CHAPTER 11

# Exhaustion and Competition Policy: Patent Exhaustion and Its Relation with Competition Law and Policy

## 11.1 Competition Law and Policy in the Multilateral Trading System

Historically, evolution of '*IPR protection*' as a discipline of law and '*Competition law*' as a domain for regulating market competition have been separate and independent of each other.[705] As such their statutory goals have also been different. IPRs are aimed at protecting creativity in different forms of its applications, while the aim of competition law (also referred to as antitrust laws) have been to enable market competition. From their well-differentiated aims, one might be led to believe that these are two conflicting disciplines of laws, however that is not the case. On the contrary, these two disciplines complement one another while often interfacing with each other.[706]

The relationship between competition law and protection of IPRs is like balancing of static and dynamic efficiencies in the market. Competition law protects static efficiency through restraints on collusion, abuse of dominance, promoting entry of more competitors and increasing the benefits in the hands of the consumers. It facilitates reducing costs in the marketplace and helps refine existing products. On the other hand, protection of IPRs through incentivising innovation creates dynamic efficiency through new inventions, improved processes, products, etc. For this reason, both are required for consumer welfare hence there needs to be a balance through existence of both, IPRs and competition laws.[707] If the protection is extended beyond new knowledge or the statutory lead time is breached, then instead of dynamic efficiency there would be distortion of the market. Similarly, if competition law

705 Anderman, Steven, "The Competition law/IP 'interface': an introductory note", in Anderman Steven (eds.), "The interface between IPR and Competition Policy", Cambridge, pg. 1, (1–24), 2007.

706 Kolstad Olaf, "Competition law and intellectual property rights – outline of an economics-based approach" in Drexel Josef (eds), "Research handbook on Intellectual Property and Competition law", Edward Elgar Publishing Ltd., pg. 3, 4, 6 (3–26), 2008.

707 Nguyen Tu Thanh, "Competition Law, Technology Transfer and the TRIPS Agreement Implications for Developing Countries", Edward Elgar Publishing Ltd. pg. 33, 34, 37, 2010.

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interventions are frequent or too intrusive, then there would not be sufficient incentives for innovation affecting dynamic efficiency. For such reasons, there exists the possibility of an IP owner acquiring a dominant position and then abusing the market power through its IP. Competition law steps in as checks and balance measure in such situations and market competition is restored.

Competition policy is of broad scope, laying down the guidelines for different stakeholders in a market to operate without any unnecessary restraint. While competition law is more a policy tool along with other tools that rests with the government to regulate the market. It is the government's competition policy that would determine the conditions that are suitable to allow maximum competition between private firms in the country and as such the government's responsibility to set the norms.[708] Multilateral trade regulations and competition laws work in tandem as a balance between protection, free competition and restrictions that are implemented through certain exceptions.[709]

IP or Intellectual assets have economic value hence we designate legal rights to these intellectual assets so that they can be protected, assigned and be used to generate market power. Competition law on the other hand regulates market power, including those generated with the help of these intellectual assets. Hence both the legal disciplines interface at different stages of their interplay in the market.[710] IPRs are guaranteed by law as a time-bound exclusivity for the creator when certain conditions are met. If the time period of such time-bound exclusivity is extended by manipulating the terms and conditions for which it has been accorded, or the terms and conditions are not met, the legitimate exclusivity granted through IPRs would distort the market hence lose its legality.[711]

Consumer welfare is the ultimate goal of competition policy of any country and the role of the competition regulator is to achieve it through effective market competition enabling maximum choice to the consumer at the best price

708 Hoekman Bernard and Holmes Peter, "Competition Policy, Developing Countries and the WTO", World Bank and CEPR No. 2211, pgs. 2, 3, 1999.

709 Schloegl Herwig, "Trade and Competition Policy Aspects of VERs: A Comment" in Petersmann Ernst-Ulrich and Hilf Rheinhard (eds.), "The new GATT Round of Multilateral Trade Negotiations", Kluwer Law, pg. 433, 1991.

710 Regibeau Pierre and Rockett Katharine, "The relationship between intellectual property law and competition law: an economic approach", Cambridge University Press, pg. 25, 2009.

711 Singham Shanker, "Competition Policy and the Stimulation of Innovation: TRIPS and the interface between competition and patent protection in the pharmaceutical industry", Brooklyn Journal of International Law, pg. 371 (363–415) 2000.

point.[712] Countries usually prefer to address consumer welfare through competition policy where consumer protection is either a result of it or addressed separately.[713] If a country has an effective competition policy in place then it would not only help the local consumers in getting the products at the most competitive price, but also help the local industries. For example, a good competition policy backed by effective competition law-enforcement mechanisms can be used to assess mergers and joint ventures so that there is balance between the market power in the hands of an entrepreneur and the availability of consumer choice. Further, technology transfer licence agreements may also be examined to make sure that the domestic industry is not adversely affected due to market aberrations.[714]

With monetisation-centric innovation and large-scale commercialisation of inventions where MNCs spend significant resources in R&D, protection of IPRs become crucial. However, tendencies to extend such IPRs beyond its intent can lead to anti-competitive market situations calling for regulators to step in. Questions like, '*What is free and fair competition?*'; '*What should be considered as profit beyond which it would constitute an abuse?*'; '*What role does IPRs play in creation of such profits?*'; '*When should the regulator step in?*' are often sources of debates and conflicts bringing to the fore the sensitive interplay between IPRs and competition law. Addressing such queries extend the discussion beyond competition law and involves competition policy interventions at large.

With increasing global trade where MNCs, often controlling such trade, governments had mooted the idea of establishing a global regulatory framework on competition law and policy. Subsequently, there were global efforts to introduce international competition law regulations. The main aim was to introduce competition law at the global level and make sure that while enhanced efforts were being made by governments to open markets, they were not prey to closure or capture by private corporate entities. Competition policy and law first reflected in the multilateral trading system when the ITO was planned. The ITO was expected to establish a non-discriminatory economic system

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712 UNCTAD, "The benefit of competition policy for consumers", TD/B/C.I/CLP/27, pg. 8, 29th April 2014. Available at, http://unctad.org/meetings/en/SessionalDocuments/ciclpd27_en.pdf.

713 International Competition Network (ICN), "Competition Enforcement and Consumer Welfare Setting the Agenda", pg. 21, 22, 10th Annual Conference at The Hague held on 17th–20th May 2011.

714 Lahouel Mohamed and Maskus Keith, "Competition Policy and Intellectual Property Rights in Developing Countries: Interests in Unilateral Initiatives and a WTO Agreement", presentation at the WTO forum, "Developing Countries' in a Millennium Round, WTO Secretariat, Centre William Rappord", Geneva 20–21, September 1999.

among the members of the UN on a MFN basis.[715] Considering the existence of widespread influence of the international cartels in the 1930s, the ITO aimed at including measures on restrictive business practices.[716] The ITO's specific trade related section dealt with the trade in goods and services under the '*Havana Charter*' which elaborated on the issue of competition.[717] However the Havana Charter never became functional mainly due to the fear among US industries that it could become bigger than the sovereign and pose threat as a super-national (or supranational) authority.[718] Since the ITO did not take off as expected, focus was mainly diverted to the GATT along with being the forum for reducing trade tariffs and other measures to remove barriers to multilateral trade.

If one considers the efforts to bring competition issues in the GATT agreement, one would note that there is a general apprehension that neither the GATT 1947 nor the GATT 1994 provide any specific provision on competition law.[719] However a deeper study will show that not only attempts were made to frame rules on separate competition law and policy at the WTO, but these attempts are still on. Discussions on whether competition issues should be included in the GATT, began as early as 1958 when a group of experts examined whether restrictive business practices could possibly be treated through non-violation complaints.[720] This was perhaps the first time that competition policy issues were considered anywhere at a global platform. At the time when GATT 1994 was being negotiated there was another effort to introduce an international

715 Fikentscher Wolfgang, "Historical Origins and Opportunities for Development of an International Competition Law in the TRIPS Agreement of the World Trade Organization (WTO) and Beyond", in Beier and Shricker "From GATT to TRIPS – The Agreement on Trade – Related Aspects of Intellectual Property Rights", 27 Studies International Review of Industrial Property and Copyright Law (IIC), Max Planck Institute, Munich, pgs. 227–228, 1996.

716 Woolcock Stephen, "International Competition Policy and the World Trade Organisation", Paper presented at the LSE Commonwealth Business Council Trade Forum in South Africa, Content 2.0, Undated.

717 Ibid at 449.

718 Fox Eleanor, "Competition Law and the Millennium Round", Journal of International Economic Law pg. 666 (665–679) 1999.

719 Heinemann Andreas, "Antitrust Law of Intellectual Property in the TRIPS Agreement of the World Trade Organisation", in Beier and Shricker "From GATT to TRIPS – The Agreement on Trade – Related Aspects of Intellectual Property Rights", 27 Studies International Review of Industrial Property and Copyright Law (IIC), Max Planck Institute, Munich, pg. 239, 1996.

720 Roessler Frieder, "Should Principles of Competition Policy be incorporated into WTO Law through non-violation complaints?", Journal of International Economic Law, pg. 413 (413–421) 1999.

competition law under the GATT. This was the '*Draft International Antitrust Code*' (DIAC) negotiated during 1991–1995 and modelled to be a plurilateral agreement within the WTO system that was being established.[721] The DIAC aimed at establishing structured competition law with systematic provisions for implementation, including elaborate provision for IPRs. *Article 6,* of the DIAC provided for, *'Restraints in Connection with Intellectual Property Rights'* where *Section 2* stated,

> Licensing of Intellectual Property Rights: It is part of the legal content of an intellectual property right to grant, during the life of the right, licenses which may be exclusive and territorially restricted and to impose on a licensee justified obligations and restrictions.[722]

There were other efforts too, by different organisations to harmonise competition issues internationally. The OECD made recommendations in 1976 to stop restrictive business by MNCs.[723] UNCTAD brought out its '*Rules for the Control of Restrictive Business Practices*' in 1980.[724] Discussions are still on in these forums but mainly to the extent of sharing global best practices. Here it must be mentioned that efforts in the US to synergize different competition regimes globally, also included the formation of '*International Competition Network*' (ICN). A brief look into the history will show that it started with the need to address competition / antitrust issues in the new developments in international trade and competition interface.

The International Competition Policy Advisory Committee (IPAC) was formed in 1997 and commissioned to recommend ways to address global competition / antitrust issues in the new dimension of global economic integration, e.g. large-scale mergers, etc. IPAC engaged with academia, governments and private enterprises came out with its first report in February 2000. In the

721 Fikentscher Wolfgang, "The Draft International Antitrust Code ("DIAC") In the Context of International Technological Integration – The Institutional and Jurisdictional Architecture", Volume 72 Issue 2 Chicago Kent Law Review, pg. 535, (533–543), 1996.

722 Gifford Daniel, "The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry", and its Appendix, "The Draft International Antitrust Code as A GATT-MTO-Plurilateral Trade Agreement", Volume 6 Issue 1, Minnesota Journal of Global Trade, pg. 29, (1–30) and Appendix pgs. 38, 39, (32–66), 1996.

723 OECD, "Guidelines for Multinational Enterprises", Declaration by OECD governments on International Investment and Multinational Enterprises, 21st June 1976.

724 UNCTAD, "Restrictive Business Practices Code" of the United Nations Conference on Trade and Development was finalised on 22nd April 1980 and adopted by the UN General Assembly as a consensual resolution on 5th December 1980.

final report, the US was asked to explore possibilities of creating a '*Global Competition Initiative*' platform for different competition law and policy stakeholders to interface globally. The idea of establishing an international competition network to interface competition authorities and other stakeholders on a single platform, gathered impetus. Later at IPAC's Brussels conference in September 2000, it was endorsed by both the US and the EC. And subsequently in February 2001 at the International Bar Association's meeting further endorsements came from more than 40 senior competition officials. Finally, the ICN was formed on 25th October 2001 with senior officials from competition authorities of 14 countries with the meeting in New York city.[725]

The ICN can be credited with the development of competition law regimes in number of countries and streamlining antitrust adjudication by providing a common platform to competition authorities from different jurisdictions. It is important to note that ICN is the only global network that addresses competition law enforcement and engages significantly in sharing best practices within members. Through its working groups, it regularly engages in training and capacity building, shares papers, holds webinars and contributes positively towards the evolution of the global competition law domain.

## 11.2 Competition Law/Policy and IPRs within the GATT/WTO Regime

Institutional work at the WTO on competition regulation in the formative years of WTO encouraged some of its members to introduce competition issues. Subsequently a WTO Working Group on Trade and Competition Policy (WGTCP) was established at the Singapore Ministerial Conference in 1996 and the WGTCP brought out a number of papers (the Competition law issues along with others raised in the meeting was later often referred to as one of the Singapore issues).[726] It was further taken up after few Ministerial Meetings at the Doha Ministerial in 2001 and was agreed by some members that there was need to get clarity on what would be the core principles to focus, modalities of voluntary cooperation, provisions on hardcore cartels, etc. to determine the scope of the agreement. However, there was strong opposition from the developing countries against introducing competition policy as an agenda item.[727]

725 For the International Competition Advisory Committee and the formation of International Competition Network see, https://www.internationalcompetitionnetwork.org/about/.

726 The first Ministerial Conference of the WTO was held at Singapore from 9th until 13th December 1996. Competition issues was discussed and the WGCTP was set up. Details available at, https://www.wto.org/English/tratop_e/comp_e/history_e.htm.

727 The Hindu, "India warns against Singapore issues at the WTO", June 2003.

Lacking consensus on the modalities for competition policy, it reached a deadlock at the Cancun Ministerial in 2003.[728] Later in the July package of 2004 it was decided that considering the priorities of the Doha Round, Singapore issues, including competition policy shall not be taken up any further and the Working Group was made inactive.[729] However the discussions on competition regulation within the WTO is still on and in 2018 the Economics, Research and Statistics department published a Working Paper on Competition Policy. The paper aimed at collating all the work done so far under the aegis of WTO and includes recent developments in the Competition Law and Policy discipline globally as well as under different regional agreements. In essence it reflects upon the important synergies that link multilateral trade and competition policy considering the ongoing work by other international agencies like the ICN.[730]

Critics of including Competition Regulations within the WTO is of the opinion that the WTO would not have the power to restrain the MNC from forming cartels since these would be under national jurisdiction. To add to this, developing country members argue that such competition regulations could become a constraint in a developing country's economic growth hence necessary transition might be required.[731] One would need to understand the reasons for the strong divide between the industrialised nations on one side and the developing countries and LDCs on the other on the issue of framing competition regulations within the WTO. '*The international conflict can roughly be summarised as one between trade officials in exporting countries trying to force open markets set against officials in poorer importing countries trying to ensure economic development in their nations through industrial policy space.*'[732] The MNCs in these countries have global market power operating in multiple

728 The Cancun Ministerial reached a deadlock on Competition policy (Non acceptance of Singapore issues). Details available at, https://www.wto.org/English/thewto_e/minist_e/min03_e/min03_14sept_e.htm.

729 The Singapore issues dropped in the July package and working group became defunct. Details available at, https://www.wto.org/English/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm.

730 Anderson D. Robert, Kovacic E. William, Mueller C. Anna and Sporysheva Nadezhda, "Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection", Staff Working Paper WTO ERSD-2018-12, 31 October 2018. Available at, https://www.wto.org/english/res_e/reser_e/ersd201812_e.pdf.

731 Singh Ajit, "Competition Policy, Development and Developing Countries", Working Paper No. 50, Indian Council for Research on International Economic Relations, pg. 27, 1999. Available at, http://icrier.org/pdf/wt07.pdf.

732 Sandrey Ron, "WTO and the Singapore Issues", No. 18 TRALAC Working Paper, pg. 19, 2006.

markets in any given time, whereas the size of most of the firms in the developing countries are usually much smaller thus creating worries among these countries. Developing countries fear that while they would open the competition in their market, they would not be able to restrain the hard-core cartels nationally and would have to depend on the global governance of the WTO.[733]

Further, industrialised countries like Switzerland had proposed unconditional and unqualified NT.[734] The developing or LDCs were reluctant to agree to NT obligations since they want to retain necessary policy space to increase the cost of entry for the MNCs to their market. With Competition rules framed under the WTO, any country that would try to protect their domestic market would become actionable before the WTO DSB. In such scenario, there is a fear that considering the asymmetrical powers of the MNC, this would lead to competition complaints against the developing countries and LDCs. Hence the developing countries called for differential treatment for domestic firms subject to size and efficiency of local firms.[735]

It is also stated that the WTO is not structured as a market regulator,

> Because competition law is typically enforced through judicial or quasi-judicial bodies, dispute settlement bodies of the WTO should not be given the ability to review competition decisions (or judgments) taken in specific cases by national competition authorities (or courts). Their task should exclusively be to assess, when if there is a complaint against a country, whether the government of that country has lived up to its commitment to enact a (non-discriminatory and transparent) law, establish a competition authority, and provide for cooperation with the competition authorities of other countries.[736]

733 ICTSD, "The Singapore Issues: Investment, Competition Policy, Transparency in Government Procurement and Trade Facilitation", Volume 1 (6) Doha Round Briefing Series, pg. 3, February 2003. EU was the only country agreed to outright ban hardcore cartels while all the other industrialised countries preferred voluntary cooperation. Details in https://www.wto.org/english/forums_e/ngo_e/iisd_singapore_e.pdf.

734 Switzerland stressed rule of law based transparent 'National Treatment'. Details available at, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=7356,1998,2060,46167,1625,25828,54923,83896,68482,80668&CurrentCatalogueIdIndex=6&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

735 Communications from India available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=6397,35679,25805,42310,44426,74607,63445,71416,34053,14015&CurrentCatalogueIdIndex=5&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True, reflects the message.

736 AGCM, "International Trade and Competition Policy: the WTO Experience".

The above argument is on the premise that competition complaints are factual in nature. As such, the DSB would need to identify the problems based on the domestic market conditions of the concerned member and then obtain all confidential documents for investigation completely depending on the member hence completely at the mercy of the member.[737] Irrespective of whether competition regulation is included in the WTO regulatory regime as an independent discipline or otherwise, there is already a trilateral interface between IPRs, International Trade and Competition laws, operating as checks and balance measures within the WTO through the TRIPS Agreement.

## 11.3 Competition Law/Policy TRIPS and Parallel Imports

The TRIPS Agreement was introduced with the intention to restrain trade in counterfeit and pirated goods. However, by the time the agreement was negotiated and signed, it introduced minimum level of harmonised protection for a wide gamut of IPRs. Further, with the introduction of intricate rules for each type of IPRs – about their acquisition and management as well as enforcement mechanisms, it turned out to be a comprehensive agreement on IPRs which also includes competition law provisions. In case of patents, these provisions cater to cases where, by virtue of the market power gained by the indispensability of patents, competitors could be unduly excluded through anti-competitive means. Such action could be investigated for abuse of dominance by the relevant national adjudicators for breach of market competition. Because there is no competition law provision under the WTO, the TRIPS includes such provisions by which members can take necessary corrective action nationally.[738]

As such, the *Preamble* of the TRIPS, *Articles 8(2), 31 and 40* are some examples where competition law elements step in as checks on IPRs. With the minimum standard of protection of IPRs being established within the larger WTO membership through the TRIPS Agreement, there is enhanced protection of IPRs in the member countries. This also increases the chances of restrictive contractual licence obligations by MNCs controlling multiple markets. As far as the ambit of patent or any other IP licenses, this would be considered empowering the holder of IPRs to contractually control movement of a licensed product,

737 Hoekman Bernard and Mavroidis Petros, "Economic Development, Competition Policy and the WTO", World Bank Research Working Paper 2917, pg. 24, October 2002.

738 Kaur Annette and Levin Marianne, "The IPT Project – proposals to reform the TRIPS Agreement", in Ghidini Gustavo, Peritz Rudolph and Ricolfi Marco (eds.), "TRIPS and Developing Countries", Edward Elgar Publishing Ltd., pgs. 175, 176 (163–215), 2014.

hence determine the mode of exhaustion of IPRs through license agreements. Given that market competition becomes intensive whenever the export price of a commodity is low, this often prompts the authorised distributor in a country to control distribution of rights and restrict legitimate competition in an anti-competitive manner acting as export cartels.

The issue of export cartels can be addressed appropriately by managing the exhaustion of the patent right. As such, a country adopting national exhaustion would result in an unproductive export cartel extending to an anti-competitive level. On the other-hand, international exhaustion would restrict possibilities of such export cartels by enabling parallel trade. Although one might argue in favour of national exhaustion claiming no welfare gain happens through parallel imports since the welfare gain at the end of the consumers is negated by the welfare loss of producers. However, given the fact that the producer already has his/her share of welfare gain by obtaining royalty, parallel imports only enable to transfer the additional gain to the consumers without any loss to the producers, hence such argument is baseless.

There is also the classic argument of free riding on the authorised manufacturer and distributor. The free riding argument as discussed earlier, usually made in case of trademark exhaustion also does not hold ground since the expenses are borne for promoting the IPRs of its owner. It is in the *Grundig, Consten* Case of 1966, that the anticompetitive market power of the IP owner (in this case the trademark owner), exercised through national exhaustion was first exposed. The case, discussed earlier, dealt with parallel importation of German Grundig products into France by its authorised distributor in France named Consten SaRL. Against Grundig and Consten's complained of infringement to the EC, the EC had decided in favour of exhaustion under the Treaty of Rome to support free movement of goods within the EU market. The ECJ, deciding on appeal against the EC decision, addressed the anti-cartel aspect of the European law and confirmed the EC's order.[739]

This was the first time that anti-cartel in European Competition law was applied in terms of regional market integration and international exhaustion was allowed, albeit within the EC, thus propounding what came to be known as regional exhaustion. From then onwards, it has been construed that the effect of restrictions on parallel imports enable market segmentation harming market competition.[740] Competition regulatory framework would not

739 Ibid at 107. Forsyth Miranda and Rothnie Warwick, "Parallel imports", Cambridge University Press, pg. 457, (429–465).

740 Ibid at 739, pg. 457.

only provide corrective measures to rectify abusive monopoly but also restrain abuse of monopoly by preventive measures, e.g. by mandating international exhaustion.[741] Moreover, restricting parallel imports act like government permission in support of vertical restraints raised by the exclusive distributors through patents (and other IPRS) to restrict import competition. The admission of international exhaustion within the European common market have been already tested (of course within EU) successfully.[742] Now extending it to all WTO members should be the most logical conclusion from the multilateral trading platform under the WTO.

In case of patents too, arguments raised in support of curbing parallel imports also state that vertical restraints enhance efficiency in distribution of the patented product by restricting free riding.[743] They argue that, the patent holder would enhance their reach in the market through exclusive territorial dealership rights which would actually help them to monitor the quality of the products and enable marketing better quality.[744] This argument of maintaining quality through exclusive distributor channel is self-defeating since in any case the patent holder would have such control in the jurisdiction from where the product is first sourced through importation. Even in case of licensed manufacturing, the patent holder could allow the licensee to produce the patented product under specified terms and conditions of the licensed agreement. Hence, if interested in maintaining high quality, they can do so by specifying such monitoring requirement in the license agreement itself.

On the contrary it can be argued that in an oligopolistic market, allowing parallel trade would help in controlling collusive tendencies of patent holders to restrict possibilities of patent abuse. In this regard, it is argued that vertical restraints have pro-competitive focus.[745] It is claimed that if vertical restraints are allowed, it would increase the net revenue obtained through the IPRS by way of distributive efficiency and thus it would promote competition.[746] But

741 Grey Rodney, "The Conflict Between Trade Policy and Competition Policy: A Comment", in Petersmann Ernst-Ulrich and Hilf Rheinhard (eds.), "The new GATT Round of Multilateral Trade Negotiations", Kluwer Law, pgs. 447, 1991.

742 Ibid at 148, pgs. 79, 80, (78–90).

743 Anderson Robert, "The Interface Between Competition Policy and Intellectual Property in the context of the International Trading System", Journal of International Economic Law, pgs. 659 (655–678) 1998.

744 Chard and Mellor, "Intellectual Property Rights and Parallel Imports", 12 (1) World Economy, pgs. 69–84, 1989.

745 Frankel Suzy and McLay Geoff, "Intellectual Property in New Zealand", LexisNexis Butterworths, pg. 74, 2002.

746 Bork Robert, "The Rule of Reason and the Per Se Concept: Price Fixing and Market Division", Yale Law Journal, pg. 403, 1966.

that is not true in case of restricting parallel imports through such vertical restraints since there is no societal benefit. Such arguments overlook the fact that allowing vertical restraints on distribution would affect output negatively and increase monopoly rents leading to consumers being forced to purchase products that have an artificially raised price. It cannot be overruled that vertical control combined with private exclusive territorial rights through control of parallel imports would likely attract collusive behaviour among dealers of patented products. In such markets that are susceptible to cartels, vertical restraints are bound to reduce competition.[747]

It is also argued that allowing or disallowing parallel imports are not to be considered under IP law as exhaustion issue or under competition law as a ban on vertical restraints but can be controlled contractually.[748] The licence contract can strictly specify the market where the licensee can sell the product, thus allowing or restricting parallel importation. In effect this would be a case of implied licence where in absence of specific restriction of the market, it would imply that there was no restriction on parallel importation. But this means that due to the asymmetrical market power, especially in case of the MNC patent owners, there would always be a possibility of them restricting parallel importation contractually. In US and EU, the two initial jurisdictions where competition law evolved, it can be noticed that pricing has not been regulated by the competition authorities and has been left to the market. The logic being, even excessive pricing would attract substitutes, hence incentives to create and compete should not be hindered. Based on such logic, if there is any restraint on IPRS through competition adjudication, it would negatively affect innovation.[749] Hence competition law can effectively balance excessive IPRS only if it could be applied *ex-ante* where it could be imposed to address any possible market abuse. Applying competition law in an *ex-post* manner to rectify any possible market abuse would be an imperfect solution.[750]

It has already been mentioned that TRIPS has built-in provisions that members can use to take necessary corrective action against anti-competitive

747 Fox Eleanor, “Parallel Imports, The Intra-brand/Interbrand Competition Paradigm, and the Hidden Gap between Intellectual Property Law and Antitrust”, Fordham International Law Journal 2002, pg. 983, 982–986.

748 Gallini Nancy and Hollis Adian, “A Contractual approach to the Gray Market”, University of Calgary 1999.

749 Ibid at 739, pg. 457.

750 Fox Eleanor, “Can Antitrust Policy Protect Global Commons from the Excesses of IPRS?” in, Maskus Keith and Reichman Jerome (eds.) “International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime”, Cambridge University Press, pg., 758–769, 2005.

practices. However, there are multiple issues that at present restrain TRIPS being used as an effective remedial measure against any such export cartel. First, under *Article 8*, members are free to adopt measures that they deem appropriate to address abuse of IPRs and further *Article 40* enables action under competition laws only within national jurisdictions where there is no harmonisation nor mandate with the article itself. Hence it is completely depending on the domestic legislation of a WTO member as to whether it addresses distribution goals of competition law and take corrective measures. Secondly, one can notice that these provisions are adapted from prevailing US and EU practices that are conceptually focused on innovation-centric competition policy rather than distribution-centric competition policy. This completely changes any possible action based on human-rights aspects of distributive goals that would determine access issues.[751] Hence taking necessary action even under *Article 31* (*k*) TRIPS might not be possible.

As mentioned, none of these provisions to address anti-competitive abuses have any specific remedial measures hence the competition policy provisions in the TRIPS Agreement are permissive rather than perspective.[752] Attempts to enforce the competition policy provisions in TRIPS effectively would also face technical challenges since there could be coordination problems in absence of any harmonious global standard as to what should be considered anticompetitive. Different jurisdictions could consider anticompetitive acts differently and further remedies imposed in one jurisdiction based on local market circumstances could impact economic welfare in another jurisdiction in negative manner.[753]

Moreover, the TRIPS Agreement in its present form, is interpreted to let owners of IPRs use their discretion to allow or restrict parallel importation

751 Ibid at 657.

752 Anderson Robert, "Intellectual Property Rights, Competition Policy and International Trade: Reflections on the Work of the WTO Working Group on the Interaction between Trade and Competition Policy (1996–1999)", in Cottier Thomas and Mavroidis Petros (eds.), "Intellectual Property: Trade Competition & Sustainable Development", Michigan University Press, pg. 251 (235–265), 2003; Also, Anderson, Feuer, Rivard & Ronayne, "Intellectual Property Rights and International Market Segmentation", in Anderson Robert and Gallini Nancy (eds.), "Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy", University of Calgary Press, pgs. 424, 425, 1998.

753 Anderson Robert, Kovacic William, Mueller Anna Caroline and Sporysheva Nadezhda, "Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection", Staff Working Paper ERSD-2018-12, World Trade Organization, pgs. 16, 17, and 18, 31 October 2018.

exclusively, hence adopt either international, national or regional exhaustion.[754] One needs to consider that with such flexibility on one hand and strengthened laws on IPRs on the other, the possibility of encouraging export cartels through IPRs would increase if parallel imports can be restricted. Hence restricting parallel importation would not be considered anticompetitive by a member's competent national adjudicatory body if the country adopted national or regional exhaustion. A country would intend to introduce competition laws that would necessarily focus exclusively on issues that might affect their economy on short term and hence might not be interested in curbing export cartels.[755] These competition clauses in the TRIPS agreement have so far not proved to be sufficient and hence it has been argued that an international competition regulation is necessary.[756]

In absence of any international agreement on restriction on export cartels, countries with competition laws would choose to restrict export cartels based on whether it harms domestic competition.[757] This would not be sufficient deterrence from the perspective of multilateral trade. E.g. A country might have comparative advantage in producing a patented product locally, more efficiently under license not just for the local market but also for exports. If the country's laws allow parallel imports while being silent on parallel exports, the patent holder could restrict the market of the patent licensee contractually hence restraining possibility of parallel exports. Since this would not harm the domestic market competition, the domestic competition regulator would not intervene, but this would restrict other WTO members to benefit from such trade.

754 Anderson Robert, "Intellectual Property Rights, Competition Policy and International Trade: Reflections on the Work of the WTO Working Group on the Interaction between Trade and Competition Policy (1996–1999)", in Cottier Thomas and Mavroidis Petros (eds.), "Intellectual Property: Trade Competition & Sustainable Development", Michigan University Press, pg. 251 (235–265), 2003; Also, Anderson, Feuer, Rivard & Ronayne, "Intellectual Property Rights and International Market Segmentation", in Anderson Robert and Gallini Nancy (eds.), "Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy", University of Calgary Press, pg. 424, 425, 1998.

755 Molina del Pozo Carlos Fransisco, Martinez Gutierrez Enrique and Pescador Diaz Javier, "International Cooperation in Antitrust Enforcement: The European Perspective", in Alexandre Daniele / Petchsiri Apirat (eds.), "Trade Regulations between the EU and ASEAN", Nomos Verlagsgesellschaft Baden-Baden, pg. 49, 2000.

756 Cottier Thomas and Meitinger Ingo, "The TRIPS Agreement without a Competition Agreement?", at the "Fondazione Eni Enrico Mattei Trade and Competition in the WTO and Beyond", pg. 7, Venice 4th–5th December 1998.

757 Suslow Valerie, "The Changing International Status of Export Cartel Exemptions", Volume 20, Issue 4 American University International Law Review, pg. 815 (785–828), 2005.

Even when international exhaustion is the most suitable mode of exhaustion from competition law perspective, political considerations influenced by influential manufacturers' associations had restrained members from adopting international exhaustion at the WTO. Further, the flexibility of choice of exhaustion has enabled mixing different exhaustion modes for different IPRs in the same country. This has complicated the applicability of exhaustion even more, a country that practices international exhaustion might find their home industry at a disadvantage if their trade partners have a different mode of exhaustion thus they might be compelled not to follow international exhaustion.[758] Even if a country has competition law provisions guiding towards international exhaustion, if it's an importing country with a strong industry lobby which is against international exhaustion, it may chose non-application of competition law.

If we consider its effect on developing countries, given the fact that developing countries are usually net importers of IP, it is often considered as '*IP tax*' on its citizens. Although they would have no other provision to excuse such '*tax*', the international exhaustion allowing parallel imports would balance it. Appropriate market driven returns for the patent being obtained on one hand by first sale of the patented product, '*double-tipping*' through additional patent revenues would be restricted.[759] Hence domestic importers in these countries would be able to source patented products from anywhere in the world where it is cheapest, leading to more efficient allocation of resources and better prices for all consumers. However, just by introducing international exhaustion in developing countries would not suffice, since trade barriers under the multilateral trade regime of WTO would still exist. Hence there is need to introduce international exhaustion regime within the WTO membership in a harmonious manner. Necessary restrictions on application of international exhaustion on certain cases where that would lead to unwanted trade distortions can also be introduced under *Article XX* (*d*) GATT. E.g. where products are not under

758 Conde Gallego Beatriz, "The Principle of Exhaustion of Rights and its Implications for Competition Law", Volume 34 (2) IIC, pg. 491, 492 (473–580), 2003.

759 Anderson Robert, "Intellectual Property Rights, Competition Policy and International Trade: Reflections on the Work of the WTO Working Group on the Interaction between Trade and Competition Policy (1996–1999)", in Cottier Thomas and Mavroidis Petros (eds.), "Intellectual Property: Trade Competition & Sustainable Development", Michigan University Press, pg. 251 (235–265), 2003; Also, Anderson, Feuer, Rivard & Ronayne, "Intellectual Property Rights and International Market Segmentation", in Anderson Robert and Gallini Nancy (eds.), "Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy", University of Calgary Press, pg. 96, 1998.

patent protection or manufactured under government administered license controls, etc.

With '*Trade Facilitation*' one of the '*Singapore Issues*' making its way as agenda item and finally trade facilitation being adopted, new aspirations have been noticed on the competition and investment issues. However, disagreement on independent competition regulations under the WTO and given that the burden of framing competition law measures to check abusive market aberrations will shift back to national jurisdictions of members have been of paramount concern. Hence it did not make its way even to the WTO Ministerial meeting at Buenos Aires in December 2017. The issue of exhaustion is not dependent on a dedicated competition policy/law at the WTO since it can be addressed through an amendment of the TRIPS. Hence while the members consider deciding on introducing competition regulation as an independent discipline within WTO, it is proposed that international exhaustion be introduced through an amendment of the TRIPS Agreement.