COMPETITION FLEXIBILITIES IN THE TRIPS AGREEMENT: IMPLICATIONS FOR TECHNOLOGY TRANSFER AND CONSUMER WELFARE

Abstract

The globalisation of IPRs under the TRIPS Agreement and discretion of country members of WTO to specify in their domestic legislation to prevent IPR-related anti-competitive practices raise complex questions. This paper takes up a necessary antecedent question: what flexibilities does TRIPS allow to foster technology transfer and consumer welfare in developing countries? The paper reviews competition law and technology transfer provisions of the TRIPS to analyze flexibilities available in these provisions from the perspective of developing country members of WTO with the aim to portray significant implications of TRIPS competition rules on technology transfer and consumer welfare in developing countries. It is argued that while IPRs are globalised, technology transfer related completion law should be 'glocalised' in developing countries according to their context and needs to foster technology transfer and consumer welfare in compliance with the TRIPS agreement.

I Introduction

COMPETITION LAW and intellectual property (IP) law are two major areas of law governing the market and fostering, *inter alia*, technology transfer and consumer welfare. The majority of intellectual property rights (IPRs) intensive technology currently is the property of multinational corporations (MNCs), which often try to maximize the profits of technology transfer from developing countries by refusing to license, charging excessive prices and incorporating anti-competitive contractual restrictions into technology transfer agreements. Consequently, these anti-competitive activities of IPR holders in fact hinder technology transfer and may adversely affect consumers.

As IPRs are protected globally by the minimum standards of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), or even the higher standards of TRIPS-plus bilateral or regional agreements, competition law plays a very important role in addressing possible IPRs abuses by MNCs. Issues concerning competition law to control IPRs abuses in general, and technology transfer related anti-competitive practices in particular under the TRIPS, have been studied from different perspectives. However, the current focus of these studies should be on how developing country members of World Trade Organization (WTO) can apply flexibilities in the TRIPS to foster technology transfer and consumer welfare. Hence arises a necessary antecedent question: what flexibilities does the TRIPS allow to foster technology transfer and consumer welfare in developing countries? A review of relevant literature is undertaken in order to analyze competition law and technology transfer in the context of flexibilities of the TRIPS with two objects. The first is the investigation of competition

law and technology transfer under the TRIPS from the perspective of developing countries. The second is the drawing of significant implications of TRIPS competition rules on technology transfer and consumer welfare in developing countries.

The issues discussed in this paper are limited to two categories of anti-competitive practices in the context of technology transfer. They are anti-competitive contractual restraints in technology transfer agreements and excessive pricing of IPRs intensive technologies, together with compulsory licensing as a remedy correcting those abuses. In this paper, the term 'technology' is confined to patents, know-how or a combination of both. The term 'technology transfer' is understood as licensing between two unconnected firms, which are directly related to the production, or assignment of the technology. Therefore, issues relating to technology transfer-related mergers and acquisitions are outside the scope of the paper. This paper focuses on technology transfer from developed countries to developing or least-developed countries (LDCs). As to the terms developed countries and developing countries, there are no definitions of developed and developing countries in the WTO. To date, all WTO member countries with the exception of the United States (US), the European Union (EU), Canada, Japan, and New Zealand have at one time or another classified themselves as developing countries for the purposes of the WTO. LDCs are also classified as developing countries for the purpose of this paper. The terms 'competition law' and 'antitrust law' are used equivalently.

II Intellectual property rights and competition law

The objective of IP laws is to contribute to, *inter alia*, transfer and dissemination of scientific and technological knowledge for the benefit of producers and consumers who profit from new products, more efficient production processes and greater product differentiation.[1] In the short run consumers are supplied with an additional choice, albeit at a monopoly price; and in the long run when the patent expires, the industry as a whole can produce more and at lower cost for consumers.[2] More specifically, the aim is to ensure the optimal flow of improvements and development of scientific and technological knowledge in order to ensure that the information created is used efficiently for the maximum benefit of producers and consumers and that knowledge is diffused to a desirable extent.[3] The IP laws do this by creating an exclusive right for a limited period of time, which is meant to work as an incentive to invention. IP laws are not intended to create monopolies in the market.[4]

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1 Josef Drexl (ed.), *Research Handbook on Intellectual Property and Competition Law* (Edward Elgar,Cheltenham, 2008).

2 Irina Haracoglou, *Competition Law and Patents* 101 (Edward Elgar, Cheltenham, 2008).

3 *Id.* at 107.

4 *Supra* note 1 at 211.

Competition law aims at protecting competition, but only does so because such protection enhances efficiency and overall consumer welfare.[5] Competition law applies to ensure the best quality products at the lowest prices with a wider choice of new or improved goods and services in order to leave more benefits and surplus in the hands of consumers. That is why, despite the fact that the exercise of IPRs is already extensively regulated by IP law by way of scope and duration rules and various exceptions, an extra filter of regulation is added by competition law.[6] This second filter aims at ensuring that the grant of exclusivity by IP law is not abused, or misused, by anti-competitive licensing agreements, monopolistic conduct, or other anti-competitive practices, which impact on end consumers, who may have to pay higher costs, with a more restricted choice or lower product quality, resulting in a loss in consumer welfare.[7]

Competition law and IP law have evolved historically as two separate systems of law. Each has its own legislative goals and each its own methods of achieving those goals.[8] Moreover, the relationship between IP law and competition law has been at the centre of debate for many years. Whilst both bodies of law share a common objective, namely, promoting innovation and the enhancement of consumer welfare, some problems arise as they operate in different ways.[9]

Exclusive rights granted by IP law seek to protect IPRs and, in doing so, limit competition. Thus, IP protection may be criticized, under the competition perspective, for creating monopoly rights which will be against consumer interests.[10] In contrast, competition law generally reflects the premise that consumer welfare is best served by removing impediments to competition.[11] From the perspective of IPRs, competition law may be considered as an interventionist instrument, which infringes right holders' entitlements and thereby affects the very foundations of IP law. Consequently, IP law may endanger competition law and *vice versa*.[12] It can be recognized that between IP laws and competition laws there is tension but no fundamental contradiction.[13] Now

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5 *Id.* at 32.

6 Tu Thanh Nguyen, *Competition Law, Technology Transfer and the TRIPS Agreement: Implications for Developing Countries* 34 (Edward Elgar, Cheltenham, 2010).

7 Consumer welfare may be defined as the maximization of consumer surplus, which is reflected in lower prices, more quantity, better quality and a wider choice of new or improved goods and services. See also, *supra* note 2 at 124.

8 Steven D. Anderman (ed.), *The Interface Between Intellectual Property Rights and Competition Policy* 1 (Cambridge, New York, 2007).

9 *Supra* note 2 at 101.

10 *Supra* note 6 at 33.

11 *Ibid.*

12 *Ibid.*

13 *Supra* note 1 at 211.

almost all scholars, practitioners and different legal systems concur that the goals of competition law and IP law are complementary and mutually reinforcing. Both sets of laws seek to promote innovation and enhancing consumer welfare.[14]

III Historical Context

The law of unfair competition was already dealt with in the Paris Convention for the Protection of Industrial Property, 1883.[15] In the Paris Convention, which has been adhered to by more than 160 states thus far, each signatory state binds itself to assure effective protection against unfair competition to the nationals of the other parties of the treaty.[16] In 1926, under the auspices of the League of Nations, a multilateral convention for the unification of national laws on restrictive business practices was proposed.[17] Consequently, the Havana Charter of 1948 contained rules against restrictive business practices and abuse of IPRs.[18] However, the Havana Charter was never ratified.[19]

Restrictive business practices in transfer of technology acquired special importance in the New International Economic Order (NIEO)[20] with the launching of negotiations on a draft International Code of Conduct on the Transfer of Technology (draft Code) from 1970-1985 under the auspices of the United Nations Conference on Trade and

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14 Competition authorities of the three largest and most innovative countries/regions viz. United States, European Commission and Japan have accepted this view. See, *supra* note 6 at 36.

15 Paris Convention, 1883, art. 5(A) states: (1) Importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail forfeiture of the patent. (2) Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work. See also, WTO, Committee on Trade and Environment, Statement by India (April 7, 1998) WT/CTE/W/82.

16 Martin J. Adelmann, Robert Brauneis, *et. al.*, *Patents and Technological Progress in a globalized world* 413 (Springer, Heidelberg, 2009).

17 *Supra* note 6 at 39.

18 Joel Davidow, "International Antitrust Codes and Multinational Enterprises" 2 *Loy. L. A. Int'l & Comp. L. Rev.* 18 (1979).

19 Of the restrictive business practices listed in art. 46.3, there were two types of IPR-related practices, namely: (e) preventing by agreement the development or application of technology or invention whether patented or unpatented; (f) extending the use of rights under patents, trademarks or copyrights granted by any member to matters which, according to its laws and regulations, are not within the scope of such grants, or to products or conditions of production, use or sale which are likewise not the subject of such grants. These practices reflected the intention of the charter's drafters to control anti-competitive practices relating to IPRs.

20 The NIEO was intended to eliminate the economic dependence of developing countries, promote their accelerated development based on the principle of self-reliance, and introduce appropriate institutional changes for the global management of world resources. See Michael Blakeney, "Transfer of Technology and Developing Nations" 11 *Fordham Int'l L.J* 689 (1988).

Development (UNCTAD).[21] The code was drafted as a response to a variety of complaints expressed by developing countries with respect to transfer of technology transactions.[22] Their dissatisfaction stemmed from the fact that often, in transfer of technology contracts, restrictive business clauses which were detrimental to developing countries were inserted.[23] The 1985 version of the draft code listed fourteen restrictive business practices (chapter 4 of the draft Code) in technology transfer transactions. They were: exclusive grant-back provisions; challenges to validity; exclusive dealing; restrictions on research; restrictions on use of personnel; price-fixing; restrictions on adaptations; exclusive sales or representation agreements; tying arrangements; export restrictions; patent-pool or cross-licensing agreements; restrictions on publicity; payments and other obligations after expiration of intellectual property rights; and restrictions after expirations of arrangement.[24]

Behind differences in the prohibited lists of restrictive practices, there remained differences in approaches to determining and scrutinizing such practices. Developed countries insisted upon a 'competition' test, which would restrict only practices that could be considered anti-competitive and forbidden under national competition law. By contrast, developing countries preferred to use a 'development' test, which would eliminate practices that were inherently unfair and unreasonable due to imbalances of bargaining power between powerful licensors (MNCs) and weaker licensees.

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21 Pedro Roffe and Taffere Tesfachew, "Revisiting the Technology Transfer Debate: Lessons for the New WTO Working Group" (ICTSD, Geneva, 2002).

22 Programme of Action on the Establishment of a New International Economic Order (1974) on Transfer of Technology reads as-All efforts should be made:

(a) To formulate an international code of conduct for the transfer of technology corresponding to needs and conditions prevalent in developing countries;

(b) To give access on improved terms to modern technology and to adapt that technology, as appropriate, to specific economic, social and ecological conditions and varying stages of development in developing countries;

(c) to expand significantly the assistance from developed to developing countries in research and development programmes and in the creation of suitable indigenous technology;

(d) to adapt commercial practices governing transfer of technology to the requirements of the developing countries and to prevent abuse of the rights of sellers;

(e) to promote international cooperation in research and development in exploration and exploitation, conservation and the legitimate utilization of natural resources and all sources of energy. In taking the above measures, the special needs of the least developed and land-locked countries should be borne in mind.

23 Susan K Sell, *North-South Politics of Intellectual Property and Antitrust* 93 (State University of New York, Albany, 1998).

24 *Available at*: http://www.fordham.edu/law/faculty/patterson/tech&hr/materials/codetfrtech.html (last visited on Oct. 10, 2014).

Furthermore, there was contention in the negotiations of chapter 4 of the draft code relating to whether the *rule of reason* or the *per se* rule should be applied to the listed restrictive practices. Although in the 1970s the US and the EU applied the *per se* rule to specific anti-competitive practices under their competition laws, they preferred that restrictive practices in chapter 4 of the draft code should all be subject to the *rule of reason* on a case-by-case basis. They also wanted to add the qualification 'unreasonably' or 'unjustifiably' to the practices listed. The developing countries, on the other hand, did not agree because, to some extent, they were not familiar with the rule of reason, while they felt that adding such a term would facilitate arbitrary conduct by licensors.[25]

By the time TRIPS was being developed in the mid-1980s, the support for the draft Code had largely disappeared. The negotiations stopped in 1985 and have thereafter not resumed.[26] UNCTAD, in the process, was effectively marginalized during the Uruguay Round of multilateral trade negotiations.[27] Notwithstanding the questionable relevance of the draft Code in today's trade environment, the draft code left at least two main legacies. *First*, such negotiations gave an opportunity to identify problems and obstacles facing the transfer of technology to third world and to build up a consensus on a number of issues, thus resulting in a large degree of agreement. Such consensus was particularly important to third world in the run-up to the negotiation of the TRIPS.[28] *Second*, the negotiation process influenced the adoption of policies on restrictive business practises in third world and has a major residual effect on the TRIPS. Some of the provisions in the draft text advanced by third world during the TRIPS negotiations were either directly based on or inspired by those of the draft code.[29]

In July 1993, a group of antitrust scholars released a draft International Antitrust Code (Munich Code), and proposed that it be adopted as a General Agreement on Tariffs and Trade (GATT) Plurilateral Trade Agreement. The Munich Code probably rested on a utopian vision of the global politics of trade and competition, but still could expressly inject competition policy into the WTO legal landscape. It could also provide an ambitious academic model agreement that might assist in stimulating

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25 *Supra* note 23 at 92.

26 *Id.* at 98.

27 Christopher May, *The World Intellectual Property Organization: Resurgence and the Development Agenda* 81 (Taylor & Francis, Oxford, 2007).

28 *Ibid.*

29 GATT, *Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods,* Communication from Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay (May 14, 1990) MTN.GNG/NG11/W/71, *available at:* https://www.wto.org/gatt_docs/English/SULPDF/92100147.pdf. (last visited on Dec. 1, 2014).

worldwide reflection and debate on the need for international competition rules.[30] Regarding restraints in connection with IPRs, the Munich Code recognized that the exercise of IPRs within the limits of the legal content of such rights would not restrain competition; but when their exploitation exceeds the limits of their legal content, any resulting restraint of competition may be illegal.[31]

IV Competition rules in the TRIPS agreement

TRIPSis part of a WTO package bargain in 1994.[32] It applies to all WTO Members.[33]Moreover, developing countries accepted the TRIPS because of experiencing escalating pressure from major powers threatening to impose unilateral trade sanctions.[34] Developing countries, while negotiating and signing the TRIPS, also hoped that global IP protection would increase technology transfer from developed to developing countries.[35] One of the fundamental characteristics of the TRIPS is that it makes protection of IPRs an integral part of the multilateral trading system, as embodied in the WTO.[36] Implementation of the TRIPS incurs substantial economic and social costs for developing countries because it involves a significant transfer of resources from consumers and firms in developing countries to those in developed countries.[37]Moreover,

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30 Herbert Hovenkamp, Marl D. Janis, *et. al., IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law* 35 (Wolters Kluwer, New York, 2013).

31 *Supra* note 6 at 39.

32 Frederick M. Abbott, "The WTO TRIPS Agreement and Global Economic Development-The New Global Technology Regime" 72 *Chi.-Kent. L. Rev.* 387 (1996).

33 *Available at*: http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm (last visited on Oct. 10, 2014).

34 IP activists redefined inadequate IP protection abroad as a barrier to legitimate trade. Adding inadequate enforcement of US IP rights abroad as actionable under existing trade statutes brought intellectual property under the normative umbrella of trade policy. The move was subsequently supported by the European Community and Japan; industry also strongly backed it. The conclusion of the TRIPs Agreement was made possible by the arm-twisting tactics used by the United States in the form of the "Section 301" action under the Trade Act, 1974, against the developing countries, particularly the newly industrialised countries who were the reluctant partners in the negotiations. See generally Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge, 2003).

35 However, statistics indicate that the asymmetry in technological capacities between developed and developing countries did not decrease, but even tended to increase. For instance, ten developed countries spent 84 percent of global resources on research and development (R&D) annually and receive 91 percent of global cross-border royalties and technology licence fees. See also, Keith E. Maskus and Jerome H. Reichman (eds.), *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* 232 (Cambridge, New York, 2005).

36 *Ibid.*

37 Justin Malbon & Charles Lawson (eds.), *Interpreting and Implementing the TRIPS Agreement: Is It fair ?* (Edward Elgar, Chheltenham, 2008).

given the profound asymmetries existing amongst WTO Members in their levels of scientific and technological development, it is not surprising that the TRIPS has become one of the most controversial pieces of the multilateral trade system.[38]

It may at first sight be somehow surprising to find competition-related elements in an international instrument which has purpose to promote effective and adequate protection of IPRs.[39] Moreover, developed countries with established rules for the control of IP related anti-competitive practices were not interested in establishing such rules in the TRIPS context. Instead US and European Community (EC) focused on the formulation of adequate standards of IP.[40] However, negotiating history of the TRIPS reflects concerns expressed by developing countries with the potential anti-competitive effects of IPRs.[41] India submitted a detailed paper that elaborated a developing country perspective on the objective of the negotiations. India was of the view that it was only the restrictive and anti-competitive practices of the owners of the IPRs that could be considered to be trade-related because they alone distorted or impeded international trade. India emphasised that any discussion on the IP system should keep in perspective that the essence of the system was its monopolistic and restrictive character.[42] Indeed, the request by developing countries for competition rules largely reflects their understanding of IPRs as a danger to competition.[43] The inclusion of competition related rules in the TRIPS was to a certain extent a concession to the developing countries in the form of articles 8.2, 31(k), and 40.[44] TRIPS does not stipulate

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38 Carlos M. Correa, *Trade Related Aspects of Intellectual Property Rights* vii (Oxford, New York, 2007).

39 Carlos M. Correa (ed.), *Research Handbook on the Protection of Intellectual Property under WTO Rules* 226 (Edward Elgar, Cheltenham, 2010).

40 GATT, *Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods,* Suggestion by the United States for Achieving the Negotiating Objective (Oct. 20, 1987). MTN.GNG/NG11/W/14, *available at*: http://www.wto.org/gatt_docs/English/SULPDF/92030039.pdf (last visited on Oct. 11, 2014); GATT, *Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods,* Guidelines and Objectives Proposed by the European Community for the Negotiations on Trade Related Aspects of Substantive Standards of Intellectual Property Rights (July 7, 1988) MTN.GNG/NG11/W/26, *available at*: http://aei.pitt.edu/5391/01/001870_1.pdf (last visited on Oct. 11, 2014).

41 Frederick M. Abbott, "Are the Competition Rules in the WTO TRIPS Agreement Adequate?" 7(3) *J. Int. Economic Law* 688 (2004).

42 GATT, *Standards and Principles Concerning the Availability, Scope and Use of Trade-Related Intellectual Property Rights*, Communication from India (10 July 1989) MTN.GNG/NG11/W/37, *available at*: http://www.wto.org/gatt_docs/English/SULPDF/92070115.pdf (last visited on Oct. 11, 2014).

43 Carlos M. Correa (ed.), *Research Handbook on the Protection of Intellectual Property under WTO Rules* 226 (Edward Elgar, Cheltenham, 2010).

44 *Ibid.*

precise obligations subjecting the exercise of IPRs to the application of competition law principles. It provides WTO Members with substantial discretion in the development and application of competition law to arrangements and conduct in the field of IPRs.[45] In other words, articles 8.2, 31(k), and 40 of the TRIPS recognise the interventionist power of members over controlling IPR-related anti-competitive practices.[46] Article 8.2 (Principle) states:

> Appropriate measures, provided that they are consistent with the provisions of this 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.

Article 31(k) of TRIPS acknowledges that compulsory licensing is a remedy to correct anti-competitive practices. Article 31(k) provides:

> 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.

Article 40 is addressed to anti-competitive provisions or conditions. 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.
> 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 grantback conditions,

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45 *Supra* note 41 at 691.

46 Tu Thanh Nguyen and Hans Henrik Lidgard, "WTO Competition Law Revisited: From TRIPS Flexibilities and Singapore Issues to the WTO Agenda of a Post-Doha Round" 7 (Lund University, Legal Research Paper 51, 2009), *available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1455366 (last visited on Oct. 10, 2014).

> conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.[47]

The restrictive practices covered by article 8.2 are of three kinds: the abuse of IPRs by rights holders, practices which unreasonably restrain trade, and practices which adversely affect the international transfer of technology.[48] In this sense, both unilateral abuse by a firm and bilateral contractual restraints of an IPR-related anti-competitive conduct is covered.[49] Article 8.2, read in conjunction with article 48.1, which regulates compensation for the injury of a third party caused by abuses of IPR enforcement procedure, can apply to anti-competitive abuses of IPR enforcement procedures.[50] Article 8.2 applies only to IPR-related abuses or practices and does not apply to other potentially anti-competitive arrangements whose primary object does not directly relate to IPRs, such as mergers and acquisitions and joint ventures.[51]

Regarding compulsory licensing as a remedy correcting anti-competitive practices, the TRIPS does not stipulate the ground for compulsory licensing in general and compulsory licensing in the case of the existence of IPR-related anti-competitive practices in particular. A WTO member can enact its laws and regulations on this issue.

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47 TRIPS, art. 40 continues: (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".

48 UNCTAD-ICTSD, *Resource Book on TRIPS and Development* 547 (Cambridge, New York, 2005).

49 Hanns Ullrich, "Expansionist Intellectual Property Protection and Reductionist Competition Rules: A TRIPS Perspective" 7 (2) *J Int Economic Law* 406 (2004).

50 TRIPS, art. 48.1 states that "the judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse."

51 Irini Stamatoudi, Paul Torremans (eds.), *EU Copyright Law* 80 (Edward Elgar, Cheltenham, 2014).

Then based on such laws and regulations, after due process, judicial or administrative competent authorities can grant compulsory licensing. Reading article 40.1 on its own or in conjunction with the objectives of the TRIPS as stipulated in article 7, one might argue that WTO members are obliged to control all anti-competitive practices relating to technology licensing. This view is supported by the fact that, according to article 40.1, Members clearly and unanimously recognize the adverse effects and impediments of some licensing practices or conditions on trade and the transfer and dissemination of technology.[52]

Article 40.1 recognizes that some IPR-related licensing practises or conditions might have adverse effect on trade or impede transfer and dissemination of technology.[53]

It constitutes a declaration of the Member's shared opinion on the detrimental consequences of certain licensing practices. The definition of these anti-competitive practices is left to the domestic law of the members.[54] This, however, does not relegate article 40.1 to a mere declaratory statement that should have rather been placed in the preamble.[55] If members have indeed agreed that certain licensing practices should be addressed, it is difficult to see members to remain inactive with respect to such practices, since these run directly contrary to the objectives of article 7. In particular because members have committed themselves in article 1.1 "to give effect to the provisions of this Agreement."[56] Therefore, the total absence of rules of competition in order to prevent abusive licensing practices may not be considered as consistent "with the other provisions of this Agreement" (article 40.2, sentence 2). Nevertheless, the implementation and definition of these rules is left to the members.[57]

Article 40.1 covers only such licensing practices or conditions which have an adverse effect on trade or which constitute an impediment to technology transfer. This wording needs to be read restrictively in respect of two criteria. *First*, the licensing practices or conditions do not have to have an adverse effect on trade and technology transfer. The reason is that Article 40.1clearly relates to licensing of IP which is not related to technology transfer, too. *Secondly*, article 40.1 applies, like article 8.2, only to the international transfer of technology. This is the case although it refers to transfer or

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52 *Supra* note 48 at 555.Country Experience" (HKS Faculty Research Working Paper RWP 14-013, 2014).

53 F.M. Scherer and Jayashree Watal, " Competition Policy and Intellectual Property: Insights from Developed

54 Peter-Tobias Stoll, Jan Busche, *et al.* (eds.), *WTO Trade-Related Aspects of Intellectual Property Rights* 665 (Martinus Nijhoff, Leiden, 2009).

55 *Ibid.*

56 *Ibid.*

57 *Id.* at 666.

dissemination of technology in general. The reason is the international character of the TRIPS, and from a systematic point of view, the procedural rules of articles 40.3 and 40.4. These are only meaningful for licensing practices that have some international component. Further, article 40.1 does not contain a *de minimis* provision. No particular degree of gravity or of harm caused by the negative effects of anti-competitive licensing practices is required. Any adverse effect on trade and any impediment on technology transfer authorize members to act.[58]

Further, article 40.2 (second sentence) requires members to limit the measures to prevent anti-competitive practices to what is "appropriate". It means only that the measure must be suited to effectively address and deal with the risk and the harm for competition which a given licensing practice may entail.[59] This requirement of proportionality must be applied similarly to the necessity requirement in article 8.2.[60] In particular, the appropriateness of the measure may only be assessed "in the light of the relevant laws and regulations of that Member." Therefore, TRIPS in no way precludes members from establishing the forms of antitrust control they consider fit in view of their legal traditions and their socio-economic conditions.[61] The WTO Dispute Settlement Body (DSB) has elaborated on the appropriateness requirement, the so called 'necessity test', in some GATT/GATS related disputes,[62] which may be applied *mutatis mutandis* to disputes relating to the competition rules in the TRIPS. In *Korea – Beef*, the WTO Appellate Body confirmed the right of South Korea to choose the level of enforcement of its Unfair Competition Act that it desired.[63]

In addition to appropriateness requirements, WTO Members also have consultation and cooperation obligations, at least where control of anti-competitive practices in contractual licences under articles 40.3 and 40.4 is concerned. The importance of article 40.3 is that, for the first time in public international law, a duty of assistance in antitrust law enforcement has been established by a multilateral agreement albeit a duty limited

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58 *Id.* at 667.59*Id.* at 671.

60 *Ibid.*

61 *Supra* note 48 at 560.

62 See *e.g.*, *Korea – Measures Affecting Import of Fresh, Chilled and Frozen Beef (Korea – Beef)*, WT/DS161/AB/R and WT/DS169/AB/R, circulated on Dec. 11, 2000; *European Communities – Measures Affecting Asbestos and Asbestos-containing Products (EC – Asbestos)*, WT/DS135/AB/R, circulated on Mar. 12, 2001, paras 168–175; *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, circulated on Sept. 26, 2002, paras 286–291; *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, circulated on 7 April 7, 2005, paras 309–311; *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, and WT/DS293/R, circulated on Sept. 29, 2006, para. 7.1423.

63 Korea – Measures Affecting Import of Fresh, Chilled and Frozen Beef (Korea–Beef), WT/DS161/AB/R and WT/DS169/AB/R, circulated on Dec. 11, 2000.

to control over restrictive contractual licensing practices and conditions covering both case-specific cooperation and technical cooperation.[64] Meanwhile, article 67 requires developed country members to provide technical cooperation for developing country and LDC Members in the preparation of laws and regulations on the protection and enforcement of IPRs as well as on the prevention of their abuses, and in capacity building.[65] However, these cooperation-related provisions are not clear and contain some shortcomings.[66]

Article 67 mainly highlights the provision of cooperation relating to the protection and enforcement of IPRs. It fails to place explicit obligations on developed country members to assist developing country members in enforcing their domestic competition laws to prevent IPR abuses. As a result, developed country members have, in practice, largely focused their technical cooperation on the preparation of domestic legislation for IP protection and the strengthening of enforcement measures in developing country members. They rarely offer technical cooperation on how best to put into practice the competition flexibilities set out in articles 8.2, 31(k), and 40 of the TRIPS.[67] Current mechanisms aiming at controlling and preventing IPR-related anti-competitive practices in most developing countries are non-existent, weak or under-utilized.[68] Thus, developed countries, in addition to providing assistance for the development of IP protection in

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64 *Supra* note 48 at 561.

65 TRIPS, art. 67 states: "In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel."

66 B.N. Pandey and Prabhat Kumar Saha, "Technical Cooperation under TRIPS Agreement: Flexibilities and Options for Developing Countries" 53 *JILI* 659 (2011).

67 *Ibid.*

68 In the research of the Commission on Intellectual Property Rights in eight selected developing and least-developed countries, there is no record of any cases related to IPRs being taken to courts under these countries' competition related legislation. Around sixty developing countries have adopted specific competitionlaws. Other developing countries stipulate IPR-related competition provisions within their existing IP laws. See Mart Leesti and Tom Pengally, "Institutional Issues for Developing Countries in Intellectual Property Policymaking, Administration and Enforcement" 37 (CIPR, Study Paper 9, 2002); Pradeep S. Mehta (ed.), *Competition Regimes in the World: A Civil Society Report* xxviii–xxxi (Jaipur Printers, Jaipur, 2006).*available at*: http://www.iprcommission.org/papers/pdfs/final_report/ciprfullfinal.pdf (last visited on Oct. 11, 2014); WTO, Working Group on Trade and Transfer of Technology, *Steps That Might Be Taken Within the Mandate of the WTO to Increase Flows of Technology to DevelopingCountries* - Submission by India, Pakistan and the Philippines, WT/WGTTT/W/10 (Oct. 13, 2005), *available at*: www.wto-pakistan.org/documents/resources/paper_TTT_pak.doc (last visited on Oct. 11, 2014).

developing countries, have an obligation to provide assistance with regard to the development of appropriate IPR-related competition laws, regulations and institutions.[69]

Further, where developed countries assist developing countries in the preparation of IPR-related competition legislation, the former often attempt to persuade the latter to adopt innovation-oriented rules. Such technical cooperation, if followed, may cause a developing country to close its doors to competition flexibilities under the TRIPS.[70] Fundamentally, the technical cooperation in question should help developing country Members to make legitimate use of the flexibilities of the TRIPS, as well as of its provisions related to technology transfer and the prevention and mitigation of IPR abuse.[71]

Meanwhile, those legal scholars who have drafted a proposal for the amendment of the TRIPS in the framework of the project titled 'Intellectual Property Rights in Transition' (IPT Proposal) propose a new TRIPS-competition article in the form of article 8b and amendment of article 40.2 in order to have a rule which is 'binding' in purpose but 'flexible' as to national execution.[72]According to this IPT proposal, the discretionary competition provisions in the TRIPS should be replaced by mandatory ones, which force members to adopt and apply statutory or compulsory licences to prevent IPR-related anti-competitive practices.

The proposal to convert discretionary competition provisions in the TRIPS into mandatory ones is not new.[73] However, after the failure of the WTO Ministerial Conference in Cancun in 2003 on the Singapore issues, competition policy was dropped from the current WTO Doha Round negotiations.[74] It will not be easy for such mandatory competition clauses to be accepted at the WTO. Substantial discretion for WTO members in the design and application of their domestic IPR-related competition laws and regulations under the current competition rules in the TRIPS serves the best interests of both developed and developing country members.[75]Thus, neither

69 CIPR, *Integrating Intellectual Property Rights and Development Policy* 26 and 149 (CIPR, London, 2002).

70 *Supra* note 66 at 660.

71 *Ibid.*

72 IPT project, Proposed Amendments to TRIPS, Synopsis of Original Version and Proposals for Amendment of the TRIPS Agreement, *available at*: www.law.nyu.edu/ecm_dlv4/.../ecm_pro_061952.pdf (last visited on Oct. 10, 2014); Annette Kur, *TRIPS Amendments (work in progress): Background and Explanation, available at*: http://www.atrip.org/Content/Activities/Kur%20AMENDMENT.pdf (last visited on Oct. 10, 2014).

73 N. Ayse Odman Boztosun, "Using TRIPS to Make the Innovation Process Work" 3 *J. World IP* 343 (2000).

74 Tzong-Leh Hwang and Chiyuan Chen (eds.), *The Future Development of Competition Framework* 13-35 (Kluwer, The Hague, 2004).

75 Ernst-Ulrich Petersmann (ed.), *Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance* 333 (Oxford, New York, 2005).

amendment of the competition rules in the TRIPS nor development of parallel binding IPR-related competition rules is desirable or feasible in the current circumstances.[76]

V Implications for technology transfer and consumer welfare

The current asymmetric status of developing countries in technological proficiency seems to remain same even in the near future and it is quite plausible that the developing countries will depend on importation of cutting edge technologies from the developed countries. However, few developing countries try to enforce flexibilities of the TRIPS to foster consumer welfare and technology transfer in advantageous terms. The Doha Declaration on the TRIPS agreement and public health is a phenomenal success for the developing countries in this context.[77] This achievement may prove a beginning for developing countries to use flexibilities of the TRIPS agreement. Developing countries may invoke not only public health-related flexibilities but also competition flexibilities to foster technology transfer and consumer welfare.[78]

An appropriate IP law designed with the general consideration of transfer and dissemination of technology can help developing countries to achieve their technological goals. Use or threat to use compulsory licensing of patented medicines on the grounds of unreasonable price, importation and public health has been successful in few developing countries and thus serves as future directions to the effective use of domestic IP law.[79] Nevertheless, even an appropriate IP law alone can neither regulate all technology transfer inflows nor can successfully prevent anti-competitive practices in technology transfer. Designing effective competition and IP laws, host countries can

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76 *Supra* note 1 at 449.

77 The Ministers adopted a separate declaration on the TRIPS Agreement and Public Health (Doha Declaration), in which, along with the recognition of "the gravity of the public health problems afflicting many developing and least-developed countries" and the recognition of the importance of IP protection for development of new medicines, the ministers emphasized that TRIPS should not prevent members from taking measures to protect public health. To this purpose, members were encouraged to use flexibilities provided in TRIPS. The declaration even provided members with reasonably detailed instructions as to how to interpret those flexibilities. For example, each member is entitled to determine the suitable grounds for granting compulsory licenses (paragraph 5 (b)), and each member can state what a "national emergency" is, while pandemics (AIDS, tuberculosis, and malaria are clearly stated in the Declaration as cases of pandemics) are automatically proclaimed a "national emergency or other circumstances of extreme urgency." See Ministerial Conference, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2. (Nov. 20, 2001), *available at*: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.pdf (last visited on Oct. 10, 2014).

78 *Supra* note 6 at 276.

79 This is also evident from the order issued by controller of patents on March 2012, while granting first compulsory licence in India under the Patents Act, 1970 in *Natco Pharma Ltd.* v. *Bayer Corporation* (Compulsory Licence Application No. 1 of 2011).

develop balance system of law to foster innovation and competition as well as consumer welfare. Effective IP related competition laws will assist host countries to regulate anti-competitive practices in technology transfer. In addition, host countries can also customize procedural aspects of their IP related competition laws to make it as a threat or bargaining tactics to foster technology transfer and consumer welfare.[80]

There is no dispute decided by WTO DSB related to article 8.2, article 40, or, more generally, competition rules regarding IPR based restraints of competition. Moreover, we do not find any definition of anti-competitive practices in WTO law.[81] It must be noted that there is no consensus on the definition of anti-competitive practices in technology transfer and it differs from country to country. There is also major difference in competition laws of developed and developing country. In particular, developed countries favour innovation- oriented competition laws while developing countries favour dissemination-oriented competition laws. If any dispute comes before WTO DSB relating to the application of national competition law to technology transfer, it is very difficult to reconcile innovation and development oriented competition laws and to appraise appropriateness of remedies provided by any one system in connection with the TRIPS. In such a case, a developing country member may well defend its position with the help of flexibilities available in the TRIPS competition rules.[82] Developing country members are facing many challenges in enforcing IPR-related competition provisions in their jurisdictions. So each country should identify its own enforcement priorities in controlling IPR-related anti-competitive practices. In the beginning, developing countries should consider prevention of some widespread IPR-related anti-competitive practices which affect technology transfer and consumer welfare seriously.[83]

An over-ambitious approach to IPR-related competition law may result in the law not being applied effectively or efficiently.[84] Developing country members should therefore apply IPR-related competition law in their own national interest. Adopting innovation-oriented competition laws of developed countries will hardly prove to be successful in developing countries because of the differences in technological goals of these two divergent legal system. Even a common IPR-related competition law in all developing countries is not practicable. Developing countries should adopt IPR-related competition law in consistent with the TRIPS but they must take into account specifics of their own technological needs and goals. While IP protection is being globalized under the TRIPS, IPR-related competition law in developing countries needs to be

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80 *Supra* note 6 at 276.

81 *Supra* note 48 at 565.

82 *Supra* note 6 at 260.

83 *Id.* at 254.

84 *Ibid.*

'glocalised' to balance that protection and foster technology transfer and consumer welfare.[85]

VI Conclusion

IPRs intensive technology transfer related anti-competitive practices have been, and continues to be, discussed in international forums. After unsuccessful negotiations of draft code of conduct on transfer of technology, the anti-competitive provisions in the TRIPS are the first significant leap for developing country members of WTO. These provisions establish a legal framework for WTO members with a substantial discretion to customize their domestic competition law to deal with anti-competitive practises in technology transfer agreements. Moreover, successful technology transfer depends on the strategic use of flexibilities in the TRIPS by developing country members. A developing country member should favour *per se* prohibition model in its competition statute rather than adopting a *rule of reason* approach keeping in mind the level of development and the economic as well as institutional environment. In any case, in the world of globalized intellectual property protection, IPR-related competition law should be 'glocalised'. Developing countries should adapt and customize their domestic anti-competitive provisions to make it fit to the local context and needs. Appropriate IPR-related competition law and policy towards technology transfer is the need of the hour for the developing countries wishing to foster technology transfer and consumer welfare.

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85 *Id.* at 302.

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