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## Trade, Competition, and Intellectual Property--TRIPS and its Antitrust Counterparts

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# Trade, Competition, and Intellectual Property—TRIPS and its Antitrust Counterparts

Eleanor M. Fox\*

## ABSTRACT

*This Article examines the interface between TRIPS' protection of intellectual property rights and antitrust law, and the extent to which TRIPS invites a counterpart agreement that would internationalize intellectual property antitrust rules.*

*Professor Fox argues that TRIPS does not call for internationalizing antitrust law, and that even developing countries, which might find a greater need for antitrust protection against abuse of dominance after TRIPS, might be better served by developing and enforcing a national antitrust law of their own.*

*She argues that TRIPS does, however, contemplate some limits to antitrust, lest antitrust enforcement impair protections guaranteed by TRIPS. Professor Fox proposes that this interface develop on a case-by-case basis, and that it be informed by a principle of respect for the scope of antitrust vis-à-vis intellectual property rights in developed bodies of national law.*

*Finally, she urges dialogue to develop principles linking trade and antitrust, with trade-and-competition-restraining uses of intellectual property to be treated as a subset of broader antitrust principles.*

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I. INTRODUCTION

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), finalized at Marrakesh on April 15, 1994 as a component of the World Trade Organization (WTO), heightens the level of world intellectual property protection by specifying certain minimum standards that are basic norms of developed legal systems. Also, TRIPS requires nations to incorporate specified norms and rules into national law and to enforce the national law, and it provides for dispute resolution. Recognizing that intellectual property (IP) protection may confer market power and that market power may lead to its abuse, TRIPS explicitly provides that nations may maintain laws deemed necessary to

prevent abuse of intellectual property rights, including the prevention of anticompetitive conduct, and that nations may order compulsory licensing to remedy anticompetitive conduct.<sup>1</sup> The agreement provides for a consultation and discovery procedure when a member nation has reason to suspect that a

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1. Final Act Embodying the Results of the Uruguay Round of the Multilateral Negotiations, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights, arts. 8(2), 30, 31, 40 [hereinafter TRIPS].

Article 8(2) provides that "Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."

Article 30 provides that "Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties."

Articles 31 and 31(k) provide:

Where the law of a Member allows for other use of the subject matter of a patent without the authorization for the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

....

(k) Members are not obliged to apply the conditions set forth, in subparagraphs (b) [prior request for license] and (f) [use for supply of the domestic market] above where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur. . . .

Articles 40(1) and 40(2) provide:

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

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

firm of another member nation is violating antitrust laws by anticompetitive licensing.<sup>2</sup>

The question addressed by this Article is whether and to what extent TRIPS suggests, invites, or requires a counterpart agreement that would internationalize antitrust rules or norms as they apply to intellectual property.

This inquiry begins by examining the TRIPS provisions that bear on competition, and asks what antitrust law problems may be raised by these provisions of TRIPS. The inquiry is followed by an analysis of the costs and benefits of internationalizing intellectual property antitrust (IP-antitrust). Finally, the author makes a proposal for the direction of the world dialogue on intellectual property, antitrust, and trade.

## II. TRIPS AND ANTITRUST

### A. *The Relevant TRIPS Provisions*

TRIPS has three types of provisions that may bear upon the need for or limits of antitrust rules. The first is permissive; TRIPS reserves the rights of nations to adopt and enforce antitrust law. TRIPS recognizes that intellectual property, and particularly intellectual property licensing, can be used in abusive ways, and

2. Articles 40(3) and 40(4) provide:

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

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

some of those ways may harm competition as well as limit the creation and diffusion of technology and restrain trade. Accordingly, TRIPS gives explicit scope for national antitrust laws that may limit intellectual property protection, lest antitrust enforcement would be vulnerable to automatic challenge as an impairment of TRIPS obligations. While TRIPS does not state how far a nation may go to favor competition over IP protection, it gives some guidance: National law as applied to licensing may prohibit exclusive grant-backs, covenants not to challenge validity of a patent, and forced packaging. Also, compulsory licensing may be ordered as a remedy.

Second, TRIPS provides a consultation and discovery procedure. This procedure enables a nation enforcing its antitrust laws against non-nationals that may be abusing IP rights in the regulating nation to enlist the aid of the suspected violator's nation. The requested nation agrees to consult and to supply information.

Third, TRIPS implicitly recognizes that some nations' laws, or at least the laws' application, may violate TRIPS or impair obligations under TRIPS. In this context, nations agree to consultation and dispute resolution.

The following discussion addresses each of these categories with a view to considering whether international antitrust rules are an important counterpart to TRIPS.

### *B. The Right of Nations to Adopt and Enforce Antitrust*

TRIPS reserves to nations the right to control anticompetitive practices. TRIPS states: "Nothing in this Agreement shall prevent Members from specifying [prohibited practices] that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market."<sup>3</sup> Thus, nations are allowed to adopt antitrust laws to prevent harm to themselves in their internal markets.

Protecting oneself and one's citizens in one's own internal market is traditionally a national task. Nations normally have antitrust laws to protect their competition systems from abuses of power in their own markets. If they have none, they may adopt such laws. If they wish to adopt a "world class" law, they might choose the European Community (EC) model or the U.S. model, which are now the two most prominent world standards. If nations prefer, they can design their own law, as long as it does

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3. *Id.* art. 40(2).

not take away the rights granted by TRIPS (a subject discussed in Part D below).

While TRIPS does not mandate an international antitrust law, nations could nonetheless decide that an international antitrust law of intellectual property is a helpful complement to TRIPS. This Article explores this proposition in Part III.

### C. *Positive Comity*

TRIPS provides for reciprocal relationships known as "positive comity." Under positive comity, member nation A agrees sympathetically to consider aiding nation B when a national of A has apparently engaged in anticompetitive licensing practices in the territory of nation B. In particular, upon request, the home country of the licensor agrees to supply relevant nonconfidential information.<sup>4</sup>

This is not an antitrust rule but a cooperative mechanism to aid in law enforcement. It is an important concept developed through bilateral negotiations.<sup>5</sup> This type of mechanism first appeared in an executive agreement between the United States and the European Community.<sup>6</sup> Incorporation of positive comity into multilateral instruments is a wise and important step. However, it does not establish or seek to establish antitrust rules.

### D. *The Limits of Antitrust in View of TRIPS*

#### 1. The Problem

TRIPS implicitly acknowledges that there may be a clash between TRIPS protection and competition law. Since aggressive antitrust law or enforcement could impair the intellectual property protection that TRIPS assures, drawing the line beyond which competition law (as well as unfair competition law) may not go is an enterprise special to TRIPS. This enterprise concerns

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4. See *id.* art. 40(3) (reproduced *supra* note 2).

5. See, e.g., Diane P. Wood, *The Internationalization of Antitrust Law*, 44 DEPAUL L. REV. 1289 (1995); Eleanor M. Fox, *Market Access, Antitrust and the World Trading System: En Route to TRAMS—Trade-Related Antitrust Measures* (Nov. 20, 1995) (presented at Congress on Competition Policy in the Process of International Integration, Italian Antitrust Authority, Rome) (published version forthcoming 1996).

6. Agreement Between the United States and the European Community on Antitrust Cooperation and Coordination, Sept. 23, 1991, 4 Trade Reg. Rep. (CCH) ¶13,504 (voided for technical deficiency and validly executed in 1995).

setting the limits on competition laws, not affirmative formulation and enforcement of competition law. It is an exercise that nations that have both antitrust and IP traditions have undertaken and resolved—however uncertainly—for themselves. In the context of TRIPS, the questions are: (1) where should the international line be drawn, (2) by what process and through what institutions, and (3) in drawing this line, are any guiding principles inherent in TRIPS itself?

The interface problem is probably most commonly raised in the context of the monopolization or abuse of dominance violation of competition law. It may also be raised in connection with tying or packaging agreements, licensing and distribution agreements, and joint ventures. The interface problem surfaces at the point of tension between enforcing the competition law and respecting the enjoyment of intellectual property rights. Presented below are five practical interface problems where a balance must be struck between protecting competition and protecting IP by the two major rights and where the balance has been struck differently competition law systems.

First, let us suppose that Eastman Kodak has a monopoly position in the market for amateur color film. It has patents on its film. If Kodak charges a sustained monopoly price for amateur color film, has it violated the monopoly law or merely exercised a right inherent in its otherwise lawful monopoly? United States law answers that there is no antitrust violation.<sup>7</sup> European Community law, reflecting greater faith in the capacity of government to regulate wisely and greater concern about use of private power to exploit others, gives the opposite answer. "Excessively" pricing even a patented good runs afoul of Article 86 of the EC Treaty of Rome.<sup>8</sup>

Second, E.I. du Pont has the best, lowest cost technology for making paint whitener (titanium dioxide), which position it achieved both by its scientific prowess and by the happenstance that its competitors' technology was found to contain pollutants and was suddenly burdened by a high tax. Du Pont develops a plan to expand; it will build new plants, attract the business of its now higher-cost competitors, and thereby hope to gain a monopoly share of the market. Its competitors seek to license the patented du Pont technology, but du Pont refuses to grant licenses on any terms. Has du Pont violated the monopoly law, or

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7. See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

8. See Case 40/70, *Sirena S.r.l. v. Eda S.r.l.*, 1971 E.C.R. 69; Case 53/87, *Conorzio Italiano v. Renault*, 1988 E.C.R. 6039, para. 16; *cf. id.* para. 17.

has it properly exercised a patent right? Under United States law, du Pont has done no more than exercise an inherent patent right.<sup>9</sup> European Community law, more concerned than the United States with competitors' access to low-cost inputs and more skeptical of the claim that a government grant of access will impair incentives to invent, is likely to give the opposite answer.<sup>10</sup>

A third example concerns the distribution system of the German company Grundig, one of many producers of electronics products such as television sets and tape recorders. Grundig is setting up its distribution system in Europe. In France its chosen distributor is Consten. Grundig gives Consten the right of exclusive distribution of Grundig electronics products in France and enables Consten to obtain the French trademark GINT (Grundig International) to protect its right and duty to develop the French market. To safeguard Consten's exclusivity and thereby to obtain better and more accountable distribution, and thus to compete better against other brands, Grundig agrees to help keep non-Consten GINT product (parallel imports) out of France. If Consten invokes its trademark and sues trademark infringers, have Consten and Grundig violated the law against competition-distorting contracts, or have they merely exercised rights inherent in intellectual property? Under European Community law, the enterprises have committed one of the gravest violations of competition law.<sup>11</sup> United States law would find no violation, with or without the protection of intellectual property.<sup>12</sup>

As a fourth example, Inventco has obtained a patent in a competitive field of virtual reality environments for training brain surgeons. It agrees to license Ventureco, a joint venture formed to develop more advanced applications, on the condition that Ventureco will exclusively grant back all technology developed from Inventco's patents. Has Inventco violated the monopoly law by contracting for an exclusive grant-back, or has it simply exercised IP rights? European Community law is likely to find a

9. See *In re E.I. DuPont de Nemours & Co. (titanium dioxide)*, 96 F.T.C. 650 (1980).

10. See Cases C-241/91P-C-242/91P, *Radio Telefis Eireann v. Commission (Magill)*, 1995 E.C.R. I-743; cf. Case 238/87, *Volvo AB v. Erik Veng (UK) Ltd.*, 1988 E.C.R. 6211, paras. 8-9.

11. See Cases 56-58/64, *Establishments Consten and Grundig S.A.R.L. v. Commission (Consten and Grundig)*, 1966 E.C.R. 299 (ruling that the Commission properly excluded evidence of interbrand competition); Cases 100-103/80, *SA Musique Diffusion Française v. Commission (Pioneer)*, 1983 E.C.R. 1825.

12. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). See *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

violation.<sup>13</sup> Under U.S. law, the framework for analysis is quite different. There is no rigid rule. The outcome depends upon anticompetitive effects. One must first inquire, "What is the market?" If Inventco's patent does not confer significant power in a well-defined market, or if the grant back clause was necessary to induce Inventco to form the joint venture, the clause will be upheld under U.S. antitrust law.<sup>14</sup>

As a fifth example, company A has achieved an enduring world monopoly through good works accompanied by patent protection, constant improvement patents, and the aggressive embrace of all opportunities to meet new demand. Has it violated monopoly law? May national law empower antitrust authorities to order a break-up if that is organically feasible, or compulsory licensing? United States law would authorize neither option.<sup>15</sup> European Community law would not authorize a break-up, but might possibly decree compulsory licensing.<sup>16</sup> Certain Central European countries would grant the power of break-up.<sup>17</sup> Professor F.M. Scherer has proposed compulsory licensing, as one of his eleven proposals for a world competition system, where a firm achieves forty percent or more of world trade for a period of longer than twenty years on the basis of valid patents and copyrights.<sup>18</sup>

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13. Under the Technology Transfer Regulation, Commission Regulation 240/96, 1996 O.J. (L 31) 2, a block exemption is available for enterprises' licensing agreements that contain only permitted clauses and no prohibited clauses. A clause imposing an obligation to assign improvements back to the licensor is a prohibited clause.

14. See U.S. Dep't of Justice & Fed. Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property*, 4 Trade Reg. Rep. (CCH) ¶ 13,132, § 5.6 (Apr. 6, 1995) [hereinafter *U.S. IP Antitrust Guidelines*]. However, such a use of leverage could be patent misuse—a doctrine that nations may also apply to limit use of power derived from intellectual property rights.

15. See *In re I.E. DuPont de Nemours & Co. (titanium dioxide)*, 96 F.T.C. 650 (1980); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1184-89 (1st Cir. 1994).

16. See Cases C-241/91P-C-242/91P, *Radio Telefís Eireann v. Commission (Magill)*, 1995 E.C.R. I-743. Cf. Case 238/87, *AB Volvo v. Erik Veng (UK) Ltd.*, 1988 E.C.R. 6211 (stating conditions under which refusal to supply products (car body parts) produced from a registered design is arbitrary, unfair, and thus illegal).

17. See, e.g., Law of Poland on Counteracting Monopolistic Practices, art. 12, para. 1 (1990, as amended 1995): "State enterprises, cooperatives and companies under Commercial Law that have a dominant position in the market can be divided or liquidated if they permanently restrain competition or the conditions for its emergence."

18. See F.M. SCHERER, *COMPETITION POLICIES FOR AN INTEGRATED WORLD ECONOMY* 94-95 (1994). Professor Scherer comments as follows on his proposal:

Thus we see a set of interface problems and a diversity of perspectives regarding them. The solutions differ in view of different preferences<sup>19</sup> regarding the weight to be given to the protection of the competition process, free movement, competitors' rights of access, and buyers' rights not to be exploited, as compared with the weight to be given to the protection of intellectual property holders' rights to exclusive enjoyment of their intellectual property and the perceived or presumed effect of such preferences in increasing incentives to invent.<sup>20</sup> Whether the tension is resolved in favor of the IP right or the competition value varies not only from country to country but also within one country over time, as reflected by the marked swing in the U.S. position over the last quarter century. When the United States was less industrialized, less challenged by foreign competitors, and not a net exporter, it preferred more competition to more protection of intellectual property rights.<sup>21</sup>

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It is improbable that nations would agree to the structural fragmentation of dominant enterprises residing within their borders. Continued dominance of a world market is likely to result only from superior performance, the control of unique natural resources, or the control of intellectual property. Superior performance is desirable and should not be challenged. Little or nothing can be done internationally about the control of unique natural resources. Patent and copyright protection for a considerable time is justified as an inducement to innovation. However, dominance can be perpetuated, with undesirable consequences for both pricing and the rate of technological progress, through the accumulation of patents and copyrights on improved products and processes. This proposal will constrain monopoly power that persists beyond the intended life of original patent grants.

*Id.* at 95 (footnote omitted).

19. This refers to different preferences even among developed countries. When less developed nations' preferences are considered, as they should be, the problem becomes yet more complex. Many less developed countries may prefer competition, by copying and otherwise, to intellectual property protection, because of the distributional consequences. Note that developed countries disagree on the respective reaches of antitrust and intellectual property even when their only concern is how best to improve allocative efficiency.

20. The experts do not agree on what balance most promotes significant inventiveness. Moreover, in some respects robust protection of dominant IP holders can undermine incentives to invent by less well-established and less well-integrated firms. See F.M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 630-60 (3d ed. 1990). But see Thomas M. Jorde & David J. Teece, *Innovation and Cooperation: Implications for Competition and Antitrust*, in *COLLABORATION AMONG COMPETITORS: ANTITRUST POLICY AND ECONOMICS* 887 (Eleanor M. Fox & James T. Halverson eds., 1991).

21. See, e.g., *United States v. Line Materials Co.*, 333 U.S. 287 (1948); *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661 (1944). See Bruce Wilson, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Remarks Before the Annual Joint Meeting of the Michigan State Bar

An appreciation of this diversity informs the answer to the questions: Where should TRIPS draw the interface line, and by what process should one decide the point at which competition law invades TRIPS protections? Do any general principles for establishing the interface emerge from TRIPS itself?

## 2. Developing the Interface

### a. A Common Law Approach

There are two approaches to developing the interface between TRIPS IP protections and competition law: (1) writing in advance rules that establish when competition law enforcement will be deemed an undue intrusion into TRIPS rights; and (2) embracing a bottom-up, common-law style, case-by-case approach to development of the law of the interface.

TRIPS itself contains the beginnings of a "positive list"—measures that a competition law can take without offending TRIPS. Namely, national law may prohibit exclusive grant-backs, prohibit covenants not to challenge patent validity, prohibit coercive package licensing, and order compulsory licensing for antitrust violations. This first-cut positive list, while helpful in setting the stage, is not a robust step in the direction of answering the interface question, because it is enabling rather than limiting.<sup>22</sup> Consistent with TRIPS (one can imply), competition law can continue to do most things it ordinarily does. A complete positive list would be lengthy and might omit what should be allowed. But in any event, the enabling of antitrust is not the issue; the issue is the *limits* to antitrust.

Writing interface rules in advance would be a daunting and probably unwise enterprise. The enterprise is daunting because, as shown in the examples above, the interface is the point of tension. Resolution of the tension is highly sensitive to history,

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Antitrust Law Section and the Patent, Trademark and Copyright Law Section (Sept. 21, 1972), *partially reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,126. The Department of Justice disassociated itself from these views in 1981. See Abbot B. Lipsky, Jr., Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Remarks Before the American Bar Association Antitrust Section (Nov. 5, 1981), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,129.

22. But see Ernst-Ulrich Petersmann, *International Competition Rules for the GATT—MTO World Trade and Legal System*, 27 J. WORLD TRADE, Dec. 1993, at 35. "Yet the scope of competition rules already existing in the TRIPS Agreement (e.g., the detailed conditions laid down in Article 31 for compulsory licensing) remains impressive." *Id.* at 59.

culture, context, empirics, and beliefs, and nations disagree as to how the tension should be resolved. Rule-writing in advance of problems is insensitive to the very nuances that may reveal the wise solution.

By contrast, case-by-case evolution is based on the inevitably complex facts and context that can give roots and legitimacy to law formation. TRIPS itself, being geared to case-by-case consultation and dispute resolution,<sup>23</sup> may be interpreted as leaning in the direction of case-by-case development of the interface.<sup>24</sup>

#### b. A Guiding Principle—Does TRIPS Contain the Germs of a Guiding Principle for the Interface?

TRIPS contains several specifically permitted antitrust prohibitions or remedies, but these are not general principles. A general principle to guide development of the interface is, however, inherent in TRIPS. That principle can be derived from a presumed expectation of the member nations: existing developed systems of antitrust are presumptively legitimate, even though they may function as a limitation on intellectual property rights. According to this principle, a nation's existing state-of-the-law that resolves the IP-antitrust tension in favor of more competition rather than more IP protection presumptively is to be respected in the international system. Since the two most established competition law models are those of the United States and of the European Community, the interface decisions contained in these bodies of law, among others, would presumptively be entitled to deference.

Such a principle cannot be expected to be enthusiastically embraced by the United States. That is because EC law, from a U.S. perspective, obliterates certain intellectual property rights in the name of undistorted competition even while the competition law enforcement advances neither real competition nor real market integration.<sup>25</sup>

The presumptive (and not conclusive) quality of the general principle, however, preserves an avenue for international dialogue where one nation's competition system is alleged to intrude

23. TRIPS, *supra* note 1, arts. 40(3), 64.

24. It would be helpful if the interface questions could be resolved under a system of *stare decisis* so that a body of law, and thus guidance, could evolve.

25. See Cases 56-58/64, *Establishments Consten and Grundig S.A.R.L. v. Commission* (Consten and Grundig), 1966 E.C.R. 299. See also Barry E. Hawk, *System Failure: Vertical Restraints and EC Competition Law*, 32 COMMON MKT. L. REV. 973 (1995).

excessively on the intellectual property of another nation's citizen. Take as an example the European challenge in the 1970s to IBM's practice of changing interfaces on its main frame computers without notifying its rival manufacturers of plug-compatible equipment of the design of the new interface. The European Commission began proceedings against IBM Europe on the ground that, by nondisclosure, IBM had abused its dominant position in Europe in violation of Article 86 of the EC Treaty of Rome. The Competition Directorate of the EC Commission proposed relief that would have required IBM Europe to predisclose all new interfaces. IBM and the U.S. Government resisted on grounds that the interface was an intellectual property design devised to improve the functioning of the IBM equipment, not a changed plug configuration designed to impose costs on the competitors. The Competition Directorate insisted that the proposed relief was procompetitive and would enhance competition in the markets for plug-compatible equipment. IBM and the U.S. Department of Justice insisted that the relief was anticompetitive and would undermine IBM's incentives to invent, and that it would be an extraterritorial appropriation of IBM's intellectual property because IBM could not technically confine compliance to Europe; compliance would as a practical matter mean forced disclosure of IBM's trade secrets to the world.<sup>26</sup>

Before TRIPS, had the EC reduced its proposal to a Commission decision and ultimately to a Court of Justice judgment, IBM and the United States would have had no forum in which to air the claim that EC law impermissibly intruded upon intellectual property rights. TRIPS provides such mechanisms, through international dialogue and dispute resolution. Under this author's proposed principle, the EC resolution of the IP-antitrust tension would be entitled to a presumption of validity; but even so, IBM or the United States would have the opportunity to urge that the EC law intrudes impermissibly on intellectual property rights whose protection is safeguarded by TRIPS.<sup>27</sup>

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26. The dispute was settled by a decree requiring the disclosure only if, after IBM announced an interface change, it did not bring the announced new product to market within four months. See Eleanor M. Fox, *Monopolization and Dominance in the United States and the European Community—Efficiency, Opportunity, and Fairness*, 61 NOTRE DAME L. REV. 981, 1011-17 (1986).

This example is perhaps more poignant than an example without spillover problems, because, given this scenario (if it occurred today), the United States would wish not only to influence the development of the interface under TRIPS but also to protect its sovereignty from extraterritorial interference.

27. Under world competition principles that the author proposed elsewhere, the deciding body would be obliged to take account of extraterritorial impacts on competition, efficiency, and technological progress as if such impacts

### III. SHOULD NATIONS INTERNATIONALIZE ANTITRUST LAW AS APPLIED TO INTELLECTUAL PROPERTY?

#### A. Introduction

Some commentators have proposed, even without regard to TRIPS, that IP-antitrust law should be internationalized.<sup>28</sup> Under TRIPS, the claim has been made more strongly. For example, at least one commentator argues that TRIPS' command to protect intellectual property rights increases the need for credible law that protects against abusive exploitation of such rights.<sup>29</sup>

#### B. The Benefits

An internationalized IP-antitrust law could round out the enterprise of TRIPS and the gains of the successive trade negotiations culminating in the Uruguay Round. It could do so (1) by assuring that anticompetitive practices neither discredit TRIPS nor undermine the cumulative gains in trade and (2) by providing a single set of principles for trade-restraining conduct, thus increasing certainty, saving costs, leveling the playing field, and smoothing the flow of trade. Moreover, an international IP-antitrust law could provide particular benefits to less developed countries that lack antitrust laws and the capabilities to enforce them, and that would profit from a common front on antitrust principles, preventing a race to the bottom.

As for rounding out TRIPS, internationalized antitrust is not called for by TRIPS. TRIPS calls for a concept of the limits of antitrust; it does not call for formulation of the core and normal scope for antitrust.

As for undermining the gains in free trade of Uruguay and the preceding rounds, it is indeed possible that intellectual property could be exploited anticompetitively in ways that

occurred within its own community. See Eleanor M. Fox, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 PAC. RIM L. & POL'Y J. 1 (1995).

28. See, e.g., Wolfgang Fikentscher, *On the Proposed International Antitrust Code*, in *ANTITRUST: A NEW INTERNATIONAL TRADE REMEDY?* 345 (John O. Haley & Hiroshi Iyori eds., 1995); Petersmann, *supra* note 22; cf. John H. Jackson, *GATT and the Future of International Trade Institutions*, 18 BROOK. J. INT'L L. 11 (1992).

29. See J. H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement*, 29 INT'L LAW. 345 (1995); J. H. Reichman, *Beyond the Historical Lines of Demarcation: Competition Law, Intellectual Property Rights, and International Trade After the GATT's Uruguay Round*, 20 BROOK. J. INT'L L. 75 (1993).

frustrate free trade, and that the greater protection of monopoly rights carries with it more opportunity for restraining trade. But this point is not different from the point that market power can be exploited anticompetitively in ways that frustrate free trade. The antitrust law applied to intellectual property is a subset of antitrust law in general; it should be informed by the more general concepts of antitrust law and should not develop an unrelated life of its own.<sup>30</sup> It would be unwise to separate "intellectual property antitrust" from the body of its parent. Principles can be developed on the more general trade-antitrust level, some of which will have particular regard to intellectual property. This point is discussed further in Part IV.

The virtues of a unified set of principles, and thus of increased certainty, are said to justify an international IP-antitrust law. In theory, a single set of principles applied by common institutions has appeal. The appeal appears to be simplicity, transactions cost-savings, and what is called a level playing field. A single set of rules would save transactions costs. Businesses and their counselors would not need to learn multiple sets of rules, and businesses would not need to alter their operations to fit the law of each nation. Such simplicity, however, assumes not only that nations can agree to the "right" rules for the world but also that the international rules, where applicable, would preempt national rules. If nations could agree to a set of rules with a meaningful level of specificity, and to mechanisms to enforce those rules in a credible and trustworthy way, and if the international law were preemptive, simplicity benefits would indeed flow. Each of these three conditions, however, is extraordinarily demanding. None of the three conditions is likely to be met in the foreseeable future.

The level playing field concept may entail nothing more than the concept implied above— aspiring to a uniform set of principles that countries would choose, ostensibly being satisfied that the principles are right for them. If it entails more, the concept may be perverse or irrelevant to antitrust. The level playing field epithet is commonly used in circumstances where regulatory law increases the costs of doing business. The goal is commonly invoked either to protect incumbents from the competition of lower-cost competitors or to protect values imbedded in the law from erosion caused by systems-competition to attract business (race to the bottom). Country A, for example, having a certain

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30. See *U.S. IP Antitrust Guidelines*, *supra* note 14, § 2.1 (treating intellectual property licensing problems as a subset of antitrust. General antitrust principles are applied).

regulation (such as environmental clean-up obligations), wishes country B to have the same regulation, even in the absence of spill-over problems, so that country A's business will not be outcompeted by the lower-cost business of country B, so that investment in country A will not flee to country B in order to take advantage of the lower costs, and so that the above two phenomena do not put pressure on country A to degrade its law. Leveling the playing field usually means increasing the regulatory costs of everyone to the level of country A, thus removing the comparative competitive advantage of country B. So stated, leveling the playing field is anticompetitive and trade-decreasing (*i.e.*, there will be less output at the higher price).

Level-playing-field problems do not attend antitrust law, at least when antitrust is applied in the service of market efficiency, which is the case in the United States today. Competition and antitrust, being market-freeing, normally make firms more rather than less cost effective. Unlike environmental law, there are no inherent, minimum basic costs of antitrust to business. To the extent that non-U.S. antitrust law handicaps large, efficient firms in order to protect less efficient, smaller firms, thus imposing costs of antitrust, one can be sure that the United States, and undoubtedly other nations as well, would not accept such a world standard (*i.e.*, we handicap our efficient firms to protect our small business; therefore you must, too.). Leveling the playing field is not a reason for internationalizing the antitrust law, as it relates to intellectual property or more generally.

One might make an argument for the interests of less developed countries (LDCs). One could argue that LDCs need antitrust in order to control the predations of multinational IP owners within their borders, especially in view of the nations' obligations under TRIPS. Indeed, TRIPS itself recognizes that nations may feel the need for antitrust in light of TRIPS.

However, as noted above, law to protect one's citizens is normally national law, and nations are free to adopt the antitrust law of their choosing. Nations may also adopt a formulation of the effects doctrine, assuring that their law reaches foreign actors selling or licensing into their nation, and thus attempting to assure that their law is adequate to its task. Moreover, the positive comity extended by TRIPS should aid in the task of enforcing law against abusing non-nationals.

Some commentators suggest that, while LDCs may need antitrust, they cannot bring their legislators to adopt it, perhaps because of statist interests and perspectives or because of bribery and corruption. However, if a nation rejects antitrust for whatever legitimate or illegitimate reasons, one may wonder whether it would not be unduly interventionist and presumptuous

for the world to cajole the nation into adopting such law for the sole purpose of protecting the latter's citizens.

A second companion claim is made by commentators that, while some LDCs have antitrust statutes, they have no will to enforce them. Therefore, the LDCs are in need of an international system. To this claim, the same concern of imperialism applies.

A third companion claim is made by commentators that adoption of antitrust laws by each LDC will cause a race to the bottom; nations will hesitate to enact the antitrust restrictions they think best. Though LDCs may prefer intrusive constraints on the exploitation of intellectual property rights, countries that adopt the strictest scrutiny fear they will experience the flight of investment to less demanding nations. To this claim there are three partial responses.

First, TRIPS itself sets a cap on "overly intrusive" antitrust law; if nations use antitrust to "take back" the IP rights protected by TRIPS, they will violate TRIPS. And, of course, if they apply the restrictions differentially to non-nationals, they will also violate TRIPS.

It may be the case that EC law will become the bellwether for defining the TRIPS competition law interface,<sup>31</sup> and that the LDCs will find the European model sympathetic to their objectives. The fact that EC competition law is a major world model the prevalence of which is expanding exponentially<sup>32</sup> suggests that EC competition law does not trigger a flight of investment. Thus, the LDCs could probably adopt EC principles without expecting a flight of capital or a race to the bottom.

Second, the expressed concern of LDCs will not be allayed by internationalizing an antitrust law of intellectual property. One cannot expect that an agreement on a set of international rules in this area will be achieved that will please the LDCs that essentially wish to rein in the power of multinationals and to preserve their own economies and cultures from being "depleted" by Western capitalism.<sup>33</sup> The competition rules most likely to be accepted as international standards are the United States

31. This is a natural consequence of the principle proposed in Part II.D that antitrust "business as usual" is not an impairment of TRIPS. From a U.S. vantage, EC competition law is relatively disrespectful of IP rights at the interface.

32. See Fox, *supra* note 5; Eleanor M. Fox, *The Developing Antitrust Law of the Visegrad Countries—Central Europe Moves into Step with the European Union*, ANTITRUST REP., Oct. 1995, at 3.

33. See Judith Chin & Gene Grossman, *Intellectual Property Rights and North-South Trade*, in *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE* 90 (Anne O. Krueger & Ronald W. Jones eds., 1990); Carlos Alberto Primo Braga, *The Economics of Intellectual Property Rights and the GATT: A View from the South*, 22 VAND. J. TRANSNAT'L L. 243 (1989).

competition rules, simply because most U.S. advocates believe that more intrusive rules are seriously harmful to competition, consumer welfare, inventiveness, and competitiveness. Advocates for the U.S. rules would not agree to international antitrust rules that are more intrusive on intellectual property rights as a matter of principle. Furthermore, United States participation would be important to the meaningfulness of a world agreement. To the LDCs, whose main objective is to control multinational power, the U.S. perspective—being exceedingly respectful of the intellectual property interest vis-à-vis the competition interest—may be “the bottom.”

Third, if LDCs need solidarity, the solidarity they need is not with the world but among like-minded countries. LDC fora for interchanges, cross-fertilization, and, possibly, uniform or model competition law development could usefully be created, within and beyond the emerging LDC (*e.g.* African) free trade areas.

For all of these reasons, the benefits of internationalizing IP-antitrust law are somewhat illusory. Also, the limits are distinct and the costs are high.

### C. *The Limits of an Enterprise to Internationalize IP-Antitrust*

If agreement of the United States, the EC nations, the Asian nations, and the LDCs, among others, is necessary to finalize a set of rules or principles, there is no set of rules and principles specifically devoted to IP-antitrust that would be acceptable to all. The diversity of perspective is due in part to the fact that the United States views antitrust law as efficiency-creating and technological-progress-creating. It is not concerned with “unfairness,” including disparate bargaining power. The United States sees intellectual property as property that ought to be protected. It views limits on intellectual property as disincentives to invent, impairing progress generally as well as impairing the competitiveness of U.S. firms in the global economy.

LDCs tend to view intellectual property as a public good (despite the formal concessions they made in TRIPS, largely in order to get increased market access rights).<sup>34</sup> They tend to view access to intellectual property as important not only to take the edge off the power of the multinationals but also to give their

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34. See J. H. Reichman, *Compliance with the TRIPS Agreement: Introduction to a Scholarly Debate*, 29 VAND. J. TRANSNAT'L L. 363 (1996). Cf. Martin Adelman, *Prospects and Limits of Patent Protection in the TRIPS Agreement: The Case of India*, 29 VAND. J. TRANSNAT'L L. 507 (1996) (certain developing countries, such as India, anticipating increasing innovation by their own nationals, recognized the benefits to be gained by protection of their own intellectual property).

firms inputs necessary both to serve their people (e.g. with affordable medicines) and to compete externally.

The fact is that what the United States calls "antitrust" is not what the LDCs call "antitrust." To some extent, the two bodies of doctrine are opposites. United States antitrust today is largely based on efficiency policy (often called Chicago School economics), which aims to increase aggregate wealth not redistribute wealth. "Antitrust" is a misnomer for turn-of-the-twentieth-century U.S. competition policy. For better or worse, efficiency policy advocates have succeeded in nearly abolishing antitrust as applied to conduct and transactions other than cartels and mergers that produce monopoly or cartel behavior.

LDCs' perspective on antitrust—which tends to be in accord with certain U.S. policies of the 1960s—is against power, exploitation, and exclusion of the weak by the powerful. It is not pro-efficiency; it is anti-power and anti-bullying. Most LDCs have no interest in following a muse of increased aggregate wealth in the world when their own people lag at the low end of wealth and opportunity. They are deeply concerned with distribution and deeply convinced that a redistribution of wealth and power and a focus on opportunity for the less well-off are necessary conditions for engagement of their nations in the world economic enterprise.<sup>35</sup> The United States sharp disassociation from this perspective in the 1970s led to the death of the UNCTAD project on the Transfer of Technology (TOT). The clear commitment of the United States to the aggregate welfare path in the 1980s and 1990s seems to assure that a TOT will never be resurrected.

The death of the TOT project is handwriting on the wall for world-IP-antitrust rules such as proposed by a group of scholars that convened in Germany and Switzerland from 1991 to 1993 (the Munich Group) and submitted a Draft International Antitrust Code to GATT Director General Peter Sutherland in July 1993.<sup>36</sup> The Munich Group's draft is the principal proposal on the point, and because it is an example of what an antitrust code on intellectual property might be, this Article devotes the next few

35. See Eleanor M. Fox, *Harnessing the Multinational Corporation to Enhance Third World Development—The Rise and Fall and Future of Antitrust as Regulator*, 10 CARDOZO L. REV. 1981 (1989).

36. The group consisted of Josef Drexler, Wolfgang Fikentscher, Eleanor M. Fox, Andreas Fuchs, Andreas Heinemann, Ulrich Immenga, Hans Peter Kunz-Hallstein, Ernst-Ulrich Petersmann, Walter R. Schlupe, Akira Shoda, Stanislaw J. Soltysinski, and Lawrence A. Sullivan.

Two members of the group, including the author, urged a more minimal approach, which is set forth in the form of 15 principles at the conclusion of the introduction in point VIII. The proposed draft code is printed in [Special Supplement] 64 *Antitrust & Trade Reg. Rep.* (BNA) No. 1628 (Aug. 19, 1993).

paragraphs to describing the code, its wisdom, and its acceptability.

The Munich Group's Draft International Antitrust Code treats intellectual property in a separate article. The introductory section provides that abusing a dominant position by obtaining or exercising intellectual property is prohibited. Pooling to suppress technology or raise price is prohibited. Further, "when the exploitation of an intellectual property right exceeds the limits of its legal content, any resulting restraint of competition may be illegal under the provisions of this Agreement."

A comment gives further content to what clauses in intellectual property licensing agreements may be legal or illegal. "Legal" clauses include obligations to procure goods and services from a given source if necessary for satisfactory exploitation of an invention, minimum royalty and quantity terms, field of use restrictions, restrictions on sublicensing and assignment, obligations not to reveal the licensor's know-how even after expiration of the patent if the know-how remains secret, to cooperate in infringement actions, to observe quality standards, to grant reciprocal non-exclusive licenses on improvements, and to grant a most-favored terms clause. On the other hand, the licensor may not exact obligations not to challenge the validity of a licensed right, and the parties may not agree to respect the licensed right after the right has expired, unless the owner of the right proves that "the limits of the legal content are not exceeded." For know-how licenses, an obligation not to use the licensed know-how at the end of the agreement may not be justified under certain circumstances but not if the know-how has become public knowledge by means other than the licensee's breach of contract.

The Munich Group's Draft Antitrust Code is far less restrictive of IP rights than the draft TOT Code, yet it similarly purports to write antitrust rules for intellectual property divorced from economic market analysis; it is largely a list of rules rather than an analytical framework, and it is a catalogue of what might be perceived as fair or unfair in the exploitation of intellectual property given presumed disparity in bargaining power, rather than a framework for analyzing what conduct suppresses competition and harms buyers, on the one hand, and what conduct advances invention and the diffusion of technology, on the other.

The Draft Antitrust Code's set of competition principles for intellectual property, particularly as spelled out in the comment elucidating the rules, follow the pattern of European Community block exemptions, which are regulatory formats. Under the European format, enterprises that include in their licensing agreements only approved and mandatory clauses and no

disapproved clauses normally have complied with the competition law requirements and, moreover, need not file their agreements. Contrariwise, "black list" clauses that would defeat use of the block exemption are generally prohibited under EC law.

For the same reasons that the TOT project failed, a Munich Code version of IP-antitrust would fail. The United States would want IP-antitrust rules only to open markets and advance rivalry, efficiency, and technological progress. Some nations would want IP-antitrust rules to prevent "unfair" extractions of terms—to redistribute the wealth.

From a U.S. antitrust perspective, it is unhelpful to list what is permitted. Everything should be and under U.S. antitrust law is permitted unless it has net anticompetitive (not merely "unfair") consequences.<sup>37</sup> Also from a U.S. antitrust perspective it is unacceptable to prohibit restrictions out of hand or even presumptively. For example, for package selling, one must first analyze whether the intellectual property owner has market power in a proper economic market for a tying product and must then analyze the structure of the tied market and determine whether the tie-in or package creates or increases economic power in the market.<sup>38</sup>

Differences in perspective would overwhelm commonalities.

#### D. *Costs of Internationalizing IP-Antitrust*

Even if agreement could be reached on IP-antitrust principles by reasoning, cajoling, or bargaining, it is not necessarily wise to codify such principles as world rules. Diversity is a good in itself. It reflects both the different contexts and different needs of nations and a healthy competition among systems. A rather complete set of international rules would not be optimal for all nations and, being virtually written in "concrete," they would be difficult to change.<sup>39</sup> Moreover, international rules could entail growth of a new bureaucracy, with attendant questions of accountability. Finally, if intellectual property rules are developed

37. See *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884 (1993).

38. See *U.S. IP Antitrust Guidelines*, *supra* note 14.

39. What was good for the United States in the 1960s (the "Nine No Nos") is no longer good for the United States in the 1990s. See *Wilson*, *supra* note 21. Flexibility facilitates adaptation.

For these and related reasons, convergence of the nations' laws through intensive cross-fertilization may be a better course. See Eleanor M. Fox & Janusz Ordover, *The Harmonization of Competition and Trade Law—The Case for Modest Linkages of Law and Limits to Parochial State Action*, 19 *WORLD COMPETITION L. & ECON. REV.* 5 (1995).

separately from the body of antitrust, they will lose their context and bearings, and therefore the law that evolves will not be as sound as it can be. Intellectual-property-antitrust rules should be cut from the whole cloth of antitrust.

#### IV. A FOCUSED PERSPECTIVE

In this Part the author first suggests focusing attention on restraints related to intellectual property that may impair trade or harm global competition. Second, the author relates concerns about intellectual property restraints to general principles of antitrust.

##### A. *An Antitrust-Trade Law of Intellectual Property*

In view of the high costs and uncertain benefits of a broad-scale internationalization of IP-antitrust law, the author turns to a more focused task and asks what antitrust problems likely to attend acquisition, use, or licensing of intellectual property may significantly impact trade or world competition. It is these areas and probably only these areas that would seem to merit world dialogue in contemplation of new international principles.

The substantive subject areas most likely to be impacted are areas involving (1) market access and anticompetitive exclusion and (2) anticompetitive collaborations of competitors designed to raise prices (*e.g.*, pooling and cross-licensing as a cover for a cartel, rather than to liberate the use of conflicting patents).

The latter type violations—covers for cartels—are historically well-known. Since at least the days of *Hartford-Empire*<sup>40</sup> and *Timken Roller Bearing Co.*,<sup>41</sup> intellectual property rights have been used to veil competitors' agreements to divide the world.

The market access problem may appear in many forms. Cartelists, under false cover of intellectual property, may sustain a boycott against outsiders, depriving them of market entry. An alliance of important competitors that promises enhanced world service (*e.g.*, seamless telecommunications) may nonetheless hold monopoly IP rights that would enable them to discriminate against or exclude outsiders. A single-firm monopolist may maintain its monopoly by anticompetitive misuse of IP rights (*e.g.*, by attempts to enforce expired rights, as in *United States v.*

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40. *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945), *clarified in* 324 U.S. 570 (1945).

41. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

*Pilkington plc*);<sup>42</sup> or by contracts with tying effects, as in *United States v. Microsoft*.<sup>43</sup> An IP owner with monopoly power may maintain its monopoly by granting a license to its only potential competitor and requiring an exclusive grant-back of technology, effectively excluding the licensee from entering the market on its own. Two firms, one of which is the only technological competitor of the other, might merge, eliminating the only important research and development competitor (as in *GM/ZKF*).<sup>44</sup>

All of these problems have an international dimension. That a problem has an international dimension, however, does not mean that it should be solved by international rules. So as not to intrude unnecessarily on nations' choices, nations' autonomy, and the value of diversity, one might favor the European subsidiarity principle, holding that what can best be handled at the national level should be handled at the national level. Applying the subsidiarity principle, one would inquire whether each of the above problems can be handled well by national law.<sup>45</sup> With the aid of the effects doctrine and some expected benefits from positive comity, the answer is, largely, yes. Indeed, most of these fact patterns have occurred and have been satisfactorily handled without the need to resort to international law.

Yet, there are limits to national law and national vision, and the needs of competition in the global marketplace justify a modest conception of international competition policy.<sup>46</sup>

### B. *International Antitrust*

The antitrust intellectual property problems posed in Part IV.A are general antitrust problems. They are problems about market power and its anticompetitive misuse. In many of these problems, the market power happens to be derived or reinforced, at least in part, from a state grant of intellectual property rights. The intellectual property grant, to be sure, carries with it certain special privileges, informing the interface of competition law and TRIPS,<sup>47</sup> but the general body of antitrust law remains a

42. 1994-2 Trade Cas. (CCH) ¶70,842 (D. Ariz. 1994) (consent judgment).

43. 1995-2 Trade Cas. (CCH) ¶71,096 (D.D.C. 1995) (consent judgment).

44. See Complaint, *United States v. General Motors Corp.*, Civ. No. 93-530 (D. Del. filed Nov. 16, 1993).

45. See Eleanor M. Fox, *Jurisdiction and Conflicts in the Global Economy: Crafting a Systems Interface in Festschrift for Valentine Korah*, in 1995 EC COMPETITION L. Y.B. (J. Kallaugher and P. Alexiadis, eds., forthcoming 1996).

46. See Fox, *supra* note 27; Fox & Ordovery, *supra* note 39.

47. For example, patent holders are entitled to exclude infringing products.

sympathetic framework for solving the problems. The state-granted nature of the privilege is a factor relevant in assessing the strength of the market power.

This Article gives examples in Part IV.A that are in fact exemplary of conduct restraining trade and competition, whether or not entailing intellectual property rights. In other words, one might naturally consider the IP-world-antitrust problem subsumed by the world-antitrust problem.

The author has proposed elsewhere a system of principles of constitutional dimension linking trade and competition.<sup>48</sup> The principles would be written and enforced largely as national law on the national level, with a right of recourse to dispute resolution in the context of the WTO. The proposed system is especially congenial to IP world-antitrust problems, and it is symbiotic with the principles of and methodologies for enforcement of TRIPS.

The proposal suggests two and only two principles of substantive antitrust law for international consideration, on the theory that violation of either of these two principles would materially interfere with the openness of the world trading system secured by the successive rounds of the GATT. The first rule is an anti-cartel rule (applicable to cartels with world effects), accompanied by a right of nations to adopt focused, nonparochial exceptions tailored to the needs of the nation's internal market. The second rule is a market access rule, assuring that nations do not use private restraints to replace the dismantled public trade restraints.

Most nations have such rules, but the formulations differ and the rules are not always enforced. The first qualification is not the important one. The differences in formulation are insignificant from the point of view of trade restraints; the differences are not barriers to trade. The second qualification is the important one, and accordingly a credible and legitimate enforcement mechanism is the focus of the proposal.

The fact that nations' rules differ in language and that nations would not lightly agree to change their language is a potential problem that the proposal finesses. Each nation is exhorted to adopt the two principles (anti-cartel and pro-market access) into its own law and to enforce its law. It may use whatever language it chooses, as long as the rule of law is transparent and non-discriminatory. The nation's own law will apply whenever the principal harm to competition occurs within that nation's borders.

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48. Fox, *supra* note 27.

The nations would be required to accord adequate discovery rights and rights of access to their courts for adjudication. Aggrieved nations and possibly private parties would have a right of complaint and adjudication. If due process for non-nationals appears to be unavailable, aggrieved nations and persons would have a right of enforcement in their own nation; but still, the defendant would have the right to application of its own law if the principal effects on completion were in its nation. Alternatively, recourse to WTO panel adjudication would be available. The WTO panel would also apply the law of the nation wherein competition was harmed. Applying a cosmopolitan principle, which the nations themselves would be enjoined to do, the panel would treat benefits and harms to competition, efficiency, and technological progress anywhere in the community of member nations as seriously as the excluding nation's law treats those impacts that fall within its own borders. Recourse to WTO panel adjudication would be available also in the event of a pattern of nonenforcement that undermines trade and world competition.

These linking principles are, it is proposed, the appropriate measure of internationalized antitrust to complement the obligations of nations under TRIPS.

## V. CONCLUSION

TRIPS does not invite an international antitrust law of intellectual property nor is one needed or advisable. In view of TRIPS, however, and in order to perfect TRIPS, it will be necessary to develop law at the interface of competition law and intellectual property law to ensure that overly aggressive competition law does not undermine the obligations under TRIPS. Such law should be developed on a case-by-case basis, and presumptively, the existing competition law principles of nations should be respected as legitimate and not in derogation of TRIPS.

While separate world principles of IP-antitrust would be inadvisable, dialogue should progress to develop principles linking antitrust to trade, especially at the market access interface. These principles would logically address the misuse of intellectual property to bar market access and thus undermine world trade.

