The TRIPs Agreement without a Competition Agreement?

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Fondazione Eni Enrico Mattei
Trade and Competition in the WTO and Beyond
Venice, December 4th-5th, 1998

Abstract

This paper addresses the relationship of intellectual property rights and competition policies and rules addressing the conduct of private enterprise. Intellectual property rights are considered to be essential, but not sufficient, conditions for competition. Potentially excessive scope and use need to be balanced by way of competition rules. Such balance is partly inherent to the scope of IPRs and thus within the TRIPs Agreement. Partly, it will be achieved by applying competition rules. The proper balance, it is argued, does not necessarily require the establishment of comprehensive global disciplines on private party conduct and competition in the WTO. A number of reasons and conflicting interests are discussed. The paper argues that the balance can be adequately achieved by way of national or regional anti-trust rules, and efforts to bring about adequate legal regimes in particular in developing and transitional countries should be supported by national and international fora, including the WTO. There is no need at this stage, nor would the World be ready, for global anti-trust regimes and authorities. The paper, however, argues in favor of harmonization of rules in two major areas: International legal assistance in the prosecution of restrictive business practices and restrictions in WTO law on export cartels. Both areas would considerably enhance the prospects for a balance between IPRs and competition rules, and thus for market access in world trade law.

Introduction

All of WTO law is, of course, essentially about conditions of international competition, based upon fundamental notions of non-discrimination of foreign products. Disciplines on tariffs, non-tariff barriers, subsidies, anti-dumping measures, state-trading and other issues amount, as much as the fundamental principles of MFN, national treatment and transparency, to guarantees of a competitive environment for international trade in goods. The same holds true for the General Agreement on Trade in Services. Principles of MFN and transparency and of market access and negotiated national treatment conditions serve, or gradually will serve, to improve the competitive relationship between foreign and domestic services. The same is true for the protection of intellectual property rights. This point, we shall address shortly. Finally, we should mention government procurement. Disciplines in the plurilateral agreement intend to bring about equal conditions of competition among domestic and foreign competitors. Current discussions on trade and competition should bear this in mind. Indeed, these discussions merely seek to add yet another but equally important layer to WTO rules on

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competition. While existing regulations all address governmental measures, it is debated whether or not such disciplines should be expanded to regulate *private* conduct among competitors, currently largely outside the scope of WTO rules.[1]

The question, whether the TRIPs Agreement requires a competition agreement addressing such private conduct can be discussed in three different ways.

First, one could argue that since Members of the former General Agreement on Tariffs and Trade (GATT 1947) considered the impact of IPRs on international trade to be important enough to negotiate IPR standards within the GATT-WTO, it would be of equal importance to take up competition rules: the impact of private conduct on international trade is at least of similar significance to international trade as are intellectual property rights. In fact, it is of increasing importance as governmental, public law barriers to trade are being reduced.

A second perspective could be that competition law is inherently related to, and even part of, IPRs. An agreement short of addressing competition thus amounts to unfinished business. Competition law not only limits IPRs in preventing right holders from misusing their rights for monopolistic and oligopolistic practices, but also has a complementary role to play. Every national IPR system is closely related to competition law, giving individuals the right to prevent others from causing confusion with their products or from slavish imitation. Rules on unfair competition are inextricably linked to IPRs, as Article 10^{bis} of the Paris Convention shows, and need to be further elaborated in WTO as well.

A third perspective could argue that the advent of the TRIPs Agreement and thus a substantial improvement of international standards and commitments in the field of IPRs should be accompanied by disciplines of competition law in the WTO system in order to establish an overall balance. This is an aspect which this paper seeks to address briefly.

The question is whether the TRIPs Agreement should be accompanied by rules on vertical and horizontal restraints (cartels) as much as by rules addressing the issue of dominant positions and, perhaps, even mergers on the level of global law. Such constraints on the freedom to contract among private operators is the subject of this paper, and the term competition law will used in this somewhat narrow sense in the WTO context.

Whether or not such rules relating to conduct of private companies will be addressed in a separate agreement or not, is a matter of secondary importance. The scope of such disciplines and their format will depend on international negotiations, which cannot be anticipated. It may well turn out, as an alternative to a separate and full agreement, that additional disciplines will be introduced or reinforced, which relate to private conduct, as it is already and partially addressed in the Agreement on Safeguards (voluntary restraint agreements, OMA's).[2]

The Relationship of Competition Rules and Intellectual Property Rights

In the landscape of creating competitive relationships by WTO rules, the TRIPs Agreement

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[1] See in this context: WTO Report of the Panel, *Japan Measures Affecting Consumer Photographic Film and Paper*, WTO/DS44/R (decided 31 March 1998, adopted without appeal).

[2] Article 11(1)(b) Agreement on Safeguards, reprinted in: The Results of the Uruguay Round of Multilateral Trade Negotiations, the Legal Texts 321, WTO Secretariat, Geneva, *reprinted* 1995.

assumes a somewhat peculiar position. Relevant both for goods and services, it covers a middle ground. Moreover, it is not directly aiming at liberalizing market access and freer markets. In fact, it has been a long-standing criticism from a perspective of competition law that IPRs rather hinder than promote competition and market access and thus amount to an anti-thesis of freer trade envisaged by the overall system of WTO rules.

Indeed, the relationship of intellectual property rights and competition law has been widely debated. The discussion is legend, and it is difficult to add much substance to it at this point.[3] The relationship is frequently depicted as a formal juxtaposition and tension. IPRs are, by definition, exclusive marketing rights (monopolies) which States grant for a limited or extendable period of time. Motives vary, but the tool essentially serves the purpose of stimulating innovation and investment by securing the potential of appropriate returns on the investment of time, financial and human resources. Exclusive rights, by definition, amount to a limitation of competition. They are therefore seen at variance with principles of market access and level playing fields sought by competition rules, in particular the restrictions on horizontal and vertical restraints, or on the abuse of dominant positions.

The relationship, however, is more complex. The negotiations leading to the TRIPs Agreement showed that the absence or inadequate protection of IPRs leads to significant distortions of competition and of the level playing field. Without adequate protection of IPRs, there is a lack of appropriate incentives, which only make competition possible in the first place. IPRs therefore are a necessary requirement for competition.[4]

At the same time, IPRs are not a sufficient requirement for competition. Distortions result as much from excessive protection, as they do from the absence of protection. This is adequately expressed by the preamble of the TRIPs Agreement.[5] It is therefore, as in other walks of life and law, a matter of finding an appropriate balance between IPRs and competition rules.

Balancing IPRs and Competition

A balance between IPRs and competition rules has to be found on two levels. First, it has to be found within the regime of intellectual property rights: the scope, duration and exceptions in the various fields. Secondly, it has to be addressed in interfacing IPRs and competition policy rules (CPRs).

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[3] For a survey see *inter alia* Edith Tilton Penrose, *The Economics of the International Patent System,* Baltimore 1951; Ward S. Bowman, *Patent and Antitrust Law: A Legal and Economic Appraisal*, Chicago 1973, OECD Committee on Competition Law and Policy, *Competition Policy and Intellectual Property Rights*, Paris 1989; Thomas M. Jorde/David J. Teece (eds.), *Antitrust, Innovation and Competitiveness,* New York 1992.

[4] In this context see Thomas Cottier, *Intellectual Property in International Trade Law and Policy: The GATT Connection*, 1 Aussenwirtschaft [1992], p. 75-105 and Thomas Cottier, *The Prospects for Intellectual Property in GATT*, in: CML Rev. Vol. 28 [1991] p. 383-414.

[5] See the first paragraph of the preamble of the TRIPs Agreement, loc. cit. (note 1) at 366, where Members stated that they are

> „desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade".

The Balance within IPRs

The definition of rights in the TRIPs Agreement seeks to strike, based on the experience in national law, an adequate and inherent balance with the concerns for competition. This is expressed in terms of scope and of duration of rights, but is equally expressed in explicit limitations of these rights. Article 27, defining the scope and limitations of patents perhaps is the most prominent example. The TRIPs Agreement also contains a number of provisions relating to the use of IPRs. First there are general considerations in paragraph 1 of the Preamble that are accompanied by Article 8(2), allowing Members to take appropriate measures in order to prevent abusive practices. Second, there are some very precise provisions concerning competition law. They allow fair use and the possibility of compulsory licensing or the granting of dependent patents, i.e. the granting of a right by public authorities, and against the will of a patent owner, in order to make use of a patent to the extent necessary to develop an new product.[6] A provision of particular importance in the present context is Article 40. It allows, but does not require, Members to prohibit anti-competitive licensing practices.

Whether or not the TRIPs Agreement has stroke a proper inherent balance is a matter in dispute and of debate. The agreement strongly reinforced the protection of rights and right holders mainly to the benefit of foreign products and services imported or produced in a Member of the WTO. The main issue is whether the standards have detrimental effects on the domestic industries and their competitiveness within the home market. Except for the problem of abusive use of IPRs, we do not further pursue this debate, as it relates to the shaping and review of the scope of IPRs as such.

Interfacing IPRs and CPRs

In the relationship of IPRs with competition policy rules (CPRs) properly speaking (and perhaps other areas of law not of concern to this paper), there are two issues to be addressed: (i) what is the impact of IPRs in shaping the disciplines of antitrust law, for example with regard to licensing agreements etc? (ii) What is the impact of competition law on the scope and use of intellectual property rights?

(i) The relationship of IPRs and competition rules is dialectical. The first constellation exerts some restrictions on a pure application of prohibitions of horizontal and vertical restraints, and usually operates as an exemption, such as Article 85(3) of the Treaty establishing the European Community (ECT) by way of individual and block exemptions, or inherently under the rule of reason. While it is costly and risky to obtain individual exemptions under the rules of Article 85 ECT or the rule of reason in U.S. law due to different interpretations of open textured principles, the only way to achieve clarity and legal security has been by applying block exemptions or the adoption of precise guidelines. For example, the EC-regulation on the transfer of technology entails precise guidelines for individuals when negotiating their contracts of patent or know-how licensing.[7] The scope of contractual liberty and governmental limitations thereof are set out in a fairly predictable manner. The balance sought is precisely

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[6] Article 31 TRIPs Agreement, loc. cit. (note 2).

[7] Commission Regulation (EC) No. 240/96 of 31 January 1996 on the Application of Article 85 (3) of the Treaty to Certain Categories of Technology Transfer Agreements, O.J. No. L 31, 09/02/1996, p. 2-13.

defined.

(ii) The second and inverse constellation usually operates primarily as a restriction of the exercise of IPRs, while not having an impact on their very existence. It is usually phrased in terms of a prohibition of abuse of IPRs due to competition law. The concept of abuse of law is elusive. It does not lend itself to clear and fast rules, but inherently depends on an assessment case-by-case. In Europe, there are important ECJ-cases in both areas of antitrust law, cartels and abuse of a dominant position (Articles 85 and 86 of the ECT). The leading case concerning licensing practices and Article 85 EC Treaty is *Maize Seed*. The ECJ held that an exclusive license is not in conflict with Article 85 if it is necessary to the successful introduction of a new technology into a market, provided that the exclusivity of the license is not such that competitors of other territories are totally excluded from the territory allocated to the licensee.[8]This decision provided the basis for successive regulations on block exemptions in this field.[9] Perhaps, the decision most intensively discussed relating to the abuse of dominant position in EC law has been *Magill.*[10] The ECJ obliged the applicants to grant compulsory licenses implicitly based on the doctrine of essential facilities[11]. This and subsequent cases shows the difficulties both in deciding whether the exercise of an IPR was abusive and whether restrictions are based on a doctrine that is unclear. It is evident that we face a problem here of legal uncertainty.

The impact of competition law, however, does not stop here. There are systemic clashes between the two concepts. The classical example are geographical distribution rights which can be achieved based upon the concept of territoriality and so called national (or regional) exhaustion of IPRs. The example in point are trademarks and the ruling in *Consten-Grundig*[12], an early leading case by the ECJ. It laid the groundwork, on the basis of competition law, for the then emerging doctrine of regional exhaustion which later became to be based on the principles of free movement of goods.[13] In *Consten-Grundig*, the Court held that IPRs must

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[8] Case 258/78, *Nungesser v. Commission*, [1982] E.C.R. 2015.

[9] In a first step the Commission implemented two acts, the Commission Regulation (EEC) No. 2349/84 of 23 July 1984 on the Application of Article 85(3) of the Treaty to Certain Categories of Patent Licensing Agreements O.J. No. L 219, 16/08/1984, p. 15-24 and the Commission Regulation (EEC) No. 556/89 of 30 November 1988 on the Application of Article 85(3) of the Treaty to Certain Categories of Know-How Licensing Agreements O.J. No. L 61, 03/04/1989, p. 1-13 which it joined in its later block exemption of technology transfer agreements cited above in note 7.

[10] Joined Cases C-241 and 242/91, *RTE and ITP v. Commission,* [1995] E.C.R. I-743.

[11] In a 1998 decision, the ECJ limited the application of the doctrine of essential facilities, see Case C-7/97, *Oscar Bronner GmbH&Co vs. Media Print Zeitungs- und Zeitschriften GmbH&Co. KG*, November 26, 1998, [1998] E.C.R. ____ (available under http://europa.eu.int/...). See also Pat Treacy, Essential Facilities – Is the Tide Turning?, [1998] ECLR 501-505; for a comment on the pre-Bronner situation in the EC see Valentine Korah, Patents and Antitrust, in: Thomas Cottier, Peter Widmer, Katharina Schindler (eds.), Strategic Issues of Industrial Property Management, Abstracts and Selected Papers of the 1st AIPPI Forum 1996, Oxford 1999, 68, 75. For a comprehensive analysis of this doctrine see Katharina Schindler, *Wettbewerb in Netzen als Problem der kartellrechtlichen Missbrauchsaufsicht: die Essential Facilities Doktrin im amerikanischen, europäischen und schweizerischen Kartellrecht*, Staempfli, Berne 1998.

[12] Joined Cases 56 and 58/64, *Consten GmbH and Grundig-Verkaufs GmbH v. Commission* [1966] E.C.R. 299.

[13] For a detailed comment see, e.g., Bernhard van de Walle de Ghelcke/Gerwin van Gerven, *Competition Law of the European Community*, New York § 9.03 (loose-leaf, release 8-10/98).

not be used to put aside the prohibition of cartels stated in Article 85 of the Treaty of Rome. The reason why in subsequent decisions the ECJ fully based its doctrine of regional exhaustion on Article 36 of the EC Treaty can be found in the *Centrafarm-Case* and even more clearly in *Sirena v. Eda*. In these and other cases, it turned out to be difficult to rely upon Article 85 of the EC Treaty in order to ban abusive exercises of IPRs.[14] As a *conditio sine qua non*, the application of Article 85 is based on contractual relations, it does not cover all down-stream constellations. In the classical constellation of parallel imports, a right holder tries to prevent others from importing his trademarked or patented goods from reimportation short of a contractual relation upon which the person could base its claim. The shift from Article 85 to Article 36 ECT, and thus to measures having equivalent effect as quantitative restrictions (Article 30 ECT), however, does not alter that the constellation is essentially one relating to competition among private operators.

Do We Need International Disciplines on Competition Law?

We should like to deal with the two areas of interfacing IPRs and CPRs and ask whether a proper balance of interests in preserving IPRs and a competitive environment requires the establishment of *global* disciplines on competition law. As a general proposition, we do not think so. The fact that there is a TRIPs Agreement, but not a WTO competition agreement, on the same level of global law does not prevent from achieving a proper balance in the area of IPRs. The TRIPs Agreement, it was seen, provides ample room to do so by means of national or regional competition law. Members of the WTO have full powers to implement rules on anti-competitive practices, and enforce such findings, without violating their obligations under the TRIPs Agreement.[15] They also retain powers to use compulsory licensing, in order to break abusive practices of dominant positions under a set of conditions set forth in particular of patents.[16]

Members are therefore free to adopt competition policies based upon national or regional laws in order to check the use of IPRs. From this point of view, there is no need for a competition agreement. The only and important problem of the existing competition provisions in TRIPs is their voluntary character. Neither the preamble nor Article 8(2), 31 or 40 of the Agreement *oblige* the Members to limit the use of IPRs.[17] The same is true for the provisions on the scope and duration of IPRs, albeit excessive protection will conflict with inherent trade interests. Based on the character of the TRIPs Agreement as a set of minimum standards, Members are not prevented from raising national levels of protection above the requirements of TRIPs and supply, to a certain extent, enhanced exclusive or monopolistic rights which may create additional barriers to international competition. No inherent limitations reaching beyond general preambular statements were introduced. The problem of excessive protection stems

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[14] Case 24/67, *Parke, Davis & Co. v. Probel, Reese, Beintema-Interpharm and Centrafarm* [1968] E.C.R. 55 and Case 40/70, *Sirena S.R.L. v. Eda S.R.L. and others*, [1971] E.C.R. 69.

[15] Article 8(2) and 40 TRIPs Agreement, see also Eleanor M. Fox, "*Trade, Competition, and Intellectual Property TRIPs and its Antitrust Counterparts* , 29 Vand. J. Transnat'l L. 481, 485 (1996).

[16] Article 31 TRIPs Agreement.

[17] A detailed discussion of these provisions gives Andreas Heinemann, *Antirust Law of Intellectual Property in the TRIPs Agreement of the World Trade Organization*, in: Beier/Schricker (ed.), *From GATT to TRIPs*, Weinheim et al. 1996, 239-247.

from the fact that in the beginning of the Uruguay Round it was uncertain whether any agreement in the field of IPRs could be realized as the positions of the negotiating countries were fundamentally apart. Thus, the goal of negotiations essentially focused on creating minimal standards. Bearing in mind the unsuccessful revisions of the WIPO Treaties, there was no reason for too much of a concern for balancing competition law issues, at that time. Moreover, industries seeking enhanced protection of IPRs certainly did not share an interest in limiting potential rights by way of proposing disciplines on competition law.

With the advent of a very substantial TRIPs Agreement, obliging in particular LDCs to substantially enhance the level of protection, the question of establishing a proper balance becomes a significant one in many quarters of the world. This, however, does not inherently make the case for a global agreement. The balance can be stroke within the TRIPs Agreement and by means of adopting appropriate national or regional competition policies and regulations. These efforts could and should be supported by technical cooperation provided for by the WTO and other international fora. So what it the problem?

We submit that the national or regional approach to competition rules within the scope of the TRIPs Agreement is likely to bring about an unbalanced situation in many countries, and it will undermine, in the long run, the legitimacy of IPR protection and the TRIPs Agreement as no efficient tools to deal with abuses are available.

First, competition policies are a complex and expensive tool. They are largely underdeveloped in many countries and Member States. Even where such rules exist, enforcement is difficult because inadequate resources are being allocated to the task. Legal assistance in obtaining evidence from abroad, in particular from industrialized countries, is difficult. Obligations are weak under Article 41 TRIPs Agreement. Finally, it is submitted that the philosophy of competition law is alien to various societal traditions (in particular in Asia), and it is at variance of authoritarian government. While the TRIPs Agreement has brought about an obligation to implement IPR standards under a process monitored by the WTO, is in unlikely that effective competition rules will emerge in many countries on their own to a sufficient degree. Many countries therefore are likely to be left with an unbalanced system, resulting in a preference to IPR protection mainly for foreign right holders, potentially to the detriment of competition on home markets.

From this point of view, it would be useful to introduce global disciplines which need to be implemented by the Members of the WTO and which are subject to a process of monitoring and enforcement by the WTO and the international community. There is a global interest in establishing an appropriate and effective balance of competition rules and IPRs within all the Member States. The international efforts could assist in overcoming domestic resistance to this effect, and a learning process will take place, in particular in developing countries which so far have not been exposed to competition rules to the same extent as most industrialized countries.

Towards Global Disciplines

Diverging Interests

Assessing different interests towards competition policies is as difficult as it is necessary to bring about a reasonable framework for potential global rules. We look at interests in

industrialized and developed countries alike.

On the one hand, it should be stated that Members of the WTO with elaborated competition policies at home do not need global rules in the first place. They can do well with the national or regional approach within the scope of the TRIPs Agreement. There is no need to adopt international standards in order to keep a balance. This is true to more so since the doctrine of extraterritorial application of competition rules brings about a global reach in order to defend negative effects on own markets. There is extensive jurisprudence to this effect in the United States and in Europe, sanctioning cartels and dominant positions abroad but deploying effects on domestic markets.[18] In *Gencor Ltd,* the EC Court of First Instance explicitly recognized the effects' doctrine in court and ruled that the application of EC merger control regulations" is justified under international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community".[19] Expansive application of rights and obligations thus explain why there is no genuine and unequivocal interest in establishing global competition policies on the part of major trading powers. Moreover, a reinforcement of competition policies abroad is likely to reduce the impact of IPRs. The issue of parallel imports in an example in point.

On the other hand, an interest to develop competition policies abroad on the part of industrial countries exists to the extent that WTO rules will lead to the abolishment of anti-competitive practices abroad being subject to national authorities. This was the essence of bringing complaints by the United States against restrictive business practices in Japan in the *Film* case.[20]

As to developing countries, concerns relating to national sovereignty and independence nurture resistance and opposition to global rules, as they did in the field of IPRs during the first phases of the Uruguay Round negotiations. Within the scope of the TRIPs Agreement, governments and legislators may want to decide independently, and in accordance with the cultural and economic traditions, to what extent competition should be regulated or not.

At the same time, it would seem that LDCs should in fact have a greater interest in CPRs in WTO, as this allows reducing excessive impacts of IPRs within their respective jurisdictions. This is particularly true for parallel imports. To the extent that the matter cannot be resolved within TRIPs, it may therefore be assisted by WTO CPRs. But this will also be the reason why industrialized countries oppose CPRs, as they fear a limitation of the impact of the TRIPs Agreement. This is certainly true for those in favor of banning parallel imports on the basis of IPRs.

Finally, there are common interests in improving legal assistance in prosecuting competition cases, as evidence is difficult to gather abroad. Also, there is a common interest in intervening

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[18] *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Circ. 1945); Joined Cases 89,104,114,116,117 and 125-129/85, *Ahlströhm a.o. v. Commission,* [1988] E.C.R. 5193. See generally, Werner Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht*, Heidelberg 1994.

[19] Gencor Ltd v. Commission of the European Communities and Federal Republic of Germany, Case T-102/96, 25 March 1999, para. 90, 1999 [E.C.R.] ___(available under http://europa.eu.int/...).

[20] WTO Report of the Panel, *Japan Measures Affecting Consumer Photographic Film and Paper*, loc. cit (note 1).

on third markets against export cartels from third countries. Such an intervention requires a title in international law. Overall, the constellation may be depicted in terms of offensive and defensive interests. The following table offers a number of clearly conflicting interests.

WTO Member	Offensive Interests (in favor of WTO Standards)	Defensive Interest (against WTO Standards)
Industrialized Members having fully developed CPRs all such Members:	• Improving market access abroad, abolishment of domestic cartels in export markets. Title to intervene • Title to intervene on third markets against export cartels of competitors • Improvement for legal assistance in assessing cases	• Extraterritorial application of own CPRs, (e.g. prohibition, or rule of reason, effects' doctrine) • Preserve full impact of IPRs of TRIPs Agreement i.e. market allocation by way of national exhaustion of rights • allow for own export cartels
small and medium Members:	• Interest in curbing extraterritorial application of foreign laws	
Developing Members without fully developed CPRs	• assistance in developing own CPRs • Interest in curbing export cartels at country of origin, relief • interest in bringing about international exhaustion and parallel imports • Interest in curbing extraterritorial application of foreign laws • Legitimately reduce full impact of IPRs by means of CPRs • Improvement of Legal assistance in assessing cases	• preserve own jurisdiction, traditions and approaches • allow for own export cartels

What Results from this Constellation?

It is apparent that there are clearly conflicting interests not only between industrialized and developing countries, but also among industrialized countries[21] and even within WTO Members and among different constituencies. It is therefore not surprising that the overall idea of introducing a special agreement on competition rules on a global scale is a most

[21] It has been pointed out, that the U.S. and the E.C. have widely diverging approaches in the field of competition law remedies against abuse of IPRs. See Eleanor M. Fox, „*Trade, Competition, and Intellectual Property TRIPs and its Antitrust Counterparts* , 29 Vand. J. Transnat'l L. (1996) 481, 487.

controversial matter. Unlike the IPR issue that was very much of interest to industry and therefore supported intensely during the Uruguay Round, the impact of a competition agreement would at least be ambivalent if not negative to them and therefore the interest in reaching an agreement would be limited in the Millennium Round.

Besides the diverging interests among Members it has also to be mentioned that approaches to competition policies and rules are everything but similar in national law of different industrialized countries with extensive experience in the field.[22] A comprehensive standardization agreement would be most difficult to reach in many points and details.

It is a matter of speculation whether standards on competition policies will emerge as a practical matter. From an analysis of the chart, however, it would seem that there could be some common ground to address two issues for which rules are lacking on the national or regional and on the international level: legal assistance and export cartels.

Improving Transnational Assistance in the Prosecution of Restrictive Business Practices

It is submitted that we should primarily address those areas where national or regional rules are almost entirely lacking in the first place. There are two issues. First, there are no multilateral rules on legal assistance of any significance. The OECD standards are limited to recommendations of soft law.[23] The relevant provisions of the TRIPs Agreement do not go much beyond this point and are not in a position to bring about evidence from without the jurisdiction of the Member concerned. Even though based on Article 40(3) TRIPs Agreement, Members have to assist other Members' investigations on the abuse of IPRs, it only obliges them to provide publicly available information. There are some bilateral agreements in place (U.S. - EC, U.S.-Canada and U.S.-Australia, and perhaps others). Based on these agreements, it is possible to develop multilateral disciplines in WTO law on legal assistance in the prosecution of abusive use of IPRs in the context of anti-competitive practices by private operators. These disciplines could be expanded to other forms of anti-competitive conduct. Procedural rules enabling countries to enforce competition law do not necessarily require the adoption of substantive standards, albeit this would facilitate the interfacing of different systems. It is equally possible to limit such rules to the interfacing of different national or regional systems, as it is the case in current bilateral agreements. This solution would thus result in reinforcing abusive practices in the application of proper IPRs having an anti-competitive effect within the Member's jurisdiction.

In the Draft International Antitrust Code (DIAC), it was suggested that an international antitrust authority should survey the enforcement of international competition provisions together with a standing international antitrust panel that would be competent to decide inter-

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[22] See the analysis of Canadian, U.S. and EC Law in Nancy T. Gallini and Michael J. Trebilcock, *Intellectual Property Rights and Competition Policy: A Framework for the Analysis of Economic and Legal Issues*, in: Anderson/Gallini (ed.), *Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy*, Calgary 1997.

[23] OECD Revised Recommendation Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade (1995), OECD Doc. C(95)130/FINAL; 35 I.L.M. 1313 (1996).

state antitrust disputes.[24] It is quite uncertain whether such an institution would bring about the desired results. The creation of a WTO body for antitrust matters, as the authors of the DIAC suggested, does not seem realistic in the first place since it would not simply be a surveillance body like the Council for TRIPs but a body with the power to sue a country under national law.[25] This would ask for important changes in the administrative structure of the WTO. Second, an international competition authority would require comprehensive resources since a worldwide control could only be realized on the basis of detailed market analysis and the cooperation with experts in the field of national competition law from all the Members concerned. Third, jurisdiction of the Members would be curtailed as the body would entail an important shift of competence from the national competition authorities to the new international authority. Therefore, we do not think that this path is realistic at this stage. This view seems to be shared by the *WTO Working Group on the Interaction between Trade and Competition Policy.*[26] Instead, coordination between national authorities would be both less costly and more effective, since national authorities have a much better access to market information.

Coordination of competition policies would be subject, of course, to WTO dispute settlement, and it could be contemplated in this context whether first steps into granting standing and self-executing rights to private parties and affected competitors should be introduced.

Global Disciplines on Export Cartels

The second subject matter and area of lacking disciplines are export cartels. Neither the law of the United States nor of the European Communities, nor many other countries, prevent and prohibit the use of export cartels.[27] The focus in antitrust law is limited to cartels with national or regional effects.[28] It still is an essentially territorial concept. As long as such practices do not affect domestic markets, cartels are allowed and may be even encouraged. It does not mind allowing for private practices and conduct which at home it would not want to see applied.

It is important to note that the advent of improving protection of IPRs on foreign markets improves the potential of export cartels at the very same time. Why is this so? IPRs essentially have been based on the concept of territoriality. Many countries therefore operate an IPR systems on the basis of what is called national exhaustion, and regional exhaustion, respectively. Exclusive marketing rights need to exhaust at some point in order to bring about legal security in down-stream markets. It is therefore generally accepted that IPRs exhaust

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[24] See Articles 19 and 20 of the DIAC (reprinted in Fikentscher/Immenga (eds.), *Draft International Antitrust Code,* Baden-Baden 1995, p. 53; for further comments see Wolfgang Fikentscher/Andreas Heinemann/Hans Peter Kunz-Hallstein, *Das Kartellrecht des Immaterialgüterschutzes im Draft International Antitrust Code*, GRUR Int. 1995, 757, 759.

[25] Wolfgang Fikentscher, *An International Antitrust Code*, 27 IIC [1996], 755, 767.

[26] Assessment based upon conversations with WTO staff, March 18, 1999.

[27] Neither Article 85 of the EC Treaty nor the U.S. Sherman Act or the FTAs contain such prohibitions.

[28] This somewhat narrow view of antitrust law is the result and the shortcoming of the effects doctrine as it is applied by the U.S., the EC Commission and other national jurisdictions.

upon the putting on the market of the product either by the right-owner or with his or her consent. This is not controversial. What is controversial is whether such exhaustion should only take place if the putting on the market takes place within the jurisdiction of the national or regional IPR.[29] In favor of this view, it is argued that IPRs are indeed a territorial and national or regional concept. Therefore, the argument goes, the putting on the market abroad does not affect the right in another jurisdiction where it is protected by a separate title, e.g. a trade mark or a patent. On the other hand, it is argued that exhaustion takes place independently as to where the putting on the market takes place. This is called the doctrine of international exhaustion. The divergence is of practical importance. While in the first case parallel imports can be banned, this is no longer possible under the second view.

Views as to exhaustion are highly controversial and were left open to Members under Article 6 of the TRIPs Agreement. It is perfectly possible for Members to continue and adopt policies of national or regional exhaustion. There is no obligation to work on the basis of international exhaustion.[30] The lawful existence of export cartels in most jurisdictions is likely to reinforce the doctrine of national exhaustion and thus of market segregation abroad. The following example may explain this relationship.

An export cartel in country A among producers I, II and III may envisage compartmentalization of markets in countries B, C and D. Each of the producer is allocated a market, and contractual relations prevent them from offering or importing the product in the other markets. Respective trademarks or patents of I, II, and III in respective markets may be partly used to protect imports or production. They may partly be used to ban production of importation. To the extent that countries B, C, and D apply doctrines of national exhaustion, the cartel can even be enforced in down-stream markets, as buyers, not bound by contractual relations among I, II, and III, can be prevented from parallel importing such products in markets B, C and D. In other words, competition is eliminated and this is likely to result in higher and differential pricing of the product.

One way of addressing the problem of export cartels is by arguing in favor of international exhaustion. This view argues that national or regional exhaustion cannot be sustained in a globalizing economy. It is at variance with basic concepts of territoriality otherwise applied in the field of law, in particular competition law. It suggests that the matter of regulating parallel imports should be addressed by GATT 1994 and dealt with under special exemptions under Article XX (d) which allows for particular marketing regulations, e.g. in the field of pharmaceuticals, books or other culturally sensitive issues.

The debate on exhaustion is a fundamental one, almost a religious one, and concepts of national exhaustion are fiercely defended by IPR owners. It will therefore be difficult to address export cartels merely by means of IPRs, hoping for a consensus on exhaustion. Moreover, even under a doctrine of international exhaustion, contractual export cartel

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[29] For a detailed analysis see Frederick M. Abbott, *First Report (Final) to the Committee on International Trade Law of the International Law Association on the Subject of Parallel Importations*, Journal of International Economic Law (1998), p. 607-636 and Thomas Cottier, *The WTO System and Exhaustion of Rights*, paper presented at the Committee on International Trade Law Conference on the Exhaustion of Intellectual Property Rights and Parallel Importation in World Trade, Geneva, November 6-7, 1998.

[30] See Marco C.E.J. Bronckers, *The Exhaustion of Patent Rights under World Trade Organization Law*, 35 Journal of World Trade 5 [1998] p. 137-159.

arrangements would escape WTO disciplines.

It is therefore submitted that the problem of export cartels should be addressed up front in the WTO. While lenience towards these restrictive practices may be conceivable from a strictly national point of view, it amounts to a beggar your neighbor policy from the point of view of the international system. Allowing export cartels obliges many Members to invest a considerable amount of resources in antitrust policies. Developing countries often do not have the means as well as medium and small nations do not have the power to enforce their own rules. Besides the financial burden of investigations against cartels coordinated abroad there is also a great difficulty to really do them since competence of national competition authorities generally stops at the border. Because of this, in many cases it is simply impossible to get access to evidence. Leading exporting Members of the WTO therefore should support efforts in bringing about competition rules around the world by agreeing to prevent and combat export cartels in the first place. If this is being done on a mutually agreed platform, it will be of equal advantage to these Members alike. A restriction on export cartels imposed by WTO rules on domestic law will allow not only to intervene where the effect of the cartel takes places, but also in the country of its origin where legal remedies to stop and fine such practices may often be better developed. From a practical point of view of law enforcement, this entails a considerable improvement of efficiency of competition rules. Many problems encountered in present and future legal assistance in prosecution could be solved that way.

A ban and disciplines on export cartels will also ease the problem of anti-competitive effects of IPRs. Even under doctrines of national exhaustion of rights, market segmentation will no longer be possible as a matter of antitrust law, and competition among different products, even from the same exporting country, will result in lowering prices in the third country market concerned.

Conclusions

In the cacophony of conflicting interests, disciplines of competition law on the use of IPRs may be addressed on different levels, national, regional and international:

We would recommend to:

- develop national or regional standards of competition law relating to IPRs, as allowed for by the TRIPs Agreement, and if necessary, expand such norms with the TRIPs Agreement.

- Provide legal and technical assistance in the formation of competition policy and law for developing countries by appropriate fora, both national and international, including WTO, WIPO, UNCTAD and OECD.

- Improve mutual legal assistance in the prosecution of competition law cases, including those relating to abuse of IPRs. Based upon bilateral experience, a multilateral mandatory agreement should be developed within the WTO.

- Elaborate binding global disciplines on export cartels within the WTO. This may affect territorial use and allocation of IPRs and work in support of enhanced market access opportunities.

- Not to undertake an effort at full harmonization of CPRs and the institution of a central and

global anti-trust authority in the WTO, at this stage. As to IPRs, jurisdiction to assess abuse of rights and exceptions based on CPRs already exists under the TRIPs Agreement and can be improved by making those exceptions binding in order to bring about an appropriate balance in all Members alike. The matter, however, essentially will need to rely upon a case-by-case assessment and requires protection by WTO dispute settlement.

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