments, or firms (Wapner, 2002). It makes no arguments about moral equivalence of actions of various networks. Rather, we seek to emphasize that adhering to rigidly defined categories often distorts the analysis and imports hidden assumptions that are more normative than analytic. Our position is that both business and NGO networks have their share of principled beliefs and instrumental goals. Hence, their actions and strategies should be viewed through a common framework.

Crises prepare the ground for reconfiguring political opportunities. Several public policy perspectives have examined conditions under which major changes in a policy domain/subsystem take place. As opposed to incremental changes, major changes take place due to changes in the domains’ external or internal environments. The Advocacy Coalition Framework (Sabatier and Jenkins-Smith, 1993) identifies external factors as necessary for major policy changes (see also Haggard, 1990). Some (not all) external changes upset the power equation and erode the power of the dominant coalition. In the Punctuated Equilibrium perspective (Baumgartner and Jones, 1993), policy changes occur when exogenous events, particularly in the macro-politics, lead to issue redefinition (for example, IPR protection as a public health issue rather than a trade issue) and the issue assumes a new policy image. Policy entrepreneurs facilitate change by shifting issues trapped in a given policy monopoly to another policy domain that is more amenable to change. For Kingdon (1984), a policy window could open because of changes either in the problem stream (HIV/AIDS crisis) or in the political stream (election of a new leader with different priorities). Again, the role of policy entrepreneurs is crucial in coupling these streams. In all of the above perspectives, political opportunities created by a crisis/exogenous shock/policy window are necessary but not sufficient to induce a major policy change; agency is required.

Employing a common framework (see Table 1), this paper systematically examines the TRIPS and Access Campaigns in terms of how competing transnational networks: (a) identified a policy crisis; (b) explicated their normative positions and policy goals; (c) mobilized a transnational network of actors with congruent goals; (d) set the policy agenda by constructing the problem, disseminating favorable information to key players, and providing a normative frame to interpret this information; and (e) brought about substantive and normative changes in the policy regime. In particular, we emphasize how competing networks created and exploited political opportunities while attempting to graft their agendas onto policy debates.

TABLE 1. Business and NGO Campaigns: A Comparison

	<i>TRIPS Campaign</i>	<i>Access to HIV/AIDS Drugs Campaign</i>
Campaign period	1980s to mid-1990s	Mid-1990s onward
Policy crisis	Technology makes appropriating IPRs easy	HIV/AIDS epidemic
Problem definition	IPRs = competitiveness, IPRs = free trade, and investment = economic growth	IPRs = high costs of drugs = needless deaths
Preferred policy solution	New regime for IPR protection; USTR should oppose compulsory licensing	Favor compulsory licensing, generic drug availability
Network's normative frame	Patents = profits = research = cure	Copy = life
Network's material interests	Stringent IPRs mean higher profits	Lower prices of AIDS drugs; political ambitions of Nader; Cipla seeking to grab market share
Key political opportunities	Huge U.S. trade deficit; arcane nature of IPR meant U.S. government relies on industry for expertise	AIDS crisis, U.S. presidential campaign; Clinton's quest for legacy; anthrax and bioterrorism
Framing strategy	IPR protection is a competitiveness issue; property rights are being appropriated by pirates	PhRMA greed kills; compulsory licensing essential to avert the human tragedy; R&D on most drugs funded by the government
Key actors in the network	<i>Industries:</i> pharmaceutical, software, music and entertainment; agricultural chemicals <i>Organizations:</i> –U.S.: ACTN, IIPC, PhRMA –Europe: Union of Industrial and Employers Confederation of Europe –Japan: Keidanren	<i>NGOs:</i> ACT UP Consumer Project on Technology, Health Action International, Medecins sans Frontieres, Oxfam <i>Business Firms:</i> Cipla Pharmaceuticals, Ranbaxy; Public sector generic producer, Far Manguinhos (Brazil) <i>IOs:</i> WHO, World Bank <i>Others:</i> Yale University students
Key individuals	Alan Homer, Edmund Pratt, and Jacques Gorlin	James Love, Ralph Nader
Normative changes	IPRs recognized as a key part of international trade regime	Recognition of public health implications of IPRs; the Doha Declaration; Special UN session on HIV/AIDS
Substantive changes	IPRs on both product and process; trade linkages in terms of access to U.S. markets becomes the lever to ensure compliance with TRIPS	USTR withdraws the threat to sanction South Africa and Brazil; Executive Order requires mandatory consultation between USTR and the U.S. Department of Health; Dramatic fall in prices of AIDS drugs
Winner	Business network	The Access Campaign led by the NGO network

### **TRIPS: Why and How the Business Network Prevailed**

TRIPS ushered in fundamental changes, normative and substantive, in the global IPR regime. Before TRIPS, IPRs were not a part of the major world trade agenda. Countries were free to establish IPR laws of their own design—responding to comparative advantages in innovation or imitation, levels of economic and industrial development, and local needs. TRIPS introduced an unprecedented “one size fits all” approach, based on the richest and most powerful nations’ laws and extending stringent norms for intellectual property (Aoki, 1996; Thurow, 1997).

#### *Crisis*

Major norm changes are “disruptive” (Keck and Sikkink, 1998:35) and some kind of crisis or exogenous shock usually precedes such changes (Haggard, 1990). In the late 1970s IPR-based industries faced what they perceived as a crisis stemming from increased appropriability of their property. Technological change had made the appropriation of intellectual property-based goods and processes easy, inexpensive, and lucrative. The lack of credible institutional means to sanction IP appropriators made such violations rampant. Imitators, primarily in developing countries, replicated expensively developed software, recorded music, videos, and pharmaceuticals.

Crises may lead to a demand for policy changes. To bring about such changes, agents need to link their private concerns to broader societal concerns. As shown in Figure 1, in the years leading up to TRIPS, U.S. policymakers’ obsession about competitiveness provided the critical political opportunity (Tyson, 1992; for a critique see Krugman, 1994).<sup>22</sup>

Between 1980 and 1985 the U.S. trade deficit increased by 309%—from \$36.3 to \$148.5 billion (Hughes, 1991:177). The trade problem was exacerbated by an overvalued dollar that made U.S. exports less competitive. After the failure of the 1985 Plaza Accords to realign the dollar’s value to solve these problems, policymakers increasingly turned to trade policy for solutions (Bhagwati, 1989: 443). The rhetoric of “fair trade” as opposed to “free trade” escalated.

#### *Normative Position and Policy Goals*

The business network lobbied the U.S. government to promote a multilateral IPR agreement to replace the 1883 Paris Convention on protecting IPRs. Further, it wanted the new agreement to be located within the aegis of the GATT. This “forum-shifting” (Braithwaite and Drahos, 2000) to GATT was an important policy goal because the traditional venue for IPR-related issues, the World Intellectual Property Organization (WIPO), lacked enforcement powers and was perceived as being dominated by less developed countries.<sup>23</sup> The network’s policy goals of a stronger multilateral IPR regime were rooted in the normative discourse that favored the neo-liberal economic agenda of protecting property rights and promoting market-based exchanges. Specifically, the business network believes that IPR protection promotes trade and investment and therefore

<sup>22</sup> Figures 1, 2, and 3 present the result of Lexis-Nexis searches by year of articles in major newspapers about the policy debate. We assume that a higher level of coverage reflects greater policy salience.

<sup>23</sup> The concept of “venue shopping” by strategic actors who shift the policy process to the most hospitable institutional context is well developed in public policy literature (Schattschneider, 1960; Baumgartner and Jones, 1993). Though not elaborated in this paper, important issues include why certain interest groups prefer specific international organizations and when they prefer international regulation to domestic regulation. We have examined these issues in detail elsewhere (Levy and Prakash, 2003). Business networks may prefer domestic regulation (and unilateralism) to international regulation (and multilateralism) if they believe they are in a better position to influence domestic politics. The same argument holds for NGOs. For example, labor and anti-nuclear groups have been less inclined to support the strengthening of the European Union (EU) because of the less formal access they have to the EU structure, and the constraints they face in establishing a pan-European identity (Marks and McAdam, 1996). On the other hand, environmental groups have welcomed European integration partially because the EU structures provided them with ample institutional access and their abilities to forge a pan-European identity.

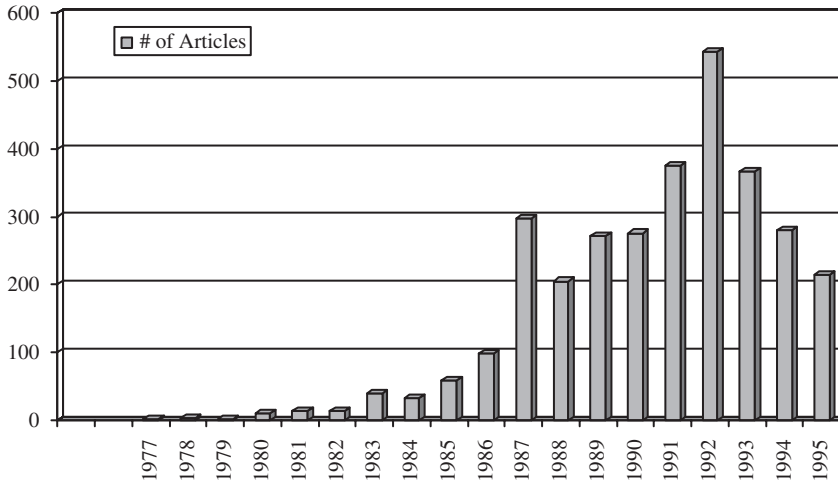


FIG. 1. Number of Articles in Major Newspapers on “Competitiveness” and “United States” as Reported in Lexis-Nexis

promotes economic growth. Although in the short run such protection may benefit developed countries disproportionately (especially by making the U.S. more “competitive”), in the long run, the network argues it would benefit developing countries as well.

#### *Mobilizing a Coalition*

Prior to TRIPS, businesses in disparate sectors were experiencing negative consequences of weak IP protection abroad. A U.S. International Trade Commission (ITC) study, widely cited by the business groups, estimated that in 1986 the annual worldwide losses of all U.S. industry due to inadequate intellectual property protection abroad were between \$43 billion and \$61 billion (ITC, 1988). Agricultural chemicals producers, book publishers, software producers, video and music entertainment providers, and non-generic pharmaceutical manufacturers were confronting the incongruity between technology and the old system of IP protection on a daily basis. However, they had to be organized into a self-conscious grouping for the pursuit of shared aims. Mobilizing others for action requires both material and discursive strategies to draw attention to the underlying congruence of interests or to construct congruence.

Prior to the 1970s, companies worried about intellectual property protection and foreign investment viewed these as local problems and tended to negotiate separately with host country governments. U.S. government involvement was minimal and ad hoc; companies would occasionally solicit the assistance of various U.S. embassies as problems arose. Beginning in the late 1970s, adversely affected industries began lobbying separately; patent and copyright interests engaged in parallel but unconnected political action.<sup>24</sup> Over time, and with the help of several key individuals (specifically, Pfizer’s Edmund Pratt, IBM’s John Opel, and industry lobbyist Jacques Gorlin), these different groups realized they were seeking the same goal—heightened IPR protection. They came to lobby together, so that patent interests testified

<sup>24</sup> Because trade associations conducted most of the lobbying of the U.S. government, collective action issues at the firm level were taken care of. However, what prevented trade associations from free riding? First, as in Olson’s (1965) “privileged groups,” the bulk of the costs of organizing collective action were borne by pharmaceutical, entertainment, and chemical industries, the major losers of the lax IPR regime. Second, because the exact contours of the U.S. position on TRIPS were not defined till the very end (for example, what trade-offs U.S. negotiators were willing to entertain to strike a deal), most associations had incentives to remain involved in the lobbying processes, lest their interests be sacrificed by governmental negotiators.

in Congress on behalf of copyright interests and vice versa (Ryan, 1998). Archer (1995) refers to this congruence of goals as “superimposition,” in which interest group agency points in the same direction. As we describe below, this superimposition at the domestic level was extended as the leaders of this network (Intellectual Property Committee, IPC) went on to craft superimposition transnationally.

The business activists enlisted government support to preserve and improve their competitive position. Thus, beginning in the 1970s, the business network shifted its focus to using the instrumentalities of U.S. power to serve its agenda. To do this successfully, it strategically had to link its agenda to broader policy challenges facing the U.S. government. Private sector mobilization began in the late 1970s when several agricultural chemicals producers, Monsanto, FMC, and Stauffer, sought U.S. government support in pressuring foreign governments to adopt and enforce stringent IP laws. In 1981, Edmund Pratt, CEO of Pfizer, was appointed chair of the Advisory Committee for Trade Negotiations (ACTN), which provides private sector consultation to the president. In 1982 at the behest of various U.S. corporate IP interests, such as the Pharmaceutical Manufacturers of America (PMA) and the Motion Picture Association of America, the U.S. engaged in bilateral trade talks with Taiwan, Singapore, Hungary, Mexico, and Korea urging stronger copyright, patent, and trademark protection. These companies joined forces with the U.S.-based International Anti-Counterfeiting Coalition and the Copyright Alliance to press for changes in U.S. trade policy. At this stage firms acted through their industry associations, such as the PMA. John Young, CEO of Hewlett-Packard, chaired President Reagan’s Commission on Industrial Competitiveness and included an addendum to its 1983–1984 report highlighting the negative effects of weak IP protection abroad.

The private sector IP lobby won changes in U.S. domestic law, most notably Sections 301 and 337 of the U.S. trade laws, heralding the rise of U.S. unilateralism. Trade amendments in 1979, 1984, and 1988 increasingly responded to the private sector IP lobby. Over time, trade policymaking became more centralized in the United States Trade Representative (USTR) (Destler, 1992), which has been very responsive toward industry concerns. The government’s new focus on market access and the trade deficit was gratifying insofar as some of the countries that posed the biggest piracy problems were heavily dependent upon trade with the U.S. (Gadbaw, 1989).

Three major business coalitions, representing copyrights, patents, and trademarks, were interested in IPR issues. In 1984, eight trade associations representing over 1,500 copyright-based companies came together as an umbrella lobbying group, the International Intellectual Property Alliance (IIPA), advocating stronger protection and enforcement abroad of U.S.-held copyrights. In 1984 the IIPA promoted revisions to the 1974 U.S. Trade and Tariff Act to make IPR violations actionable by the USTR. The U.S. government first officially linked IP protection and international trade in 1984 (D’Alessandro, 1987:433, note 116).

In 1986 the IIPA joined forces with patent protection groups, specifically, the PMA (now called the Pharmaceutical Research and Manufacturers of America, PhRMA). Together they successfully lobbied to include inadequate intellectual property protection as grounds for suspending trade privileges under programs such as the Generalized System of Preferences (GSP, non-reciprocal trade benefits for developing countries), and regional initiatives such as the Caribbean Basin Initiative and the Andean Trade Preferences Act. The U.S. government increasingly used threats of unilateral sanctions to force targeted countries to increase their IPR protection and enforcement (Sell, 1998). In 1988 these business groups successfully lobbied to get the Special 301 provision included in the Trade Act to enable the USTR to act unilaterally against countries that failed to protect adequately U.S.-held intellectual property (Sell, 2003).

In March 1986, the CEOs from twelve IP-reliant American multinational corporations established the IPC, which provided significant momentum to the business network’s quest for a stringent international IPR agreement. Its founding

members included Opel, Pratt, and Young. The IPC contacted its peers in Europe (Union of Industrial and Employers' Confederations of Europe—UNICE) and Japan (Keidanren) and worked toward developing a transnational private sector consensus. These non-U.S. actors agreed that getting IPR on the Uruguay Round agenda was a worthy goal and pledged to lobby their home governments to support it. Because of the business network's lobbying of home governments, the U.S. quest for TRIPS in the GATT did not face a serious challenge from Europe and Japan.

*Agenda Setting and Issue Linkages*

One of the most important activities of any campaign is agenda setting—generating issues by disseminating information and providing a normative frame to interpret it. The agenda-setting process is shaped by how various perspectives are presented in relation to dominant policy concerns. Normative frames help to translate information into knowledge (Comor, 2001). The business network displayed impressive framing skills. Historically, patent rights were considered “grants of privilege.” In the 1870s intellectual property protection was seen as antithetical to free trade (Machlup and Penrose, 1950). In the 1870s the U.S. first became interested in international patent protection because of its leading innovators, such as Thomas Edison. It participated in the 1883 Paris Convention deliberations. However, for much of the 20th century U.S. courts regarded patents as monopolies and thereby subject to the disciplining effect of antitrust law. Only since about 1982 have patents escaped that almost automatic association. Exploiting policymakers' preoccupation with competitiveness and highlighting the role of intellectual property in high technology innovation, private sector actors have succeeded in re-framing “grants” as “property rights” in intellectual goods (Sell and May, 2001). Their focus on U.S. trade surpluses in IP-reliant goods and services, in contrast to the overall trade deficit, held out the promise of a partial solution with expanded and better-enforced IP rights. The language of rights weighs in favor of the person claiming the right. The language of privilege weighs in favor of the person granting the privilege. By wrapping itself in the mantle of “property rights” the business network suggested that the rights it was claiming were somehow natural, unassailable, and automatically deserved. In part, these actors were able to deploy “rights talk” (Weissman, 1996:1087) effectively because they were operating in a context in which property rights are revered—especially so in the 1980s during the Reagan and Bush administrations.

To promote its perspective on IPR protection, the business network consistently provided detailed information to the U.S. government, other governments, and the media about developing countries' failure to provide IPR protection. Interestingly, to determine the scope and scale of foreign appropriation of U.S.-held IPR, the U.S. government relied predominantly on loss estimates provided by affected firms. In fact, the first official quantitative estimates of distortions in U.S. trade (USITC, 1988) stemming from inadequate intellectual property protection abroad was based on data collected by the International Trade Commission (ITC), which sent out questionnaires to affected industries.<sup>25</sup>

<sup>25</sup> Of course, the information that is provided may not always be accurate. Firms interested in a trade-based approach to intellectual property had plenty of incentive to overestimate the losses (Emmert, 1990:1324–1325); subsequent independent estimates suggested that the ITC figures were wildly inflated. For example, Gadbow and Richards (1988:379–383) surveyed the seven countries with the most extensive “pirating” operations, focused on the most heavily affected industries, and arrived at the figure of \$3.4 billion won in revenues by “piracy” and counterfeiting (Emmert, 1990:1328) compared to the ITC's \$43–61 billion estimate. This discrepancy between Gadbow and Richards's estimates of the effects of the most egregious violators and the ITC figures is so glaring that it casts significant doubt upon the accuracy of the ITC's estimates. Nevertheless, the NGO network did not forcefully point out the inaccuracies in the estimates provided by businesses. However, in the early 1990s, they began to contest PhRMA's estimates on drug development costs, thereby challenging the logic that stringent IPR protection was required to defray the high costs of new drug development.

For an agenda to resonate, it should not only identify a problem, but also assign blame (Rochefort and Cobb, 1994:15). As Keck and Sikkink note:

[P]roblems whose causes can be assigned to the deliberate (intentional) actions of identifiable individuals are amenable to advocacy network strategies.... The real creativity of advocacy networks has been in finding intentionalist frames within which to address some elements of structural problems (1998:27).

The business activists seized upon such an intentionalist frame; their indignation at those violating their property “rights” was further underscored by their claims that so-called violators were “pirates.” The term “piracy” connotes general lawlessness. As Weissman points out, “the piracy metaphor effectively changed a policy debate into an absolutist moral drama. Theft is simply wrong” (1996:1088). This evocative language highlighted wrongdoing, when in fact many of the activities condemned as “piracy” were perfectly legal in national and international laws. This discourse had a clever pre-emptive quality; “there is no room for a policy discussion about the merits of piracy, nor any space for compromise in the direction of pirates” (Weissman, 1996:1088). As C. L. Clemente, Vice President and General Counsel of Pfizer, stated, “‘Why is it that another government can base a policy of helping the consumers in their country to steal foreign owned technology’” (quoted in Weissman, 1996: 1088). Pfizer’s Pratt had urged the shift of forum from WIPO to GATT because WIPO too closely identified with the interests of the majority of developing countries “‘who abet the theft of intellectual property’” (Pratt, quoted in Ostry, 1990:24). The business network painted itself as victim of theft, and indicated that this wrongdoing had much broader negative effects—on U.S. competitiveness, its trade balance, and American jobs.

The business network’s success in framing the policy debate and in influencing U.S. negotiation strategy was greatly facilitated by the intellectual contribution of Jacques Gorlin, an economist who served as a consultant to ACTN and subsequently the IPC. Gorlin was the chief architect of the discursive and negotiating strategy that the IPC pursued. Agency is a collective concept, but individuals can make a significant difference in promoting agents’ agendas (Archer, 1995:187). Policy entrepreneurs like IPC consultant Gorlin helped to provide the conceptual template to unite disparate actors in a single course of action. In 1985 Opel, CEO of IBM, commissioned Gorlin to draft a paper for the USTR outlining a trade-based approach for IPR. His 1985 paper set a negotiating agenda, framed IP issues as trade issues, and aggregated interests. Gorlin’s paper articulated a coherent new vision for enveloping intellectual property protection in a trade context and demonstrated impressive intellectual entrepreneurship in connecting the two issues in a very specific way. It provided concrete proposals for a multilateral IPR agreement, emphasizing minimum standards of protection, dispute settlement, and enforcement, and suggested strategies for consensus building.

In 1985, ACTN created an eight-member Task Force on Intellectual Property Rights, which included Opel, Fritz Attaway, Vice President and Counsel of the Motion Picture Association, and Abraham Cohen, president of the International Division of Merck & Company, Inc. (at that time America’s largest pharmaceutical corporation). Consultations with the private sector, ACTN’s task force, led to cabinet-level discussions on intellectual property and trade in July 1985 and resulted in the government’s decision to include intellectual property in the GATT negotiations (Simon, 1986). In October 1985 this task force presented its report to ACTN and its recommendations appeared to be lifted wholesale out of Gorlin’s paper (USTR:1985, 1986; Gorlin, 1985). The business network grafted its agenda onto the established American norm of free trade and the government’s attendant preoccupation with competitiveness.

The IPC formed in March 1986 to promote a multilateral IPR agreement in GATT. The IPC met with UNICE and Keidanren in October and November 1986



to work on a negotiating consensus. Throughout the next eighteen months the transnational business network met frequently to negotiate its wish list. In the summer of 1988 it issued a Trilateral document reflecting its consensus. The document called for: 1) a code of minimum standards for copyrights, patents, trademarks, and appellation of origin issues; 2) an enforcement mechanism; and 3) a dispute settlement mechanism (IPC, UNICE, Keidanren, 1988).

In lobbying Congress and the Executive branch, this network emphasized the centrality of intellectual property-based goods and services to U.S. competitiveness, strategically linking its agenda to a major societal concern. These industry activists packaged their ideas as problem solvers—that support for their robust export industries would help the U.S. out of its perceived economic doldrums. They successfully pressed for changes in U.S. trade laws that would institutionalize their desired link between trade and intellectual property. As mentioned previously, amendments to the trade acts in 1979, 1984, and 1988 progressively responded to the demands of the intellectual property lobby, and strengthened the link between intellectual property protection and trade. The consensus-building process drew upon expertise (identifying the problem, providing information and loss estimates), framing skills (translating arcane intellectual property issues into new instruments of trade policy), and the normative appeal of the solutions advocated.

The Uruguay Round lasted from 1986 until 1994. Between 1986 and 1989 the TRIPS negotiations stalled owing to a number of developing countries' adamant opposition. Meanwhile, the U.S. employed escalating economic coercion against developing countries with lax IP laws through Section 301. Throughout the negotiations the IPC and the IIPA stayed in close contact with government negotiators and helped to shape specific proposals and successfully pressed their demands. As recommended in the 1985 Gorlin paper, negotiators worked in enclave committees to achieve plurilateral consensus—just as the IPC had done with its European and Japanese counterparts. By April 1989, developing countries finally assented to inclusion of an IP code in the GATT. They hoped that this would ease the Section 301 pressure. Initially they had viewed the choice as one between WIPO and GATT, but they came to understand that the choice now was between GATT and USTR (Ryan, 1998:566). And they preferred a multilateral forum, GATT.

At the Brussels meeting in December 1990, the Uruguay Round collapsed over a deadlock over agricultural subsidies. Since TRIPS progress was linked to progress of the Round as a whole, this slowed down the TRIPS deliberations. GATT director general Arthur Dunkel then took over the process and established an informal working group to review draft texts. The GATT talks resumed in September 1991. Eager to save the Round and move the negotiations forward, in November 1991 Dunkel produced a draft comprising the results of the negotiations in each sector. Negotiating parties finally reached agreement on the so-called Dunkel Draft and the Uruguay Round was successfully concluded on April 15, 1994.

#### *Normative and Substantive Policy Changes*

TRIPS ushered in a fundamental change, normative and substantive, in the global IPR regime. Normatively, IPR protection now became a centerpiece of the world trade and investment agenda, and IPR violations were treated as serious policy issues. Substantively, three changes took place. First, unlike the previous era in which countries were free to deny patent protection for pharmaceutical products, beginning January 1, 2005 (2016 for least developed countries) TRIPS will require developing countries to implement and enforce pharmaceutical product patent protection (Abbott, 2002). This change will significantly reduce supplies of low-price off-patent medicines within the developing world and reduce supplies available for export (Abbott, 2002). Second, prior to TRIPS, the World Intellectual Property Organization (WIPO), with no real enforcement mechanisms, administered the IPR

regime. Over the objections of developing countries, the business network succeeded in shifting administration of these issues out of WIPO and into the GATT/WTO which had superior enforcement capacities. Third, unlike earlier eras, the failure to adhere to the stringent IPR standards could result in punitive trade sanctions—unilateral, bilateral, and multilateral—by developed countries that are major destinations for exports from developing countries. Thus, using state instrumentalities, the business network now had credible means to inflict punitive damage on developing countries that did not enforce TRIPS.<sup>26</sup> No wonder Jacques Gorlin, a key actor in the business network, said, “we got 95% of what we wanted.”<sup>27</sup>

In sum, TRIPS was a victory for business interests. The scope of the victory energized the business network to press foreign countries to enforce TRIPS. However, at the same time, the HIV/AIDS epidemic and the high costs of patented drugs for treating it had galvanized a vociferous NGO network. It challenged industry dominance over the intellectual property agenda and sought to shape policy outcomes relating to enforcement of TRIPS. The crucial arena for this contest was the campaign for low-cost access to HIV/AIDS drugs.

### **The Access Campaign: Why and How the NGO Network Gained Ground**

The NGO-led Access Campaign has ushered in significant normative changes and potentially substantive changes in the IPR regime, especially as it relates to the HIV/AIDS crisis. Prior to this campaign, IPR protection had become enshrined as a key item in the global trade agenda, and IPR protection was taking precedence over issues that many developing countries believed were more important. However, the Access Campaign has diluted the business victory in TRIPS by injecting public health as an important consideration in IPR protection in the global trade and investment agenda. How were these normative and substantive changes brought about? Below, we describe the strategies of the NGO network (and the counter-strategies of the business network as well) that has spearheaded the Access Campaign.

#### *Crisis*

In the face of the devastating HIV/AIDS epidemic in sub-Saharan Africa and Thailand, the “access to essential medicines” campaign has highlighted the public health consequences of stringent IPR rights. This has pitted a transnational network of NGOs against a transnational network of pharmaceutical firms. Given the high cost of patented HIV/AIDS drugs which make them unaffordable in almost every developing country, the NGO network supports and encourages the policy of some governments—e.g., Thailand, South Africa, and Brazil—to issue compulsory licenses for the production of such drugs. Thus, the NGO network is

<sup>26</sup> Many developing countries finally assented to the inclusion of intellectual property in the Uruguay Round agenda expecting that they would get concessions in areas such as textiles and agriculture, and that it would make U.S. unilateralism (expressed in Section 301) disappear. The latter is rooted in the argument that multilateralism is attractive for the less powerful because it binds the powerful countries to a rule-based system. However, in its implementing legislation, the U.S. strengthened Special 301 by requiring the USTR to take into account a country's prior status under Special 301, the history of U.S. efforts under Special 301, and the country's response to such efforts in order to help highlight persistent recalcitrance in the face of Special 301 pressure. This increases the information requirements for USTR and has made the USTR even more dependent on private sector groups for data and analysis. Furthermore, in 1996 the USTR established an Office of Monitoring and Enforcement to oversee trade agreement implementation. It pursues enforcement actions, “aggressively” litigating disputes to “compel compliance” with the WTO agreements, NAFTA, and other regional and bilateral agreements (USTR, 1998:235). This same office also addresses problems outside the framework of the multilateral and regional treaties by invoking Section 301 and Special 301 of the Trade Act. It is likely no coincidence that 1997 saw a 25% increase in the number of trading partners named under Special 301 in 1996 (USTR, 1998:244).

<sup>27</sup> What was the 5% they did not get? Despite the IPC's strong opposition, the TRIPS agreement provided for a transition period for developing countries and retained some compulsory licensing options that the pharmaceutical members of the IPC strongly resisted (interview with Gorlin, January 22, 1996, Washington, D.C.).

employing the instrumentalities of state power to serve its normative and policy agenda, not unlike the business networks' use of state power (for example, the USTR) to pursue its agenda.

The business network views compulsory licensing as a TRIPS violation<sup>28</sup> and therefore asked USTR to sanction governments that adopt such policies. In 1997 and 1998 U.S. trade officials threatened sanctions on core Thai exports and, consequently, Thailand dropped its compulsory licensing plans. In 1998, at the behest of PhRMA, the USTR placed South Africa on the 301 "Watch List." Despite USTR pressure, South Africa refused to repeal its 1997 South African Medicines and Medical Devices Regulatory Authority Act. This law allowed the Minister of Health to revoke patents on medicines and to allow for broad-based compulsory licensing to manufacture generic versions of HIV/AIDS drugs. Thus, from the NGO's perspective, there are two crises—first, the public health crisis of the HIV/AIDS epidemic, and second, a policy crisis resulting from the USTR's actions to subordinate public health objectives to IPR protection.

#### *Normative Position and Policy Goals*

The NGO network's normative position is that public health concerns should take precedence over IPR protection, or at least be on par with it. As a result, the Access Campaign supports developing countries' rights to avail themselves of compulsory licensing provisions (Articles 30 and 31) under TRIPS to produce and to import generic equivalents of life-saving HIV/AIDS drugs in case of national emergencies. When a state grants a compulsory license, rights to produce a product are licensed to another party without the patent holder's permission, thereby bringing down the drug price.

The problem is that Article 30 (exceptions to patent rights) is somewhat ambiguous regarding its applicability to the production and export of generic versions of essential medicines (Abbott, 2002:65). Absent a more formal legal declaration clarifying the proper interpretation of this Article, countries wishing to avail themselves of such a strategy are not legally secure. This ambiguity has encouraged business networks to litigate in local courts against compulsory licensing and to pressure the USTR to sanction governments that seek compulsory licenses for HIV/AIDS drugs. Thus, the NGO strategy includes discouraging the USTR from penalizing governments that have invoked compulsory licensing and parallel importation. The NGOs have reiterated in policy-relevant international forums (such as the World Health Organization, WHO) that governments have the right to issue compulsory licenses, build alliances with the generic pharmaceutical industry to produce HIV/AIDS drugs, and to make them available at low cost. Further, they have sought to mobilize international donors to purchase such drugs and to make them available to countries facing the HIV/AIDS crises.

#### *Mobilizing a Transnational Coalition*

In the 1980s the NGO network did not present an effective normative and policy position on IPR issues. In the early 1990s some NGOs began to mobilize against the high prices of prescription drugs. This campaign initially was limited to the U.S. health policy debate. Hillary Clinton's Health Policy Working Group also seemed sympathetic to the NGO position. However, a broad coalition of the insurance, non-generic pharmaceutical industries, and small businesses successfully defeated Hillary Clinton's initiative, leaving NGOs on the losing side. The HIV/AIDS crisis presented NGOs with a new opportunity to mobilize. Undoubtedly, the impetus for

<sup>28</sup> This is an oversimplification. The business network may interpret such practices as violations, but others (e.g., Weissman, 1996; Abbott, 2002) interpret these practices as utterly permissible under TRIPS.

the successful transnational NGO mobilization can be traced to the severity of the HIV/AIDS epidemic that received substantial coverage in the media.

Over time, an increasingly broad array of NGOs, specifically Ralph Nader's Consumer Project on Technology (CPT) headed by James Love, Amsterdam-based Health Action International (HAI), ACT UP, the Nobel-prize winning group Medecins sans Frontieres (MSF), and Oxfam joined forces.

Though Nader and Love had been working on these issues since the early 1990s, in 1996 HAI got involved in these issues; this was the first time a public health group had actively got involved. HAI's initial focus was exposing drug scams (e.g., placebos, bad drugs) but it became increasingly interested in the intellectual property aspects of pharmaceuticals. In 1998 MSF contacted CPT and decided to join the campaign. In 1999, ACT UP Philadelphia invited James Love—a key policy entrepreneur for the NGO network—to speak about compulsory licensing. This led to an important partnership that, as described in more detail below, had a decisive impact on getting the Clinton administration to switch its position on South Africa. In October 2000, Oxfam, known for its developmental work and non-partisan policy positions, also joined this network.

Importantly, the NGO network mobilized support from key international organizations: the World Bank, the United Nations Development Program (UNDP), and the WHO. The World Bank's support was crucial because the Bank has impeccable credentials in supporting and promoting the neoliberal economic agenda of which IPR protection is a crucial item. However, the World Bank had an instrumental reason in supporting compulsory licensing and parallel importation—it purchased \$800 million dollars of pharmaceuticals annually and compulsory licensing and parallel importation would significantly reduce the overall bill (Vick, 1999:A18).

The NGO network sought to discredit the business agenda by highlighting the astronomical profits that pharmaceutical companies were earning by selling HIV/AIDS drugs. For this, they required help from non-NGO sources. CPT representatives sought information about the true costs of manufacturing HIV/AIDS drugs from Krisana Kraisintu, the head of R&D for the Thai Government Pharmaceutical Organization, the U.S. generic industry advocate William Haddad, and Cipla's chairman, Dr. Yusuf Hamied. At Love's urging, Dr. Hamied agreed to sell the HIV/AIDS cocktail to MSF for \$350 per year as opposed to the \$10,000 that pharmaceutical companies were charging. This strategy put pharmaceuti-

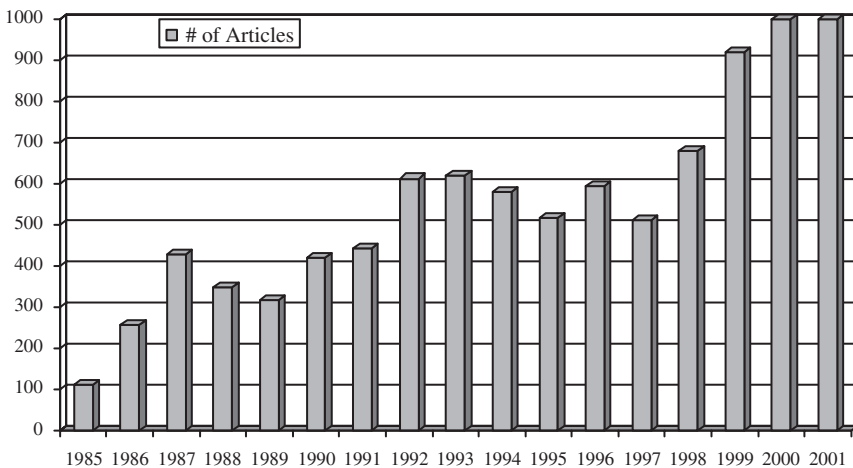


FIG. 2. Number of Articles in Major Newspapers on "HIV" and "Africa" as Reported in Lexis-Nexis

cal companies on the defensive regarding allegations of profiteering from the HIV/AIDS crisis.

The Access Campaign also managed to mobilize an unlikely constituency: students and faculty of Yale University, which holds the patent on the important antiretroviral AIDS drug d4T. It requested that Yale permit South Africa to import generic versions of d4T. Yale's patent contract with Bristol-Myers Squibb earns \$40 million a year from the drug's licensing fees (McNeil, 2001). Initially, Yale refused the request claiming that Bristol-Myers Squibb had an exclusive license and that only the company could decide how to respond. A group of Yale law students organized campus protests, and one of the drug's developers, Yale pharmacology professor William Prusoff, supported the students (Prusoff, 2001:A19).<sup>29</sup>

Thus the transnational NGO network mobilized a wide range of actors—foreign governments, international organizations, business firms, and university students—in the campaign for low-cost access to HIV/AIDS drugs and to redefine IPR protection as a public health issue.

#### *Agenda Setting and Issue Linkages*

The NGO network connected two policy domains—trade/investment and public health—by introducing IPR issues in public health debates on HIV/AIDS. It established the link between stringent IPR laws and the HIV/AIDS crisis. It aggressively disseminated its normative frame to key policymakers and in key international forums. The NGO network constructed an intentionalist frame identifying “greedy” pharmaceutical corporations as the culprits in millions of needless deaths. It followed a successful recipe for advocacy networks by highlighting the victims of the HIV/AIDS pandemic and focusing on “issues involving bodily harm to vulnerable individuals, especially when there is a short and clear causal chain (or story) assigning responsibility” (Keck and Sikkink, 1998:27).

One of the network's earliest steps in agenda setting was its participation in crafting a revised drug strategy for the WHO. The 1998 meeting of the World Health Assembly (WHA), the governing body of the WHO, provided an important political opportunity to the NGO network to introduce its normative frame to the global audience. The WHA unanimously adopted a resolution calling upon member states to ensure equitable access to essential drugs and review options under international trade agreements to safeguard access to these medicines (MSF, HAI, CPT, 1999a). With a validation from the WHA, the NGO campaign sought to project its normative position at the country level. The campaign's open letter to WTO member states urged them to: make public health their highest priority in implementing TRIPS obligations; explore the extension of grace periods for developing countries; and encourage developing countries to invoke actively the public health and public interest considerations of TRIPS Articles 7 and 8. The NGO campaign sought to employ the instrumentalities of one international organization to project its normative frame onto another.

The WHA's Executive Board approved the resolution, only because the U.S. was not on the Executive Board that year.<sup>30</sup> When the WHA met in Geneva in May 1999 to discuss the recommended revised drug strategy, the U.S. sent trade negotiators to this public health forum. To prepare for the meeting, HAI and CPT held a meeting a week before with about seventy people to help equip NGO-friendly negotiators for the WHA deliberations. At that meeting Dr. Olive Shisana, Director-General of the South African Department of Health, presented extensive evidence of U.S. compulsory licensing practices that CPT's James Love had

<sup>29</sup> Ultimately, Bristol-Myers-Squibb announced it would reduce the price to \$0.15 per daily dose which was 1.5% of the cost to an American patient (McNeil, 2001).

<sup>30</sup> It is a rotating board; the U.S. is off it every three years.

provided for her.<sup>31</sup> The USTR was caught off guard by Shisana's presentation and was unable to respond effectively. Instead the audience publicly booed the USTR representative. This was a good example of how strategic provision of information to a sympathetic actor helped the NGO network to advance its perspective successfully.

Seeking to build on the momentum provided by the WHA, the NGO network decided to exploit media opportunities presented by the November 1999, Seattle WTO Ministerial meeting. On the eve of its meeting, the NGO network held a conference in Amsterdam and issued the "Amsterdam Statement" (MSF, HAI, CPT, 1999b). It called upon member states to: ask the WTO to establish a working group on access to medicines; endorse the use of compulsory licensing of patents under Article 31; and allow exceptions to patent rights under Article 30 for production of medicines for export when the medicine is exported to a country that has invoked compulsory licensing.

An important part of agenda setting is to debunk competing arguments. The business network promoted the argument that stringent IPR norms generate resources for research and development. The NGO network sought to question the validity of this claim. In 1991, CPT's James Love began investigating the Bristol-Myers Squibb drug taxol. Love discovered that the National Institutes of Health had developed the drug and then licensed it to Bristol-Myers Squibb. The government turned over its intellectual property rights in the drug and Bristol-Myers Squibb agreed to make the best effort to get it to market. This discovery was consequential insofar as it revealed the publicly funded research (not research conducted by business firms) behind an important HIV/AIDS drug. Taxpayers, not Bristol-Myers Squibb, had paid for the drug's development. The NGO network widely disseminated this finding and employed it to debunk the business network's claim that profits generated from patents fund development of new drugs (Love, 2001).

In addition to undertaking grassroots mobilization, the NGO network sought to present its perspective to top policymakers. Institutionally, the U.S. policymaking environment is fairly accessible to diverse interest groups; they have numerous opportunities to present their perspectives to policymakers. In October 1995, Nader and Love (1995) wrote to then-USTR Michael Kantor indicating that there were many different, legitimate views about health care, and that the USTR had incorrectly chosen to focus on one of them—protecting the interests of U.S.-based international pharmaceutical firms. Nader and Love pointed out that taxpayer-funded drugs had become the very lucrative private property of global pharmaceutical firms.<sup>32</sup>

The critical political opportunity for the NGO network to graft its agenda onto U.S. policy arose with the 2000 presidential elections. Initially some members of the NGO network thought in terms of shaming pharmaceutical executives by ambushing them and throwing blood on them, like the anti-fur activists. However, at the urging of Love, they grasped the futility of such actions and the need to target the U.S. government instead. The 2000 presidential elections offered an important political opportunity. As mentioned earlier, Love's patron, Ralph Nader, was also in the presidential race (clearly, an instrumental objective) with the theme that both Republicans and Democrats have sold out to big business and only he is the savior of the common man.

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<sup>31</sup> Personal communication with James Love, May 3, 2002 (on file with author).

<sup>32</sup> In 1995 and 1996 Nader and Love began to post their information, correspondence, and position papers in their online newsletter "Pharm-policy" (<http://lists.essential.org/mailman/listinfo/pharm-policy>). Love had also posted an anti-patent statement by Noam Chomsky on Pharm-policy. In 1996 the Indian government invited Nader to attend a major patent meeting. The Speaker of Parliament quoted from Chomsky's statement, and read excerpts from Nader and Love's letter to Kantor. Thus the NGO network began to rally foreign governments in support of its perspective.

Candidate Al Gore maintained a PhRMA-friendly stance in part because his main challenger in the presidential primaries was Bill Bradley (D-NJ), whose home state had several global PhRMA firms. Gore was eager to get PhRMA campaign dollars. Additionally, Gore was closely linked to PhRMA and its lobbyists, including his former chiefs of staff Peter Knight and Roy Neel (Gellman, 2000), chief domestic policy advisor David Beier (formerly Genentech's lobbyist), and Anthony Podesta (PhRMA lobbyist, Gore friend, and brother of Clinton's Chief of Staff John Podesta) (Love, quoted in Bond, 1999: 782).

An important step in successfully setting the agenda is to convey the appropriate information along with a normative frame in a strategic setting. Sensing a political opportunity to convey the NGO perspective and to pressure the U.S. government, the U.S. advocacy group ACT UP repeatedly disrupted Vice President Al Gore's campaign appearances in the summer of 1999. Very astutely, the group was on hand for Gore's announcement of his bid for the presidency with noisemakers and banners that said "Gore's Greed Kills." These had quite an impact on live television (Gellman, 2000). Not surprisingly, given his desire to woo Nader-leaning democrats, Gore announced the change of policy to Rep. James E. Clyburn (D-S.C.) of the Congressional Black Caucus. Thus, within a week, the Clinton administration reversed its years of objections to South Africa's compulsory licensing law (Gellman, 2000).

Bill Clinton's search for a lasting legacy, his desire to see Gore secure the Democratic nomination, and his close association with the Black Congressional Caucus, created more political opportunities for the Access Campaign to graft its agenda onto U.S. policy. NGOs argued that high costs of patented pharmaceuticals made them unaffordable to most South Africans and only the affluent (predominantly white) could afford them. Thus, the policy of compulsory licensing that the USTR was opposing was, in part, a challenge to medical apartheid. Such arguments resonated well with the U.S. Congressional Black Caucus, a key pillar of support for President Clinton in his numerous political crises as well as Vice President Gore in his quest for the Democratic presidential nomination.

The September 11th terrorist attack and anthrax-related bioterrorism created more opportunities for the NGO network to put forth its perspective. Concerned over the availability and the cost of Ciproflaxin (Cipro), an antibiotic effective in treating anthrax, the United States considered compulsory licensing. Both Senator Charles Schumer (D-NY) and Secretary of Health and Human Services Tommy Thompson publicly advocated this strategy to ensure adequate supplies of the drug. Ultimately, the United States did not follow through on the compulsory licensing threat, but negotiated deep price cuts with Bayer, supplier of Cipro.

NGOs argued that if the United States was presumably willing to engage in compulsory licensing to address a national emergency, how could it possibly deny that same prerogative to developing countries daily facing thousands of preventable deaths (a national health emergency by any standard)? Second, if the U.S. had, by threatening compulsory licensing, achieved deep discounts in drug prices, why was it punishing Brazil for adopting the same strategy?

The NGO network's attempts to graft its agenda onto public debates did not go unchallenged. In November 2001, PhRMA widely circulated a report (Attaran and Gillespie-White, 2001) to demonstrate the irrelevance of patents to public health issues, thereby trying to discredit the normative frame championed by the NGOs. The report argued that barriers to accessing HIV/AIDS drugs were due to administrative and governance failures, poverty, and corruption rather than stringent IPR laws. Realizing the rhetorical potential of PhRMA's arguments, the NGO network was forced to counter them. First, the CPT posted the paper in its online newsletter, and it inspired impassioned debate. Second, the network issued a report carefully rebutting the authors' arguments (cptech, 2001). Therefore, the network sought to discredit the paper, and the NGOs' rebuttals seem to have compromised PhRMA's attempt to reassert its agenda over the AIDS crisis.

*Normative and Substantive Policy Changes*

The Access Campaign brought about normative and substantive changes regarding enforcement of TRIPs. As indicated in Figure 3, normatively, public health implications of IPR protection now prominently figure in the international trade agenda.

Further, the campaign has forced PhRMA to become defensive about IPR enforcement and its implications for the AIDS crisis—what Price refers to as “reversing the burden of proof” (1998:631). Thus, in May 2001, PhRMA posted a new item on its web site explaining all the activities it was undertaking to help poor countries gripped by the HIV/AIDS pandemic. It has continued to post responses to the issues raised by the Access Campaign such as drug pricing, generics, and AIDS and health care in Africa (PhRMA, 2002a, 2002b).

In terms of substantive changes, the Clinton administration withdrew its objections to the new South African law in June 1999. In 1999, the U.S. removed South Africa from the USTR 301 watch list (Vick, 1999:A18). At the Seattle WTO Ministerial meeting, President Clinton signaled a major change in U.S. policy that responded to the goals of the Access Campaign. He announced that the U.S. would alter its trade policy to support African access to HIV/AIDS drugs (MSF, 2000). He also introduced institutional collaboration between USTR and the U.S. Department of Health and Human Services on trade cases involving public health issues. In May 2000, the Clinton administration went even further by issuing an Executive Order that prohibited the USTR from pressuring sub-Saharan African countries into foregoing legitimate strategies, such as compulsory licensing and parallel importing, aimed at increasing access to affordable HIV/AIDS drugs. After taking office in 2001, the Bush administration indicated that it would not rescind Clinton’s Executive Order.

In June 2001, the first day the first United Nations General Assembly Special Session ever devoted to a public health issue (HIV/AIDS), the U.S. announced it was officially withdrawing its WTO case against Brazil (Steinhauer, 2001). PhRMA had already withdrawn its lawsuit against South Africa in March 2001. The UN declaration emphasized both prevention and treatment of AIDS, and there was a call to generate about \$9 billion for a Global AIDS and Health fund.

In terms of substantive policy changes at the country level, companies have begun to offer drugs to African countries at reduced prices (as individual companies and) under the auspices of the Joint United Nations Program on AIDS. Subsequent to Cipla’s offer to offer a three-drug AIDS “cocktail” for \$350 a year (versus the

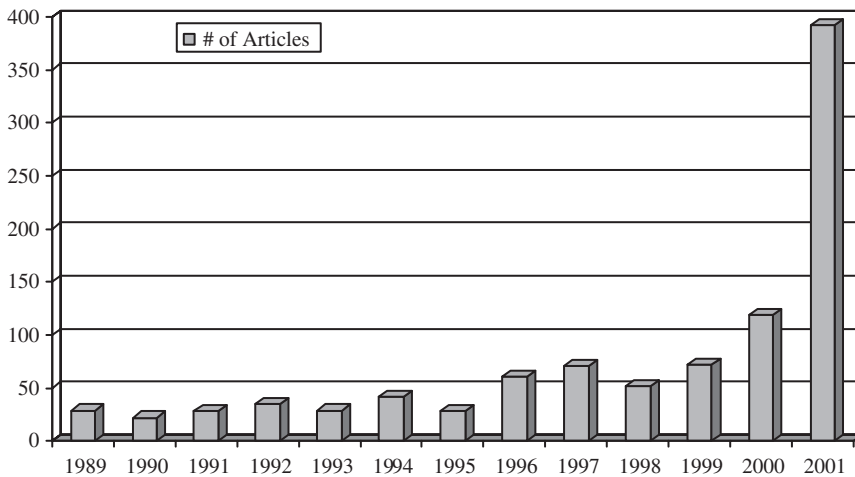


FIG. 3. Number of Articles in Major Newspapers on “Patents” and “Public Health” as Reported in Lexis-Nexis



\$10,000–\$15,000 that American patients pay), a number of pharmaceutical firms reduced their prices as well and Pfizer began to offer one drug for free.

The NGO campaign also had a significant impact in international forums. The TRIPS Council convened a special session in June 2001 to address the access to medicines issues. A building consensus emerged, including the European Union, that TRIPS should not interfere with the protection of public health. Nonetheless, the U.S. continued to defend its global drug companies (Boseley and Capella, 2001). Developing countries sought official confirmation that measures to protect public health would not make them subject to dispute settlement procedures in the WTO. The TRIPS Council resolved to continue analyzing the degree of flexibility afforded by TRIPS in the context of public health, planned future meetings on the issue, and pledged to convene another special session on trade and pharmaceuticals in September 2001 (Capdevila, 2001).

A key victory for the NGO campaign was the Doha declaration at the WTO's ministerial meeting in November 2001. In spite of opposition from the U.S. and Switzerland, the meeting adopted a resolution stating that the

TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Each member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted. Each member has the right to determine what constitutes a national emergency ... it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria, and other epidemics, can represent a national emergency (WTO, 2001).

As we mentioned previously, the legal basis for USTR and PhRMA litigation was that although TRIPS Article 30 allowed for compulsory licensing during national emergencies,<sup>33</sup> its applicability to public health crises was ambiguous. The Doha declaration clarified this critical ambiguity (Mayne, 2002).<sup>34</sup>

In sum, the HIV/AIDS crisis presented an opportunity to NGOs (who extended the coalition to include eventually generic pharmaceutical companies, international organizations, foreign governments, and university law students) to temper industry dominance over the IPR agenda. The NGO network presented a normative frame and proposed policy solutions that the business network opposed. In the end, with its successful strategies of mobilizing a transnational coalition, framing policy problems, disseminating information, grafting its agenda as a solution to policy problems, and exploiting political opportunities that the 2000 presidential elections and the anthrax episode provided, the NGO network has clearly won some substantive victories and brought about normative change in the IPR debate.

### Conclusion

Ideas matter. But this paper has highlighted whose ideas matter<sup>35</sup> and how actors make them matter. We examined alternative frames about the consequences of stringent IPR norms that two competing networks championed. The business

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<sup>33</sup> For this reason Alan Holmer (2001) of PhRMA declared that Doha declaration does not take away IPR protection as enshrined in TRIPS.

<sup>34</sup> Arguably, the U.S. did not oppose the Doha declaration for two reasons. First, it did not want to jeopardize the international alliance it had constructed against terrorism in the wake of the September 11 attacks. Second, because the Doha declaration pertained only to patents, not to trademarks and copyrights in which many U.S. industries had major stakes, the U.S. made a choice to preserve stringent IPR regime for copyrights and trademarks by sacrificing patents (Faux, 2001). However, the Doha declaration did not resolve the issue of exports (Abbott, 2002).

<sup>35</sup> In this context see the literature on the role of think tanks in influencing policy debates (Berry, 1999); in particular, why interest groups are better served if they influence policy processes indirectly by sponsoring think tanks that are favorable to their positions (Smith, 2000).

network promoted the frame that stringent IPR norms promote U.S. competitiveness, and that the profits from patents fuel research and development to provide cures for many diseases. The NGO network believes that stringent patent laws harm public health because they deny low-cost access to essential drugs. In the TRIPS case the business network achieved its goals because it successfully constructed the policy problem and linked its agenda to the dominant U.S. trade policy concern—declining competitiveness. The NGO network has gained ground in the Access Campaign because it has successfully highlighted how stringent patent laws can imperil public health in the context of the HIV/AIDS crisis. The NGO campaign successfully exploited U.S. presidential politics and events relating to anthrax/bioterrorism to promote its agenda and to persuade the U.S. government to change its policies on TRIPS enforcement.

Clearly, ideas and normative frames cannot be examined without specifying whose interests they serve. Thus, we challenged theoretically and empirically the distinction proposed by Keck and Sikkink (1998) between different kinds of transnational networks—namely, business and NGO networks—rooted in whether they pursue principled norms or instrumental objectives. We also challenged the narrow rational choice perspective that views actors as having material objectives only. Any network has its share of principled beliefs and instrumental objectives. Because in many key works of constructivist scholars that we cited, networks' strategies followed from networks' objectives, NGO networks were treated as distinct from business networks. Our analysis challenged this distinction by demonstrating that strategies and actions of the two competing networks are quite similar. In their own ways, both employed coercive state power to their own ends—businesses through USTR to enforce IPRs, and NGOs through South African and Brazilian governments' compulsory licensing policies to violate firms' IPRs and to provide low-cost access to HIV/AIDS drugs. We did not assume that NGOs are the “good guys” (poorly resourced underdogs) while business networks are the “bad guys” (well resourced and powerful). Resources are of many kinds; financial resources alone do not ensure that a particular perspective will prevail, especially in a political system with multiple access points. We treated businesses and NGOs as two competing interest groups driven by their respective normative ideals and material concerns.

This paper is not arguing that NGOs and firms are identical and the distinction between them is artificial. Firms are a category of institutions that seek to generate (perhaps even maximize) profits and in which shareholders are the ultimate claimants of this residual.<sup>36</sup> On the other hand, NGOs do not seek to generate such residuals and are not accountable to any single constituent. However, generating residuals is not the only instrumental objective an institution can follow—NGOs routinely pursue instrumental objectives such as increasing wages and benefits for their members, increasing membership, and increasing rents accruing to their members. And individuals guiding NGOs, just as individuals managing firms, often pursue their individual instrumental agendas under the cover of organizational objectives. Agency abuse is not limited to any specific organizational form. We also argued that there are no a priori reasons to believe that the levels of benefits from policies championed by NGOs would be less excludable and more widespread than the ones championed by firms.

While we have stressed similarities between the two networks, some differences, especially at the tactical level, are noteworthy. TRIPS advocates did not engage in the kind of shock tactics that ACT UP employed in disrupting Gore's presidential

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<sup>36</sup> For an overview on theory of firm see Putterman (1986) and Williamson and Winter (1993). For a review of theory of non-profits—the term employed in public policy literature to refer to NGOs—see Powell (1987) and Weisbord (1988).

campaign.<sup>37</sup> Arguably, over time some NGOs have come to internalize an organizational lesson that shock tactics deliver media coverage. Perhaps their members, the network's internal competency, are particularly skilled in staging such media events that portray them as underdogs. Such tactical differences exist when firms (or NGOs) compete against each other for market share (or membership share or media coverage). Some firms (such as Procter & Gamble) are well known for their conservative approach to marketing and advertising while others (such as Benetton) routinely employ unconventional marketing strategies. Similarly, some NGOs are more inclined to influence the policy process through legal challenges (such as the Natural Resources Defense Council) while others seem to be effective in staging media events and rallying activists (such as Greenpeace).<sup>38</sup> In sum, it is difficult to make an argument that businesses/NGOs as a category are more inclined toward certain strategies or tactics.

As a practical matter, during the TRIPS negotiations, the business network did not have to counter significant NGO mobilization. Businesses successfully grafted their agenda onto policy debates without a significant challenge from a competing NGO-inspired normative frame. In effect, the NGOs gave businesses a free ride in the first round. Unlike the pre-TRIPS process, in the HIV/AIDS debate, there are two competing normative frames to interpret the HIV/AIDS crisis and TRIPS' impact on it. The business network is determined to protect the gains it achieved in TRIPS. The two networks seem to be trying to discredit each other's position in the HIV/AIDS debate. While the NGO network has sought to expose U.S. hypocrisy on compulsory licensing (it is ok for anthrax but not ok for HIV/AIDS), pharmaceutical companies point toward weak research and unsubstantiated causal arguments (high pharmaceutical costs, therefore a public health disaster) proposed by the NGO groups.<sup>39</sup> The Attaran-Gillespie-White paper that PhRMA circulated is an example of this business counterattack.

Many analysts assume that global business firms and NGOs are hardly equals and that examining them in tandem obscures more than it reveals. They point to the structural power of global business firms both domestically (Lindblom, 1977) and internationally (Strange, 1996). For example, in our case, the U.S. government accepted and promoted PhRMA's positions on IPRs throughout several administrations with different parties in power. This may suggest some structural power of business or at least some special affinity between the goals of both business and government. However, our case also demonstrates that the NGO goals as reflected in Clinton's Executive Order were upheld by both Clinton and George W. Bush (two different presidents and two different parties). Furthermore, power does not necessarily determine outcomes. Actors may choose not to exercise power, the deployment of power may not deliver the outcomes that the powerful desire, and "the exploitation of a given potential may not involve the use of power" (Archer, 1990:81). Therefore, we suggest that the relationships between power and outcomes should be examined rather than assumed.

<sup>37</sup> McAdam (1983) and Gamson (1990) report that the use of disruptive tactics by social movements is quite effective. Finnemore and Sikkink (1998) also note this when discussing suffrage activists engaging in civil disobedience.

<sup>38</sup> On the importance of internal characteristics (resources, strategies, and leadership) in relation to structural factors (domestic structures and transnational institutions) in influencing the policy impact of transnational actors see Risse-Kappen (1995).

<sup>39</sup> One could argue that business victory in TRIPS was more "significant" than NGO victory in the Access Campaign because the former set the rules of the game while the latter has modified some aspects of it. Nonetheless, the impact of NGO victory is very significant because of the widespread policy ramifications, including the reopening of some aspects of the IPR agreement and the impact on domestic health policy debates—particularly in terms of generic drugs flooding the U.S. markets. If compulsory licensing becomes an accepted practice, then the pharmaceutical industry will lose key benefits from the enactment of TRIPS. Not surprisingly, business opposition to the Access Campaign has been strong, resolute, and well-coordinated.

Our paper raises several issues for future work. The question arises, what conditions facilitate convergence between business and NGO strategies? Scholars have debated convergence and diffusion theories—from organizational level to macro-institutional levels—in multiple literatures (DiMaggio and Powell, 1983; Bennett, 1991; Berger and Dore, 1996). The issue is complex in that one needs to specify convergence in what, why, how, to what extent, and with what implications. In our analysis, both sets of actors sought to use the instruments of government to pursue their goals. As both targets and conduits of these networks' activities, states remain central players. Arguably, business and NGO networks adopt similar strategies because competing (and cooperating) actors seek to adopt each other's best practices.<sup>40</sup> As organizational theory literature suggests, organizational strategies can be understood in terms of characteristics of internal and external environments, and strategic choices of decision-makers (Child, 1972; Granovetter, 1985). Recent work on NGOs has focused on the role of material incentives in promoting convergence (Cooley and Ron, 2002). Future research, especially research that systematically draws on social movement, public policy, and organizational theory literatures, can better specify these variables in explaining network's strategies.

Our argument opens up new avenues for both constructivists and rationale choice analysts. It offers possibilities for fruitful collaborations between different perspectives in the field. It also broadens the universe of types of actors and issues to examine through constructivist lenses. While at this point we have presented a useful taxonomy with which to compare diverse sets of actors and outcomes, further research needs to be done to probe the limits and possibilities of our perspective. For example, the use of counterfactual analysis would be helpful in teasing out the causal connections behind diverse outcomes. Would the business network have been so successful had the U.S. government not been obsessed about competitiveness? Would the NGO activists have been so successful in the absence of the HIV/AIDS pandemic? It seems clear that policy crises, whether manufactured or authentic, were necessary but insufficient conditions for networks' success. Finally, our analysis should push constructivists to make a more compelling case if they seek to maintain an absolute distinction between NGOs and other types of actors in politics.

In sum, this paper demonstrates that a critical issue in policy contests is whose frame dominates the debates. The business network argued that stringent IPR laws sustain R&D and generate funds for finding new and better cures, whereas the NGOs maintained that such IPR laws deny low-cost access to critical drugs and ultimately harm public health. Clearly, both frames have their own champions. Instead of focusing on the normative superiority of a policy frame or the inherently moral motivations of NGOs, this paper concludes with a call to bring politics back in by examining how competing groups frame their positions, disseminate their agenda, deploy their ideas, and shape public interests.

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<sup>40</sup> For example, social movements can learn lobbying tactics from trade associations (Useem and Zald, 1982).

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