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Global Health Governance and WTO/TRIPS: Conflicts Between ‘Global Market-Creation’ and ‘Global Social Rights’

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Introduction: WTO/TRIPS: globalization and market creation

Transnational pharmaceutical corporations (TNPCs), and also producers of baby food like Nestlé, are important contributors to the production of global public goods for health. As private enterprises they do not, of course, directly produce public goods, but are primarily oriented towards maximizing profits. However, some of the goods they produce are supposed to be made available publicly for those in need of them, either through the state or through some form of publicly regulated collective scheme, mostly in the form of an insurance.

The ambiguity referred to has its basis in the different modes of governance that play a role in the interfacing between institutions politically responsible for public health (national health ministries as well as WHO) and private for-profit organizations. The former have to care for the availability and affordability of needed inputs or to prevent public damage from the marketing of harmful products or concepts. Conflicts can be observed on the introduction of the Essential Medicines concept in the 1970s or, quite prominently, with Nestlé on the marketing of baby food to substitute for breastfeeding – a conflict in which CSOs marked their first major worldwide success on a health issue.

Technical progress and international negotiations interacted to reduce barriers to a globalization of trade in goods and services. The creation of global markets implied a widening of the transnational space for TNCs and the development of international law, which is changing the legal interfaces
between institutions responsible for access to public goods and private producers of these goods. The effective international implementation of intellectual property rights (IPRs) constitutes the one area of international law where these two modes of governance – the state to guarantee the delivery of public goods and the market to use the incentive to maximize private benefits for optimizing the offer of goods – have clashed concerning essential health issues.

In short, this problem can be characterized as a problem of the global organization of private activities that produce ‘global public goods for health’. A medicine that yields improvements in health should be accessible to everyone, that is, there should be non-excludability in access to this good. Certainly, there is a rivalry in consumption, but if one refers to the pure production costs after research and development (R&D) has been financed, these are, in general, comparatively insignificant. So, if basic human rights are accepted, it should be rational for the global community to provide basic medicines as global public goods.

This chapter will focus on the impact of the TRIPS agreement on access to drugs and on new forms of interfacing between public and private actors in global health. It provides an analysis of the interests and the strategies of the various groups of actors which are involved in these conflicts and examines their impact on the various intermediate outcomes from the 2001 Doha Declaration on the TRIPS Agreement and Public Health up to the TRIPS amendment in December 2005 and the beginning of negotiations on new ways to support essential health R&D in 2006. In doing so, it offers an overview of the conflicts about access to medicines and treatment of HIV/AIDS, which will be analysed from the perspective of specific actors and countries in the following chapters. The first section will look at the institutional structures of WTO and TRIPS and the legal and organizational interfaces created by them. Then, the role of intellectual property rights for pharmaceutical companies and the constitution of country positions in WTO negotiations is summarized, followed by an analysis of the effects of TRIPS concerning the human right to (the enjoyment of the highest attainable standard of) health and the increasing strength of advocacy activities for the access to affordable medicines. The section ends with a presentation of the adjustment of TRIPS in response to these demands. The chapter concludes with an analysis of central interfaces in conflicts where market-creating rules might be challenged successfully by welfare-related actors and examines the contribution of these conflicts to the development of GHG.