

First Among the BRICs:
Brazil's Necessary Challenging of TRIPs

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Abstract

The creation of the World Trade Organization in 1995 brought with it a transformation of international intellectual property (IP) law in the form of TRIPS (the Agreement on Trade-Related Aspects of Intellectual property Rights). The agreement significantly strengthened minimum IP protection and, in doing so, failed to account for the interests of developing nations, specifically in the area of health. Of all the developing nations, Brazil has emerged as the crucial challenger of TRIPS where it constrains access to medicines and has shown that developing nations can occasionally protect domestic interests despite adverse international legislation.

In May of 2007, Brazilian President Luiz Inácio Lula da Silva issued a compulsory license for Sustiva (*efavirenz*), a drug used as part of highly active antiretroviral therapy (HAART) in the treatment of HIV. Prompted by rising costs of HIV/AIDS medication, Lula decided to issue the license after the pharmaceutical company Merck, the owner of the patent, failed to offer the drug at the 60 percent reduced price Brazil had requested and that had previously been introduced in Thailand (Hunter, 2009: 374). In doing so, he was placing access to life-saving medicines above the private rights of business, a long-time debate that has recently come to a head in the international political economy. The step, considered very bold by all nations alike, was the greatest challenge to the international system governing intellectual property rights (IPRs).

Since the formation of the World Trade Organization (WTO) in 1995, IPRs have been overseen primarily by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), a provision of WTO membership. TRIPs marked an abrupt change from prior intellectual property (IP) law and quickly became the subject of many debates. The 73 articles of TRIPs stipulate minimum standards of IP protection that are much higher than most nations would like to implement (May and Sell 2006). However, in order to become a member of the WTO, nations must agree to all of its provisions and so developing countries are forced to sign onto stronger IP law than they would otherwise endorse. Deciding not to become a member of the WTO would remove a country from access to the global market. Consequently, 153 of the world's 196 countries have signed onto the regime.

Despite the claims made by the WTO that stronger IPRs will eventually benefit all nations alike, it overwhelmingly favors the interests of developed nations and big business. This comes as no surprise as the original drafting of the legislation was completed by the International Property Committee (IPC), which, in spite of its name, was primarily formed by a group of U.S. corporations that managed to pressure the U.S. government into introducing the agreement during the Uruguay Round (May and Sell, 2006: 154). As is the case of most international institutions, the WTO overlooks the interests of developing nations—specifically in the area of IP, which has resulted in a back-and-forth debate between the developed and developing world. In the past two decades, few issues “have generated and continue to generate more North-South economic debate and controversy than [TRIPs]” (Ghauri and Rao, 2009: 206).

Nevertheless, the firmness of the system has not stopped developing nations from exploiting loopholes in the legislation and even disregarding laws altogether in order to protect their own interests. The most effective challenge of the current transnational IP law under TRIPs has unquestionably been by Brazil. Although the compulsory license issued by Lula in 2007 was the *single* greatest challenge, the move is just one of many by the South American giant. In large part, their confrontation of TRIPs has been motivated by their national healthcare system that promises free universal healthcare to all citizens. The national STD and AIDS program (NAP) is considered to be the best in the developing world. Thus, the majority of their disputes with TRIPs have been regarding patents and how they relate to the field of pharmaceuticals.

The effectiveness of Brazilian pressure on the WTO has many implications. For one, the case has proven that developing nations have the power to influence international

institutions, a domain that had long been out of their grasp. In a century where developing nations, particularly the BRIC (Brazil, Russia, India, and China) economies, are poised to overtake many of the top developed nations, a shifting focus and governance of international institutions is necessary to account for these developing nations. In this paper, I argue that Brazil's actions towards the TRIPs regime is one of the best, if not *the* best, example of a developing nation challenging an international institution to secure their national interests. In confronting IPRs—a topic at the “heart of the global political economy” and at the top of the advocacy agenda—Brazil has become a crucial leader for developing nations in the struggle for access to pharmaceuticals (May and Sell, 2006: vii).

A Brief Overview of IPRs and the Formation of TRIPs

Before delving into Brazil's challenge to IPRs, it is first necessary to comprehend the establishment of TRIPs and the consequent debates. Intellectual property rights are defined by the WTO as “rights given to persons over the creations of their minds” (WTO, 1994). These products, which are protected by IP law, often have monetary value and come in the form of literary and artistic works, industrial designs, or inventions. However, the manner in which such creations are protected depends upon the area of IP. For instance, a musical album will require a copyright whereas an antiretroviral drug is protected by a patent. These protections give the creator exclusive rights over their creation for a definite amount of time, during which they have the authority to restrict access.

Lacking the tangibility of traditional property rights, IPRs are certainly harder to grasp. Even the definition of IPRs, meant to be simple and to the point, remains very ambiguous as one is left wondering what exactly constitutes a “creation of the mind.” Of course, the WTO goes into depth identifying what is meant by this statement, but even so, questions over what can and cannot be protected under TRIPS are numerous and constant, particularly in cases where they overlap with biochemicals. Unsurprisingly, the history of IPRs is equally “complex and multifaceted,” but a basic outline is nonetheless useful in understanding the present debates regarding transnational IP law (May and Sell, 27).

IPRs were first brought into international legislation in 1883 under the Paris Convention, which establishes that a patent lasts for twenty years and must be filed in each country where protection is sought within one year of the primary patent filing date (Castro and Westerhaus, 2007: S86). The Paris Convention remained the principal legislation on IPRs until 1967, when it was appended to the World Intellectual Property Organization (WIPO). WIPO was formed as a result of increased globalization that led many developed countries to request improved means of protecting IP across the world.

The primary reason for this shift was due to how IPRs relate to transnational corporations in knowledge-based industries, most notably, entertainment, software/“high-tech,” and pharmaceuticals. Often based in developed nations, large-scale corporations active in these leading world industries want to assure that, when doing business in a foreign nation, IP is protected under the same legislation as in their home country. In countries with weak IP protection, corporations fear that their patents and copyrights will be overlooked and investment in the country could actually result in financial loss rather

than gain (DFID 2003). Leading up to the creation of WIPO, “knowledge about patents became as crucial to corporations as knowledge about inventions” themselves (Drahos and Braithwaite, 2001: 457). Unfortunately, this statement has only become more accurate as we begin the second decade of the twenty-first century.

The 1980 United States Supreme Court case *Diamond v. Chakrabarty*—resulting in the patentability of a genetically modified organism—was a fitting beginning to a decade that ushered in a concept of “IP protection as a system to protect and exclude, rather than one based on competition and diffusion” (May and Sell, 2006: 143). Large companies in the fields of pharmaceuticals and agribusiness were seeking profits from the establishment of monopolies both home and abroad, but the IPRs legislation under WIPO was hampering their efforts. As a specialized agency of the United Nations (UN), WIPO does not weigh votes in international settlements based on population or funding, rather it allows each nation one equal vote. When WIPO was established, the UN had 123 member nations with the majority of them being developing nations, which were thus able to block the aspirations of developed nations to expand international IP law. However, the Uruguay Round offered the perfect opportunity for developed nations and big business to bring IPRs back to the drawing table.

The Uruguay Round was a series of multilateral trade negotiations under the framework of the General Agreement on Tariffs and Trade (GATT) that began in 1986 and lasted until 1994. The Round resulted in the transformation of GATT into the World Trade Organization (WTO), which “succeeded in reshaping international trade because the process bundled previously unrelated areas into a single take-it-or-leave-it package” (Bratspies, 2007: 4). In order to become a member nation, countries were forced to abide

by all the agreements that constitute the WTO. The 73 articles that made up TRIPS constituted one such agreement. Despite its clear favoring of big industry, the pretense of a “single undertaking” by the WTO forced developing nations to sign on or risk exclusion from the global economy.

According to one expert on IP law, “this invokes a counter-instrumentalist policy that members, regardless of their state of industrialization, should sacrifice their national interests in favor of the higher posited order of international trade” (Oddi, 1996: 440). As stated in the first article of the agreement, TRIPS is a set of obligations that establish minimum standards for IPRs protection required by members of the WTO. While the agreement acts as a “floor” in that it establishes these minimum standards, many nations, especially developing ones, regard it more as a ceiling because of the strict protection of patent rights it requires (Barbosa, 2007: 87). However, the agreement is not a model and places actual legislation in the hands of the sovereign nations. Therefore, countries have some freedom in establishing their specific laws on IPRs, but any major challenge to the system will result in a dispute with the WTO.

The Health Debate: Private Rights vs. Access to Medicines

Naturally, TRIPS has been the topic of much debate since its enactment in 1995. The focus of most of the disagreements have undoubtedly been on patent rights as they relate to the pharmaceutical industry. The major question remains: is the right of an individual to his or her “creation of the mind” greater than the right of an individual to receive adequate health care (Amado and Gewertz, 2004: 296)? The debate has often divided into two camps, those who favor the private rights of pharmaceutical companies

and those who favor access to life-saving generic drugs. Unsurprisingly, developed and developing nations naturally divide along this line.

Although the TRIPs doctrine accentuated this debate, the divide has long been in existence. As Barbosa et. al (2007) argue, most representative of this debate is the scholarly argument between philosophers Robert Nozick and John Rawls that emerged in the 1970s. In his entitlement theory, Nozick contests that the individual has a fundamental right to his holdings (in this case intellectual property), whether they are a result of his own intellectual labor or acquired by legitimate means of distribution. Thus, IPRs should be viewed as little different from physical property rights and protected accordingly, regardless of public needs. On the other side of the line Rawls, who was Nozick's contemporary as a professor at Harvard University, holds that a person's right to health is a basic liberty and therefore of greater moral importance than intellectual property. Rawls argues the principle of "fair equality of opportunity," which contends that those without access to medicines should not be denied their basic liberties due to their inherent situation. Any "infringement upon basic liberties cannot be justified by enhanced economic compensation" for others (Amado and Gewertz, 2004: 296).

Although many texts have been spent examining the two sides, the philosophers' debate is important as it relates to the contrasting development goals of developed and developing countries. Namely, development is a word frequently used in international institutions, but it denotes different meanings for different countries. Following Nozick's entitlement theory, developed nations support a "development as growth" model. That is, international intellectual property should support and encourage "economic growth, increasing trade liberalization, promoting foreign direct investment, and ultimately

enhancing innovation through resulting technology transfer” (Barbosa, 2007: 77). For this reason, developed, industrialized nations prefer strong IP protection that allows businesses a temporary monopoly on new pharmaceutical products and view such protection as a necessary edge in a complex and diversifying international marketplace (Jain, 1996: 22).

Developing nations more often follow a “development as freedom” model that falls in line with John Rawls’ argument. This notion prefers domestic capacity-building based on the enhancement of human development (life, bodily health, and thought) and identifies it as a requisite to the enhancement of a country’s economic development (Barbosa, 2007). Strong IP protection not only limits access to medications necessary for human development, but it also stymies the growth of national firms by imposing impediments on production. Weaker IP protection in these countries is thus a means of assuring access to technology and information needed for economic growth. As it is now, developing countries are forced to remain dependent on developed nations at the expense of their own domestic interests.

As mentioned above, the TRIPs regime outlines a very strict protection of IPRs and undoubtedly falls into the “development as growth” side of the dispute. This is evident in that, with the formation of the WTO, the primary legislation on IPRs changed hands from the United Nations (and specifically WIPO) to the General Agreement on Tariffs and Trade (GATT), which eventually was absorbed into the WTO. In this switch between the U.N., an institution that oversees development in many forms—health (WHO), environment (UNEP), economy (IMF), etc.—to the GATT, an institution

focused on administering global trade, IPRs were inherently altered to promote “development as growth.”

Of course, the overwhelming disregard of the original TRIPs text for access to healthcare was quickly identified and brought to attention prominently in such instances as the 1997 case against South Africa that was heard before the Dispute Settlement Body (DSB) of the WTO. Forty pharmaceutical companies filed the case claiming that the South African law allowing parallel importing, or the importation of generic products without the ascent of the IP owner, violated TRIPs. The law, constructed by the South African government in order to allow the purchase of generic HIV/AIDS drugs from countries where it is cheaper, challenged the WTO stance on rights to health. Despite their usual backing of industry, Western governments were hesitant to weigh in on the wrong side of the HIV/AIDS debate fearing a public backlash (Satapathy, 2001: 1180). The issue needed resolving and became the heart of the Doha Development Round initiated in 2001.

Despite several meetings spanning a decade, the Doha Round produced little of substance and danced around the issue of access to medicines where it collides with IP. Although the original meeting in 2001 produced the Doha Declaration, which in its 4th article states, “...we affirm that the [TRIPs] Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all,” the actual implementation of said law by developing nations faces serious repercussions (WTO, 1994) The text acts as a front that developed nations can point to, but in reality carries very little weight. For example, the U.S. still refrains from accepting that access to medicines should take

priority over intellectual property. The Government Accountability Office had this to say:

The United States interprets the declaration as a political statement that recognizes the severity of public health crises while affirming the importance of IP protection. It maintains that the declaration neither changes existing TRIPS obligations nor creates new obligations, and does not assign public health greater priority than IP protection. Instead, USTR says, the declaration simply clarifies certain flexibilities already in TRIPS for WTO members facing public health crises, including overriding patents through the issuance of compulsory licenses under certain circumstances (G.A.O., 2007: 3-4).

However, the “certain circumstances” have been few and far between because of certain threats associated with weak IP protection, a label that would befall any nation who attempts to use parallel importing or compulsory licensing.

The primary argument has been that weak IPRs will deter foreign direct investment (FDI). In the cases of South Africa and Thailand, we see this direct relation as several large-scale corporations perceived a threat to their interests and pulled out of the two nations. Although the direct relation between weak IPRs on FDI is debatable (Correa 2000, Bird 2008), the possibility of losing FDI from developed nations is often enough to deter any challenge of TRIPs by utilizing patent-forgoing mechanisms. So even though parallel importing and compulsory licensing are technically legal in accordance with TRIPs law, attempts to use such processes are usually stifled by the WTO or result in lost FDI. The best most developing nations can do is wait for handouts provided by international financial institutions, such as the World Bank and International Monetary Fund, to solve health crises. However, “it [would] be foolish to get swayed by the pharmaceutical majors temporarily offering a few drugs at cost prices” because it does not work to change the system and deepens the dependence of developing nations on the developed world (Satapathy, 2001: 1108).

As demonstrated by the constraints placed on developing countries abiding by TRIPs, the WTO unquestionably remains a “rich man’s club” (Barbosa, 2007: 116). The strong protection of IPRs enables developed nations with big industry to capitalize on temporary monopolies at the expense of lesser developed countries. Without the economic and political power to back any challenging of the grandiose WTO, these countries remain largely unable to assure vital medicines to their citizens and are reliant upon foreign aid. In doing so, they are not confronting the fundamental disparity between the “development as growth” model of TRIPs and their own “development as freedom” ambitions. Instead, they are permitting the continuance of the current system, which favors large companies to make a profit against rights of poor people to receive treatment of fatal diseases (May and Sell 2006).

The BRICs: In Pursuit of a New World Order

The so-called BRIC countries are the exception to the majority of developing nations. Referring to Brazil, Russia, India, and China, the collective term “BRIC” was coined in 2003 by economists at Goldman Sachs, who projected that the BRIC countries would overtake half of the G6 countries in regards to gross domestic product (GDP) by 2050 (Bird and Cahoy, 2007: 400). As of January 2010, the BRICs have only exceeded expectations, currently accounting for over 43 percent of the world’s GDP, a number greater than the United States and Europe combined (Hasenclever and Paranhos, 1). The global financial crisis finally put to rest the idea of Brazil as the “eternal country of the future,” a tag given by writer Stefan Zweig in the mid-twentieth century. The country presently has a growth rate consistently averaging around 4-5 percent and an extremely

diversified economy that has proven more resilient than most to the recession (the drop in foreign direct investment in Brazil was only 25 percent compared to 49 percent globally) (Purushothaman, 2005: 8). With such emerging economies, the BRIC nations carry a weight in the international arena previously unbeknownst to developing nations.

In large part, the BRICs do not have the same worries as other developing nations in regards to FDI and, since the liberalization of their economies in the mid-1990s, they have shown resistance to pressures from developed nations that had once crippled them. Gone are the days when the simple inclusion of the developing nations in international institutions was enough. Despite specific and diversified domestic agendas, the BRICs are united in their quest for a reshaping of these institutions that will better account for the interests of developing nations. For the most part, they do not want to overthrow the current transnational systems of governance, but simply desire a more prevalent role within them that would allow these countries to make certain policies more consistent with their own development course (de Almeida, 2009).

The BRICs have particularly pushed the envelope in areas of intellectual property. Although all of the BRIC nations in varying ways have challenged TRIPS, “of the four, Brazil has been by far the most masterful in counteracting economic and political influence of the U.S. over global IP law” (Bird and Cahoy, 2007: 406). The United States is the primary developer and proponent of TRIPs, so to confront it on IP law is to stab at the heart of the global system.

Brazil: A Necessary Opponent to TRIPs

Brazil has proven to be the most successful challenger of the current transnational system governing IPRs and a necessary opponent in protecting the rights of developing nations. Specifically, it is the leader in promoting access to HIV/AIDS medicines and, in spite of TRIPs, continues to pursue “development as freedom” by championing the human right to health. In doing so, the South American nation has destabilized the IPRs system, demonstrating that certain developing nations, most notably the BRICs, can substantially confront the rules put into place by international institutions.

Nevertheless, the other BRICs have not been nearly as effective as Brazil in the area of IP and pharmaceuticals and, without the success of Brazil, many fewer countries would be inclined to dispute TRIPs and obtain access to medicines. The manner in which the BRIC nations have challenged TRIPs is as diverse as the countries themselves, despite their similar place in the world economy. Russia for one has not received the same pressure from the U.S. as the other BRICs (likely due to its unique position following the Cold War), despite having one of the largest markets for piracy worldwide. Therefore, Russia has been a thorn in the side of the entertainment industry and a challenger to copyrights more so than to the pharmaceutical industry and their patents. Russia has yet to accede to the WTO and TRIPs so the fact that the country is not officially under the legislation devalues any challenge to it.

Similarly, China only signed onto TRIPs in 2001 and, even with a large industry in generic pharmaceuticals, has proven largely compliant, never having even issued a compulsory license. Like Brazil, India joined the WTO in 1995, but failed to enact legislation meeting TRIPs standards until 2005. Brazil, on the other hand, signed onto

the WTO from its onset and enacted TRIPs-compliant IP protection as early as 1997. The transition to TRIPs was a huge change from previous IP law in Brazil, which was not well-developed and provided no sort of patent protection for pharmaceutical products or processes throughout the 1970s and 1980s (Dunagan, 2009: 6). Nevertheless, their quick transition was well-received by developed nations and a far cry from most developing nations, many of which chose to exercise the five year transitory period (or ten year for the least developed countries) allowed by the WTO.

Brazil's early adoption of the legislation was largely a result of the nation's foreign policy agenda. Like the other BRICs, Brazil has a resolute yearning to become a world leader in international policy-making and to have a similar sway as the developed countries. Brazilian leaders have recognized the country's importance to the region, but have always aspired "to achieve for Brazil a position of greater importance at the world level" (de Almeida 2009: 168). However, unlike other developing nations, Brazil rapidly enacted the TRIPs law even though it was adverse to their domestic interests, mainly health care and the development of the biotech industry. In large part, this was due to a certain national pride and shared belief among Brazilians that the country will rise to the top of the global political economy by firmly engaging in international institutions rather than by withdrawing from them.¹ Since Brazil's challenge of TRIPS has come while it has been working within the system, it has artfully punctured IP law where the other BRIC nations have only managed to scratch.

Brazil has proven very involved within the WTO Dispute Settlement Body (DSB) and, since its accession to the WTO, has racked up a high number of dispute cases (24

¹ Such dreams of *grandeza* are important in understanding Brazilian foreign policy decisions. For further reading on the subject see Brainerd and Martinez-Diaz (2009).

cases as complainant, 14 as respondent, and 49 as third party) with mostly positive results (Baumann, 2008: 9). Their approach and actions in such dispute cases provide a useful template for other developing countries in the WTO attempting to protect their interests by formal means. Brazil's numbers are the highest among any developing nation and, as of 2008, it remained the only developing country to ever file a case against a developed nation. The 2002 case against U.S. subsidization of cotton, in which Brazil won a sanction of \$295 million, was a direct response to the U.S.'s dispute with Brazil from the previous year that challenged the legitimacy of Article 68 in Brazilian IP law.

Given that Article 1 in the legislation establishes TRIPs as a set of obligations rather than a model, nations are allowed to create sovereign laws so long as they are above minimum standards. Brazil utilized this little freedom in order to protect their interests in Article 68 of Lei 9.279, which stipulates that the owner of a patent must satisfy a local-working requirement (planalto.gov.br). If the product is not manufactured in Brazil three years after its registration, then Brazil has the right to issue a compulsory license for domestic production or buy a foreign generic version through parallel importing.

In doing so, Brazil was protecting its health care system, by assuring access to necessary medications, while also protecting the nascent biotech industry, which has been a national priority in the past decades.² The state-owned pharmaceutical company

Farmanguinhos has continually grown since its development in the 1970s and, as of

² Brazil has long felt that outside nations have capitalized on their natural resources while they themselves have reaped little of the benefit. The sentiment permeates all layers of society and the lack of growth in the past has spurred such outcries as “the Amazon is ours!” and is rationale for the protectionism Brazil practices under their “nationalist-developmental” approach to trade (Hochstetler and Keck, 2007: 69). Telling is the fact that Brazil has imported more pharmaceuticals from the U.S. than they have exported to it (Garcia-Johnson 2000: 20). No wonder the South American nation, home to the Amazon and one-fourth of the world's biodiversity, enacted IP legislation that would help to ensure growth in their pharmaceutical production.

2001, it produced percent of the ART consumed nationally (Orsi, 2007: 2000).³ “For the Brazilian government, seeking convergence and avoiding isolation did not mean accepting a subordinate position, however; on the contrary, it was the path toward strengthening Brazil’s relative position in international society” (Cepaluni and Vigevani, 2009: 57). Rather than seeing enactment of TRIPs legislation as a defeat, Brazil used it as an opportunity to put pressure on the system in an area that remained (and still remains) somewhat ambiguous. Brazil’s use of the DSB, especially against the U.S., shows that they will not collapse under pressure exerted from developed nations in the area of IP.

In addition to their formal disputes within the WTO, part of the Brazil’s power has come simply in the form of public scrutiny of the system from a charismatic leader. While Lula is considered a “friendly dissenter” in that he is not proposing an overthrow of the system like neighbors Hugo Chávez in Venezuela and Evo Morales in Bolivia, he has been openly critical of TRIPs and has resourcefully used public opinion to his advantage. When the U.S. filed the complaint in 2001, Brazil tied Article 68 to the AIDS debate between developing countries and pharmaceutical enterprises, despite its authorization to grant a compulsory license for any good regardless of social importance (Bird and Cahoy, 2007: 407).

Therefore, the United States’ complaint directly pitted private rights, or the patents of pharmaceutical companies, against public rights, in this case, health. The Brazilian government unveiled this dispute to the media and non-governmental organizations (NGOs) in order to shame the pharmaceutical companies for their high prices and discourage the governments of developed nations from backing them. “Essas

³ Today, *Farmanguinhos* has even greater production capacities and boasts “mais de 1 Bilhão de medicamentos por ano para a população brasileira,” (www.far.fiocruz.br/farmanguinhos).

comunidades estavam convencidas de que o Brasil deveria ter o direito de fornecer medicamentos à sua população a despeito da redução dos lucros da indústria farmacêutica” (Oliveira, 2007: 18).⁴ The Brazilian Ministry of Health even went so far as to place advertisements in the *Wall Street Journal* and other American newspapers that questioned current pharmaceutical practices (Stoeffler, 2001). The U.S. government, weary of being seen as an opponent to AIDS, repealed the case the following year. During the same year, Brazil also helped to draft the UN Commission on Human Rights and, of the 53 members, the U.S. was the only nation not to sign.

Likewise, such disdain for TRIPs and its favoring of a “development as growth” model has been shared by Brazil at almost every Ministerial Meeting of the WTO. In Doha, Qatar during the 2001 meeting, Brazilian Minister of Health José Serra said, “a proposta dos EUA é redundante e restritiva” and “somos transigentes para negociar, mas é evidente: queremos que o ponto-de-vista mais importante e acertado prevaleça” (*Jornal do Brasil*, 2001).⁵ At the subsequent meeting in 2003, Brazil played a leading role in advocating reduced domestic subsidies in developed countries (Cepaluni and Vigevani, 2009: xii). In a dispute of the U.S. “Section 301 Trade Act” (which allows U.S. to impose tariffs on countries deemed to have unsatisfactory IP law) brought before the DSB by the European Communities, Brazil used the opportunity to hand the U.S. another direct blow. As a third party, Brazil utilized its right to comment and stated that “Brazil did not sign onto the WTO agreement to be the object of unilateral determinations of non-compliance” (WTO 2000: II, 1048). Their blows have been constant, ranging from

⁴ Translated to English: “These communities were convinced that Brazil should have the right to provide medicines to its population despite reducing the profits of the pharmaceutical industry.”

⁵ Translated to English: “The U.S. proposal is redundant and restrictive. We are open to negotiate, but it is clear: we want the most important and accurate point-of-view to prevail.”

formal disputes within the WTO to public launches by Lula, and have placed Brazil as the leader among developing nations in this area.

The challenge has been unrelenting despite the aforementioned risk of losing FDI. Only twenty years earlier, Brazil succumbed to such a threat when in 1988 President Reagan imposed a 100 percent tariff on Brazilian imports until the South American nation improved IPRs. However, in the face of decreasing U.S. FDI in the Brazilian chemical sector at the beginning of the 21st century (see Appendix II), Brazil only leaned harder against TRIPs. The growing resistance to TRIPs therefore can be linked to the economic growth and stability witnessed by the South American giant in the past two decades. Of course, the United States remains Brazil's number two trading partner and a split would still be cause of much concern; regardless, Brazil has made the choice to protect their national health care system at all costs.

In the past few decades, Brazil has placed special importance on its national health care system, the *Sistema Único de Saúde* (SUS), which has provided universal free health care since 1988. Even today, “apenas 30% dos brasileiros têm planos de saúde privados (que não cobrem assistência farmacêutica) e 70% da população depende diretamente da atenção pública na área da saúde” (Loyola, 2008: 765).⁶ Predating the SUS, however, is Brazil's National AIDS Program (NAP) that was formed in 1985 due to rising rates of HIV infection (Nunn, 2009: 1104). The program has been the main reason why the present total of HIV/AIDS cases in Brazil is around 660,000, less than half the number predicted by the World Bank in the late 1990s (Orsi, 2007: 1997). Since the formation of both institutions in the 1980s, Brazil has resolutely defended the human

⁶ Translated to English: “Only 30% of Brazilians have private health insurance (that doesn't cover pharmaceutical assistance) and 70% depend directly on public service in the area of health.”

right to health and their AIDS program has been considered by some to be the best in the world.

The improvement of overall health in Brazil, measured by mortality rates and life expectancy, has definitely had a hand in narrowing the income distribution gap that has so long plagued Brazil. Between 2001 and 2008, mortality rates decreased by one percent and the income distribution gap shrunk by six percent.⁷ A recent study in the *Journal of World Business* noted this relation between health and the economy, stating: “Health can also be viewed as a critical component of a country’s infrastructure as well as an important environmental factor that could facilitate or discourage foreign direct investment and trade” (Ghauri & Rao, 2009: 207). This implies that, in Brazil at least, the inward flow of FDI is more affected by overall health than IP protection. So, the nation’s adamant continuation of a domestic “development as freedom” approach has seemed to be more beneficial than if they had been following a strict reading of TRIPs. Likewise, it demonstrates that health care should not be sacrificed for strict IP protection because “development as growth” will likely not occur without a healthy population, a consequence of “development as freedom.”

In May of 2007, Brazil made this ever more apparent as Lula finally issued a compulsory license for “public interest” drugs. The move by Brazil was made to secure access to Sustiva (*efavirenz*), a drug used in the treatment of HIV. In a public statement, Lula asserted, “from an ethical point of view the price difference is grotesque”—referring to the higher cost Merck was offering Sustiva to Brazil than it had Thailand—“and from a political point of view, it represents a lack of respect, as though a sick Brazilian is inferior” (Alcorn, 2007). The Brazilian President had support from former U.S. President

⁷ (<http://ddp-ext.worldbank.org>; nytimes.com 2008)

Bill Clinton, who declared, “No company will live or die because of high price premiums for AIDS drugs in middle-income countries, but patients may” (Dugger, 2007). The move by Brazil was unquestionably the most extreme use of a compulsory license and, consequently, the greatest menace to TRIPs legislation by a WTO member.

As of January 2010, Brazil has yet to face any backlash that other developing nations encountered when issuing compulsory licenses for HIV/AIDS medications, most notably South Africa and Thailand. Perhaps this is due to Brazil’s greater political and economic abilities or the manner in which they have maneuvered through the structure of the WTO. Regardless, Brazil is an anomaly, in that it has managed to improve its development (in all senses of the word) in light of strict transnational IP law that hampers “development as freedom” in developing nations.

Brazil has proven to be a necessary opponent to TRIPs. By working from within the structure of the WTO, they have destabilized it in a manner that other BRICs have not. The South American nation has been proactive and successful within the Dispute Settlement Body and has also publicly made a stand in accusing TRIPs (and its cohorts of pharmaceutical companies) of denying access to medicines. Brazil has furthermore been the “poster child of the use of—or, more precisely, the threat to use—compulsory license to promote access to essential medicines” (Yu, 2008: 349). The success witnessed by their HIV/AIDS program while challenging the system has encouraged other developing nations to follow suit. While their almost single-handed approach has been very successful, a more united front of developing nations could fundamentally transform TRIPs and the WTO, housing broader implications for developing nations’ influence in regards to international institutions.

The Need for South-South Alliances

Unquestionably, there has been a growth of South-South cooperation in the form of an increased number of alliances between developing nations. One explanation for such an alignment is that it enables countries of the global South to overcome dependency on the industrialized North by “strengthening the political, technical, and economic cooperation among each other” (Fontaine and Seifert, 2009: 2). Brazil has certainly taken such a route as many initiatives of the Lula administration are situated in the framework of international trade negotiations and “the search for deepening political coordination with emerging countries, namely India, South Africa, Russia and China” (Cepaluni and Vigevani, 2009: 81). As of 2009, China had even replaced the U.S. as Brazil’s number one trading partner, emphasizing the diversification the South American nation has administered in its economy (Cepaluni and Vigevani, 2009: 81).

The alliances between these developing nations are vital in diminishing the leverage developed nations can have on them in the area of IP. In building this front, the BRICs must be sure to account for the needs of lesser developed countries. Otherwise, these countries are driven to sign free trade agreements (FTAs) with developed countries, particularly the U.S., which have been enacting even stronger IPRs, referred to as TRIPs-plus. As former Guatemalan President Juan José Arévalo warned, such “international treaties are a farce when they are pacted between a ‘shark’ and a ‘sardine’” (Arévalo, 2009: 178). In recent FTAs, such as CAFTA and those made with select Andean countries, TRIPs-plus legislation has included such measures as further limiting compulsory licenses and disallowing parallel importing (Castro and Westerhaus, 2007: S90).

The acceptance of TRIPs-plus legislation offers no breathing room for these developing countries when seeking access to medicines. These agreements make them reliant on handouts from developed nations, such as the President's Emergency Plan for AIDS Relief (PEPFAR) signed in 2003 by President Bush that allocated \$15 billion to AIDS relief programs. Although Brazil has increased its horizontal cooperation with developing nations, especially in Africa, such support needs to continue so that lesser developed countries do not get mired in TRIPs-plus legislation and are able to follow previous Brazilian actions when possible.

Conclusions

Brazil has undoubtedly shed its label as the "eternal country of the future" and is now recognized by all as an emerging world power. One indicator is the fact that Brazil was recently awarded the right to host such prestigious international sporting events as the World Cup in 2014 and the Summer Olympics in 2016. The South American powerhouse has proven itself to the developed world through sound economic policies, relative social stability, and a willingness to participate within international institutions that oversee the global political economy. Despite perhaps the strongest overall regulatory environment in Latin America, Brazil has occasionally challenged such institutions in order to protect national interests that unsurprisingly share similarities to those of other developing nations. Undoubtedly, the ongoing dispute with the WTO in relation to TRIPs has been the most extreme case due to how it conflicts with Brazil's domestic health care policy.

By protecting its health care system, which guarantees “integral, universal, and free access to all of the country’s population,” Brazil has emerged as the leader among developing nations in defying strict IPRs where they conflict with access to medicines (Ministério de Saúde, 2010). The BRICs have illustrated that the weight of strong patent law in light of the AIDS pandemic can be undermined and that, under certain circumstances, developing nations can protect their interests in the face of international legislation adverse to their agendas (Castro and Westerhaus, 2007). In doing so, they have also been working to transform the ‘political economy’ of the administrative process in these agencies to better coincide with the interest of developing nations and their “development as freedom” agendas (Baumann, 2008: 1). While their efforts have been successful to date, there is still much to be done before achieving a fundamental transformation of IP law, including continued research on the subject.

Even though the body of literature investigating TRIPs and its clash with access to medicines is substantial given the relatively recent establishment of the WTO, there is a need for further study in specific areas. As Brazil has shown, the overall health of a nation can prove remarkably beneficial in regards to FDI inflow. In the interests of developing nations, the balance between protecting national health versus protecting IPRs in assuring inward FDI should be more thoroughly investigated. Also, a quantitative study (not by the WTO) comparing the benefits of institutional challenge (from within international institutions) rather than outside challenges by non-members could unveil the need to participate *in* global structures to witness their fundamental change. In a time when developing nations are beginning to replace some of the top economic powers

historically, more research examining the nature of these institutions is necessary to understand their capacity for change and to predict possible development solutions.

APPENDIX I: Article 68 in *Lei 9.279*

Seção III
Da Licença Compulsória

Art. 68. O titular ficará sujeito a ter a patente licenciada compulsoriamente se exercer os direitos dela decorrentes de forma abusiva, ou por meio dela praticar abuso de poder econômico, comprovado nos termos da lei, por decisão administrativa ou judicial.

§ 1º Ensejam, igualmente, licença compulsória:

I - a não exploração do objeto da patente no território brasileiro por falta de fabricação ou fabricação incompleta do produto, ou, ainda, a falta de uso integral do processo patentado, ressalvados os casos de inviabilidade econômica, quando será admitida a importação; ou

II - a comercialização que não satisfizer às necessidades do mercado.

§ 2º A licença só poderá ser requerida por pessoa com legítimo interesse e que tenha capacidade técnica e econômica para realizar a exploração eficiente do objeto da patente, que deverá destinar-se, predominantemente, ao mercado interno, extinguindo-se nesse caso a excepcionalidade prevista no inciso I do parágrafo anterior.

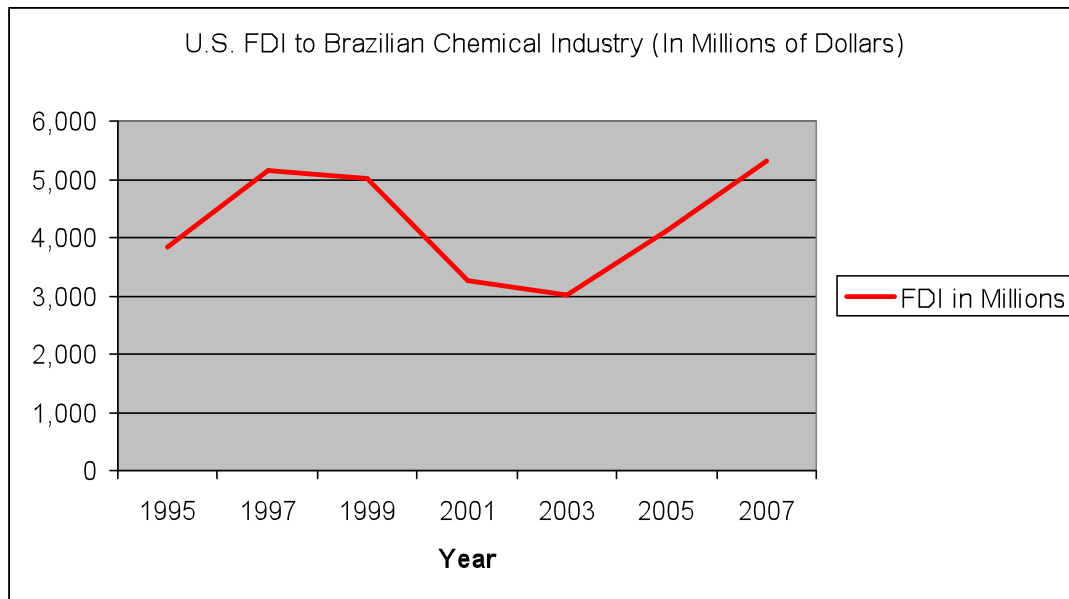
§ 3º No caso de a licença compulsória ser concedida em razão de abuso de poder econômico, ao licenciado, que propõe fabricação local, será garantido um prazo, limitado ao estabelecido no art. 74, para proceder à importação do objeto da licença, desde que tenha sido colocado no mercado diretamente pelo titular ou com o seu consentimento.

§ 4º No caso de importação para exploração de patente e no caso da importação prevista no parágrafo anterior, será igualmente admitida a importação por terceiros de produto fabricado de acordo com patente de processo ou de produto, desde que tenha sido colocado no mercado diretamente pelo titular ou com o seu consentimento.

§ 5º A licença compulsória de que trata o § 1º somente será requerida após decorridos 3 (três) anos da concessão da patente.

From : http://www.planalto.gov.br/ccivil_03/Leis/L9279.htm

Appendix II



Adapted from data found on bea.gov (<http://bea.gov/international/di1usdbal.htm>)

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