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Cross-Cutting Issues Under the WTO: Non-Economic Concerns and Enhancement of Healthier Trade Ties

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...Chapter 3 Compulsory Licenses for Access to Medicines, Expropriation and Investor-State Arbitration Under Bilateral Investment Agreements: Are There Issues Beyond the TRIPS Agreement?

Over the last decade, the severe public health problems occurring in developing countries have become a topic of intense debate and have secured much worldwide attention. While most communicable illnesses are either preventable or treatable with a relatively small amount of medicines, according to World Health Organization...estimates in 2004, nearly one-third of the world's population still lacks regular access to essential and life-saving medicines.

(p. 57)

In the context of the World Trade Organization, all Members are required under the Agreement on Trade-Related Aspects of Intellectual Property Rights...to provide patent protection for pharmaceutical products for at least twenty years.

(pp. 57-58)

While pharmaceuticals are strongly protected by patents and world markets are largely dominated by multinational pharmaceutical corporations, prices of medicines are high, particularly for developing countries. In consequence, developing countries with pressing health needs are forced to confront a greater challenge relating to access to medicines from the TRIPS requirement.

Among the specific flexible provisions of the TRIPS Agreement that enable Members to adopt measures in the pursuit of non-economic goals, compulsory licensing is considered by developing countries as an effective means of ensuring affordable access to medicines, whereby medicines on patent can be made available to the public at lower prices through generic competition. However, the broad-based use of compulsory licenses is disputed; some argue that it would have a negative impact on the R&D expenditure of the pharmaceutical industry which is both research-intensive and marketing-intensive.

The debate on access to medicines does not stop at the WTO framework. A growing wave of Bilateral Investment Agreements..., the main tool for developing countries to attract foreign investments, is compounding such concerns. Intellectual property rights, including patents, are commonly considered as an 'investment' and are protected under the BIAs. To put it differently, intellectual property and related patents are subject to the general guarantees afforded to investors under the BIA.

(p. 58)

These include, among others, protection in case of expropriation, fair and equitable treatment, national treatment and most-favored-nation treatment.

(pp. 58-59)

Moreover, foreign investors are provided with legal grounds to file a claim against the host country for failing to protect their intellectual property under investor-state dispute settlement provisions. **A recent example with particular reference to compulsory licenses and investment can be found in the 2007 Brazil case, where Brazil issued a compulsory license on Efavirenz (a patented HIV/AIDS drug) to allow the importation of generic versions of Efavirenz after Merck had failed to match the 60% price reduction requested. Instead of being challenged for engaging in inappropriate compulsory licensing, Brazil's measure was claimed by companies to be an illegal 'expropriation' of the American HIV/AIDS drug Efavirenz because of the less than 'fair' compensation.11...**

11 LAWRENCE A. Kogan, "Lula Disrespects Private Property, 'Taking' Foreign Investors' DPP",

<http://www.itssd.org/Publications/LulaDisrespectsPrivateProperty,TakingForeignInvestors_DPP.pdf> (last visited 15 Mar. 2008) The claimant Merck also warned in a statement that the 'expropriation' of intellectual property sends a chilling impact on Brazil's reputation as an industrialized country seeking to attract inward investment. See Merck & Co., Inc. Statement on Brazilian Government's Decision to Issue Compulsory License for STOCRIN™. Notably, while Brazil has seen large investment flows, it has still shied away from any BIAs.

(p. 59)