The TRIPS Agreement and Access to HIV Medications: A discussion on ethics

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The Faculty of Culture and Society and the Department of Global Political Studies of Malmö University
In Partial Fulfilment of the Requirements for the Degree Bachelor of Arts with a Major in Human Rights
Human Rights III, (MR106L), Spring 2014

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The TRIPS Agreement and Access to HIV Medications: An ethical discussion

Abstract

With over 30 million people infected with HIV today, it has become an epidemic. Without a cure, HIV continues to be a threat to health and development. In 1994, the TRIPS Agreement, administered by the World Trade Organization came into effect. The Agreement which aims inter-alia to increase patenting in order to promote research and development has been questioned in it's effects on affordable access to HIV medications in the least-developed and developing countries. In this thesis, the TRIPS Agreement's purposes are thus analysed according to two ethical theories and their modern versions, deontology and utilitarianism/consequentialism. This analysis is made in order to seek the ethical responsibilities that the World Trade Organization has in relation to the TRIPS Agreement. The thesis findings conclude through the careful consideration of each ethical theories, and by asking additional questions than those offered in the theories, that the WTO has the ethical responsibility to reform the TRIPS Agreement so as to, at the least, not include pharmaceutical products.

Keywords: WTO, TRIPS, HIV, medication, pharmaceutical, ethics, deontology, utilitarianism, consequentialism, Kant, Pogge, Mill, Singer

Word count: 13 981
# Table of Contents

1. **Introduction**
   1.1 HIV Treatment in the Least-Developed Countries and Developing Countries p.1
   1.2 Research Problem, Aim, And Research Question p.2
   1.3 Review and Discussion of Previous Research p.2
   1.4 Structure p.3
   1.5 Delimitations p.3

2. **Method**
   p.4

3. **Material**
   3.1 Trade-Related Aspects of Intellectual Property Rights p.9
      3.1.1 Patents p.10
      3.1.2 Compulsory Licensing p.10
      3.1.3 Differential Pricing p.10
      3.1.4 Parallel Imports p.11
   3.2 The TRIPS Agreement and Access to ARVs p.11

4. **Theory**
   4.1 Does the End Justify the Means? p.13
   4.2 Kantian Deontology p.13
   4.3.1 The Modern Nonconsequentialist p.16
   4.3.2 Thomas Pogge on Institutional Reform p.16
   4.3 Utilitarianism p.17
   4.3.1 Modern Consequentialism p.20
   4.3.2 Peter Singer on World Poverty p.21
   4.4 Summary p.22

5. **Analysis**
   5.1 TRIPS Agreement Flexibilities p.25
   5.2 TRIPS Agreement and Deontology p.25
   5.3 Institutional Reform p.26
   5.4 TRIPS Agreement and Utilitarianism p.28
   5.5 Preventing Bad, Promoting Good p.29
   5.6 Further Critical Thinking p.30
   5.7 Further Questions Answered p.31
   5.8 Summary p.32
6. Conclusion

Bibliography
Abbreviations

AIDS: Acquired immunodeficiency syndrome
ARV: Antiretroviral therapy
HIV: Human immunodeficiency virus infection
NGO: Non-governmental Organization
TRIPS: Trade-Related Aspects of Intellectual Property Rights
UNDP: United Nations Development Programme
WHO: World Health Organization
WTO: World Trade Organization
The TRIPS Agreement and Access to HIV Medications: An ethical discussion

1. Introduction

The history of HIV/AIDS is a relatively short one. Having only become apparent in the 1980s, the virus has quickly spread into an epidemic. Today over 30 million people are infected with HIV, and roughly the same amount of people have died from the virus\(^1\). Still without a cure, the HIV epidemic continues to be a great threat to health and development. However, treatment for those infected with the virus has been introduced and research has allowed for drastic improvements in the effectiveness of the medications – those taking a combination of three antiretrovirals daily can expect to live for many years without developing AIDS\(^2\).

1.1 HIV Treatment in the Least-Developed Countries and Developing Countries

Many least-developed countries and developing countries, particularly in Sub-Saharan Africa and Central Asia, have been hard hit by the HIV epidemic. Despite the existence of HIV treatment, affordable access to the treatment remains an essential problem. The World Trade Organization's (WTO) Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement encourages patenting on innovative products and processes, including those in the pharmaceutical sector. This leads to a decrease in the production of generic drugs and thus, an increase in cost of patented drugs. The higher cost of drugs, of course, affects the access to medication in the least-developed and developing countries in a negative way. It is important to stress that not only are these medications – often – too expensive for the lesser developed countries, but the restriction of generic drug production means that these lesser developed countries are unable to produce generic versions of the medications for themselves. The production of generic drugs would be done at a lower cost, which results in more affordable access to treatment to the people within these countries; as well as the export of these generic versions to other countries, benefitting both the importing country – who could gain access to the medications more affordably – as well as the exporting country's economy and development.

The TRIPS Agreement does, however, include an article which adds flexibility to the Agreement. Article 31 allows for a fairly reasonable exception to generic drug production, including compulsory licensing – a license to produce a product without the patent-holder's consent – and parallel importing – importing the product from another country at a lower price than the

\(^{1}\) World Health Organization  http://www.who.int/ \(<\text{Accessed 25/04/14}\>

\(^{2}\) AVERTing HIV and Aids  http://www.avert.org/ \(<\text{Accessed 25/04/14}\>\)
manufacturer/patent-holder offers. Despite article 31 of the Agreement, very few countries have in fact taken advantage of these flexibilities.

1.2 Research Problem, Aim, and Research Question

The purpose of this thesis is to evaluate the intentions of the WTO's TRIPS Agreement from an ethical standpoint. In doing so, I will be using two ethical theories, deontology and utilitarianism. Deontology emphasizes the rightness in an action itself – or rather that there are other characteristics of an action other than it's consequences that determine whether it is morally right – while utilitarianism emphasizes the overall pleasure or happiness in an action's consequences. I will include in both of these ethical theories, modern versions of them, namely, nonconsequentialism, Pogge's theory on institutional reform, modern consequentialism and Singer's theory on World Poverty. By looking at the TRIPS Agreement in an ethical manner, I will be able to critically analyse the purposes behind the Agreement and what the Agreement entails. Having critically analysed these tools – as well as the ethical theories – I will be able to find the ethical responsibilities of the World Trade Organization.

Therefore, the research question of this thesis is as follows:

**What ethical responsibilities does the World Trade Organization – through the Trade-Related Aspects of Intellectual Property Rights Agreement – hold in the public health sector, in regards to the access of HIV/AIDS medications?**

This subject relates to the health of millions of people around the world who are carrying HIV. Health is, of course, considered a human right in several international and regional human rights treaties. The treatment for the virus exists, yet far too many do not have access to it. Without treatment, HIV often leads to AIDS – as well as several other health problems.

1.3 Review and Discussion of Previous Research

Generally, research on the topic of access to HIV medications tends to focus on government responsibility rather than the responsibilities of international institutions. Although the former is important, I do believe that it is equally as important to look into the latter. International institutions do play a role in the access to HIV medications, which suggests that they also play a role in the HIV
The TRIPS Agreement and Access to HIV Medications: An ethical discussion

I have found reports which focus directly on the TRIPS Agreement's effect on the access to HIV medication in lesser developed countries. These reports are however written by the WTO, WHO, and by the United Nations Development Programme (UNDP). They put great emphasis on the flexibilities that the TRIPS Agreement allows for, yet they do not put much focus on the fact that these flexibilities are very rarely taken advantage of. However, these reports will be used as material in this thesis in order to gain greater insight into the intentions behind the TRIPS Agreement.

1.4 Structure
This chapter has so far outlined the research problem, aim, research question, and it has discussed existing research on this topic. The structure of the thesis will be outlined now, followed by the delimitations. Chapter two will discuss the method of the thesis, argumentation analysis, which will later be applied to the theory and material to develop a better understanding of the problem at hand. Chapter three will discuss the material, the reports on the TRIPS Agreement. The next chapter, chapter four will discuss the theories mentioned previously, that will be critically analysed and applied to the material. This will be followed by chapter five, the analysis itself. Finally, the sixth and final chapter, will summarise the research and connect it to broader issues.

1.5 Delimitations
The main materials that will be used have been produced by the WTO, WHO, and UNDP. These reports reflect a generally positive outlook on the TRIPS Agreement which of course are works of the WTO – who has support from both the WHO the UNDP. Further research would benefit from case studies or interviews from public policy representatives or NGOs based in one or more of the lesser developed countries who are facing the HIV epidemic. However this research is based on the ethical responsibilities of the WTO, which could be successfully conducted without such case-studies or interviews.
The TRIPS Agreement and Access to HIV Medications: An ethical discussion

2. Method

There are no sets of rules to guide us through making ethical decisions. What is needed then, is the ability to reach our own decisions using a set of skills used in critical thinking, which can be achieved by using the argumentation analysis method. Critical thinking, according to Sigel, holds an emphasis on reasoning well and acting appropriately. In doing so, it is important to have the ability to understand and evaluate arguments, make well-reasoned decisions, and to have a tendency to be fair-minded. To practice these three skills it is beneficial to be able to recognize reasons and conclusions, unstated assumptions, and to analyse and evaluate reasons, concepts and principles.3

While this thesis uses two moral theories, it is important to analyse the arguments made in each theory. If we are to even consider making decisions according to these moral theories, we must first be able to understand them in full. Furthermore, while the purposes of the TRIPS Agreement do not appear at first hand to be of a moral concern, it is also appropriate to be able to analyse the argument within the Agreement itself.

The use of the argumentation analysis method, in ethics, is meant to aid in forming reasonable beliefs. After all, if we wish to think critically when analysing arguments, we must be able to make well-reasoned decisions of our own. To make such decisions it is important to consider options, implications, and consequences. This of course, is Anne Thomson's view of the argumentation analysis, which she calls critical thinking in ethics.4

Within any theory, an argument is present, which is essentially a set of reasons used to support a given conclusion. In decisions making, there is a difference between making a decision and making a moral decision. Although the skills needed to make the decisions are similar, a different question is being asked. An argument within a moral theory attempts to answer the question of what ought I do? rather than what shall I do? and as such it is appropriate to consider the consequences of an action or to weigh conflicting responsibilities, in order to come to a conclusion.5

Moral arguments make moral claims in the argument's conclusion, often in the form of recommendations on what should or ought to be done or not done. As we know, not every

4 Ibid p. 91-92
5 Ibid p. 5
recommendation is a moral one – for example: Pouring water on a laptop will break it, so, do not pour water on a laptop – this recommendation is not a moral recommendation. Where a recommendation is not a moral one, it is a practical one. The difference between moral and practical recommendations lies within the argument's reasons; often the reasons for a practical recommendation is to achieve a goal; meanwhile the reasons for a moral recommendation are because an action is – sometimes arguably – right or wrong, often with emphasis on autonomy, justice or harm, which will be discussed in greater detail later.6

To understand and evaluate an argument is to understand it's conclusion and to evaluate whether it's reasons do in fact support the conclusion, as well as to evaluate whether it's reasons are valid. If we wish to understand and evaluate an argument, we must first recognize it's conclusion and reasons. Often, a conclusion is marked by key-words, or indicators, such as so, hence, or therefore7. For example: Lying to someone will make them lose trust in you, so you should not lie. Here, we have come to the conclusion that one should not lie. Like conclusions, reasons can often be recognized by their own indicators. Words such as because, for, or since, can be used to commence a sentence – or segment of a sentence – which contains a reason. However, all of these indicators, both those of conclusions and reasons, are of course words which can have different meanings according to context so it should not be taken for granted that a conclusion or reason is present every time that one of these words are present. Just as well, conclusions or reasons could also be present in a sentence that does not contain any of these indicators – or the sentence might contain statements such as this concludes that..., or the reason for this is..., which clearly introduces a conclusion or a reason.8

Sometimes, the author of a text takes for granted that certain knowledge is obvious or it is common-knowledge, and so he does not state it explicitly. These are called unstated assumptions, and they must also be recognized in order to evaluate them9. An example of an unstated assumption goes as follows: During midsummer weekend, there is an increase in deaths caused by car accidents. For this reason, a campaign against drunk-driving was launched. No one should drink and drive. In this example we can assume that there is also an increase in car accidents, and that the reason for this increase is that there is an increase of people who are driving under the influence of alcohol.

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6 Ibid p. 10-11
7 Ibid p. 6
8 Ibid p. 7
9 Ibid p. 20
The purpose of a reason is to support an argument's conclusion; a reason can be given to convince the audience that something is true, or to explain why something is as it is\textsuperscript{10}. It is important to differentiate between whether a reason is given in order to convince or to explain, so that the reasons are not taken for granted to be factual. If the given reasons are not true in a practical recommendation, we are able to question whether the conclusion is true. Similarly, a conclusion's reasons could be true, but have no real link to the conclusion.\textsuperscript{11} For example, \textit{the apple tree bears fruit because the sky is blue}. We know for a fact that the sky appears blue, however this has little to do with the apple tree bearing fruit.

It is difficult to reason in ethics because most people rely on their feelings about certain ethical issues. However it is possible to do by analysing two features of ethical discourse, most commonly known as the fact/value distinction, and the is/ought gap. The former is founded on “the assumption that statements which we make about the world can be divided into those which are merely factual and those which are either partly or wholly evaluative”, or, between statements that can be proven as true or false (if resources were unlimited), and statements that could not possibly be proven to be true or false. Opinions or taste are an example of an evaluative statement.\textsuperscript{12} The latter is a necessary continuation to the fact/value distinction, and will be discussed shortly.

If we wish to put our feelings aside to debate ethical issues, we must look for reasons which are both true and support our moral conclusions. Take for instance, \textit{lying is wrong}. One could surely think of situations where lying could be the right thing to do, though if we are to argue that lying is wrong, as a fact, we must offer true and supporting reasons. This brings us to the second feature or ethical discourse, the is/ought gap. The is/ought gap is explained by Hume in a way that explains that the relationship between the reasons and the conclusion of a moral argument – or evaluative statement – is only valid if both the reasons and the conclusion are evaluative. In simpler terms, we cannot come to an \textit{ought} (or evaluative) conclusion, from an \textit{is} (or factual) reason. Coming back to \textit{lying is wrong}, one could say that this is true because by lying to a friend they would lose trust in you. However, one could also say that \textit{lying is right, because by lying to the murderer about his victim's whereabouts, the murderer did not find and murder his meant-to-be victim}. In both cases,
The TRIPS Agreement and Access to HIV Medications: An ethical discussion

the reasons are true, which by logic resulted in two true, but opposing conclusions, where both of the given reasons as well as their conclusions are evaluative.13

Many moral arguments include moral concepts. Concepts are associated with particular words or phrases, such as the concept of freedom, or harm. Generally people have different understandings of concepts, and so when they are used in arguments, their meanings need to be very clear14. In moral reasoning, the concept of harm is of vital importance. Without it, you are not engaged in moral reasoning15. As such, a clear definition of harm should be present in any moral argument, whether or not it exists as an unstated assumption. Without a clear definition of any concept, the conclusions that we reach in our arguments may differ. We have a general understanding of what harm is, but it could differ according to context.

Similar to moral concepts, are moral principles. Linked to moral concepts, moral principles can be generalized statements – such as that of killing is wrong – which supports and is supported by the moral concept of the right to life16. Understanding or analysing the principle would require an understanding of the moral concept that it is linked to, as well as an understanding of the definition of harm. In the vegetarianism as a means of ethics, argument, we ask whether it is only humans who have the right to life, or if animals do too; what are the harms; to what degree is killing wrong, should we make an effort to stop animals from killing other animals? We must draw out the implications of principles in order to analyse them; and when and how they should be applied – which may include the decision whether there are exceptions to the principle or not17.

In summary, argumentation analysis calls for the recognition of reasons and conclusions, unstated assumptions, and the analysis of evaluative reasons, concepts, or principles. Arguments are sets of reasons that are given in order to support a conclusion. Moral arguments are similar, however they make moral claims in their conclusions, usually in the form of a moral recommendation. Aside from evaluating reasons, we must be sure to also recognize unstated assumptions that are to be evaluated as well. While reasons are used either to convince or explain a cause, it is important to ensure that the reasons are factual. Where a reason is not true, there is a good possibility that the conclusion is

14 Ibid p.28
15 Ibid p. 109
16 Ibid p. 28
17 Ibid p. 56
The TRIPS Agreement and Access to HIV Medications: An ethical discussion

not true either. With this being said, it should be remembered that in ethics it is difficult, if not impossible, to conclude whether moral statements are true. Instead they are debated whether they are reasonable or not – for moral statements express general feelings or preferences. Reasoning in ethics is often difficult to do because people generally have strong feelings towards certain ethical issues. In order to put those feelings aside, strong and truthful reasons must be presented.

Alongside moral concepts and principles, is the is/ought gap, which is easiest described as: you cannot reach an is from an ought. Where a reason is evaluative, so is the conclusion. Moral concepts usually have to do with harm or freedom, and as such, the reasons behind the moral concept will usually have to do with harm. Moral principles, as we have just seen, are generalized statements that support moral concepts.
3. Material

As this thesis focuses on the ethical analysis of the TRIPS Agreement, the material I have selected are mainly reports on the Agreement written by the WTO, WHO, and UNDP. Of course, the TRIPS Agreement itself is also included.

3.1 Trade-Related Aspects of Intellectual Property Rights

The purpose of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, as outlined in its preamble, is, inter-alia, to promote the protection of intellectual property rights, while recognizing the special needs of the least-developed member countries\(^\text{18}\). The protection of intellectual property rights – or private rights – is recognized to contribute to the promotion of research and development, or technological innovation. Meanwhile, the recognition of the special needs of the least-developed member countries is to enable them to create a secure technological base. This is to be done by promoting the transfer and dissemination of technology, as stated in article 7: Objectives\(^\text{19}\).

The TRIPS Agreement, established by the World Trade Organization (WTO), was signed by all WTO members in Marrakesh, Morocco on the 15\(^{\text{th}}\) of April 1994. Before the Agreement, over 40 WTO members had not yet provided patent protection for pharmaceuticals, and by the time the TRIPS negotiations ended, 20 of those still had not done so\(^\text{20}\). Prior to the TRIPS Agreement, there have been no international instruments that have set minimum standards for pharmaceutical patents\(^\text{21}\). Understanding that the implementation of the Agreement might be lengthy and more difficult for developing countries and the least-developed countries, special terms were set for these countries. Developing countries were given until January 1\(^{\text{st}}\), 2000, while the least-developed countries were given until January 1\(^{\text{st}}\), 2006 with a possible extension\(^\text{22}\).

\(^{18}\) TRIPS Agreement 1994 – Preamble
\(^{19}\) Ibid – Art.7
\(^{20}\) WTO Agreements & Public Health: A joint study by the WHO and the WTO Secretariat, Printed by the WTO Secretariat VII-2002-6,000 © World Trade Organization / World Health Organization, 2002 p. 42
\(^{21}\) Ibid p.94
\(^{22}\) Ibid p. 46
3.1.1 Patents
For the purpose of this thesis, when referring to intellectual property rights, we will be speaking of patents. Patents are underlined in Part II, Section 5 of the TRIPS Agreement. Patentable subject matter includes both products and processes in all fields of technology\textsuperscript{23}. As such, pharmaceutical medications are included. Patents are applied to a product in order to protect the rights of the inventor(s), from here on known as the patent-holder, by preventing the product from being made, used, offered for sale, sold, or imported without the patent-holder's consent.

3.1.2 Compulsory Licensing
Article 31 describes the terms of use of a patented subject without the consent of the patent-holder, which is otherwise known as compulsory licensing – although, the term compulsory licensing does not appear in the Agreement. The user must have attempted to gain consent from the patent-holder, under reasonable terms and conditions, without success. In the case of a “national emergency or other circumstances of extreme urgency or in cases of public non-commercial use”, the requirement to attempt to obtain consent may be waved, so long as the patent-holder is made aware within an appropriate amount of time\textsuperscript{24}.

It is important to emphasize that the need of a national emergency or a circumstance of extreme urgency is not necessarily necessary to issue compulsory licensing. However, it is written in Article 31 in such a way that this could easily be misunderstood. The Doha Declaration on the TRIPS Agreement and Public Health does clarify that it is up to the member country to determine the grounds for a compulsory license\textsuperscript{25}. Although, “many developing countries and least developed countries do not know their rights vis-a-vis patent, compulsory licensing, and TRIPS”\textsuperscript{26}.

3.1.3 Differential Pricing
The manufacturers of a product – both generic companies and brand name companies – are allowed under the TRIPS Agreement to export their product at different prices in different markets. This

\textsuperscript{23} TRIPS Agreement 1994 – Art. 27.1
\textsuperscript{24} TRIPS Agreement 1994, Art. 31.b
\textsuperscript{25} WTO Agreements & Public Health: A joint study by the WHO and the WTO Secretariat, Printed by the WTO Secretariat VII-2002-6,000 © World Trade Organization / World Health Organization, 2002 p. 100
\textsuperscript{26} Gonzalez, Eduardo, “’Access to Inexpensive Medicine Is a Right of the People’: An interview with ’Gypsy Pharmacist’ Krisana Kraisintu”, Asian Politics & Policy, Volume 3, Issue 3, 07/2011, p.466
The TRIPS Agreement and Access to HIV Medications: An ethical discussion means that a drug worth 300 USD in the United States, could be sold for the same price in France, and for a mere 10 USD to Burkina Faso, for example. Differential pricing is permitted under a combination of Art. 6 which states that “nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights”\textsuperscript{27} and, Art. 8.1 which permits members to “adopt measures necessary to protect public health and nutrition”\textsuperscript{28}.

Although differential pricing is permitted under the TRIPS Agreement, a workshop organized by the WHO and WTO Secretariats in 2001 concerning differential pricing left unanswered some key questions: how the most favourable price is to be determined; what types on incentives could be used to promote differential pricing; and what are the best ways to keep drugs sold at a lower cost from re-entering their original country or market?

3.1.4 Parallel Imports
Also unaffected by the TRIPS Agreement due to Articles 6 and 8.1 is parallel importation. Where one country imports a drug at a lower price due to differential pricing, that country is permitted to export as little or as much of the imported product. Using the example above, Nigeria is permitted to import the drug from Burkina Faso at the lower cost, instead of directly from the United States, whether or not the United States offers the drug to Nigeria for the same 10 USD.

3.2 The TRIPS Agreement and Access to ARVs
In 2006, the United Nations Development Programme (UNDP) released a report \textit{The TRIPS Agreement and Access to ARVs}, outlining the effects of the TRIPS Agreement on the Least-developed and developing countries in terms of access to HIV medications. The report makes mention of the decline in prices of HIV medications having to do with the generic production in the Indian local industry; national attempts to legally enforce TRIPS flexibilities in developing countries; the strategic use of government issued compulsory licensing; and others\textsuperscript{29}. The UNDP report was co-sponsored by the United Nations Programme on HIV/AIDS for reasons including the reverse of development gains resulting in illnesses and deaths since the TRIPS Agreement\textsuperscript{30}.

\textsuperscript{27} TRIPS Agreement 1994, Art. 6
\textsuperscript{28} TRIPS Agreement 1994, Art 8.1
\textsuperscript{29} United Nations Development Programme, “The TRIPS Agreement and Access to ARVs”, 2006 p.8
\textsuperscript{30} Ibid p.5
The TRIPS Agreement and Access to HIV Medications: An ethical discussion

Most HIV medications can be made as generics in the international market, which are thus less expensive in both production and in sales. Although, few developing countries have the capacity or the resources to produce these drugs, either at all, or to satisfy their domestic demand. A number of the least developed countries, despite having been given until 2016 to enact the TRIPS Agreement, have already done so.31

Having mentioned the Indian local industry in generic pharmaceuticals, it is important to note that “more than 30% of all generic drugs in developing countries are supplied by India”, and until 2005, Indian law did not recognize patented products. As developing countries were given until January 1st, 2005 to enact the TRIPS Agreement, that is the date that India introduced patent protection for pharmaceuticals. This was naturally a concern for developing countries and the UN alike, and as such, India is allowed to continue to produce generics so long as they were already producing the drugs prior to 2005. However, compulsory licensing is only allowed for three years after the grant of a patent.32

The TRIPS Agreement's flexibilities were found to be rather unclear. It was not until the Doha Declaration on TRIPS and Public Health that the ability for developing countries to issue compulsory licenses was clarified33.

31 Ibid p.8
32 Ibid p.9
33 Ibid p.8
4. Theory

In this chapter, I will present a detailed description of deontology and utilitarianism, followed by brief descriptions of both of their modern versions, nonconsequentialism and Pogge's theory on institutional reform, and, consequentialism and Singer's theory on world poverty.

4.1 Does the End Justify the Means?

Is it moral to do wrong for the sake of what is right? It is not rare that people are put into situations where they consider doing a wrongful or immoral act in order to produce a better result. We must contemplate however whether the morality of an act holds more leverage over the consequences of the act, or vice-versa. It is debated upon by philosophical scholars whether doing wrong for the sake of what is right, is indeed moral. Immanuel Kant believes that it is the act itself that is fundamental as opposed to the act's consequences because “however carefully we plan our actions, it is impossible to guarantee their outcomes” \(^\text{34}\). On the other hand, utilitarians such as Mill argue that the consequences of an action are necessary in evaluating our actions in the moral sense – we ought to strive for an end where the greatest amount of happiness or the least amount of pain amongst all peoples.

Take for instance, Dick Cheney is made aware that two airplanes have been hijacked and are flying towards the World Trade Centre in New York. He is faced with two options; he could order the military to shoot the airplanes down, or he could let the hijackers complete their course. If he were to order to have the airplanes shot down, innocent people would be killed. If however, he were to allow the hijackers to complete their course, the airplanes would likely crash into the World Trade Centre. In making this decision, he essentially has to decide whether it is right, or if he is willing, to kill innocent people in order to save more innocent people. In the following sections, these two options will be discussed in terms of deontology and utilitarianism.

4.2 Kantian Deontology

The idea behind deontology originates in Christianity where humans have a primary duty to God. In the New Testament, Jesus asks “What shall it profit a man if he gain the whole world and lose his

own soul?”35. This question separates the acts of doing right and faring well, and presupposes that doing right holds more importance than faring well. It is no secret that there are people who are believed by others to never do right, but always fare well. This shows us that completing immoral acts will not restrict us from material wealth36, leading us to wonder why doing right is actually preferable to faring well. Kant tries to show us why.37

Kant puts emphasis on the duty to do what is right, for doing right lies in our reason – which will be explained in more detail later. When one who constantly does wrong but always enjoys prosperity, it is not understood nor does it give pleasure to any impartial witness. In Kant's terms, doing what is wrong reaps your worthiness to be happy, just as doing what is right makes you worthy to happiness. Now, if doing right leads to good, and doing wrong leads to bad, what are the most basic standards of good and bad, right and wrong?38

Behind all of our actions lies intention, be it good or bad. What is important to understand is that our wills or intentions do not always lead to the consequences that we desire. As one's good will or intention could be interrupted “by a particularly unfortunate fate of the niggardly provision of a step-motherly nature” the act itself, even when the consequences are dire, will still “sparkle as a jewel in its own right, as something that had full worth in itself”.39 What he tries to explain here is that no matter what we do, we cannot guarantee any particular consequences to our actions. One can save the life of a drowning man who – that you are unaware of – will later take the lives of 2 others in murder. The act of saving a life is undeniably good, though the consequences to which could result badly. The same applies to the opposite act of doing bad. You might have the intention of doing bad when performing a bad act, but the consequences could still end up being good. Even though the result is good, your act is still a bad one. This is why intention and consequence need to be separated, as one cannot guarantee particular results, what is most important is the intention or will (as Kant calls it) behind the action, instead of the success or failure of the action.40

Furthermore, in Kant's emphasis on the duty to do what is right, he believes that a moral act in itself is not necessarily moral. He also considers the motivation for which we perform the act, and calls

36 Ibid 99
37 Ibid 101
38 Ibid p.102
The TRIPS Agreement and Access to HIV Medications: An ethical discussion

this inclination. There is a difference between performing a moral act because it is right and performing a moral act because one has a motivation to do so. If one volunteers at a soup kitchen every week, even if they do it out of good character, they might feel a personal gain, a certain pride perhaps. Then a series of unfortunate events occurs in their life, and they no longer have the energy, or the will to keep volunteering at the soup kitchen even though the soup kitchen continues to need volunteers. By stopping, or taking a break from volunteering, their motivation for volunteering in the first place comes into a visual effect. It is only if one continues to volunteer during their own personal hardships, that the act of volunteering is a moral one. For this Kant believes that the good will must be qualified, “nothing in the world – indeed nothing even beyond the world – can possibly be conceived which could be called good without qualification except a good will”, by being attached to the duty to do what is right.

So far we have found that a good act can be considered moral only if it is good in itself and unmotivated by personal benefit. However, we have not yet considered what is a good act in itself. In Plato's Euthyphro, Socrates and Euthyphro discover that what is moral, is moral not because the gods like it, but rather the gods like it because it is moral. In deeper meaning, this suggests that a moral act is something that simply is moral, and found on a transcendent level, above the gods. If this is so, how are we to know how to act, if we wish to live moral lives? Kant addresses this concern in imperatives, in which there are two kinds: the hypothetical imperative, and the categorical imperative. The hypothetical imperative, is just that, hypothetical – one performs an action because of a desire that can be achieved through performing the said action. One will only eat if they are hungry, if they are not hungry, there is no reason to eat. This type of imperative however, does little to help us find what is a moral act. The latter type of imperative, the categorical imperative, “transcend(s) our wants and desires by presenting us with rational principles of action in the light of which those desires themselves are to be assessed”. This is the type of act in which one ought to do because it is a moral duty, even if one does not want – or if one has no desire – to do it. These acts, or moral duties, Kant believes can be examined by using, what he calls, pure practical reason.

41 Ibid 104
43 Plato, “Euthyphro”, Infomotions Inc., South Bend, IN, USA (2001)
45 Ibid 110
46 Ibid 111
The TRIPS Agreement and Access to HIV Medications: An ethical discussion

As humans are not perfectly rational, we sometimes act in a way that we ought not to in order to benefit from the act. Kant proposes that to stop ourselves from performing these acts, we should ask ourselves if we would agree for someone else to perform the same act, under the same circumstances. He writes: “I should never act in such a way that I could not will that my maxim be a universal law”\(^{47}\). His maxim is his reason, thus if the act could be made into a universal law, it has pure practical reason. If it cannot, however – if we would not agree that someone else should perform the same act under the same conditions – it is not in line with pure practical reason and is thus not a moral act. This maxim combined with the second formulation of the categorical imperative, “act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end”\(^{48}\) we find that it is our duty not to use a human being as a means to an end\(^{48}\). This making deontology a rights-based theory.

Reason on it's own is something that Kant sees to be “given to us as a practical faculty, i.e. one which is meant to have an influence on the will”\(^{49}\). Although we as humans have reason, we also have natural traits of selfishness, and for this we use pure practical reason to check for selfishness.

4.2.1 The Modern Nonconsequentialist

Nonconsequentialism is the denial of the rightness or wrongness of an action according to the good amounted to as a consequence of the action, or in other words, deontology. Although Kant's deontology is quite modern, the modern nonconsequentialist differs themself from Kant where they claim that negative duties – ie. Not to harm – are more demanding than positive duties – ie. To aid\(^{50}\). Additionally, nonconsequentialists believe that there are acts that are morally valuable, yet not morally required, at a time to produce better consequences. With this, “the nonconsequentialist may also propose that there are distinctive ways of distributing aid among people that do not merely try to maximize good”\(^{51}\). This will be discussed further in the next chapter.

\(^{49}\) Ibid p. 125
\(^{51}\) Ibid. p.15
4.2.2 Thomas Pogge on Institutional Reform

As Thomas Pogge's theory on institutional reform is a rights-based theory, it can be read as a form of deontology. Pogge claims that global poverty is the outcome of the current world system which has been shaped by the affluent countries. He believes that those who create the rules in the current world system are the leaders of the affluent countries and as such, the developing countries are faced with challenges in terms of development – because their needs are rarely accounted for in the instruments of international institutions. As the ultimate outcome, Pogge finds that this creates a divide between the affluent and the poor, where these instruments are of better use in the affluent countries. In order to alleviate this divide, and to alleviate world poverty, he argues that institutional reform is necessary.

Under the topic of world poverty, Pogge specifically discusses pharmaceutical reform. He states that “markets in generic versions of advanced medicines, for instance – have been shut down under WTO rules designed to facilitate global monopolies”. Where patents are held to financially promote research and development, it is often ignored that much of pharmaceutical research is conducted in universities. Therefore, “the creative intellectual ingredient into physical reproduction is entirely cost free at the margin. And one may then be tempted to think that poor people, at least, should have access to this creative intellectual ingredient free of charge, that is, (poor people) should pay only the market price for physical reproduction”.

4.3 Utilitarianism

While deontology focuses on the moral rightness of an action, utilitarianism focuses on the consequences of an action to derive whether the act is a moral right. Utilitarianism is made up of two aspects, consequentialism and hedonism. Consequentialism focuses on the consequences of an action, while hedonism focuses on pleasure as a natural good. As such, utilitarianism focuses

53 Ibid p.49
54 Ibid p.36
56 Ibid p.225
58 Ibid p.138
59 Ibid. p.43
The TRIPS Agreement and Access to HIV Medications: An ethical discussion

on the amount of pleasure or happiness that an action creates in it's consequences. These two aspects will first be discussed separately to better understand utilitarianism, then utilitarianism on it's own will be discussed as a moral theory to explain how it is one ought to make decisions before performing an action.

Every action produces consequences, which is really their purpose. If actions produce consequences, those consequences understandably lead to further consequences, and so on. We assume that a bad action is likely to produce a bad consequence, or a good action will produce a good consequence. Noting of course that an action must take place in order for a consequence to exist – it is only when consequences happen that consequentialism can be considered.

We can only assess a consequence after it has happened, and the consequence is not entirely in our control. Although, it is possible for us to anticipate a consequence or several possible consequences before performing the act, and for this reason, consequences can hold moral relevance. It is in deciding how to act that is made difficult, specifically because we cannot see into the future. However, due to the fact that most actions in many situations have been performed in the past, we are able to make generalizations of cause and effect and we even “summarize our experiences in useful general rules of conduct”.

Acting according to general rules of conduct does not secure the anticipated consequence, however. Sometimes the consequences are not only unforeseen, but unforeseeable, thus it would be unreasonable to say that people have acted badly just because the consequences were bad. Consequentialism does not only consider the actual consequences, but the probable consequence as well. This differs from Kant's will, where it is not only the intention that the actor has in performing the action, but the actual likelihood of the anticipated consequence. The generalization that “acting upon anticipated good consequences generally leads to actual good consequences” is what consequentialists believe is important in determining whether the action was a right one. That is to say that an act should be generally accepted by the community in order to be considered morally right. Acting according to the rule of action with the best aggregated consequences is what is called rule-consequentialism.
The other aspect of utilitarianism is hedonism which creates a direct link between pleasure and good. Where pleasure is the opposite of pain, pain is correspondingly the natural evil – as it is the opposite to good\(^{63}\). Happiness is, of course, the sensual feeling of pleasure, and absence of pain. If it is so that hedonism seeks a life with the highest amount of pleasure, or the lowest amount of pain, a degree of pain must be present. For how can one feel pleasure if he does not know how pain feels? This being so, “the fact is that the life of pleasure recommends only some pleasures” and we can make distinctions between pleasures – to which of them are better than the others.\(^{64}\)

Mill does take note in that some who have led very fortunate lives might require more pleasures to make him happy, as opposed to one who has led a life full of unfortunate consequences. For example, a rich man who enjoys a sandwich, would likely enjoy it less than a starving man who has not eaten in days. However the rich man would very unlikely prefer to live the life of the starving man, only to experience the pleasures that the sandwich has brought about. This is examined as marginal utility. Also noted in Mill's work is the existence of temptation, and thus, the preference of the lower pleasure over the higher one. If one had to choose between good health and tobacco, the obvious choice is good health, however many choose tobacco in any case due to temptation.\(^{65}\)

Hedonism and consequentialism are distinct of each other, and neither imply the other\(^{66}\). An angry consequentialist couple who have decided to get divorced might decide that it would be better if they were to stop talking to each other to avoid further argument. This decision is not utilitarian because it does not increase happiness, the couple continue to be bitter with each other, though the decision leads to a smoother divorce process. What this implies however is that both aspects, consequentialism and hedonism, are important, because if either of them are proven to be false, then utilitarianism as a whole would also be proven false.

Utilitarianism does not seek one person's overall happiness, but the overall happiness of all persons both in quantity and quality\(^{67}\). What we as humans ought to aspire to is an end which creates the most pleasure for all beings, or the least amount of pain. Keeping in mind that all people are

\(^{63}\) Ibid. p. 43
\(^{64}\) Ibid p. 44
\(^{65}\) Gensler et al., Ethics; Contemporary Readings, Routledge (2004) p. 197, 198
different and have different preferences, one must be impartial to his own happiness. If one must suffer pain for the rest of the world to experience pleasure, then he should do so. The utilitarian doctrine can be summarized to “that action is best, which procures the greatest happiness”, which is better known as the greatest happiness principle\(^{68}\).

Seeking happiness as an end, does not only apply to the consequences of actions, it can also be expanded to the general outcome of one's life\(^{69}\). If one lives his life maximizing happiness and minimizing pain, or according the greatest happiness principle, he lives a morally good life.

The main issue with the greatest happiness principle, which is recognized and addressed by Mill, is that it is not too difficult to think of a situation where pursuing the greatest happiness principle would condition performing some very questionable actions\(^{70}\). For example, stealing goods from the rich to give to the poor, in a society where there are more poor than rich, creates a greater happiness. However, because it follows the greatest happiness principle, it condones stealing – which is generally understood to be wrong. It is for this reason that Mill believes that it is best to have a system of rules which would disallow such actions. He says that human freedom (or the refrain from hurting others) “are more vital to human well-being than any maxims, however important, which only point out the best mode of managing some department of human affairs”\(^{71}\).

4.3.1 Modern Consequentialism

In the present day, consequentialism has evolved – from utilitarianism of course – to a way to determine what is the best alternative in a decision-making situation. The right alternative would be the one which leads to a better, expected, outcome, no matter the act performed\(^{72}\). The term better here, relates to what Pettit calls a neutral good\(^{73}\), or a good that expresses a good for all beings as opposed to a relative good which belongs to one or a few people.

There is good reason to relate the theory of modern consequentialism to the work of social or

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\(^{69}\) Ibid p. 131

\(^{70}\) Ibid p. 135

\(^{71}\) Ibid p. 136


\(^{73}\) Ibid p. 43
political institutions, just as we already assess them on economic functions. “They raise issues of how far they allow people to enjoy equality of justice or the chance to lead meaningful lives”, a moral concern\textsuperscript{74}. Consequentialists would thus assess institutions based on the degree of the neutral good in the outcome of their work. Generally, the success of an institution can be seen in its survival, however the moral success of the institution depends more on the quality of life of those living under it. If this is the case, then the success of international institutions should depend on the quality of life for all human beings. This thought is fairly straightforward. Although, in the implementation of say, a new law which ought to bring out the better consequences, a set of duties are imposed – the law itself – which demands a more deontological approach. If the new law is considered to be good, then that law is to be obeyed and enacted not because it brings the best consequences, but because it is one's duty to follow the law. This is okay to the modern consequentialist because it takes on a rule-consequentialist approach, it is dependent on all people following the rules out of instinct, and if any concerns were to appear in the minds of the people, it would be clear that deliberation is needed\textsuperscript{75}.

\textbf{4.3.2 Peter Singer on World Poverty}

Peter Singer, a consequentialist, argues that our moral outlooks on life, and the way that we live it, have a need to be altered. He believes that where it is in our power to prevent something bad from happening without causing harm to something of comparable moral significance, then we ought to do it. This is to prevent what is bad and to promote what is good. This principle does not take into account proximity or distance. Although it is more likely that one would help their neighbour rather than someone on the other side of the world, they still morally ought to help the person on the other side of the world. The principle also applies to everyone, whether you are the only person who could do something or if you are one in millions who could do something in any situation.\textsuperscript{76}

This principle only requires us to prevent what is bad, and to promote what is good – and only when we can do it without sacrificing anything of comparable moral importance. For example, while at the fair you find a lost child, and bring the child to the nearest information/security point. Completing this act meant that you had to give up your spot in line for a ride. This is insignificant because you prevented the child from possible harm or danger. We can see in this example that it

\textsuperscript{74} Ibid p.61
\textsuperscript{75} Ibid p.63
was easier to assess what the child needed in comparison to what a poor child in Asia might need, and as such, Singer sees that there is reason to help those near to us first. However, due to advances in technology/communication and transportation, those in the affluent countries are well aware of widespread poverty or health epidemics in other countries and regions. With this being so, it is difficult to justify inaction with the excuse of distance.\textsuperscript{77}

When it comes to poverty, it is all too easy to compare your actions or inactions in terms of aid, to those around you in the affluent countries. There is after all a psychological difference between being the only one who can prevent something bad, and being one of many who can do the deed – one would feel less guilty if they could blame others. Singer believes that this psychological difference does not apply to our moral obligations\textsuperscript{78}. It could easily be that somebody else would bring the lost child at the fair to security, however simply thinking that \textit{someone else will do it} does not prove that it is not your moral obligation to do it – if someone should do it, you should do it. Considering this, it is well known that poverty exists and that the affluent do have the capacity to make considerable changes in terms of aid. This of course, is a problem that involves everyone equally.

\textbf{4.4 Summary}

In the debate between deontology and utilitarianism/consequentialism, we come back to the example where Dick Cheney is faced with two options. The options were: to have the planes that are heading towards the World Trade Centre buildings shot down; or to let them continue their course. The question at hand is whether it is right to kill innocent people in order to save innocent people. If he decides to let the planes take their course, they will likely crash into the World Trade Centre, killing those in the plane, and many in the building, if he orders to have the planes shot down, those in the plane would die, and perhaps some people on the ground where the planes would hit the ground. By allowing the planes to continue their course, he makes a deontological decision, because he does not take action to kill anyone himself. However, if he orders the planes to be shot down, he would be making the utilitarian/consequentialist decision, as less people would die, and therefore there would exist more happiness. Of course, the manner in which I have applied this example to the theories could be done differently. The reversed application will be seen shortly.

\textsuperscript{77} Ibid
\textsuperscript{78} Ibid
We do not know which course of action (or inaction) is ultimately correct, because we understand both theories. It is difficult to balance the ends with the means because we want what is good, although the question is whether we ourselves are willing to treat people as means.

Now we can take into consideration that Cheney's decision could also be reversed. Cheney might feel as though he has the moral duty – in deontology – to have the planes shot down to save innocent people, for if he did not, he would be killing those in the World Trade Centre. Or, taking the utilitarian/consequentialist approach, letting the planes continue their course, whereas if he did not, American citizens would lose trust in their government and gain fear, believing that the government had killed its own people.

Due to the possibility of reversing which action is deontological and which is utilitarian/consequentialist, we are left with a complicated thought. If an action can be justified by both theories, why do they appear to be so different? Deontology is rooted in theology where we as humans have a primary duty to God. The modern version of deontology set by Kant shifts our duty to reason, instead of God. In both cases, our duties are guided by something transcendent. Our reason is something that we simply have access to. Utilitarianism's concern is human welfare. While neither theory does, could we not argue that human welfare is at the heart of God or of our own reason? Utilitarianism defines human welfare in hedonic terms – that is looking for pleasure and avoiding pain. Meanwhile, what is good, defined by deontology is not only happiness but respect, dignity, etc. – we would suffer pain for our dignity. With this being said, perhaps justifying ends with means is not particularly ethically useful, since it does not help us make decisions. Though we discuss the two in order to raise the question of doing wrong, because as we have seen, doing bad things can be justified as doing good, no matter how one defines what is good and what is bad.

If we can justify doing wrong, then we could do what is wrong in order to do what is right. Ordinary speech does not distinguish the good and the right, or the bad and the wrong, in the careful way that moral theory can. We have now found that our moral duty not to kill innocent people does not override our moral duty to protect. So where should we go from here? Talking about ends and means does not make any action justifiable, however in competing duties or in
different outcomes in human welfare, we are able to compare the duties or the outcomes. We can make these comparisons by evaluating the probability of the outcomes, the clear and unclear consequences of the action, as well as the harms and benefits of the action.

The probability of outcomes has already been recommended by Mill, however should be looked at differently when making comparisons. As we cannot be sure of the outcomes of an action, we should weigh possible immediate consequences as well as less certain future ones. In other words, we should count the benefits instead of what is possible. Comparing the clear and unclear consequences, we take into account what is almost certain as well as what is possible to happen. For example, a new type of airborne disease is discovered, and a new vaccine introduced. By getting the vaccine you find yourself immune to the disease, this is the clear consequence. However the unclear consequences might include the formation of a health defect later on in life, where the vaccine is responsible. Comparing the harms and the benefits is much like comparing which is more important between freedom and security. Reducing a freedom can be seen as a moral issue, however having security (which to a degree reduces your freedom) is seen as being important. It is simply a question of which is more important.

In order to solve moral questions, evaluating the merits of deontology and utilitarianism raises an obstacle. The question concerning the ends and the means should be reformed, however not forgotten. Our lives consist of one action after another, which means we face the dilemma of how we ought to make decisions everyday. With this being so, the debate between deontology and utilitarianism is important, however, how practically useful the theories are in decision making is questionable and dependent on how a decision is applied to the theories. This is of course a limitation on all ethical theories.
5. Analysis

In this chapter I will combine theory with method and material in order to analyse the TRIPS Agreement from a theoretical and ethical perspective. In doing so, I hope to come to a general answer to the research question of this thesis.

5.1 TRIPS Agreement Flexibilities

As the TRIPS Agreement encourages patents on all products and processes, including pharmaceuticals, one might be inclined to think that the Agreement has a negative impact on access to HIV medications. The WTO, WHO, and UNDP all stress that the TRIPS Agreement has flexibilities which allows for generic drug production and as such the Agreement should not have a negative impact for the least-developed and developing countries to have affordable access to generic HIV medications. However, access to HIV medications remains a problem in many countries who are fighting the HIV epidemic, and more importantly, very few countries do use these flexibilities. This brings us to a very clear question: If the TRIPS Agreement allows for flexibilities that are counteractive to the majority of the Agreement, and international institutions even encourage their use, why have the Agreement at all? I will now look for the possible answers to this question by taking both the deontological and consequentialist approach.

5.2 TRIPS Agreement and Deontology

In chapter three, I mentioned that one of the purposes of the TRIPS Agreement is to promote the protection of intellectual property rights. By protecting intellectual property rights in the pharmaceutical industry, pharmaceutical companies are given the financial support to further their achievements in research and development. The protection of intellectual property rights are meant to be actualized while recognizing the special needs of the least-developed member countries, in order to enable them to create a secure technological base – by the promotion of transfer and dissemination of technology.

From a deontological point of view, it is clear that the promotion of the transfer and dissemination of technology is morally good. The least-developed and developing countries, often lack technology, and so those who say sharing is caring, would be difficult to argue with in this
The TRIPS Agreement and Access to HIV Medications: An ethical discussion

scenario. The purpose of protecting intellectual property rights however is not as simple to assess in line with deontology. There are two ways to look at it: the promotion of the protection of patents to promote research and development; and the restriction of generic drug production.

The protection of patents to promote research and development takes on a consequentialist characteristic. Although we could still apply it to the categorical imperative. In doing so we find ourselves asking: is this something that we think everyone should do? The answer coming from the WTO would clearly be yes, the TRIPS Agreement is something that would ideally be enacted universally. Promoting research and development is an overall good thing, after all, and as such anything other than good that would come out of this would have to be considered consequences that are out of our own control. Although once taking into consideration the second formulation of the categorical imperative, we ask: are there human beings being used as a means to an end? With an increase of deaths due to HIV, we find that yes, there are humans who are the means to an end, and as such, Kant's morality test – the categorical imperative – is not passed. We find that by applying the categorical imperative to restricting the production of generic drugs we come to a similar result. Is this something that we think everyone should do? The TRIPS Agreement does allow for flexibilities and encourages least-developed and developing countries to use them, so the answer would have to be no. Of course, there is no change in whether humans are being used as means to an end, and so, once again the TRIPS Agreement does not pass the morality test.

The modern nonconsequentialist might combine these two questions and answers related to the categorical imperative, to find that promoting research and development may be morally valuable yet not morally required, whereas the duty not to harm is more stringent than the duty to aid. It has been found that the production of generic HIV medications has played a role in the decrease in price, and thus the increase in accessibility of drugs in the least-developed and developing countries. Thus, restricting the production of generic drugs would cause a decrease in accessibility, harming these countries. Because the duty not to harm is more stringent than the duty to aid, the fact that the TRIPS Agreement also calls for a transfer of technology to the countries in need, does not make a difference.

As the TRIPS Agreement includes an article, Article 31, which allows for flexibilities, the entire Agreement cannot be discarded as immoral in terms of deontology or nonconsequentialism. If very
few countries use these flexibilities, that would be considered a consequence that is out of one's own control. Differential pricing and parallel imports might be some of the ways that the modern nonconsequentialist would suggest as ways of distributing aid without merely trying to maximize good. Differential pricing and parallel imports could be seen easily as helping those in need, an act that is good in itself.

5.3 Institutional Reform
In Thomas Pogge's *Real World Justice*, he argues that the rules of the current world system have been created by the leaders of the more affluent countries, causing a slowdown in the development of developing countries. In his works, he suggests that institutional reform is needed to end poverty – in this case I would like to apply his argument directly to the TRIPS Agreement. Applying patents to pharmaceutical products may have an effect on access to healthcare and medicines. Where poverty and health can easily be related to each other, if Pogge's argument is correct, a reform concerning the TRIPS Agreement could have a positive effect on access to healthcare. There are many countries who already lack access to basic healthcare, that have also been fighting the HIV epidemic.

Pogge finds that the use of intellectual property rights harms the poor, by depriving them of what is justly theirs – for he believes that what belongs to the affluent also belongs to the poor. This suggests that the WTO is harming the poor by enforcing the TRIPS Agreement on an international level. Once a patent expires, the drug goes generic, which is to say that any company is legally able to produce or sell the drug. This, increasing the competition, makes the drugs more affordable and thus, accessible to the least-developed and developing countries. Aside from medications becoming more affordable for purchase by the least-developed and developing countries, they are also able to produce the drugs themselves. In producing the drugs themselves, they are able to distribute the drugs easier, as well as sell the drugs to neighbouring countries to earn a profit.

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80 Ibid p.41
5.4 TRIPS Agreement and Utilitarianism
We have found that by enacting the TRIPS Agreement research and development is being provided for, in finances as well as technology and knowledge. However, it also led to a decrease in production of generic HIV medications as a consequence. This decrease suggests an increase in the cost of the drugs, and a decrease of accessibility to the drugs by the least-developed and developing countries, as further consequences. We could say that the promotion of research and development contributes to the happiness and well-being of millions, either from new medications, new knowledge, technology, or other benefits. The decrease in production of generic medications, on the other hand, contributes to the pain of millions. The word pain in this instance is used as an opposite to happiness. With 1.2 billion people living in extreme poverty (less than $1.25 a day)\textsuperscript{81}, it comes to no surprise that there is a very large number of people who cannot afford essential medicines. There are many least-developed and developing countries who are fighting against both poverty and the HIV epidemic. As one could imagine, if there are people who cannot afford even the most basic essential medicines, they likely cannot afford HIV medications.

Having found both good and bad when applying the purposes of the TRIPS Agreement to utilitarianism, we are far from deciphering whether the utilitarian would suggest the Agreement to be morally right or wrong. Perhaps taking into consideration marginal utility may help us. Mill claimed that the more fortunate might require more good, to acquire happiness. For the purpose of this analysis, I will say that the more fortunate in this scenario are those who are more directly benefitting from the TRIPS Agreement, ie. The pharmaceutical industry, individual researchers and developers, ect., and the less fortunate are the ill persons in the countries who struggle to attain affordable access to medication. If this is true, then it is reasonable, according to Mill, to believe that the fewer amount of persons who are directly benefitting from the TRIPS Agreement, require the Agreement in order to produce happiness, and what comes of the research and development will benefit at least some of the less fortunate, who will produce more happiness, as they require less to be happy. This is opposed to a non-restriction of the production of generic drugs which would benefit more of the less fortunate, but less of the more fortunate – which from the beginning is smaller in number than the less fortunate. This brings us to see that in terms of utility, a non-restriction of the production of generic drugs would produce more happiness in quantity.

\textsuperscript{81} United Nations Millennium Development Goals, 2013
Mill also stressed the importance of human freedom, or refraining from hurting others. If by implementing patents, there will be a decline in production of generic drugs, many, namely the poor, will be harmed. If this is the case, then the TRIPS Agreement does harm others. Utilitarianism calls for the most pleasure in both quantity and quality of all persons – or the greatest happiness principle: maximizing happiness, minimizing pain – so perhaps a non-restriction on the production of generic medications would be preferred by the utilitarian.

5.5 Preventing Bad, Promoting Good
As a kind of modern consequentialism, Singer believes that it is our moral obligation to prevent bad things from happening where doing so does not cause you to commit harm to anything that is morally comparable. By enacting the TRIPS Agreement, one could argue that by promoting research and development we are preventing further disease outbreaks, by introducing more effective medicines or cures. However, as we have found, the other side of the promotion of research and development is the restriction of generic drug production. Whether the restriction of generic drug production is considered a harm of comparable moral significance is arguable, and may depend on a matter which cannot be calculated in the long run – one way of assessing the positive outcomes with the negative outcomes could be to count how many lives are saved and comparing that number to how many lives are lost.

As it happens, the decrease in production of generic drugs leads to the higher cost of brand-name drugs – making accessibility to drugs in developing countries at least partially, an issue of affordability. Now we find ourselves in a situation where, knowingly, there continues an HIV epidemic in Sub-Saharan Africa and South-East Asia, where there is a struggle to access the treatment. Whereas each person in the affluent countries does not act in the manner in which Singer believes that we ought to – we should do whatever we can to prevent illness or the spread of HIV in more communities than just our own – the epidemic continues. With this, the TRIPS Agreement which has led to an increase in illnesses and deaths due to HIV, despite it's flexibilities, appears not to be fulfilling it's moral obligations.

The TRIPS Agreement, signed by all members of the WTO, recognizes in it's preamble the special needs that the developing countries require. With the purpose of the transfer and dissemination of
technology to the least and developing countries, and in order to fulfil one's moral obligations as defined by Singer, not only should all countries with more advanced pharmaceutical technology be sharing their innovative inventions, but also teaching them to produce HIV medications through compulsory licensing. With this being said, it would be even more ideal if all pharmaceutical industries would give licenses to state-owned pharmaceutical organizations – at the least – so that compulsory licensing would not be necessary. Of course, if this were to happen, the brand-name pharmaceutical industry would face financial losses which might have an effect on the promotion of research and development.

5.6 Further Critical Thinking
Kant's categorical imperative – act only according to that maxim by which you can at the same time will that it should become a universal law – is a principle which tests the universality of a proposed action. The problem with it is that it is too easily passed, and that those “willing to be treated cruelly would be morally justified in being cruel to others”. If the principle were to include can rationally and without inconsistently will the acceptance of cruelty would be ruled out.82

Kant's theory in the *Groundwork of the Metaphysic of Morals*, does not include the term *rights*, only moral concepts. However as discussed in chapter 2, there is a correlation between moral concepts and moral principles – or between rights and duties. This is acknowledged in other works by Kant. If there is a right to health, then there is a duty to protect it. This duty would then be to ensure access of medications to those in need. The promotion of research and development does, to a degree, ensure that there will be safe and effective treatments for new and existing illnesses. However, the decrease in production of generic medications lowers the affordable access to those suffering from illnesses – especially those in lower income countries. Clearly, research and development as well as affordable access to medicine are both essential in the eradication of the HIV epidemic. The TRIPS Agreement including it's flexibilities does recognize both, in which case it fulfils it's moral duties.

A general problem with utilitarianism and consequentialism is that they require us to take into consideration of not only this generation, but future generations as well. Although, when it comes to

the effects of the TRIPS Agreement on the HIV epidemic, we really ought to be considering future generations in lieu of only this generation. This point stands for many international agreements that do not have a distinguished end date or a general period of enforcement.

Typically, if we are to consider future generations, then we would prefer to maximise the number of people born who would have preferences that we could satisfy\textsuperscript{83}. In the case of the TRIPS Agreement, this could mean several things: increasing the number of births in wealthy families to outnumber the births in poverty-stricken families – which sounds fairly ridiculous; develop highly-effective low cost patented medicines or cures to illnesses such as HIV and malaria – with which the terms \textit{low cost} and \textit{patent} are rarely seen hand-in-hand; increase the production of low cost generic medicines; or others.

Anne Thomson believes that rights could be derived from rule-consequentialism, as people would be happier if there were a common understanding that where a rule is applied, a right is implied\textsuperscript{84}. In light of the TRIPS Agreement's concern with the pharmaceutical industry, the right involved is clearly the right to health – which implies access to drugs. Every being would be happy knowing that their right to health is being protected. However, as seen in previous discussion, the concern of whether the TRIPS Agreement has a negative effect on the affordable accessibility to drugs, has risen. So, the number of people who are happy, could have decreased since the introduction to the TRIPS Agreement.

5.7 Further Questions Answered

In chapter 4 we had come to the conclusion that additional questions should be asked when applying the moral theories of deontology and utilitarianism/consequentialism. These questions were to clarify the clear and unclear consequences of the action; the harms and the benefits of the action; and the probability of the outcomes – which is to weigh the possible immediate consequences as well as less certain future ones.

Let's begin with the clear and unclear consequences of enacting the TRIPS Agreement. From the beginning, as it notes in the preamble, a concern was raised for the effect that the Agreement would

\begin{footnotesize}
\textsuperscript{83} Ibid p. 128  
\textsuperscript{84} Ibid p. 130
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have on the least-developed and developing countries. For this we are able to rule that one of the clear consequences was the difficulties that the lower income countries would face. Another clear consequence is of course the promotion of research and development in the pharmaceutical industries. The unclear consequences could include an increase in both poverty and death caused by HIV and the expenses that are concerned with the illness.

The harms and benefits have been much discussed when applying the two ethical theories. While the main harm involved is a decrease in access to affordable medication, the main benefit is a promotion in research and development. As there are flexibilities to the Agreement, another harm could include the political tensions that could interfere in the use of compulsory licenses; or in the use of differential pricing and parallel imports, drugs could find their way into affluent countries and taken advantage of at lower prices. Another benefit might include safer and effective medicine since they are being distributed by the patent-holders who originally developed the product.

In terms of possible immediate outcomes and uncertain future ones, we can see generic drug companies approaching their demise, which has an affect on not only the least-developed and developing countries, but also in a loss of jobs particularly in those countries. There would be a decrease of competition in the pharmaceutical market. Even though technology is encouraged to be shared, companies will have the legal right not to do so. As for uncertain future outcomes, there could hypothetically be a decrease of support of the WTO from the least-developed and developing countries. The black market for generic drugs could expand. Or poverty rates could increase.

There could of course be several pros or cons that I have not thought of. However in what I have found, if we are to weigh the pros and the cons, the cons seem to win.

5.8 Summary
In this chapter we have seen that even though the TRIPS Agreement allows for flexibilities, they are rarely taken advantage of, which is important in the evaluation of the Agreement. When we applied the purposes of the TRIPS Agreement to deontology, we tested the Agreement by using the categorical imperative. We found that the transfer of technology is of course, morally good; however, the restriction of production of generic medications could not be applied universally – which is why the Agreement has flexibilities. In applying the second formulation of the categorical
The TRIPS Agreement and Access to HIV Medications: An ethical discussion

imperative we found that humans were being used as means to an end– so, in terms of deontology, the Agreement did not pass the morality test. From the modern nonconsequentialist view, we have found that the Agreement causes harm, and as such, the aid – or the transfer of technology – can be deemed as irrelevant. However, some the flexibilities of the Agreement, namely differential pricing and parallel imports, are both moral from the deontological standpoint.

We have seen that Pogge just may have good reason for claiming that institutional reform is needed to benefit the developing countries and to bring together the divide between the rich and the poor. Although one of the purposes of the TRIPS Agreement is to promote research and development, the truth, according to Pogge is that the pharmaceutical industry would not be making too big of a sacrifice allowing poorer countries to produce generic versions of their products.

When applying the purposes of the TRIPS Agreement to utilitarianism, we found that the consequence of enacting the Agreement was the decrease of production of generic medications, and from a hedonic view, this meant a decrease in happiness due to it's negative effects on poverty. Higher and lower pleasures were also considered, and as an end result we found that according to the greatest happiness principle, more would benefit if there were no restriction on the production of generic drugs, than if there was one.

The term *rights* is not found in Kant's *Groundwork for the Metaphysic of Morals* although rights can be considered moral concepts, to which principles are applied. Rights are found in deontology in general, as it is a rights-based theory. The TRIPS Agreement does promote research and development, and it's flexibilities promote affordable access to drugs. Though the flexibilities are not often taken advantage of, this is no concern to the deontologist. The TRIPS Agreement in this sense does fulfil it's moral duties.

Because future generations should be considered in utilitarianism and consequentialism – and rightfully so in the case of an agreement such as the TRIPS – we discussed the ways in which we could increase the number of births whose preferences we could fulfil. The most feasible and rational way to fulfil the preferences of future generations, out of the options raised, is to increase the availability of low-cost generic drugs.
The TRIPS Agreement and Access to HIV Medications: An ethical discussion

As the rule-consequentialist can be justified to lead to the right to health, we have found that with the application of the TRIPS Agreement, the prices of medications have risen. As such, the international Agreement does not protect the right to health universally, and there may have been a decrease in happiness since the enactment of the TRIPS Agreement.

In applying Peter Singer's version of consequentialism we have found that the TRIPS Agreement does not fulfil it's moral obligations to prevent bad from happening, whereas the HIV epidemic continues despite our knowledge of it, and because it has been found that the number of deaths due to HIV have increased since the enactment of the Agreement. Furthermore, while the Agreement promotes the transfer and dissemination of technology to developing countries, ideally and morally, according to Singer's principle, it is every country who has innovative technology's responsibility to share their inventions as well as to give licenses to produce HIV medications.

Finally, we had come back to the further questions that were found to be important when discussing morality by comparing actions using deontology and utilitarianism/consequentialism. After having found the harms and the benefits, the clear and unclear consequences, and the certain immediate consequences and the uncertain future consequences, we found that the cons weighed more than the pros for the TRIPS Agreement – at least in the pros and the cons that I have listed and found.
The TRIPS Agreement and Access to HIV Medications: An ethical discussion

6. Conclusion

The main focus of this thesis is the TRIPS Agreement, an international instrument of the WTO. Its main purposes are—to implement patent rights on all processes and products including pharmaceuticals—to promote research and development, and to encourage the transfer and dissemination of technology to developing countries. Although the Agreement is made to encourage patenting, it has flexibilities which allows for generic production in the least-developed and developing countries, as well as flexibilities such as differential pricing and parallel imports which allows for poorer countries to attain drugs at lower prices.

The UNDP had put together a report on the TRIPS Agreement concerning its effects on access to HIV medications in developing countries, due to concerns raised having to do with the decline in generic drug production, and the increase in illnesses and deaths since the enactment of the TRIPS Agreement. The report stresses the flexibilities of the Agreement and that clarifications about compulsory licensing were made in the Doha Declaration on TRIPS and Public Health.

The purposes behind the TRIPS Agreement creation were analysed through the use of two moral theories; deontology/nonconsequentialism and utilitarianism/consequentialism. Kant's form of deontology is a modern theory, however is considered to be a type of nonconsequentialism. Another rights-based theory is Thomas Pogge's who argues for institutional reform in order to eradicate poverty and to eliminate the divide between the rich and the poor. With particular thoughts on intellectual property rights, Pogge argues that by allowing developing countries to produce generic drugs, the pharmaceutical industry would not suffer much of a loss in terms of research and development, and on the other spectrum, poorer countries would have better access to drugs—especially those producing them themselves—and would be able to earn a profit by exporting their products. Utilitarianism on the other hand is revived by consequentialism which holds strong roots in utilitarianism, and has been examined within this topic with Peter Singer's view on world poverty. I had asked whether the end justifies the means, and in assessing these theories we have found that though they are opposite to one another, it is possible for them to come to the same conclusions. Although their use may be seen as necessary in the analysis of the purposes of the TRIPS Agreement, we have found that it is important to ask additional questions, such as what are the probability of the outcomes? What are the clear and unclear consequences? And what are the harms and the benefits of the action?
It should not be taken for granted that the TRIPS Agreement allows for flexibilities for few countries do take advantage of them. However the fact that the Agreement does allow for flexibilities must be considered when analysing the Agreement with an ethical approach.

The deontologist would easily find that the promotion of the transfer and dissemination of technology is morally good. The promotion of research and development takes on the same moral characteristics. However, in terms of restricting the production of generic drugs, according to the categorical imperative, the restriction is not morally good as the Agreement allows for flexibilities and as such the act cannot be said to be universal. As the Agreement does ultimately include flexibilities as well as a promotion for research and development, the deontologist may conclude that the Agreement does fulfil its moral duties.

The utilitarian who looks at the amount of happiness in the consequence of an action, would recognize the increase of illnesses and deaths caused by HIV, and the decline in access to essential medicines and healthcare, however the utilitarian would also recognize the good that research and development, and the transfer of technology could produce. Peter Singer, one of the modern day consequentialists, believes that it is everybody’s moral obligation to help those in need, whether the ones in need are next door to you or across the globe – so long as sacrifices to comparable moral significances do not need to be made. As the TRIPS Agreement has led to an increase in deaths related to HIV, it does not fulfil its moral obligation. While the transfer and dissemination of technology could be seen as good, the manner in which it ought to be applied could interfere with the promotion of research and development.

The conclusion of both theories highly depends on how one deciphers the purposes of the TRIPS Agreement and how it is applied to the moral theories. This is why we have decided in the theory chapter that additional questions should be asked. With my own answers and interpretations of the TRIPS Agreement, I have found that in weighing the pros and the cons, there seems to be more cons.

As a result, I have found that the TRIPS Agreement does more damage than it does good for the least-developed and developing countries, and through analysis I have not found why the TRIPS
The TRIPS Agreement and Access to HIV Medications: An ethical discussion

Agreement exists at all if the WTO and other international institutions are so keen on promoting the TRIPS Agreement flexibilities. If the widespread of patenting is the ultimate goal, then it seems bizarre that the same agreement – and it's writers – also encourage the production of generic drugs in the least-developed and developing countries. By doing so, Pogge's theory that international institutions are the cause for the divide between the rich and the poor, may be proven to be true.

As such I believe that the WTO does have an ethical responsibility to drastically reform the TRIPS Agreement to not include, at the least, pharmaceuticals. The TRIPS Agreement is the first to set minimum standards on patents, and as a result the health of millions have been affected. The right to health is too important to be overlooked, even if the goal – through research and development and the transfer of technology – is to improve health. Besides, with patents, developments in the pharmaceutical industry still might not become affordably accessible to the least-developed and developing countries. Inadvertently, the newer more effective medicines will always be reserved for the affluent countries who can afford them – so long as patenting in the pharmaceutical industry continues.

Where a reform on the TRIPS Agreement to not include pharmaceutical products could have a positive effect on the eradication of HIV. As HIV leads to AIDS – which as we know opens the door for other illnesses – less medications would be needed if the Agreement were to be reformed properly. Instead, governments would be able to focus on supplying essential medicines, vitamins, or vaccines to it's citizens. The eradication of HIV would have a major toll on the eradication of poverty, and as such, development could continue more effectively. Development as a whole, if done correctly, could solve environmental problems, and in many ways, everyday life.
The TRIPS Agreement and Access to HIV Medications: An ethical discussion

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