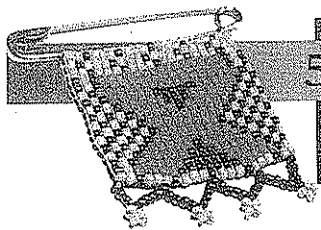


CHAPTER 5

International law

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5.1

Understanding international and foreign law

In addition to our Constitution and Bill of Rights, international law and foreign law also play an important role in the field of HIV/AIDS and human rights.

Between 1945 and 1990, a great deal of international law was developed that aimed to prevent discrimination and abuse of people who are **vulnerable**: women, children, racial minorities and ethnic groups. Since 1990, as we see from the *UNAIDS International Guidelines on HIV/AIDS and Human Rights*, there has also been a commitment to protect people living with HIV or AIDS.

Our Constitution says that when our courts or other legal bodies are interpreting the Bill of Rights they:

“ must consider international law ” s39 (b)

“ may consider foreign law ” s39 (c)

5.1.1 WHAT IS INTERNATIONAL LAW?

International law is made up of standards, rules and principles which are **binding** on States when they interact with each other – in other words, rules and principles which States must follow. Some areas of international law are also binding on individuals and companies.

Three different types of international law are:

Customary international law

These are legal principles which, even though they are not part of a formal agreement, have become established as international standards that are respected and followed by governments. For example, it has become a principle of customary international law that torture should not be used to get a confession from an accused person.

Sometimes Declarations made by governments develop into accepted principles of customary international law because of their wide acceptance, eg the Universal Declaration of Human Rights.

We can argue that the principle of **non-discrimination** against people with HIV or AIDS has become a part of customary international law.

Bi-lateral laws

These are agreements (treaties) that have been made between two countries, eg an agreement to extradite (hand over) people who are wanted for criminal offences.

Multi-lateral laws

These are agreements (also known as 'treaties') made between more than two countries, eg the *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, which governs countries who are members of the World Trade Organisation.

For more on the TRIPS agreement, see 5.4.1 on page 106.

5.1.2 WHAT IS FOREIGN LAW?

Foreign law means judgements and statutes from other countries around the world. For example, in the United States, Canada, Australia, Brazil and India, there have been many legal cases on HIV-related discrimination. These cases may help our courts to decide similar cases in South Africa.

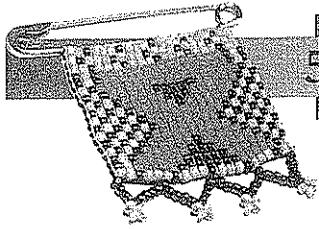
FOREIGN LAW CASES ON HIV/AIDS DISCRIMINATION

- In *Bragdon v Abbott* (1998), the United States Supreme Court decided that all stages of HIV infection should be treated as a **disability** by the courts, and people with HIV should be protected from discrimination on the grounds that they have a disability.
- In *Quebec v Montreal* (2000), the Canadian Appeal Court said that people can experience discrimination when other people think that they have a disability, and treat them unfairly because of this.



For more on HIV/AIDS as a disability, see 4.3.1 on page 68.

The rest of this Chapter will focus on international law and its importance for HIV/AIDS issues.



International organisations attempting to establish multi-national rules and standards have existed for hundreds of years. They reflect the need for co-operation between national governments. In recent years the massive growth in communications, travel and trade has made some of these bodies more important and more powerful.

When looking at the international law on HIV/AIDS, some of the most important bodies are:

- The United Nations (UN)
- The World Trade Organisation (WTO)
- The World Health Organisation (WHO).

5.2.1 THE UNITED NATIONS

The United Nations was established in 1945. One of its most important aims was to strengthen co-operation between countries and prevent serious violations of human rights between countries and within countries. The United Nations has its headquarters in New York and all 185 countries in the world are members.

The founding Charter of the United Nations confirmed the duty on States to “respect human rights and fundamental freedoms”.

In 1948, the United Nations General Assembly adopted the *Universal Declaration of Human Rights (UDHR)*. One of the Declaration’s key principles, which is very relevant to people living with HIV or AIDS, says:

“ All human beings are born free and equal
in dignity and rights. ”

While the UDHR is not a formal multi-lateral agreement, it has become the foundation for customary international law on human rights.

5.2.2 THE WORLD TRADE ORGANISATION

The World Trade Organisation (WTO) was established in 1995. It has over 100 countries as members, including all the powerful industrialised countries.

The WTO decides on and draws up some of the key international rules and laws that affect trade between countries. For a country to become a member of the WTO, it must agree to follow these rules and, where necessary, to make changes to its own national laws to ensure that WTO rules are respected.

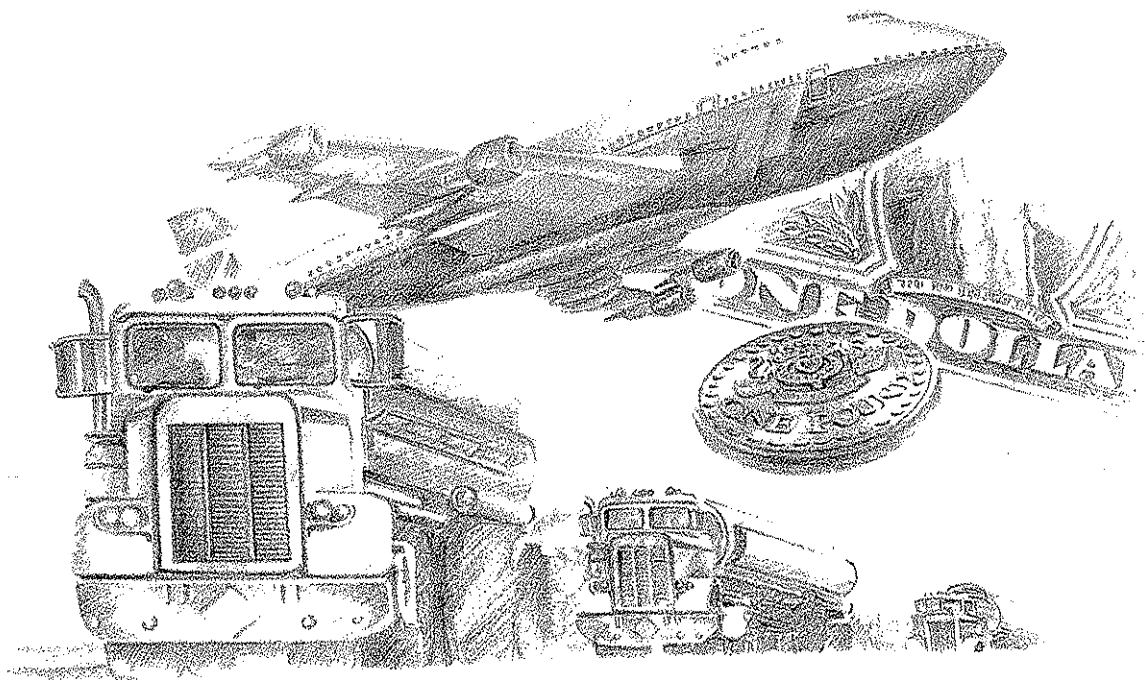
Sometimes, these rules can have a negative effect on the lives of citizens, particularly in poor countries. Unfortunately, these rules often reflect the interests of powerful nations and powerful lobby groups that can influence the laws and policies adopted by governments of industrialised countries.

EXAMPLE

For more on the effects of WTO rules and the TRIPS Agreement, see 5.4 on page 106.

THE EFFECT OF POWERFUL LOBBIES

The rules in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) were heavily influenced by lobbying from pharmaceutical companies who used their power within the United States Government to put intellectual property rights high on the agenda of the WTO.



Since the Universal Declaration on Human Rights (UDHR), the UN has produced a number of international agreements dealing with human rights. These agreements, which are also called 'covenants', 'conventions' and 'charters', aim to give more detail to the rights in the UDHR.

The UN encourages its members to sign and ratify these agreements, and then include their contents in national laws. Although covenants, conventions and charters are examples of international law, they are not binding on a country until they have been ratified.

SIGNING AND RATIFYING INTERNATIONAL AGREEMENTS



- When a country signs an agreement, it commits itself to the aim and purpose of the agreement. But by signing an agreement, a country usually does not yet bind itself to the agreement.
- When a country ratifies an agreement after signing it, this means it is now a 'party' to the agreement. The rights and duties in the agreement are then binding on the country under international law.

5.3.1 WHICH INTERNATIONAL AGREEMENTS AFFECT SOUTH AFRICA?

STEPS BEFORE SOUTH AFRICA RATIFIES AN AGREEMENT



Before the South African Government can ratify an international agreement and make it binding on the country, the agreement must:

- Be approved by the National Assembly and the National Council of the Provinces, and
- Not be in conflict with (go against) the Bill of Rights in the Constitution.

Some of the important UN agreements affecting South Africa are:

- The International Covenant on Economic, Social and Cultural Rights (ICESCR)
- The International Covenant on Civil and Political Rights (ICCPR)
- The Convention on the Rights of the Child (CRC)
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

In Africa, the African Charter on Human and People's Rights has been agreed to by most African governments. This Charter was drawn up by the Organisation of African Unity (OAU) in 1986, and was ratified by South Africa in 1996.

Many of these international agreements include sections that are directly relevant to the human rights of people living with HIV or AIDS.

WHAT AGREEMENTS SAY ON HIV/AIDS

Convention on the Rights of the Child (CRC):

“States ... shall strive to ensure that no child is deprived of his or her right to access to health care services.”

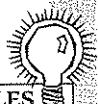
The CRC commits governments to take steps to ...

“diminish infant and child mortality ... and ... ensure appropriate pre-natal and post-natal health care for mothers.”

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW):

“States shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on the basis of equality of men and women, access to health care services, including those relating to family planning.”

EXAMPLES



For more on the ICESCR, see 5.3.3 on page 103.

South Africa ratified the CRC and CEDAW in 1995, but has not yet ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR).

5.3.2 WHAT HAVE OUR COURTS SAID ABOUT INTERNATIONAL AGREEMENTS?

After the Government ratifies an international agreement, national law must be changed so that it respects everything that is in the agreement. However, even before this has taken place, our courts will take note of the international agreement if the Government has signed or ratified the agreement.

THE DUTY UNDER INTERNATIONAL LAW TO DO AWAY WITH UNFAIR DISCRIMINATION

In *Hoffman v South African Airways (2000)*, the Constitutional Court said:

- There was a need to 'eliminate unfair discrimination because of our Constitution and South Africa's international obligations (duties) under international law.
- Once an international agreement has been ratified, it is "binding on the Republic of South Africa".

This is how the Constitutional Court explained the link between national and international law:

“ The need to eliminate unfair discrimination does not arise only from Chapter 2 of our Constitution. It also arises out of international obligation. South Africa has ratified a range of anti-discrimination Conventions, including the African Charter on Human and Peoples' Rights. In the preamble to the African Charter, member states undertake, amongst other things, to dismantle all forms of discrimination. Article 2 prohibits discrimination of any kind. In terms of Article 1, member states have an obligation to give effect to the rights and freedoms enshrined in the Charter.

In the context of employment, the ILO Convention III, Discrimination (Employment and Occupation) Convention, 1958 proscribes discrimination that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. In terms of Article 2, member states have an obligation to pursue national policies that are designed to promote equality of opportunity and treatment in the field of employment, with a view to eliminating any discrimination.

Apart from these Conventions, it is noteworthy that item 4 of the SADC Code of Conduct on HIV/AIDS and Employment, formally adopted by the SADC Council of Ministers in September 1997, lays down that HIV status "should not be a factor in job status, promotion or transfer". It also discourages pre-employment testing for HIV and requires that there should be no compulsory workplace testing for HIV. ”



5.3.3 HOW DOES INTERNATIONAL LAW AFFECT THE RIGHT TO HEALTH?

The International Covenant on Economic, Social and Cultural Rights (ICESCR) says that all States:

“ recognise the right of everyone to the enjoyment of the highest attainable level of physical and mental health. ”

The ICESCR also says that all countries that have ratified the Covenant should create:

“ conditions which would assure to all medical services and medical attention in the event of sickness. ”

For people with HIV – and many other diseases – access to drugs and quality health care services is essential. But our Constitution limits this right by:

- Linking it to “available resources”, and
- Accepting that this right can be fulfilled as long as the State shows that it is taking meaningful steps to deliver on this right.

This is different from the ICESCR which says that people have a right to the “highest attainable” standard of care.

Because the ICESCR has not been ratified by South Africa, the meaning of many social and economic rights in our Constitution cannot be decided by strictly following the provisions in the ICESCR. However, this does not prevent the courts from looking at what the ICESCR says because South Africa has signed it.

For more on the right of access to health care, see 4.7 on page 79.



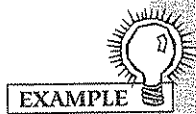


INTERPRETING THE RIGHT TO HOUSING

In *Government of the Republic of South Africa and Others v Grootboom and Others* (2000), the Constitutional Court had to make a decision about the meaning of the right to access to housing. The court said that, although it could look at international law on this:

- Under our Bill of Rights, the right to housing is more restricted, and
- The ICESCR was not binding on South Africa.

It is important for human rights activists and people with HIV or AIDS to be aware of international law and South Africa's commitments to introduce international law into our national law. Knowing international and foreign law can help with advocacy for policies and laws that respect and protect the rights of people with HIV or AIDS.



THE SADC CODE

In 1997, the Southern African Development Community (SADC) adopted a Code on HIV/AIDS and Employment. This Code was not a treaty or legally binding agreement on the members of SADC. But it is used by activists in South Africa, Namibia and Zimbabwe to lobby to have similar policies and laws introduced at national level.

One of the aims of the World Trade Organisation (WTO) has been to improve the protection of “intellectual property” around the world.

The inventions of individuals, companies and governments are known as ‘intellectual property’. The aim of protecting intellectual property is to prevent other people from copying inventions and then selling them for their own benefit.

THE ROLE OF PATENTS



- The main legal way to protect intellectual property is called ‘a patent’. A person who has invented a new product or a way of making a product (known as a ‘process’) applies for this product or process to be patented.
- If this person can prove that their product or process is a new invention, they are given a patent.
- A patent makes it *unlawful* for somebody else to copy and use another person’s invention.

Before the WTO was born, many developing countries did not have laws to register patents. With certain things, including medicines, countries deliberately chose not to have laws to grant and protect patents. Instead, they encouraged local manufacturers to find ways to copy products and processes safely. This happened in countries like India, Egypt and even South Africa. These countries argued that patents should not restrict access to public goods, like medicines.

5.4.1 THE TRIPS AGREEMENT

However, the WTO has created a new international law to extend and strengthen the protection of intellectual property world-wide. It is called 'the TRIPS Agreement'. TRIPS stands for Trade-Related Aspects of Intellectual Property Rights.



WHAT THE TRIPS AGREEMENT MEANS

- *WTO members must all grant patents for a minimum of 20 years for all new inventions – including essential products such as medicines and processes for the manufacture of medicines.*
- *When this happens, for at least 20 years after the patent is registered, no other company is allowed to manufacture or market the same product.*
- *The effect of a patent is that even if another company can produce an identical product and offers to sell it at a much cheaper price, it is not allowed to do this. With medicines, this means that poor countries cannot buy affordable medicines, but must either buy the expensive patented products or not buy them at all.*

In South Africa, the Patents Act allows for the registration and protection of patents.

Unfortunately, patents give drug companies the power to set high prices – and reap high profits. Many people and organisations say:

- This is a **violation** of human rights because it means that poor people cannot afford to buy medicines that may make them well and improve their lives.
- While international patent law may be justified for inventions such as new types of car or computer parts, it should not cover essential life-saving goods like medicines, or needs such as clean water.



EXAMPLE

For more on the Fluconazole example, see TAC campaign to import generic drugs in 5.4.3 on page 108.

PFIZER'S PATENT ON FLUCONAZOLE

- The United States drug company, Pfizer, has a patent for a medicine called Fluconazole. Fluconazole is an effective drug for treating some of the opportunistic infections that affect people with HIV.
- In South Africa, Pfizer has a patent for Fluconazole (brand name, Diflucan), which means it is the only company that is allowed to sell this medicine. It sells it for a very high price to doctors and wholesalers in the private sector – usually over R80 for a single tablet.
- But in Thailand, where Pfizer does not have a patent, and where other companies are allowed to manufacture the same medicine, it can be bought for less than R2 per tablet. This means that many more people can afford treatment.

5.4.2 DO GOVERNMENTS HAVE TO FOLLOW THE TRIPS AGREEMENT?

No – but if a government wants to become a member of the WTO, it must change its laws to fit in with the TRIPS agreement. South Africa did this in 1997 when it passed the *Intellectual Property Laws Amendment Act*.

Countries that choose not to join the WTO will be isolated in the world economy and this is likely to have a very negative effect on the lives of their citizens.

Complaints can be made against WTO members who refuse to follow the TRIPS agreement. A tribunal of the WTO can make a judgement on these complaints and can take steps against the country refusing to respect the agreement. For example, in 2000 the United States complained to the WHO about Brazil's law on medicines.

5.4.3 GENERIC DRUGS

When a patent expires after 20 years, drugs become 'off-patent'. International law then allows other companies to compete with the original inventor and to manufacture and sell copies. These are known as 'generic drugs' or 'generic medicines'. They are always much cheaper than the patented original. The use of generic drugs is also sometimes referred to as 'generic substitution'.

Many older drugs for diseases such as Tuberculosis can be bought cheaply as generics. However, as HIV/AIDS is a new disease (HIV was only discovered in 1985), most of the drugs that now seem to be effective in treating HIV (known as 'anti-retrovirals') – are still under patent. This means that they are very expensive and most of the drugs cannot be afforded by the public health systems of poor countries.

TAC CAMPAIGN TO IMPORT GENERIC DRUGS

The Treatment Action Campaign (TAC) has lobbied and taken action to import cheaper generic HIV/AIDS drugs that have been shown to be safe and effective in treating people living with HIV or AIDS.

In October 2000, a TAC representative returned to SA with 3000 tablets of a generic version of Fluconazole, known as Biozole. These drugs were imported illegally, because they were not declared at customs, and their use in South Africa is not allowed as a result of Pfizer's patent on Diflucan.

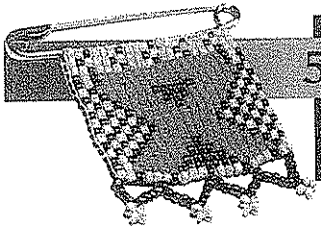
TAC called a press conference to announce that it had deliberately broken the law on patents, because poor people cannot afford Diflucan. TAC pointed out that Biozole cost R1.78 a tablet, whereas Pfizer sells Diflucan to the Government for R28 a tablet, and to private hospitals and clinics for over R80 a tablet. TAC said:

- It was breaking the law out of necessity and to save lives.
- Constitutional rights to dignity, life and access to health care services were more important than the rights of drug companies to patents.

TAC agreed to apply to the **Medicines Control Council (MCC)** for special permission to use the drugs, and voluntarily gave the drugs to the Department of Health for safekeeping. In November 2000, the MCC gave TAC permission, as long as it could prove that the Biozole was made up of the same active ingredients as Diflucan. TAC had the drug tested and it was proved to be the same. As a result of TAC's actions, a permit has been granted to a clinic in Cape Town to use the drugs.

 **EXAMPLE**

For more on access to treatment, see 4.7 on page 79 and 6.4 on page 146.



5.5

What can governments do to increase access to essential medicines?

Are there legal steps that governments can take to overcome the problems caused by patents on essential medicines?

“ Access to affordable drugs is a matter of life and death in our region, as access to these drugs determines who lives and who dies.

The lack of equitable access to affordable drugs exposes the pitfalls of the world's trading systems, and this is a sore point between the major drug manufacturers, based largely in developed countries, and the disproportionately affected and resource constrained developing countries.

And, therefore, as a principle, we support generic substitution, compulsory licensing, parallel importing, strengthening of local production capacity, because these strategies are critical in achieving the goal of access to affordable drugs. ”

Speech by Manto Tshabalala-Msimang, South African Minister of Health, on World AIDS Day, 2000

The South African Government has a legal duty to improve access to health care services, including essential medicines. However, its ability to do this is affected by the price of medicines, and the amount that must be spent on medicines compared with other aspects of health care.

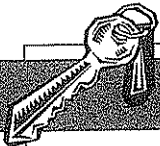
In South Africa, the registration of medicines is covered by the *Medicines and Related Substances Control Amendment Act*. This Act creates a body called the Medicines Control Council (MCC), which has a duty to register medicines as long as they can prove that they are:

- Safe
- Of good quality
- Are effective (in other words, they work as medicines).

However, although the MCC can register generic medicines, patents make it illegal for these medicines to be sold or given away free to people who need them. This is a clear conflict between the Government's duty to improve access to health care and the intellectual property rights of drug companies. This conflict will probably have to be resolved by the Constitutional Court.

We will look at 2 steps governments can take to overcome this conflict:

- Compulsory licensing
- Parallel importing.



KEY POINT

WHAT THE MCC CAN DO

- The MCC is allowed to register any medicine which meets these 3 standards.
- The MCC does not need to know if a medicine is a generic or patented brand.

5.5.1 WHAT IS COMPULSORY LICENSING?

Compulsory licensing is when a government or court issues a licence to allow another person to produce and sell a product, such as a medicine, that is still under patent. In the past, compulsory licences were often used, particularly by Western governments, to buy and manufacture medicines more cheaply.



COMPULSORY LICENCE RESTRICTIONS

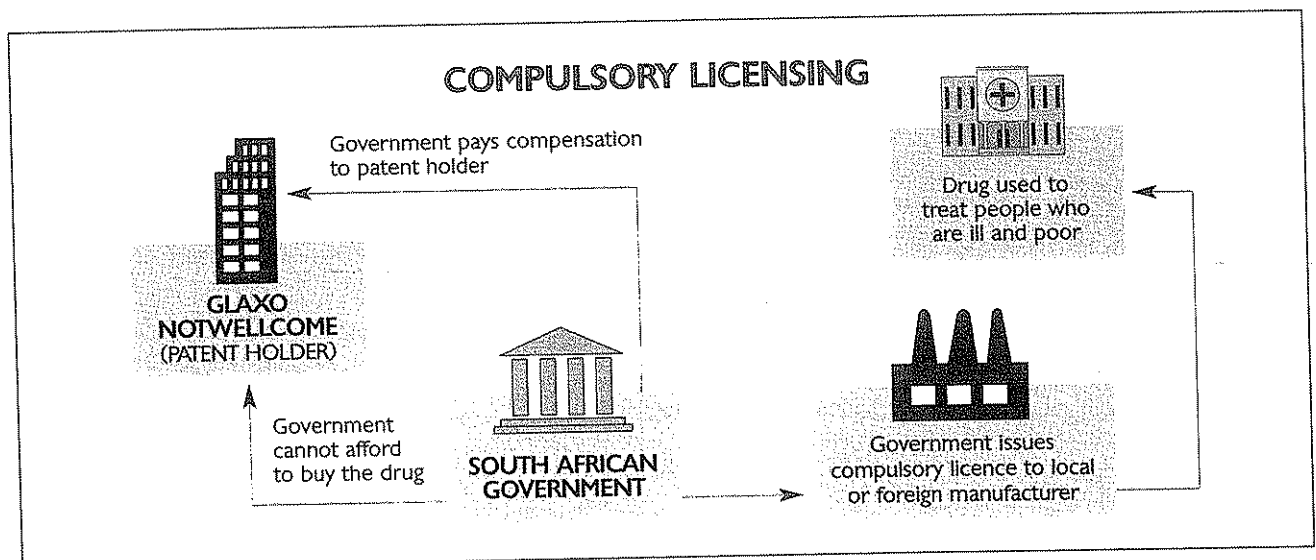
Under the TRIPS agreement, compulsory licences are only allowed under these strict conditions:

- That an attempt has been made to buy the product from the patent-holder.
- That the licence is for public non-commercial use – in other words, a government does not want to sell it for profit, but rather to use it to treat people who are ill and poor.
- That a royalty (compensation payment) is paid to the patent-holder.

The TRIPS agreement says that compulsory licences may be issued without following the above steps “in conditions of emergency or extreme urgency”.

The United Nations has declared that HIV/AIDS is an emergency and that it is a threat to security and development. This should be a strong enough reason for using compulsory licences to reduce the price of medicines.

Under South Africa’s Patents Act, compulsory licences can be applied for by Government Ministers “for public purposes”. Although the Minister of Health has said that she will use compulsory licences, this has not yet happened.



5.5.2 WHAT IS PARALLEL IMPORTING?

Drug companies sell medicines for different prices in different countries. The price is often decided by what a market can afford to pay, rather than the cost of the ingredients of a medicine or the amount that was spent on its development.

Parallel importing happens when a government chooses to buy a medicine from a wholesaler in a country where it has been sold by the manufacturer at a cheaper price than the price that the manufacturer is offering to that government for the same medicine. This is also called 'parallel importation'.

EXAMPLE

See Implementing the new Medicines Act on page 2 for an update



HOW THE SOUTH AFRICAN GOVERNMENT COULD USE PARALLEL IMPORTING

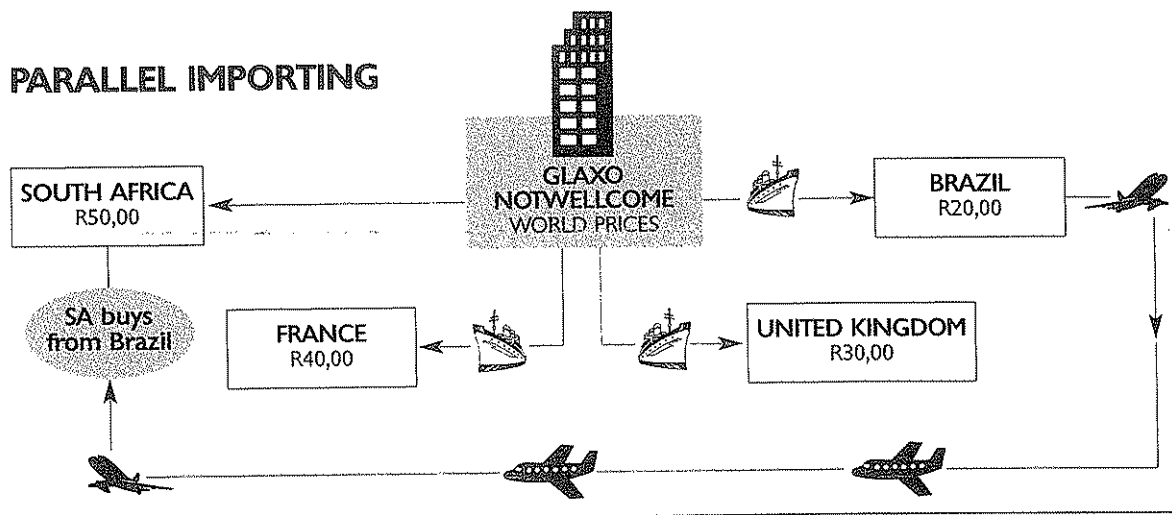
A company called Glaxo Notwellcome offers to sell a drug TZA to the South African Government for R50 a pill. But in Brazil, Glaxo Notwellcome sell the same drug for R20 a pill. If the South African Government chooses to buy TZA from Brazil at a lower price, this is parallel importing.

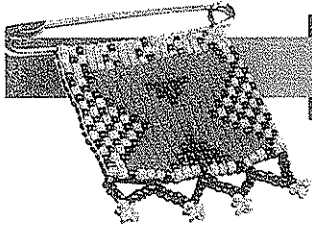
TRIPS AND PARALLEL IMPORTING

Parallel importing is not dealt with in the TRIPS agreement – this means that it is an issue that can be decided by national law.

In 1997, South Africa's Parliament passed the *Medicines and Related Substances Control Amendment Act*. One section of this law would allow the Minister of Health to legally use parallel importing in the public interest. For over 3 years drug companies challenged this law in court. They said that it was a violation of their property rights. As a result, the law was not implemented. However, in April 2001 the drug companies withdrew their legal action, as a result of public pressure led by the Treatment Action Campaign. When the law is implemented in 2003, parallel importing of medicines will be legal.

PARALLEL IMPORTING

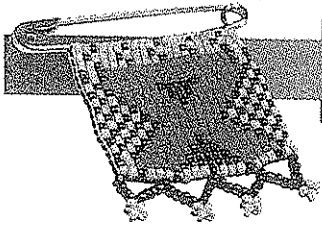




Talking points



- 1** Under foreign law, in countries such as the United States, HIV infection is considered to be a disability by laws like the Americans with Disabilities Act.
 - *If a person argued that she was discriminated against on the grounds that her HIV infection was a disability, would South Africa's Constitutional Court have to take the same approach?*
- 2** Do you think that some essential life-saving products, such as medicines for HIV/AIDS, should be exempted from patent protection?
- 3** What action can be taken to speed up and improve access to cheaper, safe and effective generic drugs for people living with HIV or AIDS in South Africa?



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