CHAPTER 22

INTERNATIONAL TRADE, INTELLECTUAL PROPERTY AND COMPETITION RULES: MULTIPLE CASES FOR GLOBAL "REGULATORY CO-OPETITION"?

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I INTRODUCTION

> No game is an island. Even so, people draw boundaries and divide the world up into many separate games. It is easy to fall into the trap of analysing these separate games in isolation – imagining that there is no larger game. The problem is that mental boundaries are not real boundaries – there are no real boundaries.[1]

According to trade theory, the development of international trade through trade liberalisation, based on the conclusion of reciprocal and mutually advantageous arrangements, is usually seen as contributing to the growth of national economies and hereby to the increase of the standard of living or overall wealth and prosperity of all.[2] Similar to the difficulties of economists in trying to economically measure

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1 Adam M. Brandenburger and Barry J. Nalebuff *Co-opetition* (New York, Currency Doubleday, 1999) at 234.

2 Cf the Preamble of the Marrakesh Agreement Establishing the World Trade Organization (with Annexes, Final Act and Protocol), concluded at Marrakesh on April 15 1994, (1994) 33 ILM 1144; see also Michael J. Trebilcock and Robert Howse *The Regulation of International Trade* (2nd ed,London, Routledge, 2005) at 1-16.

and assess quality of life,[3] the community of lawyers is struggling with the process of finding the best regulatory approach to realise the economic objectives by transposing trade theory into trade practice. The legal debate on the best regulatory approach has often been framed in terms of different forms of regulation expressed by the dichotomies of regulatory diversity versus regulatory harmonisation or regulatory competition versus regulatory cooperation.[4] In the context of the continuing process of the removal of barriers to trade and commerce, this debate has largely focused on the governmental competition between different national legal regimes or jurisdictions under the aegis of an international regulatory regime. At the same time, parallel debates have emerged that address the various threats to the unity of international law caused by a growing fragmentation of international law in general and of international trade law in particular.[5] Yet, another important debate that continues to occupy the legal community is the one of the public – private law distinction at both the national and international level.[6] In sum, the

3 Eg Joseph E. Stiglitz, Amartya Sen and Jean-Paul Fitoussi "Report by the Commission on the Measurement of Economic Performance and Social Progress (CMEPSP)" (14 September 2009) at 41-59, <www.stiglitz-sen-fitoussi.fr/documents/rapport_anglais.pdf>; see also Bruno Frey and Alois Stutzer "What Can Economists Learn From Happiness Research?" (2002) 40 Journal of Economic Literature 402.

4 Eg Karl M. Meessen (ed.) *Economic Law as an Economic Good: Its Rule Function and its Tool Function in the Competition of Systems* (Munich, Sellier, 2009), Dale D. Murphy "Interjurisdictional Competition and Regulatory Advantage" (2005) 8(4) Journal of International Economic Law 891, Jonathan R. Macey "Regulatory Globalization as a Response to Regulatory Competition" (2003) 52 Emory Law Journal 1353, Daniel C. Esty, "Regulatory Competition in Focus" (2000) 3(2) Journal of International Economic Law 215, Alan 0. Sykes "Regulatory Competition or Regulatory Harmonization? A Silly Question?" (2000) 3(2) Journal of International Economic Law 257, Joel P. Trachtman "Regulatory Competition and Regulatory Jurisdiction" (2000) 3(2) Journal of International Economic Law 331, Michael Trebilcock and Robert Howse "Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics" (1998) 6 European Journal of Law and Economics 5, and Joel P. Trachtman "International Regulatory Competition, Externalization, and Jurisdiction" (1993) 34(1) Harvard International Law Journal 47.

5 See eg Denis Alland et al. (eds) *Unite et diversite du droit international: ecrits en l'honneur du professeur Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff Publishers, 2014), International Law Commission (ILC) *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (Martti Koskenniemi (ed) (Report of the Study Group of the International Law Commission), A/CN.4/L.682, 13 April 2006, and Andreas Fisher-Lescano and Günther Teubner "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law" 25 Michigan Journal of International Law 999 (2004); and see Panagiotis Delimatsis "The Fragmentation of International Trade Law" (2011) 45 (1) Journal of World Trade 87.

6 Eg Elizabeth Trujillo "From Here to Beijing: Public/Private Overlaps in Trade and Their Effects on U.S. Law" (2009) 40 Loyola University Chicago Law Journal 691, Rostam J. Neuwirth "International Law and the Public/Private Law Distinction" (2000) 55 Zeitschrift für öffentliches Recht 393, A. Claire Cutler "Artifice, Ideology and Paradox: The Public/Private Distinction in

current trends of globalization of trade and commerce in relation to law and regulation, which have been described as "internationalisation of law" is becoming increasingly complex.[7] Various factors are leading to this increasing complexity and, in turn, call for more adequate responses at the level of regulatory theory. Among them features the notion of "regulatory co-opetition", which was used by Daniel C. Esty and Damien Geradin as a criticism of "race-toward-the-bottom" and regulatory competition theories and to better reflect and parallel this diversity and complexity.[8] They defined "regulatory co-opetition" as meaning that "optimal governance requires a flexible mix of competition and cooperation between governmental actors, as well as between governmental and non-governmental actors".[9] In fact, their arguments are sound and have become more pressing in view of various changes to both the architecture of the international (economic) legal order and the way business is conducted in the globalised world today. Especially with regard to the latter, new technologies are nowadays threatening to undermine the progress made in the evolution of the international legal order.[10] The changes introduced by these new technologies not only affect the international legal order but also the world of business and commerce, which have resulted in novel industries and novel products. Among them feature a category of so-called "convergence products" which have been defined as "a digital-platform product bundle that physically integrates two or more digital-platform technologies into a common product form (eg, a mobile phone and a digital camera into a camera phone)".[11] This definition, however, is limited to digital products but many more examples of convergence products exist and even a broader trend in the economy as a whole as "convergenomics" has been stated.[12] This wider trend has also been described as follows:

International Law" (1997) 4(2) Review of International Political Economy 261, and Franz Bydlinski "Kriterien und Sinn der Unterscheidung von Privatrecht und öffentlichem Recht" (1994) 194(4) Archiv für die civilistische Praxis 319.

7 Marcelo Dias Varella *Internationalization of Law: Globalization, International Law and Complexity* (Berlin, Springer, 2014) at 1.

8 Daniel C. Esty and Damien Geradin *"*Regulatory Co-opetition" (2000) 3(2) Journal of International Economic Law 235 at 237.

9 Ibid.

10 Marcelo Dias Varella *Internationalization of Law: Globalization, International Law and Complexity* (Berlin, Springer, 2014) at 22-25.

11 Jin K. Han et al. "Technology Convergence: When Do Consumers Prefer Converged Products to Dedicated Products?" (2009) 73 Journal of Marketing 97 at 97.

12 Sang M. Lee and David L. Olson *Convergenomics: Strategic Innovation in the Convergence Era* (Farnham, Gower, 2010).

> During the last few years, competition has radically changed due to the increase of unconventional players (mainly inter- or cross-industry) that have redrawn the landscape of many industries. Boundaries are increasingly fading among hi-tech industries (for example, the ICT) as well as among hi-touch and hi-tech industries: nutriceutics (also called the 'functional food' industry), edutainment, cosmeceutics and genetics diagnostics are just a sample of the emerging convergent markets.[13]

This trend means that several ways in which industries and products, both goods and services, have been categorised are no longer viable. A generic term that describes these changes in the realm of business and law that has gained popularity is the one of the "creative economy". Even though the creative economy has so far defied a single definition, it has been characterised as an "evolving concept", which "entails a shift from the conventional models towards a multidisciplinary model dealing with the interface between economics, culture and technology and centred on the predominance of services and creative content".[14] The multidisciplinary character of these new creative industries also translates into the greater relevance of a vast set of legal regimes and regulations.[15] In the context of global trade in the era of a creative economy, this includes but is not limited to the respective legal regimes governing international trade, intellectual property and competition to mention but a few.[16] Overall, the situation also gives rise to an interesting paradox in the quest for the optimal regulatory approach, namely that apparently international law is further fragmenting while businesses and industries appear on a path towards greater convergence.[17]

As far as the regimes of international trade law, intellectual property laws and competition laws are concerned, the prevalent conditions largely diverge. First, international trade law has become largely and progressively harmonized under the

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13 Fabio Ancarani and Michele Costabile "Coopetition Dynamics in Convergent Industries: Designing Scope Connections to Combine Heterogeneous Resources" in Saïd Yami et al (eds) *Coopetition: Winning Strategies for the 21st Century* (Cheltenham: Edward Elgar, 2010) 216 at 216.

14 United Nations Conference on Trade and Development (UNCTAD) *World Creative Economy Report 2008: The Challenge of Assessing the Creative Economy Towards Informed Policy-Making* (Geneva: UNCTAD, 2008) at iii and 3-4.

15 United Nations Conference on Trade and Development (UNCTAD), *World Creative Economy Report 2010: Creative Economy: A Feasible Development Option* (Geneva: UNCTAD, 2010) at 221-223.

16 See also Rostam J. Neuwirth "Global Market Integration and the Creative Economy: The Paradox of Industry Convergence and Regulatory Divergence" (2015) 18(1) Journal of International Economic Law 21.

17 Ibid.

GATT/WTO system, i.e. the evolution from the General Agreement on Tariffs and Trade (GATT) in 1947 until the creation of the World Trade Organization (WTO) in 1994.[18] It has also seen the expansion from the regulation of trade in goods to trade in services covered by the General Agreement on Trade in Services (GATS) and to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as well as many more related agreements.[19] Despite the inclusion of the TRIPS Agreement in the realm of the WTO, the situation for intellectual property rights is still more fragmented than the one of trade regulation. This is because the TRIPS Agreement only introduced minimum standards and also left several contentious issues open for future negotiations.[20] Moreover, based on the territorial approach introduced by the Paris and Berne Conventions, which the TRIPS Agreement partially incorporates, the present situation has been aptly termed a "territorial mess".[21] Finally, the TRIPS Agreement also makes a few references to issues normally governed by competition laws but there is currently no international legal regime dealing with competition issues. In fact, the initial work programme for the Doha Round negotiations had foreseen an effort to formulate global competition rules; this plan has meanwhile been abandoned or indefinitely postponed.[22] As a result, the current transnational landscape of competition law regimes can be best described by the terms "universal proliferation" and "global convergence".[23] As mentioned by the UNCTAD in 2007, a total of 113 countries

18 See generally Thomas Cottier and Manfred Elsig (eds) *Governing the World Trade Organization: Past, Present and Beyond Doha* (Cambridge, Cambridge University Press, 2011).

19 Most of the WTO agreements are the result of the 1986–94 Uruguay Round negotiations, signed at the Marrakesh ministerial meeting in April 1994. There are about 60 agreements and decisions totalling 550 pages, available at <www.wto.org/english/docs_e/legal_e/legal_e.htm>.

20 Jerome H. Reichman "Universal Minimum Standards of Intellectual Property Protection under the TRIPs Component of the WTO Agreement" in Carlos M. Correa and Abdulqawi A. Yusuf (eds) *Intellectual Property and International Trade: The TRIPs Agreement* (London, Kluwer Law International, 1998) 21.

21 Peter K. Yu "Region Codes and the Territorial Mess" (2012) 30 Cardozo Arts & Entertainment Law Journal 187–264 at 188: "[I]t is therefore no surprise that copyright holders seeking to protect their works in multiple markets remain frustrated by the 'territorial mess' created by national divergences in laws, policies, and institutions, not to mention the additional differences in market capacities and consumer expectations.

22 See also Einer Elhauge and Damien Geradin *Global Competition Law and Economics* (Oxford, Hart, 2007) at 1105-1112.

23 Eg David Gerber "Asia and global competition law convergence" in Michael Dowdle, John Gillespie, Imelda Maher (eds) *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* (Cambridge, 2013) at 36-52; Leonardo T. Orlanski "Searching for the Basis of International Convergence in Competition Law and Policy" (2011) 4 Global Antitrust Review 7.

and regional groupings have adopted or were in the process of adopting competition legislation.[24] Even though it has been argued that the competition law regime is active in roughly 60-70% of the countries with competition legislation,[25] the universal proliferation of competition law regimes became a largely uncontested trend.[26] Ultimately, this leaves the global situation of competition rules in a state where numerous national (or regional in the case of the European Union (EU)) competition authorities (NCAs)[27] enforce their national competition rules against the backdrop of an integrating global market.[28]

This means that at least the three closely related areas of international trade, intellectual property and competition presently face a complex situation caused by the respective differences in the degree of their international harmonisation. For this reason, "regulatory co-opetition" understood by Daniel C. Esty and Damien Geradin as "a flexible mix of competition and cooperation between governmental actors, as well as between governmental and non-governmental actors" appears to be the adequate descriptive term. The term "governmental actors" can be understood to include also the various international organizations (or "inter-governmental agencies") competent in these areas. This is the meaning given to the term in this paper, which, in trying to address the issue of the optimal regulatory approach to international trade and commerce in the future, argues for a better coordination not only between non-governmental actors and governmental actors but, most importantly, between the various international organizations active in these areas. For the areas of international trade, intellectual property and

24 UNCTAD Guidebook on competition systems (Geneva, 2007), available at <http://unctad.org/en/Docs/ditcclp20072_en.pdf>.

25 Abel Mateus, Competition and Development: What Competition Law Regime? (26 October 2010), available at <http://ssrn.com/abstract=1699643>.

26 Against this background, there are only few jurisdictions that have not made comprehensive competition legislation a part of their national legal system. For example, according to 2014 data, five ASEAN countries have not yet implemented a comprehensive competition law: Brunei, Cambodia, Lao PDR, Myanmar, and Philippines. See Cassey Lee and Yoshifumi Fukunaga "ASEAN Regional Cooperation on Competition Policy" (2014) 35 Journal of Asian Economics 77. See also Alexandr Svetlicinii "The Limits for the Global Proliferation of Competition Law: The Case of Macao SAR" (2014) 2 European Scientific Journal 31.

27 By 2009 the number of national competition authorities (NCAs) joining the International Competition Network has reached 104 NCAs from 92 jurisdictions. International Competition Network, Factsheet and key messages, p. 1, available at <www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf>.

28 See also Eleanor M. Fox "Antitrust Law on a Global Scale: Races Up, Down and Sideways" in Daniel C. Esty and Damien Geradin (eds.) *Regulatory Competition and Economic Integration* (Oxford: Oxford University Press, 2001) 348.

competition law, these organizations mainly involve the WTO, the World Intellectual Property Organization (WIPO), the United Nations Conference on Trade and Development (UNCTAD), the United Nations Commission on International Trade Law (UNCITRAL) and the Organization of Economic Co-operation and Development (OECD).

In this regard, the present paper identifies and discusses six selected case studies, which aim at highlighting the need for greater "regulatory co-opetition" between the governmental and non-governmental actors in the three related areas of international trade, intellectual property law and competition. To this end, the first case concerns a WTO dispute involving Brazil, India and the EU on the subject of the seizure of generic drugs in transit and compliance with the WTO legal texts. This case demonstrates how the issue of parallel imports is addressed in the areas of international trade, intellectual property and competition. The second case study follows the litigation saga evolving around the application of the Australian tobacco packaging legislation in the context of the applicable WTO rules (GATT, TBT, TRIPS), BIT-based investor-state arbitration and national constitutional law. The case raises a number of legal issues including but not limited to the public health concerns and related issues under the WTO law, intellectual property law, foreign investment law to mention but a few. The third case study demonstrates the current inadequacy in the regulation of the private parties' status in international commerce using the example of the DVD Regional Coding System, the implementation of which by the private parties led to the fragmentation of the global markets and price discrimination of the consumers. The fourth case demonstrates the intersection of the international trade rules and competition rules on the example of the tariff classification of a product as medicine or foodstuff. Even though the change in tariff classification effectively changes the conditions for competition on the relevant market, the international trade rules and competition rules (at least on the national level) lack the necessary "regulatory co-opetition" to address this problem. The fifth case study is related to the use and abuse of standard essential patents, the patented technologies that become industry standards following the process of standardization. When the holders of the standard essential patents become unavoidable trading partners for anyone who uses the patented technology in their products, the former can refuse licensing or attempt to extort unfavourable licensing terms from the licensee ("patent holdup"). These practices of the patent holders can have anti-competitive effects on the relevant market and the case study demonstrates the deficiencies of the intellectual property rules and competition rules in addressing the problem, which calls for more regulatory coordination between the two regimes. Finally, the sixth case study highlights the importance of the procedural rules in the coherent

enforcement of the substantive rules. This is exemplified in the case of private enforcement of EU competition rules, where the divergences in procedural rules of individual Member States does not permit the coherent enforcement of the substantive competition rules, which could lead to forum shopping and fragmentation of the markets along the lines of the national jurisdictions.

II TRADE IN PHARMACEUTICALS: EUROPEAN UNION – SEIZURE OF GENERIC DRUGS IN TRANSIT

The first case to highlight problems for global business relations caused by the current fragmentation and inadequate coordination of the respective regimes of international trade law, intellectual property law, and competition law is found in a conflict involving Brazil, India and the EU. In 2010 India and Brazil requested consultations with the EU in line with the proceedings provided by the WTO against the seizure of generic drugs in transit through the EU.[29] In that case, a Brazilian company had bought pharmaceuticals from an Indian company (without apparently violating any relevant intellectual property rights in the respective countries of Brazil and India) but the respective merchandise was later seized on transit in the Netherlands on the ground of infringements of one or more patents alleged to be valid and enforceable in the Netherlands. More concretely, Brazil and India asked the EU for consultations concerning the "repeated seizures of consignments of generic drugs originating in India" which were on transit in the Netherlands for their final destination in Brazil (and other countries in South America).[30] Several other WTO Members including Canada, Ecuador, Turkey, China and Japan, joined the request for consultations with the EU.[31] The request for consultations formulated by Brazil described the facts as follows:

> A shipment of the generic drug Losartan Potassium, produced in India and destined to Brazil, was seized when in transit at Schiphol Airport, in the Netherlands, in December 2008, and later returned to the country of origin. The Dutch authorities seized the shipment pursuant to the European Communities Council Regulation No

29 European Union and a Member State – Seizure of Generic Drugs in Transit (Request for Consultations by India), WT/DS408/1 (19 May 2010) and European Union and a Member State – Seizure of Generic Drugs in Transit (Request for Consultations by Brazil), WT/DS409/1 (19 May 2010).

30 Annex to European Union and a Member State – Seizure of Generic Drugs in Transit (Request for Consultations by India), WT/DS408/1 (19 May 2010) at 4.

31 The respective communications by Canada (WT/DS408/2 (1 June 2010)), Brazil (WT/DS408/3 (2 June 2010)), Ecuador (WT/DS408/4 and WT/DS409/3 (2 June 2010)), India WT/DS409/4 (2 June 2010), Turkey (WT/DS408/5 and WT/DS409/5 (3 June 2010)), China (WT/DS408/6 and WT/DS409/6 (3 June 2010)), and Japan (WT/DS408/7 and WT/DS409/7 (3 June 2010)).

1383/2003 (EC Regulation No 1383/2003). Based on complaints of suspected infringement by alleged owners of patents (or supplementary protection certificates), over the last two years, customs authorities in the Netherlands have seized a substantial number of consignments of generic medicines from India in transit through the Netherlands, including the aforementioned shipment of Losartan Potassium destined to Brazil.

As can be seen from the complaints by Brazil and India, this problem was not a single event but had occurred over several years. In legal terms, the two complainants argued that the laws in the Netherlands and the EU relevant for the seizure of the said products are inconsistent with their obligations arising from their WTO membership and notably the GATT and the TRIPS. As far as the contested EU measures are concerned, India and Brazil invoked *inter alia* Article V GATT ("Freedom of Transit"), Article X GATT ("Publication and Administration of Trade Regulations"), as well as Articles 28 ("Rights Conferred"), 31 ("Other Use Without Authorization of the Right Holder"), 41 ("Enforcement") and 42 ("Fair and Equitable Procedures") of the TRIPS Agreement.[32] As for the legal outcome of the dispute, it is unfortunate that the last reported step in these proceedings was that the EU had informed the Dispute Settlement Body (DSB) of the WTO that it had accepted all requests to join the consultations.[33] This means that until now there is neither a mutually agreed solution to the problem found between the disputing parties nor was a panel established or even requested to be established.

Regardless of the final outcome of this dispute, the case points to more serious problems, which are rooted in various clashes between the respective regimes of international trade, intellectual property and competition matters. As a first category of clashes, it is possible to mention the conflict between the rules of international trade law as governed by the agreements administered by the WTO and the rules regulating various international commercial transactions between private parties such as those governed by UNCITRAL conventions.[34] This means that as an inherent flaw in the design of the present international trade order, the rules of public international law governing the trade relations between states are by and large separated from those governing the trade relations between private individuals. At the same time (and due to the current incorporation of intellectual

32 WT/DS408/1 and WT/DS409/1 (19 May 2010), Above n 29.

33 Communication from the EU, Acceptance by the European Union of the Requests to Join Consultations, WT/DS408/8 and WT/DS409/8 (18 June 2010).

34 UNCITRAL texts and their status are available at <www.uncitral.org/uncitral/en/uncitral_texts.html>.

property law within the competence of the WTO), the same problem also persists with regard to trade rules and intellectual property laws.[35] The problem of their potential clash was hypothetically exemplified by Bruno Zeller having extended the facts of the present case to a dispute involving Article 42 of the UN Convention on Contracts for the International Sale of Goods (CISG).[36] In order to better demonstrate the problem, we reproduce the text of the Article 42 CISG below:

> Article 42 CISG
>
> (1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:
>
> (a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or
>
> (b) in any other case, under the law of the State where the buyer has his place of business.
>
> (2) The obligation of the seller under the preceding paragraph does not extend to cases where:
>
> (a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or
>
> (b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

In principal, the main issue at stake is to what extent the CISG can successfully address the present problem where the buyer (a Brazilian company) did not receive the merchandise it bought from the seller (an Indian company) because the merchandise has been seized on grounds of third party claims, i.e. claims by the holder of the intellectual property rights in the relevant products seized. To this

35 See also Thomas M. Beline "Legal Defect Protected by Article 42 of the CISG: A Wolf in Sheep's Clothing" (2007) 7 University of Pittsburgh Journal of Technology Law & Policy 9.

36 Bruno Zeller "Intellectual Property Rights & the CISG Article 42" (2011) 15(2) Vindobona Journal of International Commercial Law and Arbitration 289. Note that the example being hypothetical, because neither Brazil nor India is currently a member of the CISG which excludes the CISG's application to the present dispute; see also Article 1 CISG.

end, Bruno Zeller looks at various issues related to the case. These include particularly the seller's and buyer's obligations with regard to the scope of the knowledge of the existence of third party claims, namely whether they are limited to the buyer's (i.e. Brazil) and seller's (i.e. India) jurisdictions or extend to other jurisdictions as well (in this case the Dutch or EU legislation).[37] They also include possible defences based on Article 79 CISG governing impediments beyond a party's control.[38] Upon the review of several interpretations of the CISG rendered by the courts, the author comes to the following conclusion:[39]

> Finally, returning to the hypothetical WTO dispute, it appears that buyer has the stronger argument. First, the goods were not delivered which is a fundamental duty of any seller and is independent of any other claims such as intellectual property rights. Secondly, the seller ought to have known that the existence of third party rights for generic goods are always a possibility. However, the seller can rely on Art. 79 and claim that an impediment beyond its control, namely, that the seizure of goods while in transit was the cause of the non-delivery.

Apart from the substantive problems in deciding this (hypothetical) case, there is a procedural problem concerning which forum would be competent to decide the case. This is because, on the one hand, the determination of the legality of the seizure of the products in question under WTO law has to be established by the WTO. At the same time, private parties are presently precluded from accessing the WTO dispute settlement system, which is only open to WTO Member's governments.[40] This would not only take probably a considerable time but it would also raise several politically sensitive issues with regard to the effect of WTO rules in a domestic court, which is currently widely rejected by the WTO members.[41]

To extend the hypothesis further, even if a WTO panel or the appellate body would decide the case, it would still be likely to face criticism given that the relationship between trade rules and rules on intellectual property is not always smooth or legally certain. In other words, if the seizure was held to be legal and the

37 At 292-302.

38 At 297-298.

39 At 302.

40 Cf Article 1(1) Understanding on Rules and Procedures Governing the Settlements of Disputes (DSU); but see Aaron Catbagan "Rights of Action for Private Non-State Actors in the WTO Dispute Settlement System" (2009) 37 Denver Journal of International Law and Policy 279, proposing to open the WTO dispute settlement procedures to private non-state actors.

41 Eg Hélène Ruiz Fabri "Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?" (2014) 25(1) The European Journal of International Law 151.

EU measures consistent with WTO law, India and Brazil and its respective companies (seller and buyer in this case) would still criticise the decision. In the case to the contrary, the EU and most likely also the country in which the company holding the patent rights is situated would consider the ruling in conflict with the doctrine of the regional exhaustion of intellectual property rights. The reason for this likely unsatisfactory outcome is not a bad decision by the WTO panel but the insufficient coordination between trade, intellectual property and competition rules. The potential conflict between these rules or international legal regimes has been exemplified in the context of trade in pharmaceutical products against the backdrop of the legally unresolved problem of parallel imports. As a matter of fact, the issue of parallel imports has not been harmonized by the TRIPS Agreement as its Article 6 stipulates as follows:

> Exhaustion
>
> For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

This current situation with the parallel imports not being harmonized was therefore rightly described as a situation of "unparallel laws".[42] Parallel imports continue to be controversial in both theory and practice. The issue is particularly problematic in the context of trade in pharmaceuticals where trade and intellectual property rules meet with the so-called "non-trade concern" of public health.[43] Generally, parallel imports (or gray market goods) are closely related to the exhaustion or first sale doctrine, which means that once an IP-protected product is put on the market, the IP right holder loses the right to control the resale of the protected goods.[44] The exhaustion can take two different forms, namely first a

42 Rajnish Kumar Rai and Srinath Jagannathan "Parallel Imports and Unparallel Laws: An Examination of the Exhaustion Doctrine through the Lens of Pharmaceutical Products" (2012) 21(1) Information & Communications Technology Law 53.

43 See also Rajnish Kumar Rai and Srinath Jagannathan "Parallel Imports and Unparallel Laws: An Examination of the Exhaustion Doctrine through the Lens of Pharmaceutical Products" (2012) 21(1) Information & Communications Technology Law 53 and Ng Loy Wee Loon "Parallel Imports of Pharmaceuticals: Doha versus Free Trade Agreements" in Christopher Heath and Anselm Kamperman Sanders (eds) *Intellectual Property and Free Trade Agreements* (Oxford, Hart, 2007) 157.

44 See also James B. Kobak Jr. "Exhaustion of Intellectual Property Rights and International Trade" (2005) 5(1) Global Economy Journal 1.

national (or regional) and an international exhaustion of the first sale rights.[45] This means that in the case of the former, the holder of the IP rights cannot control the circulation of the sold products within the national (or regional) territory but can effectively control the (re-)import of the same goods from foreign markets. In the case of an international exhaustion of rights, the holder of the IP rights has effectively lost control over the subsequent movements of the products regardless of the national market anywhere in which they have been sold in the first place. A major problem in this context is that different countries follow different practices, which then may lead to conflicts, which is why it has been suggested to harmonize the issue of parallel imports.[46] However, parallel imports not only involve diverging interests associated with different objectives pursued by trade rules and IP rules, they also involve a fair amount of aspects governed by competition rules.[47] The nature of the conflict of interests has been summed up as follows:[48]

> Parallel imports are one of the most iridescent and enigmatic phenomena of international trade. On the one hand, they strictly follow the laws of the market; yet on the other hand, the laws of the market are not the only ones that apply to this kind of activity. While industrial producers are pressing for general barriers in order to maintain price differences of goods among various countries, consumers find such differences puzzling in a world that is increasingly heading towards international trade and the removal of trade barriers.

This is because when parallel imports are impossible, because of a country adopting the doctrine of the national exhaustion of intellectual property rights, considerable price differences can be achieved. Such price discrimination is not only fragmenting the emerging global market, it also discriminates among

45 See also Rajnish Kumar Rai and Srinath Jagannathan "Parallel Imports and Unparallel Laws: An Examination of the Exhaustion Doctrine through the Lens of Pharmaceutical Products" (2012) 21(1) Information & Communications Technology Law 53 at 62-63.

46 Eg Enrico Bonadio "Parallel Imports in a Global Market: Should a Generalised International Exhaustion be the Next Step?" (2011) 33(3) European Intellectual Property Review 153.

47 Eg Francesco Liberatore "UK calls for ban of parallel trade of prescription medicines - what are the EU competition law implications?" (2013) 34(4) European Competition Law Review 189.

48 Christopher Heath "Parallel Imports and International Trade" (1999) at 1, <www.wipo.int/edocs/mdocs/sme/en/atrip_gva_99/atrip_gva_99_6.pdf>.

consumers in the different national markets.[49] There are, of course, various advantages and disadvantages linked to either approach, a national or international exhaustion of IP rights, but it suffices to have established that trade, IP and competition rules are intrinsically linked while their respective degree of harmonization at the global level drastically differs.

In other words, the present case of requested consultations in the *European Union and a Member State – Seizure of Generic Drugs in Transit* plus a brief hypothetical extension of its facts to the conditions in the multilateral trading order reveal various possibilities for conflicts not only between different national jurisdictions but also the international regimes governing international trade, international intellectual property rights and the widely absent international (but vastly nationally harmonised) competition rules. In institutional terms, this means that the trade (GATT and GATS) and intellectual property (TRIPS) rules governed by the WTO may also clash with the rules laid down in the CISG and other texts adopted or endorsed by UNCITRAL for the purpose of facilitating international commercial transactions.

III TRADE AND PUBLIC HEALTH: AUSTRALIA – TOBACCO PLAIN PACKAGING

The second case, or series of cases, that well exemplify and underscore the need for greater coordination between trade, intellectual property and competition rules is found in another recent dispute that was, or is being decided, in a domestic court, in international arbitral proceedings, and before the WTO. The dispute is also placed amidst the different and competing legislative objectives related to international trade, trademark protection, competition and public health. The case at issue is the one regarding the Australian Tobacco Plain Packaging Act,[50] which became known as the *Australia - Tobacco Plain Packaging* dispute in the WTO.[51]

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49 As confirmed by the European Court of Justice in case agreements that aim at limiting parallel trade "have as their object the prevention of competition". Judgment of October 6, 2009 in *GlaxoSmithKline Services v Commission of the European Communities* (Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P) [2010] 4 CMLR 2 at 59. See also Edith Loozen "The Workings Of Article 101 TFEU In Case Of An Agreement That Aims To Limit Parallel Trade" (GlaxoSmithKline Services (C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P) (2010) 31(9) European Competition Law Review 349-353.

50 Tobacco Plain Packaging Act 2011, Act No. 148 of 2011; Australian Government, ComLaw, <www.comlaw.gov.au/Details/C2011A00148>.

51 The respective requests for consultation by Ukraine, Honduras, Dominican Republic, Cuba and Indonesia "Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco products and Packaging" WT/DS434/1 (15 March 2012), WT/DS435/1 (10 April 2012), WT/DS441/1 (23 July 2012), WT/DS458/1 (7 May 2013) and WT/DS467/1 (23 September 2012).

The Tobacco Plain Packaging Act serves to improve public health by discouraging the use of tobacco products based on several measures, including a detailed regulation of the appearance of retail packaging of all tobacco products sold in Australia.[52] It means that tobacco products sold in the Australian market need to conform to certain strict requirements in terms of the design and colours. More precisely, cigarette packs are sold in a uniform design in a "drab dark brown" colour, which means that effectively all cigarette brands will be sold in the same design and, most of all, prohibits the different trademarks associated with the different cigarette brands generally from appearing on the retail packaging.[53] At the same time, the size of the health warnings was also increased. The underlying rationale of the Act is that, following the general ban of all tobacco advertising and promotion in line with the Framework Convention on Tobacco Control,[54] tobacco packaging advanced to the "key promotional vehicle of the tobacco industry".[55] Thus, as a next step in curbing consumption of tobacco products, even the packages are supposed to be free from the advertising effect of trademarks.

From the perspective of "regulatory co-opetition" it is thus interesting to note that the legislation was challenged, first in 2011, by two major tobacco companies within the Australian legal system. The High Court of Australia, however, dismissed their submissions that the Act is invalid in its application to the trademarks and, subsequently, that it would amount to an expropriation of their property, which is vested in the trademark and get-up used on their products.[56]

Even before its entry into force, the same Act was also challenged by a tobacco company in another forum, this time using arbitral proceedings in the context of an investor-state dispute. As the first investor-state dispute that has been brought against Australia, Philip Morris (PM) Asia challenged the tobacco plain packaging

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52 Section 3 Tobacco Plain Packaging Act 2011; see also Trade Marks Amendment (Tobacco Plain Packaging) Act 2011, Act No. 149 of 2011; Australian Government, ComLaw, <www.comlaw.gov.au/Details/C2011A00149>.

53 See Sections 18-26 Tobacco Plain Packaging Act 2011.

54 Framework Convention on Tobacco Control, UNTS Vol. 2302, p. 166. FCTC is the first treaty negotiated under the auspices of the World Health Organization. The Convention entered into force on 27 February 2005 - 90 days after it had been acceded to, ratified, accepted, or approved by 40 States. See FCTC official website <www.who.int/fctc/en/>.

55 See Becky Freeman, Simon Chapman and Matthew Rimmer "The Case for the Plain Packaging of Tobacco Products" (2008) 103 Addiction 580 at 580.

56 High Court of Australia, *JT International SA v Commonwealth* and *British American Tobacco Australasia Ltd v Commonwealth*, 2012 HCA 43; for more information, see the useful discussion in Tania Voon "Acquisition of Intellectual Property Rights: Australia's Plain Tobacco Packaging Dispute" (2013) 35(2) European Intellectual Property Review 113.

legislation under the 1993 Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments (Hong Kong-Australia BIT), which – by virtue of Article 10 – also contains a clause for the settlement of investment disputes relying on the 2010 UNCITRAL Arbitration Rules.[57] Article 10 of the Hong Kong-Australia BIT reads as follows:

> Settlement of Investment Disputes
>
> A dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the area of the latter which has not been settled amicably, shall, after a period of three months from written notification of the claim, be submitted to such procedures for settlement as may be agreed between the parties to the dispute. If no such procedures have been agreed within that three month period, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The arbitral tribunal shall have power to award interest. The parties may agree in writing to modify those Rules.

Put briefly, the notice of claim by PM proposed Singapore as the seat of arbitration and argued that it had investments in Australia, including notably the intellectual property and the goodwill, which would be threatened by the planned legislation on plain packaging. At the same time, the planned legislation was also considered to contravene its rights enshrined in the Hong Kong-Australia BIT.[58] The remaining arguments have been summed up as follows:[59]

> Philip Morris Asia is arguing that Australia's tobacco plain packaging measure constitutes an expropriation of its Australian investments in breach of Article 6 of the Hong Kong Agreement. Philip Morris Asia further argues that Australia's tobacco plain packaging measure is in breach of its commitment under Article 2(2) of the Hong Kong Agreement to accord fair and equitable treatment to Philip Morris Asia's investments. Philip Morris Asia further asserts that tobacco plain packaging constitutes an unreasonable and discriminatory measure and that Philip Morris Asia's

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57 Agreement with Hong Kong concerning the Promotion and Protection of Investments (15 September 1993), [1993] ATS 30 [Hong Kong-Australia BIT], <www.austlii.edu.au/au/other/dfat/treaties/1993/30.html>.

58 Notice of Claim Under the Australia Hong Kong Agreement for the Promotion and Protection of Investments (15 July 2011) at 1-2; Investment treaty arbitration (ita), <www.italaw.com/cases/851>.

59 Australian Government – Attorney-General's Office "Tobacco Plain Packaging – Investor-State Arbitration" <www.ag.gov.au/tobaccoplainpackaging>.

investments have been deprived of full protection and security in breach of Article 2(2) of the Hong Kong Agreement. Australia rejects these claims.

To date, no award has been rendered in this case and only several procedural orders have been issued, including a decision on the bifurcation or the splitting of the proceedings into distinct phases covering jurisdictional issues and the merits. It has been predicted that PM's "substantive claims under the Hong Kong–Australia BIT appear weak, in particular as regards fair and equitable treatment, full protection and security, unreasonable impairment, and the umbrella clause", whereas it may have "stronger arguments in relation to Australia's obligation not to engage in expropriation".[60] For certainty about the outcome, one will have to wait for the award to be rendered.

Last but not least, the Tobacco Plain Packaging Act saga also includes five proceedings commenced in March 2012 before the WTO.[61] The request for consultations was led by Ukraine and followed by Honduras, Dominican Republic, Cuba and Indonesia.[62] In the meantime, an all-time record of more than 40 WTO members from all around the globe have joined the proceedings as third parties, underscoring the great relevance of the dispute(s).[63] In substance, the complaints are mainly based on the TRIPS Agreement but also the Agreement on Technical Barriers to Trade (TBT Agreement). The complaining parties contend *inter alia* that the Australian measures fail to respect Australia's obligations deriving from the TRIPS Agreement (and – by virtue of incorporation into the TRIPS Agreement – the Paris Convention) with regard to protecting the trademark holder's legitimate rights, which "constitute an unjustifiable encumbrance on the use of trademarks" and "prevent the normal exploitation and thus the enjoyment of the patent rights for

60 Tania Voon and Andrew D. Mitchell "Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia" (2011) 14(3) Journal of International Economic Law 515 at 552.

61 See also Andrew D. Mitchell "Australia's Move to the Plain Packaging of Cigarettes and Its WTO Compatibility" (2010) 5 Asian Journal of WTO and International Health Law and Policy 399.

62 Above n 51.

63 The countries listed a third parties to the five different requests are: Argentina, Brazil, Canada, Chile, China, Chinese Taipei, Cuba, Dominican Republic, Ecuador, Egypt, European Union, Guatemala, Honduras, India, Indonesia, Japan, Korea, Republic of, Malawi, Malaysia, Mexico, Moldova, New Zealand, Nicaragua, Nigeria, Norway, Oman, Panama, Peru, Philippines, Russian Federation, Saudi Arabia, Singapore, South Africa, Thailand, Trinidad and Tobago, Turkey, Ukraine, United States, Uruguay, Zambia, Zimbabwe, <http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm>.

tobacco products".[64] Additionally, based on Article 2.2 of the TBT Agreement it is argued that the measures in question constitute "an unnecessary obstacle to trade and are more trade restrictive than necessary to achieve the stated health objectives".[65] Finally, based on Article III:4 GATT, Article 3.1 TRIPS and Article 2.1 of the TBT Agreement, it is also argued that the Australian measures fail to respect the national treatment requirement "by not providing equal competitive opportunities to imported tobacco products and foreign trademark right holders as compared to like domestic tobacco products and trademark right holders".[66] As the latest development in the proceedings before the WTO, which have not yet been decided, the DSB established a panel at its meeting on 28 September 2012 and on 5 May 2014 the panel was composed as well. In a communication dated 10 October 2014, the chairperson of the panel informed the parties that it expects to issue its final report to the parties not before the first half of 2016.[67]

The fact that these complaints are based on a combination of trade rules (i.e. GATT and TBT Agreement) as well as intellectual property rules (TRIPS and Paris Convention), which not explicitly but implicitly have serious repercussions for global competition, demonstrates the enormous complexity of the regulation of trade and commerce today. In the absence of a multilateral agreement on competition, matters related to competition are only implicitly recognised, for instance, when the TBT Agreement states that "technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade".[68] Here the phrase "unnecessary obstacles" can also be translated into meaning "distortions of global competition". This is why a better and more explicit recognition of competition rules in the context of international trade and trade-related aspects of intellectual property is urgently needed. As two out of the three legal proceedings challenging the Australian measures are still pending, it is impossible to give a final opinion. However, it is already clear that, in sum, in both substantive and procedural terms,

64 WT/DS434/1 (15 March 2012), above n 51, at 2-3; see also WT/DS434/1 (15 March 2012), WT/DS435/1 (10 April 2012), WT/DS441/1 (23 July 2012), WT/DS458/1 (7 May 2013) and WT/DS467/1 (23 September 2012), above n 51.

65 WT/DS434/1 (15 March 2012), above n 51, at 3.

66 Ibid.

67 Communication from the Chairperson of the Panel, WT/DS434/14, WT/DS435/19, WT/DS441/18, WT/DS458/17, WT/DS467/18 (14 October 2014).

68 Recital 5 of the Preamble of the Agreement on Technical Barriers to Trade (TBT Agreement).

the legal saga related to the Australian Tobacco Plain Packaging Act underscores the need for more and better coordination between the respective legal regimes governing international trade, intellectual property and competition as well as between international organizations and national state authorities with regulatory and enforcement competences in these areas.

IV PRIVATE PARTIES IN INTERNATIONAL TRADE: THE DVD REGIONAL CODING SYSTEM (DVD RCS)

The third case, or more accurately a serious problem given the absence of any legal proceedings to this end, is the issue of private parties' involvement but lack of legal status in the international legal arena. This issue also underscores the complex entwinement of trade, intellectual property and competition rules at the global level. In today's international legal regime governing international trade and commerce, the role of private parties is paradoxical. On the one hand, there is an international or rather transnational legal regime that governs the business relations between private parties, such as those regulated in various UNCITRAL legal texts. On the other hand, there exists a multilateral trading regime under the aegis of the WTO, which also governs trade, which is mainly conducted between private parties (both legal and natural) but which is exclusively based on the actions of governments denying or obstructing private parties' access to international trade and their domestic markets. This may cause serious problems for all parties concerned, i.e. both the businesses and consumers as well as governments. An important example that underscores the actual relevance of this problem is found in the so-called "Digital Versatile Disc Regional Coding System" (DVD-RCS).[69] The DVD-RCS is also known as "Regional Playback Control" and falls within the realm of "Digital Rights Management" (DRM). DRM refers to new technologies that – as private and non-legal but technological measures – are being used by "owners of copyright and related rights to facilitate rights clearance, inform consumers of permitted uses, and prevent unauthorised usage of their protected content".[70]

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69 See Rostam J. Neuwirth "The Fragmentation of the Global Market: The Case of Digital Versatile Discs (DVDs)" (2009) 27 Cardozo Arts & Entertainment Law Journal 409, Peter K. Yu "Region Codes and the Territorial Mess" (2012) 30 Cardozo Arts & Entertainment Law Journal 187, and Simon den Uijl and Henk J. de Vries "Pushing Technological Progress by Strategic Manoeuvring: the triumph of Blu-ray over HD-DVD" (2013) 55(8) Business History 1361.

70 Organization for Economic Co-operation and Development (OECD) "Piracy of Digital Content" (Paris: OECD, 2009) at 57; see also Darren A. Handler "The Copyright & Digital Mismanagement Chasm: Fair Use Implications of Digital Rights Management Technologies Upon the Digital Versatile Disk Medium" (2007) 7 Wake Forest Intellectual Property Law Journal 173 at 179-84.

As part of DRM, the DVD-RCS technologically divides the global market into a total of eight (or in the case of Blu-Ray DVDs into three) regions.[71] The division, however, does not strictly follow national or regional territorial borders but seems instead to be motivated by considerations of an economic kind or the per capita gross domestic product (GDP) or the respective purchasing power of consumers.[72] As a result, it establishes the possibility of price discrimination between consumers grouped in different regional categories by economic and technological and not political or legal means. Additionally, the DVD-RCS is not of public but of private origin. This means it has not been put in place by one or more states but a consortium of private companies operating transnationally. In fact, it originates from a licensing agreement administered by the DVD Copy Control Association ("DVD CCA"), a "not-for-profit corporation with responsibility for licensing the CSS (Content Scramble System) to manufacturers of DVD hardware, discs and related products", which is said to be necessary in order to release copyrighted content into the market.[73] Effectively, it means that "a movie on a DVD from one region can only be watched on the respective hardware (i.e., a computer or a DVD player) manufactured or distributed and sold in the same region".[74]

In sum, the factual evidence supports the argument that the DVD RCS has a definite impact on the free movement of products across national and regional borders and raises several questions as to the consistency with the rules on trade in goods (GATT) as well as the TBT Agreement.[75] Given that the DVD RCS is also said to be motivated by considerations of protecting intellectual property rights and preventing piracy,[76] it clearly falls within the scope of the TRIPS Agreement as well. Finally, in view of the absence of a regime of global competition rules, it is from a national and regional perspective that the DVD RCS also raises serious concerns given the possibilities for price discrimination between the different markets virtually created by the respective region codes. The various, albeit

71 Rostam J. Neuwirth "The Fragmentation of the Global Market: The Case of Digital Versatile Discs (DVDs)" (2009) 27 Cardozo Arts & Entertainment Law Journal 409 at 416-418.

72 Emily Dunt, Joshua S. Gans, Stephen P. King "The Economic Consequences of DVD Regional Restrictions" (2002) 21(1) Economic Papers 32 at 36-38.

73 DVD Copy Control Association (DVDCCA), About *DVDCCA*, <www.dvdcca.org/about.aspx>.

74 Rostam J. Neuwirth "The Fragmentation of the Global Market: The Case of Digital Versatile Discs (DVDs)" (2009) 27 Cardozo Arts & Entertainment Law Journal 409 at 413.

75 At 441-449.

76 See also Peter K. Yu "Region Codes and the Territorial Mess" (2012) 30 Cardozo Arts & Entertainment Law Journal 187 at 21-22.

unsuccessful attempts of national or regional competition authorities in Australia and the EU to investigate the DVD RCS testify to its negative impact on global competition.[77] Given the nature of the DVD RCS originating from private parties, it cannot be challenged by a WTO member since only measures adopted by WTO member states can be challenged. At the same time, it can also not be challenged before the WTO by a private party because private parties have no access to the WTO dispute settlement system. For these reasons, both the present limitations on access of private parties to the WTO dispute settlement system and the absence of a set of global competition rules was deplored because it was considered that such instruments would allow for the better consideration of private parties and notably consumers' interests.[78]

This last aspect is an important finding as the problems related to partition of the global markets do not only exist in the realm of the global trade in DVDs. Similar problems have been found in the area of the international trade in foodstuffs, as exemplified, for instance, by private standards in the food safety area, such as GlobalGAP.[79] But it is the context of cyberspace, which has opened up new opportunities for e-commerce, where fragmentation, or what has been termed as "geolocation" (ie tools to limit access to content on their websites from certain countries or regions),[80] creates harmful effects for consumers, retailers and national economies worldwide. In short, it is another area where the disparities in terms of regulatory coordination at the global level between trade, intellectual property and competition rules, aggravated by the inadequate consideration of private parties makes itself felt as an important cause for regulatory conflict.

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77 Emily Dunt, Joshua S. Gans, Stephen P. King "The Economic Consequences of DVD Regional Restrictions" (2002) 21(1) Economic Papers 32 at 32 and Rostam J. Neuwirth "The Fragmentation of the Global Market: The Case of Digital Versatile Discs (DVDs)" (2009) 27 Cardozo Arts & Entertainment Law Journal 409 at 432-435.

78 Rostam J. Neuwirth "The Fragmentation of the Global Market: The Case of Digital Versatile Discs (DVDs)" (2009) 27 Cardozo Arts & Entertainment Law Journal 409 at 453.

79 Eg WTO Secretariat, Committee on Sanitary and Phytosanitary Measures, Summary of the Meeting Held on 29-30 June 2005, G/SPS/R/37/Rev.1 (18 August 2005); see also WTO Committee on Sanitary and Phytosanitary Measures, Private Voluntary Standards and Developing Country Market Access: Preliminary Results (Communication from the OECD), G/SPS/GEN/763 (27 February 2007); and see Antoine Bernard de Raymond and Laure Bonnaud "Beyond the Public–Private Divide: GLOBALGAP as a Regulation Repository for Farmers" (2011) 21(2) International Journal of Sociology of Agriculture and Food 227 and Bernd M.J. van der Meulen (ed) *Private Food Law: Governing Food Chains Through Contract Law, Self-Regulation, Private Standards, Audits* (Wageningen, Wageningen Academic Publishers, 2011).

80 Marketa Trimble "The Future of Cybertravel: Legal Implications of the Evasion of Geolocation" (2012) 22 Fordham Intellectual Property, Media & Entertainment Law Journal 567 at 569.

V INTERNATIONAL TRADE AND COMPETITION RULES: IS IT A DRUG OR A FOODSTUFF?

Another set of problems related to the inadquate "regulatory co-opetition" between different legal regimes is mirrored in the following case originating from the Republic of Moldova which concerns the import regime for *Theraflex*, a drug administered to the patients with various spine and neck problems such as aches, pains and inflammations. During the period 2009-2011 *Theraflex* was classified as a pharmaceutical product and imported under the tariff position 3004 (8% VAT and 0% import tariff). In October-December 2011 the Customs Service[81] has changed its practice of tariff classification for *Theraflex* from position 3004 to position 2106. The product was effectively re-classified as a foodstuff and had to be imported under 20% VAT and 15% import tariff.[82] The representative office of *Bayer Schering* in Moldova complained to the Competition Council[83] and argued that the customs authorities have discriminated against the importers of *Theraflex* vis-à-vis the domestic producers of the substitute drugs, which should be considered as an infringement of competition rules. The new Competition Act of the Republic of Moldova,[84] which entered into force on 14 September 2012, prohibits any actions or inactions of the state authorities and local or central public administration institutions, which restrict, prevent or distort competition.[85] Where the Competition Council establishes the existence of any such actions it can issue prescriptions aimed at restoring competition restricted by the state authorities.[86]

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81 *Serviciul Vamal al Republicii Moldova* <www.customs.gov.md/>.

82 The Integrated Customs Tariff was developed and applied pursuant to the Government Decision No. 501 concerning the Integrated Customs Tariff of the Republic of Moldova of 14 August 2009, published in the Official Gazette No. 127-130/562 on 21 August 2009. Electronic version of the Integrated Customs Tariff is available at <www.customs.gov.md/index.php?id=3072>.

83 *Consiliul Concurenţei* (Moldovan competition authority) <www.competition.md/>.

84 Law on competition No. 183 of 11 July 2012 published in the Official Gazette No. 193-197 on 14 September 2012. See Alexandr Svetlicinii "New Competition Law of the Republic of Moldova: Prospects and Concerns" (2013) 6 Austrian Competition Journal 210; Valentin Mircea "The Republic of Moldova adopts a new competition law: A step into the right direction" e-Competitions Bulletin January 2013, Art. No. 51099.

85 Law on competition, Article 12(1). The non-exhaustive list of such actions includes: a) limitation of undertaking's rights to purchase or commercialise; b) setting discriminatory conditions or granting privileges to undertakings, in case these are not provided for by the law; c) setting interdictions or restrictions, which are not provided for by the law, related to the activity of undertakings; d) forcing, directly or indirectly, the undertakings to associate or concentrate, irrespective of the form. Ibid, Article 12(1)(a)-(d).

86 Ibid, Article 13(1).

When it comes to the sector specific regulations, *Theraflex* is regarded as a pharmaceutical product, which is included in the Medicines Register administered by the Medicines Agency (AMED)[87] under the common international designation *Chondroitinisulfas+D-Glucosaminum*. According to the information supplied by AMED to the Competition Council, there were seven other products substitutable with *Theraflex*, which were licensed by the AMED for distribution in Moldova and taxed with 8% VAT as other medicines. Based on this information the Competition Council has defined the relevant product as including all products licensed by the AMED under the specified designation. Based on *Theraflex*'s inclusion into the Medicines Register the competition authority concluded that this product should be viewed as a medicine (pharmaceutical product). At the same time, the Competition Council acknowledged that the Customs Service, charged with administration of the customs procedures at the importation of goods, was applying the classification of goods under the Integrated Customs Tariff system established by the Government.

In light of the apparent discrepancy between the AMED's classification and the tariff positions attributed to the same product by the Customs Service, the competition authority focused its assessment on the impact on competitors. The Competition Council noted that after the Customs Service has modified its tariff classification practice, *Theraflex* and other substitutable drugs were no longer imported in Moldova. Since the foreign substititutes were no longer present on the market, the competition authority concluded that there was no actual discrimination in favour of domestic producers. As a consequence to such conclusion, the Competition Council decided to close its investigation.[88] At the same time, in order to prevent possible discrimination in the future, the competition authority urged the Government to coordinate the classification of medicines so as to harmonize the application of the Integrated Customs Tariff and the Medicines Register.

The *Theraflex* case raises a number of concerns related to the application of competition rules to the actions of state authorities. It is apparent in the present case, that importation of *Theraflex* was terminated after the tariff classification

87 *Agenția Medicamentului și Dispozitivelor Medicale*, <www.amed.md/>. For a competition case involving AMED see Alexandr Svetlicinii "The Moldovan Competition Authority finds bid rigging practices in purchases of anti-diabetic medicines (Medicines Agencies)", e-Competitions Bulletin June 2011, Art. No 37384.

88 Competition Council, Decision No. CCE-5 of 26 September 2013. See Alexandr Svetlicinii "The Moldovan Competition Authority investigates the actions of the Customs Service concerning attribution of tariff positions to certain pharmaceutical products (Serviciul Vamal al Republicii Moldova)" e-Competitions Bulletin September 2013, Art. No. 64925.

practice was modified by the Customs Service. At the same time, the competition authority concluded that no undertaking was privileged or disadvantaged by the Customs Service because *Theraflex* was no longer imported. While the CC's decision appears to be based on the absence of anti-competitive effects on the relevant market, it remains unclear what kinds of actions of state authorities could be characterised as infringement of competition rules. For the purpose of the present discussion, however, the *Theraflex* case presents an example of the "regulatory co-opetition" (or the absence thereof) between the application of the international trade rules and competition rules in the context of a domestic market of a single country. One can imagine that on the international level, in the context of WTO trade rules, the absence of the global competition rules and the lack of coordination between the two areas, similar regulatory conflicts can appear on an even wider scale.

VI INTELLECTUAL PROPERTY AND COMPETITION RULES: "PATENT AMBUSH" AND "PATENT HOLDUP" OF STANDARD ESSENTIAL PATENTS

As a fifth example for the inadequate inter-regime coordination and notably between the rules of intellectual property and competition rules, it is worth mentioning the following problems. The legal protection of patents is based on the underlying idea of exclusivity of the rights of patent holder over patented technology, which implies the discretion of the patent holder to decide whether to license its patent, to whom and on what terms (including the amount of royalties to be paid by the licensee).[89] In case of an unauthorised use of a patent, the patent holder can seek remedies that prevent or deter future infringements such as injunctions, punitive damages and attorney fees as well as remedies that compensate for the past infringement of the patent holder's exclusive right i.e. monetary damages with interest.[90] In case of standard essential patents (SEPs) however, the patentee becomes a mandatory trading partner to any company on the

89 For the discussion on philosophical justifications of the patent law including the utilitarian theory promoting public welfare through the protection of useful inventions and the natural rights theory with the focus on the exclusive rights of the patent holders see generally F. Scott Kieff, Pauline Newman, Herbert F. Schwartz, Henry E. Smith *Principles of Patent Law* (5th ed, Foundation Press, 2011) at 39-54. See also Edmund W. Kitch "The Nature and Function of the Patent System" (1977) 20 Journal of Law and Economics 265.

90 For the discussion on remedies for the patent infringement, see F. Scott Kieff, Pauline Newman, Herbert F. Schwartz, Henry E. Smith *Principles of Patent Law*, (5th ed. Foundation Press, 2011) at 1234-1340.

market where the patented technology has become an industry standard.[91] The bargaining power of a SEP holder that can be exercised vis-à-vis his actual and potential licensees emerges not from the fact that its patented technology becomes part of the industry standard but from the subsequent success of that standard i.e. its acceptance and implementation by the industry.[92] The bargaining power of the SEP holder vis-à-vis a particular manufacturer that has undertaken standard-specific investments and is locked-in in the patented technology should not be confused with market power since the situation of an individual manufacturer might have little or no effect on the competitive conditions of the market. Nevertheless, the patentee's refusal to license its patent or an injunction against an unauthorised user could effectively exclude the latter from the relevant market. Such exercise of the market power held by the patentee due to the importance and success of its patented technology can be viewed as problematic under relevant competition/antitrust laws due to its exclusionary and/or exploitative effects.[93] At least the following forms of unilateral conduct of SEP holders can be viewed as problematic under competition law: refusal to license, excessive royalties and other exploitative conditions imposed on the licensees.[94]

The analysis of the deceptive practices of the SEP owners during the standardisation process (often regarded as "patent ambush") [95] under EU competition law indicates that the antitrust liability under Article 102 TFEU will be triggered only in cases where the patent owners already holds a dominant position and cannot be applied to cases of attempted monopolization of the market.[96] As a

91 Eg Janice M. Mueller "Patent Misuse through the Capture of Industry Standards" (2002) 17 Berkeley Technology Law Journal 623.

92 Urška Petrovčič *Competition Law and Standard Essential Patents: A Transatlantic Perspective* (The Hague: Kluwer, 2014) at 73.

93 For the discussion on the application of the EU competition rules to the exclusionary and exploitative abuses of dominant position see Pinar Akman *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Oxford, Hart Publishing, 2012); Ekaterina Rousseva *Rethinking Exclusionary Abuses in EU Competition Law* (Oxford, Hart Publishing, 2010).

94 See generally David Telyas *The Interface Between Competition Law, Patents and Technical Standards* (The Hague, Kluwer, 2014).

95 Brian D. Abramson "The Patent Ambush: Misuse or Caveat Emptor" (2011) 51 Intellectual Property Law Review 71.

96 Daniel Culley, Malik Dhanani, Maurits Dolmans "Learning from Rambus - How to Tame Those Troublesome Trolls" (2012) 57 Antitrust Bulletin 117 at 128. The authors refer to the *Rambus* case addressed by the EU Commission where the latter could not charge Rambus with an abuse of dominance for fraudulent monopolization or "patent ambush" but only for the exclusionary and/or exploitative practices of the firm that acquired the dominant position as a result of such

result, the EU competition law would not prove effective in confronting the opportunistic behaviour of patent owners during the standardization process that would allow them to promote their patented technologies for adoption as industry-wide standard. In contrast, the U.S Sherman Act (Section 2)[97] will apply to the monopolization attempts by patent owners during the standardization process irrespective of their actual market power at that time. This highlights an important divergence between the substantive rules of the EU competition law and U.S. antitrust law in this area. While antitrust liability in the U.S. will be triggered by the attempts to monopolise regardless of the current market power of the offender, the EU competition law has little concern with the way the dominant undertaking has acquired its dominance (besides merger control) and focuses on how the acquired market power is used.

Following the adoption of the industry standard that relies on the patented technology, the SEP holders can engage in a variety of anti-competitive practices (generally regarded as "patent holdup"),[98] taking advantage of the fact that they have thus become unavoidable partners for the manufacturers of standard complaint goods. Although the economic viability of patent holdup strategy has been questioned in economics and legal literature,[99] the recent developments in IT industry, particularly in the smartphone sector, demonstrates increase in litigation over SEPs.[100] On the one hand, the patent holders that have for various reasons exited the manufacturing market continue to rely on SEPs as an important source of income. On the other hand, new market leaders who did not participate in the standardization process increasingly use SEPs in their products. As a result, an

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monopolization. See also EU Commission, Case COMP/C-3/38 636 *Rambus*, Rejection Decision, C(2010)150, available at <http://ec.europa.eu/competition/antitrust/cases/dec_docs/38636/38636_1192_5.pdf>.

97 Sherman Antitrust Act, 15 USC § 1-7 (1890).

98 Mark A. Lemley "Ten Things to Do About Patent Holdup of Standards (and One Not To)" (2007) 48 Boston College Law Review 149 and Mark A. Lemley and Carl Shapiro "Patent Holdup and Royalty Stacking" (2007) 85 Texas Law Review 2163.

99 Eg Damien Geradin, Miguel P. Rato, "Can Standard-Setting Lead to Exploitative Abuse? A Dissonant View on Patent Holdup, Royalty Stacking and the Meaning of FRAND" (2006) 3 European Competition Journal 101; Elyse Dorsey, Matthew R. McGuire "How the Google Consent Order Alters the Process and Outcomes of FRAND Bargaining (2013) 20 George Mason Law Review 979; J. Gregory Sidak "Patent Holdup and Oligopolistic Collusion in Standard-Setting Organizations" (2009) 5 Journal of Competition Law and Economics 123.

100 Coleen V. Chien "Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents" (2009) 87 North Carolina Law Review 1571.

increase in litigation both for injunctions against the infringers and abuse of dominance claims against SEP-holders appeared in the headlines of the industry.

The patent holdup strategies can include among other things: refusal to license and imposition of unfair licensing terms that have exploitative and/or exclusionary effects. The antitrust liability for refusal to deal appears to be less severe under the U.S. antitrust law where, especially after Supreme Court's *Trinko* judgment,[101] the courts would be reluctant to impose the duty to deal on SEP holders.[102] This possibility appears more likely under Article 102 TFEU provided the competition authority or private plaintiffs would be able to demonstrate "essentiality" and "new product" criteria in line with the CJEU jurisprudence.[103] Charging of excessive royalties is another potentially anti-competitive practice that could be addressed by competition rules. While antitrust liability for excessive royalties is theoretically possible under Article 102 TFEU, the excessive pricing abuses are currently absent from the EU Commission's enforcement practice.[104] The prosecution under U.S. antitrust law appears even more unlikely as Section 2 of the Sherman Act deals with the anti-competitive monopolisation and once the undertaking has legally obtained market power it should be allowed to charge any price for its products or services.

As acknowledged in a recent study on antitrust enforcement against abusive SEP practices, "the antitrust intervention towards exploitative licensing practices remains controversial" and "neither EU competition law nor U.S. antitrust law provides an optimal solution to the problems that arise in the step context".[105] As a result, the misuse of the SEPs remains a challenging issue on the borderline between the intellectual property and competition law that demonstrates a case of insufficient "regulatory co-opetition" between the two regimes.

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101 *Verizon Communications, Inc. v Law Offices of Curtis V. Trinko, LLP*. 540 US 398 (2004).

102 Herbert J. Hovenkamp "Standards Ownership and Competition Policy" (2007) 48 Boston College Law Review 87 at 105: "One is the fact that a 'mere' refusal to license is not an antitrust violation".

103 Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co*. [2004] ECR I-5039, Case T-201/04 *Microsoft v Commission* [2004] ECR II-4463.

104 Eg Alexandr Svetlicinii and Marco Botta "Article 102 TFEU as a Tool for Market Regulation: 'Excessive Enforcement' Against 'Excessive Prices' in the New EU Member States and Candidate Countries" (2012) 8 European Competition Journal 1744.

105 Urška Petrovčič, above n 92, at 188-189.

VII SUBSTANTIVE AND PROCEDURAL LAW: CASE OF PRIVATE ENFORCEMENT OF EU COMPETITION RULES

The sixth case reproduced in the present study highlights the need for better inter-regime coordination not only on the level of substantive rules, but also in the domain of the procedural law, which can have a significant impact on the way the respective substantive rules are enforced or under-enforced in practice. This need for "regulatory co-opetition" between the substantive and procedural rules shall be demonstrated using the example of the private enforcement of EU competition law. The present section highlights the discrepancy between the harmonization of the substantive competition rules and divergence of the procedural rules used in private enforcement proceedings, which calls for better "regulatory co-opetition" between the two sets of rules for a more uniform application of the EU competition rules across the EU Member States.

Under the current decentralised system of enforcement introduced by the Regulation 1/2003[106] the free market competition in the Internal Market of the EU is safeguarded through a public and private enforcement mechanism.[107] The system of public enforcement is functional at the EU level (EU Commission and the CJEU) and at the level of the EU Member States (by the national competition authorities (NCAs). The private enforcement of EU competition rules is carried out by the national courts of the EU Member States on the initiative of the private plaintiffs who claim damages for competition infringements. The uniform interpretation and application of the EU competition rules in private enforcement is achieved through the coordination of the enforcement activities of the NCAs within the European Competition Network (ECN)[108] where the EU Commission closely monitors the enforcement activities undertaken by the individual NCAs. The system of private enforcement where interpretation and application of the EU competition rules is carried out by the independent national judiciary, the EU Commission has very restricted possibilities for oversight.

According to the CJEU case law, it is established that "any individual" has standing to initiate a damage compensation claim for the breach of EU competition

106 Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1.

107 See eg Heike Schweitzer and Kai Hüschelrath (eds) "Public and Private Enforcement of Competition Law in Europe: Legal and Economic Perspectives" *ZEW Economic Studies* Vol. 48 (New York, Springer, 2014).

108 See generally Firat Cengiz "The European Competition Network: Structure, Network and Initial Experiences of Policy Enforcement" EUI Working Paper MWP 2009/05.

rules.[109] Therefore, at least at the EU level, there is no *a priori* limitation of legal standing for the plaintiffs affected by competition law infringements. In spite of the broad definition of the legal standing of the plaintiffs, private enforcement of EU competition rules is far less developed than in the US. In particular, most of the procedural rules of the EU Member States do not provide for US-style discovery rules,[110] contingency fees,[111] treble damages,[112] while forms of class actions have been introduced only by half of the EU Member States and they are still not common in competition law.[113] As a consequence, most of the damages claims are initiated as "follow-on" rather than as "stand-alone" actions, and they are concentrated in the civil courts of a limited number of EU Member States. The EU Commission reported that most of the follow-on actions take place in the civil courts of UK, Germany and the Netherlands, which provide more favourable procedural rules to the plaintiff.[114] In the absence of a common EU civil procedure

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109 Case C-295/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619, para. 61: "any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 101 [or Article 102] TFEU."

110 Few EU Member States provide for mandatory pre-trial disclosure requirements. In most of the EU Member States, the plaintiff has to indicate the precise list of documents for which is seeking disclosure, and the reasons that motivate disclosure of each piece of evidence. Since the plaintiff is not aware of which documents could be useful to support its claim, disclosure of relevant documents in cases of private enforcement in Europe is quite rare. See Bojana Vrcek, "Overview of Europe" in Albert Foer and Jonathan Cuneo (eds), *The International Handbook on Private Enforcement of Competition Law* (Cheltenham, Elgar, 2010) at 285.

111 In Europe, contingency fees are generally prohibited. Most of the EU Member States recognise the principle that the losing party will have to pay the legal costs faced by the winning party. Ibid., at 292.

112 Most of the EU Member States allow only for single damage compensation. See generally Paolisa Nebbia "Damages Actions for the Infringement of EC Competition Law: Compensation or Deterrence?" (2008) 33 European Competition Law Review 23; Alessandro Di Gio "Contracts and Restitution Law and the Private Enforcement of EC Competition Law" (2008) 32 World Competition 199; Daniel J. Edelman and Okeoghene Odudu "Compensatory Damages for Breach of Art. 81" (2002) 27 European Law Review 327.

113 In relation to the on-going debate in Europe concerning the introduction of common rules concerning class actions in antitrust law see Paolo Buccirossi and Michele Carpagnano "Is it Time for the European Union to Legislate in the Field of Collective Redress in Antitrust (and how)?" (2013) 4 Journal of European Competition Law and Practice 3 at 3-15; Andrea Andreangeli "Collective Redress in EU Competition Law: an Open Question with Many Possible Solutions" (2012) 35 World Competition 529 at 529-558 (2012); Fabio Polverino "A Class Action Model for Antitrust Damages Litigation in the European Union" (2007) 30 World Competition 479 at 479-499.

114 See European Commission Staff Working Paper *Impact Assessment Report, Damages Actions for Breach of EU Antitrust Rules* Published in Strasbourg on 11 June 2013 at 54, COM(2013) 404 final (11 June 2013).

code, national courts of the EU Member States enforce the same substantive EU competition rules on the basis of diverging national procedural rules.

During the past years, national procedural rules relevant in the field of private competition law enforcement have been progressively harmonized via the CJEU case law. The Court has relied on the principle of effectiveness, considering a number of national procedural rules incompatible with the effective enforcement of EU competition law, thus causing a de facto partial harmonization of national procedural rules.[115] The harmonization efforts have been also undertaken by the EU Commission in June 2013, when it published a legislative package in the field of private enforcement. The legislative package includes a Directive harmonizing certain procedural rules, which was approved by a European Parliament resolution in April 2014. The Directive was finally approved by the Council in November 2014. The Directive both codifies existing CJEU case law (principle of "full" damage compensation; standing of indirect customers; passing on defence, etc.) and introduces new harmonized procedural rules (discovery rules, binding value of previous NCA decision; joint liability for cartel members; harmonized limitations period to start a damage compensation action; disputes settlement rules, etc).[116] The legislative package also includes a Recommendation on collective redress, urging the EU Member States to adopt rules on class actions, as well as a Practical Guide addressed to national courts, summarising the techniques followed by economists in quantifying damages in cases of private enforcement of EU competition law.[117]

Although the Directive established a minimum level playing field, it does lead to full harmonization of national procedural rules relevant in private enforcement

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115 See Case C-453/99, *Courage Ltd v Bernard Crehan* 2001 ECR I-6297; Case C-295/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* 2006 ECR I-6619; Case C-360/09, *Pfleiderer AG v Bundeskartellamt* 2011 ECR I-5161; Case C-199/11, *European Commission v. Otis NV and others* 2012, nyp; Case C-536/11, *Bundeswettbewerbsbehörde v Donau Chemie AG and Others* 2013, nyp; Case C-557/12, *Kone AG and Others v ÖBB Infrastruktur AG* 2014, nyp. In relation to the application of the principles of procedural autonomy, equivalence and effectiveness in EU competition law, see Maciej Bernatt "Convergence of Procedural Standards in the European Competition Proceedings" (2012) 8 The Competition Law Review 255 at 255-283.

116 See Directive of the European Parliament and the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union adopted on 10 November 2014. The final text of the Directive is available at <http://ec.europa.eu/competition/antitrust/actionsdamages/damages_directive_final_en.pdf>.

117 See Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 2013 OJ (L 201) 60; EU Commission Staff Working Paper, Practical Guide Quantifying Harm in Actions for Damages Based on breaches of Articles 101-102 TFEU (6 November 2013) SWD (2013) 205.

of EU competition law. For example, the harmonization package leaves out the issues related to the standard of proof in relation to the nexus of causality between the competition infringement and the sustained damages. Essentially all EU Member States recognise that damage compensation can be awarded when three cumulative conditions are satisfied: the defendant carries out an illegal conduct; the claimant suffers a damage which can be quantified; there is a causal link between the illegal conduct and the damage suffered.[118] Although the three cumulative conditions are common in the procedural rules of many EU Member States, their application in concrete cases by national courts is strongly influenced by national legal traditions. In particular, national jurisprudence in the field of tort law has an important impact on how "direct" the link between illegal anti-competitive conduct and the suffered loss has to be.[119] Other factors that have an impact on the national courts' interpretation of the concept of causal link include *inter alia*: 1) whether competition law is enforced by a specialised competition court or a general civil court; 2) whether the plaintiff can start the damage action on the basis of a specific legal basis found in competition law, rather than on general tort law; 3) whether a legal presumption exists that anti-competitive conduct causes damage to the plaintiff. All of these factors will continue to diversify the regulatory landscape of the private enforcement of EU competition rules across the EU Member States and the need for uniformity of enforcement will require more "regulatory co-opetition" between the substantive and procedural rules in this field.

VIII CONCLUDING REMARKS

> Cosmopolitan legal thought may therefore seek to provide consistency and legal certainty where possible, but may also be paraconsistent in character where necessary.[120]

The set of legal cases, and the juridical problems they cause, presented in this chapter were taken from the vast repertory of today's global trade relations in a multijurisdictional and territorially or virtually fragmented world. They may have originated at different times and in different places and involve different industries or subjects of international and domestic law. However, they share an important feature characteristic of the general problem that the global regulation of

118 See Albert Foer and Jonathan Cuneo (eds.) *The International Handbook on Private Enforcement of Competition Law* (Cheltenham: Edward Elgar, 2010).

119 Eg Nathalie Jalabert-Doury "France" in Albert Foer and Jonathan Cuneo (eds) *The International Handbook on Private Enforcement of Competition Law* (Cheltenham, Edward Elgar, 2010) at 318.

120 H. Patrick Glenn *The Cosmopolitan State* (Oxford: Oxford University Press, 2013) at 291.

international trade and global business faces today, namely the inadequate coordination between the international rules governing trade, intellectual property and competition as well as their principal institutions, which include but are not limited to the WTO, WIPO, UNCTAD, UNCITRAL, and the OECD.

The degree of harmonisation between the rules of trade, intellectual property and competition differs largely at the multilateral level. As a result, their respective global regimes are in a state of regulatory competition and even potential regulatory conflict. At the same time, the inadequate but varying levels of international harmonisation lead to even larger disparities at the national level, further complicating the effective coordination at the global level. This situation leads to a first paradox, namely one that was said to consist in "the parallel tendencies for businesses to converge, while national and international regulatory jurisdictions continue to diverge and perhaps even fragment further".[121] The convergence, as was shown, also leads to serious problems of classification, which threaten to undermine the existing legal framework of fragmented legal regimes. Yet, we know, as Michael Trebilcock and Robert Howse noted, that international harmonization of domestic policies must not always increase domestic and global welfare but may instead have the opposite effect.[122] Paradoxically, this is not the case only with economic welfare effects but also extends to the field of jurisprudence. In jurisprudence, the absence of harmonized rules, as is largely the case in the field of global competition law, at the global level does not mean that the interpretation of the different national rules leads to contradictory or divergent outcomes at the global level; whereas the existence of harmonized rules, as exemplified by the TRIPS Agreement, does not automatically lead to harmonious and coherent rulings being rendered by the competent judicial bodies.

A further complicating element in our view is the fact that the respective multilateral regimes on trade, intellectual property and competition also display strong disparities with regard to the role of and access to them by private parties. This may lead either to different outcomes in different jurisdictions or, else, to a situation where important private rights are not being respected and even violated because they cannot be effectively adjudicated by the interested parties. This constitutes another paradox where the legal subjects that significantly affect the

121 Rostam J. Neuwirth "Global Market Integration and the Creative Economy: The Paradox of Industry Convergence and Regulatory Divergence" (2015) 18(1) Journal of International Economic Law 21.

122 Trebilcock and Howse, above n 4, at 8.

development of global trade and commerce have little to say about the formulation, interpretation and application of its laws.

In view of the many seeming contradictions and paradoxes, from a conceptual perspective, we thus believe that the best possible response to this unsatisfactory situation lies in the paraconsistent logic inherent in the essentially oxymoronic concept of "regulatory co-opetition".[123] In this context, regulatory cooperation is understood as the optimal mix between regulatory competition and regulatory cooperation in the governance of international trade and commerce based on not just a better coordination between governmental and non-governmental actors but notably between the inter-governmental or international organizations competent for the closely related fields of international trade, intellectual property and competition matters. In institutional terms, it refers to the urgent need to step up the efforts and to search for stronger and more efficient institutional ties between, particularly, the WTO, the WIPO, UNCTAD, UNCITRAL, and the OECD so as to improve the overall coherence and unity of the emerging global legal order and to avoid real legal conflicts and the unnecessary duplication of their respective efforts.

123 H. Patrick Glenn *The Cosmopolitan State* (Oxford: Oxford University Press, 2013) at 267 ("Two of the new logics would thus be 'paraconsistent' in admitting the possibility of true contradictions in the world and providing means of dealing with them (beyond radical and definitive choice of one or the other")); see also Rostam J. Neuwirth "Essentially Oxymoronic Concepts" (2014) 2 Global Journal of Comparative Law 147 at 153.