

Competition Law and Intellectual Property Rights  
with Special Reference to the TRIPS Agreement

Research Paper for the Competition Commission of India

February-March 2010

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## §1 THE IPR AND COMPETITION LAW INTERFACE

The simple hallmark of competition law is the protection of those principles and practices which enable the efficient functioning of markets.<sup>1</sup> A natural concomitant to this objective is making certain that incumbent enterprises do not engage in anticompetitive practices to the detriment of the market.<sup>2</sup> However, the application of competition law standards—in terms of practices that should be banned outright, viewed as potentially anticompetitive or should be investigated further—varies widely across jurisdictions.<sup>3</sup>

The interaction between intellectual property rights (IPRs) and competition law is predominantly created by the non-rivalrous and non-excludable nature of intellectual property, which causes the problem of “appropriability”.<sup>4</sup> The creation of this *prima facie* “inherent tension”<sup>5</sup> is due to IPR holders being granted statutory rights to essentially control access to the intellectual property and charging monopoly rents for the use of the IPRs—something apparently in conflict with competition law, which attempts to curtail such market power.<sup>6</sup>

Historically, this conflict has been overplayed, right from the early days of the 20<sup>th</sup> century, when granting patents in particular brought about paranoia regarding monopolies<sup>7</sup> and patent licensing was heavily regulated.<sup>8</sup> However, following the expansion of IPRs to fill out the available market space and a gradual dissolution of the paranoia of automatically associating all IPRs with competition law violations (aided in no small part by the emergence of the law and economics analysis of competition law and IPRs spearheaded by the Chicago school<sup>9</sup>), this view has been tempered.

This tempering has grown into a more well-rounded concern of competition law with IPRs owing to two major developments<sup>10</sup>—the expansion in functional coverage of IPR protection and its vertical expansion to a new range of products, especially knowledge-based products<sup>11</sup> and the appreciable trend, especially in IPR-driven markets such as the US, EU and Japan, of individual market leadership reinforced by IPR-protected industrial standards.<sup>12</sup>

However, it is now usually accepted<sup>13</sup> (as typified by the formulation of competition law as “public interest law designed to regulate the exercise of economic power”<sup>14</sup>) that the two regimes are not so much at loggerheads as they pursue the goals of consumer welfare and encouraging innovation<sup>15</sup> through different means. Premised on the idea that enterprises in a competitive market will be less complacent and have greater incentive to innovate to gain market share, competition law can indeed act as a spur for intellectual property.<sup>16</sup> It is thus implicitly understood that the real issue that competition law has is not with the *existence* but with the *exercise* of IPRs.<sup>17</sup> Striking this balance involves walking the tightrope between over- and under-protection of

innovators' efforts—not compromising on a sufficient incentive for the innovator but also ensuring that follow-on invention is not delayed and consumers are not victimized for unnecessarily long periods by high prices.<sup>18</sup>

Three theoretical bases have been suggested for this reconciliation between IPRs and competition law regimes:<sup>19</sup>

(a) the view that competition law should only interfere with innovation/IPRs when social welfare is at risk;

(b) the view that concentration and monopoly markets have the edge over competitive markets in terms of innovation owing to greater capital and resources and

(c) the view that competition law only concerns itself with consumer welfare when the effects of a proposed action on production and innovation efficiency are neutral or indeterminate.<sup>20</sup>

These theoretical underpinnings would suggest that a reasonability standard be applied, taking into account the facts and circumstances of the case in question.

Two main concerns dominate this IPR/competition law interface. The first of these is the potential abuse of monopoly pricing, especially in developing countries where effective substitutes to IPR-protected products may not be readily available.<sup>21</sup> Second, competition law seeks to draw a line between permissible business strategies and abuse of IPRs—a line which is often blurred by horizontal agreements, exclusionary licensing restrictions, tie-in agreements, excessive exploitation of IPRs and other selling practices.<sup>22</sup>

However, at a conceptual level, the lines are clear. The limited monopolies granted by IPRs are not *per se* anticompetitive or excessively exploitative—they only become anticompetitive when the IPR holder looks to extend those rights beyond their intended and proper scope.<sup>23</sup>

## §2 TYPES OF RESTRAINTS

This interface between IPRs and competition law has evolved several types of restraints on competition. While no one has sought to contend that licensing agreements are *per se* anticompetitive,<sup>24</sup> the focus of these restraints is typically a licensing agreement which could adversely affect competition by artificially dividing markets among enterprises and possibly impeding the development of new goods and services.<sup>25</sup>

More specifically, the phenomenon of exclusive licensing, manifested through several unilateral market tactics by enterprises such as tie-in arrangements,<sup>26</sup> exclusive dealing, licensing restrictions (covering grant back clauses,<sup>27</sup> extensions of IPR terms<sup>28</sup> and field-of-use restrictions<sup>29</sup>) as well horizontal agreements (like pooling<sup>30</sup> and cross-licensing by parties collectively possessing market power), have attracted the attention of competition regulation authorities across the world.<sup>31</sup>

## §3 COMPETITION LAW REGULATION OF IPRs ACROSS JURISDICTIONS

### §3.1 EUROPE

The IPR/competition law interface finds expression in Article 81 of the EC Treaty<sup>32</sup> which discusses the compatibility of IPR licensing agreements with competition policy. In this regard, the policy of the EC has evolved from a liberal, permissive approach in earlier years to a middle phase based on formal intervention, to the prevalent, more economics-centric approach reflected in the block exemption for technology transfer agreements (TTBER) of 2004, accompanied by the relevant Technology Transfer Guidelines,<sup>33</sup> which specifically cover patents.<sup>34</sup> The permissive approach, best illustrated by the “Christmas Message” of 1962,<sup>35</sup> excluded even exclusive patent licensing agreements from the scope of Article 81 to the extent that the restrictions fell within the scope of the patent. In the 1970s, however, the EC followed a more hard-line approach, holding that an IPR license going beyond the simple right to exploit an innovation was in straightforward violation of Article 81, save a specific exemption.<sup>36</sup> This stance forced a search amongst innovators for block exemption regulations on patent licenses. After a first draft in 1979, the first block exemption was adopted in 1984.<sup>37</sup> With the block exemption floodgates opened, the EC had very little in terms of competition law concerns associated with IPR licensing agreements post-1984.<sup>38</sup>

The TTBER of 1996<sup>39</sup> listed eight “blacklisted” categories including certain restrictions relating to price and output, competing products, exports to territories within the common market, customer allocations, R&D activities and full grant-backs of license improvements.<sup>40</sup> This block exemption was replaced by the 2004 TTBER.

Further breaking away from the interventionist approach in *Nungesser*,<sup>41</sup> the ECJ concluded that exclusivity provisions did not automatically infringe Article 81.<sup>42</sup>

Also of importance in the EC context is the yardstick for abuse of dominant position under Article 82, which transactions involving IPR agreements often trigger.<sup>43</sup>

### §3.2 US

Though the existence/exercise distinction is not expressly recognised under US law, basic standards in terms of IPR licensing and competition law, such as mere acquisition of IPRs not being illegal<sup>44</sup> and enforcement of IPRs possibly constituting monopolization under Section 2 of the Sherman Act<sup>45</sup> have been well-recognised.<sup>46</sup> Even horizontal agreements such as cross-licensing have been engaged with at a nuanced level, taking into account its potential positives and negatives.<sup>47</sup>

US law, under Section 33(b)(7) of the Lanham Act also pays special attention to the entanglement of trademarks and competition law, based on the recognition of the fact that trademarks become valuable property rights, as opposed to monopoly rights, which

patent law is based on.<sup>48</sup> Several US cases in this area have emerged from corrective measures adopted to set right old monopolistic/cartel arrangements.<sup>49</sup>

Similar to patent law, US Courts have evolved a competition misuse doctrine applicable to trademarks, based on the “clean hands” doctrine.<sup>50</sup> However, for the defence to be used in trademark cases, the use of the trademark has to be essential to the competition law violation.<sup>51</sup> US Courts have also taken the lead in mapping out the interaction between trademark licensors and the extent of control exercised by them in a competition law context.<sup>52</sup> More specifically, considering exclusivity-based arrangements such as tie-in agreements, US law has evolved its own reasonableness standards.<sup>53</sup>

The most recent legislative effort of note is the adoption of the US Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property Rights, 1995, under which very few horizontal restraints are challenged as *per se* unlawful. Among those restraints which have been held *per se* unlawful, price fixing, market division and output restraints and certain group boycotts are most prominent.<sup>54</sup> The standard adopted to determine whether a restraint in a licensing condition is given *per se* or rule of reason treatment is an assessment of whether the restraint can be expected to contribute to an efficiency-enhancing integration of economic activity.<sup>55</sup>

### **§3.3 OTHER JURISDICTIONS**

In Japan, the Guidelines for the Regulation of Unfair Trade Practices with Respect to Patent and Know-How Licensing Agreements, 1989 placed five types of restrictions including restrictions on domestic prices of patented goods, prohibitions on handling or using competitors’ goods/technology, R&D restrictions and exclusive grant-back requirements.<sup>56</sup> These have since been supplanted by Section 21 of the Anti-Monopoly Act and the Guidelines for Patent and Know-How Licensing Agreements, 1999, the combined effect of which was that acts recognised as an exercise of rights under the Japanese Patent Act or other Acts are no longer subject to the Anti-Monopoly Act.<sup>57</sup>

Following the UK example, Australia now provides, under Section 144 of the Australian Patent Act, 1990 that certain anticompetitive practices in furtherance of exercising patent licenses are automatically deemed to be null and void.<sup>58</sup>

## **§4 THE TRIPS AGREEMENT**

Perhaps the most important characteristic of the TRIPS Agreement<sup>59</sup> is the room provided for flexibilities, presumably for developing countries.<sup>60</sup> Given the uphill battle<sup>61</sup> faced by developing countries in terms of compliance with the TRIPS provisions relating to pharmaceutical product patents, plant varieties and well-known trademarks<sup>62</sup> to name a few, competition law-related compliance is but an additional term imposed on

developing countries. Contrarily, the scope for exercising flexibilities exists for developing countries in this area as well.

There is specific, if limited,<sup>63</sup> mention in the text of the TRIPS Agreement itself of the role competition policy is expected to perform in supplementing the IPR policy under the TRIPS.<sup>64</sup> However, it is equally noticeable that this expectation, notwithstanding illustrative lists such as those in Article 40, is a mere exhortation, it is not mandatory in character.

Despite the absence of mandatory character, since WTO law cannot be “read in clinical isolation from public international law”,<sup>65</sup> it gives greater precedence to the obligation to read the TRIPS in good faith and, accordingly, the term “anticompetitive practices”<sup>66</sup> under TRIPS may be read broadly.<sup>67</sup>

Thus, the competitive balances sought to be attained by TRIPS are contained in the objectives and principles.<sup>68</sup> First, Members may, in formulating or amending their laws, adopt appropriate measures to prevent the abuse of IPRs, restraint of trade or international transfer of technology.<sup>69</sup> Second, is an interpretive principle in favour of adopting measures necessary for prevent monopoly abuse by IPR holders and anticompetitive licensing arrangements, which is put into operation by Article 40 (a *lex specialis* provision to the general provision in Article 8.2),<sup>70</sup> which establishes a regime for controlling such practices.

#### **§4.1 ARTICLE 7**

These TRIPS objectives and principles which seek to attain competitive balances are provided in Articles 7<sup>71</sup> and 8.2. These Articles set the framework for the TRIPS Agreement and have been lauded as being consistent with developing country interests.<sup>72</sup>

The inclusion of Article 7 in the substantive text of TRIPS is puzzling, considering that it features the word “should”, normally the preserve of preambular clauses.<sup>73</sup> However, the *factum* of its inclusion under Part I means that it was intended *not* to be a preambular condition and therefore is required to be interpreted according to the effective interpretation principle.<sup>74</sup>

The real value of Article 7, therefore, is in providing valuable context for the interpretation of other provisions—an obligation heightened by GATT/WTO jurisprudence, which explicitly highlights the need to consider the underlying purpose of the concerned treaty.<sup>75</sup>

## §4.2 ARTICLE 8.2

The other limb of the TRIPS objectives and principles relevant to competition law is provided by Article 8.2.<sup>76</sup> It is significant from a developing country perspective since it affords room for justifying provisions of competition law to deal with areas on which TRIPS is silent, such as IPR abuses arising out of dominant positions.<sup>77</sup>

This provision suffers from the handicap that it does not *mandate* that WTO Members have a competition policy, in addition to the fact that purely private enterprises unsupported by the government cannot be proceeded against under WTO rules.<sup>78</sup>

Another possible limitation on Article 8.2 is the “consistent with this Agreement” proviso, which could potentially be interpreted restrictively and thereby deprive it of any substantial meaning.<sup>79</sup>

## §4.3 ARTICLE 40

Article 40<sup>80</sup> is undoubtedly the epicentre of the IPR/competition law interface in TRIPS and is seen as a crucial element of the flexibilities available to developing countries.<sup>81</sup> Given that it has its roots in developing country-backed initiatives such as the draft International Code of Conduct on Transfer of Technology<sup>82</sup> and the Set of Multilaterally Equitable Agreed Principles and Rules for the Control of Restrictive Business Practices adopted by the UN General Assembly in 1980,<sup>83</sup> this is not surprising.

The significance of Article 40 is partly symbolic—not only is it the first time that the subject has been formalized in the domain of international law, it is also commendable since, at the top of Uruguay Round, the discussion on anticompetitive practices was sought to be shelved altogether.<sup>84</sup>

It is also evident from a plain reading of Article 40 that IPR law and competition law are viewed *in pari materiae* and that competition law is seen as the second layer which helps in establishing a balance of rights and obligations relating to IPRs.<sup>85</sup>

Article 40, by definition, also brings within its ambit activities of transnational enterprises in issuing IPR licenses and is therefore far more pathbreaking than any such prior efforts.<sup>86</sup> These positives has to be set against the fact that, in essence, Article 40 is merely permissive and contains no substantive indicators of conditions that it deems to be *per se* anticompetitive.<sup>87</sup> Under *status quo*, there is marked disagreement on what licensing conditions are considered *per se* illegal and what standards are used to decide whether a condition is impermissible or not.

In an enabling sense, though, Article 40 gives Members the leeway to adopt “appropriate measures” to control anticompetitive practices in addition to a provision for consultation and request-based cooperation to deal with violation of competition laws.<sup>88</sup>

This “appropriate measures” flexibility, however, raises questions of access in situations where there is an outright refusal to transfer technology. The jurisprudence on refusal to grant an IPR license *at all* is not widely recognised as anticompetitive,<sup>89</sup> though the ECJ held otherwise in the *RTE* case.<sup>90</sup> This problem is further complicated in network-based industries such as telecom and IT, where the larger objective of building an information-based economy is often not possible without the building blocks for further innovation covered by the rights of the IPR holder.<sup>91</sup> Though such issues are resolved voluntarily in developed countries, such voluntarism would be next to impossible to enforce in developing countries facing the problem of access to technology.<sup>92</sup> Therefore, granting developing countries the flexibility to use “appropriate measures” under Article 40 (and, essentially, specify circumstances which would be *per se* violations)<sup>93</sup> is a valuable tool in challenging the paradigm of US/EC-like laws.

Article 40.1, regarded as one of the few direct applications of Article 8.2 in the TRIPS Agreement, appears to be recognition-based and is worded more restrictively (“impede”) than Article 8.2 (“adversely affect”).<sup>94</sup>

Despite the evident restriction of Article 40 to licensing, the term “practices or conditions” seems to suggest that Article 40.1 applies not only to clauses in a contract but to the *circumstances surrounding* the conclusion or not of a licensing agreement, including situations of refusal and discriminatory conduct by IPR holders.<sup>95</sup>

Further, Article 40.1 is tied to these practices and conditions not only “restrain[ing] competition” but also having “adverse effects on trade and [possibly impeding] the transfer and dissemination of technology.” This prompts the conclusion that, unlike the original proposal of developing countries, the restraint of competition is a non-negotiable requirement under Article 40.1.<sup>96</sup>

As to the legal effect of the provision, two interpretations are possible. One view is that it is a directory, non-committal provision.<sup>97</sup> However, it immunizes Members from violation complaints under TRIPS in case they control restrictive practices in licensing arrangements, subject to the criteria set in Article 40.2.<sup>98</sup> The other view is that Article 40.1, read in conjunction with Article 7, may be understood as imposing an obligation on Members to address certain forms of anticompetitive practices.<sup>99</sup>

Other issues for consideration under Article 40.1 include whether the Member where the licensor is domiciled can be deemed to be under an obligation to control practices if their effects take place in a foreign jurisdiction.<sup>100</sup>

Further, whether Article 40 positively allows adoption of measures against restrictive or abusive practices that do not comply with the general definition set out in Article 40.1 is also open to question.<sup>101</sup>

Taking the basic minimum from these issues, Article 40.1 should not be read to imply Members having passed up their right to control practices other than those covered by the Article, such as export restrictions, which may limit the development impact of licensing agreements.<sup>102</sup>

Article 40.2 does not contain specific obligations but instead expressly allows Members to adopt measures and unlike Article 40.1, there is reference to an “adverse effect on competition” specifically.<sup>103</sup> Thus, it appears to put the control of licensing practices more directly into the scope of competition law regulation and exclude the possibility of considering effects on the transfer of technology as sufficient grounds to disallow a practice if it is not abusive and does not affect competition in the relevant market.<sup>104</sup>

The need to examine the effects of licensing practices/conditions requires a standard like the US “rule of reason” doctrine, which requires weighing of circumstances to determine whether a practice *unreasonably* restrains competition.<sup>105</sup> However, Article 40.2 prescribes no such substantive rule, instead only issuing a general indication about the method of examination.<sup>106</sup>

A peculiar feature of Article 40.2 is the inclusion of three examples<sup>107</sup> of anticompetitive practices, culled from many other restrictions such as restrictions on research and use of personnel, price fixing, exclusive sales or representation agreements, tying agreements, export restrictions and other practices which were included in earlier drafts of Article 40.2.<sup>108</sup> Perhaps the most meaningful explanation for this is to see these three as reflecting a minimum consensus.<sup>109</sup>

Article 40.3 provides for a consultation system of checking anticompetitive practices in licensing agreements through “positive comity”, though it does not oblige the second country to initiate an independent investigation or control a practice deemed to be anticompetitive by the first country.<sup>110</sup>

For a Member to activate the WTO Dispute Settlement Body under Article 40.3, it must prove that such anticompetitive practices are the effects of a direct involvement and not mere inaction of the second country in the private firms’ anti-competitive conduct. This was elaborated in WTO panel reports in *Japan-Film*<sup>111</sup> and *Argentina-Hide and Leather*.<sup>112</sup>

The starting point for activating the Article 40.3 process is the intention of the first country to secure compliance with its national legislation, though this is a problem in itself, given that, until 1990 (when the substantive draft of the TRIPS Agreement on this issue was near-complete), only sixteen developing countries had a formal competition policy.<sup>113</sup> Compounded by a lack of experience and resources to handle international competition disputes,<sup>114</sup> there has been no evidence of the Article 40.3 system having been invoked to date.

Article 40.4 has been characterized as the “defensive” side of the Article 40.3 process, which allows Members to request consultation when their nationals are subject to procedures in foreign countries and requires the host Member to respond to such requests.<sup>115</sup> Much like Article 40.3, there is full judicial and administrative freedom for the home agencies to decide the issue in accordance with law and much like Article 40.3, Article 40.4 has never been effectively applied either.<sup>116</sup>

It is thus impossible to shrug off the feeling that the full realization of Article 40 is only possible if all Members have effective mechanisms and guidelines for quality and speedy adjudication of competition disputes.<sup>117</sup> Though efforts such as the first ministerial conference of the WTO in 1996 have served to catalyze this process in developing countries, the progress in this field remains limited.<sup>118</sup>

#### **§4.4 ARTICLE 6**

Under Article 6, TRIPS deals with the issue of exhaustion of rights of IPR holders. It is seen as a necessary ingredient in balancing the rights of the IPR holder and the needs of the market.<sup>119</sup>

Article 6 makes an exclusion of the issue of exhaustion of rights for the purposes of dispute settlement under TRIPS.<sup>120</sup> This suggests that exhaustion may be subject to TRIPS for other purposes.<sup>121</sup> From a developing country perspective, Article 6 makes for happy reading since it leaves flexible the extremely broad question of *when* exhaustion may be deemed to have occurred. Though no preference *vis-à-vis* a particular exhaustion regime is indicated,<sup>122</sup> the predominant view appears to be that international exhaustion is the most pragmatic extension of healthy competition policy since such a system would safeguard the competitiveness of local economies which would undoubtedly be prejudiced if they were forced to buy production inputs exclusively from distributors who charge higher prices than in foreign markets.<sup>123</sup> Equally, consumers would benefit from their market expanding to include potentially cheaper foreign-sourced products.

This freedom of Members to allow such “parallel imports”<sup>124</sup> under Article 6 was confirmed by para 5(d) of the Doha Declaration, which declared the right of each Member to establish their own exhaustion regimes “without challenge.”<sup>125</sup>

An unlikely source for the interpretation of Article 6 emerges from the Treaty on Intellectual Property in Respect of Integrated Circuits, 1989<sup>126</sup> according to which the consent of the IPR holder would be a condition precedent for the legality of parallel imports.<sup>127</sup> This is the instructive, if only for the reason that it is the singular express exhaustion of rights clause contained in WIPO-developed treaties.<sup>128</sup> Since it must be assumed that the TRIPS drafters were aware of the 1989 Treaty, TRIPS must be interpreted as explicitly *not* containing such a limitation.<sup>129</sup>

However, following this idea of IPR holders' consent to its conclusion, a compulsory license *cannot* be the source of legitimate parallel imports, unless the rationale for exhaustion is subjected to a more straightforward reward-for-innovation paradigm<sup>130</sup> under which the price of the product sold in a foreign market is deemed to include the value of the IPR/compensation for the protected subject matter.<sup>131</sup>

This would appear to be a safe, consistent and effective interpretation of Article 6,<sup>132</sup> since it can scarcely be argued that the IPR holder has a right to control use/resale of goods put on the market where the first sale/distribution already incorporates the rents duly earned by the IPR holder.<sup>133</sup> These arguments are backed up by a recent EC study which suggests that the impact of an international exhaustion regime on pricing would be minimal, owing to the rampant nature of other price equalizing factors such as import duties, technical barriers and tight vertical restraints.<sup>134</sup> However, this comes with the significant *caveat* that no such broad-based study has been carried out using developing countries as the base market.<sup>135</sup>

Naturally, this interpretation has to deal with the objection that parallel trade would, at some level, the reward theory notwithstanding, devalue the incentive for innovation.<sup>136</sup> A further argument supporting parallel import restrictions stresses the possibility of widely differing quality of products, thereby leading to consumer deception.<sup>137</sup> At a practical level too, territorial restrictions on licensing contracts and product labeling would be very hard to enforce.<sup>138</sup> Jumping on the international exhaustion bandwagon would also be to lose sight of the objectives of price-discriminating monopolists whose most likely responses to arbitrage would be to raise, rather than lower, prices uniformly or, worse, withdraw supply altogether.<sup>139</sup>

The choice of interpretation notwithstanding, segregation of exhaustion policies whether according to categories of IPR or categories of products remains devilishly difficult, since Members retain the freedom to retain differing exhaustion regimes for different categories of IPR. A further issue is of whether the harmonization of exhaustion policies should be done unilaterally, bilaterally or regionally and which alternative would not violate the MFN clause in Article 4.<sup>140</sup>

#### **§4.5 ARTICLE 31**

Situations under which TRIPS deems the issuing of compulsory licenses<sup>141</sup> to be a valid exercise of Members' powers are listed in Article 31 [of which the competition law-specific escape clause is Article 31(k)<sup>142</sup>] and stands as a powerful counterbalance to the potentially adverse effects of strong IPR protection.<sup>143</sup> The absence of consensus which has precipitated Article 31 may, in itself, be seen as a significant achievement for developing countries for whom this is a significant policy instrument.<sup>144</sup> Indeed, it is readily apparent that there is a huge gap between the rights permitted under TRIPS and the practical experience in enforcing those rights in developing countries.<sup>145</sup>

The eleven conditions in Article 31 have been painted as “strict safeguards” but most are dependent on the purposes for which use without authorization of the IPR holder is granted in the first place.<sup>146</sup> Thus, constructing grounds to ensure such conditions fall within Article 31 (and the non-discrimination principle under Article 27.1)<sup>147</sup> is not particularly difficult.

It remains to be seen, however, whether developing countries that aim to encourage innovation by domestic entities would be trigger-happy on compulsory licensing provisions since this could work against the interests of new domestic inventors and set an adverse example to potential inventors.<sup>148</sup>

Indeed, as the US challenges to the compulsory licenses granted by Brazil and Argentina in 2000 showed,<sup>149</sup> opposing movements to tighten and relax Article 31 have cancelled each other out.<sup>150</sup> Thus, a WTO clarification on the precise scope of Article 31 may well be necessary.<sup>151</sup> A clarification would help preserve and expand the ability of Members to grant compulsory licenses and rid them of unilateral pressure or threats of dispute settlement proceedings.<sup>152</sup>

## **§5 WHAT STANCE SHOULD DEVELOPING COUNTRIES TAKE?**

Given the unsatisfactory nature of provisions dealing with competition law under TRIPS, there is always the possibility that this area could be a part of a broader set of negotiations on trade and competition at the WTO.<sup>153</sup> However, given the diverse sets of interests involved, there is little reason to believe that anything more substantial than an object of compromise would come to pass.<sup>154</sup> However, if such an initiative does come to pass,<sup>155</sup> developing countries would do well to carefully scrutinize and clarify the exact scope of these provisions in addition to continuing to exploit the flexibilities currently assured under the TRIPS Agreement.<sup>156</sup>

Another fear that developing countries are justified in having from such further negotiations is of the actual development of TRIPS-plus jurisprudence (based on the case law development in the US, EU and Japan) which could well tighten TRIPS flexibilities instead of developing a new basis for discussion.<sup>157</sup> The objective of developing countries in encouraging competition law cooperation should thus be to focus on cases where IPR-induced restraints operate to nullify the anticipated benefits.<sup>158</sup>

As for the TRIPS itself, notwithstanding the statements of intent in Articles 7 and 8.2, competition law does not appear to be very predominantly addressed.<sup>159</sup> From a competition law perspective, developing countries must continue to ask whether and on what grounds, for objective reasons, IPR protection can be reasonably denied because the exclusivity that comes with it disincentivises innovation<sup>160</sup>—a question especially pertinent in the context of Article 31.

There is also the obvious risk that the “consistent with this Agreement” term in Article 8 could be interpreted restrictively enough to severely curtail the substance of Article 8.<sup>161</sup> However, this particular issue seems to have been laid to rest by the strong affirmation of the importance of Article 8 in the Doha Declaration, with para 5(a) stating that *each provision* of TRIPS is to be read in light of the object and purpose of the Agreement.<sup>162</sup> The “principles” clearly mean business.

The TRIPS is also almost exclusively the developing countries’ battleground since a lot of its substantive content was based on the EPC and has therefore had little impact on EU law, other than limiting the grounds for granting compulsory licenses.<sup>163</sup> Indeed, in the EU in particular, it has been argued on the strength of Article 50 of TRIPS and the decision in *Lenzing AG’s European Patent (UK)*<sup>164</sup> that the TRIPS does not have direct effect.<sup>165</sup> Therefore, since the TRIPS has the greatest potential impact on them, the focus of developing countries, at all times, must remain on *their* markets and what measures best respond to their historical context, objectives and development needs.<sup>166</sup>

On the issue of dissemination of technology in developing countries, it is becoming increasingly evident that Article 7 is a mere pipe dream and the real difficulty is in ensuring that developing countries with weak technological capabilities can work and innovate around existing patents.<sup>167</sup> Further, in negotiating technology transfers, developing country producers are often at a bargaining power disadvantage since developed country licensors may attempt to exploit their market dominance by including unfair technology transfer clauses.<sup>168</sup> It therefore becomes essential to ensure that Articles 8.2 and 40 in particular are adopted into national legislations<sup>169</sup> and to encourage developing countries to be proactive in utilizing compulsory licensing under Article 31.<sup>170</sup>

Thus, the issue comes back to the need for developing countries specifying concrete conditions to govern the granting of compulsory licenses as the legal certainty would incentivise domestic producers to take up licenses.<sup>171</sup>

Developing countries should also seek to formalize Article 40 of TRIPS into a set of guidelines establishing the precise areas of intervention for Members in cases of IPR regimes triggering competition law.<sup>172</sup>

As for Article 6 obligations, owing to the country-specific factors that greatly influence exhaustion regimes,<sup>173</sup> developing countries would be well-advised to ensure that appropriate exhaustion regimes with regard to all types of IPRs are enacted and implemented at a national level at least, as well as getting their act together as pertains to their stance on parallel imports.<sup>174</sup>

Outside of IPR licensing issues, competition regimes in developing countries should also be equipped to tackle directly anticompetitive practices such as collusive tendering,

exploitative pricing and tied purchases and market targets<sup>175</sup>—essentially any anticompetitive practice that could have direct impacts on consumer welfare.<sup>176</sup>

Developing countries should also expand efforts at the regional level, especially in the context of the public health/access to drugs since entire regions are galvanized by this common concern.<sup>177</sup> This could be used to come up with a consolidated set of conditions for granting compulsory licenses, for example, and could prove to be an unqualified benefit for the countries involved, at a political level as well.<sup>178</sup>

## **§6 ADDRESSING THE IPR AND COMPETITION LAW INTERFACE IN INDIA**

### **§6.1 THROUGH DOMESTIC LEGISLATION**

The roots of Indian law on competition can be traced back to Articles 38 and 39 of the Constitution which lay down the duty of the State to promote the welfare of the people by securing and protecting a social order in which social, political and economic justice is prevalent and its further duty to distribute the ownership and control of material resources of the community in a way so as to best subserve the common good, in addition to ensuring that the economic system does not result in the concentration of wealth. It is from these duties that the MRTP Act, 1969, also influenced by US, UK and Canadian legislations,<sup>179</sup> came about.<sup>180</sup>

The process of initiating a new competition law in India was started by an Expert Group set up to study trade and competition policy, following the Singapore Ministerial Declaration of the WTO in 1996.<sup>181</sup> Noting that competition policy is a prerequisite to economic liberalization, the Expert Group, in its report submitted to the Ministry of Commerce in January 1999 recommended that a fresh competition law be drawn up.<sup>182</sup> In October 1999, the government appointed a High Level Committee on Competition Policy and Competition Law to draft the new competition law, which was submitted in November 2000.<sup>183</sup> The resultant Competition Act, 2002,<sup>184</sup> coming into force mere months before the expiry of the TRIPS compliance period for India can therefore be seen as India's fulfillment of its TRIPS obligations.<sup>185</sup>

Under Section 3, the Competition Commission is required to look into agreements which are anticompetitive in nature and those found to be anticompetitive are declared void.<sup>186</sup>

The Competition Act incorporates a blanket exception for IPRs under Section 3(5) based on the rationale that IPRs deserve to be cocooned since a failure to do so would disturb the all-important incentive for innovation, which, itself, would have knock-on effects in terms of a lack of technological innovation and reflect a lack of quality in goods and services produced.<sup>187</sup> However, equally, it *does* draw the line inasmuch as it does not permit unreasonable conditions to be passed off under the guise of protecting IPRs.<sup>188</sup>

Thus, in principle, IPR licensing arrangements which interfere with competitive pricing, quantities or qualities of products would fall foul of competition law in India.<sup>189</sup>

However, this manifestation of Section 3(5) is far removed from the original recognition given by the High Level Committee to the fact that all forms of IPRs have the potential to raise competition policy problems, in effect recognizing the existence/exercise distinction.<sup>190</sup>

That apart, it has no mention of exhaustion, parallel importation or compulsory licensing.<sup>191</sup> Owing to the blanket exemption under Section 3(5), the square peg of any anticompetitive practice tethered to the use of IPRs must now be brought through the round hole of “abuse of dominant position”<sup>192</sup> under Section 4.<sup>193</sup>

Section 3 also remains puzzling, inasmuch as it goes against MRTP Commission precedent under the old Act which held that the Commission (and, by extension, the Competition Commission of today) had complete and unfettered jurisdiction to entertain a complaint regarding IPRs.<sup>194</sup> Indeed, *Manju Bhardwaj v. Zee Telefilms Ltd*<sup>195</sup> and *Dr Vallal Peruman v. Godfrey Phillips (India) Ltd*<sup>196</sup> stand as authority for the view that unfair trade practices [as understood under Section 36-A(1) of the old Act] could be triggered by the misuse, manipulation, distortion, contrivance or embellishment of ideas generated by the complainant.

Other grounds for critique of Section 3 in particular include the almost exclusive focus on protecting the IPR holder, no adequate consideration of public interest and the absence of any power to restrict an IPR holder from imposing reasonable conditions on licensees for protecting such IPRs.<sup>197</sup>

While the Act *does* create categories of *per se* illegality such as price fixing, geographical divisions and market divisions, the standardized treatment extended to these categories as well as to tying arrangements, refusals to deal, re-sale price maintenance and exclusivity agreements suggests that the standard of if “they cause an appreciable adverse effect on competition”<sup>198</sup> would have to be very sound indeed.

## **§6.2 AT INTERNATIONAL FORA**

Relevant to IPR and competition law, India made three proposals at the WTO Ministerial Conference in 1999.<sup>199</sup> The first was with regard to transfer of technology and called on developed countries to provide incentives to enterprises to promote technology transfer to developing countries as they were enjoined to do under Article 66.2.<sup>200</sup> India used the example of environmentally friendly technology that could serve as a useful starting point for facilitating such fair and favourable transfer<sup>201</sup> and also supported a further study of the TRIPS provisions including Article 40 to better evaluate where implementation of technology transfer could be improved.<sup>202</sup>

The second proposal was a call for harmonizing the approaches to utilizing living resources as under the TRIPS Agreement and the UN Convention on Biological Diversity—primarily a clash between the hand-me-down provision under Article 27.3 of the former and the affirmation of Members’ sovereignty in such issues under the Preamble of the latter.<sup>203</sup> India suggested the *viamedia* of including further conditions on patent applications under Article 29 of TRIPS and subsequent harmonization of national laws in line with this.<sup>204</sup>

Lastly, the Indian delegation put on record its view that a higher level of protection for GIs was necessary, noting the anomaly under Article 23 of TRIPS which extended the “kind”, “type” and “imitation” protections only to wines and spirits.<sup>205</sup> India called on Members to respond to the need to expedite and spread the benefits of work already initiated by the TRIPS Council in this regard under Article 24.<sup>206</sup>

While the first two initiatives are of an international character and require India to remain persistent at the international level, the third suggestion, *viz.* better protection for GIs, is something that Indian competition law also currently lacks. Thus, it may be recommended that India, which has adopted the relevant TRIPS standards under Section 22 of its GI Act, 1999, should look to bring unfair competition in dealing with GIs under its competition law since, currently, there is no agency to ensure enforcement of Section 22.<sup>207</sup>

Suffering from the same handicaps as the rest of the developing country bloc on the issue of competition law enforcement owing to the recent revamping of the regulatory structures governing competition law, it would appear to be bad policy for India to support a WTO-backed multilateral agreement on competition law.<sup>208</sup> If competition law improvements are sought to be made to the TRIPS itself, India would do well to buy more implementation time, restrict progress only to measures actually stymieing free trade and lobby for more exemptions.<sup>209</sup>

India also needs to be extremely careful about how to exercise discretion under Article 31 in granting compulsory licenses since the potential negative effects on R&D and new innovation are immense.<sup>210</sup> Following due administrative/judicial process is an absolute must, as provided by the Article 31 procedure.<sup>211</sup> The need for harmonizing the current Act (which, in *status quo*, merely provides that an evaluation of whether an enterprise enjoys a dominant position take into account technical advantages including IPRs held by it) with the standards for granting compulsory licenses in Article 31 is thus apparent,<sup>212</sup> since the due regard to technical advantages dilutes the stronghold created on the abuse of dominant position under Section 4.<sup>213</sup> It would be most advisable, therefore, to specify concrete circumstances in which compulsory licenses should be granted or, at the very least, which of the conditions in Article 31 of TRIPS are supported by India.

## ENDNOTES

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<sup>1</sup> This involves ensuring that entry and exit of enterprises is orderly and not artificially motivated and that efficient combinations of enterprises are enabled. The objective of safeguarding market efficiency may be allied to additional goals such as the promotion of small-scale enterprises or privileging a certain sector of the economy. These additional goals have gained great favour in recent years especially in developing countries, where the post-globalization entry of foreign enterprises has caused concern that free markets work *against* the interests of developing economies. See K. Maskus, COMPETITION POLICY AND INTELLECTUAL PROPERTY RIGHTS IN DEVELOPING COUNTRIES: INTERESTS IN UNILATERAL INITIATIVES AND A WTO AGREEMENT, <http://siteresources.worldbank.org/DEC/Resources/84797-1251813753820/6415739-1251814020192/maskus.pdf> (March 7, 2010).

<sup>2</sup> Such practices ordinarily cover merging with competitors to attain monopoly, refusing to supply goods or to license technologies on market terms in order to prevent competition and agreeing with other firms to establish collusive restraints on trade. In the context of intellectual property rights, certain peculiar anticompetitive practices, examined in detail in §2 *infra* gain prominence.

<sup>3</sup> *Supra* note 1.

<sup>4</sup> *Supra* note 1, at 10.

<sup>5</sup> *Supra* note 1, at 10.

<sup>6</sup> A. Ng, D. Liang and P. Waters, INTERSECT BETWEEN INTELLECTUAL PROPERTY LAW AND COMPETITION LAW, <http://www.chinalawinsight.com/2008/10/articles/corporate/antitrust-competition/intersect-between-intellectual-property-law-and-competition-law/> (March 7, 2010).

<sup>7</sup> See *E Bement & Sons v. National Harrow Co* 186 US 70, 91 (1902) and *US v. Masonite Corp* 316 US 265, 280 (1942).

<sup>8</sup> See *Motion Picture Patents Company v. Universal Film Manufacturing Company* 243 US 502 (1917). See also H. Johannes, *Technology Transfer under EEC Law—Europe between the Divergent Opinions of the Past and a New Administration: A Comparative Law Approach*, FORDHAM CORPORATE LAW INSTITUTE (1982), at 65.

<sup>9</sup> See generally R. Bork, THE ANTITRUST PARADOX (1978) and R. Posner, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976).

<sup>10</sup> S.D. Anderman, THE INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION POLICY (2007), at 8.

<sup>11</sup> See generally I. Rahnasto, INTELLECTUAL PROPERTY RIGHTS, EXTERNAL EFFECTS AND ANTITRUST LAW (2002), at 49-62.

This has been accompanied by an internationalization of these issues owing to TRIPS, which has been described as “a process whereby the wish lists of various intellectual property lobby groups are inscribed into public international law”. See P. Gerhart, *Why Lawmaking for Global Intellectual Property is Unbalanced*, EUROPEAN INTELLECTUAL PROPERTY REVIEW (2000), at 309.

<sup>12</sup> In this scenario, competition risks arise from the possibility that the market power might be abused to prevent access to downstream markets. In such situations, the IPR holder increasingly tends to look proprietorially at the development of improvements and new products relating to the IPR “system”. See generally D. Evans and R. Schmalensee, SOME ECONOMIC ASPECTS OF ANTITRUST ANALYSIS IN DYNAMICALLY COMPETITIVE INDUSTRIES, <http://www.nber.org/books/innovation2/evans5-1-01.pdf> (March 7, 2010).

<sup>13</sup> A. Jones and B. Suffrin, EC COMPETITION LAW: TEXT, CASES AND MATERIALS (2008), at 777. The converse point of view has been expressed in *US v. Westinghouse* 648 F.2d 642 (9th Circuit, 1981), where the Court said, “one body of law creates and protects monopoly power while the other seeks to proscribe it.” See M. Naniwadekar, INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW; FRIENDS OR FOES?, <http://spicyipindia.blogspot.com/search/label/competition%20law> (March 7, 2010) quoting J. Hovenkamp and Lemley, IP AND ANTITRUST: 2007 LOOSE-LEAF SUPPLEMENT, [http://www.law.uiowa.edu/documents/faculty\\_bib/hovenkamp-bib.pdf](http://www.law.uiowa.edu/documents/faculty_bib/hovenkamp-bib.pdf) (March 7, 2010).

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<sup>14</sup> R.J. Peritz, *A Counter-History of Anti-Trust Law*, DUKE LAW JOURNAL (1990), at 317.

<sup>15</sup> According to the United States Federal Trade Commission, competition law protects free competition in the marketplace, while IPRs protect innovators' ability to earn a return on the investments necessary to innovate and both spur competition among competitors to be the first to enter the marketplace. *Supra* note 6.

Today, the relationship between the two systems is characterized more by its accommodation than by its conflict. Examples of this balance include fair use in copyright law and non-obviousness and compulsory licensing in patent law. See generally S.D. Anderman, J. Kallaugher, TECHNOLOGY TRANSFER AND THE NEW EU COMPETITION RULES: INTELLECTUAL PROPERTY LICENSING AFTER MODERNIZATION (2006).

<sup>16</sup> L. Peeperkorn, *IP Licenses and Competition Rules: Striking the Right Balance*, 26 WORLD COMPETITION (2003), at 527.

<sup>17</sup> It can be argued that the existence/exercise dichotomy is a flexible tool developed by the ECJ to enable policy decisions to be made. This distinction was first introduced in *Consten & Grundig v. Commission* [1966] CMLR 418 and was further elaborated in *Deutsche Grammophon Gesellschaft v. Metro-SB-Großmärkte GmbH* [1971] CMLR 631.

See also *Keurkoop v. Nancy Kean Gifts* [1983] 2 CMLR 47 and *RTE & ITP v. Commission* [1995] 4 CMLR 718, at para 49.

Indeed, ECJ jurisprudence has been characterized by clamping down on the exercise and not the existence of IP rights, though the distinction between existence and exercise has also been regarded as unconvincing. See Fennelly, A.G. in *Merck and Co, Inc v. Primecrown Ltd (Merck II)* [1997] 1 CMLR 83, at para 95 on the grounds that a property right which cannot be exercised has no value. *Supra* note 13, at 774, 781.

<sup>18</sup> *Supra* note 16, at 527-528.

<sup>19</sup> See generally ABA Section of Antitrust Law, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW (2007), at 264.

<sup>20</sup> In other cases however, competitive restraints may be justified in order to increase production or innovation efficiency even though the immediate effect on consumers of the product may be adverse. Further, according to this view, the promotion of innovation is a competition policy concern, even in the absence of other legislation. See J.F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Process*, 62 NEW YORK UNIVERSITY LAW REVIEW (1987), at 1041-1042.

<sup>21</sup> *Supra* note 16 and *supra* note 1, at 14-15.

<sup>22</sup> *Supra* note 1, at 15.

<sup>23</sup> C. Gastle, M. Martyn, TRIPS, DOHA AND THE ROLE OF COMPETITION LAW IN COMPULSORY LICENSING, [http://www.dtn.go.th/vtl\\_upload\\_file//1256803453890/Lecture%20VII,%20%20TRIPS,%20Doha,%20Compulsory%20Licensing,%2009-10-19.ppt](http://www.dtn.go.th/vtl_upload_file//1256803453890/Lecture%20VII,%20%20TRIPS,%20Doha,%20Compulsory%20Licensing,%2009-10-19.ppt) (March 7, 2010).

<sup>24</sup> In fact, far from it, several benefits in terms of bringing new competitors, disseminating new technology and increasing rewards for innovation have been attributed to the general practice of licensing. Its effects are generally pro-competitive and beneficial to consumer welfare. It may be argued that since a license of IP rights allows a third party to exploit the rights, allowing it to do what would otherwise be unlawful, the grant of a license opens up markets and does not restrict competition. However, it has been seen that license agreements commonly contain provisions which go beyond a bare permission for the licensee to exploit the right. *Supra* note 13, at 789.

<sup>25</sup> The Institute of Chartered Accountants of India, COMPETITION LAWS AND POLICIES (2004), at 134.

<sup>26</sup> Tie-in arrangements are characterized by requirements that licensees acquire particular goods solely from the patentee, thereby foreclosing opportunities of other producers. They also encompass situations where a licensee is forbidden from competing or handling goods which compete with the goods of the IPR holder. *Id.*

<sup>27</sup> Grant-back clauses can be used to stifle competition by allowing a dominant player to license his technology without fear that a licensee might develop a better process to compete with the licensor since the clauses require any improvement be granted back to the licensor. *Supra* note 23.

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<sup>28</sup> These include agreements for royalty payments beyond the expiry period of the patent, royalty payments in respect of unpatented know-how as well as the subject matter of the patent. *Supra* note 25.

<sup>29</sup> This refers to restrictions placed on licensees based on territoriality or categories of customers. *Supra* note 25.

<sup>30</sup> Though not all such instances are anti-competitive, in most cases of patent pooling, manufacturing firms pool in their patents and undertake not to grant licenses to third parties while also fixing quotas and prices. This enables them to earn supra-competitive profits and keep new entrants out of the market. *Supra* note 23.

<sup>31</sup> In addition, several other anticompetitive practices such as clauses prohibiting licensees from competing or using rival technology, licensees being subjected to a condition not to challenge the validity of IPRs in question and licensors fixing prices at which the licensee should sell may be frowned upon by competition regimes. *Supra* note 25.

<sup>32</sup> The full text of Article 81 is available at European Union, TREATY ESTABLISHING THE EUROPEAN COMMUNITY: ARTICLE 81, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E081:EN:HTML> (March 7, 2010).

<sup>33</sup> The Guidelines set out a framework of general principles concerning Article 81 and IPRs. Further, they explain the provisions and application of the TTBER and also explain the application of Articles 81(1) and (3) to agreements outside the scope of the TTBER. This latter role is important as the new TTBER now plays a reduced role compared with that played by the previous IPR licensing block exemptions. New market share thresholds in the TTBER now mean that it provides less legal certainty and operates more as a "safe harbour." *Supra* note 13.

<sup>34</sup> The 2004 TTBER provides a block exemption/safe harbour for bilateral technology transfer agreements concluded between parties which do not exceed specified market shares and which do not contain specified hardcore restraints. The full text of the 2004 TTBER Regulation is available at IPRSTRUST, EU TTBER, <http://www.iprstrust.org/category/antitrust/eu-ttber> (March 7, 2010). *Supra* note 13, at 772.

<sup>35</sup> [1962-3] JO 2922/62 (December 24, 1962). *Supra* note 13, at 790.

<sup>36</sup> This was triggered by the development of the exhaustion doctrine and a greater reliance on the existence/exercise distinction. The *Consten & Grundig* case in particular strongly brought home to the EC the potential harm that could be caused by exclusive licensing agreements by isolating markets. However, so long as the parties were willing to modify the exclusivity clauses and other provisions held to be restrictions (tie-ins, no-challenge clauses, grant-backs of improvement), the EC showed a willingness to exempt them under Article 81(3). *Supra* note 13, at 789, 791.

<sup>37</sup> This block exemption was issued with due consideration of the decision in *Nungesser v. EC Commission* [1983] 1 CMLR 278 and an appeal from the *Maize Seeds* case [1978] 3 CMLR 434. *Supra* note 13, at 789.

<sup>38</sup> *Supra* note 13, at 790.

<sup>39</sup> This was provided for under Article 3 of the TTBER 240/1996.

<sup>40</sup> See generally A.S. Gutterman and B.J. Anderson, *INTELLECTUAL PROPERTY IN GLOBAL MARKETS* (1997), at 258-263.

<sup>41</sup> *Supra* note 37.

<sup>42</sup> The Court looked at the economic context and held that if the exclusivity provisions were necessary to induce the licensee to enter the transaction, then competition was not restricted. However, this approach was limited, since the Court also made a blanket statement invalidating clauses leading to the imposition of absolute territorial protection without considering their possible economic motives (paras 77-78). Further, nothing in the text of the ECJ judgement goes to show that the *Nungesser* principles do *not* apply to other categories of manufacturing licenses. This gained relevance in *Erauw-Jacquéry v. La Hesbignonne* [1988] 4 CMLR 576, where even an export ban was held to be outside Article 81(1). *Supra* note 13, at 794-795.

<sup>43</sup> *Supra* note 13, at 773.

<sup>44</sup> See *Automatic Radio Manufacturing Co v. Hazeltine Research, Inc* 339 US 827 (1950) and *US v. Singer Manufacturing Co* 374 US 174 (1963).

<sup>45</sup> See *Walker Process Equipment, Inc v. Food Machines & Chemical Corp* 382 US 172 (1965).

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<sup>46</sup> See W.L. Fugate, FOREIGN COMMERCE AND THE ANTITRUST LAWS: VOLUME II (1996), at 10-11.

<sup>47</sup> *Ibid*, at 75.

<sup>48</sup> *Supra* note 46, at 109.

The role of the law of trademarks as a part of the general law on unfair competition can be traced as far back as 1918 and *United Drug Co v. Rectanus Co* 248 US 90 (1918), though the sentiment that trademarks are meant to prevent a person from “palming off” his goods as another’s goes even further back to *Chadwick v. Covell* 23 NE 1068, 1069 (1890).

<sup>49</sup> See *Humble Oil & Refining Co v. American Oil Co* 405 F 2d 803 (8<sup>th</sup> Cir, 1969) and *Philip Morris Inc v. Imperial Tobacco Co* 401 F 2d 179 (4<sup>th</sup> Cir, 1968). *Supra* note 46, at 111.

<sup>50</sup> *Supra* note 46, at 109.

<sup>51</sup> In many cases, the competition law violation asserted has been held to be collateral to the trademark use and the defence has been denied. See *Drop Dead Co v. SC Johnson & Sons, Inc* 326 F 2d 87 (9<sup>th</sup> Cir, 1963), at 95-96, *Phi Delta Theta Fraternity v. JA Buchroeder & Co* 251 F Supp 968 (WD Mo, 1966), *Clairol, Inc v. The Gillette Co* 270 F Supp 371 (EDNY, 1967) and *Carl Zeiss Stiftung v. VEB Carl Zeiss* 433 F 2d 686 (2<sup>nd</sup> Cir, 1970).

<sup>52</sup> See generally S. Sage, *Trade-Mark Licenses and ‘Control’*, 43 TRADEMARK REPORTS (1953), at 653. This idea had been previously recognized in connection with licensing of secret processes in cases such as *US v. General Electric Co* 82 F Supp 753 (DNJ, 1949), at 849 and *US v. Sealy, Inc* 388 US 350 (1967).

<sup>53</sup> See *Susser v. Carvel Corp* 206 F Supp 636 (SDNY, 1962) and *Siegel v. Chicken Delight, Inc* 311 F Supp 847 (ND Cal, 1970) modified by 448 F 2d 43 (9<sup>th</sup> Cir, 1971). *Supra* note 46, at 115.

<sup>54</sup> J. Watal, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES (2001), at 305.

<sup>55</sup> See para 3.4 of the 1995 Guidelines, available at US Department of Justice, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY, 1995, <http://www.justice.gov/atr/public/guidelines/0558.htm> (March 7, 2010).

<sup>56</sup> See generally R.D. Anderson, *The Interface between Competition Policy and Intellectual Property in the Context of the International Trading System*, 1(4) JOURNAL OF INTERNATIONAL ECONOMIC LAW (1998), at 655-678.

<sup>57</sup> J. Shibata, *Patent and Know-How Licenses under the Japanese Anti-Monopoly Act*, published in J. Dextl (ed.), RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND COMPETITION LAW (2008).

<sup>58</sup> This is in addition to the Australian Trade Practices Act, 1974, which specifically prohibits anticompetitive agreements such as misuse of market power, price fixing and exclusive dealing. It is encouraging to note that the Indian Patent Act, under Section 140, also incorporates such a restriction. *Supra* note 54, at 306-307.

<sup>59</sup> The TRIPS Agreement establishes a minimum level of harmonized intellectual property law to be adopted by all members of the WTO. TRIPS is administered by the WTO and is backed by the dispute settlement procedures of the WTO. C. Colston and K. Middleton, MODERN INTELLECTUAL PROPERTY LAW (2005), at 10.

<sup>60</sup> A.K. Koul, THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)/WORLD TRADE ORGANIZATION (WTO): LAW, ECONOMICS AND POLITICS (2005), at 455.

<sup>61</sup> The tendency in many developed countries to grant over-broad patent claims coupled with the acquisition and strategic use of patent portfolios to prevent competition by similar products has resulted in this uphill battle for developing countries. Indeed, the opportunistic use of horizontal agreements in agricultural biotechnology, for instance, has resulted in the top ten corporations in the pharmaceutical, seed and agrochemical markets now account for approximately 36, 40 and 82 percent of their respective global markets. M. Stillwell and E. Tuerk, TOWARDS A FULL REVIEW OF THE WTO’S TRIPS AGREEMENT UNDER ARTICLE 71.1 (APRIL 2001), [http://www.ciel.org/Publications/Assessment\\_Trips\\_article711.pdf](http://www.ciel.org/Publications/Assessment_Trips_article711.pdf) (March 7, 2010).

<sup>62</sup> *Supra* note 1.

<sup>63</sup> There was initially serious concern by developing countries regarding the effects of anticompetitive practices with reference to IPRs motivated, in part, by the unsuccessful negotiations on the International Code of Conduct on Transfer of Technology in the 1970s. However, developed

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countries, having already established adequate competition monitoring mechanisms, saw the inclusion in the TRIPS as unnecessary. See UNCTAD-ICTSD, RESOURCE BOOK ON TRIPS AND DEVELOPMENT (2005), at 543-546.

The current inclusion, therefore, may be seen as an object of compromise.

<sup>64</sup> *Supra* note 10, at 7.

<sup>65</sup> WTO Appellate Body Report, *United States- Standards for Reformulated and Conventional Gasoline*, AB-1996-1, WT/DS2/AB/R, adopted on April 29, 1996.

<sup>66</sup> “Anti-competitive practices” has not been defined and even the WTO Reference Paper on Basic Telecommunications, in Section 1.2 merely lists three anti-competitive practices See WTO, WTO REFERENCE PAPER ON BASIC TELECOMMUNICATIONS”,

[http://www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/tel23\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm) (March 7, 2010).

It was however interpreted very broadly in WTO Panel Report, *Mexico- Measures Affecting Telecommunication Services (Mexico- Telecoms)*, WT/DS204/R, adopted on June 1, 2004.

<sup>67</sup> In particular, due deference must be given to the principles of treaty interpretation under Article 31 of the VCLT. See The United Nations, THE VIENNA CONVENTION ON THE LAW OF TREATIES, [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) (March 7, 2010).

<sup>68</sup> The South Centre, UTILIZING TRIPS FLEXIBILITIES, <http://apps.who.int/medicinedocs/en/d/Js4968e> (March 7, 2010).

<sup>69</sup> **Article 8.2 states: “Appropriate measures, provided they are consistent with the provisions of the Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.”**

See WTO, AGREEMENT ON THE TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS, [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm) (March 7, 2010).

<sup>70</sup> T.T. Nguyen, and H.H. Lidgard, TRIPS COMPETITION FLEXIBILITIES, <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1528251&fileId=1528252> (March 7, 2010).

<sup>71</sup> Article 7 reads: **“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”** *Supra* note 69.

<sup>72</sup> *Supra* note 54, at 292-293.

<sup>73</sup> C.M. Correa, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT (2007), at 93.

<sup>74</sup> The principle of effective interpretation (or *l’effet utile*) has been applied in several GATT/WTO cases such as *Argentina—Safeguard Measures on Imports of Footwear* WT/DS121/AB/R (2000). See also P. Mengozzi (ed.), *The World Trade Organization Law: An Analysis of its First Practice*, published in INTERNATIONAL TRADE LAW ON THE 50<sup>TH</sup> ANNIVERSARY OF THE MULTILATERAL TRADE SYSTEM (1999).

<sup>75</sup> D. Shanker, *The Vienna Convention on the Law of Treaties, the Dispute Settlement System of the WTO and the Doha Declaration on the TRIPs Agreement*, 36 JOURNAL OF WORLD TRADE (2002), at 721.

<sup>76</sup> *Supra* note 69.

<sup>77</sup> *Supra* note 54, at 293.

<sup>78</sup> *Supra* note 73, at 111.

<sup>79</sup> *Supra* note 60, at 453. For the negotiating history behind Article 8.2, see D. Gervais, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS (1998).

<sup>80</sup> WTO, “Overview: The TRIPS Agreement”, [http://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm) (March 7, 2010).

Article 40 states: **“1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.”**

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**2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grant-back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.**

**3. Each Member shall enter, upon request, into consultations with any other Member which has cause to believe that an intellectual property right owner that is a national or domiciliary of the Member to which the request for consultations has been addressed is undertaking practices in violation of the requesting Member's laws and regulations on the subject matter of this Section, and which wishes to secure compliance with such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member. The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall cooperate through supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member.**

**4. A Member whose nationals or domiciliaries are subject to proceedings in another Member concerning alleged violation of that other Member's laws and regulations on the subject matter of this Section shall, upon request, be granted an opportunity for consultations by the other Member under the same conditions as those foreseen in paragraph 3." *Supra* note 69.**

<sup>81</sup> See UNCTAD, *The TRIPS Agreement and Developing Countries*, UNCTAD/ITE/1, Geneva (1997), at 53-54.

<sup>82</sup> C.M. Correa, *Innovation and Technology Transfer in Latin America: A Review of Recent Trends and Policies*, published in S. Lall (ed.), *THE ECONOMICS OF TECHNOLOGY TRANSFER* (2002), at 339-342.

<sup>83</sup> UNGA adopted this by Resolution 35/63 of December 1980. See The United Nations, *A SET OF MULTILATERALLY EQUITABLE AGREED PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES*, <http://www.un.org/documents/ga/res/35/a35r63e.pdf> (March 7, 2010). These Principles apply to all transactions in goods and services and to all enterprises save intergovernmental agreements. It deals with horizontal restraints (such as price-fixing, collusive tendering, market/customer allocation agreements) and with the abuse of dominant position or market power through practices such as discriminatory pricing. Despite concerns about lacunae in the draft and implementation problems, developing countries promoted its upgrading to a *binding* instrument. See C.M. Correa, *Competition Law and Development Policies*, published in R. Zäch (ed.), *TOWARDS WTO COMPETITION RULES: KEY ISSUES AND COMMENTS ON THE WTO REPORT (1998) AND TRADE AND COMPETITION (1999)*, at 372 and C.M. Correa, *Emerging Trends: New Patterns of Technology Transfer*, published in S. Patel, P. Roffe and A. Yusuf, *INTERNATIONAL TECHNOLOGY TRANSFER: THE ORIGINS AND AFTERMATH OF THE UNITED NATIONS NEGOTIATIONS ON A DRAFT CODE OF CONDUCT* (2000), at 275-276.

<sup>84</sup> Thus, criticism that the TRIPS failed to mention other aspects of the interface between competition law and IPR such as patent pooling is possibly unjustified. See F-K. Beier and G. Schricker (eds.), *FROM GATT TO TRIPS—THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS* (1996), at 407.

<sup>85</sup> C.M. Correa, *REVIEW OF THE TRIPS AGREEMENT: FOSTERING THE TRANSFER OF TECHNOLOGY TO DEVELOPING COUNTRIES*, <http://www.twinside.org.sg/title/foster.htm> (March 7, 2010).

<sup>86</sup> *Supra* note 54, at 305.

<sup>87</sup> Any proclamations of Article 40 being an unqualified benefit to developing countries would be premature without the explicit incorporation of such conditions in the TRIPS Agreement. *Supra* note 54, at 304-305.

<sup>88</sup> This co-operation includes the supply of relevant, publicly available, non-confidential information and other available information, subject to national law and agreements for safeguarding confidentiality. *Supra* note 54, at 304-305.

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<sup>89</sup> See *Dawson Chemical Co v. Rohm & Haas* 448 US 175 (1980), at 215 where the US Supreme Court held that treating the refusal to license as patent misuse would essentially deprive the patent owner of the right to exploit the technology exclusively on his own.

<sup>90</sup> *Supra* note 17. The ECJ held that, in some instances, a refusal to license IPRs may actually be an abuse of dominant position if it can be shown that the refusal was unjustified.

<sup>91</sup> *Supra* note 54, at 308.

<sup>92</sup> *Supra* note 54, at 308.

<sup>93</sup> *Supra* note 81, at para 268.

<sup>94</sup> Such a provision was first included in the Havana Charter on an International Trade Organization under its Article 46 but it was never adopted and efforts were made at the GATT in 1954 and then again in 1958 to recognize that international cartels might hamper expansion of world trade and economic development of countries and interfere with the objectives of the GATT. Article 40 is hence one of the few provisions in WTO agreements that expressly deals with some modalities of restrictive practices. *Supra* note 73, at 398.

<sup>95</sup> *Supra* note 73, at 399.

<sup>96</sup> *Supra* note 73, at 399.

<sup>97</sup> A. Heinemann, *Antitrust Law of Intellectual Property in the TRIPS Agreement of the World Trade Organization*, *supra* note 84, at 245.

<sup>98</sup> *Supra* note 73, at 399-400.

<sup>99</sup> *Supra* note 63, at 555-556.

<sup>100</sup> Generally, under the effects doctrine, countries control restrictive practices that have an anti-competitive effect in their territories, even if they originated in another country. See generally D. Brault, *DROIT DE LA CONCURRENCE COMPARE: VERS UN ORDRE CONCURRENTIEL MONDIAL?* (1995).

<sup>101</sup> The Article states what a member *may* do and only based on an *a contrario* argument—which is a very weak basis for legal interpretation—it may be read as excluding the Member’s right to consider other practices as void or non-enforceable. *Supra* note 73, at 400.

<sup>102</sup> Indeed, the sole distinct implication is that States’ measures controlling practices not covered under Article 40.1 will not be immunized against complaints by other Members. *Supra* note 73, at 401.

<sup>103</sup> *Supra* note 73, at 401.

<sup>104</sup> On the idea of the “relevant market”, See H. Hovenkamp, *ANTITRUST* (1993), at 336. However, Article 40.2 should be read in light of Article 40.1 and the concept of relevant market should not be limited, but should include markets for technology and other intellectual assets.

<sup>105</sup> *Supra* note 73, at 402.

<sup>106</sup> *Supra* note 63, at 559.

<sup>107</sup> These three examples are exclusive grant-back conditions, conditions preventing challenging to validity and coercive package licensing. *Supra* note 85 and *supra* note 10, at 7.

<sup>108</sup> These earlier drafts, most notably include the Brussels Draft of Article 40 of the TRIPS Agreement. *Supra* note 79, at 278-279 and *supra* note 73, at 403.

<sup>109</sup> *Supra* note 73, at 404.

<sup>110</sup> The system is triggered by a suspicion on part of the first country while preserving the full freedom of an ultimate decision of either member. This provision rather requires members to be available for consultations and to cooperate in a limited way. *Supra* note 73, at 404-405.

<sup>111</sup> See the WTO Panel Report, *Japan- Measures Affecting Consumer Photographic Film and Paper (Japan-Film)*, WT/DS44/R, adopted on April 22, 1998, at para 10.41.

<sup>112</sup> See the WTO Panel Report, *Argentina- Measures Affecting the Export of Bovine Hide and the Import of Finished Leather (Argentina- Hide and Leather)*, WT/DS155/R, adopted on February 16, 2001, at paras 11.49 and 11.51.

<sup>113</sup> *Supra* note 73, at 405.

<sup>114</sup> P. Mehta, *COMPETITION POLICY IN DEVELOPING COUNTRIES: AN ASIA-PACIFIC PERSPECTIVE* (BULLETIN ON ASIA-PACIFIC PERSPECTIVES 2002/03, <http://www.unescap.org/pdd/publications/bulletin2002/ch7.pdf> (March 7, 2010)).

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<sup>115</sup> *Supra* note 73, at 406.

<sup>116</sup> *Supra* note 73, at 406.

<sup>117</sup> *Supra* note 54, at 309.

<sup>118</sup> *Supra* note 54, at 309.

<sup>119</sup> *Supra* note 60, at 460.

Negotiations on this provision were led by Hong Kong, Australia, New Zealand, Singapore and India. *Supra* note 54, at 296.

<sup>120</sup> *Supra* note 73, at 78.

<sup>121</sup> Since Members are not allowed to complain for non-compliance, it is, however, difficult to come up with a situation where this would be relevant. It may be argued, though, that the intent of the “for the purposes” phrase is abundant caution in making clear that exhaustion of rights might be subject to dispute settlement under other WTO agreements. Alternatively, it could mean that action before national Courts is not precluded. *Supra* note 73, at 78.

<sup>122</sup> This “neutrality” of Article 6 is attributed to/blamed on the failure to generate international consensus during the TRIPS negotiations. See M. Forsyth and W.A. Rothnie, *Parallel Imports*, in *supra* note 10, at 431 and *supra* note 79, at 2.69-2.70.

<sup>123</sup> *Supra* note 73, at 79.

<sup>124</sup> Parallel importation refers to a situation where a third party, without the authorization of the patent holder, imports a foreign manufactured product put on the market abroad by the patent holder, his licensee or in another legitimate manner in competition with imports or locally manufactured products by the patent holder or his licensee. Parallel importation is often used as a measure to prevent market division and price discrimination on a regional or international scale. *Supra* note 68.

<sup>125</sup> This assumes great significance in the context of the public health debate and access to patented drugs. Paragraph 5(d) of the Doha Declaration reads: “The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.” See WTO, DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH: WT/MIN(01)/DEC/2, [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm) (March 7, 2010).

<sup>126</sup> See WIPO, WASHINGTON TREATY TREATY ON INTELLECTUAL PROPERTY IN RESPECT OF INTEGRATED CIRCUITS, 1989, [http://www.wipo.int/treaties/en/ip/washington/trtdocs\\_wo011.html](http://www.wipo.int/treaties/en/ip/washington/trtdocs_wo011.html) (March 7, 2010). This Treaty never entered into force due to its inability to garner the requisite number of ratifications.

<sup>127</sup> This interpretation has been grounded on the footnote to Article 51, though the scope of the footnote is very narrow: applies only to trademarks and copyrights where the treaty deals with semiconductors only. *Ibid*, at Article 6(5).

<sup>128</sup> *Supra* note 73, at 84.

<sup>129</sup> The history of the TRIPS negotiations confirms this, as the reference to the right holder’s consent was present in the negotiating drafts, but was dropped in the full treaty. *Supra* note 73, at 84.

<sup>130</sup> This was first outlined by the US Supreme Court in *Adams v. Burke* 84 US 453 (1873).

<sup>131</sup> Equally, if the product is sold by a licensee, either voluntary or compulsory, he also receives compensation, generally in the form of a royalty payment. Hence, parallel importation does not deprive the patent owner of income to recoup past investment or impede contributions to future R&D, though the net impact of parallel importation on contributions to R&D will depend, *inter alia*, on the price differential between exporting and importing countries. See I. Govaere, *THE USE AND ABUSE OF INTELLECTUAL PROPERTY RIGHTS IN EC LAW* (1996), at 10.

<sup>132</sup> It also helps explain the use of the term “predominantly for the domestic market” under Article 31(f), which appears to permit at least a part of the production under a licensing arrangement to be parallel exported. *Supra* note 73, at 85.

However, there is more than enough evidence to suggest that this “predominantly for the domestic market” is a standard that has been abandoned post-Doha Declaration. *Supra* note 23.

<sup>133</sup> *Supra* note 73, at 86.

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<sup>134</sup> See National Economic Research Associates, THE ECONOMIC CONSEQUENCES OF THE CHOICE OF REGIME OF EXHAUSTION IN THE AREA OF TRADEMARKS, [http://ec.europa.eu/internal\\_market/indprop/docs/tm/exhaust\\_en.pdf](http://ec.europa.eu/internal_market/indprop/docs/tm/exhaust_en.pdf) (March 7, 2010). Indeed, even where such trade has been permitted within the EU, price differences have been negligible.

<sup>135</sup> *Supra* note 54, at 298.

<sup>136</sup> *Supra* note 54, at 296.

<sup>137</sup> *Supra* note 54, at 296.

<sup>138</sup> *Supra* note 54, at 296.

<sup>139</sup> *Supra* note 54, at 301.

<sup>140</sup> *Supra* note 54, at 300.

<sup>141</sup> A compulsory license is granted by an administrative or judicial body to a third party to exploit an invention without the authorization of the IPR holder. This type of license is usually non-voluntary since there is a lack of consent by the IPR holder. At the international level, compulsory licences have been formally recognized and provided for as early as Article 5A(2) of the Paris Convention, 1883. *Supra* note 68.

Compulsory licensing provides an important way to secure the balance of rights and obligations sought by the TRIPS Agreement, especially through accelerating the transfer and dissemination of technology. *Supra* note 61, at 8.

<sup>142</sup> Regarding unilateral conduct as an IPR abuse, Article 31(k) reads: ***“Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur.”*** *Supra* note 69.

<sup>143</sup> *Supra* note 54, at 380-381.

Effective implementation of Article 31 is seen as a crucial gateway to fully realizing control over anticompetitive practices which arise due to exercise of IPRs. See J.M. Berger, USING COMPETITION LAW TO INCREASE ACCESS TO TREATMENT FOR HIV/AIDS, <http://gateway.nlm.nih.gov/MeetingAbstracts/ma?f=102250187.html> (March 7, 2010).

<sup>144</sup> *Supra* note 54, at 380-381.

<sup>145</sup> *Supra* note 10, at 15.

<sup>146</sup> *Supra* note 54, at 381.

<sup>147</sup> However, Article 27.1 (non-discrimination between imported and domestically produced products) was meant to rule out the forcing of local manufacture or “working” of patents through compulsory licenses—many developing countries continue to require the local working of patents even though this is inconsistent with TRIPS. This was only recently removed by measures such as Article 68(1).I of the Brazilian Patent Act, 1997 and Article 43 of the Argentine Patent Act, 1996. *Supra* note 61, at 7.

<sup>148</sup> *Supra* note 54, at 381.

<sup>149</sup> *Supra* note 54, at 381.

<sup>150</sup> *Supra* note 54, at 381.

<sup>151</sup> *Supra* note 54, at 381.

<sup>152</sup> *Supra* note 61, at 8.

<sup>153</sup> *Supra* note 54, at 334.

<sup>154</sup> F.M. Abbott, *Are the Competition Rules in the WTO TRIPS Agreement Adequate?*, 7(3) JOURNAL OF INTERNATIONAL ECONOMIC LAW (2004), at 687-703.

<sup>155</sup> This remains in doubt due to the woefully inadequate competition law regimes in most developing countries which tend to indicate that such discussions will, at best, yield further study rather than concrete international consensus. The only genuine potential benefit to developing countries would be in terms of enhanced global market access. *Supra* note 1, at 22.

<sup>156</sup> *Supra* note 54, at 183.

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The need of the hour for developing countries is to ensure that they do not commit to a proposal that could see them getting dragged to the WTO dispute settlement forum for competition law related infractions. *Supra* note 73, at 111-112.

<sup>157</sup> This is typified by the work of the Working Group on Trade and Competition set up following the 1999 WTO Ministerial Conference, which has been dominated by the US/EU/Japan patent bloc. *Supra* note 54, at 374.

See also T. Cottier and I. Meitinger, THE TRIPS AGREEMENT WITHOUT A COMPETITION AGREEMENT?: FONDAZIONE ENI ENRICO MATTEI WORKING PAPER NO. 65-99, <http://ssrn.com/abstract=200622> or [doi:10.2139/ssrn.200622](https://doi.org/10.2139/ssrn.200622) (March 7, 2010).

<sup>158</sup> *Supra* note 1, at 21.

<sup>159</sup> A. Kur, *Limiting IP Protection for Competition Policy Reasons—A Case Study Based on the EU Spare-Parts-Design Discussion*, in *supra* note 57, at 340.

On the relationship between TRIPS and competition law aspects, see H. Ullrich, *Expansionist Intellectual Property Protection and Reductionist Competition Rules: A TRIPS Perspective*, 7 JOURNAL OF INTERNATIONAL ECONOMIC LAW (2004), at 401.

<sup>160</sup> M. Ricolfi, *Is there an Antitrust Antidote against IP Overprotection within TRIPS?*, 10 MARQUETTE INTELLECTUAL PROPERTY LAW REVIEW (2006), at 324.

<sup>161</sup> *Supra* note 79, at para 2.84.

<sup>162</sup> *Supra* note 63, at 119, 131.

<sup>163</sup> *Supra* note 59, at 60.

<sup>164</sup> [1997] RPC 245.

<sup>165</sup> D.I. Bainbridge, INTELLECTUAL PROPERTY (2002), at 16.

<sup>166</sup> E.M. Fox, *Economic Development, Poverty and Antitrust: the Other Path*, 13 SWARTHMORE JOURNAL OF LAW & TRADE, (2007), at 235. See also The United Nations, UN GENERAL ASSEMBLY RESOLUTION A/RES/59/221, FEBRUARY 11, 2005, <http://www.un.org/depts/dhl/resguide/r59.htm>, at para. 30 (March 7, 2010).

<sup>167</sup> R. Kariyawasam, *Technology Transfer*, in *supra* note 10, at 470.

One solution proposed by the first session of the WTO Working Group would be to require MNCs, as part of an FDI or licensing strategy, to locate the production of goods and services that embody patents in the local market and put in place the necessary training and partnership programmes that will increase the chance of spillover and diffusion will take place. However, many developing countries would require massive technical and financial assistance to achieve this. See The South Centre, THE WTO WORKING GROUP ON THE INTERACTION OF TRADE AND COMPETITION POLICY, FIRST SESSION: WT/WGTTT/M/1, [http://www.southcentre.org/index.php?option=com\\_docman&task](http://www.southcentre.org/index.php?option=com_docman&task), at para 55(a) (March 7, 2010).

This miscalculation has possibly been due to an underestimation of the short-term impacts of patent licensing on economies not having sound competition structures in place. See W. van Caenegem, INTELLECTUAL PROPERTY LAW AND INNOVATION (2007), at 20.

<sup>168</sup> This fear was also expressed by the WTO Working Group on the Interaction of Trade and Competition Policy at its fifth session (WT/WGTTT/5). *Ibid*, at para 15.

<sup>169</sup> *Supra* note 167, at 471.

<sup>170</sup> *Supra* note 167, at 485.

<sup>171</sup> C.M. Correa, INTELLECTUAL PROPERTY RIGHTS (1995), at 244.

<sup>172</sup> D.V. Eugui, WHAT AGENDA FOR THE REVIEW OF TRIPS? : A SUSTAINABLE DEVELOPMENT PERSPECTIVE, [http://www.ciel.org/Publications/AgendaTrips\\_Summer02.pdf](http://www.ciel.org/Publications/AgendaTrips_Summer02.pdf), at 7 (March 7, 2010).

<sup>173</sup> *Supra* note 10, at 431.

<sup>174</sup> For instance, Section 107 of the Indian Patent Act reads: **“(1) In any suit for infringement of a patent, every ground on which it may be revoked under section 64 shall be available as a ground for defence. (2) In any suit for infringement of a patent by the making, using or importation of any machine, apparatus or other article or by the using of any process or by the importation, use or distribution of any medicine or drug, it shall be a ground for defence that such making, using importation or distribution is in accordance with any or more of the conditions specified in section 47.”**

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<sup>175</sup> *Supra* note 73, at 111.

<sup>176</sup> *Supra* note 70.

<sup>177</sup> A regional setup would enable pooling in expertise, efficient distribution of resources and developing trading partners. *Supra* note 68.

<sup>179</sup> These include the Sherman Act, Clayton Act, the US Federal Trade Commission Act, 1914 (as amended in 1938) in the US, the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, the Resale Prices Act, 1964 and Restrictive Trade Practices Act, 1964 of the UK and the Combined Investigation Act, 1910 of Canada.

<sup>180</sup> *Supra* note 25, at 117-118.

<sup>181</sup> *Supra* note 25, at 128.

<sup>182</sup> *Supra* note 25, at 128-129.

<sup>183</sup> *Supra* note 25, at 129.

<sup>184</sup> R. Dutta, CRITICAL ANALYSIS: REFLECTION OF IP IN COMPETITION LAW OF INDIA, <http://www.indlawnews.com/display.aspx?4674> (March 7, 2010).

<sup>185</sup> *Id.*

<sup>186</sup> Although the Section 3 defines anti-competitive agreements, it leaves open the interpretation of “anti-competitive” *de novo* in respect of each case. *Supra* note 184.

<sup>187</sup> *Supra* note 25, at 133.

<sup>188</sup> See generally S. Jain and S. Tripathy, *Intellectual Property and Competition Laws: Jural Correlatives*, 12 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS (2007), at 236-243.

<sup>189</sup> *Supra* note 25, at 134.

<sup>190</sup> The Committee noted that IPRs provide exclusive rights to their holders to undertake commercial activities but this does not include the right to exert restrictive or monopoly power in a market/society. See S.M. Dugar, COMMENTARY ON THE MRTP LAW, COMPETITION LAW & CONSUMER PROTECTION LAW—LAW, PRACTICES AND PROCEDURES: VOLUME 1 (2006), at 757.

<sup>191</sup> S. Ghosh, NEW ACT COULD HAMPER EFFORTS TO CONTAIN ANTI-COMPETITIVE TRENDS IN ECONOMY: FINANCIAL EXPRESS, JUNE 9, 2003, <http://www.financialexpress.com/printer/news/81508/> (March 7, 2010).

<sup>192</sup> M. Kochiapalli, COMPETITION BILL IN INDIA: THE NEXUS WITH IP: SEPTEMBER 22, 2007, <http://spicyipindia.blogspot.com/search/label/competition%20law> (March 7, 2010).

<sup>193</sup> Section 4 defines abuse of dominant position broadly to include: (a) unfair or discriminatory prices, (b) restrictions on production or technical and scientific development, (c) practices that result in denial of market access, and (d) tying and market leverage. Thus, infractions are conduct-based, rather than having any sound structural or doctrinal basis to them. *Supra* note 191.

<sup>194</sup> *Supra* note 190, at 11.

<sup>195</sup> (1996) 20 CLA 229.

<sup>196</sup> (1995) 16 CLA 201.

<sup>197</sup> P.S. Mehta and U. Kumar, TACKLING IPR EXCUSES THROUGH THE NEW COMPETITION LAW: THE FINANCIAL EXPRESS, JUNE 12, 2001, <http://www.cuts-international.org/article%20comp.htm> (March 7, 2010).

<sup>198</sup> See generally S. Ghosh, PRESENTATION ON IP AND COMPETITION IN INDIA, <http://www.business.uiuc.edu/stip/documents/ShubhaGhosh.pdf> (March 7, 2010).

<sup>199</sup> Ministry of Commerce, Government of India, *India's Proposals on IPR Issues: Preparations for the 1999 Ministerial Conference* 1(3) INDIA & THE WTO (March 1999), available at <http://commerce.nic.in/wtomar.htm> (March 7, 2010).

<sup>200</sup> *Ibid*, at para 3.

<sup>201</sup> India also noted the role of such technology transfer in bringing about better access to technology, which, in turn, helps in accelerating the pace of economic development. *Supra* note 199, at paras 6, 8.

<sup>202</sup> India also addressed cost barriers and the problem of denial of dual-use technologies faced by developing countries in this regard. *Supra* note 199, at paras 8-10.

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<sup>203</sup> *Supra* note 199, at para 12.

<sup>204</sup> *Supra* note 199, at para 16.

<sup>205</sup> India suggested that all categories of goods, including its own export interests such as *basmati* rice, Darjeeling tea, alphonso mangoes and the like be given Article 23-style protection. *Supra* note 199, at paras 17-18.

<sup>206</sup> *Supra* note 199, at para 18.

<sup>207</sup> S. Chakravarthy, COMPETITION POLICY AND INTELLECTUAL PROPERTY RIGHTS, [http://www.cci.gov.in/images/media/forum/34f\\_IPRs\\_chakravarthy\\_22July2005.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstn7Rf00](http://www.cci.gov.in/images/media/forum/34f_IPRs_chakravarthy_22July2005.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstn7Rf00) (March 7, 2010).

<sup>208</sup> A. Bhattacharjea, INDIA'S COMPETITION POLICY: AN ASSESSMENT, [http://www.competitionlaw.cn/upload/temp\\_08033019381892.pdf](http://www.competitionlaw.cn/upload/temp_08033019381892.pdf), at 36 (March 7, 2010).

<sup>209</sup> *Id.*

<sup>210</sup> P.S. Mehta and U. Kumar, NEED FOR CLEARER NORMS ON IPR IN NEW COMPETITION BILL: THE FINANCIAL EXPRESS, JUNE 13, 2001, <http://www.cuts-international.org/article%20comp.htm> (March 7, 2010).

<sup>211</sup> A competent authority has first to determine that the anti-competitive practice is prevalent before the government can grant a license to others. Again the best-suited authority here would, of course, be the competition authority and hence this needs to be reflected in the new competition law. *Id.*

<sup>212</sup> *Supra* note 210.

<sup>213</sup> *Supra* note 191.

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