

Corporate Power and State Resistance in Latin America: Brazil's Use of TRIPS Flexibilities for its National AIDS Program

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Abstract: The use of compulsory licenses outlined by the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) has become increasingly prevalent for antiretroviral (ARVs), medicines used to treat HIV/AIDS, due to the epidemic's high visibility and demands from organized civil society groups. This paper evaluates some of the factors suggested by other scholars to explain varied forms of TRIPS compliance in developing countries. **I argue that a key explanatory factor missing in other accounts is the establishment of strong, autonomous health agencies, committed to universal public health care empowers health officials to press for changes in intellectual property legislation. This state activism accounts for the incorporation of more TRIPS flexibilities in national laws and use of humanitarian safeguards. A review of Brazil's use of compulsory licenses in the purchase of AIDS medicines provides support to my argument.**

Introduction

Since the creation of the World Trade Organization (WTO) in 1995, debate has spread from the frontlines of activists to the classrooms of academics concerning the impact of the Agreement on the Trade-Related Aspects of Intellectual Property (TRIPS) on developing countries. The accord establishes a universal baseline of intellectual property (IP) protection for all member states, including a minimum twenty-year period for the protection of patents. IP regimes provide material incentives to industry to produce and market innovations but also have important humanitarian consequences for countries upholding commitments to insuring access to essential medical treatments.

The introduction of a transnational legal framework embodied by TRIPS raises important questions related to globalization: Does TRIPS enhance the power of transnational corporations and diminish authority of nation-states? What explains the different levels of national compliance with TRIPS? Why do some countries take advantage of the flexibilities included in the accord, while others adopt even more stringent intellectual property (IP) laws?

TRIPS provides a number of exceptions and flexibilities that may or may not be adopted, and once adapted, may or may not be enacted. The most controversial aspect of the TRIPS flexibilities is the use of compulsory licenses whereby a country rescinds a patent holder's right of market exclusivity, that is, to hold a temporary monopoly for their product. Scholars have highlighted a number of important factors why certain countries adopt more stringent IP regimes as opposed to more flexibilities, and why certain countries employ compulsory licenses more than others. These variables include the strength of civil society pressure, such as non-governmental organizations (NGOs) fighting for medicines to treat HIV/AIDS; the presence of a weak, domestic-owned pharmaceutical industry; the balance between the needs of corporations seeking investment opportunities versus host countries'

desire to attract investment; pressures from hegemonic countries, namely the United States; and lastly issue area discourses, or how certain issues are framed. The dimensions provide important insights concerning the debate of TRIPS compliance and social struggles over patents but they often omit the critical role of state autonomy. While new global rules limit the policy-making space of developing countries (Wade 2003; Lanoszka 2003), state-based organizations can be pro-active, especially when provided with bureaucratic solidarity and given a clear political mandate (Evans 1995; Portes and Smith 2008). My state-centered approach does not rule out alternative explanations listed above; rather my argument compliments, in many ways, the factors highlighted by other scholars but emphasizes the role of pro-active state institutions. Policy constraints resulting from stringent IP laws may lead policymakers not only to incorporate more humanitarian safeguards into national legislation but also to employ them, i.e. compulsory licenses, when possible.

At the center of the debate concerning the impact of TRIPS and use of its flexibilities has been the case of Brazil. South America's largest country was one of the first middle income countries to change its domestic IP laws in accordance with the international agreement in 1996, and also one of the first countries to use compulsory licenses to drive down the price of medicines. **I use the case of Brazil to illustrate my argument of state autonomy and to clarify the impact of TRIPS on Brazil and its use of humanitarian safeguards. The social base concerning Brazil's use of TRIPS flexibilities, I contend, stems from the institutionalization of a universal public health system and subsequent state building.**

The legal and political commitment to universal health care is best illustrated by the establishment of the National AIDS Program. Having to sustain a long term commitment to AIDS treatment with a limited amount of resources is what shapes policymakers interests, drives them to use humanitarian flexibilities, and lays the groundwork for alliances with civil society.¹ **In the Brazilian case, coping with AIDS has enhanced state powers.**

The rest of this essay is organized in the following manner. First, I introduce the TRIPs accord, explain its ramifications for developing countries, and detail the flexibilities proscribed to limit abuses by patent holders. Next, I review the theoretical debate concerning the pressures of convergence and divergence offered to explain variation seen among middle income countries in terms of TRIPS compliance. Third, I describe Brazil's public health system, in particular its AIDS program, and the demands it places on the state. **Fourth, I give an overview of Brazil's use of compulsory licenses to reduce the price of medicines, providing empirical support based on primary evidence to support my argument.** (pp. 3-4)

...Four Instances a Compulsory License was threatened during Price

Negotiations Brazil's use of compulsory license stems from that fact that health officials must balance the Ministry's available resources with necessary inputs for its health system. Interviewees from Brazil's Ministry of Health and National AIDS Program consistently repeat that **the overall objective is to insure the sustainability of universal access without interruption (Costa 2008; Alvares 2008; Chequer 2008). Sustainability also includes the medium and long term viability.** To this end, negotiators from the Ministry of Health have sought "commodity prices." That is, policymakers want a price offering reduced premiums (i.e. profits) to the seller based upon Far-Manguinhos' cost-of-production parameters or lowest available prices on the international market. The institutionalized commitment to providing universal ARV therapy has driven the Ministry of Health to propose legislative changes in IP law and use compulsory licenses in price negotiations.

Since the administration of Jose Serra, Brazil's Minister of Health (1999-2002), Brazil has threatened to issue compulsory licenses in their negotiations with foreign patent holders of AIDS medicines on several occasions... (p.12)

...*Balance of Needs*: Brazil's need for investment versus a company's need for markets has also been at the center of the debate about the potential pitfalls of using humanitarian safeguards (Blanchard 2004). My argument is that through time Brazil's has become less vulnerable to drug company threats to withhold investments as its economy has strengthened. Consequently, AIDS bureaucrats have become more successful in lobbying for support from other government ministries. (p.14)

...*Issue Area Discourses*: The way in which issues concerning intellectual property rights and the legitimate employment of compulsory licenses are framed have the potential to augment state power vis-à-vis corporations (Blanchard 2004; Greenhill and Busby 2008). For Brazilian Health officials, this discourse is rooted in notions of collective rights expressed in a public health system. But the framing of the contentious issue concerning the use of compulsory licenses by both sides has evolved over time. In the first episode, Brazil declared that its model AIDS program represents a case of urgency and public emergency. But in later occasions, the Ministry of Health employed the public interest clause (or public noncommercial use) in intellectual property legislation instead of emergency use...

Industry has begrudgingly adapted to the new reality after the Doha Declaration on TRIPS and Public Health was approved during the WTO negotiations in 2001. Although some industry advocates like USA for Innovation call Brazil and Thailand's actions as "theft" (USA for Innovation 2007) and IP defenders advocate a strong U.S. response (Kogan 2006), spokespeople for drug companies and industry associations concede that they are not against compulsory licenses but that the measure should only be used in the last instance, specifically national emergencies like after 9/11. A PhRMA representative said that the Brazilian government acted within the TRIPS agreement but "against the spirit of the law" when issuing its first compulsory licenses for efavirenz in May 2007 (Singer 2007)... (p.16)

...References

...Kogan, Lawrence A. 2006. Brazil's IP Opportunism Threatens U.S. Private Property Rights. *Inter-American Law Review* 38, no. 1: 1-139. [http://www.itssd.org/Publications/IAL105-II\(frompublisher\)%5B2%5D.pdf](http://www.itssd.org/Publications/IAL105-II(frompublisher)%5B2%5D.pdf). (p.21)